

# ENTRENCHMENT, INCREMENTALISM, AND CONSTITUTIONAL COLLAPSE

Michael D. Gilbert\*

*Entrenchment is fundamental to law. Grand documents like the U.S. Constitution, and mundane ones like city and corporate charters, entrench themselves against change through supermajority rules and other mechanisms. Entrenchment frustrates responsiveness, but it promotes stability, a rule of law virtue extolled for centuries. It does so through a straightforward channel: Entrenched law is difficult to change. Scholars have long understood this idea, which can be called the first status quo bias of entrenchment. This Article shows that a second bias lurks: Entrenchment makes changes that do take place incremental. As entrenchment deepens, the scope of potential change to law collapses on the status quo. To restate the idea, when we entrench law, we prevent change, at least for a time, and we confine any changes that do take place to small steps. This has implications for constitutional law, especially the debate about Article V and the separation of powers, both of which shield the Constitution from change more than scholars realize. It also illuminates several questions, especially in comparative constitutional law, such as why constitutions remain unpopular after amendment. Finally, it generates a theory of constitutional failure. When voters' preferences evolve consistently in one direction, entrenched law eventually becomes as unstable as ordinary law, only less popular. Thus, entrenchment buys neither stability nor responsiveness. Because entrenchment confines legal change to incremental steps, amendment cannot correct the problem. This recasts questions of legal design in new light, and it may explain why some constitutions endure while others collapse.*

INTRODUCTION.....	632
I. PRELIMINARIES .....	638
II. MODELING ENTRENCHMENT .....	643
A. Majority Rule .....	644

---

\* Sullivan & Cromwell Professor of Law, University of Virginia. For helpful comments I thank Justin Fox, Mauricio Guim, John Harrison, Andrew Hayashi, Rich Hynes, Doug Laycock, Daryl Levinson, Greg Mitchell, Sai Prakash, Fred Schauer, Rich Schragger, Mila Versteeg, and workshop participants at the University of Virginia and the 2016 Political Economy and Public Law Conference.

<i>B. Supermajority Rule and Two Principles</i> .....	647
<i>C. Generalizing from Supermajority Rule</i> .....	649
<i>D. Depth and Heterogeneity Applied</i> .....	651
III. THE DOUBLE STATUS QUO BIAS.....	653
<i>A. The Incrementalism Principle</i> .....	654
<i>B. Entrenchment Failure</i> .....	659
IV. IMPLICATIONS.....	662
<i>A. Incrementalism and Constitutional Theory</i> .....	662
<i>B. Incrementalism and Constitutional Failure</i> .....	665
<i>C. Incrementalism and Empiricism</i> .....	668
<i>D. Incrementalism and Legal Design</i> .....	669
CONCLUSION.....	671

#### INTRODUCTION

THE rule of law requires stability. Aristotle made this claim 2,000 years ago, stating, “the habit of lightly changing the laws is an evil,” and “a readiness to change from old to new laws enfeebles the power of the law.”<sup>1</sup> The Framers of the U.S. Constitution worried about “sudden and violent passions”<sup>2</sup> and called “irregular and mutable legislation . . . an evil in itself.”<sup>3</sup> Through stare decisis and other bows to reliance interests, predictability, and planning, the law and its attendants promote the same idea. A stable, unpopular, and even unjust law may be better than an unstable, popular, just one.

Entrenchment promotes legal stability. Through supermajority rules, bicameralism, executive presentment, voter approval requirements, and other methods, institutional designers can insulate law from change. The U.S. Constitution, with its demanding amendment rules, epitomizes entrenchment,<sup>4</sup> as do other grand documents like the United Nations Charter and the Marrakesh Agreement establishing the World Trade Organi-

---

<sup>1</sup> Aristotle, *The Politics*, in *The Politics and the Constitution of Athens* 9, 49 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1996) (c. 350 B.C.E.).

<sup>2</sup> *The Federalist* No. 62, at 315 (James Madison) (Ian Shapiro ed., 2009).

<sup>3</sup> *Id.* No. 37, at 181 (James Madison).

<sup>4</sup> See U.S. Const. art. V (providing two methods of constitutional change, amendment and convention); see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 260, 261 tbl.11 (Sanford Levinson ed., 1995) (reporting that the U.S. Constitution is among the hardest to amend worldwide).

zation.<sup>5</sup> But entrenchment saturates law at all levels. State constitutions and city charters, private companies' articles of incorporation, and the governing documents of churches, homeowners' associations, and transportation bodies all feature entrenchment.<sup>6</sup>

Entrenchment buys stability at the price of dynamism. Entrenched law remains fixed when passions rage *and* when circumstances evolve and reasoned, informed majorities seek change. This underpins a profound tension of institutional design: balancing stability and responsiveness.<sup>7</sup>

This tension runs especially deep in constitutional law.<sup>8</sup> The fundamental problem of constitutionalism is "how changeable a people's constitution ought to be."<sup>9</sup> In the American setting, some scholars defend Article V's onerous amendment requirements,<sup>10</sup> and originalism seeks to

<sup>5</sup> See U.N. Charter art. 108 (describing supermajoritarian rules for amendment); Marrakesh Agreement Establishing the World Trade Organization art. X, Apr. 15, 1994, 1867 U.N.T.S. 154 (same).

<sup>6</sup> See, e.g., Mont. Const. art. XIV, § 8 (1972) (describing supermajoritarian rules for amendment); Fla. Stat. Ann. § 720.306 (West 2015) (establishing a default rule that a homeowners' association's governing documents can be changed by "the affirmative vote of two-thirds of the voting interests"); City of Minneapolis, Amendments to the Charter, Minneapolisn.gov, [http://www.minneapolisn.gov/charter/charter-commission\\_amendment-process](http://www.minneapolisn.gov/charter/charter-commission_amendment-process) [<https://perma.cc/B32U-3YXD>] (amendments to charter by ordinance require unanimous support by city council); Washington Metropolitan Area Transit Authority Compact art. XVI, § 84, [https://www.wmata.com/about/records/public\\_docs/upload/Compact\\_Annotated\\_2009\\_final.pdf](https://www.wmata.com/about/records/public_docs/upload/Compact_Annotated_2009_final.pdf) [<https://perma.cc/CG8N-N6L2>] (stating that the compact establishing the Washington Metropolitan Area Transit Authority, which operates the Metro train system in and around Washington, D.C., cannot be changed without unanimous consent from its signatories); Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 Del. J. Corp. L. 895, 918 (1996) (describing use of supermajority rules in corporations); United Church of Christ Constitution and Bylaws art. XI, § 61(c), [http://www.ucc.org/ucc\\_constitution\\_and\\_bylaws](http://www.ucc.org/ucc_constitution_and_bylaws) [<https://perma.cc/BC55-ER7V>] (stating that certain modifications to church governance require two-thirds support).

<sup>7</sup> For a recent statement of the tension, see N.W. Barber, *Why Entrench?*, 14 Int'l J. Const. L. 325, 325–26 (2016) ("Entrenchment has been praised as a device that lends certainty and stability to law, and has been commended as the hallmark of constitutionalism. . . . [O]thers have warned that entrenchment runs contrary to democratic values, making it hard for legislatures to modernize the law.").

<sup>8</sup> See John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 Law & Soc. Inquiry 501, 502–03 (1997) (stating that "[i]t is a commonplace . . . that a tension exists between law and democratic rule" and discussing how scholars disagree on whether "legal stability or democracy" deserves the "foremost position").

<sup>9</sup> *Id.* at 502.

<sup>10</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 33–80 (2013) [hereinafter McGinnis & Rappaport, *Good Constitution* (2013)] (arguing that supermajority rules like those in Article V generate constitutions with good consequences).

prevent judges from sidestepping those requirements by changing the Constitution through interpretation.<sup>11</sup> On the other side, critics have long resisted the entrenched laws of “certain long dead gentlemen, who could not possibly have visualized . . . current circumstances.”<sup>12</sup> They think Article V is too strict and support alternative methods of change, including judicial updating.<sup>13</sup>

This debate, which has consumed scholars and judges for decades,<sup>14</sup> addresses entrenchment directly. Other debates generate as much heat while addressing entrenchment indirectly. The countermajoritarian difficulty arises when unelected judges invalidate the acts of democratic majorities.<sup>15</sup> Judicial activism becomes troubling when judges exercise discretion in extralegal ways.<sup>16</sup> Popular constitutionalists fear judges—a “lawyerly elite”—having exclusive “charge of the Constitution.”<sup>17</sup> The magnitude of these problems depends on entrenchment: A shallowly entrenched constitution can be amended to counteract judges’ countermajoritarian, activist, elitist instincts, while a deeply entrenched one can-

<sup>11</sup> See, e.g., John Harrison, *Forms of Originalism and the Study of History*, 26 *Harv. J.L. & Pub. Pol’y* 83 (2003) (describing variants of originalism and their roots); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 854 (1989) (describing and defending originalism).

<sup>12</sup> Martin Shapiro, Introduction, in *The Constitution of the United States and Related Documents* vii, xxi–xxii (Martin Shapiro ed., 1966).

<sup>13</sup> See, e.g., David A. Strauss, *The Living Constitution* 115 (2010) (stating that Article V presents “just too difficult a process” and “living constitutionalism is inevitable, and necessary”).

<sup>14</sup> See, e.g., Shapiro, *supra* note 12, at xxi–xxii; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 4–5 (1971) (presenting a classic argument for why “judicial supremacy” is “illegitimate” unless the Supreme Court applies a “valid and consistent theory . . . based upon the Constitution” that earlier courts, like the Warren Court, lacked).

<sup>15</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 *N.Y.U. L. Rev.* 333, 334–35 (1998) (explaining that the countermajoritarian difficulty “serves as shorthand for the problem of reconciling judicial review with popular governance in a democratic society”); cf. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

<sup>16</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1093 (2001) (describing activism as when judges are “not hewing to prior precedents” or when they “stretch[] prior precedents out of their appropriate contexts”); see generally Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 *Calif. L. Rev.* 1441, 1463 (2004) (defining judicial activism).

<sup>17</sup> Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *Calif. L. Rev.* 959, 1009 (2004).

not.<sup>18</sup> As these examples show, entrenchment features in many of law's enduring debates.

Almost no one takes a categorical position on entrenchment. Few believe law should never change,<sup>19</sup> and few believe it should always respond to a bare majority's whim. In all of the debates, scholars seek balance between stability and responsiveness. Striking that balance correctly requires understanding how entrenchment works—how exactly this or that degree of entrenchment affects stability and responsiveness. We do not presently understand it.

Entrenchment creates a double status quo bias. The first and widely understood bias is simple: Entrenched law is hard to change.<sup>20</sup> The second bias, and my focus, is subtle: Entrenchment makes change incremental. When we entrench law, we prevent change, at least for a time, *and* we confine any changes that do take place to small steps. I call this the *incrementalism principle*. Later, I will develop the principle with rigor, but for now consider an example. Suppose the tax rate equals one percent and three legislators have authority to change it. They prefer rates of two, ten, and twenty percent, respectively. If the legislators make decisions using majority law—the law is not entrenched—they may make the rate ten percent. Two legislators prefer ten percent to one. If the legislators make decisions under a unanimity rule—the law is entrenched—they cannot make such a drastic change because the first legislator opposes it. Only incremental change, like a move from one percent to two, would get unanimous support.

---

<sup>18</sup> Cf. Robert A. Dahl, A Preface to Democratic Theory 106 (1956) (“Judicial review derives its strategic importance from the difficulties of altering the Constitution by formal amendment.”).

<sup>19</sup> Some law is essentially unamendable, like Article I, § 3 of the Constitution, which guarantees each state equal representation in the Senate. See U.S. Const. art. V (describing process for changing the Constitution, then concluding, “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”). Professor Sanford Levinson reports that John Locke favored immutable constitutions, at least when he wrote them. See Sanford Levinson, Introduction: Imperfection and Amendability, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 3, 3–4 (Sanford Levinson ed., 1995) [hereinafter Levinson, Introduction].

<sup>20</sup> See, e.g., Erwin Chemerinsky, The Case Against the Supreme Court 7–8 (2014) (“[A] defining characteristic—indeed, *the* defining characteristic—of the American Constitution is that it is very difficult to alter.”); Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 134 (1995) (“A constitutional text strives to make fast . . . the form of government”); Laurence H. Tribe, American Constitutional Law 10 (2d ed. 1988) (describing the Constitution as “deliberately structured so as to be difficult to change”).

The incrementalism principle has an important corollary: a theory of entrenchment failure. If the preferences of voters evolve consistently in one direction—for example, they become more politically liberal over time—then an entrenched law that used to seem centrist now seems conservative. Eventually it becomes too conservative for citizens' tastes, and legislators change it. However, the incrementalism principle confines that change to small steps, and small steps mean the newly amended law hardly differs from its predecessor. Though less conservative than before, it remains more conservative than society. As preferences continue to evolve, the law becomes too conservative again, it gets amended again, and the process repeats. The law keeps changing, yet it remains out of step. In this situation, entrenchment fails. It delivers neither stability nor responsiveness.

To illustrate this phenomenon, return to the example of taxes and legislators. The rate equals one percent, and the legislators prefer rates of two, ten, and twenty percent, respectively. Suppose they vote unanimously, as law requires, to increase the rate to two percent. Now suppose their views evolve so that they favor rates of three, eleven, and twenty-one percent. The law, which just changed from one percent to two, may change again from two percent to three, but not much more. The process repeats. The tax keeps changing, yet two of three legislators remain dissatisfied.

These findings matter for constitutional theory. Scholars often assume that amendment processes can correct constitutional defects.<sup>21</sup> This motivates the argument that constitutions can accommodate change and that judicial updating is unnecessary and unwise. The incrementalism principle counters this by exposing an important and sometimes severe limitation on amendment processes. This limitation compels a reevaluation of the optimal method of constitutional change. More generally, the incrementalism principle shows that entrenchment stabilizes law more powerfully than previously understood. Scholars—even Framers—who argue that Article V successfully balances stability and responsiveness base

---

<sup>21</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *Geo. L.J.* 1693, 1737 (2010) [hereinafter McGinnis & Rappaport, *Good Constitution* (2010)] (“[A] well-designed constitution should avoid becoming out-of-date. Its constitutional restraints would generally remain useful, and most of the updating would be done by the legislature and the executive. When provisions do become out-of-date, one would expect that they would be amended.”).

that conclusion on a partial understanding of how entrenchment works.<sup>22</sup> If they accounted for incrementalism, they may favor less entrenchment. Conversely, opponents of Article V and other onerous amendment procedures have a deeper critique than they know.

These findings generate a theory of constitutional failure. Entrenchment fails—it delivers neither stability nor responsiveness—when citizens’ preferences march in one direction. When this happens, constitutions, which exemplify entrenchment, may collapse. The problem is not that constitutions cannot transform but that, because of the incrementalism principle, they cannot transform enough to satisfy society’s demands. Thus, the theory of constitutional failure: Constitutions fail not when citizens’ preferences stay fixed or change drastically but when they evolve persistently. This theory provides guidance on when constitutions should change through amendment and when they should change through a convention.

These findings illuminate some puzzling facts, especially in the blossoming field of comparative constitutional law. Recent work demonstrates constitutional “stickiness”: New constitutions closely resemble the documents they replace.<sup>23</sup> Many claim that constitutions should embrace a nation’s “highest values,”<sup>24</sup> and surveys show that citizens want their constitutions to reflect their deepest beliefs.<sup>25</sup> Yet many constitu-

---

<sup>22</sup> See, e.g., *The Federalist* No. 43, *supra* note 2, at 225 (James Madison) (Article V “guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”).

<sup>23</sup> See Ozan O. Varol, *Constitutional Stickiness*, 49 *U.C. Davis L. Rev.* 899, 902, 904 (2016) (observing that “amendment processes around the globe . . . produce relatively little change in constitutional substance” and calling this “constitutional stickiness”); see also Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* 59 (2009) (“The average amended constitution covers 97 percent of the same topics as the previous document, prior to amendment.”).

<sup>24</sup> Mila Versteeg, *Unpopular Constitutionalism*, 89 *Ind. L.J.* 1133, 1135 (2014). Versteeg is not endorsing this position but reporting the views of others. See, e.g., Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* 5 (2009) (noting that the primary function of constitutions is to “imagine and then help to realize a shared collective existence”); Elkins, Ginsburg & Melton, *supra* note 23, at 38 (noting that a “function that constitutions serve is the symbolic one of defining the nation and its goals”); Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* 155 (2009) (describing constitutions as “forms of national self-expression, providing the framework for the working out within a particular ‘nomos’ of its contests, commitments, and identity”).

<sup>25</sup> See Versteeg, *supra* note 24, at 1172 (“The main impression” from the author’s survey “is that, overwhelmingly, people do want to enshrine their values in the constitution.”).

tions, including frequently amended ones, are unpopular.<sup>26</sup> Law, especially entrenched law, often “trails” society. The incrementalism principle casts light on these diverse observations with a single, unifying theory.

Finally, the findings have a lesson for legal designers, whether they negotiate global treaties or decision-making rules for a local church. When you entrench a law, you ensure that it will remain fixed or change only a little, even as the views of those governed by it evolve. Among other things, this counsels wariness of special interests: Their incentive to entrench self-serving provisions is stronger than we realize.

This Article proceeds in four Parts. Part I provides background on entrenchment and clarifies the argument. Part II develops a technique from social science—spatial modeling—for analyzing entrenchment. It also defines and explores two principles of legal design: depth and heterogeneity. Part III uses spatial models to develop the incrementalism principle and its corollary, entrenchment failure. Part IV discusses implications.

## I. PRELIMINARIES

The literature on entrenchment is vast. Rather than reviewing it all, I will focus on important strands, and develop six clarifications, to advance the argument.

Entrenchment is relative. If a typical law can be amended with the support of a bare majority, then a law requiring two-thirds support to change is (relatively) entrenched. Supermajority rules offer a common mechanism of entrenchment,<sup>27</sup> but others abound. One can entrench a law by requiring not one but two legislative chambers to approve amendments (bicameralism),<sup>28</sup> executive approval (presentment),<sup>29</sup> or

---

<sup>26</sup> See *id.* at 1137 (“[T]here is generally no connection between specific constitutional choices and popular opinion.”).

<sup>27</sup> See, e.g., Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* 101 (2000) (listing supermajority rules as a “main hurdle[] for constitutional amendments”); see also John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 705 (2002) (“We argue that the central principle underlying the [U.S.] Constitution is governance through supermajority rules.”).

<sup>28</sup> See Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 *Int’l Rev. L. & Econ.* 145, 153 (1992) (showing how bicameralism entrenches law).

<sup>29</sup> See Robert D. Cooter, *The Strategic Constitution* 214–15 (2000) (showing how the separation of powers, like a supermajority rule, “privileges the status quo”).



both. Some states require voter approval to change their constitutions,<sup>30</sup> while others require multiple approvals by the same body.<sup>31</sup> One can combine these mechanisms. Amending the U.S. Constitution requires two-thirds support in the House and the Senate and ratification by three-quarters of the states.<sup>32</sup>

Informal entrenchment can substitute for or complement these formal mechanisms.<sup>33</sup> Amending the Civil Rights Act requires the same steps as changing a law that names a federal building, yet everyone knows the former is entrenched. The Act's antidiscrimination principle "has saturated American social and political culture,"<sup>34</sup> and substantial revision is hard to imagine.<sup>35</sup> The Social Security Act, which benefits millions of voters who oppose meddling politicians, is informally entrenched.<sup>36</sup>

This leads to the first clarification: The analysis generalizes to all formal methods of entrenchment and many informal methods as well.<sup>37</sup> Thus, this is not strictly an Article about Article V, or about constitutions generally, though constitutions serve as examples throughout. This

---

<sup>30</sup> See, e.g., Idaho Const. art. XX, § 1 (stating that amending Idaho's constitution requires two-thirds support in both legislative chambers and majority support from "the electors of the state").

<sup>31</sup> See, e.g., Del. Const. art. XVI, § 1 (stating that amending Delaware's constitution requires supermajority support in the General Assembly and "in the General Assembly next after").

<sup>32</sup> See U.S. Const. art. V.

<sup>33</sup> See Melissa Schwartzberg, *Democracy and Legal Change* 8–16 (2007) (discussing different types of entrenchment).

<sup>34</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1242 (2001).

<sup>35</sup> If legislators' preferences about the Civil Rights Act do not change, then the Act is not entrenched, even in an informal sense. However, if their preferences do change but some mechanism—political pressure, the threat of litigation—prevents them from converting those changed preferences into changed law, then the Act is informally entrenched. For purposes of this example, I assume the latter.

<sup>36</sup> President Franklin D. Roosevelt wanted to entrench social security "so deeply in our institutional life that it would be politically impossible for his opponents to repeal it." Bruce Ackerman & Anne Alstott, *The Stakeholder Society* 15 (1999). For a discussion of "functional" entrenchment and its treatment in law, see generally Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400 (2015).

<sup>37</sup> The ideas may also have implications for legislative entrenchment. See generally Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665 (2002) (defining and defending legislative entrenchment); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 *Calif. L. Rev.* 1773 (2003) (criticizing legislative entrenchment).

is an Article about entrenchment,<sup>38</sup> which Article V and thousands of other legal provisions feature.

Observers have long understood that stability in law has value,<sup>39</sup> and entrenchment encourages stability. Under that broad proposition lie important arguments. Entrenching law protects reliance interests<sup>40</sup> and prevents “the recurrent need to establish a basic framework for political life.”<sup>41</sup> Entrenchment prevents “frivolous” amendments<sup>42</sup> and allows passions to cool.<sup>43</sup> Entrenchment facilitates credible commitments.<sup>44</sup> A new law—say, one that expropriates property—may be popular, but society can only flourish under the old law. Entrenchment commits society to that old law. Relatedly, entrenchment can protect minorities: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . .”<sup>45</sup> Aristotle argued that stability promotes compliance.<sup>46</sup>

This leads to the second clarification: The rationale, or lack thereof, for an entrenchment does not affect the analysis. The work has equal bite with laws good and bad. It applies to deliberative, public-minded lawmakers and self-interested lawmakers operating under chaotic conditions.

---

<sup>38</sup> To be precise, this Article addresses partial entrenchments, meaning laws that *can* change but not easily. Complete entrenchments, like a statute or constitutional provision that cannot be repealed or amended in any circumstance, are not addressed.

<sup>39</sup> See *supra* notes 1 and 2 and accompanying text.

<sup>40</sup> See Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 *J. Contemp. Legal Issues* 69, 69–72 (2003) (cautioning against legal transitions unless the marginal benefit of simplifying the law clearly outweighs the cost of upsetting reliance interests); see also Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule 9* (2014) (stating, “institutional stability is ostensibly attractive because of the ‘security of expectations’” it affords).

<sup>41</sup> Holmes, *supra* note 20, at 153.

<sup>42</sup> *Id.* at 155.

<sup>43</sup> See Elster, *supra* note 27, at 133 (stating that bicameralism gives “hot spirits time to cool down”); F.A. Hayek, *The Constitution of Liberty* 180 (1960) (supporting entrenchment in part because it gives time for “passions to cool,” which “on occasion may be very important”).

<sup>44</sup> Elster, *supra* note 27, at 88 (“Many writers have argued that political constitutions are devices for precommitment or self-binding . . .”).

<sup>45</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>46</sup> See Aristotle, *supra* note 1, at 49 (“For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.”).

Scholars fight about entrenchment, especially in American constitutional law. One group of scholars supports Article V and similar demanding amendment rules.<sup>47</sup> Many also support originalism, a theory of interpretation that should tend to keep law fixed.<sup>48</sup> These scholars often assume that formal amendment processes can correct constitutional defects.<sup>49</sup> Other scholars oppose Article V and support “living constitutionalism” or other more flexible theories of interpretation.<sup>50</sup> They often assume that formal amendment processes, at least in the U.S. Constitution, cannot or at least do not correct defects.<sup>51</sup> Much of the debate rests on normative claims about the proper balance between stability and responsiveness.

Third clarification: I do not take a position on Article V or the optimal weights to ascribe to stability and responsiveness. I do not take a position on the best theory of interpretation. At its core, the project is positive, not normative. Thus, one cannot dismiss the work by rejecting a subjective assumption about the value of stability or whether a two-thirds or three-quarters voting rule works best. I make no such assumptions.

The Constitution, Madison famously wrote, offers mere “parchment barriers against the encroaching spirit of power[.]”<sup>52</sup> When and why does entrenchment work? What, if anything, can lead kings, dictators, presidents, legislators, judges, and bureaucrats constrained by entrenched laws—that they oppose but cannot formally change—to comply with those laws? A similar question can be posed to private actors, like parties to a contract, in places without strong commercial laws and enforcement. Hobbes and Spinoza before, and a bevy of scholars since,

---

<sup>47</sup> See, e.g., McGinnis & Rappaport, *Good Constitution* (2013), *supra* note 10, at 33–34 (arguing that supermajority rules like those in the Constitution generate law with good consequences).

<sup>48</sup> See *id.* at 81–99 (arguing that “it is desirable to interpret a supermajoritarian constitution based on its original meaning”).

<sup>49</sup> See, e.g., McGinnis & Rappaport, *Good Constitution* (2010), *supra* note 21, at 1737 (discussing the capacity of formal amendments to correct defects).

<sup>50</sup> See, e.g., Strauss, *supra* note 13, at 115 (criticizing the rigidity of Article V and promoting living constitutionalism). See generally Jack M. Balkin, *Living Originalism* (2011) (offering a theory of “living originalism”).

<sup>51</sup> See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* 165 (2006) (describing the Article V amendment process as an “iron cage” with “almost kryptonite-like bars”).

<sup>52</sup> *The Federalist* No. 48, *supra* note 2, at 252 (James Madison).

have contemplated Madison's dilemma.<sup>53</sup> However, this does not affect the analysis because of the fourth clarification: I assume that, as is often the case in reality, actors comply with entrenched law. The reason for compliance does not matter.

Constitutions and other documents may be formally entrenched, making their text difficult to amend, but judges can interpret and reinterpret their provisions as times change, new cases arise, and court membership turns over. This is not coincidence: Deeper formal entrenchment *implies* greater interpretive discretion, as judges can adopt a variety of positions about an entrenched law's meaning without facing override.<sup>54</sup> Because of this relationship, constitutional scholars often combine their discussions of amendment and judicial interpretation or focus only on the latter.<sup>55</sup> I separate these topics and focus only on the former. Thus, clarification five: This Article assumes that entrenched law changes only through formal methods, like the Article V amendment process.

Finally, and somewhat technically, consider the Coase Theorem.<sup>56</sup> It holds that, when bargaining is costless, parties will agree to an efficient outcome, regardless of the substance of the legal rule.<sup>57</sup> For the topic at hand, the theorem implies that entrenchment does not affect efficiency if lawmakers can bargain costlessly.<sup>58</sup> If changing a law would help some, hurt others, but on balance create value, then that change will take place if bargaining is costless. The beneficiaries of the change will be able to buy enough support to make the change, whether that requires transferring something of value to a few (to achieve a majority) or many (to achieve a supermajority).

---

<sup>53</sup> For a review of the literature, see generally Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv. L. Rev.* 657 (2011).

<sup>54</sup> See Ferejohn, *supra* note 8, at 504 ("If a constitution is difficult to amend, those officials in a position to interpret the document—whether courts, legislatures, or agencies—will have a great deal of unchecked latitude to change the constitution through interpretation.").

<sup>55</sup> See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 *Wake Forest L. Rev.* 913, 914 (2014) ("Given the many essential functions formal amendment rules serve, we would expect constitutions to entrench them, and indeed most of them do. Yet the structure of formal amendment rules has received little scholarly attention. Scholars have devoted considerably more attention to informal amendment . . .").

<sup>56</sup> See generally R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960) (providing the germinal analysis behind the theorem).

<sup>57</sup> See Cooter, *supra* note 29, at 53 (stating the theorem).

<sup>58</sup> See *id.* (developing the "political Coase Theorem," which holds that, assuming zero transaction costs, "the supply of private law and public goods by the state is efficient relative to the preferences of lawmakers").

This point has important and underappreciated implications for legal and especially constitutional design.<sup>59</sup> However, I will not explore them here because of the sixth clarification, which is really an assumption: The transaction costs of bargaining are high. This is a common assumption in spatial models of voting, which underpin the analysis below. This assumption seems especially reasonable when changing law requires a vote from a large and unorganized group like voters or shareholders.

## II. MODELING ENTRENCHMENT

The incrementalism principle grows from an analytical technique called spatial modeling. Spatial models are common in social science but, despite anchoring some prominent work,<sup>60</sup> uncommon in legal scholarship.<sup>61</sup> This Part introduces spatial modeling in three steps. First, it develops a model of legal change under majority rule, which I treat as the baseline for unentrenched law. Next, it extends the model to supermajority rule. Finally, it generalizes to other methods of entrenchment. I will use the models to comment on some phenomena of interest to legal scholars, like why two sets of laws with identical amendment rules can get amended at very different rates. But mostly this work sets the stage for Part III. Readers familiar with spatial models can start there.

---

<sup>59</sup> For example, it may help explain why formal amendment difficulty and actual amendment rates are not tightly correlated. See generally Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *Int'l J. Const. L.* 686, 689–92 (2015) (discussing challenges and puzzles in the relationship between amendment difficulty and constitutional change).

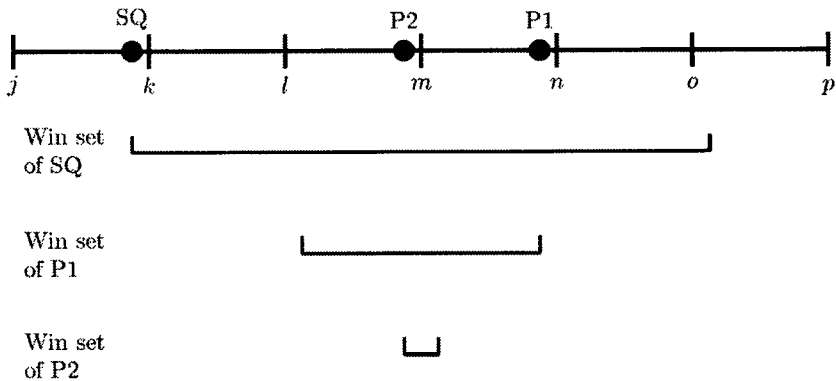
<sup>60</sup> See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331, 353–89 (1991) (applying spatial models to statutory interpretation).

<sup>61</sup> In social science, see, for example, David W. Brady & Craig Volden, *Revolving Gridlock: Politics and Policy from Jimmy Carter to George W. Bush* 12–48 (2d ed. 2006) (employing spatial models); Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 20–48 (1998) (same); George Tsebelis, *Veto Players: How Political Institutions Work* (2002) (same). In law, see, for example, Cooter, *supra* note 29, at 25–41, 154–61, 215–39 (employing spatial models); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *Calif. L. Rev.* 613, 641–64 (1991) (same); Michael D. Gilbert & Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the Highest Vote Rule*, 38 *J. Legal Stud.* 383, 389–93, 398–401 (2009) (same).

### A. Majority Rule

Suppose that seven voters—members of a unicameral legislature or an electorate voting on ballot propositions—make laws. The voters have names: *j*, *k*, *l*, *m*, *n*, *o*, and *p*. They use pairwise voting, meaning they choose between two proposals at a time—the status quo and an alternative—and they operate under majority rule, meaning the proposal with four or more votes wins.<sup>62</sup> They vote individually on each issue. To demonstrate what this means, they would cast separate votes on proposals involving climate change and gun control, not one vote on both. This assumption allows the voters to be situated on a single policy dimension stretching from left to right, as in Figure 1. The dimension is general. It could represent levels of greenhouse gas emissions or gun control, or it could represent the expansiveness of speech rights, Congress’s power under the Commerce Clause, or whatever else.

Figure 1



The voters appear at their ideal points, indicated with tick marks.<sup>63</sup> A voter’s ideal point represents the policy that she prefers most. To illustrate, suppose the policy dimension represents speed limits, which increase as we move rightward. Voter *j* prefers a low limit—say, thirty-five miles per hour—while voter *l* prefers a limit like forty-five and *p* a limit like sixty-five. The voters have single-peaked preferences. This means their “utility”—roughly, their happiness or satisfaction—declines as law departs from their ideal points. Voter *l*, for example, wants that

<sup>62</sup> I assume voters never abstain.

<sup>63</sup> Each voter has a unique ideal point.

forty-five miles per hour speed limit, and her utility decreases as the actual limit goes from forty-five toward zero or toward infinity. Finally, the voters have symmetrical preferences. This means their utility declines at the same rate whether law moves left or right of their ideal points. Consider again voter  $l$ . She is equally unhappy whether the speed limit is forty or fifty, as both are five miles per hour from her ideal. She is unhappier yet, but equally so, whether the limit is thirty or sixty, and so on.

These are standard assumptions,<sup>64</sup> and they have an intuitive implication: Voters prefer proposals closer to their ideal points. To illustrate, suppose the status quo law equals the point SQ. Given the choice between SQ and the proposal P1, a majority prefers P1. For voters  $m$ ,  $n$ ,  $o$ , and  $p$ , P1 lies closer to their ideal points, so they support it.

The proposal P1 is not the only alternative that a majority prefers to SQ. Every point in the *win set* of SQ would defeat the status quo. For example, suppose SQ gets paired with a proposal equal to voter  $k$ 's ideal point. Six voters— $k$  through  $p$ —prefer that proposal. Suppose instead that SQ gets matched with a proposal at  $l$ . Five voters— $l$  through  $p$ —prefer that proposal to SQ.

Return to the example of P1, and suppose it replaces SQ. P1 becomes the new status quo, and every point in the win set of P1 would defeat it. To demonstrate, a majority of voters— $j$  through  $m$ —prefer P2 to P1. P2 becomes the new status quo, a win set opens, and the process repeats.

One can play this game until the law equals  $m$ , the ideal point of the median voter, meaning the voter with an equal number of voters on either side.<sup>65</sup> Once there, law sticks. To see why, consider a proposal to replace a status quo at  $m$  with a law right of  $m$ . No more than three voters— $n$ ,  $o$ , and  $p$ —would support such a change. The same logic prevents changes from  $m$  to a point on its left. Under our assumptions, law converges to the median voter's ideal point and then remains stable. This is the median voter theorem.<sup>66</sup>

<sup>64</sup> See, e.g., Cooter, *supra* note 29, at 23–27; Krehbiel, *supra* note 61, at 21–28; Gilbert & Levine, *supra* note 61, at 389–90.

<sup>65</sup> I assume there is a unique median.

<sup>66</sup> See generally Duncan Black, *The Theory of Committees and Elections* 14–25 (1958) (describing the median voter theorem); Anthony Downs, *An Economic Theory of Democracy* 73–74 (1957) (same). For an accessible but careful discussion, see Kenneth A. Shepsle, *Analyzing Politics: Rationality, Behavior, and Institutions* 91–99 (2d ed. 2010).

Three observations about the model are relevant. First, the status quo does not matter as law always converges to the median.<sup>67</sup> Second, law can oscillate from one side of the dimension to the other as it approaches the median. In Figure 1, law can jump from SQ on the far left to P1 on the right, then jump back to P2 on the left, and so forth. Third, the median voter's ideal point is a unique equilibrium, meaning a point where law stabilizes. If the law exactly equals  $m$ , then it defeats every possible alternative in a head-to-head vote. No other point on the dimension has that feature.

The model of majority rule provides a baseline against which to analyze entrenchment. Before turning to that comparison, I will justify the analysis so far. The value of the model depends on the accuracy of the assumptions. Are they defensible? For many, the answer is clearly yes. I assumed there are seven voters, but so long as there is a unique median, there could be one million and seven; the exact number does not matter. Likewise, the voters are evenly spaced in the Figures, but only for clarity. The voters could be distributed unevenly—most clustering near the middle, for example, with a few on the ends—and the analysis would not change. Pairwise voting and majority rule are standard practices.

The remaining assumptions are also defensible, though not unequivocally. Voters may often, but not always, have single-peaked preferences.<sup>68</sup> Likewise, some voters may have asymmetrical preferences. A legislator who believes that the optimal driving speed is sixty-five miles per hour may not be indifferent between drivers going fifty-five and seventy-five.<sup>69</sup> Finally, I assumed that voters make decisions on one issue at a time, but sometimes they decide many issues at once, as when Congress passed the “Cromnibus,” a bill addressing immigration, tropical diseases, military spending, abortion, and other matters.<sup>70</sup> When vot-

---

<sup>67</sup> This is true under the assumption that no powerful agenda setter, like a committee chairperson in Congress, prevents proposals from getting a vote.

<sup>68</sup> To illustrate, consider a voter making choices over school funding, where the choices are a high level of funding ( $H$ ), a medium level ( $M$ ), and a low level ( $L$ ). A voter would satisfy single-peakedness with any of the following preference orderings:  $H > M > L$ ,  $L > M > H$ ,  $M > H > L$ , or  $M > L > H$ . It would violate single-peakedness if the voter had these orderings:  $H > L > M$  or  $L > H > M$ . This example comes from Cooter, *supra* note 29, at 38–39.

<sup>69</sup> See Michael D. Gilbert, *Insincere Rules*, 101 Va. L. Rev. 2185, 2211 (2015) (discussing asymmetry and providing an example: “Parents who prefer an 8:30 bedtime may suffer much more if their children turn off the lights at 9:00 than if they turn them off at 8:00”).

<sup>70</sup> See Ed O’Keefe, *What’s in the Spending Bill? We Skim It so You Don’t Have To*, Wash. Post (Dec. 10, 2014), <https://www.washingtonpost.com/news/post->



ers decide multiple issues with one vote, the median voter theorem usually breaks down.<sup>71</sup> But multi-issue decision making may be rare in settings where entrenchment is common. No amendment to the U.S. Constitution resembles the Cromnibus, perhaps because bundling issues can increase opposition.<sup>72</sup> The House of Representatives has a (loosely enforced) germaneness rule,<sup>73</sup> and states and foreign countries have a (more strongly enforced) single subject rule, which limits legislation and constitutional amendments to one “subject.”<sup>74</sup> These provisions limit the scope of entrenchments.

I do not claim that the assumptions of the model are accurate all the time. Instead, I claim that they are accurate often enough that the model can provide new, if not always definitive, insights about the world. Finally, I note that the value of the model depends on objectives. The goal is not perfection but improvement over existing analyses, a baseline against which the model and its extensions succeed.

### *B. Supermajority Rule and Two Principles*

Suppose the foregoing assumptions hold with one exception: Voters do not operate under a 4/7ths majority rule but instead a 5/7ths supermajority rule. Thus, law is (relatively) entrenched. Consider Figure 2, and suppose the status quo law equals the median voter’s ideal point, *m*. As before, law is stable, as no more than three voters would support a move in either direction. Suppose instead that the status quo law equals the

---

politics/wp/2014/12/09/whats-in-the-spending-bill-we-skim-it-so-you-dont-have-to/?utm\_term=.74e63826c087 [https://perma.cc/QQ3Q-NL22].

<sup>71</sup> This is a well-known result in social choice theory. For an accessible discussion, see Shepsle, *supra* note 66, at 99–110.

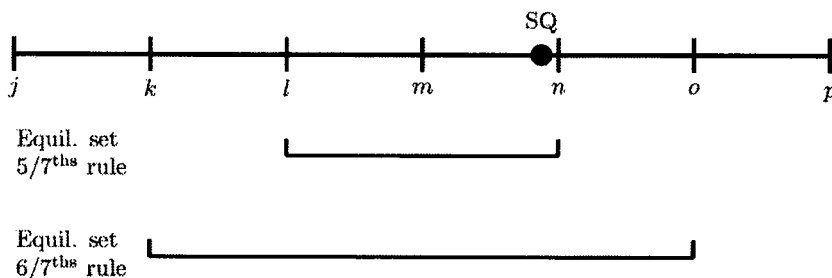
<sup>72</sup> See Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. Cal. L. Rev. 949, 961 (2005) (“The addition of a second, third, or fourth dimension [to a ballot initiative] is political suicide because it increases the possibility of generating opposition.”).

<sup>73</sup> See generally Stanley Bach, *Germaneness Rules and Bicameral Relations in the U.S. Congress*, 7 Legis. Stud. Q. 341, 343 (1982) (discussing the House’s germaneness rule).

<sup>74</sup> See Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. Legal Stud. 333, 345–46 (2011) (finding fewer subjects in ballot propositions that judges do not strike down on single subject grounds than in propositions they do, suggesting the rule deters multidimensional propositions). See generally Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687, 691–92 (2010) (discussing application of the single subject rule to statutory and constitutional initiatives); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. Pitt. L. Rev. 803, 811 (2006) (discussing application of the single subject rule to legislation).

point SQ. No more than four voters would support a change to the left, and no more than three would support a change to the right. It takes five votes to replace SQ, so SQ is also stable. To generalize, every point between  $l$  and  $n$  is stable. This is the *equilibrium set* under a 5/7ths rule. The equilibrium set captures every point at which law will remain fixed. If law lies anywhere in the equilibrium set, it cannot change.

Figure 2



Note the differences between majority and supermajority rule. The latter features an equilibrium set, not a single equilibrium point, and consequently, law may not converge on the median voter.<sup>75</sup>

The size of the equilibrium set depends on the level of entrenchment. Suppose the voters switch from a 5/7ths to a 6/7ths voting rule, meaning entrenchment deepens. The equilibrium set widens, stretching from  $k$  to  $o$ , as Figure 2 shows. Likewise, the size of the set depends on the distribution of ideal points. Suppose the voting rule remains 6/7ths. If voters  $k$ ,  $l$ ,  $m$ ,  $n$ , and  $o$  cluster in the middle, the equilibrium set narrows. If they disperse, with  $j$ ,  $k$ , and  $l$  on the far left and  $n$ ,  $o$ , and  $p$  on the far right, the set widens.

For convenience, I attach labels to these ideas. The *depth principle* holds that deepening entrenchment widens equilibrium sets,<sup>76</sup> making law stable in more places. The *heterogeneity principle* holds that diversifying voters' preferences widens equilibrium sets.<sup>77</sup> The next step is to show that these principles generalize beyond the simplistic setup—seven

<sup>75</sup> This is consistent with Krehbiel, *supra* note 61, at 20–48, who shows that supermajoritarian institutions, including the separation of powers, create a gridlock zone in which law remains stable, regardless of its proximity to the median voter.

<sup>76</sup> To be precise, deepening entrenchment cannot narrow equilibrium sets.

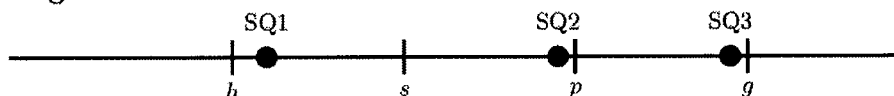
<sup>77</sup> Diversifying voters' preferences cannot narrow equilibrium sets. It widens them when the distance between the ideal points of the voters who anchor each end of the equilibrium set increases.

voters using supermajority rule—to real-world systems for making decisions.

### C. Generalizing from Supermajority Rule

Suppose law gets entrenched through bicameralism.<sup>78</sup> Two chambers, a House of Representatives and a Senate, must agree for law to change, and each chamber operates under majority rule. Figure 3 depicts this scenario. The point  $h$  represents the ideal point of the median member of the House, and  $s$  reflects the median in the Senate. A law at SQ1 is stable. Any proposal to move it rightward will be opposed by  $h$  and the other members of the House to her left, a majority.<sup>79</sup> Likewise, any proposal to move law leftward will be opposed by a majority in the Senate. SQ1 is not unique; the entire space between  $h$  and  $s$  makes up the equilibrium set.

Figure 3



The heterogeneity principle holds. To see why, suppose  $h$  and  $s$  drift farther apart. The equilibrium set between them necessarily grows. Likewise, the depth principle holds. Suppose the legislature were unicameral rather than bicameral, and the House alone made decisions under majority rule. As in the model of majority rule above, law would converge on  $h$ , the median voter in the House. That point,  $h$ , would represent the sole equilibrium point. Deepening entrenchment by adding the Senate transforms that point to a set.

Suppose entrenchment deepens further. In addition to bicameralism, legal change requires presidential approval. Now the model resembles the statute-making process in the United States and elsewhere.<sup>80</sup> Suppose

<sup>78</sup> See Levmore, *supra* note 28, at 151–55 (explaining how bicameralism entrenches law).

<sup>79</sup> Recall that the median voter is the one with an equal number of voters on either side of her. This implies that all the voters on one side, plus the median, form a majority. It may be easier, though less realistic, to think of the points  $h$  and  $s$  as representing the unanimous view of the members of the House and Senate, respectively. Thus, the House opposes a move rightward from SQ1 because every member of the House prefers SQ1 to any such move.

<sup>80</sup> Consistent with other spatial models—see, for example, Krehbiel, *supra* note 61, at 20–48—Figure 3 ignores committees and political parties. It also ignores the filibuster. Adding these features would complicate but not change the analysis.

$p$  reflects the President's ideal point, and consider the status quo law SQ2. A majority of the House and Senate will oppose any move rightward, and the President will oppose any move leftward. All three must agree for law to change, so SQ2 is stable. To generalize, the equilibrium set stretches from  $h$  to  $p$ . The depth principle holds: Deepening entrenchment by requiring not two but three actors to agree widens the equilibrium set. Likewise, the heterogeneity principle holds: Moving the actors' ideal point farther apart increases the space between.

Switching gears, suppose that changing law requires multiple approvals from the same body. In Nevada, for example, voters must approve an initiative to amend the state constitution twice in consecutive elections before it takes effect.<sup>81</sup> In Figure 3,  $s$  can represent the median voter in the first election, and  $p$  the median in the second. The depth principle holds: Requiring only one approval would cause law to converge on  $s$ , while requiring two—deepening entrenchment—creates an equilibrium set running from  $s$  to  $p$ . The heterogeneity principle holds, too.

Turning to informal entrenchment, recall the example of the Social Security Act. Like other federal legislation, the Act can be amended through bicameralism and presentment, but tinkering risks grave political consequences, so lawmakers tend to leave it alone.<sup>82</sup> Figure 3 adds one more ideal point,  $g$ , to capture this. This point reflects the preference of a powerful interest group like AARP.<sup>83</sup> If politicians will not alter Social Security without AARP's approval, then AARP acts as another player in the lawmaking game, analogous to a third chamber in the legislature.<sup>84</sup> The status quo law SQ3 is stable as at least one actor will oppose a change leftward or rightward. To generalize, the equilibrium set stretches from  $h$  to  $g$ . Deepening entrenchment widened the equilibrium set, and diversifying the actor's preferences will widen it further. Both principles hold.<sup>85</sup>

---

<sup>81</sup> Nev. Const. art. XIX, § 2.

<sup>82</sup> See *supra* note 36 and accompanying text.

<sup>83</sup> See generally Frederick R. Lynch, *One Nation Under AARP: The Fight over Medicare, Social Security, and America's Future* (2011) (examining the political power of Baby Boomers and AARP).

<sup>84</sup> This scenario is not unrealistic. See Laura Meckler, *Key Seniors Association Pivots on Benefit Cut*, *Wall St. J.*, June 17, 2011, at A1 (reporting that AARP "dropp[ed] its longstanding opposition to cutting Social Security benefits," which "could have a dramatic effect on the debate surrounding the future of the federal safety net . . . given the group's immense clout").

<sup>85</sup> One might argue that AARP, though influential, is not tantamount to the Senate or other "official" players in the lawmaking game, casting doubt on the discussion. Interest groups

These examples demonstrate a broad point. Amending entrenched law requires a certain number of actors to agree. One can represent these actors and the rules that govern them (supermajority requirements, for example) on the line. Thereafter, precise details of amendment techniques disappear, and a simple, general model remains.<sup>86</sup> The general model demonstrates the same principles, depth and heterogeneity, that grew from the initial, specific model with one body of seven voters.

The power of this generalization bears emphasis. *All* formal mechanisms of entrenchment lead to the same core conclusions about depth and heterogeneity.<sup>87</sup> Institutional details, like the number of legislative chambers and their voting thresholds, do not affect those conclusions. The substance of the entrenched law—religious rights, sales tax rates, or whatever else—is irrelevant. Whether the setting is American constitutional law, the World Trade Organization, or a homeowners' association, the conclusions hold. If an instance of informal entrenchment, as with Social Security and AARP, can reasonably be captured with the model, then the conclusions extend to that exercise of informal entrenchment.

#### *D. Depth and Heterogeneity Applied*

The main purpose of the last Section was to show that ideas generated from the simple, seven-voter model generalize to other, more realistic entrenchment settings. Thus, I will return in Part III to the seven-voter model without worrying that doing so cabins the findings. But first, a few observations are in order.

Because the depth and heterogeneity principles hold across entrenchment settings, including realistic ones, they can be applied to real-world problems and phenomena, beginning with drafting. Suppose that drafters at a convention select the initial, status quo laws that make up a constitution. Under majority rule, their selection does not much matter as law will converge to the median voter's ideal point.<sup>88</sup> If the law is entrenched, their selection matters a lot. As long as they select a point in the equilibrium set, law will not change. As entrenchment deepens and

---

certainly could be modeled in different ways. Some of those ways would lead to the same conclusion. For example, suppose AARP is not a player in the game but instead an influence on the President. Thus, AARP draws the President's ideal point closer to *g*. That would deepen entrenchment by diversifying the official players' preferences.

<sup>86</sup> This is the central insight of an important book. See Tsebelis, *supra* note 61, at 1–37.

<sup>87</sup> This is true given the assumptions in Sections II.A and II.B.

<sup>88</sup> Again, assuming there is no agenda setter. See *supra* note 67.

as the preferences of subsequent lawmakers diverge, the set of stable laws from which they can choose grows. The power of “first movers” increases as the equilibrium set widens.<sup>89</sup>

These ideas cast light on many entrenchment decisions. The framers of California’s constitution had less power than the framers of Idaho’s. The former can be changed by a bare majority of voters through the initiative process,<sup>90</sup> while changing the latter requires majority support from voters and supermajority support in the legislature.<sup>91</sup> The representativeness of the drafters of Iraq’s constitution was important, and not just for obvious reasons. Changing that constitution requires supermajority support in the legislature, executive agreement, and majority support among voters.<sup>92</sup> Because Iraqis have heterogeneous views, the equilibrium set must have been very wide.

Whether empowering first movers helps or harms society depends, of course, on the qualities of the first movers. If first movers have expertise and represent their constituents well, then empowerment helps. Drafters can select from a menu of laws, some of which may yield great benefits despite being far from the political center. If first movers are foolish, corrupt, or otherwise unrepresentative, then the analysis runs the other way. As the equilibrium set grows, the representativeness and quality of drafters becomes paramount.

The point about Iraq leads to a broader point about heterogeneity. Because of the heterogeneity principle, identical amendment rules can yield very different amendment rates. To demonstrate, consider the constitutions of Alabama and Japan.<sup>93</sup> Amending the former requires sixty percent support, and amending the latter requires two-thirds support, in two legislative chambers. In addition, both require majority support among

---

<sup>89</sup> This is consistent with the common observation that the Articles of Confederation contained problematic provisions that, because of the unanimity requirement for amendment, were very difficult to change. See, e.g., Howard Gillman, Mark A. Graber & Keith E. Whittington, 1 *American Constitutionalism: Structures of Government* 51 (2013).

<sup>90</sup> Cal. Const. art. II, §§ 8, 10. The California framers did not know this at the time, as Californians adopted the initiative power later. See Philip L. Dubois & Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* 3–6, 11–14 (1998) (providing a brief history of the adoption and use of initiatives in California).

<sup>91</sup> Idaho Const. art. XX, § 1.

<sup>92</sup> Article 126, Section 6, *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005, [http://www.iraqinationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf) [<https://perma.cc/C5NQ-JUH9>].

<sup>93</sup> I am grateful to Professor Mila Versteeg for this example.

voters.<sup>94</sup> These almost identical amendment rules have led to quite different outcomes. Alabama's constitution, the longest in the world, gets amended about eight times per year,<sup>95</sup> while Japan's constitution has not changed since its creation after World War II.<sup>96</sup> Many context-specific factors may explain this divergence, but the heterogeneity principle may also help. If Alabamans have relatively homogeneous views, then equilibrium sets in that state are narrow. Law will be relatively unstable in such circumstances.<sup>97</sup>

This leads to a lesson for legal designers. Given a homogenous population of decision makers, legal stability requires deeper entrenchment. Given a heterogeneous population, one can achieve stability with shallower entrenchment. Failing to account for the preferences of tomorrow's lawmakers will cause today's institutional designers to entrench too little or too much.

All of these ideas connect to a core concern: stability. Under majority rule, law that diverges from the median voter's ideal point will change, possibly multiple times, as it converges on the median. Once it reaches the median, law stabilizes, but only until the median voter's preferences change, which could be often. In contrast, entrenched law stays fixed as long as it falls within the equilibrium set. Even if voters' preferences change over time—if, for example, voter *m*'s ideal point moves rightward in Figure 2—the law stays fixed as long as it remains in the set.

This culminates in an obvious point: Entrenched law is hard to change. This is the first status quo bias of entrenchment. Scholars have long understood this bias,<sup>98</sup> but a second, hidden one lurks.

### III. THE DOUBLE STATUS QUO BIAS

Entrenchment has a double status quo bias: It not only prevents law from changing (at least for a while) but also confines changes that do take place to small steps. This second idea is the incrementalism principle. Moreover, entrenchment can fail. Under certain circumstances, entrenched law becomes as unstable as ordinary law—only less popular—

---

<sup>94</sup> See Ala. Const. art. XVIII, § 284; Nihonkoku Kenpō [Kenpō] [Constitution], art. 96, para. 9 (Japan).

<sup>95</sup> See Lutz, *supra* note 4, at 248.

<sup>96</sup> See Elkins, Ginsburg & Melton, *supra* note 23, at 199.

<sup>97</sup> This assumes that Alabamans' preferences change over time, albeit in tandem, relative to the law.

<sup>98</sup> See *supra* note 20.

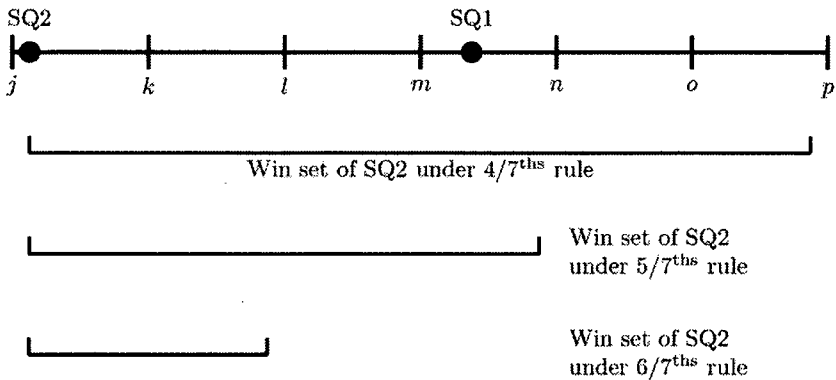
and amendment cannot correct the problem. This Part develops these ideas.

### A. The Incrementalism Principle

As Section II.C showed, the simple, seven-voter model yields ideas that generalize to more realistic and complicated entrenchment settings. Thus, I will retain that basic setup without fear that it sacrifices generality. Seven voters have single-peaked, symmetrical preferences, and they make decisions on one issue at a time using pairwise voting and majority rule. Now make a new assumption: Voters' preferences change over time.

Figure 4 demonstrates the effect of preference change. Suppose the status quo law labeled SQ1 began at the median voter's ideal point. However, the voters' views evolved, and they all moved leftward on the line. Relative to voters, the law drifted rightward; thus, SQ1 appears to the right of  $m$ . Under majority rule, SQ1 would be unstable, as any proposal closer to  $m$  would defeat it. But under a 5/7ths rule, law will not change. The status quo remains in the equilibrium set, which runs from  $l$  to  $n$ .

**Figure 4**



What happens when the status quo exits the equilibrium set? The point labeled SQ2 illustrates. That law began in the equilibrium set, but voters' views lurched to the right. So, relative to them, the law lies on the far left. Under majority rule, any proposal in the first, wide win set



of SQ2 would defeat it. Law could move, for example, from SQ2 to a point close to  $p$ .<sup>99</sup> If the voters use a 5/7ths supermajority rule, then only those proposals in the second, narrower win set would defeat it. Those proposals alone make at least five voters better off. Law could move from SQ2 to  $m$ , or it could move close to  $n$ , but it could not reach  $o$  or  $p$ . Under a 6/7ths rule, only those proposals in the third, narrowest win set would defeat it. Law could move from SQ2 to  $k$  or a point close to  $l$ , but no further.

Note how the win set changes as entrenchment deepens. It not only narrows, it converges on the status quo. From SQ2, law can change drastically under majority rule, moderately under a 5/7ths rule, and marginally under a 6/7ths rule. Hence, the incrementalism principle: Entrenchment confines legal change to small steps. When preferences evolve and law falls out of equilibrium, change becomes possible, but the scope of possible change depends on the level of entrenchment. As entrenchment deepens, the scope narrows, collapsing on the status quo.<sup>100</sup>

The model provides a visualization, but perhaps not an explanation, for the second status quo bias. Here is an example. Suppose the tax rate equals one percent and three legislators have authority to change it. They prefer rates of two, ten, and twenty percent, respectively. If the legislators make decisions using majority law—the law is not entrenched—they may make the rate ten percent. Two legislators prefer ten percent to one. If the legislators make decisions under a unanimity rule—the law is entrenched—they cannot make such a drastic change because the first legislator opposes it. That legislator may support an increase to two percent, but not to ten.

Majority rule empowers the second and third legislator. They do not need the first legislator in their coalition, so they can approve a relatively drastic change in law, including one that makes the first legislator

---

<sup>99</sup> Of course, law would not be stable near  $p$ . The median voter theorem teaches that law will remain unstable until it reaches  $m$ . See *supra* Section II.A.

<sup>100</sup> This idea follows from the spatial model, and other work approaches it. See, e.g., Brady & Volden, *supra* note 61, at 12–48 (presenting a similar analysis); Krehbiel, *supra* note 61, at 20–48 (showing how supermajoritarian institutions like the filibuster create “pivots” which can keep changes close to the status quo); Tsebelis, *supra* note 61, at 149–51 (using a multi-dimensional model to show that supermajority rules eliminate or shrink win sets); John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 *Tex. L. Rev.* 1115, 1146–58 (2007) (observing without generalizing that supermajority rules can keep government spending at or near the status quo). However, I cannot find a direct discussion of the phenomenon.

worse off than the status quo. Unanimity, on the other hand, empowers the first legislator. No change will happen without her support. She is mostly happy with the status quo tax, which differs from her ideal rate by only one percentage point, and she will only support changes that make her even happier. To achieve that, the new tax rate will have to differ from her ideal by *less* than one percentage point. Incremental change, like from one percent to two, can accomplish that, but more drastic change, like from one percent to ten, cannot.

To generalize from the example, as entrenchment deepens, the size of the coalition necessary to change law grows. As the size of that coalition grows, proponents of change need more and more decision makers on their side. They cannot rely exclusively on strong opponents of the status quo, those who seek radical change; they need support from those who more or less favor the status quo as well. To get their support, proponents cannot push drastic change. The law is already close to those supporters' ideal points, and to get them on board requires drawing it even closer. One cannot garner support from those who seek refinement of law by offering wholesale revision.

The logic of the incrementalism principle is unassailable, at least under the assumptions that underpin the spatial model. Earlier I gave reasons to believe that those assumptions are reasonable. Still, one might inquire about facts. Does the principle affect legal change in the world? Consider the passage of the Fifteenth Amendment.<sup>101</sup> Drafts of the Amendment not only prohibited denying suffrage on account of race, they also prohibited states from denying the right to hold office on account of race and provided an affirmative right to vote.<sup>102</sup> The Senate approved one of these ambitious drafts with the required supermajority.<sup>103</sup> But constitutional amendment requires supermajority support in both chambers. Not surprisingly, only a milder version—one without a

---

<sup>101</sup> See U.S. Const. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

<sup>102</sup> For an accessible discussion, see Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 *Cardozo L. Rev.* 2153, 2215–20 (1996) (describing various drafts). The classic, detailed authority on the history of the Fifteenth Amendment is William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (1965).

<sup>103</sup> See Wang, *supra* note 102, at 2219 (describing passage in the Senate, by a vote of thirty-five to eleven, of a version that included the right to hold office).

right to hold office—survived the process.<sup>104</sup> Other examples consistent with the incrementalism principle abound. To illustrate, the original Bill of Rights that passed in the House contained limitations against states, but the Senate removed them, yielding a final, more moderate set of amendments.<sup>105</sup>

Rather than anecdotes like these, one might prefer systematic evidence, but this is hard to find because of a perennial problem: missing data. The incrementalism principle holds that, as entrenchment deepens, the range of alternatives that can replace a given law converges on the status quo. Consider what a clean empirical test of the principle would require: information on a status quo law, information on every alternative that would defeat it under majority rule, and information on every alternative that would defeat it under supermajority rule. We do not have such information. Legislators do not vote on every possible alternative to a law; rather, they typically vote on one or a handful. Once one passes, they quit. Thus, when a law passes with sixty percent support, we do not thereafter observe whether a different version of the law, one that makes greater change, would have passed with fifty-five percent support.

The problems run deeper. Leaders like the Speaker of the House often do not schedule votes on bills they know will fail.<sup>106</sup> Thus, we do not observe votes on far-reaching bills that cannot survive the required supermajoritarian procedures, and so we cannot tell if, as the principle predicts, some of them would have survived a bare majoritarian procedure.

This may frustrate readers who prefer data to anecdote and abstraction. I cannot show with certainty how incrementalism affected all parts of the Constitution. I cannot observe the incrementalism principle at work in all places. I can only provide good reasons to believe it exists.

---

<sup>104</sup> See *id.* at 2220 (describing removal of the office-holding right in the conference committee).

<sup>105</sup> See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 237 (2006).

<sup>106</sup> Or that they know will pass but create political backlash. See, e.g., Eugene Robinson, *Boehner's Immigration Inertia Forces Obama to Act*, *Wash. Post* (Nov. 17, 2014), [https://www.washingtonpost.com/opinions/eugene-robinson-boehners-immigration-inertia-forces-obama-to-act/2014/11/17/06ad7b02-6e75-11e4-ad12-3734c461eab6\\_story.html?utm\\_term=.5d19a75794a6](https://www.washingtonpost.com/opinions/eugene-robinson-boehners-immigration-inertia-forces-obama-to-act/2014/11/17/06ad7b02-6e75-11e4-ad12-3734c461eab6_story.html?utm_term=.5d19a75794a6) [<https://perma.cc/3FXW-SDMQ>] (arguing that Speaker of the House John Boehner refused to allow a vote on an immigration bill because he knew it would likely pass with bipartisan support).

With that said, let me offer fuller evidence from a particular context: direct democracy. In many states, citizens can initiate and vote directly on proposed laws.<sup>107</sup> Sometimes multiple, conflicting proposals appear on the same ballot.<sup>108</sup> To illustrate, in November 2006, Arizonans voted on two proposals, one to ban smoking in bars and another to permit it under certain circumstances.<sup>109</sup> The incrementalism principle implies that, given two proposed changes to law, the one closer to the status quo should get more votes.<sup>110</sup> In separate work, a co-author and I identified thirty-seven instances in which conflicting proposals that could be classified according to their distance from the status quo appeared on the same ballot.<sup>111</sup> In twenty-four of those instances, the proposal closer to the status quo did, in fact, get more votes.<sup>112</sup>

On rare occasions, voters approve conflicting proposals. To illustrate, Californians simultaneously approved a measure eliminating a tax prospectively and another more extreme measure eliminating the same tax prospectively and retroactively.<sup>113</sup> These occasions provide a cleaner (if still imperfect) test of the incrementalism principle: The more extreme proposal should get less support (though still a majority), while the relatively moderate one should get more support (a supermajority). Of the four cases my co-author and I studied, three matched this prediction, and the fourth is debatable.<sup>114</sup>

---

<sup>107</sup> See generally Dubois & Feeney, *supra* note 90 (providing a comparative analysis of the initiative process in the District of Columbia and the twenty-four states that have adopted it).

<sup>108</sup> See generally Gilbert & Levine, *supra* note 61 (examining conflicting ballot proposals by using spatial models).

<sup>109</sup> *Id.* at 394.

<sup>110</sup> This assumes that both proposals would move law in the same direction—in the models above, towards the center—relative to the status quo. Cf. *id.* at 392 n.11 (explaining why the proposal closer to the status quo will not necessarily receive more votes when the conflicting proposals are “bidirectional”). It also assumes voters do not vote strategically across the proposals. See *id.* at 390, 393–96.

<sup>111</sup> See *id.* at 394.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 395.

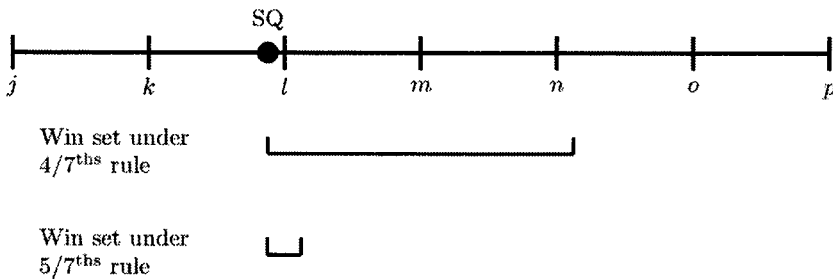
<sup>114</sup> See *id.* at 395–96. In the fourth case, voters simultaneously approved one proposal that increased the percentage of legislators required to approve tax increases from a majority to two-thirds (301,382 affirmative votes) and another proposal that retained majority rule for tax increases but required legislators to approve tax increases twice (255,830 affirmative votes). See *id.* at 396, 414. Levine and I concluded that the latter proposal made the smaller change to the status quo and, because it received fewer votes, weakened our theory. See *id.* at 396. However, we failed to account for a key passage in the second proposal, which explicitly told voters that it would take effect “only if a majority of the voters reject[ed]” the first proposal. See State of Nev., Ballot Questions (1996),

This evidence does not prove that the incrementalism principle shapes legal change, but it supports the theory.

### B. Entrenchment Failure

Sometimes voters' preferences change suddenly and dramatically. In a decade or two, Americans went from strongly opposing same-sex marriage and legalization of marijuana to supporting both.<sup>115</sup> On many issues, however, preferences change gradually. Voters may become supportive of a religious or racial group's rights, but that support grows steadily, not in jumps. Figure 5 captures this idea. The status quo law, SQ, began at  $m$ , the median voter's ideal point, but then the voters' opinions steadily evolved, and their ideal points crawled rightward. Relative to them, SQ crawled leftward.

Figure 5



If the voters operated under a 4/7ths majority rule, then any point in the first win set could defeat SQ. Law could move back to the center or

---

<http://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1996.pdf> [<https://perma.cc/86RA-7NCA>]. This invited strategic decision making by voters that falls outside of the model.

<sup>115</sup> See, e.g., Mark Berman, How Public Opinion on Marijuana Has Changed over the Last Half-Century, Wash. Post (Feb. 24, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/02/24/how-public-opinion-on-marijuana-has-changed-over-the-last-half-century/?utm\\_term=.ecd6182eccf1](https://www.washingtonpost.com/news/post-nation/wp/2015/02/24/how-public-opinion-on-marijuana-has-changed-over-the-last-half-century/?utm_term=.ecd6182eccf1) [<https://perma.cc/6W7P-8ELU>] (reporting about a thirty percentage point increase in popular support for legalized marijuana between 1994 and 2014); Scott Clement & Robert Barnes, Poll: Gay-Marriage Support at Record High, Wash. Post (Apr. 23, 2015) [https://www.washingtonpost.com/politics/courts\\_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa\\_story.html?utm\\_term=.025933dbd3e7](https://www.washingtonpost.com/politics/courts_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa_story.html?utm_term=.025933dbd3e7) [<https://perma.cc/JD7X-KQUJ>] (reporting about a twenty percentage point increase in popular support for same-sex marriage in the last decade).

even right of center.<sup>116</sup> Of course, if the voters used majority rule, they could have replaced SQ with a law closer to  $m$  the moment SQ strayed from the median. Suppose, however, that the voters use a 5/7ths supermajority rule, meaning law is entrenched. Under this rule, the equilibrium set stretches from  $l$  to  $n$ . As the voters crawled rightward, SQ drifted leftward. At first, law could not change because it remained in the equilibrium set, but eventually SQ exited the set. Now law can change. Note, however, the narrowness of the win set: Only miniscule change is possible. Law can go from SQ, which is just left of  $l$ , to a point just right of  $l$ , but no further.

Suppose that a new law just to the right of  $l$  replaces SQ. The new law lies inside the equilibrium set. If voters stop moving rightward on the line, or if they reverse course and oscillate leftward, then the new law, though very similar to the law it replaced, will stick. But suppose voters keep moving gradually rightward. That evolution pushed SQ out of the equilibrium set to begin with, and it might continue. The new law, which necessarily lies close to the border of the equilibrium set, will drift outside of the set again. Now Figure 5 repeats itself. The status quo lies just outside of the set, a narrow win set opens, a new but very similar law replaces the old, and the process repeats.<sup>117</sup>

---

<sup>116</sup> Under majority rule, law could move right of  $m$ , but it would not stabilize until it reached  $m$ . See *infra* Section II.A.

<sup>117</sup> This idea may appear to conflict with a recent, valuable article. See Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 *J. Legal Stud.* 331, 335 (2013). Professor Stephenson argues that the separation of powers causes “greater fragmentation of legislative power,” and this “attenuates the threat of repeal. This means that when one faction has sufficient (albeit temporary) control over the government to push through extreme policies in its favor, it is more likely to do so than would be the case if legislative power were more concentrated.” *Id.* Thus, Professor Stephenson predicts occasional but extreme changes to law entrenched through the separation of powers. In contrast, I predict, under the scenario described above, regular, incremental changes to law entrenched through the separation of powers or other means. One can reconcile these articles. First, and most importantly, one might translate Professor Stephenson’s work into the spatial models. In Figure 5, imagine voters  $j$ ,  $k$ , and  $l$  lurching to the right of  $m$ . This mirrors Professor Stephenson’s assumption that power can, at least temporarily, be lodged entirely in the hands of a unified group (in this example, voters right of  $m$ ). Now law can make a much bigger jump from SQ than would be possible if  $j$ ,  $k$ , and  $l$  stayed in place. This translation of Professor Stephenson’s ideas into my model suggests that we do not disagree; we just make different assumptions about the speed and nature of preference change. Second, our ideas may have merit in different circumstances. See *id.* at 354–55 (stating that, “for policy extremism to be greater under an SOP system . . . three things must be true” and listing those conditions, all of which involve the probability of one political party monopolizing control of government); *id.* at 342 nn.13–14 (noting his assumption that adopting extreme policies does not affect

To make this concrete, return to the example of tax rates. The status quo rate equals one percent, and the three legislators with power to change it operate under unanimity rule. They prefer rates of two, ten, and twenty percent, respectively. Because they operate under unanimity rule, and therefore need the first legislator's support, they cannot increase the rate drastically. The first legislator would only agree to move from one percent to a rate below three percent as that would bring the tax closer to his ideal.<sup>118</sup> Suppose they change the rate to 2.5 percent. Now the legislators' views evolve and they prefer rates of three, eleven, and twenty-one percent. They all prefer to increase the rate, but the change will have to be small. They might switch the rate from 2.5 to 3.4 percent, and the process continues.

In this scenario, law is unstable. Like a cart, it trails behind as voters march, never lurching ahead but never resting. The law under supermajority rule changes just as often as it would under majority rule, but it is less popular, by which I mean it never matches the median. Thus, entrenchment fails. It does not generate stable law or democratically responsive law.

Does entrenchment fail in practice like this theory predicts? Consider recent events in Texas. Amending that state's constitution requires supermajority support in the legislature, as well as majority support among the people.<sup>119</sup> In 2007, an amendment empowered the legislature to exempt the residences of certain "totally" disabled veterans from ad valorem taxation.<sup>120</sup> In 2011, an amendment empowered the legislature to

---

electoral fortunes and that assuming otherwise could weaken the incentive to pass extreme policies). Third, our hypotheses do not necessarily conflict because of Professor Stephenson's emphasis on distribution. For him, a policy change is extreme if the winners from the change keep the gains to themselves and do not share with the losers. See *id.* at 338, 355 (assuming the variable  $T$  represents a transfer from the winners of a policy change to the losers and labeling policies more extreme as  $T$  approaches zero). In contrast, I define extremism in a spatial sense, so a change from the status quo becomes more extreme as the distance between it and the new law grows. To illustrate the difference, a change from the status quo to a point just to its right would be incremental in my sense but, if the winners do not share their gains with the losers, extreme in Professor Stephenson's sense. Thus, our analyses can be understood to focus on different issues: the magnitude of the substantive change in my case and the distribution of spoils in his.

<sup>118</sup> To simplify, I assume the first legislator opposes changes that would leave him indifferent, as from one percent to three percent when his ideal equals two percent.

<sup>119</sup> See Tex. Const. art. XVII, § 1.

<sup>120</sup> See Tex. Legislative Council, Amendments to the Texas Constitution Since 1876, at 94 (Feb. 2016), <http://www.tlc.state.tx.us/docs/amendments/Constamend1876.pdf> [<https://perma.cc/3BSY-USSW>].

extend the tax exemption to the surviving spouse of a “totally” disabled veteran.<sup>121</sup> In 2013, another amendment let the legislature extend the tax exemption to “partially” disabled veterans and their surviving spouses when their “residence homestead was donated . . . by a charitable organization.”<sup>122</sup> In 2015, yet another amendment allowed the legislature to extend the tax break to the surviving spouse of a “totally” disabled veteran who died before the 2011 amendment took effect.<sup>123</sup> The law of homestead taxation rolls along.

The theory of entrenchment failure follows from the incrementalism principle. Because the law is entrenched, only incremental change is possible, and incremental change cannot bring an unpopular law back to the political center. It also follows from an independent idea, the *pace principle*. As the pace of preference change slackens—as law creeps rather than jumps out of equilibrium—the range of alternatives that can replace it shrinks. Returning to Figure 5, if SQ slips out of the equilibrium set as pictured, it can only slip back in. If instead law leaps out of the set—SQ suddenly aligns with *j*'s ideal point—it can leap back in, all the way to the median, even under 5/7ths rule. The pace principle holds regardless of the level of entrenchment.

#### IV. IMPLICATIONS

Should constitutional law change through amendment, or should judges update constitutions through interpretation? Why are constitutions worldwide unpopular among the people they govern? Is consensus in lawmaking desirable? When should we shun amendments and call a constitutional convention? These are fundamental questions, and the ideas developed above help answer them.

##### *A. Incrementalism and Constitutional Theory*

One of the thorniest and longest-running debates in American constitutional law involves the choice between amendment and judicial updating. Scholars have produced volumes on this topic, but here I will just sketch the dominant perspectives. One side argues that Article V provides the exclusive means of constitutional change, and that judicial updating—changing constitutional meaning through interpretation—

---

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 95.



violates this principle and produces bad results.<sup>124</sup> This view is closely associated with the interpretive theory of originalism.<sup>125</sup> The other side rejects originalism<sup>126</sup> and embraces a more active role for courts. Professor Dworkin called for “a fusion of constitutional law and moral theory,”<sup>127</sup> and Professor Tribe argues that the Constitution “invites us, and our judges, to expand on the . . . freedoms that are uniquely our heritage.”<sup>128</sup> This kind of reasoning underpins “living constitutionalism.”<sup>129</sup>

The anti-updating claim rests in part on an assumption about Article V and formal amendment generally: It can correct constitutional defects. Professors McGinnis and Rappaport, leading scholars on originalism and supermajority rules, write, “[A] well-designed constitution should avoid becoming out-of-date. . . . When provisions do become out-of-date, one would expect that they would be amended.”<sup>130</sup> The incrementalism principle casts grave doubt on this. When provisions become outdated, they may well be amended, but amendment cannot necessarily bring them up to date. The same entrenchment that kept law steady for a time precludes amendments that would modernize it. Judicial interpretation, on the other hand, can bring law up to date. The Supreme Court operates under majority rule and thus is not constrained by the logic of incrementalism.

Here is another angle on the point. Scholars understand and often celebrate the fact that changing an entrenched law requires broad support. They argue that “[s]upermajority rules . . . address the need for consensus by permitting only norms with the support of a substantial consensus to be entrenched.”<sup>131</sup> But requiring consensus limits change. Expanding the size of the required coalition reduces the viable alternatives to a small set near the status quo. Thus, consensus is not optimal, at least not

<sup>124</sup> See, e.g., McGinnis & Rappaport, *Good Constitution* (2013), *supra* note 10, at 85–99; Scalia, *supra* note 11, at 854–56.

<sup>125</sup> See, e.g., McGinnis & Rappaport, *Good Constitution* (2013), *supra* note 10, at 85–99; Scalia, *supra* note 11, at 854–56.

<sup>126</sup> But see generally Balkin, *supra* note 50 (developing a theory of originalism that reserves a place for judges in constitutional construction).

<sup>127</sup> Ronald Dworkin, *Taking Rights Seriously* 149 (1977).

<sup>128</sup> Laurence H. Tribe, *God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* 45 (1985).

<sup>129</sup> See generally Strauss, *supra* note 13, at 115 (arguing that “[s]ome form of living constitutionalism is inevitable, and necessary, to prevent the Constitution from becoming either irrelevant or, worse, a straitjacket that damages the society by being so inflexible”).

<sup>130</sup> McGinnis & Rappaport, *Good Constitution* (2010), *supra* note 21, at 1737.

<sup>131</sup> McGinnis & Rappaport, *Good Constitution* (2013), *supra* note 10, at 12.

when substantial change is warranted. Because courts do not require consensus beyond a bare majority, they can make such change.

To be clear, I do not claim that judicial updating systematically outperforms formal amendment. That judges *can* bring law up to date does not mean they will or even should.<sup>132</sup> Still, thinking in these terms helps us understand constitutional change in a new way. We have long thought of the amendment process as a mechanism for change. George Washington did not contend that the Constitution was “free from imperfections,” but he stated that Article V leaves “a Constitutional door open” to remedy them.<sup>133</sup> The incrementalism principle and the analysis of entrenchment failure suggest otherwise. Sometimes, perhaps often, amendment cannot deliver much of a remedy. It can, however, reliably block change, and perhaps we should think of it in those terms. Amendment rules do not create a mechanism for curing law’s imperfections; mostly they determine how imperfect law can become.

The incrementalism principle may create another quandary for scholars who oppose updating. Living constitutionalists do not argue that updating does or should grant judges vast discretion that produces monumental change. Instead, they argue that updating does and should happen in a gradual, common law–like fashion that constrains judges.<sup>134</sup> If this argument is right as a positive matter—if updating does, in fact, tend to happen through the gradual accumulation of precedent—then updating may mimic, rather than undercut, formal amendment.<sup>135</sup> Both approaches may produce more or less the same incremental change.<sup>136</sup>

So far, I have shown that the incrementalism principle presents challenges for opponents of updating, including many originalists, but it may also hearten them. To the extent one prizes stability in law, Article V

---

<sup>132</sup> See Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in *The Least Examined Branch: The Role of Legislatures in the Constitutional State* 229, 259–70 (Richard W. Bauman & Tsvi Kahana eds., 2006) (providing a thorough evaluation of the relative strengths and weaknesses of amendment and updating and pinpointing complications).

<sup>133</sup> Levinson, Introduction, *supra* note 19, at 3 (internal quotation marks omitted).

<sup>134</sup> See Strauss, *supra* note 13, at 33–49 (arguing that judges interpret the Constitution in a way analogous to common law adjudication).

<sup>135</sup> See McGinnis & Rappaport, *Good Constitution* (2013), *supra* note 10, at 88–90 (explaining how judicial updating of a constitutional provision can preclude amendment, even if the updating does not produce the same result that amendment would).

<sup>136</sup> If both processes produce the same kind of change, then judicial updating is unnecessary. On the other hand, if both processes produce the same kind of change, then judicial updating is harmless.

and entrenchment generally do more work for the cause than is apparent. Not only do demanding amendment rules prevent change, they promote incrementalism. Between incrementalism and overhaul, whether through judicial updating or other means, originalists and other legal conservatives will probably tend to prefer the former.

If the incrementalism principle bolsters this side, it may discourage the other. For legal liberals, living constitutionalists, and others who prioritize responsiveness, Article V is worse than they thought. Not only does it inhibit change, when the gates finally open and amendment becomes possible, Article V greatly limits its scope.

### *B. Incrementalism and Constitutional Failure*

Ratified in 1788, the American Constitution is remarkably old. “[M]ost constitutions die young, and only a handful last longer than fifty years.”<sup>137</sup> What explains constitutional mortality? Recent, valuable work connects it to the depth of entrenchment. Scholars have shown that easy-to-amend constitutions live short lives—presumably because they are unstable—but so do hard-to-amend constitutions.<sup>138</sup> The latter get ignored rather than updated.

If a constitution gets ignored and discarded, and in the process presumably violated, that must generally count as a constitutional failure. This is especially so if the constitution provided a (disused) mechanism for its own amendment. Thus, the work quoted above leads to a theory, albeit an imprecise one: Constitutions fail when they are too easy or too hard to amend.

The incrementalism principle enriches this reasoning. Constitutions can fail for the same reason that entrenchment in general fails. Recall the theory of entrenchment failure developed in Section III.B: When voters’ preferences drift consistently in one direction, entrenched law eventually slips out of the equilibrium set. Because of the incrementalism principle, it can only slip, not jump, back into the set. As preferences keep drifting, law promptly slips out of the set again, it gets replaced again, and the process repeats.

Voters may tolerate some entrenchment failure. They may tolerate one or a few constitutional provisions that are neither stable nor aligned with popular opinion. But they may not tolerate a constitution full of

---

<sup>137</sup> Elkins, Ginsburg & Melton, *supra* note 23, at 1.

<sup>138</sup> See *id.* at 140 (developing this hypothesis).

such provisions, and they might not tolerate a constitution with even a single such provision if they feel intensely about the issue it addresses.

These ideas generate a theory of constitutional failure: Constitutions are more likely to fail as entrenchment deepens and as preferences evolve slowly but persistently in one direction. The second part of the theory is the original and counterintuitive part. If voters' preferences never change, they will not reject their constitution, assuming it more or less aligns with their values to start. Likewise, if voters' preferences change suddenly and dramatically, they will not reject their constitution because they can amend it, even under supermajority rule, to reflect popular values (this is the pace principle discussed above). But if their preferences change slowly and steadily, they find themselves in a bind. The constitution is neither stable nor responsive, and amendment cannot solve the problem. This is when constitutions fail.

To demonstrate this theory, consider France. The Fourth Republic, which began after World War II, was notorious for cabinet instability and political paralysis.<sup>139</sup> In 1950, a movement for constitutional revision developed, espousing three aims: to empower one of the chambers of the national parliament, to bolster the executive, and to curb the obstructiveness of the Communist Party.<sup>140</sup> After four years of wrangling, a slate of amendments received supermajority support and became law.<sup>141</sup> Only the "least important" among them received "overwhelming" support,<sup>142</sup> and two articles "were altered only in a technical sense and remain[ed] substantially the same as they were in the original constitution."<sup>143</sup> As one observer wrote, "lines of [constitutional] reform had definitely crystallized," but only "one minor reform had been put through in 1954."<sup>144</sup> That reform was insufficient, and continued paralysis coupled with a crisis in Algeria prompted a constitutional collapse.<sup>145</sup>

---

<sup>139</sup> See, e.g., John D. Huber & Cecilia Martinez-Gallardo, *Cabinet Instability and the Accumulation of Experience: The French Fourth and Fifth Republics in Comparative Perspective*, 34 *Brit. J. Pol. Sci.* 27, 27 (2004).

<sup>140</sup> See Roy Pierce, *Constitutional Revision in France*, 17 *J. Pol.* 221, 221–22 (1955).

<sup>141</sup> See *id.* at 223.

<sup>142</sup> *Id.* at 221–22.

<sup>143</sup> *Id.* at 223.

<sup>144</sup> Carl J. Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 *Harv. L. Rev.* 801, 808 (1959).

<sup>145</sup> See Huber & Martinez-Gallardo, *supra* note 139, at 27 ("Party leaders often seemed incapable during the Fourth Republic of addressing many of the problems France faced, particularly in its colonies. Finally, during a crisis in Algeria in May 1958, a majority in the National Assembly voted themselves and the Constitution out of 'office' . . .").

The story of France is complicated, but its basic features match the model: Amendment could not produce the meaningful reform necessary to stabilize the constitution.

In addition to constitutional failure, these ideas cast light on an important question of constitutional evolution: When to amend and when to convene? Article V authorizes two methods for changing the text of the Constitution: amendments and conventions.<sup>146</sup> Other constitutions offer the same basic choice.<sup>147</sup> Amendments are more likely to fit the spatial models, which assume decisions happen on one issue at a time. Thus, changing law through amendment will more likely produce the incrementalism and instability described above. Conventions, on the other hand, often involve bargaining across multiple issues. Such bargaining can generate meaningful change. Returning to Figure 5, voter *l* will not, without more, approve replacing SQ with a law at *m*. She might, however, support such a change if she gets a change on another issue in exchange. Suppose the dimension in Figure 5 reflects rights for religious minorities, and another unpictured dimension reflects the right to education. Voter *l* opposes moving rights for religious minorities further from her ideal point—which going from SQ to *m* would do—but she would nevertheless support it as part of a deal that simultaneously moves the right to education closer to her ideal point. Thus, bargaining can produce large change even when law is entrenched and the incrementalism and pace principles operate.

In short, the solution to the constitutional predicament described above is a convention. Voters or their representatives must bargain across issues, not vote individually on each one. Returning to the case of France, after the constitution collapsed in 1958, General de Gaulle's government drafted a new one. Voters cast one vote on the complete package; they did not vote on each provision. According to a key parliamentarian, the new constitution "embod[ied] the reforms envisaged earlier," meaning the amendments considered but rejected during the Fourth Republic.<sup>148</sup> Revision accomplished what amendment could not. France's Fifth Republic endures to this day.

---

<sup>146</sup> See U.S. Const. art. V.

<sup>147</sup> See, e.g., Cal. Const. art. II, §§ 8, 10 (authorizing amendments to the California constitution through the initiative process); see *id.* art. XVIII, § 2 (authorizing constitutional conventions).

<sup>148</sup> See Friedrich, *supra* note 144, at 808.

Conventions have another advantage. Amendments can only move law *closer* to the political center. Every model and example above demonstrates this. Conventions are not so constrained, as constitutional bargaining could move a legal provision further from the center. Voter *l* might approve moving SQ to *m* in exchange for moving the right to education further from the center and toward her ideal point on the political fringe. If the status quo on religious rights causes discord while the right to education does not, then constitutional stability justifies this bargain. In short, if the objective is unpopular or drastic change, including change that seeks to replace an unstable status quo with a law deep in the equilibrium set, conventions work best.

### C. Incrementalism and Empiricism

Empirical legal studies has blossomed as a subfield of legal scholarship in recent years, enlivening comparative constitutional law. A group of scholars have brought rigorous empiricism to this subject and made important discoveries.<sup>149</sup> But they have also encountered puzzles, some of which incrementalism can help explain.

Constitutions tend to be “sticky,” meaning their contents do not fluctuate much over time.<sup>150</sup> “The recent . . . constitution-making process in Egypt . . . produced a constitution that looks remarkably similar to its predecessor.”<sup>151</sup> An empirical study of constitutions around the world suggests that amendments provoke little change: “The average amended constitution covers 97 percent of the same topics as the previous document, prior to amendment.”<sup>152</sup> “[I]nstitutional arrangements are incredibly resilient,” and scholars cannot fully explain why.<sup>153</sup> The incrementalism principle provides insight. Entrenchment not only stabilizes law, at least for a time, it also restricts the evolution of unstable law. Of course

---

<sup>149</sup> See, e.g., Elkins, Ginsburg & Melton, *supra* note 23, at 1–4; Versteeg, *supra* note 24, at 1136–39.

<sup>150</sup> See Varol, *supra* note 23, at 902–04 (stating that “even a casual survey of constitutional replacement and amendment processes around the globe reveals that many counterintuitively produce relatively little change” and referring to this as “constitutional stickiness”).

<sup>151</sup> *Id.* at 903.

<sup>152</sup> Elkins, Ginsburg & Melton, *supra* note 23, at 59.

<sup>153</sup> Kathleen Thelen, *How Institutions Evolve: Insights from Comparative Historical Analysis*, in *Comparative Historical Analysis in the Social Sciences* 208, 209 (James Mahoney & Dietrich Rueschemeyer eds., 2003).

constitutions resemble their prior versions: Entrenchment tends to thwart all but incremental change.<sup>154</sup>

This connects to a puzzle about popular support for constitutions. By many accounts, constitutions should enshrine a nation's highest ideals. "[I]n times of commitment to society's fundamental values," the conventional story goes, "great patriots entrench the society's timeless" principles.<sup>155</sup> Yet many constitutions, including some frequently amended ones, are deeply unpopular.<sup>156</sup> Again, the incrementalism principle has an explanation: Entrenchment forces law to change gradually. As preferences change and law becomes unpopular, amendments can help, but only a little. Absent a sudden and radical change in voters' preferences (recall the pace principle), amendment cannot bring an unpopular, entrenched law back to the political center. The new law may be nearly as out of step as the old.

Finally, recall that majority rule can lead to oscillation. Law can jump from one side of the median to the other and back again as it converges on the political center. This theoretical possibility conflicts with the widespread intuition that law, and especially constitutional law, often trails society. In the model's terms, law stays on one side of the median rather than skipping ahead to the other. The incrementalism principle explains why. Changes to entrenched law come in gradual steps, at least when those changes come through the amendment process. An out-of-step status quo lies on one side of the median or the other, and the incrementalism principle tends to keep it there. Entrenchment, for better or for worse, keeps law behind the times.

#### *D. Incrementalism and Legal Design*

The last implication is short but important: The analysis has lessons for ongoing legal design. Democracy and popular rule are celebrated in many corners of the globe, but most governments, including democratic ones, make collective decisions through one kind of supermajoritarian

---

<sup>154</sup> Entrenchment is especially likely to produce incrementalism when change happens through amendment. As discussed, conventions can generate greater change. See *supra* Section IV.B.

<sup>155</sup> Michael C. Dorf, *The Aspirational Constitution*, 77 *Geo. Wash. L. Rev.* 1631, 1632 (2009). Professor Dorf is expressing the conventional view, not necessarily his own.

<sup>156</sup> See Versteeg, *supra* note 24, at 1137 (finding in a study of many countries "generally no connection between specific constitutional choices and popular opinion").

procedure or another.<sup>157</sup> In addition to the well-known procedures addressed above, others—like quorum requirements,<sup>158</sup> absolute majority rules,<sup>159</sup> the Senate filibuster,<sup>160</sup> and equivalents in parliamentary systems<sup>161</sup>—are widespread. New decision rules get adopted every day. Recent decades have seen an explosion in constitutional drafting,<sup>162</sup> and all such efforts “run[] into the teeth of the old cliché: A ‘balance must be struck’ between rigidity and flexibility in constitutional entrenchment.”<sup>163</sup>

At a more parochial level, lawyers right now are drafting governing documents for civic groups and partnerships, and they confront the same choice. In short, entrenchment is ubiquitous, and the ideas developed above cast fresh light on it. Entrenchment exerts a drag on legal change. It compels and produces gradualism in a way previously unrecognized. When preferences evolve slowly, this effect compounds, and these forces combined can undermine the very law one seeks to protect.

A final point merits attention. Entrenchment stabilizes law regardless of its content. Thus, special interests like to entrench self-serving law even if it does not align with society’s deepest principles.<sup>164</sup> Next to religious liberties and property rights, state constitutions limit mechanics’ working hours<sup>165</sup> and forbid the caging of pregnant pigs.<sup>166</sup> At the federal

---

<sup>157</sup> See Pasquale Pasquino, *Majority Rules in Constitutional Democracies: Some Remarks About Theory and Practice*, in *Majority Decisions: Principles and Practices* 219, 219–22 (Stéphanie Novak & Jon Elster eds., 2014) (showing that supermajority procedures are widespread and concluding that scholars should “discount the alleged role of majority rule as the paramount decision-making rule of our democratic regimes”).

<sup>158</sup> See *id.* at 220 (discussing quorum requirements).

<sup>159</sup> See Adrian Vermeule, *Absolute Majority Rules*, 37 *Brit. J. Pol. Sci.* 643, 644–45 (2007) (discussing absolute majority rules).

<sup>160</sup> See Krehbiel, *supra* note 61, at 22–23 (discussing the filibuster as a supermajoritarian rule).

<sup>161</sup> See Pasquino, *supra* note 157, at 220–21 (discussing supermajoritarian procedures in parliaments).

<sup>162</sup> See Arend Lijphart, *Constitutional Design for Divided Societies*, 15 *J. Democracy* 96, 96 (2004) (discussing the “sea change” in constitutional design in the last fifty years).

<sup>163</sup> Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 275, 294–95 (Sanford Levinson ed., 1995).

<sup>164</sup> Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *Fordham L. Rev.* 111, 117 (1993) (discussing how “interest groups can seek rents from the legislature through constitutional provisions”).

<sup>165</sup> See Cal. Const. art. XIV, § 2.

<sup>166</sup> See Fla. Const. art. X, § 21.



level, the Administrative Procedures Act, an entrenched statute, gives powerful constituents influence over agencies that regulate them.<sup>167</sup> The incrementalism principle shows that entrenchment is more appealing to special interests than one might suppose. In addition to freezing their preferred laws in place, at least for a time, it limits changes to those laws. Mechanics and pregnant pigs may lose some of their protections, but probably not much and probably not quickly. The incentive of special interests to entrench is powerful, and legal designers must guard against it.

#### CONCLUSION

Entrenchment is a cornerstone of law at all levels and in many places. Scholars, especially in American constitutional law, explicitly or implicitly debate the merits of entrenchment when writing about Article V, the separation of powers, originalism, living constitutionalism, and so on. Lawyers and other legal designers select levels of entrenchment while revising constitutions and crafting church charters. All of this work takes account of entrenchment's first status quo bias: Entrenched law is hard to change. But a second bias has always operated: Entrenchment forces law to change in increments. Uncovering that bias casts fresh light on entrenchment and some of law's deepest puzzles.

---

<sup>167</sup> See generally Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *J.L. Econ. & Org.* 243, 244 (1987) (discussing how agencies can be channeled to favor results that most benefit interest groups).

\*\*\*