

DECENTRALIZING THE AMENDMENT POWER

by
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*The United States Constitution could soon be re-written by the states. Article V of the Constitution authorizes two-thirds of the state legislatures to bypass Congress and demand a convention to initiate federal constitutional amendments addressing any number of issues. States have adopted resolutions calling for a convention to consider amendments that would, among other things, require a balanced federal budget, eliminate life tenure for Supreme Court Justices, constitutionalize universal healthcare, and even invalidate bulwark rulings such as *Roe v. Wade*. In April 2014, Michigan arguably became the thirty-fourth state to adopt such a resolution, and convention supporters believe that a convention should now be convened.*

Although many observers believe that the current convention movement is a political gimmick unlikely to succeed, Article V's amendment procedures raise fundamental questions about how the amendment power should be allocated between levels of government. Why should subnational units such as states, provinces, and regions have significant influence in the amendment of national constitutions? How do other countries allocate the amendment power between levels of government? What are the likely risks and benefits that constitutional designers should consider when allocating the amendment power? Despite recent interest in constitutional amendment rules, scholars have not fully addressed many of these issues.

This Article presents findings and analysis from a comprehensive study of decentralization in national constitutional amendment rules. It provides constitutional designers and scholars with a useable model for understanding how and why constitutional amendment rules might be structured to include subnational units in the amendment process. Based on an exhaustive review of the amendment rules in the approximately

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191 extant national constitutions, the Article claims that there are currently five dominant decentralization mechanisms. The Article further claims that although there are real risks associated with strong decentralization of the amendment power, there are several sound normative justifications for including subnational units in the amendment process. Finally, although one might expect decentralization of the amendment power to correspond to lower amendment rates, the Article finds that amendment rates in strongly decentralized systems are actually higher than amendment rates in countries with centralized procedures.

In sum, this Article contributes to the study of comparative constitutional design by providing a systematic approach to decentralization of the amendment power.

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INTRODUCTION

The United States Constitution could soon be re-written by the states.¹ Article V of the Constitution authorizes two-thirds of the state legislatures to bypass Congress and demand a convention to initiate any number of federal constitutional amendments.² A convention could, for example, approve amendments to require a balanced federal budget,³ eliminate life tenure for Supreme Court Justices,⁴ constitutionalize universal healthcare,⁵ or even invalidate bulwark rulings such as *Roe v. Wade*.⁶ A state-initiated convention of this magnitude is more than an academic curiosity. In April 2014, Michigan arguably became the thirty-fourth state to adopt an active resolution calling for a convention,⁷ and convention supporters are demanding that a convention be convened.⁸

¹ See Albert R. Hunt, *Push for Constitutional Convention Gathers Steam*, BLOOMBERGVIEW (Nov. 30, 2014), <http://www.bloombergtview.com/articles/2014-11-30/constitutional-convention-gathers-some-steam> (“Rising frustration with Washington and conservative electoral victories across much of the U.S. are feeding a movement in favor of something America hasn’t done in 227 years: Hold a convention to rewrite the Constitution.”).

² See U.S. CONST. art. V (stating that Congress “shall” call convention “on the Application of the Legislatures of two thirds of the several states”); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53, 59 (2012) (concluding that the “convention method allows the nation to bypass Congress and propose amendments that constrain Congress’s powers”).

³ Several states have called for a convention to adopt a balanced-budget amendment. See Gerard N. Magliocca, *State Calls for an Article-Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 74, 83; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 764–89 (1993) (describing all convention resolutions through 1993).

⁴ At least two states have adopted resolutions calling for a convention to address this issue: Tennessee (1977, 1978) and Alabama (1981). See Paulsen, *supra* note 3, at 765, 784.

⁵ In 2012, the Hawaii Legislature adopted a resolution calling for a convention to address “[a] declaration of the constitutionality of the federal Patient Protection and Affordable Care Act, including the individual mandate requiring the purchase of health insurance.” H.R. Con. Res. 114, 26th Leg., Reg. Sess. (Haw. 2012).

⁶ At least twenty states have adopted resolutions calling for a “pro-life” convention. See Paulsen, *supra* note 3, at 765–89.

⁷ The counting of state resolutions for a convention implicates myriad unresolved legal issues such as whether states can rescind, whether a resolution

Although there are good reasons to believe that the current convention movement is a political gimmick unlikely to succeed,⁹ the movement has highlighted the extraordinary role that the states play in the amendment of the United States Constitution.¹⁰ Not only can the states bypass Congress and call a convention to adopt amendments, but a small minority of states can effectively veto amendments approved by a super-majority of Congress.¹¹ These procedures for amendment raise fundamental questions about how the amendment power should be allocated between levels of government. From a constitutional design perspective, why should the states have so much influence in the national amendment process?¹² Perhaps, as some scholars have suggested, a better and more streamlined approach would be to “simply eliminate the participation of the states.”¹³

“Decentralizing” the amendment power—that is, giving subnational units¹⁴ some authority in the process—is not uncommon in other nation-

remains valid if Congress itself proposes a related amendment, and whether state resolutions can expire. *See* Paulsen, *supra* note 3, at 681. Nevertheless, some observers believe that Michigan’s March 2014 resolution was the thirty-fourth resolution. *See* Stephen Dinan, *Constitutional Conundrum: Michigan Demand for a Balanced Budget Could Trigger Amendment Convention*, WASH. TIMES (Mar. 31, 2014), <http://www.washingtontimes.com/news/2014/mar/31/constitutional-conundrum-michigan-demand-for-a-bal/print/> (interviewing legal scholars regarding Michigan’s resolution).

⁸ *See* Stephen Dinan, *Balanced Budget Convention Gains Steam as Congressman Calls for Official Evaluation*, WASH. TIMES (Apr. 1, 2014), <http://www.washingtontimes.com/news/2014/apr/1/balanced-budget-convention-gains-steam-congressman/print/> (reporting on convention movement).

⁹ *See* Magliocca, *supra* note 3, at 75–76 (“[a]chieving reform through a new convention is basically a fantasy . . .”).

¹⁰ *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 120–22 (1996) (describing states’ extraordinary power under Article V).

¹¹ Article V also provides for amendments approved by “two thirds of both houses” in Congress and ratified by three-quarters of the states. *See* U.S. CONST. art. V. All successful amendments to the Constitution have been made using this process. *See* JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES* 186 (2d ed. 2003). However, the states have effectively “vetoed” six amendments that were approved by Congress. *Id.* at 183 (describing six failed amendments).

¹² *See* Levinson, *supra* note 10, at 120–22 (“How can anyone seriously defend . . . the present system that in essence allows one house of 13 states to block the desires of the remaining public?”).

¹³ *Id.* at 120 (suggesting that one alternative to Article V is to allow “national political institutions—either Congress alone or Congress plus President” to approve amendments followed by national referendum).

¹⁴ Throughout this Article, “subnational units” refers to constitutionally recognized and protected intermediate government units such as states, provinces, districts, cantons, *länder*, etc. *See infra* Part III.A (describing and defending this usage).

al constitutions around the world.¹⁵ Some systems, such as Australia, Mexico, and Ethiopia, are similar to the United States in that they give subnational units powerful veto rights on all proposed national amendments.¹⁶ Other systems, such as South Africa and Austria, include subnational units in only those amendments that affect subnational interests.¹⁷ Constitutional amendment rules in many other countries (including some unitary, non-federal states) are also characterized by some form of decentralization.¹⁸ Indeed, it appears that approximately one-third of all extant national constitutions include subnational units in the national amendment process in some way.¹⁹

It is surprising, therefore, that there is very limited scholarship specifically investigating the role that subnational units play in the amend-

¹⁵ In its most general sense, “decentralization” simply refers to a constitutionally protected “vertical” division of power between national and subnational government institutions. See AREND LIJPHART, PATTERNS OF DEMOCRACY 185–95 (1999). Some political scientists ascribe a more specific meaning to the term that distinguishes it from federalism. See, e.g., Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 38 (2001). I use the term in the more general sense.

¹⁶ See AUSTRALIAN CONSTITUTION s 128 (all amendments must at least be approved by majority in both houses of national legislature, approved by majority of voters in national referendum, and approved by majority of voters within majority of states); Constitución Política de los Estados Unidos Mexicanos, CP, Feb. 5, 1917, tit. 8, art. 135 [hereinafter CONST. OF MEX.] (all amendments must at least be approved by two-thirds majority in both houses of national legislature and by majority of state legislatures); CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Aug. 21, 1995, ch. 11, art. 105 (all amendments must at least be approved by two-thirds majority of joint session in national legislature and two-thirds of councils of member states).

¹⁷ See Bundes-Verfassungsgesetz [B-VG] May 1, 1945, art. 35, 45 [hereinafter CONST. OF AUSTRIA] (amendments not affecting “competence of the Laender in legislation or execution” can be amended by two-thirds majority of National Council, but amendments affecting *länder* must also be approved by two-thirds majority in Federal Council, which is comprised of representatives elected by *länd* legislatures); S. AFR. CONST., 1996 s 74 (amendments implicating provincial issues must be approved by six of ten provinces).

¹⁸ See *infra* notes 187–192 and accompanying text (discussing decentralization of amendment power in unitary states). Afghanistan’s 2004 Constitution, for example, declares that Afghanistan is a “unitary and indivisible state.” See Qanoon Asasi Afghanistan Pashto, Jan. 26, 2004, ch. 1, art. 1 [hereinafter CONST. OF AFG.]. Its amendment rules, however, provide a role for the provincial councils in the amendment process. See *id.* ch. X, art. 149 (amendments require approval from House of Elders comprised of representatives from provincial councils).

¹⁹ Of the approximately 191 extant national constitutions that I reviewed, 66 of them contained amendment rules that secure at least some role for subnational units in the amendment process. See *infra* Part III (describing my methodology and findings).

ment of national constitutions.²⁰ This is particularly unfortunate because amendment rules are arguably the most important provisions in any constitution.²¹ Among other things, they establish the processes for changing (or even eliminating) all other provisions,²² and they determine how constitutional law will be entrenched.²³ They also establish manageable processes for popular involvement in constitutional change,²⁴ and can operate as effective checks on government actors.²⁵ Amendment rules are, in many respects, at the core of constitutionalism.²⁶ Thus, there is a real and pressing need for rigorous investigation of constitutional amendment rules. Constitutional designers and reformers need reliable analysis and evidence to inform their design and modification of amendment processes.²⁷

²⁰ Indeed, I found only one unpublished inquiry, and it was limited to federal systems. See Anne Twomey, *The Involvement of Sub-National Entities in Direct and Indirect Constitutional Amendment Within Federations* (2007) (unpublished manuscript), <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Twomey.pdf>. That paper notes that research was limited by unavailable English translations of constitutions. *Id.* at 1. This problem has been largely alleviated by the repository recently published by the Comparative Constitutions Project [hereinafter CCP]. See Ed Finkel, *Constitution Mining*, A.B.A. J., Mar. 2014, at 11 (discussing repository). The repository made it possible for me to review reliable English translations of all existing national constitutions. See *infra* Part III.A (discussing methodology). Additionally, my review was not limited to federal systems, which resulted in my discovery that some expressly unitary states have decentralized amendment processes. See *infra* notes 187–193.

²¹ Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461 (1994) (describing amendment rules as having “unsurpassed importance [because they] define the conditions under which all other constitutional norms may be legally displaced”).

²² See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 913–14 (2014) (discussing function and importance of amendment rules); Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 195, 195 (Tom Ginsburg ed. 2012).

²³ See ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 39–40 (1999) (explaining role of amendment rules in ensuring that constitutions operate as higher law).

²⁴ See Dixon & Holden, *supra* note 22, at 195.

²⁵ See Albert, *supra* note 22, at 913–14.

²⁶ Aside from their prominent function, amendment rules are increasingly relevant because of the frequency with which they are used. See *infra* note 41 (discussing increasingly high amendment rates around the world). Despite anomalies like the United States, constitutions are amended or replaced on average once every five years. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1674–75 (2014).

²⁷ See Levinson, *supra* note 10, at 111 (“Anyone thinking about constitutional design . . . must . . . address procedures for amendment.”); Albert, *supra* note 22, at 914 (“[C]onstitutional designers have few academic resources to explain how to design the rules governing formal amendment . . .”).

This Article presents findings from a comprehensive study of decentralization in national constitutional amendment rules. From a theoretical perspective, the Article explores possible design rationales associated with including subnational units in the amendment of national constitutions.²⁸ This discussion is important because it is not self-evident that subnational units should have an independent voice in national amendment processes. Indeed, decentralization may create significant barriers to necessary constitutional change and even produce wildly undemocratic amendment processes if subnational units have strong veto rights.²⁹ The Article claims that notwithstanding these risks, there are at least four coherent justifications for decentralizing amendment power: (1) promoting constitutional legitimacy in political systems that are predicated, at least in part, on the consent of subnational polities; (2) providing an additional “check” on national institutions vested with managing constitutional change; (3) protecting self-governance for subnational communities; and (4) enriching the quality of the constitutional debate.³⁰ This list is not intended to be exhaustive. Nor are these rationales mutually exclusive. They nevertheless provide a helpful starting point for understanding why constitutional designers might divide the amendment power between vertical levels of government.

From an empirical perspective, the Article explores the various ways that national constitutions actually decentralize the amendment power. Existing scholarship generally considers decentralization of the amendment power to be a characteristic of formal federal systems where amendment rules are structured to “safeguard” the federal arrangement

²⁸ See *infra* Part II. This inquiry contributes to the growing literature addressing comparative constitutional design. See, e.g., Tom Ginsburg, *Introduction*, in *COMPARATIVE CONSTITUTIONAL DESIGN*, *supra* note 22, at 1–11 (describing comparative constitutional design); DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 1–25 (2006).

²⁹ Both of these criticisms have been raised, for example, regarding the United States Constitution. See Levinson, *supra* note 10, at 120–22 (suggesting that it might make sense to “eliminat[e] the participation of the states”); *infra* notes 120–122 and accompanying text (discussing controversial counter-majoritarian amendment outcomes in Switzerland, Australia, and United States). Empirical research by political scientists has shown that notwithstanding powerful extrinsic factors, a constitution’s flexibility is affected by the number of veto players included in the amendment process, which suggests that giving subnational units veto rights may impact constitutional flexibility. See Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY* 319, 327 (Roger D. Congleton & Birgitta Swedenborg eds., 2006); Dixon & Holden, *supra* note 22, at 195–96 (“[S]uccessful constitutional amendment may be more difficult in larger decision-making bodies, simply as a result of the law of large numbers.”).

³⁰ See *infra* Part II (explaining and defending these design rationales).

by giving subnational units strong veto rights.³¹ However, my review of amendment rules in every extant national constitution demonstrates that systems actually decentralize the amendment power in various complex and creative ways.³² The five dominant approaches (with many subtle and interesting variations) are: (1) guaranteeing subnational units representation in the national legislature that is authorized to amend the constitution; either by creation of a separate “upper” chamber or by providing subnational units with special representation in a unicameral legislature; (2) requiring subnational communities or institutions to directly approve amendments; (3) allowing subnational units to participate in amendments that address certain subjects; (4) guaranteeing subnational units representation in special bodies convened to review proposed amendments; and (5) allowing subnational units to initiate amendments.³³ This taxonomy is a significant contribution to the study of constitutional design because it highlights the creative ways that constitutional designers can structure the amendment power to include subnational units in the processes of constitutional change.³⁴ The Article further aids constitutional designers by identifying common extrinsic factors that may undermine genuine subnational involvement in the amendment process, such as strong national political parties, coordination problems between subnational units, and electoral rules.

Finally, my review of amendment rules in all extant constitutions allows for some important preliminary observations regarding amendment rates. A potential concern with including subnational units in national amendment processes is that it might make constitutions too difficult to amend. Indeed, the United States and Australia, which give subnational units strong veto rights, have extremely low formal amendment rates.³⁵

³¹ See, e.g., Albert, *supra* note 22, at 957–60 (discussing how subnational units are given power in amendment process to safeguard federalism); WILLIAM S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 14 (1956) (“Most students of federalism have agreed that a federation demands an amending procedure in which the states as separate entities play a part.”).

³² See *infra* Part III.A (explaining basic data set and methodology for this review). In short, I reviewed the amendment rules and related constitutional provisions for the approximately 191 national constitutions that were in effect as of January 2014. Appendix A lists the countries and the adoption years for all constitutions I reviewed.

³³ See *infra* Part III.B (explaining and defending each category).

³⁴ Others have noted that “[c]onstitutional designers must often be particularly attentive to the vertical separation of powers between national and subnational governments[,]” and that “constitutional designers should not discount” “the extent to which formal amendment rules give voice and representation to subnational states” Albert, *supra* note 22, at 960. However, until now, there has not been an exhaustive study of the ways that amendment rules can “give voice” to subnational units. This Article fills that void.

³⁵ The United States Constitution has been formally amended only twenty-seven times since its ratification in 1788. See VILE, *supra* note 11, at 331. The Australian Constitution has been amended only six times since it was adopted in 1900. See 43RD

Amendment procedures in these countries are often criticized as problematic because they do not allow for more regular constitutional change through popular political processes.³⁶ Recent comparative research has also found that notwithstanding anomalies like the United States and Australia, constitutions are more likely to fail if amendment procedures do not allow for regular formal amendment.³⁷ Thus, it is important that any study regarding decentralization of the amendment power explores how decentralization might correlate with available data regarding amendment rates. My taxonomy of decentralization mechanisms provides an opportunity to do this. My analysis shows that, on average, amendment rates in systems that require direct ratification by subnational units are higher than amendment rates in systems that do not decentralize the amendment power in any way. Additionally, average amendment rates are even higher in systems that include subnational units only when proposed amendments concern subnational issues. These results challenge current notions regarding amendment rules and constitutional flexibility.³⁸

In sum, this Article contributes to the study of comparative constitutional design by providing a systematic approach to decentralization of the amendment power. The Article has four major parts. Part I explains the general theoretical background underlying amendment rules. Part II explores the various design rationales that might justify decentralization of the amendment power. Part III catalogues the ways that subnational units have been included in national amendment processes based on my review of all extant constitutional amendment rules. Part IV discusses amendment rates in systems that decentralize the amendment power.

I. THE THEORY BEHIND FORMAL AMENDMENT RULES

Before exploring design rationales for decentralizing the amendment power, we must understand why constitutions have amendment rules in the first place. This Part provides that necessary theoretical back-

PARLIAMENT, PARLIAMENTARY HANDBOOK OF THE COMMONWEALTH OF AUSTRALIA pt. 5 (2011), <http://apo.org.au/node/27021> (providing official record of all amendments and amendment attempts); *see also* Cheryl Saunders & Katy LeRoy, *Commonwealth of Australia*, in LEGISLATIVE, EXECUTIVE AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 37, 40–41 (Katy Le Roy & Cheryl Saunders, eds., 2006) (discussing relative difficulty of amending Australian constitution).

³⁶ *See* Levinson, *supra* note 10, at 120–22 (criticizing Article V); Albert, *supra* note 22, at 972 (noting that Australia’s amendment rules make it difficult to amend).

³⁷ *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 7–11, 94–103 (2009); *see infra* notes 347–353 and accompanying text (describing findings).

³⁸ *See infra* Part IV (discussing significant limitations in using amendment rates to measure relative constitutional flexibility and further describing my methodology and findings).

ground in four Sections. The first Section explains that amendment rules were born from the practical realization that constitutions will, from time to time, be under pressure to change and that there are meaningful benefits to institutionalizing incremental constitutional change. The second Section explains that amendment rules often reflect (at least to a degree) the source of political sovereignty in a society. The third Section explains that all amendment rules reflect a determination as to the degree and character of political deliberation that a society expects when making changes to its fundamental law. The final Section explains that all amendment rules must strike a balance between flexibility and entrenchment.

A. *Practical Reasons for Institutionalizing Constitutional Change*

From our current vantage point, after more than two centuries of constitutional history, it may seem obvious that all constitutions need rules for amendment.³⁹ After all, every extant written national constitution contains express amendment procedures,⁴⁰ and constitutional amendment is an increasingly frequent part of political life in many countries.⁴¹ However, from a theoretical perspective, it is not self-evident that constitutions should contain procedures for their own amendment.⁴²

³⁹ The “modern written constitution” was “first developed” by the North American English colonies. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 355 (1994).

⁴⁰ Many early colonial charters and state constitutions omitted amendment procedures. See WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 139–40 (2001); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 20–41 (1996) (discussing amendment processes in early state constitutions and colonial charters). The Pennsylvania Constitution of 1776 contained the first explicit amendment procedure. See Lutz, *supra* note 39, at 356. The use of formal amendment procedures subsequently “diffused” throughout the world. *Id.* By 1978, more than 96% of all national constitutions contained amendment procedures. See HENC VAN MAARSEVEEN & GER VAN DER TANG, *WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY* 80 (1978). All 194 extant national constitutions contain procedures for amendment. CONSTITUTE PROJECT, <https://www.constituteproject.org/search?lang=en&key=amend> (tagging all 194 constitutions as containing an explicit “constitutional amendment procedure”).

⁴¹ See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 806–07 (2012) (discussing relative frequency of amendments). Although constitutions in countries such as Australia, Japan, and the United States are rarely (if ever) amended, most countries amend their constitutions regularly. *Id.* On average, national constitutions are replaced or amended once every five years. See Versteeg & Zackin, *supra* note 26, at 25. This means that constitutional amendment is a regular part of political life in many countries, and that amendments are generating a significant corpus of constitutional law each year.

⁴² See ADAMS, *supra* note 40, at 136–37 (examining early constitutional theories of John Locke and William Blackstone and explaining that they failed to develop basis

At their core, written constitutions are intended to organize and limit government, and operate as effective pre-commitments that bind future majorities to certain fundamental values.⁴³ If constitutions are readily amendable, however, they may cease to provide effective restraints on government and popular majorities.⁴⁴ It is not surprising, therefore, that early constitutionalists wrestled with whether amendment rules were inimical to the very idea that government could be subject to a supreme written law.⁴⁵

Perhaps the most provocative theorist in this regard was John Locke.⁴⁶ Locke believed that the supremacy of constitutional law required that it be honored in perpetuity and any changes to constitutional law required wholesale revolution.⁴⁷ The 1669 Fundamental Constitutions of Carolina, which Locke drafted, famously declared that “these fundamental constitutions . . . shall be and remain the sacred and unalterable form and rule of government of Carolina forever.”⁴⁸ Similarly, six of the original sixteen state constitutions did not contain any rules for amendment or revision.⁴⁹

for amendment); Levinson, *supra* note 10, at 107 (describing hypothetical constitution that forbids any amendments).

⁴³ See generally CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* 96–101 (2001) (describing constitutions in this way). But see Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 *TEX. L. REV.* 1751, 1757–58 (2003) (critiquing some aspects of this description of constitutionalism).

⁴⁴ See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 103 (Tom Ginsburg & Rosalind Dixon eds., 2011) (noting this concern and citing John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *LAW & SOC. INQUIRY* 501, 501–03 (1997)).

⁴⁵ Indeed, early constitutionalists struggled with whether amendment rules could ever be consistent with the concept of constitutional law as “set above the entire government against which all other law is to be measured.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 260 (1969); see SUNSTEIN, *supra* note 43, at 96. (discussing this tension and noting that it was at the core of debate between Thomas Jefferson and James Madison regarding frequency of constitutional change).

⁴⁶ See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 1–17 (1992) (discussing various theorists’ views on constitutional amendment and describing Locke’s theories).

⁴⁷ See ADAMS, *supra* note 40, at 136 (describing Locke’s views on amendment); see also JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 89, 134, 149–58, 225–26 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690). There are more contemporary proponents of unalterable constitutional values. See CARL SCHMITT, *CONSTITUTIONAL THEORY* 150–52 (Jeffery Seitzer trans., Duke Univ. Press 2008) (1928) (arguing that some constitutional values should be beyond amendment).

⁴⁸ See Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION* 3, 4 (Sanford Levinson ed., 1995) (quoting and discussing 1669 Fundamental Constitutions of Carolina).

⁴⁹ See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 62 (1998) (listing early states without amendment rules).

Although some early American constitutions did not contain explicit rules for amendment, early American constitutionalists quickly identified problems with Locke's theoretical approach.⁵⁰ For one thing, a perpetual constitution presupposes the infallibility of its drafters. As Noah Webster forcefully argued in 1787, proposals to fix constitutions in "perpetuity" imply a "perfect wisdom and probity in the framers; which is both arrogant and impudent."⁵¹ Although Webster ultimately rejected the idea that written constitutions could provide effective restraints on government,⁵² his critique highlights what contemporary constitutional theorist now accept as a basic premise underlying amendment rules.⁵³ Namely, because constitutions will most likely contain errors, they need some mechanism for change to correct those errors when they are exposed.⁵⁴

Early American constitutionalists identified other reasons for constitutional amendment besides pure error correction. They recognized that human knowledge regarding government and constitutionalism can grow.⁵⁵ Even under the best conditions, constitutional provisions can have unanticipated consequences.⁵⁶ Framers can miscalculate how provisions will be applied or interpreted once a system is operationalized.⁵⁷

⁵⁰ See ADAMS, *supra* note 40, at 137–44 (describing early American departures from Locke's theories).

⁵¹ WOOD, *supra* note 45, at 379 (quoting Noah Webster).

⁵² *Id.* at 381–82 (quoting Webster) ("Unless the Legislature is the supreme power, and invested with *all* the authority of the State, its acts are not laws, obligatory upon the whole State.").

⁵³ See Levinson, *supra* note 48, at 3–4 (noting that Locke's viewpoint represents "conceit"). This viewpoint was expressed by George Mason at the Philadelphia Constitutional Convention in 1787: "The plan now formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary . . ." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (Max Farrand ed., 1911) [hereinafter FARRAND].

⁵⁴ The First Amendment to the South African Constitution provides a contemporary example of this. See S. AFR. CONST., First Amendment Act of 1997 (including memorandum explaining that amendment was necessary because original text included error regarding procedures for administering oath of office for Deputy President).

⁵⁵ See LUTZ, *supra* note 28, at 151 ("Americans had long considered each government institution and practice to be in the nature of an experiment . . . [P]rovision had to be made for altering institutions after experience revealed their flaws and unintended consequences."); WOOD, *supra* note 45, at 614 ("Americans . . . believed [that] new knowledge about the nature of government could be converted into concrete form . . .").

⁵⁶ See KYVIG, *supra* note 40, at 37 (noting that Articles of Confederation required revision because "constitutional thought and practice at the state and national level had evolved in a very short time").

⁵⁷ See David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 9, 21 (David E. Kyvig ed., 2000) ("Experience with unforeseen flaws in

They may also underestimate or overlook key environmental factors impacting a constitution's efficacy. As constitutions are deployed, mankind gains understanding about how they function and how environmental conditions impact their effectiveness. Amendment rules provide a mechanism for societies to refine their constitutional arrangements based on human progress in constitutional science.⁵⁸

Finally, constitutions may also need to be updated or adjusted because of changing social conditions such as technological developments, economic fluctuations, and evolving norms.⁵⁹ Early constitutionalists recognized that social conditions and attitudes can change in ways that require adjustments to a society's fundamental law. As Webster again observed, "Unless the advocates for unalterable constitutions of government, can prevent all changes in the wants, the inclinations, the habits and the circumstances of people, they will find it difficult . . . to prevent changes in government."⁶⁰ The far reach of the contemporary administrative state and the extreme pace of contemporary social and economic change further emphasize the need for mechanisms to accommodate constitutional change.⁶¹ In today's age, government institutions and social values can quickly become outdated, which creates the need for constitutional change.⁶²

the Articles of Confederation reinforced the delegates' beliefs that the new constitution should provide for further amendment.").

⁵⁸ Madison believed that procedures for amendment of the United States Constitution were necessary because "useful alterations will be suggested by experience." See THE FEDERALIST NO. 43 at 284–85 (James Madison) (Isaac Kramnick ed., Penguin 1987). The Twelfth Amendment to the United States Constitution, which was adopted primarily to address the development of strong national political parties, provides a relevant example. See Akhil Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 216 (1995) (explaining that the Twelfth Amendment was adopted primarily to address the impact of political parties on rules for electing President); Donald G. Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DENV. U. L. REV. 449, 464 (2003) ("[T]o take account of the rise of the political parties, Jefferson promptly secured ratification of the Twelfth Amendment . . .").

⁵⁹ See ELKINS ET AL., *supra* note 37, at 82 (Amendment procedures "allow[] the constitution to adjust to the emergence of new social and political forces."); VILE, *supra* note 46, at 79 (quoting Justice Joseph Story) ("It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper . . .").

⁶⁰ See WOOD, *supra* note 45, at 377 (quoting Noah Webster).

⁶¹ See William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. 353, 355 (2002) (explaining that social changes present complexities for constitutionalism).

⁶² See *id.* (quoting Richard Kay) ("'[H]uman history tells us that sooner or later every constitution will begin to chafe,' and fundamental departures from an original constitutional agreement inevitably occur."). Constitutional amendments stemming from the creation of the European Union are illustrative. See Tom Ginsburg & Eric A.

However, the inevitability of change and human error does not necessarily require that constitutions provide rules for amendment.⁶³ Indeed, John Locke, the most notable proponent of “unalterable” constitutions, acknowledged that “things of this world are in so constant a flux that nothing remains long in the same state.”⁶⁴ Locke insisted, however, that fundamental political change was justified only as wholesale revolution.⁶⁵ For Locke, changes to fundamental law could occur only when “those entrusted with the powers of government . . . disqualif[ied] themselves by endangering the happiness of the community to such a degree that civil society can be said to have reverted to a state of nature.”⁶⁶ He rejected the notion that there could be legitimate ad hoc changes to the fundamental structure of government.⁶⁷ Thus, Locke’s constitutionalism creates a zero-sum game in regards to constitutional change: A society can change portions of its fundamental law only if it is willing to absorb the costs created by undoing the acceptable and beneficial portions.⁶⁸

Against this backdrop, the advent of constitutional amendment rules was a “radical” and “fundamental” breakthrough in constitutional theo-

Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1611–18 (2010) (describing changes brought about by the European Union and significant constitutional reforms that member states undertook as result); Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, 686 (Helen Keller & Alec Stone Sweet eds., 2008).

⁶³ See Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION, *supra* note 48, at 163, 168 (“Acceptance of the necessity, even inevitability, of change tells us nothing about the political desirability, the procedural propriety, or the substantive legitimacy of any specific proposal for change.”).

⁶⁴ LOCKE, *supra* note 47, § 157.

⁶⁵ *Id.* §§ 149, 155; see ADAMS, *supra* note 40, at 136 (explaining Locke’s theory of constitutional change and revolution). Locke recognized that changed social conditions may require reapportionment of the legislature. See LOCKE, *supra* note 47, § 158. However, he believed that the executive could unilaterally make those changes. *Id.*

⁶⁶ ADAMS, *supra* note 40, at 136 (summarizing Locke’s theory of constitutional change). Locke’s position was grounded, in part, in his belief that constitutional law related only to the most basic structure of government. See, e.g., LOCKE, *supra* note 47, § 157. He claimed, for example, that the executive had the standing authority to reapportion the legislature when it became “very unequal and disproportionate.” See *id.*; VILE, *supra* note 46, at 11 (noting that Locke “commended executive remedies” when certain changes to the legislature were necessary).

⁶⁷ See VILE, *supra* note 46, at 11 (stating that Locke “would not have drawn a fine line between constitutional amendment and the right of revolution”); Donald L. Doernberg, “We the People”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 58 (1985) (explaining that Locke believed that there could not be major “alteration of the form of government without political revolution”).

⁶⁸ See ADAMS, *supra* note 40, at 141–42.

ry.⁶⁹ Amendment rules provided a mechanism for changing the fundamental “rules of government” without resorting to violence and without abandoning existing constitutional law that is desirable and effective.⁷⁰ It was a persistent theme in early American constitutional thought that constitutional amendment processes could operate as an alternative to violent revolution and anarchy.⁷¹ Indeed, George Mason famously opened the debate regarding constitutional amendment at the Philadelphia Convention by stating that “[a]mendments . . . will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than trust to chance and violence.”⁷² Amendment rules solved a pressing problem in early constitutional thought: They provided a means for accommodating the inevitable need for constitutional change by, in effect, “institutionaliz[ing] and legitimiz[ing] revolution.”⁷³

This development in constitutional theory is not purely a historical anecdote. It continues to order the theoretical basis for amendment processes.⁷⁴ Amendment rules serve a variety of different important functions,⁷⁵ but their immediate function is to provide an ordered legal process to manage necessary and inevitable constitutional change.⁷⁶ Significant for present purposes, this raises the question of why political systems might fracture the amendment power and allocate it between national and subnational government.

B. Sovereignty and Constitutional Amendment Processes

Another important theme in early constitutional thought was the relationship between constitutional amendment and sovereignty. Early constitutionalists seemed to equate the authority to amend a constitution with the authority to create a constitution.⁷⁷ That is, they understood con-

⁶⁹ Levinson, *supra* note 48, at 4; *see* ADAMS, *supra* note 40, at 136–42 (discussing how American constitutional theory broke from thinking of the time regarding supremacy and inalterability of constitutional law).

⁷⁰ Levinson, *supra* note 48, at 4.

⁷¹ *See* ADAMS, *supra* note 40, at 138 (“The need for means of nonviolent change was repeatedly mentioned in public debate.”); WOOD, *supra* note 45, at 614 (“Americans had in fact institutionalized and legitimized revolution.”).

⁷² FARRAND, *supra* note 53, at 202–03.

⁷³ WOOD, *supra* note 45, at 614.

⁷⁴ *See* Levinson, *supra* note 48, at 4 (discussing theoretical issues involved in studying constitutional amendment rules).

⁷⁵ *See* Albert, *supra* note 22, at 913–14 (explaining that formal constitutional amendment rules are “gatekeepers to the constitutional text,” “specify what is subject to or immune from formal amendment, promote deliberation about constitutional meaning,” and “express constitutional values”).

⁷⁶ *See* Levinson, *supra* note 48, at 4.

⁷⁷ *See* WOOD, *supra* note 45, at 307 (quoting Samuel West as saying in 1776 that “it is the major part of a community that have the sole right of establishing a constitution

stitutional amendment to be an act of sovereignty indistinguishable from the foundational act of creating a constitution.⁷⁸ This theoretical approach to amendment presented early constitutionalists with design problems. If amendment is an act of popular sovereignty, how is the will of the people ascertained?⁷⁹ Amendment procedures had to be practical and implementable, but they also had to somehow capture the direct will of the people.⁸⁰

Early state constitutions contained a variety of different procedures designed to capture the will of “the people” by separating amendment procedures from ordinary lawmaking representatives.⁸¹ The Maryland Constitution of 1776, for example, could be amended only by acts of two successive separately elected legislatures.⁸² The intervening election “obviously was meant to function as a referendum on amendments.”⁸³ The Georgia Constitution solicited more direct popular involvement.⁸⁴ It could be amended only after a majority of voters petitioned the legislature to call a constitutional convention.⁸⁵ These early amendment procedures were intended to operationalize the amendment power by separat-

and authorizing magistrates; and consequently it is only the major part of the community that can claim the right of altering the constitution”).

⁷⁸ *Id.* at 307–08. Constitutional amendment was frequently described as an exclusive right of “the people” to adjust their fundamental law. *Id.* Additionally, amendment was understood as an expression of popular sovereignty designed to reduce agency costs and ensure the loyalty of representatives. *See* ADAMS, *supra* note 40, at 138. For example, the Pennsylvania Constitution of 1776 created a “Council of Censors” that was to periodically investigate violations of the Constitution by the government. WOOD, *supra* note 45, at 308 (describing this feature of the Pennsylvania Constitution).

⁷⁹ *See* WOOD, *supra* note 45, at 307 (“But how was the will of the major part of the community determined?”).

⁸⁰ Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment, in* RESPONDING TO IMPERFECTION *supra* note 48, at 89, 111 (explaining that early American constitutionalists struggled to reconcile doctrine of popular sovereignty with manageable processes for constitutional amendment).

⁸¹ *See* ADAMS, *supra* note 40, at 136–42 (discussing early attempts to design amendment procedures and concluding that “[t]he point at issue clearly was the relationship between the sovereign people and their elected rulers”).

⁸² *See* WOOD, *supra* note 45, at 308 (describing Maryland’s amendment procedure).

⁸³ ADAMS, *supra* note 40, at 137–38 (discussing Maryland’s amendment procedure).

⁸⁴ *See* WOOD, *supra* note 45, at 308 (describing Georgia’s amendment procedure).

⁸⁵ *Id.* at 308–09 (describing all early amendment procedures). South Carolina’s amendment procedure stands out in this regard because it permitted amendment by a simple majority in both houses of the legislature. *See* ADAMS, *supra* note 40, at 140.

ing it from ordinary lawmaking and providing opportunities for direct or indirect popular ratification.⁸⁶

However, there is an anomaly inherent in the amendment power that early constitutionalists underappreciated.⁸⁷ As Stephen Holmes and Cass Sunstein have observed, “The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.”⁸⁸ In other words, the amendment power operates in a “twilight zone between authorizing and authorized powers.”⁸⁹ Amendment is an act of semi-restrained sovereignty that is different from the unrestrained power to create a constitution, but nevertheless superior to ordinary law-making authority.⁹⁰

This anomaly is important because it draws out the complicated relationship between constitutional amendment and sovereignty. Changes to fundamental law necessarily implicate the source of sovereignty in any society.⁹¹ However, amendment rules reflect a pre-commitment by the sovereign to constrain its power to a stipulated process.⁹² In a democratic society, this means that “the people” pre-commit themselves to making constitutional changes pursuant to certain procedures.⁹³ That pre-commitment limits the sovereign right of the people in that they agree to not make ultra vires changes to the constitution, but it also provides a practical mechanism for changing the constitution that carries the authority of the sovereign to make fundamental law.⁹⁴

⁸⁶ See WOOD, *supra* note 45, at 309 (“These were beginnings, rudimentary efforts to make effective the distinction between the fundamental principles of the constitution and positive law.”).

⁸⁷ See Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION, *supra* note 48, at 275, 276 (“This . . . alerts us to the undertheorized dilemma posed by the constitutionally regulated power to revise constitutional regulations of power.”).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *id.* at 276–77 (discussing this issue further).

⁹¹ See *id.* In democratic societies, sovereignty ostensibly lies with the “people.” *Id.* at 276. But, this does not fully explain the theoretical basis for the amendment power or the reality of how many amendment rules are structured. See *id.* If the amendment power is entirely derivative of the people’s sovereignty, why, for example, does Article V not require ratification by some form of national referendum? See Levinson, *supra* note 10, at 120 (raising this issue).

⁹² Holmes & Sunstein, *supra* note 87, at 276 (“It is almost as if the electorate, through its residual right to initiate and ratify constitutional amendments, retains some of its original authority to choose the nature of the political regime, to lay down the ground rules of subsequent decision making, and to establish the limits and legitimate aims of government action.”).

⁹³ *Id.*

⁹⁴ *Id.* This is why some democratic systems can legitimately amend their constitutions without any form of public referendum. This is not because sovereignty does not ultimately reside with the people. Rather, it is because the people pre-

As explained below, the relationship between sovereignty and amendment is crucial for understanding decentralization of the amendment power.⁹⁵ Many political systems, even democratic systems, have complicated legitimacy matrices. Decentralized amendment processes often reflect the complicated anatomy of sovereignty and political legitimacy in diverse and sometimes divided societies where subnational groups receive collective recognition and protection.

C. *Deliberation and Constitutional Decision Making*

Early American constitutionalists believed in the “efficacy of a deliberative process.”⁹⁶ More specifically, they believed that inclusive, rigorous deliberation would result in collective decisions that better served the common good.⁹⁷ Even if one rejects this theory of collective decision-making,⁹⁸ all political decision-making processes exist somewhere on a deliberative continuum.⁹⁹ Some decisions are made expeditiously without a slow and inclusive deliberative process.¹⁰⁰ Other decisions are subjected to more protracted and inclusive political deliberation.¹⁰¹

Amendment rules are no exception. All amendment rules situate constitutional amendment decisions somewhere on this deliberative continuum.¹⁰² Some amendment processes are onerous and highly inclu-

committed themselves to making constitutional changes in a certain way, and they delegated the amendment power to representatives subject to certain procedures. *But see* Amar, *supra* note 80, at 90–92 (arguing that amendment rules, at least Article V, cannot forbid popular amendment of a constitution).

⁹⁵ See *infra* Part II.A (discussing how decentralization can facilitate legitimacy in certain political systems).

⁹⁶ LUTZ, *supra* note 28, at 151.

⁹⁷ *Id.*

⁹⁸ Early American constitutionalists believed that “the more important the decision, the more deliberative the [decision-making] process should be”. *Id.* Thus, amendment decisions were generally subject to more deliberative processes. *Id.*

⁹⁹ See John Ferejohn, *Instituting Deliberative Democracy*, in DESIGNING DEMOCRATIC INSTITUTIONS 75, 82 (Ian Shapiro & Stephen Macedo eds., 2000).

¹⁰⁰ This was precisely Alexander Hamilton’s defense of a unitary federal executive. THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (arguing that the executive should be characterized by “decision, activity, secrecy, and dispatch” and asserting that these will generally “characterize the proceedings of one man”); see Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 174 (2004) (explaining the case for unitary executive in terms of immediate action without much deliberation).

¹⁰¹ This was precisely Alexander Hamilton’s argument for why a legislative body should be numerous. THE FEDERALIST NO. 70, *supra* note 100, at 402–08 (arguing that a numerous legislature is “best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people”).

¹⁰² See VILE, *supra* note 46, at 79 (quoting John C. Calhoun as saying, “The great principle to be sought is to make the [constitutional] changes practicable, but not too easy; to secure due deliberation, and caution”). Although deliberation in

sive.¹⁰³ Those procedures often foster greater deliberation and consensus amongst participants with diverse perspectives.¹⁰⁴ For example, the Constitution of the Netherlands provides that amendments must be approved by both chambers of the national legislature before and after an intervening election.¹⁰⁵ This process is designed to facilitate deliberation by (and between) representatives and citizens regarding proposed amendments.¹⁰⁶ Other amendment procedures are rather streamlined and can result in highly exclusive pro forma amendment proceedings. For example, in Nicaragua, the constitution can be amended by a single supermajority of the unicameral national legislature.¹⁰⁷ This process likely facilitates a lesser degree of deliberation and inclusion than the process in the Netherlands.

The important point is that amendment rules can embrace varying degrees of deliberation and inclusion.¹⁰⁸ As discussed below, this is significant for conceptualizing decentralization of the amendment power because including subnational groups in the amendment process may reflect a preference for more inclusive and deliberative processes.¹⁰⁹ Conversely, a centralized amendment process may reflect a preference for consolidating the amendment power and limiting voices—especially subnational voices—from the amendment process.

D. Balancing Flexibility and Entrenchment

Scholars and constitutionalists have long recognized that amendment rules must strike a delicate balance between flexibility and en-

constitutional amendment exists on a continuum, there seems to be general agreement amongst theorists that constitutional amendment rules should strive for deliberative processes. See Amar, *supra* note 80, at 110–11 (discussing the goal of deliberation in amendment proceedings).

¹⁰³ See Rasch & Congleton, *supra* note 29, at 331 (explaining that amendment procedures in many Nordic countries are designed to create consensus by requiring multiple decisions by multiple parties).

¹⁰⁴ See LUTZ, *supra* note 28, at 151–52; Rasch & Congleton, *supra* note 29, at 331 (“The degree of consensus can be increased through explicit supermajority requirements within legislatures, or implicitly through other institutional means.”).

¹⁰⁵ See Grondwet voor het Koninkrijk der Nederlanden [Gw.][Constitution], ch. 8, art. 137–38.

¹⁰⁶ See Rasch & Congleton, *supra* note 29, at 331 (discussing Netherlands’ amendment procedures as an example of a consensus-building process).

¹⁰⁷ See Constitución Política de la República de Nicaragua [Cn.], tit. X, ch. III, art. 191–94 La Gaceta. Diario Oficial [L.G.] Jan. 18, 1987, Reforma Parcial a la Constitución de la República de Nicaragua, L.G. Jan. 19, 2000.

¹⁰⁸ See Amar, *supra* note 80, at 110–11 (explaining that “there remains considerable room for flexibility in implementing the deliberation requirement”).

¹⁰⁹ See *infra* Part II.D (discussing decentralization in the amendment process and constitutional deliberation).

trenchment.¹¹⁰ On the one hand, amendment rules must be reasonably flexible so that constitutions can adapt to changed circumstances.¹¹¹ Dramatic technological developments, economic fluctuations, and changes in social norms all put pressure on constitutional texts.¹¹² Flexible amendment rules provide a mechanism for constitutions to prolong their relevance and legitimacy by adapting to these fundamental and unanticipated changes.¹¹³

On the other hand, constitutions must be relatively rigid and entrenched or they cease to provide real limitations on political power.¹¹⁴ By definition, constitutions are intended to restrain government officials and protect minorities from majoritarian abuses.¹¹⁵ Constitutions pre-commit society to a basic civil structure in order to promote predictability, fairness, and stability. To do this effectively, however, constitutions

¹¹⁰ See Ferejohn, *supra* note 44, at 502–03.

¹¹¹ *Id.*; see ELKINS ET AL., *supra* note 37, at 81 (“Given the existence of exogenous shocks that change the costs and benefits to the parties to a constitutional bargain, constitutions require mechanisms for adjustment over time.”); THE FEDERALIST NO. 85, at 484–86 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (discussing the need for mechanisms to correct unintended consequences).

¹¹² See ELKINS ET AL., *supra* note 37, at 81–83.

¹¹³ It is well recognized that constitutional change can occur through formal amendment of the constitutional text or “informal” changes in constitutional norms. See Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change between Reform and Evolution*, 39 PUBLIUS 213, 217 (2009) (explaining implicit constitutional change as any extra-textual shift in constitutional norms). Informal changes often occur through judicial interpretation of constitutional texts. See Lutz, *supra* note 39, at 357–58 (explaining that constitutional change is necessary in any system, and if amendment procedures are arduous, change will likely occur through judicial review). It is nevertheless appropriate to study formal constitutional amendment independent of informal amendment for several reasons. See Richard Simeon, *Constitutional Design and Change in Federal Systems: Issues and Questions*, 39 PUBLIUS 241, 241–42 (2009). Formal constitutional amendment is usually an overt act. This means that the costs and benefits of explicit constitutional amendment are different from implicit amendment, which can be subtle and insulated from direct popular approval. See, e.g., Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 274 (2002) (discussing this point in relation to amendment of the U.S. Constitution). Consequently, formal amendments provide a clear picture of the sort of constitutional changes a society intentionally and directly selects. Additionally, from a comparative constitutional perspective, there is evidence that constitutional change increasingly occurs through formal amendment, which makes the study of amendment procedures timely. See *supra* note 26 (discussing increased frequency of constitutional amendment).

¹¹⁴ See ELKINS ET AL., *supra* note 37, at 76–78; Ferejohn, *supra* note 44, at 502–03.

¹¹⁵ See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 3–5 (1991) (“[A] written constitution is like a trust agreement. It specifies what powers the trustees are to have and it endows these agents with certain authority delegated by the settler who created the trust.”).

must be changeable only by special and more arduous procedures.¹¹⁶ Otherwise, they cease to provide meaningful limits on political power.¹¹⁷

In other words, constitutions must be flexible enough to accommodate the inevitable pressure to change, but they must not be so flexible that they cease to operate as higher law that effectively restrains society and government.¹¹⁸ Thus, any discussion regarding the allocation of the amendment power must be sensitive to how design proposals will affect a constitution's flexibility. This is especially true for design proposals related to decentralization, which may include adding new parties to the decision-making process.¹¹⁹

II. DESIGN RATIONALES FOR DECENTRALIZING THE AMENDMENT POWER

In view of the above theoretical framework, it is not self-evident that subnational units should have significant influence in national amendment processes. Indeed, there are real risks associated with decentralizing the amendment power. For one thing, adding parties to the amendment process may make necessary constitutional change more difficult because, in general, as the number of parties to a constitutional decision increases, the number of choices that the entire group will accept decreases.¹²⁰ Thus, approval of a constitutional amendment is less likely in a system that requires subnational units to ratify amendments in addition to other national institutions.¹²¹ Moreover, if subnational units are given significant minority veto rights, they may be able to exert disproportion-

¹¹⁶ See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 418–29 (2003) (discussing purposes of entrenchment). Constitutionalism is necessarily connected with the rule of law, which requires that government itself be subject to law. The entrenchment and supremacy of constitutional law is designed to realize this ideal. See Harvey Wheeler, *The Foundations of Constitutionalism*, 8 LOY. L.A. L. REV. 507, 508 (1975).

¹¹⁷ See ELKINS ET AL., *supra* note 37, at 82 (“To be sure, if taken to an extreme, flexibility undermines the very notion of constitutionalism as a set of stable limits on ordinary politics.”).

¹¹⁸ See *id.* (“If a constitution is completely flexible, as in the model of parliamentary sovereignty, it may not be able to provide enduring rules that bind the polity together.”).

¹¹⁹ See Dixon & Holden, *supra* note 22, at 196–99 (discussing how constitutional amendment becomes more difficult as more decision-makers are added).

¹²⁰ See *id.*

¹²¹ This is by no means a settled conclusion amongst political scientists. See *id.* at 195–210 (testing and confirming a version of this premise); Ferejohn, *supra* note 44, at 522–23 (analyzing data from thirty constitutional republics and finding no evidence that a requirement for ratification by subnational units increases amendment rates). It is nevertheless a real risk facing constitutional designers and it is supported by theoretical and empirical constitutional scholarship. See Rasch & Congleton, *supra* note 29, at 319 (discussing theory and empirical testing).

ate power over the amendment process, which could undermine a constitution's popular legitimacy.¹²²

In light of the real risks associated with decentralizing the amendment power, it is important to investigate any countervailing rationales that might nevertheless justify decentralization. Understanding these design rationales does not resolve the risks associated with decentralization, but it may explain why some systems accept those risks, and, more importantly, it may help constitutional designers craft amendment rules suitable to their circumstances. This Part argues that there are at least four sound rationales for including subnational units in national amendment processes.¹²³

¹²² A basic theoretical problem in constitutionalism is how to justify, from a democratic perspective, the reality that constitutions permit past majorities to dictate the choices of current majorities. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 98–113 (2d ed. 1986) (providing a classic discussion of this issue). Decentralizing the amendment power in constitutional democracies can sometimes accentuate this “counter-majoritarian” problem by allowing a small segment of the national population to block constitutional amendments supported by the rest of the population. See LIVINGSTON, *supra* note 31, at 312–13 (discussing this issue in federal systems); Levinson, *supra* note 10, at 120 (discussing the potential legitimacy problems created by Article V's amendment procedures). In Australia, for example, there have been six instances where constitutional amendments failed even though they were approved by a majority in both houses of the national legislature and a majority of voters in a national referendum. See PARLIAMENTARY HANDBOOK, *supra* note 35, at 385. Those amendments failed solely because Australia's constitution requires amendments to be ratified by a majority of voters in a majority of the Australian states. See AUSTRALIAN CONSTITUTION s 128 (constitutional amendment rules); LIVINGSTON, *supra* note 31, at 124–28 (discussing three of these failed amendments). There are other examples of failed amendments like this in Switzerland, the United States, and Canada. See LIVINGSTON, *supra* note 31, at 312–13 (discussing a failed amendment in Switzerland that received a majority in national referendum but failed to be ratified by a majority of cantons); *id.* at 234 (discussing failed amendments in United States that were approved by Congress and ratified by a majority of states that comprised a majority of the national population); Peter Oliver, *Canada, Quebec, and Constitutional Amendment*, 49 UNIV. TORONTO L.J. 519, 591–92 (1999) (discussing failed Meech Lake Accord amendments that were approved twice by the national House of Commons and by eight of ten provincial legislatures (representing over 93% of the national population) but nevertheless failed because two small provinces did not support them).

¹²³ This is not intended to be an exhaustive list. Moreover, amendment rules in any particular system may be the product of various design strategies and extrinsic environmental factors. Thus, this Part does not claim to fully describe any particular system. Rather, this Part seeks to systematize the possible justifications for decentralizing amendment power and draw upon helpful anecdotal illustrations.

A. *Political Legitimacy and Decentralizing the Amendment Power*

Under certain conditions, decentralizing the amendment power may help promote or maintain constitutional legitimacy. For example, many federal states are predicated, at least in part, on a joining or union of pre-existing political units.¹²⁴ In those states, the national constitution represents an agreement between political communities regarding the terms of the federal union.¹²⁵ The legitimacy of the national constitution arises, in part, from the consent of the subnational communities that created it.¹²⁶ Many early scholars of federalism therefore concluded that “federalism . . . demands an amending procedure in which the states as separate entities play a part.”¹²⁷ On this theory, national constitutional change can occur “only with the consent of the component units” because their consent is necessary to legitimize the new conditions of the federal union.¹²⁸ Thus, it is important that amendment rules provide a mechanism for “eliciting” that consent from subnational units.¹²⁹

The Articles of Confederation are illustrative. Under the Articles, the thirteen original states joined together to create a confederation of independent states.¹³⁰ The Articles were predicated on the sovereignty of the states and not the sovereignty of the people as a consolidated national community.¹³¹ The central government’s legitimacy was derived entirely from the compacting of the thirteen original states, which retained their

¹²⁴ See Koen Lenaerts, *Constitutionalism and the Many Facets of Federalism*, 38 AM. J. COMP. L. 205, 206 (1990) (describing sources of legitimacy in both “integrative” and “devolutionary” federal systems and analyzing various political forces in federal systems that provide legitimacy to the national constitution).

¹²⁵ See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* 59 (2005) (discussing the connection between this model of constitutionalism and Lockean political theory); see Lenaerts, *supra* note 124, at 205–06.

¹²⁶ See Lenaerts, *supra* note 124, at 206 (“The goal of establishing an effective central government with direct operation on the people inside its sphere of powers is pursued under respect of the powers of the component entities.”).

¹²⁷ LIVINGSTON, *supra* note 31, at 14 (citing JAMES BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 173 (1901); CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 209 (1937)).

¹²⁸ LIVINGSTON, *supra* note 31, at 298.

¹²⁹ *Id.* at 299–300.

¹³⁰ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987) (explaining that the framers of the Articles of Confederation had in mind “an association of states . . . that could coordinate joint action by its ‘sovereign’ members”); RICHARD B. BERNSTEIN WITH JEROME AGEL, *AMENDING AMERICA* 10–11 (1993) (same).

¹³¹ See Amar, *supra* note 130, at 1449 (“[T]he heart of the issue was sovereignty. The Articles [of Confederation] . . . [were] . . . erected on the uneven and shifting foundation of the sovereignty of the People in each state.”).

independence and sovereignty.¹³² Indeed, the central government did not have jurisdiction over individual citizens, but was dependent on the states to enforce any national policies.¹³³ The amendment procedures in the Articles of Confederation reflected this “compact theory”¹³⁴ of legitimacy because they required all amendments to be approved by every state.¹³⁵ In other words, the amendment rules reflected an extreme decentralization of the amendment power that was consistent with the source of sovereignty in that system.¹³⁶

Tanzania’s current constitution provides a contemporary example. Tanzania is effectively a union between the east African country of Tanganyika and Zanzibar, a small archipelago off the coast of Tanganyika.¹³⁷ Tanzania’s amendment rules reflect this because although Zanzibar is much smaller than Tanganyika, Zanzibari representatives participate in all proposed amendments.¹³⁸ Additionally, any amendments to the constitution that would affect Zanzibar’s status or jurisdiction must be approved by two-thirds of Zanzibar’s representatives in the unicameral National Assembly.¹³⁹ Although this structure might deeply entrench provisions related to Zanzibar, it presumably provides stability to the system by protecting Zanzibar from abuses by Tanganyika.¹⁴⁰ In this way, the Tanzanian Constitution protects the original constitutional bargain be-

¹³² As Amar explains, the Articles of Confederation were more akin to a multi-lateral treaty between independent countries than a national constitution. *See id.* at 1446–47.

¹³³ *Id.* at 1446 (“Such a federation would in no sense be an internal government exercising sovereign coercive powers over individuals.”); *see* BERNSTEIN & AGEL, *supra* note 130, at 10 (stating that under the Articles of Confederation, the national government had “no power to operate directly on individual citizens”).

¹³⁴ *See* Amar, *supra* note 130, at 1464.

¹³⁵ *See* ARTICLES OF CONFEDERATION OF 1781, art. XIII; *see also* BERNSTEIN & AGEL, *supra* note 130, at 11 (quoting and discussing Article XIII of Articles of Confederation).

¹³⁶ *See* BERNSTEIN & AGEL, *supra* note 130, at 11 (concluding that because each State understood itself to be an independent sovereign, “[i]t was natural that so far-reaching an act as amending the Articles should require the consent of all members of the Confederation”).

¹³⁷ *See* S.G. AYANY, A HISTORY OF ZANZIBAR 138–47 (1970) (describing the creation of Tanzania and the union between Tanganyika and Zanzibar and including copies of founding documents). There has been a strong movement to consolidate power in Tanzania and create a unified national republic.

¹³⁸ *See* CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, April 25, 1977, ch. 3, pt. 3, § 98 and Second Schedule [hereinafter CONST. OF TANZ.].

¹³⁹ *Id.*

¹⁴⁰ *But see* Festo Maro & Joseph Ibreck, *Petroleum Policy and Constitutional Paradox in the United Republic of Tanzania*, ECON. & SOC. RES. FOUND., (TAKNET Policy Brief Series, Nov. 5, 2009) (discussing Zanzibar’s newfound wealth from offshore oil and how this change has caused Zanzibar to destabilize the constitution because it wants to renegotiate more favorable terms).

tween Zanzibar and Tanganyika by decentralizing the amendment power.

Notwithstanding these examples, sovereignty and political legitimacy are often more complicated than a simple compact between constituent units.¹⁴¹ The Constitution of Switzerland, for example, is the only extant constitution that expressly identifies itself as a “confederation,” which might suggest that it is primarily a union of its constituent units (the Cantons).¹⁴² However, the Swiss Constitution further provides that the “Confederation” is formed by the “Swiss People” and the “Cantons,” which suggests that legitimacy derives from both the national population as a whole and the Cantons.¹⁴³ Indeed, Switzerland’s amendment rules reflect this because they require ratification by both national popular referendum and the Cantons.¹⁴⁴ Other countries, such as South Africa, have constitutionalized subnational government but expressly rejected the notion that their national constitutions are based on the union of pre-existing political communities.¹⁴⁵ South Africa’s amendment rules nevertheless include provincial representatives in all amendments that affect provincial interests.¹⁴⁶ This division of power in South Africa was primarily the result of an important power-sharing compromise that was designed to protect certain subnational groups.¹⁴⁷

¹⁴¹ See Amar, *supra* note 130, at 1450–66 (discussing many complexities associated with “locating” sovereignty in the United States after the Federal Constitution was adopted); Lenaerts, *supra* note 124, at 206–20 (discussing the complexities of sovereignty in federal systems).

¹⁴² See BUNDESVERFASSUNG [BV] Apr. 18, 1999, SR 101, art. 1, [hereinafter CONST. OF SWITZ.]. The data from the CCP shows that no other extant national constitution identifies itself as “confederal.” See *infra* note 214 and accompanying text (discussing CPP data).

¹⁴³ The Swiss Constitution provides: “The People and the Cantons . . . form the Swiss Confederation.” CONST. OF SWITZ., SR 101, art. 1; see Lenaerts, *supra* note 124, at 233–37 (discussing history and nature of Switzerland’s political arrangement; albeit before Switzerland’s updated constitution was adopted in 1999); see also Walter Haller, *The New Swiss Constitution: Foreign and International Influences*, 30 INT’L J. LEGAL INFO. 256, 256 (2002) (concluding that although “Switzerland has a brand-new Federal Constitution . . . the main features of our constitutional order—a federal state . . . go back to 1848”).

¹⁴⁴ See CONST. OF SWITZ., SR 101, art. 140.

¹⁴⁵ Indeed, section 1 of South Africa’s Constitution declares that “[t]he Republic of South Africa is one, sovereign, democratic state.” S. AFR. CONST., 1996 s 1; see *In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* (11 SA 1098 (CC) at para. 14 (S. Afr.) (“[T]he provinces are the recipients and not the source of power.”)).

¹⁴⁶ See S. AFR. CONST., 1996 s 44 (describing procedures for amending South Africa’s constitution).

¹⁴⁷ See Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J.

These latter examples highlight that constitutional legitimacy sometimes derives from a combination of the national community as well as subnational units. Constitutional designers may need to be sensitive to this when designing amendment rules. If political legitimacy in a society requires recognition and voice for certain subnational units or communities, it will be important to consider whether those groups should be included in the amendment process to some degree.¹⁴⁸ Conversely, if political legitimacy derives in part from the national community as a whole, amendment rules may need to include mechanisms that elicit approval from the national community. Legitimacy matrices are complicated in any society, but the general design point here is that promoting or maintaining constitutional legitimacy can be a legitimate reason for decentralizing the amendment power.

B. Checks-and-Balances and Constitutional Outputs

Another reason to decentralize the amendment power may be to promote checks-and-balances in the amendment process and in government in general.¹⁴⁹ A generic objective for decentralizing government authority is to protect against government abuse.¹⁵⁰ In many systems, subnational government exists, in part, to provide a “check” on national institutions.¹⁵¹ By dividing government power between national and subnational institutions, it is hoped that both levels of government have incentives to monitor each other, which can prevent government abuses and protect liberty.¹⁵² This was Madison’s well-known justification for American federalism.¹⁵³

TRANSNAT’L L. 585, 602–21 (2008) (discussing details of this compromise and its significance for South Africa’s political structure).

¹⁴⁸ See Albert, *supra* note 22, at 960 (noting that this consideration may be greater during times of constitutional transition).

¹⁴⁹ See Dixon & Holden, *supra* note 22, at 97 (noting that the general function of constitutional amendment rules is to provide checks on informal constitutional change).

¹⁵⁰ See GARDNER, *supra* note 125, at 80–143 (describing this role of federalism in United States); James A. Gardner & Antoni Abad Ininet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 AM. J. COMP. L. 491, 494–96 (2011) (defining “contestatory federalism” as “a conception of divided power that justifies federalism as a method of protecting liberty through the institutionalization of a permanent contest for power between national and subnational units of government”).

¹⁵¹ See Gardner & Ininet, *supra* note 150, at 494.

¹⁵² *Id.*

¹⁵³ See THE FEDERALIST NO. 46, at 298–302 (James Madison) (Isaac Kramnick ed., 1987); THE FEDERALIST NO. 47, at 302–08 (James Madison) (Isaac Kramnick ed., 1987); THE FEDERALIST NO. 51, at 320–21 (James Madison) (Isaac Kramnick ed., 1987); Gardner & Ininet, *supra* note 150, at 494 (“‘The accumulation of all powers . . . in the same hands,’ wrote Madison in *Federalist No. 47*, ‘may justly be pronounced the

This design logic is relevant to amendment rules in at least two ways. First, the general checks-and-balances system in government fails if national institutions can unilaterally amend the national constitution to circumvent (or eliminate) subnational government. Under those conditions, national government would have less incentive to respect subnational government, and subnational government would have less incentive to challenge national government. Although entrenchment of constitutional provisions provides some protection for subnational government, a stronger protection is to include subnational government in the amendment process. If subnational government is included, it can more confidently challenge national action without fear of a unilateral constitutional response by the national government. Thus, some constitutions might decentralize the amendment power as a way to protect the overall allocation of government authority.¹⁵⁴

Madison's checks-and-balances logic is also relevant to amendment rules in another way. The amendment power, like any government power, can be misused, especially if it is consolidated in one person or institution.¹⁵⁵ Thus, it makes sense to build checks-and-balances into the amendment power itself. If the amendment power contains its own checks-and-balances, it is less likely to be misused or captured by any particular group.¹⁵⁶ One way to achieve this is to require both national and subnational institutions (or communities) to consider proposed amendments. This gives each level of government an effective means of preventing misuse of the amendment power, and, therefore, makes capture more difficult.

There is evidence that Article V in the United States Constitution was designed with a checks-and-balances rationale in mind. During the debates in 1787, some delegates initially expressed concern about Congress'

very definition of tyranny.' To protect liberty . . . power must be divided, [and] [f]ederalism serves this purpose by parceling out government powers among different levels of government, giving each level of government, national and subnational, powers sufficient to allow each to monitor and check the abuses of the other.").

¹⁵⁴ See Albert, *supra* note 22, at 957–60 (describing how amendment rules can be designed to provide effective “safeguards” for federalism).

¹⁵⁵ See Gardner & Ininet, *supra* note 150, at 494; Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1121 (1994) (discussing the assumption that government power will be misused if it is consolidated).

¹⁵⁶ The concern here is not only that the amendment power might be used to eliminate the federal arrangement, but that the amendment power might be used to further policies or interests that are not in the public good. This sort of “capture” of government power is a familiar concern in the agency context. See Clayton P. Gillette & James E. Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064–69 (1990) (describing the problem of agency capture).

role in the amendment process.¹⁵⁷ Specifically, there was concern that if Congress was required to approve all proposed amendments, it “may abuse [its] power, and refuse . . . consent on that very account.”¹⁵⁸ The “convention” method of amendment, which does not require any ratification by Congress, was chosen primarily to provide a check on potential abuses by Congress.¹⁵⁹ Using the convention method, the states can, at least in theory, call a convention and unilaterally amend the Constitution without Congress. Although the states have never ratified an amendment by convention, it appears that the threat of a convention has operated as an effective check on Congress from time to time.¹⁶⁰

Constitutional designers should be aware that decentralizing the amendment power can be an effective strategy for fostering healthy checks-and-balances and preventing harmful capture of the amendment power.

C. *Protecting Self-Governance and Accommodating Collective Rights*

A third reason to decentralize the amendment power may be to promote self-governance by subnational communities. Some countries decentralize political power to enable some degree of self-governance by subnational communities.¹⁶¹ In those systems, subnational government exists, in part, to ensure that subnational communities can exercise a degree of political self-determination.¹⁶² Subnational government can allow communities to enact their own policies (through subnational legislatures), enforce their own laws (through subnational executives), and/or

¹⁵⁷ See FARRAND, *supra* note 53, at 202–03.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; see James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1015 (2007) (“The records of the Constitutional Convention clearly show that the purpose of the Convention Clause was to protect the States against a recalcitrant or corrupt Congress.”).

¹⁶⁰ See Rogers, *supra* note 159 at 1008–09 (suggesting that the threat of constitutional convention was a “key factor” in causing Congress to “act preemptively to propose the desired amendment itself” and noting that this may have occurred regarding the Bill of Rights, Seventeenth Amendment, Twenty-First Amendment, Twenty-Second Amendment, and Twenty-Fifth Amendment).

¹⁶¹ Ethiopia’s federal system illustrates this. The Ethiopian Constitution includes the right of consolidated political groups within existing subnational units to apply for statehood. See CONSTITUTION OF THE FEDERAL DEMOCRATIC OF ETHIOPIA, Aug. 21, 1995, art. 47(3) [hereinafter CONST. OF ETH.]. The Constitution recognizes “[t]he right of any Nation, Nationality or People to form its own state . . .” *Id.*; see Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT’L L. 51, 64 (2003) (discussing this provision in the Ethiopian constitution).

¹⁶² See G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 783 (2009) (explaining that the right of political self-determination is the most basic collective right).

resolve their own disputes (through subnational tribunals).¹⁶³ This kind of structure is common in “divided societies” that are comprised of many diverse subnational groups.¹⁶⁴

However, for political self-determination to be meaningful, subnational government must have some degree of independence from the preferences and policies of national institutions, and even the aggregate national community.¹⁶⁵ Implicit in this system is a protected “space” where subnational governments can operate without interference from national institutions.¹⁶⁶ Although this “space” can be preserved through a variety of different mechanisms, a particularly effective method of ensuring that subnational communities retain a degree of independence is to ensure that they can participate in any amendments to the national constitutional structure. Including subnational units in that process helps ensure that community rights, which might implicate only a small minority, are not infringed by national political institutions representing majoritarian preferences.¹⁶⁷

Ethiopia’s amendment process provides a good example. Ethiopia is an ethnic federal system that was intended to accommodate dramatic ethnic diversity under one constitutional system.¹⁶⁸ “The main purpose was to achieve ethnic and regional autonomy, while maintaining the state of Ethiopia as a political unit.”¹⁶⁹ Consequently, Ethiopia is comprised of nine ethnicity-based territorial regions,¹⁷⁰ and the Ethiopian Constitution “affirms the unrestricted corporate right of all ethnic groups.”¹⁷¹ Ethiopia’s amendment rules reflect this prioritization of subnational self-

¹⁶³ See Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1169–72 (2011) (explaining this approach to subnational constitutionalism).

¹⁶⁴ See James A. Gardner, *In Search of Subnational Constitutionalism*, 4 EUR. CONST. L. REV. 325, 333 (2008) (discussing “ethnocultural self-determination as a justification for federalism”).

¹⁶⁵ See Marshfield, *supra* note 163, at 1169–72.

¹⁶⁶ See Robert Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 15–16 (G. Alan Tarr et al. eds., 2004) (describing this concept as it relates to subnational units’ authority to adopt their own constitutions).

¹⁶⁷ See LIVINGSTON, *supra* note 31, at 312. (“All these [amendment] instrumentalities are designed to preclude the possibility that a mere majority of the people in the whole nation will impose upon a minority of dissident states an amendment to the constitution to which they are opposed.”).

¹⁶⁸ See Alem Habtu, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, 35 PUBLIUS 313, 313 (2005) (describing social conditions underlying Ethiopia’s constitutional structure).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 313, 331.

¹⁷¹ *Id.* at 329.

governance. Constitutional provisions relating to the rights of ethnic groups, including the right of secession may be amended only if they are approved by a majority in *all* regional parliaments and a supermajority in both houses of the national legislature.¹⁷² Thus, Ethiopia has decentralized the amendment power to ensure that subnational ethnic groups retain a protected “space” for self-governance.¹⁷³

Constitutional designers, especially in divided societies, should be aware that robust protection of collective rights might also require some form of decentralization of the amendment power.

D. Decentralization as a Means of Enriching the Constitutional Debate

Another reason for decentralizing the amendment power may be to promote diverse voices in the amendment process and improve deliberation. Some democratic theorists maintain that public decision-making bodies benefit from processes that include more diverse representatives.¹⁷⁴ As Jeremy Waldron claims, when “diverse perspectives are brought together in a collective decision-making process, that process will be informed by much greater informational resources than those that attend the decision-making of any single individual.”¹⁷⁵ In other words, the quality of public decisions may improve if decision-making processes include more stakeholders with a diversity of knowledge, experience, and interests.¹⁷⁶ The basic logic is that diversity of viewpoints will facilitate constructive deliberation, which, in turn, will improve the ultimate quality of substantive decisions.¹⁷⁷

¹⁷² See CONST. OF ETH., art. 105; see also Habtu, *supra* note 168, at 329 (discussing how this amendment procedure was intended to protect the collective rights of subnational ethnic groups).

¹⁷³ This rationale is very obvious in countries that include subnational government only in amendments that affect the rights and duties of subnational communities. See *infra* Part III.B.3 (discussing subject-matter inclusion of subnational units). These subject-matter “triggers” for subnational involvement aim to ensure that subnational communities retain a degree of control over their status in the constitutional structure.

¹⁷⁴ See Jeremy Waldron, *Representative Law Making*, 89 B.U. L. REV. 335, 343 (2009) (“The key here is diversity. Different people bring different perspectives to bear on the issues under discussion and the more people there are the greater the richness and diversity of viewpoints are going to be.”); see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1575 (1988) (stating that “‘differences of opinion’ and ‘jarring of parties’ can ‘promote deliberation’”).

¹⁷⁵ Waldron, *supra* note 174, at 343.

¹⁷⁶ See *id.*; Sunstein, *supra* note 174, at 1575–76 (“Disagreement . . . [is] a creative and productive force, highly congenial to and even an indispensable part of the basic republican faith in political dialogue.”).

¹⁷⁷ See Sunstein, *supra* note 174, at 1588 n.262 (explaining the relationship between diversity of opinions in collective decision-making and quality of choice).

If one accepts this general theory of collective choice, then these principles would seem to apply equally to constitutional amendment decisions. Amendment decisions may benefit from a diversity of viewpoints, interests, knowledge, and expertise.¹⁷⁸ In this regard, subnational communities provide unique and valuable information that can inform constitutional debate.¹⁷⁹ Subnational representatives may be uniquely aware of local issues, interests, expertise, or values.¹⁸⁰ They may also be best situated to anticipate any unique effects that amendments may have on their particular community.¹⁸¹ Centralizing the amendment power risks losing this valuable information.

Germany may provide a relevant illustration here. Germany is often characterized as an administrative federal state because the federal government is primarily responsible for making policy and the *länder* are primarily responsible for administering and implementing that policy.¹⁸² Additionally, “[t]he division of responsibilities in German federalism is not one of strict separation, however; rather, it is a system of cooperation, interconnections, and interrelationships.”¹⁸³ Notwithstanding this cooperative federal structure, the *länder* are still given an independent voice in the amendment process through their representatives in the *Bundesrat*, which is the second national legislative chamber designed to represent *länd* interests. Amendment of the German constitution requires a two-thirds vote in both the *Bundesrat* and the *Bundestag*.¹⁸⁴ Representatives in the *Bundesrat* are delegated by *länd* governments and each delegation

¹⁷⁸ See Rasch & Congleton, *supra* note 29, at 331 (discussing inclusion and consensus in constitutional amendment rules); Amar, *supra* note 80, at 110–11 (acknowledging that amendment decisions should be subject to meaningful deliberation).

¹⁷⁹ See Waldron, *supra* note 174, at 344 (“If the community is geographically diverse, for example, with different conditions in the North compared with those in the South, then one would value the presence of legislators from both ends of the country; if there is diversity of interests as between town and country, again one would value the presence of people from rural and urban sectors.”).

¹⁸⁰ See *id.*; Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 480 (2002) (explaining that even in highly technical areas such as environmental regulation, local representatives have valuable expertise, knowledge, and information that can improve the quality of collective decision-making outcomes).

¹⁸¹ See Foster, *supra* note 180, at 480–84. Subnational government officials may also have expertise regarding local administration or efficiencies that can inform constitutional deliberations.

¹⁸² See ARTHUR GUNLICKS, *THE LÄNDER AND GERMAN FEDERALISM* 60–61 (2003) (“[T]he [German] federation in fact carries most of the responsibility for legislation, while the *Länder* are primarily responsible for administration.”).

¹⁸³ *Id.* at 61.

¹⁸⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW) [GG], art. 79 (Ger.).

must vote as a bloc.¹⁸⁵ Although this structure may serve a variety of purposes,¹⁸⁶ it would seem to ensure that the *länder* are heard on issues related to their responsibilities as the administrators and implementers of federal law. The *länder* offer a unique perspective that other representatives and institutions would not likely provide.

This rationale for decentralizing the amendment power may also explain why some “unitary” systems have nevertheless included subnational representatives in the national amendment process.¹⁸⁷ Afghanistan’s constitution, for example, declares that Afghanistan is a “unitary and indivisible state.”¹⁸⁸ The Constitution also provides that the “central administration shall be divided into several administrative units,” called provinces.¹⁸⁹ The provinces have separately elected provincial councils,¹⁹⁰ which each elect a member to represent their province in the upper chamber of the National Legislature (the House of Elders).¹⁹¹ Amendments to Afghanistan’s constitution require approval of the majority of the members of both houses.¹⁹² In this way, provincial council members are directly included in the amendment process.

Systems like Afghanistan are somewhat curious from a constitutional design perspective. Because these systems are expressly unitary, they are not generally concerned with promoting legitimacy by soliciting approval from subnational polities. Further, these systems are not necessarily concerned with protecting local self-government or ensuring that subnational government can provide an effective check on national government. Instead, subnational institutions exist primarily to work cooperatively in administering national policies and delivering national services. Why then, are their amendment rules structured to include subnational representatives? One possible explanation, from an institutional design per-

¹⁸⁵ See GUNLICKS, *supra* note 182, at 346.

¹⁸⁶ It likely was also intended to protect larger *länder* from unfair fiscal burdens and ensure a check on national institutions. *See id.* (“To ensure that they would at least be able to block constitutional amendments that they might see as damaging their interests, in particular fiscal equalization among the *Länder*, the four large *Länder* in the West were given 6 votes each . . . in the amendment to the Basic Law . . .”).

¹⁸⁷ My survey revealed at least fifteen such systems. To identify these systems, I cross referenced my data with the CCP data that identify systems that are expressly unitary. *See infra* Part III.A (explaining my empirical methodology and use of CCP data). Those systems are: Albania, Afghanistan, Angola, Belarus, Bolivia, Bulgaria, Burkina Faso, Burundi, Colombia, Guinea, Moldova, Namibia, Nicaragua, Portugal, and Spain. In many of these systems, subnational government appears to be a result of administrative decentralization.

¹⁸⁸ See CONST. OF AFG., ch. I, art. 1.

¹⁸⁹ *See id.* ch. IIX, art. 136.

¹⁹⁰ *See id.* ch. IIX, art. 138.

¹⁹¹ *See id.* ch. V, art. 84.

¹⁹² *See id.* ch. X, art. 149.

spective, is that these systems recognize that subnational government officials and communities are uniquely situated to understand how constitutional changes will affect aspects of administrative efficiency. Thus, in order to ensure that constitutional changes are informed by subnational administrative perspectives, these systems include subnational units in the amendment process.

In any event, constitutional designers should be aware that including subnational communities in national amendment processes may enrich and improve the overall quality of the decision-making process.

III. EXISTING DECENTRALIZATION IN CONSTITUTIONAL AMENDMENT RULES

Existing scholarship generally considers decentralization of the amendment power to be a characteristic of formal federal systems where amendment rules are structured to “safeguard” federalism by giving subnational units strong veto rights.¹⁹³ However, my review of amendment rules in every extant national constitution demonstrates that many countries decentralize the amendment power in complex and creative ways and that some federal systems do not decentralize the amendment power at all. This Part provides a summary of the dominant approaches to decentralizing the amendment power based on my review of all extant constitutions. It has three major Sections. The first Section briefly describes my general methodology and dataset for reviewing and cataloguing the amendment rules. The second Section presents and analyzes the decentralization mechanisms that I discovered. The final Section discusses the few anomalous federal systems with strongly centralized amendment rules that came to light during my review.

A. *Empirical Methodology*

Before presenting my findings, it is necessary to provide a brief overview of my methodology in reviewing and analyzing the amendment rules. There are four important methodological points.

First, as others have observed, any comparative constitutional study must address the reality that some constitutions are “sham” constitutions.¹⁹⁴ That is, many constitutions do not reflect how “power is actually

¹⁹³ See, e.g., Albert, *supra* note 22, at 967–60 (discussing how subnational units are given power in amendment process to safeguard federalism); LIVINGSTON, *supra* note 31, at 14; Markus Kaltenborn, *Constitutional Amendment Rules in Federal and Unitary States*, in CHANGING FEDERAL CONSTITUTIONS 271, 272 (Arthur Benz & Felix Knupling eds., 2012) (noting that federal systems have unique amendment procedures).

¹⁹⁴ See, e.g., Albert, *supra* note 22, at 915; see also LUTZ, *supra* note 28, at 152 (“Any comparative study of the amendment process must first distinguish true constitutional systems from those that use a constitution as window dressing . . .”).

exercised and constrained” in their corresponding societies.¹⁹⁵ Because of this, many comparative studies include only democracies where there is some evidence that the constitution is respected and followed as higher law.¹⁹⁶ This limitation is important if the purpose of the study is to explore systems where “democratic constitutional design” reflects “democratic practice in fact.”¹⁹⁷ However, my purpose here is broader. I want to identify all the ways that constitutional designers have *purported* to allocate the amendment power between levels of government.¹⁹⁸ My primary goal is to construct a complete taxonomy of design choices based on the procedures captured in existing constitutional provisions.¹⁹⁹ Even if some of those provisions are only “window dressing” in their respective societies, this does not mean that they should not be studied for their potential application in other contexts.²⁰⁰ Thus, I did not limit my review to only functioning constitutional democracies. Instead, I reviewed the amendment rules in all extant national constitutions.

To conduct this review, I used the constitutional repository created by the Comparative Constitutions Project (“CCP”).²⁰¹ At the time I fin-

¹⁹⁵ Albert, *supra* note 22, at 915 (citing Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861–62 (1962)).

¹⁹⁶ See, e.g., *id.* at 915 (“Although sham constitutions entrench formal amendment rules, their entrenched rules do not actually bind political actors, nor do citizens accept them as accurate and legitimate reflections of how power is actually exercised and constrained.”).

¹⁹⁷ *Id.* (basing conclusions on “analysis of amendment rules in the world’s highest-performing democratic countries”).

¹⁹⁸ See LUTZ, *supra* note 28, at 148 (“Although it is true that a constitution is often used as ideological window dressing, . . . few political systems, whether dictatorial or democratic, fail to reflect major political change in their respective constitutions, [and that] when carefully read, [constitutions] are windows into [the] underlying political reality.”).

¹⁹⁹ Not all comparative constitutional studies limit themselves to functioning democracies. See ELKINS ET AL., *supra* note 37, at 8–10, 47–64 (describing comparative study of constitutional design features that studied “almost the full population of national constitutions since 1789”); Tom Ginsburg et al., *Do Executive Term Limits Cause Constitutional Crises?*, in COMPARATIVE CONSTITUTIONAL DESIGN, *supra* note 22, at 350, 350–55 (explaining dataset for comparative study of executive term limits in national constitutions).

²⁰⁰ Moreover, a comprehensive study of this kind has value precisely because it identifies the kind of constitutional arrangements that exist in low-performing democracies. See *infra* Part III.C. (discussing my discovery that some “federal” states have strongly centralized amendment power; perhaps because those federal arrangements are dominated by central control).

²⁰¹ COMP. CONST. PROJECT, <http://comparativeconstitutionsproject.org>. The CCP is a large-scale academic initiative designed to collect all of the world’s constitutions. See Finkel, *supra* note 20, at 11 (explaining that the CCP is the result of work by Professors Zachary Elkins, Tom Ginsburg, and James Melton); see also CONSTITUTE PROJECT, <https://www.constituteproject.org/content/about?lang=en> (explaining the

ished my review in April 2014, the repository included full English versions of the 189 national constitutions that were “in force in September of 2013.”²⁰² I reviewed the amendment rules in each of those constitutions as well as the new constitutions of Fiji, (adopted in late 2013) and Tunisia and Egypt (both adopted in January 2014).²⁰³ Appendix A lists the countries as well as the adoption year of each constitution that I reviewed.

Second, because the primary focus of my review was to study how constitutional amendment rules include “subnational units” in the amendment process, it is important to define that concept. “Subnationalism” can have many meanings in political science and public law.²⁰⁴ It may, for example, refer generally to smaller cultural, religious, linguistic, or ethnic communities within a national jurisdiction.²⁰⁵ These communities may not have any specific constitutional status and they may not be concentrated in a particular subnational jurisdiction.²⁰⁶ However, within public-law scholarship, especially literature discussing federalism, “subnational units” usually refers to constitutionally recognized intermediate territorial jurisdictions such as states, provinces, cantons, or regions.²⁰⁷ It may also refer to non-territorial subnational communities that

project). In conjunction with Google, CCP has released <http://constituteproject.org>, which is a searchable full-text database of the world’s constitutions.

²⁰² See CONSTITUTE PROJECT, *supra* note 201 (stating that the repository includes “the constitution that was in force in September of 2013 for nearly every independent state in the world”). According to CCP, “certain countries whose constitutional order consists of multiple documents, or whose constitutions are in transition, are temporarily omitted.” *Id.* My review omitted those countries not contained in the CCP database.

²⁰³ Thus, my review captured all available extant national constitutions through January 2014. See Appendix A.

²⁰⁴ See, e.g., GARDNER, *supra* note 125, at 20–21 (discussing subnationalism from a public law standpoint in the United States); HELENA CATT & MICHAEL MURPHY, SUB-STATE NATIONALISM: A COMPARATIVE ANALYSIS OF INSTITUTIONAL DESIGN 18 (2002) (describing subnationalism from a political science perspective as a “collectivity of people living within an existing state who express a strong sense of identification as a distinct nation”).

²⁰⁵ See JOSHUA B. FORREST, SUBNATIONALISM IN AFRICA: ETHNICITY, ALLIANCES, AND POLITICS 1–8 (2004) (discussing the many uses of the concept in political science and especially the changing notion that subnationalism refers to territorially consolidated subnational populations); ASEEMA SINHA, THE REGIONAL ROOTS OF DEVELOPMENTAL POLITICS IN INDIA: A DIVIDED LEVIATHAN 203–04 (2005) (using the phrase to refer to “cultural subnationalism” in India).

²⁰⁶ See FORREST, *supra* note 205, at 5–6 (discussing how subnationalism does not always trace territorial communities).

²⁰⁷ See James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 5 (2013) (using the phrase in the context of public law to refer to intermediate subnational government). Although the phrase “subnational” can technically also refer to local government institutions, the term generally refers to intermediate or “regional” government

have constitutionally protected statuses.²⁰⁸ Although it may be important for future scholarship to investigate how amendment rules affect subnational communities that do not have any constitutional status, my focus here is on constitutionally recognized subnational units.²⁰⁹

Third, because the focus of this review was to identify all formal mechanisms for including subnational units in the amendment process, I structured it around a series of broad questions designed to capture all existing decentralization techniques.²¹⁰ For each constitution, I recorded answers to the following questions:²¹¹

- Do the amendment rules generally require approval by a unicameral national legislature that contains at least some subnational representatives?²¹²

institutions. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, CHARACTERISTICS OF NATIONAL CONSTITUTIONS CODEBOOK 128 (Apr. 18, 2014), <http://www.comparativeconstitutionsproject.org/files/surveyinstrument.pdf> (including “local/municipal government” within “subnational government”). I use the phrase in the regional sense.

²⁰⁸ See Arend Lijphart, *Typologies of Democratic Systems*, 1 COMP. POL. STUD. 3, 32 (1968) (discussing non-territorial federal arrangements—or “consociational” arrangements—that provide constitutional recognition for subnational groups rather than subnational territories); see also AREND LIJPHART, THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS 143 (1968) (exploring the same concept in the Netherlands); Charles E. Ehrlich, *Democratic Alternatives to Ethnic Conflict: Consociationalism and Neo-separatism*, 26 BROOK. J. INT’L L., 447, 457–459 (2000) (discussing Lebanon’s failed attempt at establishing non-territorial federal system).

²⁰⁹ I did not restrict my analysis to territorially based subnational units, but there are very few non-territorial systems.

²¹⁰ See *supra* note 15 (explaining that decentralization as used in this Article refers to a constitutionally protected vertical division of power between national and subnational government institutions).

²¹¹ This “survey” approach to tracking textual variations across constitutions is an established approach to comparative constitutional analysis. See, e.g., HENC VAN MAARSEVEEN & GER VAN DER TANG, *supra* note 40, at 17–20 (“The object of this research is . . . to investigate the constitutional texts of national states in order to find out whether certain of their provisions are similar, and if so to what extent.”); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1187–88 (2011); Law & Versteeg, *supra* note 41, at 770–71. This approach has limitations. See *id.* at 1187–88. For one thing, it does not capture various extrinsic factors that might affect how a constitutional text is applied. *Id.* Nevertheless, it is a recognized and valuable method of studying formal constitutional provisions across countries. *Id.*

²¹² This question captures systems where the national legislature is structured to include at least some “representatives” of subnational units. I am interested in identifying only those systems that provide for *separate* election or appointment of subnational representatives distinct from representatives accountable to the larger national constituency. It is not my purpose to explore all the eccentricities of each country’s election rules. See LIJPHART, *supra* note 15, at 143–70 (describing variations in electoral systems around the world). Thus, if a system uses subnational units only

- Do the amendment rules generally require approval by a bicameral national legislature with a separate “subnational” chamber or an upper chamber with some subnational representatives?²¹³
- Do the amendment rules generally require direct ratification of amendments by subnational units (either by popular referendum or approval by a subnational legislature)?
- Do the amendment rules limit subnational ratification to only certain subjects?
- Do the amendment rules impose any heightened restrictions on amendments affecting subnational units or subnational interests?
- Do the amendment rules allow for subnational units to initiate amendments?
- Do the amendment rules provide for any other miscellaneous institutions or procedures that include subnational units?

After reviewing the constitutions, collecting this information, and recording any variations that did not fit neatly within my survey, I merged my data with data available from the CCP.²¹⁴ The CCP data provide other

as a basis for delineating multi-member electoral constituencies (with the number of representatives based on the subnational unit’s proportion of the aggregate national population), I do not consider that system to include subnational representatives in the national legislature. See generally Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT’L POL. SCI. REV. 297, 299 (1997) (describing major electoral systems).

²¹³ A system fits this description if it has an upper chamber dedicated to representatives that, at least in theory, should represent the interests of their subnational units. See LIJPHART, *supra* note 15, at 187–88 (discussing bicameralism as a means of ensuring that subnational interests are represented). The United States Senate is an example of such an upper chamber (at least by design). Not all “upper chambers” are dedicated solely to representation for subnational units. See Samuel C. Patterson & Anthony Mughan, *Senates and the Theory of Bicameralism*, in *SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD* 1, 3–9 (Samuel C. Patterson & Anthony Mughan eds., 1999) (summarizing all extant bicameral systems and noting how representatives are elected or appointed to each upper chamber). Some systems have a blended upper chamber that includes representatives from subnational units and representatives appointed by the executive. See *id.* I classified a system as including subnational units so long as its upper chamber included at least some subnational representatives. I discuss the limitations that these “blended” upper chambers might have for subnational interests in Part III.B.

²¹⁴ In addition to the repository of constitutional texts, see *supra* note 202, the CCP has created a massive database that codes the characteristics of most national constitutions since 1789. See CONSTITUTE PROJECT, *supra* note 201 (describing the data and the coding process). The data include information related to 667 survey questions completed by the CCP for each constitution. All data used are on file with the author.

important constitutional characteristics such as whether a constitution identifies itself as expressly “federal” or “unitary” and whether a constitution creates or protects subnational units. Merging the data provided a more complete picture of each constitution’s overall structure.

One final definition is important at this stage. Some constitutions have separate procedures for constitutional “amendment” and constitutional “revision.”²¹⁵ Amendment generally refers to ad hoc changes to the existing constitutional text without “a fundamental change that departs from the presuppositions of the constitution.”²¹⁶ Revision usually refers to more wide-spread, systematic changes to the constitution and its core principles.²¹⁷ As other scholars have noted, the distinction between these two concepts can be blurry.²¹⁸ Although a study of decentralization in “revision” rules would likely provide important and related insight, my focus here is exclusively on rules that relate to constitutional amendment. Thus, I excluded from my review rules that relate exclusively to constitutional revision.²¹⁹

B. Taxonomy of Decentralization Mechanisms

This Section presents a taxonomy of decentralization mechanisms that is based on my review of the amendment rules contained in the approximately 191 extant national constitutions. My review identified five dominant ways that subnational units are included in national amendment processes. Not all amendment rules fit neatly into the categories described below, but these categories capture the dominant approaches. This Section also provides a preliminary assessment of each method and identifies additional factors that can affect subnational inclusion in constitutional amendment procedures.

1. Inclusion in the National Legislature

The most common way that subnational units are included in national amendment processes is by providing them with representation in the national legislature, which is responsible for initiating and/or ap-

²¹⁵ Constitutions display great variety in how they use and define these concepts. See Albert, *supra* note 22, at 929–32 (describing variations and noting that the distinction is sometimes implicit in constitutions).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ ELKINS ET AL., *supra* note 37, at 55–59.

²¹⁹ Some constitutions use the phrase “revise,” “revision,” or “reform” to refer to amendment. See Albert, *supra* note 22, at 930 (noting that the Chilean Constitution uses “reform”). As others have done, when a constitution uses those phrases without distinguishing them from other types of alteration, I interpreted those provision to relate to amendment. See *id.* (following this approach). Thus, I excluded from my analysis only those provisions that provided an obvious separate procedure for constitutional revision.

proving proposed amendments. This method can take many different forms and provide for varying degrees of inclusion for subnational units. As explained further below, my review identified fifty-four systems that attempt to decentralize amendment processes through either: (1) special representation of subnational units in a unicameral national legislature; or (2) representation in a separate “upper” legislative chamber.²²⁰ However, on closer look, there seems to be a variety of extrinsic factors that can undermine or dilute decentralization of the amendment power when this is the sole mechanism for including subnational units in the amendment process.

a. Subnational Representatives in a Unicameral Legislature

Many amendment rules allow the national legislature to amend the constitution by adopting a constitutional law.²²¹ These amendment rules can sometimes incorporate subnational units because the national legislature includes some subnational representatives. Those subnational representatives are sometimes elected directly by subnational communities, but they may also be appointed or nominated by subnational officials or institutions. In any event, by including subnational representatives in the national legislature, these systems attempt to provide subnational units with a voice in the national amendment process. My review identified twelve countries that require a unicameral legislature with some subnational representatives to approve amendments.²²²

The small South American country of Guyana provides an example. Guyana’s unicameral National Assembly can amend the constitution by passing a constitutional bill that is supported by a majority of its 65 members.²²³ Under the original default election rules, 53 representatives were elected from a national list based on proportional representation.²²⁴ Guyana’s ten Regional Councils, which are separately elected, each elected one council representative as an additional member of the National As-

²²⁰ This includes systems such as the United States and Australia that also require subnational units to directly approve amendments.

²²¹ Often, but not always, constitutional laws must be adopted by a supermajority in the national legislature and/or confirmed by a popular referendum. See Albert, *supra* note 22, at 919–24 (providing a summary of basic procedures in amendment rules).

²²² Those systems are: Andorra, Angola, Burkina Faso, Cyprus, El Salvador, Guinea, Guyana, Kosovo, Micronesia, Nicaragua, Portugal, and Tanzania.

²²³ See CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA OCT. 6, 1980, pt. I, ch. vi, tit. 52, sec. 1. Certain amendments require a subsequent referendum to ratify them. *Id.* pt. I, ch. vi, tit. 164, sec. 1.

²²⁴ See *id.* pt. I, ch. vi, tit. 60, sec. 2. These rules were altered by subsequent acts of the National Assembly to ensure more proportional representation. Thus, the system now includes twenty-five representatives elected from multi-member constituencies that correspond to the ten regions, and forty representatives elected proportionally from a national list. See *Frequently Asked Questions*, GUY. ELECTIONS COMM’N, <http://www.gecom.org.gy/faq.html>.

sembly.²²⁵ Thus, although national representatives dominate the National Assembly, the regions are represented by members chosen by the Regional Councils, and those representatives are necessarily included in the national amendment process.

The island country of Cyprus provides another interesting example. Cyprus has a unicameral national legislature (House of Representatives) with authority to amend the constitution.²²⁶ However, the constitution requires that 30% of the legislative seats must be reserved for the Cypriot Turkish community.²²⁷ Amendment requires “at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.”²²⁸ Thus, this system was specifically designed to include subnational interests in the national amendment process. In reality, however, this inclusion of minority subnational interests has been a non-factor because the Turkish community has not taken its seats in the legislature since 1964.²²⁹

Another less obvious variation on this method is for systems to incorporate subnational interests by electing some representatives proportionally from an aggregate national constituency and some representatives from subnational constituencies.²³⁰ For example, representatives to the unicameral Legislative Assembly in El Salvador are elected from fourteen multi-seat constituencies corresponding to the fourteen subnational “departments” as well as from a single national constituency.²³¹ Because the El Salvador Constitution can be amended only by the Legislative Assembly,²³² this dual election system provides (at least in theory) a mechanism for subnational interests to be represented in the amendment process.

Including subnational units only by providing them with representation in a unicameral national legislature has significant limitations. First,

²²⁵ See CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA Oct. 6, 1980, pt. I, ch. vi, tit. 60, sec. 3.

²²⁶ See ΣΝΤΑΓΜΑ ΤΕΕ ΚΥΠΡΕΕΑΚ ΤΗΕΕΜΟΚΡΑΤΑ Aug. 16, 1960, pt. XIII, art. 182, sec. 3 (Cyprus) [hereinafter Const. of Cyprus].

²²⁷ See *id.* pt. IV, art. 62, sec. 2.

²²⁸ See *id.* pt. XIII, art. 182, sec. 3.

²²⁹ See W.M. Dobell, *Division of Cyprus*, 22 INT’L J. 278, 284 (1967) (noting that Turkish representatives withdrew). For a full discussion of the “Cyprus problem” and the issues related to the Turkish vacation of the government created by the 1960 Constitution, see Tozun Bahcheli & Sid Noel, *The Quest for a Political Settlement in Cyprus: Is a Dyadic Federation Viable?*, 44 PUBLIUS 659 (2014).

²³⁰ See Norris, *supra* note 212, at 299 (describing how electoral systems can be structured in this way).

²³¹ This system is not constitutionally established. See CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR Dec. 15, 1983, tit. II, art. 79 (authorizing election rules for Legislative Assembly to be established by law).

²³² See *id.* tit. IX, art. 248.

because of the countervailing policy of proportional representation, systems often ensure that subnational representatives are in the minority.²³³ Thus, subnational representatives are unlikely to be able to block amendments that adversely affect subnational interests or secure amendments that protect subnational interests.²³⁴ This does not mean that their inclusion is meaningless. Including subnational representatives ensures that subnational communities have a voice in the amendment process even if they might not determine the outcome. However, because subnational representatives are often outnumbered, their inclusion is largely for purposes of enriching the amendment debate rather than contributing to its outcome.

Second, systems that are dominated by national political parties often weaken the distinction between “subnational representatives” and other members of the national legislature.²³⁵ Strong national party competition tends to dominate voter preferences to the point where a candidate’s party association is more important (to the representative and voters) than the candidate’s subnational loyalties.²³⁶ This means that subnational representatives have less incentive to protect subnational interests during the amendment process and are primarily concerned with national party interests.²³⁷

Finally, many constitutions allow the legislature to set election rules through ordinary legislation. In those systems, inclusion of subnational units through representation in the national legislature may not be constitutionally protected, and subnational units could be excluded from the process simply by amending a statute.²³⁸ Nevertheless, many systems, such as Cyprus and Tanzania, constitutionalize inclusion of subnational units

²³³ There are several unicameral systems that allow subnational units to have only a minority of representatives in the national legislature. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF ANGOLA, Jan. 21, 2010, art. 144 (providing that 130 members are elected proportionally and 90 members are elected by subnational districts); *see also* Kevin Roust & Olga Shvetsova, *Representative Democracy as a Necessary Condition for the Survival of a Federal Constitution*, 37 PUBLIUS 244 (2007) (arguing that long-lasting federal democracies need proportionally representative institutions).

²³⁴ Of course, subnational representatives may sometimes find themselves in a situation where they are the swing vote for a proposed amendment, which might bring subnational interests to the forefront of an amendment proposal.

²³⁵ *See infra* Part III.B.2 (discussing this issue).

²³⁶ There is much literature on this point. *See, e.g.*, Marta Arretche, *Federalism, Bicameralism, and Institutional Change: General Trends and One Case Study*, 5 BRAZ. POL. SCI. REV. 10, 24 (2010) (explaining how national political parties affect subnational representation in Brazilian Senate).

²³⁷ *Id.*

²³⁸ *See supra* note 224 (discussing Guyana’s constitutional arrangement and legislation affecting subnational representation).

in the national legislature, making this a real method of including subnational units.²³⁹

b. Bicameralism and Subnational Interests in the Amendment Process

Some bicameral systems include subnational units by dedicating a legislative chamber to subnational interests (to some degree) and requiring that constitutional amendments be approved by that chamber.²⁴⁰ This is a familiar characteristic of federal systems, where the “upper chamber” is designed to ensure that regional interests are not overrun by aggregate “populational” majorities.²⁴¹ Election to this upper chamber can vary. Some systems such as Austria, the Netherlands, and Sudan provide that representatives must be elected by subnational legislatures.²⁴² Other systems, such as the United States and Australia, require subnational communities to directly elect representatives. In any event, these systems include subnational representatives in a second legislative chamber to some degree and require that chamber to participate in amendments.²⁴³

²³⁹ See CONST. OF CYPRUS pt. IV, art. 62 (“Out of the number of Representatives provided in paragraph I of this Article seventy per centum shall be elected by the Greek Community and thirty per centum by the Turkish Community separately from amongst their members respectively.”); CONST. OF TANZ. ch. 3, pt. 3, § 98 (explaining that Parliament cannot pass any law that would reduce Zanzibar’s representation in unicameral legislature).

²⁴⁰ See Nichols Aroney, *Formation, Representation and Amendment in Federal Constitutions*, 54 AM. J. COMP. L. 277, 326 (2006) (describing the upper chamber in several federal systems as a “States House”).

²⁴¹ See Arretche, *supra* note 236, at 20. Bicameralism is often associated with federal systems that include a second chamber to protect the interests of the constituent states. *Id.* However, many systems that are not truly “federal” have adopted bicameralism and included second chambers that represent other minority interests, provide specialized expertise, or simply operate as a further check-and-balance on government power. The Czech Republic and the Philippines are examples.

²⁴² The Democratic Republic of the Congo also operates in this way.

²⁴³ Those systems are: Afghanistan, Algeria, Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Bosnia-Herzegovina, Brazil, Burundi, Canada, Colombia, Congo, Democratic Republic of Congo, Dominican Republic, Ethiopia, German Federal Republic, Haiti, India, Kazakhstan, Kenya, Liberia, Madagascar, Malaysia, Mauritania, Mexico, Namibia, Netherlands, Nigeria, Pakistan, Philippines, Russia, Somalia, South Sudan, Spain, Sudan, Switzerland, Thailand, United States of America, Uzbekistan, and Zimbabwe. Many systems have added members to the second legislative chamber that represent other interests such as the academy, trade associations, cultural groups, and municipal government. I have included these systems in my list if they nevertheless guarantee seats in the second chamber for representatives from constitutionally protected intermediate subnational units.

Interestingly, a few systems that are not formally federal have adopted this approach.²⁴⁴

It appears that Australia's Senate was intended to ensure that state interests were protected in the national legislature, including in the amendment process.²⁴⁵ Australia's constitution can be amended by, among other things, approval from both chambers of the national legislature—the House of Representatives and the Senate.²⁴⁶ The Senate is comprised of twelve senators from each state, regardless of the state's population, and two senators from the two autonomous internal territories.²⁴⁷ Because senators are elected directly by state communities and all states are equally represented, "it was hoped and expected that the Senate would serve as the agency within the structure of the national government that would protect the rights of the states."²⁴⁸

Similarly, Brazil's constitution is amended by approval of both legislative chambers, the Chamber of Deputies and the Federal Senate.²⁴⁹ The Federal Senate is comprised of three representatives from each state and three representatives of the Federal District.²⁵⁰ The Brazilian Senate was also apparently intended to represent state interests in this way.²⁵¹

However, national political parties seem to significantly undermine the effectiveness of this type of subnational inclusion. In Australia, for example, there is evidence that senator voting preferences are guided by party association more than state loyalties, especially on proposed constitutional amendments.²⁵² A study of all constitutional amendment proposals submitted to referendum between 1901 and 1961 showed that

²⁴⁴ Haiti's Senate is an example. CONSTITUTION OF THE REPUBLIC OF HAITI Mar. 29, 1987, art 94.

²⁴⁵ See LIVINGSTON, *supra* note 31, at 129–33; see also William H. Riker, *The Senate and American Federalism*, in THE DEVELOPMENT OF AMERICAN FEDERALISM 135, 138–39 (William H. Riker ed., 1987) (discussing United States Senate in this context).

²⁴⁶ See AUSTRALIAN CONSTITUTION s 128. If one house twice refuses to concur in a proposed amendment, the Governor-General can circumvent this requirement and send the proposal to referendum. *Id.*

²⁴⁷ See *id.* s 7.

²⁴⁸ See LIVINGSTON, *supra* note 31, at 129.

²⁴⁹ See CONSTITUIÇÃO FEDERAL [C.F.] OCT. 5, 1988, art. 60 [hereinafter CONST. OF BRAZ.].

²⁵⁰ See *id.* art. 46, sec. 1.

²⁵¹ See Arretche, *supra* note 236, at 28 (discussing the intended role of the Brazilian Senate).

²⁵² See LIVINGSTON, *supra* note 31, at 130–33; see also Francis G. Castles & John Uhr, *Australia: Federal Constraints and Institutional Innovations*, in FEDERALISM AND THE WELFARE STATE: NEW WORLD AND EUROPEAN EXPERIENCES 51, 85–86 (Herbert Obinger et al. eds., 2005); Samuel C. Patterson & Anthony Mughan, *Fundamentals of Institutional Design: The Function and Powers of Parliamentary Second Chambers*, 7 J. LEGIS. STUD. 39, 39–60 (2001) (discussing agency issues related to representatives in "upper chambers").

senators' voting records displayed greater party coherence than state coherence.²⁵³ Similarly, recent studies have shown that when voting on constitutional amendments, Brazil's Senate is characterized primarily by national "partisan cohesion" rather than state loyalty.²⁵⁴ This finding is significant because Brazil was previously believed to exhibit little national party cohesion in the Senate on account of strong subnational loyalties.²⁵⁵

Another limitation on this method is the structure of the legislature's "upper chamber." Although many systems structure their upper chambers around representation of subnational units, many bicameral systems have "diluted" this focus by including representatives of other minority groups and special interests. In Algeria for example, the constitution can be amended if both chambers of the national Parliament approve the amendment.²⁵⁶ Although two-thirds of the upper chamber (Council of Nations) are elected by subnational legislatures, the remaining third are appointed by the President "from among the personalities and national elites in the scientific, cultural, professional, economic and social fields."²⁵⁷ Thus, the Algerian Senate is not exclusively dedicated to subnational interests.²⁵⁸

A further limitation is the alternative use of nation-wide referenda to amend national constitutions. Some systems such as Belarus not only require amendments to be ratified by a legislative chamber representing subnational units, but also permit amendments to be ratified, in the alternative, by a nation-wide referendum.²⁵⁹ Thus, the amendment rules offer two pathways, only one of which provides subnational communities with an opportunity to participate in the process.

In sum, although bicameral systems may appear to be more effective at including subnational units, available evidence suggests that there are still significant limitations, especially in countries that have strong national political parties.

²⁵³ Castles & Uhr, *supra* note 252, at 85–86.

²⁵⁴ See Arretche, *supra* note 236, at 28; see also Roland Sturm, *Austria*, in HANDBOOK OF FEDERAL COUNTRIES 45, 49–50 (Ann L. Griffiths ed., 2005) (discussing same issue in Austria).

²⁵⁵ See Scott Mainwaring, *Politicians, Parties, and Electoral Systems: Brazil in Comparative Perspective*, 24 COMP. POL. 21, 32 (1991) (explaining Brazil's local political party system).

²⁵⁶ See *Dstwurr al-Jumhuriat al-Jazayiriat al-Dimuqratiat al-Shaebia* Feb. 23, 1989, tit. IV, art. 174 [hereinafter CONST. OF ALG.]. An approved amendment must also be ratified in a national referendum. *Id.* Additionally, certain amendments can be approved by a three-quarters vote of both chambers of Parliament. *Id.* art. 176.

²⁵⁷ See *id.* tit. II, ch. II, art. 101.

²⁵⁸ Other systems with a similar "hybrid" structure in their upper chamber include Kenya, Kazakhstan, Madagascar, Thailand, Uzbekistan, and Zimbabwe.

²⁵⁹ See *Kanstyucyja Respubliki Bielarus* Mar. 15, 1994, § 8, art. 140 [hereinafter CONST. OF BELR.]. Kenya, Burundi, Namibia, the Congo, and the Comoros also have similar systems.

2. *Direct Consent of Subnational Units*

A few systems directly incorporate subnational units into constitutional amendments by requiring that subnational communities or institutions directly ratify proposed amendments.²⁶⁰ This method is often, but not always combined with approval by the national legislature. In all, there are approximately eleven systems that generally require subnational ratification on most proposed amendments,²⁶¹ and six systems that require subnational ratification only on specific issues affecting subnational interests.²⁶² In theory, this method of inclusion would seem to be more effective than representation in the national legislature because it reduces agency costs associated with sending subnational representatives to the national legislature.

Mechanisms for approval by subnational units vary. Some systems such as Mexico require the majority of state legislatures to approve the amendment.²⁶³ Other systems, such as Australia, Micronesia, and Palau require a majority (or super-majority) of the subnational units to ratify the amendment through subnational referenda.²⁶⁴ Iraq is unusual in that it requires amendments affecting particular regions to be ratified by both the regional legislatures and regional populations via referenda.²⁶⁵ Somalia's constitution provides an interesting twist on this theme. After a proposed amendment is approved by one of the national legislative chambers, the two chambers must form a "joint committee" to review the proposed amendment.²⁶⁶ The Somalian constitution provides that the joint committee must "[e]ngage Federal Member State legislatures and incorporate the Federal Member States' harmonized submissions into the proposed amendment, whereas the matter concerns Federal Member State interests."²⁶⁷

It is difficult to assess this method of decentralization, but anecdotal evidence from the United States, Australia, and Switzerland seem to sup-

²⁶⁰ This method of including subnational units is often characterized as distinctly federal. See Aroney, *supra* note 240, at 326 (discussing amendment rules in federal systems).

²⁶¹ Those systems are: Australia, Canada, the Comoros, Ethiopia, Mexico, Micronesia, Nigeria, Palau, Russia, Switzerland, and United States of America.

²⁶² Those systems are: Iraq, Kiribati, South Africa, Uganda, India, and Pakistan.

²⁶³ See CONST. OF MEXICO, tit 8, art. 125.

²⁶⁴ See AUSTRALIAN CONSTITUTION, s 128; CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA May 10, 1975, art. XIV, sec. 1 [hereinafter CONST. OF MICR.]; CONSTITUTION OF THE REPUBLIC OF PALAU Apr. 2, 1979, art. XIV, sec 2.

²⁶⁵ See Article 126, Section 4, Dustur Jumhuriyat al-'Iraq 2005 [hereinafter CONST. OF IRAQ].

²⁶⁶ See DASTUURKA JAMHUURIYADDA FEDERAALKA SOOMAALIYA 2012, ch. 15, tit. 1, art. 132(5) [hereinafter CONST. OF SOM.].

²⁶⁷ See *id.* ch. 15 tit. 1, art. 132(6) (f).

port its effectiveness at including subnational units.²⁶⁸ In the United States, for example, the states have failed to ratify six amendments that both the Senate and House of Representatives approved by a two-thirds majority.²⁶⁹ This suggests a degree of independent judgment by the states that presumably reflects state interests not captured by national institutions. Further, the states have failed to ratify several amendments that likely would have been approved at an aggregate nation-wide referendum.²⁷⁰ The most notable example is the Equal Rights Amendment, which was designed to guarantee equal rights to women. The Amendment was approved by Congress in 1972 and submitted to the states for ratification. In the first years after its passage, most public opinion polls showed national majorities favoring the Amendment.²⁷¹ However, the Amendment failed because it was ratified by only thirty-five states, three states short of the required super-majority.²⁷² Many complex explanations have been offered for the Amendment's failure, but there is strong support for the conclusion that the Amendment failed because a minority of opposition states effectively exercised their veto authority.²⁷³

The adoption of the original Bill of Rights implicated a similar issue. Included with the Bill of Rights was a proposed amendment concerning the apportionment of the House of Representatives.²⁷⁴ Congress approved the amendment and submitted it to the states for ratification. Only ten states approved the amendment, which was one state short of the super-majority required at the time.²⁷⁵ Interestingly, it is estimated that the ten ratifying states accounted for approximately 79.6% of the nation-

²⁶⁸ See LIVINGSTON, *supra* note 31, at 312–13 (discussing instances where states have vetoed amendments in Switzerland, Australia, and United States even though amendments had aggregate nation-wide support).

²⁶⁹ See CONG. RESEARCH SERV., S. DOC. NO. 112–9, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 49–51 (2014), <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014.pdf> (discussing proposed amendments not ratified by the states).

²⁷⁰ See LIVINGSTON, *supra* note 31, at 234–37 (recounting instances where amendments failed state ratification even though they likely had aggregate nationwide support); Louis Bolce et al., *The Equal Rights Amendment, Public Opinion, and American Constitutionalism*, 4 POLITY 551, 558 (1978).

²⁷¹ Mark R. Daniels et al., *The ERA Won—At Least in the Opinion Polls*, 15 POL. SCI. 578, 583–84 (1982) (discussing evidence of popular support for the Equal Rights Amendment).

²⁷² See S. DOC. NO. 112–9, *supra* note 269, at 49–51 (listing proposed amendments that were not ratified).

²⁷³ See Daniels et al., *supra* note 271, at 584 (analyzing various explanations and concluding that a minority of states thwarted the process; although suggesting that legislatures in those states were not responsive to constituent preferences).

²⁷⁴ See LIVINGSTON, *supra* note 31, at 234.

²⁷⁵ *Id.*

al population.²⁷⁶ Thus, the amendment was defeated by states comprising a “populational” minority at the time.

Australia’s experience with constitutional amendment is particularly interesting in this regard because it requires an amendment to be approved simultaneously by national and state referenda.²⁷⁷ Because of these rules, there have been six instances where the national referendum approved an amendment but the amendment failed because a majority of the states rejected it.²⁷⁸

Although anecdotal, these instances suggest that requiring subnational units to directly endorse amendments can be a particularly potent method of including subnational units. Inclusion of this sort provides them with an effective means of protecting their own unique interests through the “negative” action of vetoing amendments endorsed by national institutions, and even sometimes popular national majorities.

3. *Subject-Matter Inclusion of Subnational Units*

Amendment rules use subject-matter “triggers” in a variety of ways.²⁷⁹ Some systems include subnational units in constitutional amendment only when the proposed amendment addresses certain subjects.²⁸⁰ Other systems use subject-matter triggers to increase subnational authority in the amendment process.²⁸¹ There is some variety in the subjects that “trigger” subnational involvement, but issues related to the authority, jurisdiction, and territory of subnational units are the most common triggers.²⁸² The

²⁷⁶ *Id.*

²⁷⁷ See AUSTRALIAN CONSTITUTION s 128.

²⁷⁸ See PARLIAMENTARY HANDBOOK, *supra* note 35, at 383, 385–86.

²⁷⁹ See Albert, *supra* note 22, at 942–43 (discussing subject-matter triggers in constitutional amendment rules).

²⁸⁰ The following systems include subject-matter triggers related to subnational involvement in the amendment process: India, Iraq, Kiribati, Pakistan, Russia, South Africa, and Uganda.

²⁸¹ For example, both Australia and the United States have strongly decentralized amendment procedures for all proposed amendments, but they also impose heightened requirements for amendments affecting state representation in their respective Senates, and, in Australia, issues related to state boundaries. See U.S. CONST. art. V (“no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”); AUSTRALIAN CONSTITUTION s 128 (“No alteration diminishing the proportionate representation of any State in either House of the Parliament, . . . or increasing, diminishing, or otherwise altering the limits of the State, . . . shall become law unless the majority of the electors voting in that State approve the proposed law.”). The following systems impose heightened restrictions for amendment that affect certain subnational interests: Australia, Austria, Brazil, Canada, Dominican Republic, Ethiopia, German Federal Republic, India, Iraq, Kiribati, Macedonia, Madagascar, Malaysia, Nigeria, Pakistan, Russia, South Africa, Tanzania, Uganda, and United States of America.

²⁸² Some constitutions also include categorical prohibitions on amendments affecting the territory or jurisdiction of subnational units. See, e.g., CONSTITUTION DE

admission of new subnational units may also trigger subnational involvement.²⁸³ Uganda's constitution requires subnational involvement in proposals to amend tax provisions and provisions addressing local government.²⁸⁴ Ethiopia's constitution requires subnational involvement regarding any proposals to amend rights provisions.²⁸⁵ India's constitution includes subnational units on any proposals regarding changes to representation of the states in the national legislature.²⁸⁶

The mechanisms for including subnational units vary greatly in this regard. Most systems that include subject-matter triggers require subnational units to directly approve the proposed amendment, either through referenda or subnational legislatures. In Austria, however, amendments affecting the legislative or executive authority of the *länder* trigger a super-majority requirement in the Federal Council (*Bundesrat*), which is comprised of representatives elected by *länd* legislatures.²⁸⁷ Macedonia and Tanzania also include procedures based on representation in the national legislature.²⁸⁸ In Tanzania, any issues that affect Zanzibar must be approved by two-thirds of Zanzibar's representatives in the unicameral national legislature.²⁸⁹ Iraq is unusual in that any amendments affecting the authority of the Regions must be approved by a majority of the "concerned region[']s" legislature and "the majority of its citizens in a general referendum."²⁹⁰ Finally, Pakistan has an unusual process whereby an affected province gets a specific veto on an amendment directed towards it.²⁹¹

LA QUATRIÈME RÉPUBLIQUE DE MADAGASCAR Dec. 11, 2010, tit. VI, art. 163 ("The principle of autonomy of the Decentralized Territorial Collectivities . . . may not be made the object of revision.").

²⁸³ See, e.g., CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, ch. 18, art. 260.

²⁸⁴ See *id.* ch. 18, art. 260 (reference to ch. 9, art. 152 relates to tax chapter).

²⁸⁵ See CONST. OF ETH., art.105.

²⁸⁶ See INDIA CONST. art. XX, § 368, cl. 2.

²⁸⁷ See CONST. OF AUSTRIA ch. II, sec. D, art. 44. South Africa has a similar procedure. See S. AFR. CONST., 1996 ch. 4, pt. C (requiring National Council of Provinces to approve amendments related to provincial authority and also requiring provincial legislatures to approve any amendment that "concerns only a specific province").

²⁸⁸ See USTAVOT NA REPUBLIKA MAKEDONIJA [CONSTITUTION] Nov. 20, 1991, amend. XVII (Maced.) ("Such provisions and articles, shall require a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in the majority in the population of Macedonia").

²⁸⁹ See CONST. OF TANZ., ch. 3, pt. III, § 98(1) (b).

²⁹⁰ See CONST. OF IRAQ § 6, art. 126(4).

²⁹¹ See PAKISTAN CONST. pt. XI, art. 239, § 4.

These are just some of the many variations in these provisions, but they illustrate that many systems have selectively decentralized the amendment power by limiting subnational involvement to certain issues.

4. Inclusion of Subnational Units Through Special Institutions or Procedures

A few constitutions provide that amendments must be reviewed and/or approved by a special body convened for the purpose of considering amendments. The special body may be a joint meeting of both chambers of the national legislature, or it may be a body wholly distinct from the legislature. This is a very unusual process,²⁹² but it can operate as a unique decentralization mechanism when the special body is wholly distinct from the national legislature and includes subnational representatives.

Malaysia provides the best example of this amendment procedure. The Malaysian constitution provides that amendments related to certain subjects (the special privileges of certain indigenous people, the official language, or the status of indigenous monarchies) must be approved by the “Conference of Rulers.”²⁹³ The Conference of Rulers is distinct from the bicameral Malaysian Parliament, which is the primary law-making body.²⁹⁴ For purposes of constitutional amendment, the Conference is comprised of one representative from each state within Malaysia.²⁹⁵ Because of this configuration, the Conference seems designed to ensure that subnational interests are represented in the amendment process on certain subjects.

Malaysia’s arrangement raises interesting possibilities for constitutional designers. By requiring a special body comprised of subnational representatives to consider certain amendments, constitutional designers may be able to mitigate agency costs that sometimes dilute subnational interests within the national legislature. And, by constitutionally establishing and organizing a special body, constitutional designers can also control coordination problems between subnational units.

²⁹² My review identified only two systems that included subnational units in this way: Malaysia and Somalia. See CONSTITUTION OF THE FEDERATION OF MALAYSIA Aug. 27, 1957, ch. pt. XII, art. 159(5) [hereinafter CONST. OF MALAY.]; CONST. OF SOM. ch. 15, tit. 1, art. 132, § 5. (Amendment process triggers “joint committee” convened by Somalian constitution).

²⁹³ See CONST. OF MALAY., pt. XII, art. 159; see ABDUL AZIZ BARI & FARID SUFIAN SHUAIB, CONSTITUTION OF MALAYSIA: TEXT AND COMMENTARY 336 (rev. ed. 2004) (discussing restrictions on amendment process).

²⁹⁴ See CONST. OF MALAYSIA, pt. IV, ch. 2(38) (establishing and describing Conference of Rulers).

²⁹⁵ The Conference has other duties besides review of constitutional amendments, including selection of the monarch. The representatives for the nine Malay states are the monarchic rulers from each state and the appointed governors from the remaining four non-Malay states. See *id.*

5. *Inclusion of Subnational Units Through Initiation of Amendment*

In general, most amendment rules require amendments to be initiated by the national legislature,²⁹⁶ national executive,²⁹⁷ or popular initiative.²⁹⁸ A few systems, however, allow subnational units to directly initiate constitutional amendments. This is a rare inclusion device. My survey identified only eight systems that authorize subnational units to initiate national amendments in some way.²⁹⁹

There is some variety in how subnational units can initiate amendments. In Brazil, a majority of the state legislatures can initiate an amendment.³⁰⁰ The United States permits the states to initiate amendments only by calling a Constitutional Convention.³⁰¹ Interestingly, in Moldova, amendments can be proposed by public initiative, but only if “[c]itizens initiating the revision of the Constitution . . . cover at least a half of the territorial-administrative units of the second level, and in each of these units must be registered at least 20,000 signatures in support of the said initiative.”³⁰² This process seems aimed at ensuring that amendments brought by public initiative have widespread support within the majority of subnational units. Italy also has an unusual process. Although subnational units cannot truly initiate amendments, Italy’s Regional Councils can intervene in the amendment process by requesting that a proposed amendment already approved by the national legislature be submitted to a national referendum for ratification.³⁰³ This process allows the Regional Councils to operate collectively as a check on the national legislature.

An important practical limitation on this approach is the difficulty of coordinating amendment proposals between multiple states.³⁰⁴ Additionally, other than the United States, most systems require that the national legislature or a national referendum ratify any amendments proposed by

²⁹⁶ See, e.g., S. AFR. CONST., 1996 ch. 4, §44. (“The national legislative authority as vested in Parliament . . . confers on the National Assembly the power to . . . amend the Constitution.”).

²⁹⁷ See, e.g., CONST. OF IRAQ, § 6, art. 126 (1) (allowing the President in conjunction with the Council of Ministers to propose amendments).

²⁹⁸ See, e.g., CONST. OF SWITZ., tit. 4, ch. 2, art. 139 (“Any 100,000 persons eligible to vote may . . . request a partial revision of the Federal Constitution.”).

²⁹⁹ Those systems are: Brazil, Ethiopia, Italy, Liechtenstein, Moldova, Russia, Spain, and the United States of America.

³⁰⁰ See CONST. OF BRAZ., art. 60. Russia and Liechtenstein follow this approach as well.

³⁰¹ See U.S. CONST. art. V.

³⁰² See CONSTITUTIA REPUBLICII MOLDOVA July 29, 1994, tit. VI, art. 141, § 1(a).

³⁰³ See Costituzione art. 138 (It.).

³⁰⁴ See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1511, 1527 (2010) (discussing coordination problems created by Article V’s convention method).

subnational communities. These limitations may explain why research has not yet revealed a single amendment initiated by subnational units in any of the systems that permit subnational initiation.³⁰⁵

C. *Non-Decentralization in Some Federal Systems*

In addition to the decentralization mechanisms described above, my review also identified a few “federal” systems that do not decentralize the amendment power in any way. These systems constitutionally divide power between regional and central government, but they nevertheless consolidate the amendment power in national government institutions.³⁰⁶ This procedure is understandable in unitary states without subnational units. It is surprising, however, in federal systems with constitutionally recognized subnational government.³⁰⁷ My survey of existing constitutional-amendment rules identified three expressly federal systems that do not include subnational units in constitutional amendment in any way.³⁰⁸

The Constitution of Venezuela, for example, describes Venezuela as a “federal and decentralized State.”³⁰⁹ The constitution further describes the Venezuelan states as “politically equal and autonomous organs with full juridical personality.”³¹⁰ Subnational communities separately elect their state governors and legislatures, and states are required to adopt their own subnational constitutions “to organize public authority.”³¹¹ However, despite this federal structure, Venezuela’s amendment rules effectively exclude subnational government. Amendment can be initiated only by the President, a majority vote in the unicameral National Assembly, or public initiative.³¹² Once an amendment is initiated, the proposal

³⁰⁵ Although the Constitution of the United States has not been amended through the convention process, scholars have noted that the threat of a convention has provided political pressure for Congress to approve certain amendments. *See generally* Rogers, *supra* note 159 (discussing these instances).

³⁰⁶ *See* LIJPHART, *supra* note 15, at 186–87 (providing general definition of federalism).

³⁰⁷ Notwithstanding these exceptions, the dominant trend among federal systems is to decentralize amendment power to some extent. My survey revealed that approximately 22 of 25 federal systems include subnational constitutions in constitutional amendment in some way.

³⁰⁸ These systems were Venezuela, the United Arab Emirates, and The Federation of Saint Christopher and Nevis. All three of these systems constitutionally recognize subnational government and expressly identify themselves as federal.

³⁰⁹ *See* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, pmb1.

³¹⁰ *See id.* tit. IV, ch. III, art.159.

³¹¹ *See id.* tit. IV, ch. III, art. 164.

³¹² *See id.* tit. IX, ch. I, art. 341. The Venezuelan Constitution also provides procedures for “Constitutional Reform,” which, unlike amendment, can alter the “fundamental structure” of the Constitution. That procedure also excludes subnational units. *See id.* tit. IX, ch. II, art 342–46.

must be ratified by a nationwide public referendum.³¹³ Thus, although Venezuela constitutionally protects subnational government (and even subnational constitutionalism), it does not include subnational officials or communities in the national amendment process.

Albania provides another example. Albania's constitution recognizes "regions" as subsidiary subnational units of government.³¹⁴ The regions have elected Regional Councils that create policy for the region.³¹⁵ Indeed, the "region is the unit where regional policies are made and implemented and where they are harmonized with policies of the state."³¹⁶ Notwithstanding this decentralization, Albania's amendment rules effectively exclude subnational units because the national constitution can be amended by the unicameral, proportionally elected National Assembly and by a nationwide referendum.³¹⁷

From an institutional design perspective, there are various possible explanations for why these systems exclude subnational units from constitutional amendment. First, constitutional systems with strong (perhaps even authoritarian) executives have incentives to consolidate constitutional power at the center. Indeed, in many of these countries, subnational government is strictly controlled by the center in any event. Thus, it is not surprising that their constitutional amendment rules consolidate the amendment power at the center.³¹⁸ Second, some non-authoritarian systems decentralize authority primarily to ensure efficient delivery of government services. Subnational government is primarily a tool for the system, as a whole, to ensure efficient and effective delivery of government services.³¹⁹ These systems rely primarily on national institutions to create policy, and this is reflected in their amendment rules as well.

³¹³ *Id.* tit. IX, ch. II, art. 344.

³¹⁴ *See* KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË Nov. 28, 1998, pt. 6, art. 108(1) (Alb.).

³¹⁵ *See id.* pt. 6, art. 110(3).

³¹⁶ *See id.* pt. 6, art. 110(2).

³¹⁷ *See id.* pt. 17, art. 177, § 1–8.

³¹⁸ This may explain systems like Albania, among others. In Albania, although the Regions are constitutionally recognized, a national prefect oversees the Regions. *Congress of Local and Regional Authorities, Local and Regional Democracy in Albania*, Doc. No. CG(13)29, at II (Nov. 20, 2006), <https://wcd.coe.int/ViewDoc.jsp?id=1054079&Site=Congress>. "[T]he prefect exists to ensure that the policy approaches of the central government are followed at the local level. . . . The prefect employs a number of staff who monitor the social, economic and political affairs of the region. All policy documents and budgets are passed to the prefect who can hold them for ten days to assess their legality." *Id.* at III.

³¹⁹ *See, e.g.*, CONSTITUCION POLITICA DE COSTA RICA Nov. 7, 1949, tit. VII, art. 168 ("To the effects of the Public Administration the national territory is divided into provinces."). Similarly, in Afghanistan, provincial legislatures are separately elected, but the provinces exist expressly for administrative purposes.

Although the dominant approach within federal systems is to decentralize the amendment power in some way, my study demonstrates that not all federal arrangements need to decentralize the amendment power.

IV. AMENDMENT RATES AND DECENTRALIZING THE AMENDMENT POWER

Recent empirical scholarship has shown that constitutional flexibility is often important for constitutional endurance.³²⁰ In general, constitutions are more likely to fail if they are either too rigid or too inflexible.³²¹ It is important therefore to consider how decentralizing the amendment power might impact constitutional flexibility. One might expect, for example, that including subnational units in the amendment process would result in more rigid constitutions, especially where subnational units can veto amendments that would otherwise have been enacted.³²² Including subnational representatives in the national legislature could also retard amendment rates if those representatives truly champion subnational interests and the amendment rules require their approval.³²³ Thus, it is important to explore these issues so that constitutional designers understand the likely consequences of their design choices.

My taxonomy of decentralization mechanisms provides an opportunity to examine indicia of constitutional flexibility across the various decentralization categories. This Part first describes the basic methodological limitations facing any comparative analysis of constitution flexibility. It then examines amendment rates across the various decentralization mechanisms. I find that, on average, amendment rates are actually higher in systems that require direct ratification by subnational units than in systems that do not decentralize the amendment power in any way. I also find that, on average, amendment rates are highest in systems that require direct ratification by subnational units only on certain subjects.

A. *Limitations on the Comparative Study of Amendability*

Measuring the relative flexibility of a constitution is remarkably complex.³²⁴ There is much debate among political scientists and legal

³²⁰ See ELKINS ET AL., *supra* note 37, at 7–11, 94–103.

³²¹ *Id.* at 82.

³²² See *supra* notes 30 and 121 (discussing empirical and theoretical literature on this point).

³²³ See *supra* notes 120–121 and accompanying text (discussing how denominator problem can frustrate constitutional amendment).

³²⁴ See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT. J. CONST. L. 686, 687 (2015).

scholars about the key determinants of constitutional flexibility.³²⁵ There are at least three major areas of complexity in this regard.

First, it is very difficult to assess the relative difficulty of formal amendment procedures on their face because they vary greatly across systems.³²⁶ The “steps to passage” of a constitutional amendment vary greatly, and it is hard to know which procedures are more difficult to satisfy than others.³²⁷ For example, as Tom Ginsburg and James Melton have observed, “it is difficult to evaluate whether a constitution that requires a two-thirds 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.”³²⁸ Adding to the complexity is the fact that many amendment procedures include alternative procedures for amendment.³²⁹ In the Comoros, for example, amendments can be initiated by either the President or one-third of the members of the unicameral national legislature.³³⁰ Once initiated, the amendment can be approved by either two-thirds of the total membership of the national legislature along with two-thirds of the subnational legislatures, or by a national referendum.³³¹ Additionally, many constitutions make certain provisions or topics “unamendable” or provide different (sometimes more arduous) procedures for different subjects.³³² All of these variations make it very difficult to assess the overall relative difficulty of formal amendment procedures.³³³

Despite these concerns, some scholars have looked to amendment rates as a measure of constitutional flexibility.³³⁴ But counting amendments across constitutional systems presents its own difficulties. 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.”³³⁵ The adoption of the Bill

³²⁵ See Dixon, *supra* note 44, at 96 (describing debate).

³²⁶ See Ginsburg & Melton, *supra* note 324, at 690.

³²⁷ Ginsburg & Melton, *supra* note 324, at 690. *But see* LUTZ, *supra* note 28, at 167–68 (developing the index for estimating the relative difficulty of the amendment process).

³²⁸ Ginsburg & Melton, *supra* note 324, at 690.

³²⁹ *Id.* at 691.

³³⁰ See CONSTITUTION OF THE UNION OF COMOROS, 2001, tit. VIII, art. 42; *see also* Ginsburg & Melton, *supra* note 324, at 691 (discussing Finland as an example of alternative paths).

³³¹ See CONSTITUTION OF THE UNION OF COMOROS, 2001, tit. VIII art. 42.

³³² See Ginsburg & Melton, *supra* note 324, at 691.

³³³ *But see* Albert, *supra* note 22, at 913–14 (offering a sophisticated catalogue of amendment categories that accounts for many of these variations).

³³⁴ See Ginsburg & Melton, *supra* note 324, at 692–93 (explaining how scholars have used amendment rates to measure constitutional flexibility).

³³⁵ 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

of Rights in the United States illustrates this.³³⁶ 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 in the constitution's true amendment "count."³³⁷ Scholars have also noted that, from a political perspective, once an amendment has been accepted, it is easier to get agreement regarding any subsequent amendments.³³⁸ Thus, simply aggregating all amendments equally may not be a reliable measure of constitutional flexibility. Amendment rates may also fail to account for the availability of alternatives to formal amendment.³³⁹ Some systems, such as the United States', have accommodated the need for constitutional change through informal processes such as judicial review.³⁴⁰ Those alternative mechanisms for change presumably relieve some of the "pressure" for formal amendment, and, consequently, may affect a constitution's amendment rate.³⁴¹

Finally, scholars have noted that constitutional flexibility is likely affected by non-institutional factors such as political culture.³⁴² Every society seems to have a "set of attitudes about the desirability of amendment" that is "independent of the substantive issues under consideration and the degree of pressure for change."³⁴³ Those attitudes create a "baseline level of resistance to formal constitutional change" that affects amend-

constitutional system. *See, e.g.*, S. AFR. CONST., Seventeenth Amendment Act of 2012 (making various textual changes to the constitution to effectuate the singular purpose of re-organizing the judiciary).

³³⁶ *See* 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).

³³⁷ *See* ELKINS ET AL., *supra* note 37, at 55–59; Law & Versteeg, *supra* note 41, at n.87; Rasch & Congleton, *supra* note 29, at 333.

³³⁸ *See* Ginsburg & Melton, *supra* note 324, at 694. This is because the "primary difficulty in amending a constitution is finding a coalition willing to pass the amendment." *Id.* After the constitution is amended the first time, "such a coalition is identified and subsequent amendments are easier to promulgate." *Id.*

³³⁹ *See id.*

³⁴⁰ *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 17–31 (2006) (recounting how federal constitutional change necessarily occurs through practical judicial decision-making because the federal constitution is extremely hard to amend).

³⁴¹ *See* Rasch & Congleton, *supra* note 29, at 338 (concluding that "the number of formal changes to constitutional documents is a far from perfect measure of constitutional stability").

³⁴² *See* Ginsburg & Melton, *supra* note 324, at 697; Dixon, *supra* note 44, at 107 ("[T]he existing empirical literature makes clear that formal constitutional amendment rules are far from an exclusive determinant of the rate of constitutional amendment.").

³⁴³ *See* Ginsburg & Melton, *supra* note 324, at 697; Dixon, *supra* note 44, at 107 ("Popular attitudes toward a constitution . . . have a clear potential to influence the practical difficulty of constitutional amendment.").

ment rates independent of the formal processes for amendment.³⁴⁴ This may partially explain why systems such as that in Japan, which has a relatively easy process for amendment,³⁴⁵ have never amended their constitutions, but other systems with similar amendment procedures have amended their constitutions.³⁴⁶

B. Amendment Rates in Countries with Decentralized Amendment Rules

Despite these limitations in measuring amendment rates across systems, scholars have developed meaningful quantitative models that compare amendment activity across systems.³⁴⁷ The most recent and significant advancement in this regard is the work done by Zachary Elkin, Tom Ginsburg, and James Melton in *Constitutional Endurance*. *Constitutional Endurance* is an exhaustive study of almost all of the world's constitutions.³⁴⁸ Among other things, the authors found that there is a statistically significant correlation between a constitution's longevity and its susceptibility to formal amendment.³⁴⁹ Within certain limits, a more static constitution tends to increase the likelihood that a constitution will fail.³⁵⁰ Significantly for present purposes, the authors' analysis includes a model for estimating the ease of amending any given constitution.³⁵¹ The model includes several variables designed to capture environmental factors relevant to amendment rates, such as the specificity of the constitution's text, ethnic heterogeneity, economic development, legacy of constitutional endurance, democracy, and geographical location.³⁵² In conjunction with those variables, the model used information from both a constitution's

³⁴⁴ See Ginsburg & Melton, *supra* note 324, at 697.

³⁴⁵ See Nihonkoku Kenpō [KENPŌ], ch. IX, art. 96 (Japan) (amendment initiated by two-thirds vote of both houses in bicameral national legislature and ratified by majority vote in national referendum).

³⁴⁶ Examples of countries with similar amendment procedures include: Peru (six amendments since adoption in 1993), Albania (one amendment since adoption in 1998), and Paraguay (one amendment since adoption in 1992).

³⁴⁷ See Dixon, *supra* note 44, at 105 (summarizing various studies that have been undertaken); Ginsburg & Melton, *supra* note 324, at 709 (listing and analyzing seven studies of this kind).

³⁴⁸ See ELKINS ET AL., *supra* note 37, at 8–10, 47–64.

³⁴⁹ See *id.* at 82–83, 99–101, 140. The authors found a non-linear relationship between constitutional flexibility and endurance. *Id.* They found that the “predominant effect of the variable is to decrease the odds of replacement as flexibility increases,” but “extremely high values on flexibility are associated with an increased risk of death.” *Id.* at 140.

³⁵⁰ *Id.* at 140–41.

³⁵¹ See *id.* at 99–103.

³⁵² See Elkins et al., Online Appendix for The Endurance of National Constitutions (Nov. 3, 2009) (model included 56 total variables); ELKINS ET AL., *supra* note 37, 225–29.

“observed amendment rate” and its “formal amendment procedures” to calculate a predicted amendment rate per year that ranged from 0 to 1.³⁵³

This amendment “index” provides a usable measure for comparing constitutional flexibility across systems. Because I categorized all extant national constitutions based on how they decentralize the amendment power, I was able to cross-reference my designations with the amendment rate index data from *Constitutional Endurance*. I was also able to cross-reference my categorizations with raw amendment rate data from the CCP. After making certain necessary adjustments, I was able to compare amendment rates in decentralized systems with amendment rates in centralized systems.³⁵⁴

For the amendment index data, the authors of *Constitutional Endurance* found that the mean amendment rate for all constitutions was 0.38 (with a standard deviation of 0.38).³⁵⁵ Using that amendment rate data and information regarding constitutional life spans, they also concluded that 0.54 appears to be the optimal amendment rate for constitutional longevity.³⁵⁶

As shown in Chart 1 below, I found that the average amendment rate for systems that do not decentralize the amendment power in any way is 0.388, with a standard deviation of 0.342 (shown by the horizontal line).³⁵⁷ Surprisingly, the average amendment rate for systems that require direct ratification of amendments by subnational units is slightly higher at 0.394 (with a standard deviation of 0.433).³⁵⁸ Moreover, the

³⁵³ See *id.* at 101, 129; see Law & Versteeg, *supra* note 41, at 807 n.106 (explaining that the index predicts a constitution’s chance of being amended in any given year). Two of the variables included in the index are whether a constitution’s formal amendment rules require “subsidiary units” or the “second chamber of the legislature” to approve proposed amendments. See ELKINS ET AL., *supra* note 37, at 225–29. Those variables overlap somewhat with my decentralization taxonomy, but they do not appear to capture all of the decentralization nuances described in my taxonomy.

³⁵⁴ My adjustments are explained *infra* in note 357.

³⁵⁵ ELKINS ET AL., *supra* note 37, at 101.

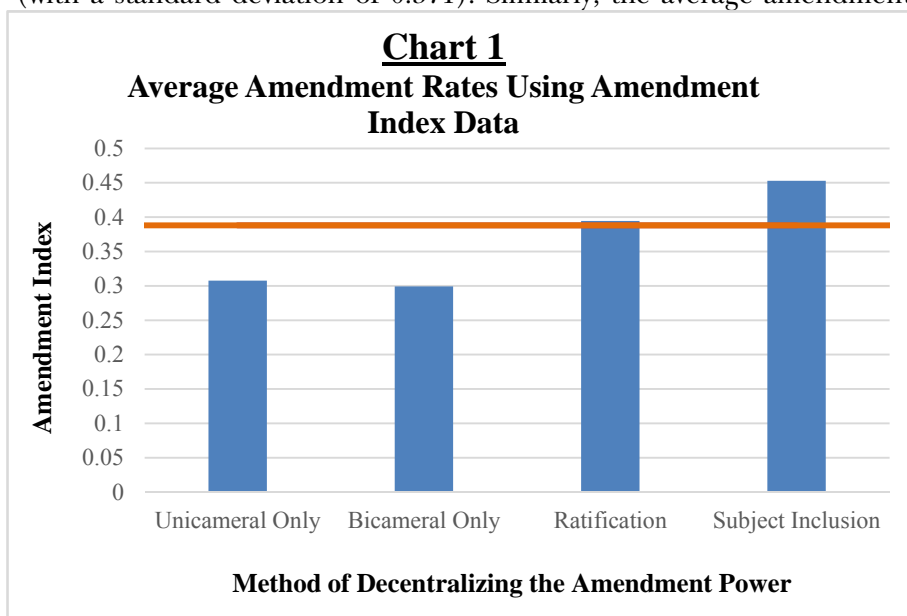
³⁵⁶ *Id.* at 140.

³⁵⁷ The amendment index data available from CONSTITUTIONAL ENDURANCE covers all constitutions through 2005. *Id.* at 129. Thus, to ensure that I analyzed only data for constitutions that I actually reviewed, I excluded from my analysis all constitutions that were replaced between 2006 and April 2014 (when I completed my review). I also confirmed that the amendment procedures for all surviving constitutions had not been changed after 2005. This resulted in constitutions from the following countries being removed from my sample: Angola, Bhutan, Bolivia, Dominican Republic, Ecuador, Egypt, Fiji, Guinea, Hungary, Kenya, Kyrgyz Republic, Libya, Madagascar, Maldives, Montenegro, Morocco, Myanmar, Niger, Somalia, Syria, Thailand, Tunisia, Turkmenistan, and Zimbabwe.

³⁵⁸ To conduct this comparison, I looked only at those systems that require subnational units to directly ratify most constitutional amendments. I did not include systems that require subnational ratification only on amendments that address certain

amendment rate for systems that include subnational units only on issues that relate to subnational interests was even higher at 0.453 (with a standard deviation of 0.356).³⁵⁹ Thus, the average amendment rates for those two decentralization categories were higher than the average amendment rate for systems with a fully centralized amendment power. This means that those systems are, on average, more likely to be amended in any given year than centralized systems.³⁶⁰ They are also slightly closer to the optimal amendment rate of 0.54 than centralized systems.³⁶¹

Chart 1 also shows that the average amendment index for systems that include subnational units in the amendment process only by providing them with representation in a unicameral national legislature is 0.308 (with a standard deviation of 0.371). Similarly, the average amendment



subjects. The following constitutions were therefore included: Australia, Canada, Comoros, Ethiopia, Mexico, Micronesia, Nigeria, Palau, Russia, Switzerland, and United States of America.

³⁵⁹ To conduct this comparison, I looked at those systems that require subnational units to approve amendments only when those amendments relate to certain subjects. I did not include systems that require subnational units to approve amendments only when those amendments directly affect a particular subnational unit. However, I did include Austria and South Africa because both of those systems maintain a robust upper chamber in the national legislature that represents subnational interests and the amendment rules require that body to approve any amendments that relate to certain subjects affecting subnational interests. The following constitutions were therefore included: Austria, India, Iraq, Kiribati, Malaysia, Pakistan, Russia, South Africa, Tanzania, and Uganda.

³⁶⁰ See Law & Versteeg, *supra* note 41, at 807 n.106 (explaining amendment index in this way).

³⁶¹ See ELKINS ET AL., *supra* note 37, at 140 (“Amendment flexibility appears to be ‘just right’ at about 0.54 on our flexibility scale.”).

index for systems that include subnational units by providing them with representation in a second legislative chamber was 0.299 (with a standard deviation of 0.356). These averages are below the average for systems with a centralized amendment power and even below the overall average for all constitutions. This suggests that these systems are, on average, slightly more rigid than centralized systems.

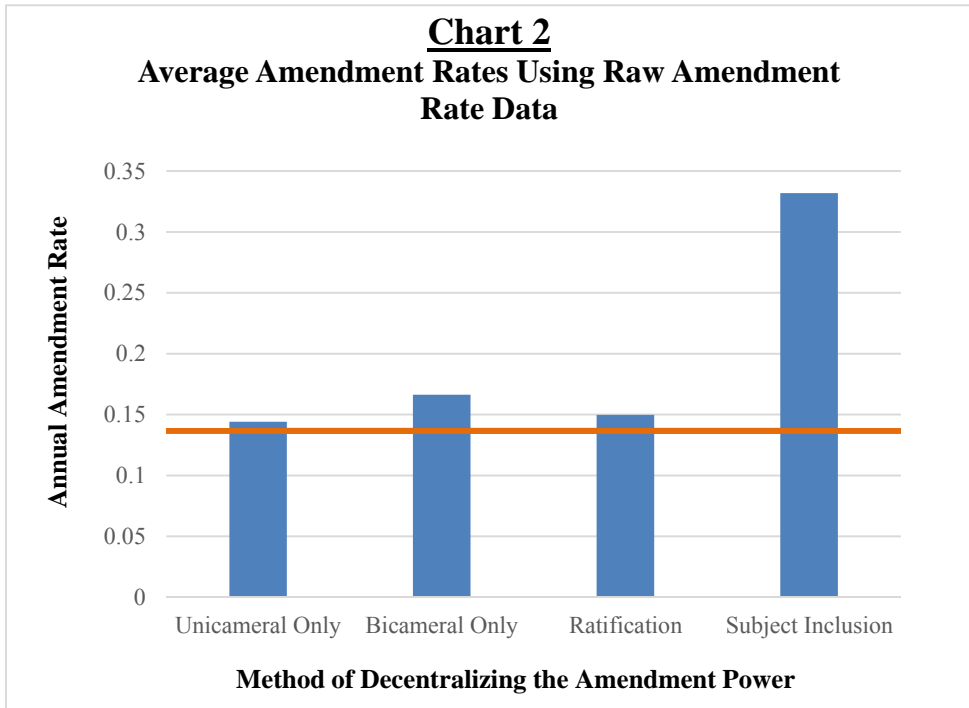
The results based on raw amendment rates are similar. Using data from the CCP, I was able to calculate an annual amendment rate for each constitution.³⁶² I did this by dividing the number of amendments to a constitution by the number of years that the constitution was in effect.³⁶³ As shown in Chart 2 below, the average amendment rate for all systems that do not decentralize the amendment power in any way is 0.137 (with a standard deviation of 0.153) (shown again by the horizontal line). The average amendment rate for systems that require direct ratification of amendments by subnational units is again slightly higher at 0.15 (with a standard deviation of 0.204).³⁶⁴ The average amendment rate for systems that include subnational units only on issues that relate to subnational interests was again even higher at 0.332 (with a standard deviation of 0.29).³⁶⁵ Finally, the amendment rates for systems that include subnational units only by providing representation in the national legislature were slightly higher than the average for systems with a fully centralized amendment power.

³⁶² The CCP data provides this information for all constitutions through 2013. However, I limited my analysis to constitutions through 2011 in order to avoid biasing the results by including new constitutions that have not had any real opportunity to undergo amendment. Thus, I removed the following six constitutions: Egypt, Fiji, Somalia, Syria, Tunisia, and Zimbabwe. Also, although the CCP data includes information for all constitutions, including superseded constitutions, my analysis was confined to extant national constitutions because that was the basis for my catalogue of decentralization mechanisms.

³⁶³ See *supra* note 214 (describing CCP data). The CCP data records the initial year that a constitution became effective as well as every year that it was amended through the end of 2013. The CCP data does not record the number of actual changes to a constitutional text that occur within any given year. By recording amendments in this way, the data avoids counting problems associated with “bundled” amendments. For example, for the United States Constitution, the data shows only one amendment event in 1791 when the states ratified all ten amendments comprising the Bill of Rights. This is not a limitation on the data, however, because, as noted above, amendments are often adopted in packages. The better measure of constitutional change is whether a constitution was amended in a given year and not the total number of textual amendments.

³⁶⁴ This includes the same systems that I analyzed using the amendment index data. See *supra* note 358.

³⁶⁵ This includes the same systems that I analyzed using the amendment index data. See *supra* note 359.



There are many limitations on my preliminary analysis of these data. As mentioned above, measuring constitutional flexibility is difficult at best and methodologically impossible at worst. Neither the amendment rate index nor the annual amendment rate that I use above are perfect indicators of constitutional flexibility. Moreover, my comparison of averages across categories does not account for the myriad variables that might explain amendment rates, and my decentralization categories generally involve small sample sizes. Any attempt to show a causal relationship between my decentralization categories and constitutional flexibility would require a more sophisticated quantitative model that accounts for numerous variables (some of which scholars are only just beginning to discover).³⁶⁶ Thus, it is not my purpose here to defend any causal relationships. I hope instead to draw attention to various plausible causal hypotheses suggested by my analysis that should be investigated with more rigorous empirical methods as scholars learn more about how to analyze constitutional flexibility.

The first hypothesis suggested by my findings is that decentralizing the amendment power by requiring subnational government to ratify all (or most) proposed amendments may not frustrate constitutional flexibility. This is somewhat surprising because this method of decentralizing the amendment may be the most effective at reducing agency costs that

³⁶⁶ See Ginsburg & Melton, *supra* note 324, at 697.

undermine subnational interests.³⁶⁷ In other words, it appears that the most effective decentralization mechanism might not compromise constitutional flexibility. If true, this could be an important discovery for constitutional designers wrestling with how best to divide the amendment power between levels of government.

This hypothesis gains some tangential support from early empirical studies examining smaller constitutional samples. In 1997, John Ferejohn developed a model to analyze amendment data from thirty constitutional republics.³⁶⁸ He found that “[t]here is no evidence that a ratification requirement . . . involving states . . . has any significant impact on amendment rates.”³⁶⁹ Instead, Ferejohn found that national “legislative complexity—the requirement of special majorities or separate majorities in different legislative sessions or bicamerality—is the key variable explaining amendment rates”³⁷⁰ A separate 2006 study of nineteen countries did not find any unique effect on amendment rates associated with a requirement for ratification by subnational government.³⁷¹ The study also found that super-majority requirements in the legislature do not seem to affect amendment rates.³⁷² Rather, “the salient factor seems to be multiple decisions with voter involvement.”³⁷³ These findings are far from conclusive, but they nevertheless provide some tangential support for my findings here and set the stage for further inquiries of this kind.³⁷⁴

³⁶⁷ See *supra* Part III.B.1 (discussing agency problems when subnational units are represented only by inclusion in the national legislature).

³⁶⁸ See Ferejohn, *supra* note 44, at 523 (analyzing data from thirty constitutional republics).

³⁶⁹ *Id.*

³⁷⁰ See Ferejohn, *supra* note 44, at 523; see also Dixon, *supra* note 44, at 105 (“Ferejohn found no evidence that any form of ratification requirement affected the rate of amendment: the only factors he found to be statistically significance were super- and double-majority requirements for legislative passage of proposed amendments, and legislative bicameralism.”).

³⁷¹ See Rasch & Congleton, *supra* note 29, at 333.

³⁷² See *id.*

³⁷³ See *id.* at 334.

³⁷⁴ A more recent 2012 study of only federal countries used the same data from *Constitutional Endurance* to examine constitutional fatality in federal countries. See John Kincaid, *The Relevance of Constitutional Change in Federal Systems*, in CHANGING FEDERAL CONSTITUTIONS, *supra* note 193, at 31, 33–34. The study found that although the overall median lifespan of all federal constitutions was relatively low (11 years), the median lifespan of extant federal constitutions was relatively high (30 years). Because the median lifespan of all current national constitutions is 25 years, these results suggest relative longevity for extant federal constitutions. *Id.* Twenty-two of the twenty-five federal systems analyzed in this follow-up study included subnational units in national constitutional change in some form. Using federalism as a proxy, this study seems to support the possibility that decentralization of amendment power does not necessarily correlate to reduced constitutional lifespans.

The second hypothesis suggested by my findings is less surprising but no less significant for the study of constitutional design. My findings suggest that decentralizing the amendment power by requiring subnational units to ratify amendments only if the proposals affect subnational interests has even less effect on constitutional flexibility. My review identified ten countries that give subnational units significant power in the amendment process when the proposed amendments affect subnational interests.³⁷⁵ These systems otherwise do not decentralize the amendment power in any meaningful way. Amendment rates in these countries are, on average, higher than any other decentralization category and significantly higher than systems with centralized amendment procedures. Indeed, these systems were, on average, very close to the optimal amendment rate index identified in *Constitutional Endurance*.

If validated, these findings suggest that carefully selecting the subjects that trigger subnational involvement may be an effective way to decentralize the amendment power without compromising constitutional flexibility. This design has the benefit of including subnational interests in the amendment process on issues where subnational communities may provide meaningful input and where they may have real interests at stake. Thus, without compromising constitutional flexibility, it provides a *relevant* check on national institutions vested with the amendment power and *relevant* diversification of voice in the amendment process. It may also help foster political legitimacy by ensuring that subnational units do not have disproportionate power to veto amendments, but nevertheless guarantee that their interests will not be affected without their direct involvement. In many respects, this decentralization mechanism provides an opportunity for constitutional designers to have the best of both worlds.

In all, further investigation is necessary to precisely determine the impact (if any) of decentralizing the amendment power. However, the analysis here draws attention to the significance of future inquiries into these issues and provides a starting point for framing those inquiries.

CONCLUSION

As our knowledge of constitutional change grows, it is important that we continue to investigate how constitutional designers can best structure the amendment power. This Article provides the first detailed taxonomy of decentralization devices and identifies the various reasons why decentralizing the amendment power might be desirable. This Article also exposes some interesting correlations between decentralization of constitutional amendment power and constitutional amendment rates. These preliminary findings suggest that decentralizing the amendment power

³⁷⁵ See *supra* note 359 (explaining and listing these ten systems).

may not necessarily frustrate constitutional flexibility. There is much to be done to fully understand the amendment power, but this Article aims to make a small contribution to our understanding of this important constitutional issue and hopefully provide constitution makers and scholars with some insight into the intelligent design of amendment rules.

APPENDIX A

LIST OF ALL CONSTITUTIONS REVIEWED AND YEAR OF ADOPTION

<u>Country</u>	<u>Year of Constitution</u>
Afghanistan	2004
Albania	1998
Algeria	1963
Andorra	1993
Angola	2010
Antigua and Barbuda	1981
Argentina	1983
Armenia	1995
Australia	1901
Austria	1945
Azerbaijan	1995
Bahamas	1973
Bahrain	2002
Bangladesh	1986
Barbados	1966
Belarus	1994
Belgium	1831
Belize	1981
Benin	1990
Bhutan	2008
Bolivia	2009
Bosnia-Herzegovina	1995
Botswana	1966
Brazil	1988
Brunei	1959
Bulgaria	1991
Burkina Faso	1991
Burundi	2005
Cambodia	1993
Cameroon	1972
Canada	1867
Cape Verde	1980
Central African Republic	2004
Chad	1996
Chile	1980
China	1982
Colombia	1991
Comoros	2001
Congo	2001
Costa Rica	1949
Cote D'Ivoire	2000
Croatia	1991
Cuba	1976
Cyprus	1960

<u>Country</u>	<u>Year of Constitution</u>
Czech Republic	1993
Democratic Republic of Congo	2005
Denmark	1953
Djibouti	1992
Dominica	1978
Dominican Republic	2010
East Timor	2002
Ecuador	2008
El Salvador	1983
Equatorial Guinea	1991
Eritrea	1997
Estonia	1992
Ethiopia	1994
Fiji	2013
Finland	1999
France	1958
Gabon	1991
Gambia	1996
Georgia	1995
German Federal Republic	1949
Ghana	1992
Greece	1975
Grenada	1991
Guatemala	1985
Guinea	2010
Guinea-Bissau	1984
Guyana	1980
Haiti	1987
Honduras	1982
Hungary	2011
Iceland	1944
India	1949
Indonesia	1959
Iran	1979
Iraq	2005
Ireland	1937
Israel	1958
Italy	1947
Jamaica	1962
Japan	1946
Jordan	1952
Kazakhstan	1995
Kenya	2010
Kiribati	1979
Kosovo	2008
Kuwait	1992
Kyrgyz Republic	2010
Laos	1991

<u>Country</u>	<u>Year of Constitution</u>
Latvia	1991
Lebanon	1926
Lesotho	1993
Liberia	1986
Libya	2011
Liechtenstein	1921
Lithuania	1992
Luxembourg	1868
Macedonia	1991
Madagascar	2010
Malawi	1994
Malaysia	1957
Maldives	2008
Mali	1992
Malta	1964
Marshall Islands	1979
Mauritania	1991
Mauritius	1968
Mexico	1917
Micronesia	1981
Moldova	1994
Monaco	1962
Mongolia	1992
Montenegro	2007
Morocco	2011
Mozambique	2004
Myanmar	2008
Namibia	1990
Nauru	1968
Nepal	2006
Netherlands	1815
Nicaragua	1987
Niger	2010
Nigeria	1999
Norway	1814
Oman	1996
Pakistan	2002
Palau	1981
Panama	1972
Papua New Guinea	1975
Paraguay	1992
People's Republic of Korea	1972
Peru	1993
Philippines	1987
Poland	1997
Portugal	1976
Qatar	2003
Republic of Korea	1948

<u>Country</u>	<u>Year of Constitution</u>
Romania	1991
Russia	1993
Rwanda	2003
Samoa	1962
Sao Tome and Principe	1975
Saudi Arabia	1992
Senegal	2001
Serbia	2006
Seychelles	1993
Sierra Leone	1996
Singapore	1959
Slovakia	1992
Slovenia	1991
Socialist Republic of Vietnam	1992
Somalia	2012
Solomon Islands	1978
South Africa	1996
South Sudan	2011
Spain	1978
Sri Lanka	1978
St. Kitts and Nevis	1983
St. Lucia	1978
St. Vincent and the Grenadines	1979
Sudan	2005
Suriname	1987
Swaziland	2005
Sweden	1974
Switzerland	1999
Syria	2012
Taiwan	1947
Tajikistan	1994
Tanzania	1977
Thailand	2007
Togo	1992
Tonga	1875
Trinidad and Tobago	1976
Tunisia	2014
Turkey	1982
Turkmenistan	2008
Tuvalu	1986
Uganda	1995
Ukraine	1996
United Arab Emirates	1971
United States of America	1789
Uruguay	1985
Uzbekistan	1992
Vanuatu	1980
Venezuela	1999

<u>Country</u>	<u>Year of Constitution</u>
Yemen	1991
Zambia	1991
Zimbabwe	2013