Temporal Limitations in Constitutional Amendment

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Formal amendment rules are designed to fragment or consolidate power, whether among political parties or government branches, or along ethnic, subnational, or other lines. Time is an understudied and undertheorized dimension along which amendment rules may also fragment or consolidate power. This temporal feature of formal amendment rules entails unique implications for how we understand the formation of constitutional consensus and how we evaluate contemporaneity in amendment ratification. In this article, I apply a comparative perspective to the use of time in formal amendment in order to demonstrate the possibilities for the design of temporal limitations and also to probe the trade-offs between political brinkmanship and contemporaneity in ratification. My larger purpose is to suggest a research agenda for further comparative inquiry into the use of time in the design of formal amendment rules.

Les règles de modification officielles sont conçues de manière à fragmenter ou consolider le pouvoir, que ce soit au sein de partis politiques ou d'agences gouvernementales ou encore, conformément à des lignes ethniques, infranationales ou autres. Le temps est une dimension qui, jusqu'à présent, a fait l'objet de peu d'études et de théories, et en vertu de laquelle les règles de modification peuvent aussi fragmenter ou consolider le pouvoir. Cette caractéristique temporelle des règles de modification officielles entraîne des conséquences uniques par rapport à la façon dont nous entendons la création du consensus constitutionnel et la façon dont nous évaluons la contemporanéité dans la ratification de modifications. Dans cet article, j'applique une perspective comparative à l'emploi du temps dans la modification officielle afin de montrer le potentiel pour l'élaboration de limites temporelles ainsi que pour examiner les compromis entre la politique de la corde raide et la contemporanéité en matière de ratification. Mon objectif plus global est de proposer un programme de recherche visant de nouvelles études comparatives sur l'emploi du temps dans l'élaboration des règles de modification officielles.

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I. Introduction

We cannot understand constitutional change without inquiring into its relation to time. Yet the temporal dimension of constitutional amendment remains today understudied and undertheorized, despite the prevalence of democratic constitutions that require constitutional actors to adhere to certain specifications as to the timing of various steps in the amendment process, whether at the initiation, proposal, or ratification stages, or indeed in all of these steps.[1] For example, amendment rules sometimes establish deliberation floors or ceilings to compel constitutional actors to consider an amendment proposal during a defined period of time, establishing either a minimum or maximum period of consideration.[2] Amendment rules sometimes also create safe harbour provisions that altogether prohibit constitutional actors from proposing amendments for a defined period of time, either after a new constitution has come into force or after an amendment has failed or succeeded.[3] In this article, I evaluate the use of temporal limitations in constitutional amendment from a comparative perspective in order both to demonstrate the possibilities for the design of temporal limitations and to expose the trade-offs between political brinkmanship and constitutional contemporaneity in constitutional amendment.[4]

Time is only one dimension along which formal amendment rules may fragment or consolidate power. They may also fragment or consolidate power among political parties, as does the Japanese Constitution, by requiring supermajority agreement in the national legislature.[5] Amendment rules may also fragment or consolidate power among branches of government; for example, the French Constitution authorizes the executive and legislature each to initiate a constitutional amendment.[6] Amendment rules may also fragment or consolidate power along ethnic or linguistic identities, as does the Constitution of Bosnia and Herzegovina, which authorizes amendment only by a Parliamentary Assembly whose members must include Croats, Bosniacs, and Serbs,[7] or the Constitution of Kiribati, which does not permit an amendment to the rights of Banabans unless the amendment is supported by the nominated or elected representative of the Banaban community.[8] Geographic boundaries are another

1 See Part II, *below*.
2 See Section II.B, *below*.
3 See Section II.A, *below*.
4 In this article I focus on the interrelation between time and constitutional change in connection only with formal amendment. I leave for another day how time interrelates with informal amendment.
5 Japan Const, ch IX, art 96 (1947).
6 France Const, tit XVI, art 89 (1958).
7 Bosnia & Herzegovina Const, art X, para 1 (1995).
8 Kiribati Const, ch IX, art 124 (1979).

way to fragment or consolidate the amendment power: in Iraq, regional legislative authorities and the people of the regions may withhold their consent from, and thereby defeat, certain amendments.[9] Federalist structures are yet another way of fragmenting or consolidating amendment power: the Constitutions of Australia and South Africa each sometimes require a subnational entity affected by a given amendment to consent to the change.[10]

Fragmenting and consolidating power are the core design strategy for formal amendment rules in constitutional democracies. Allocating power along these lines can serve any number of purposes, from promoting efficiency in formal constitutional change, to complicating amendment in order to protect the founding constitutional bargain, or to rallying a broad, representative, and sustainable base of support behind a ratified amendment.[11] In contrast to the consequences of consolidating the amendment power, fragmenting the amendment power almost always exacerbates amendment difficulty. The fragmentation of amendment power is a screen through which may pass only those amendments reinforced by a breadth and depth of political and popular agreement that may potentially reflect multiple layers of legitimacy — not only the legal legitimacy that comes from successfully navigating the textually entrenched rules of amendment or the sociological legitimacy reflected in the approval of constitutional actors representing disparate groups, but also the moral legitimacy associated with modern forms of collaborative governance that privilege consent and cooperation over conquest and the consolidation of power.[12]

The fragmentation and consolidation of the amendment power across time has unique properties and consequences that today remain open questions. The study of the temporal dimension of constitutional amendment moreover responds to Paul Pierson's call for greater attention to the *structure* as opposed to the *number* of veto points in institutional design, particularly as to how and why political institutions are structured to resist or facilitate change.[13] I therefore take this as an invitation, both to fill the void and to advance our learning and interest in the relationship between time and change. Although I focus primarily on Canada and the United States, the analysis may be applicable elsewhere and indeed is intended to invite further study.

9 Iraq Const, s VI, ch I, art 126 (2006).

10 Australia Const, ch VIII, art 128 (1901); South Africa Const, ch 4, art 74 (1996).

11 In this article, I use "amendment" to mean "formal amendment" unless otherwise noted.

12 For a discussion of these three forms of legitimacy, see Richard H Fallon, Jr, "Legitimacy and the Constitution" (2005) 118:6 Harv L Rev 1787 at 1794-97.

13 See Paul Pierson, *Politics in Time* (Princeton University Press, 2004) at 144-46.

Just as democratic constitutions structure the conduct of their subjects and objects — the who and what of constitutional law — constitutions sometimes also structure the timing — the when — of decisions constitutional actors make on the authority of the constitutional text. For example, the *Constitution Act, 1982* required the Prime Minister of Canada to convene a first ministers' constitutional conference within 15 years of its coming-into-force.[14] The United States Constitution established a temporal rule of its own: the slave trade was protected from abolition for the first 20 years of the Constitution.[15] These and other uses of time in constitutional design to shape conduct and choice have with good reason drawn recent attention from scholars of comparative public law.[16] Yet there remains much to learn about the temporal dimension of constitutional change, specifically about the architecture of the rules of formal amendment.

My purpose in this article is to illuminate the options available to constitutional designers as they consider whether and why to entrench temporal limitations on how constitutional actors deploy amendment rules. This study of amendment has real implications for the present day, as we have seen and will likely continue to see efforts by constitutional actors around the democratic world to circumvent the onerous rules of constitutional amendment.[17] Constitutional designers have at their disposal resources to help them understand the relationship between formal amendment difficulty and informal constitutional change,[18] as well as how to identify when constitutional actors deploy the democratic procedures of amendment and ordinary law-making to achieve non-democratic ends.[19] But they have few resources to understand and

14 See *Constitution Act, 1982*, s 49, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. The conference was held in 1996 but some question whether it fulfilled the spirit of the requirement. See John D Whyte, "'A Constitutional Conference … Shall be Convened …' Living with Constitutional Promises" (1996) 8:1 Const Forum Const 15.

15 US Const, art V (1789).

16 See e.g. Sofia Ranchordás, *Constitutional Sunsets and Experimental Legislation* (Cheltenham: Edward Elgar, 2014); Ozan O Varol, "Temporary Constitutions" (2014) 102:2 Cal L Rev 409; Rosalind Dixon & Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" (2011) 9:3 Intl J Const L 636.

17 See Richard Albert, "Amending Constitutional Amendment Rules" (2015) 13 Intl J Const L 655.

18 See e.g. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999) at 225-30; Edward Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Lanham, MD: Rowman & Littlefield Publishers, 2006) at 223.

19 See e.g. Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673; Ozan O Varol, "Stealth Authoritarianism" (2015) 100 Iowa L Rev 1673; David Landau, "Abusive Constitutionalism" (2013) 47:1 UC Davis L Rev 189.

evaluate the use of temporal limitations in the design of formal amendment rules. I seek here to begin to fill that void.

II. Time and Change in Constitutional States

There are two major forms of temporal limitations in constitutional amendment: deliberation requirements and safe harbours.[20] I focus in this article on deliberation requirements, though it is useful here to distinguish them from safe harbours and to briefly discuss the latter. A deliberation requirement compels constitutional actors to evaluate an amendment proposal during a defined period of time. This period of time may be either a floor or a ceiling, the former referring to a minimum amount of time for which an amendment proposal must remain open to deliberation by constitutional actors and the public prior to its ratification, and the latter to the maximum amount of time during which constitutional actors and the public may deliberate on an amendment before a ratification vote must be held. A safe harbour creates an outright prohibition on constitutional amendment during a specified period of time. Both kinds of limitations are variable in that designers may choose to entrench deliberation requirements or safe harbours of varying durations of time, either separately or in combination.[21]

A. Safe Harbours

Constitutional designers entrench different forms of safe harbours in connection with constitutional amendment. We can identify at least five general periods of time during which designers will impose safe harbours: (1) states of emergency; (2) periods of succession or regency; (3) the interval following a failed amendment; (4) the interval following a successful amendment; and (5) the period immediately following the adoption of a new constitution. Each of these forms of safe harbours disables the amendment process during specified periods of time.

Consider a safe harbour during a state of emergency. Under the Spanish Constitution, "[t]he process of constitutional amendment may not be initiated in time of war or under any of the states considered in section 116,"[22] a refer-

20 See Richard Albert, "The Structure of Constitutional Amendment Rules" (2014) 49:4 Wake Forest L Rev 913 at 952-54.

21 Safe harbours are occasionally subject to override, as in Portugal, where constitutional actors may by an extraordinary supermajority and for exceptional reasons vote to initiate the amendment process despite the prohibition on amendment. See Portugal Const, tit II, art 284(2) (1976).

22 Spain Const, pt X, s 169 (1978).

ence to states of "alarm, emergency and siege (martial law)."[23] Constitutions also entrench safe harbours in connection with succession or where a ruler is unable to lead. In Belgium, for example, "[d]uring a regency, no change can be made in the Constitution with respect to the constitutional powers of the King and Articles 85 to 88, 91 to 95, 106 and 197 of the Constitution."[24] Likewise, in Luxembourg, "[d]uring a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession."[25]

Safe harbours sometimes also prohibit amendment in the immediate aftermath of a failed or successful amendment and in the period following the adoption of a new constitution. In Estonia, "[a]n amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the Riigikogu,"[26] the unicameral legislature authorized to amend the Constitution in collaboration with other institutions in the country.[27] In contrast, under the Greek Constitution, "revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision."[28] The Cape Verdean Constitution illustrates the fifth form of safe harbour, which authorizes amendments only five years after the adoption of the 1980 Constitution: "This Constitution may be revised, in whole or in part, by the National Assembly after five years from the date of its promulgation."[29] The Constitution does, however, create an escape-hatch authorizing an extraordinary supermajority of the National Assembly to bypass this safe harbour.[30] One of the earliest safe harbours, if not the first, appeared in the first French Constitution, which disallowed amendments to the new constitution for the first two terms of the national legislature.[31]

B. Deliberation Floors and Ceilings

This article is concerned principally with deliberation requirements. The distinction between a deliberation floor and ceiling is important to what follows, so let us review examples of each to concretize the difference. A deliberation floor establishes a minimum period of time to deliberate on an amendment

23 *Ibid*, pt V, s 116.
24 Belgium Const, tit VIII, art 197 (1994).
25 Luxembourg Const, ch. X, art 115 (1868).
26 Estonia Const, ch XV, art 168 (1992).
27 *Ibid*, ch XV, arts 161-68.
28 Greece Const, pt IV, s II, art 110(6) (1975).
29 Cape Verde Const, tit III, art 309(1) (1980).
30 *Ibid*, tit III, art 309(2).
31 French Const, tit VII, art 3 (1791).

proposal prior to a binding vote or action to ratify it, or to move the proposal forward to the next steps in the amendment process. In contrast, a deliberation ceiling establishes the maximum period of time within which to consider and vote on an amendment.

Consider the Italian Constitution. It creates a deliberation floor requiring at least three months between legislative debates on an amendment proposal: "Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting."[32] Similarly, although its deliberation floor is directed to the public, not the legislature, the South Korean Constitution requires the President to give the public a minimum amount of time to evaluate an amendment: "Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more."[33]

In contrast, the Costa Rican Constitution entrenches a deliberation ceiling. The Legislative Assembly must review the amendment proposal "three times at intervals of six days, to decide if it is admitted or not for discussion."[34] The Australian Constitution merges both a deliberation floor and ceiling into its conditions for ratifying an amendment: "The proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."[35]

There is a third variety of deliberation requirement: the intervening elections model. This model of constitutional change combines time with the design of representative institutions, for instance by requiring successive parliaments to consent to an amendment. The same parliament is prohibited from both proposing and ratifying a formal amendment without an intervening national election to reconstitute the parliament between each of these steps. This model is prominent in Scandinavia, where Denmark, Norway, and Sweden

32 Italy Const, tit VI, s II, art 138 (1947).
33 South Korea Const, ch X, art 129 (1948).
34 Costa Rica Const, tit XVII, art 195(2) (1949).
35 Australia Const, pt V, ch VIII, art 128 (1901).

each structure formal amendment in this way.[36] In this article, I focus only on deliberation floors and ceilings.

III. Two Models of Constitutional Consensus: Canada and the United States

Both deliberation floors and ceilings structure how constitutional actors and the public arrive at the consensus required to legitimate a constitutional amendment. Yet each design is anchored in a different perspective on the nature and form of the political agreement that legitimizes a constitutional amendment and each privileges different values in the formation of constitutional consensus. In this section, I compare two competing approaches to the entrenchment of deliberation floors and ceilings. The American model, which imposes neither a deliberation floor nor a ceiling, authorizes the inter-generational ratification of a constitutional amendment. Inter-generational ratification fragments the amendment power across time. In contrast, the Canadian model imposes both a deliberation floor and a ceiling. It therefore makes constitutional amendment conditional on intra-generational ratification and consolidates the amendment power in a defined period of time. Both models reveal complications, some more problematic than others.

A. Inter-Generational Ratification

The text of the original United States Constitution is silent on when amendment proposals must be ratified. As I discuss below, however, Congress has sometimes imposed a ratification deadline on amendment proposals, an option the Constitution leaves open by its very silence. On this point, the text of the Constitution says only that an amendment will be valid where two-thirds of Congress votes to propose one and thereafter three-quarters of the states vote to ratify it either in state legislatures or conventions.[37] By law, though not required by the constitutional text, the Archivist of the United States issues a certification when the requisite number of states have ratified an amendment.[38] Historically, the average time span from proposal to ratification has been under two years and three months for 24 of the 27 amendments to the Constitution,

36 See Denmark Const, pt X, sec 88 (1953); Norway Const, pt E, art 121 (1814); Sweden Inst of Gov, ch 8, art 16 (1974).

37 US Const art V. The convention-centric amendment process has never been successfully used. See William B Fisch, "Constitutional Referendum in the United States of America" (2006) 54:Supp Am J Comp L 485 at 490.

38 See 1 USC § 106b (1988).

but one amendment proposal took over 200 years to ratify.[39] The Constitution's silence has with good reason raised questions about how long a state may take to ratify a proposal.

On March 2, 1861, one month before the first major battle in the Civil War, the United States Congress passed an amendment proposal protecting slavery in the states. Known as the "Corwin Amendment," for Representative Thomas Corwin,[40] this amendment proposed that "[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[41] Outgoing president James Buchanan signed the proposal,[42] newly-elected president Abraham Lincoln did not oppose it,[43] and three states ratified it.[44] However, the onset of the Civil War interrupted the ratification process.[45] The Corwin Amendment would have become the Thirteenth Amendment had it been ratified,[46] but instead the United States ultimately entrenched a different Thirteenth Amendment abolishing slavery.[47]

This sequence of events suggests a question worth asking: is the Corwin Amendment still today ratifiable?[48] The ratification of the Twenty-Seventh Amendment in 1992 — well over 200 years after Congress passed it and transmitted it to the states — suggests the answer could well be yes. The amendment states that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[49] James Madison initially proposed the amendment in the

39 See The U.S. National Archives and Records Administration "Constitution of the United States: Amendments 11-27", *The Charters of Freedom* (2015), online: <www.archives.gov/exhibits/charters/constitution_amendments_11-27.html>.

40 Ewen Cameron Mac Veagh, "The Other Rejected Amendments" (1925) 222 The North American Rev 274 at 281.

41 US, HR Res 80, *Proposing an Amendment to the Constitution of the U.S.*, 36th Cong, 1861.

42 Rogers M Smith, "Legitimating Reconstruction: The Limits of Legalism" (1999) 108:8 Yale LJ 2039 at 2059 n 89.

43 Abraham Lincoln, First Inaugural Address (4 Mar 1861), reprinted in *The Abraham Lincoln Papers at the Library of Congress*, Washington, DC, Library of Congress, online: <memory.loc.gov/mss/mal/mal1/077/0773800/012.jpg>.

44 Douglas Linder, "What in the Constitution Cannot be Amended?" (1981) 23:2 Ariz L Rev 717 at 728.

45 Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge: Harvard University Press, 2010) at 36.

46 Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York: New York University Press, 2004) at 2-3.

47 US Const, amend XIII.

48 Michael Stokes Paulsen, "A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment" (1993) 103:3 Yale LJ 677 at 701-04.

49 US Const, amend XXVII.

First Congress on June 8, 1789.[50] Congress adopted a resolution proposing the amendment in the same year, six states had ratified it by 1792, and a seventh state ratified it in 1873.[51] Yet it was not until 1978 that another state ratified the amendment, which subsequently led another 30 states to jump aboard in the intervening 14 years.[52] In 1992, Michigan became the 38th state to ratify the amendment proposal, in so doing reaching the three-fourths threshold for satisfying the ratification requirement.[53] Despite having taken over 200 years to ratify, Congress saw no constitutional infirmity with the amendment,[54] the Department of Justice issued a memorandum defending its constitutional soundness,[55] and a federal court refused to hear a challenge to it.[56]

The amendment rules in Article V do not prohibit Congress from imposing a time limit on states to ratify an amendment proposal.[57] Yet it was not until the Eighteenth Amendment that Congress first imposed a ratification deadline.[58] The proposal stated that "this article shall become inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the State by the Congress."[59] Similar language has appeared in all amendment proposals or authorizing resolutions since the Twentieth Amendment.[60] The Corwin Amendment could therefore be ratifiable by the requisite number of states today. The same is true

50 Louise Weinberg, "Political Questions and the Guarantee Clause" (1994) 65:4 U Colo L Rev 887 at 937 n 179.

51 Gideon M Hart, "The 'Original' Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment" (2010) 94 Marq L Rev 311:1 at 327 n 88.

52 Richard A Primus, "When Should Original Meanings Matter?" (2008) 107:2 Mich L Rev 165 at 209 n 157.

53 David P Currie, "The Constitution in Congress: Substantive Issues in the First Congress" (1994) 61:3 U Chi L Rev 775 at 851 n 449.

54 Paul E McGreal, "There is no Such Thing as Textualism: A Case Study in Constitutional Method" (2001) 69:6 Fordham L Rev 2393 at 2431.

55 Memorandum from the Office of the Assistant Attorney General (2 November 1992) in US, US Department of Justice Office of Legal Counsel, *Opinions of the Office of Legal Counsel: Consisting of Selected Memorandum Opinions Advising the President of the United States, The Attorney General and Other Executive Officers of the Federal Government In Relation to Their Official Duties* (Washington DC: US Department of Justice, 1992) vol 16 at 102, online: <www.ncjrs.gov/pdffiles1/Digitization/141890NCJRS.pdf>.

56 See *Boehner v Anderson*, 809 F Supp 138 (D DC 1992).

57 Adam M Samaha, "Dead Hand Arguments and Constitutional Interpretation" (2008) 108:3 Colum L Rev 606 at 649.

58 Peter Suber, "Population Changes and Constitutional Amendments: Federalism Versus Democracy" (1987) 20:2 U Mich JL Reform 409 at 423-24.

59 US Const, amend XVIII, § 3.

60 Michael J Lynch, "The Other Amendments: Constitutional Amendment that Failed" (2001) 93:2 L Library J 303 at 305.

of three other amendments proposed by the Congress years ago but not yet ratified by the states.

Each of these unratified amendments has been passed by both houses of Congress, transmitted to the states, and contains no expiration date. Each apparently remains viable as a valid amendment pending ratification by the required three-quarters of states. The first proposes to change the size and number of congressional districts.[61] Proposed in 1789, it has thus far been ratified by roughly 10 states.[62] The second would strip American citizenship from anyone who accepts a foreign title of nobility, honour, or dispensation without congressional permission.[63] It was successfully proposed in 1810 by a wide margin in the Senate and the House.[64] The third proposes to grant Congress the power to regulate child labour.[65] Proposed in 1924, it has been ratified by twenty-eight states.[66] The fourth outstanding amendment is the Corwin Amendment.

These four outstanding amendment proposals were transmitted to the states in 1789, 1810, 1861, and 1926, respectively. The long interval between proposal and ratification raises the question whether an amendment without a ratification deadline nonetheless expires after a significant period of time. The answer from political practice is no: the Twenty-Seventh Amendment was ratified over 200 years after its proposal. The answer from the case law of the United States Supreme Court appears also to be no: lapse of time does not by itself negate the ratifiability of an amendment passed by Congress and transmitted to the states.[67] Whether an amendment has been ratified with sufficient contemporaneity to its proposal is a judgment for Congress to make,[68] and Congress' judgment is moreover a political question unreviewable by courts.[69] The congressional role is collateral to the larger point here, however, which is that the United States Constitution authorizes inter-generational ratification:

61 1 Pub Res 3, *Proposing an Amendment to the Constitution of the U.S.*, 1st Cong, 1 Stat 97 (1789).

62 Gabriel J Chin & Anjali Abraham, "Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments" (2008) 50:1 Ariz L Rev 25 at 29.

63 11 Pub Res 2, *Proposing an Amendment to the Constitution of the U.S.*, 11th Cong, 2 Stat 613 (1810).

64 Curt E Conklin, "The Case of the Phantom Thirteenth Amendment: A Historical and Bibliographic Nightmare" (1996) 88:1 Law Library J 121 at 123.

65 US, HRJ Res 184, *Proposing an Amendment to the Constitution of the U.S.*, 68th Cong, 1924.

66 Jol A Silversmith, "The 'Missing Thirteenth Amendment': Constitutional Nonsense and Titles of Nobility" (1999) 8 S Cal Interdisciplinary LJ 577 at 580 n 20.

67 *Coleman v Miller*, 307 US 433 (1939).

68 *Ibid* at 454.

69 *Ibid. Coleman* refined the earlier holding in *Dillon v Gloss*, 256 US 368 (1921), which held that ratification "must be within some reasonable time after the proposal." *Ibid* at 375. Nonetheless it is unclear whether the modern Court would resolve the issue in the same way.

an amendment proposal may be validly ratified by a future generation whose ratifiers may not even have been alive when it was first proposed.

B. Intra-Generational Ratification

In contrast, the general amendment procedure in the Constitution of Canada consolidates the amendment power in the hands of present political actors in a compressed period of time: it requires intra-generational ratification and indeed denies the possibility of inter-generational ratification. Here I stress the *general* amendment procedure because the *Constitution Act, 1982* entrenches five separate amendment procedures,[70] each one designated for amendments to specific provisions and principles and each increasing in difficulty according to the importance of the entrenched provision or principle to which it is assigned.[71] It is beyond the scope of this article to explain and evaluate all five amendment procedures but a short word on each is appropriate.[72]

The unilateral provincial amendment procedure authorizes provinces to amend their own constitution by simple legislative majority.[73] The unilateral federal amendment procedure, authorizes a majority in both houses of Parliament to amend Parliament's own internal constitution and matters of federal executive government.[74] The regional amendment procedure requires both houses of Parliament and the legislatures of one or more but not all provinces affected by a given amendment to agree by majority vote to the amendment.[75] The most onerous amendment rule, the unanimity procedure, requires approval resolutions from both houses of Parliament and from each provincial legislature, and it applies to amendments to the provisions and principles thought to be most important in Canada, including the monarchy, the composition of the Supreme Court, and the rules of formal amendment themselves.[76] None of these four amendment procedures entrenches a temporal limitation on proposal or ratification.

70 Parliament also possesses a narrow power of amendment outside of the *Constitution Act, 1982*. See *Constitution Act, 1867*, (UK), 30 & 31 Vict, c. 3, s 101, reprinted in RSC 1985, Appendix II, No 5.

71 See *Constitution Act, 1982*, *supra* note 14, Part V. For a theoretical perspective on the purpose of these escalating amendment thresholds, see Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2016) 41:1 Queen's LJ 143.

72 For a detailed analysis of Canada's formal amendment rules, see Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85.

73 *Constitution Act, 1982*, *supra* note 14, s 45.

74 *Ibid*, s 44.

75 *Ibid*, s 43.

76 *Ibid*, s 41.

The general amendment procedure in Canada entrenches both a deliberation floor and ceiling, in contrast to the United States Constitution. This procedure requires approval from both houses of Parliament and from at least two-thirds of the provinces whose aggregate population represents at least half of Canada's total provincial population.[77] This "general" amendment procedure serves as both the default amendment procedure and a more targeted one: it must be used to amend all provisions and principles not otherwise assigned to another amendment procedure and it also applies to certain designated provisions and principles, for instance senatorial selection, power, and representation.[78] For our purposes, the key parts of the general amendment procedure are the temporal limitations it puts on ratifying an amendment:

> A proclamation shall not be issued [] before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.
>
> A proclamation shall not be issued [] after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.[79]

The first part reflects a deliberation floor and the second a deliberation ceiling. Together, they generate the rule that no amendment may become official without giving constitutional actors at least one year from the date of its proposal to consider it, nor may an amendment pass after three years from the same date. This is a very small window of time within which to authorize a material change to the Constitution of Canada. Below I discuss the consequences of this rule.

But first consider that there are both theoretical and actual reasons why this rule makes sense in the Canadian context. As a matter of theory applicable elsewhere, the rationale for the three-year limit was threefold: first, "to bring closure to an amendment process that was dragging on without ever capturing the necessary support"; second, to "ensure that a forgotten resolution supporting an amendment would not later catch a government by surprise if the requisite support was gained"; and third, "to ensure a proposal was debated at a time when the circumstances surrounding its initiation were still current."[80] As a Canada-specific matter, however, the one-year rule must be read alongside

77 *Ibid*, s 38(1).
78 *Ibid*, s 42(1).
79 *bid*, s 39.
80 Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42:2 UTLJ 139 at 146.

the cluster of rules allowing provinces to opt out of amendments that affect provincial powers, rights, or privileges.[81] In order to invoke this protection, a province "needs a reasonable time to decide whether or not to exercise this option, and one year does not seem unduly long to consider a change that is likely to last for generations."[82] The Constitution's formal amendment rules are therefore designed to give provinces one year to evaluate whether to proceed with ratifying the amendment or to opt out from its application.

The Constitution of Canada entrenches other amendment rules in connection with time. For example, the House or Senate or indeed any legislative assembly may rescind an earlier-passed resolution of assent to a proposed amendment at any time before the amendment is proclaimed.[83] Indeed, Newfoundland exercised this power of rescission when a change of government occurred while the Meech Lake Accord was pending before the legislative assemblies.[84] Another temporal amendment rule in Canada allows the House to overcome Senate inaction: an amendment made using the regional, general, or unanimity procedure may be made without an authorizing Senate resolution if the Senate has not adopted one within 180 days of the House of Commons adopting its own authorizing resolution and again adopting it after 180 days.[85] The rules of amendment specify that this 180-day period does not run while Parliament is prorogued or dissolved.[86]

Some have attributed the failure of the Meech Lake Accord to the three-year deliberation ceiling, which required provinces to ratify it within the specified time or the entire amendment package would expire.[87] The Meech Lake Accord sought to fulfill Quebec's requests for more powers in the aftermath of the process that led to the *Constitution Act, 1982* — a process in which Quebec

81 *Constitution Act, 1982*, *supra* note 14, ss 38(2)-(4), s 40.

82 Swinton, *supra* note 80.

83 *Constitution Act, 1982*, *supra* note 14, s 46(2).

84 James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 112.

85 *Constitution Act, 1982*, *supra* note 14, s 47(1).

86 *Ibid*, s 47(2).

87 See e.g. Canada, Special Joint Committee of the Senate and House of Commons on the Process for Amending the Constitution of Canada, The Process for Amending the Constitution of Canada (Ottawa: Supply and Services Canada, 1991) at 31; Gordon Robertson, *Memoirs of a Very Civil Servant: Mackenzie King to Pierre Trudeau* (Toronto: University of Toronto Press, 2000) at 342-48; Patrick J Monahan, "After Meech Lake: An Insider's View" (The Inaugural Thomas G Feeney Memorial Lecture delivered at the University of Ottawa 13 October 1990), at 9-10, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/reflectionpapers/Reflections5AfterMeechLake.pdf >.

had been marginalised.[88] Negotiated by the heads of government in Canada, the Meech Lake Accord was both perceived as and indeed was in fact the result of "executive federalism,"[89] a term with negative connotations for excluding the public from meaningful participation in its design and negotiation. The Accord proposed amendments to recognize Quebec as "a distinct society,"[90] to give all provincial governments the formal power to suggest senatorial nominees for appointment,[91] to grant all provinces some control over immigration, to constitutionalize the Supreme Court,[92] to mandate constitutional conferences,[93] and to grant all provinces a veto in constitutional amendments on major items concerning proportional representation, the Supreme Court, and the Senate.[94] Most of what Quebec had demanded was later offered to all provinces.

There was some doubt, however, whether the Meech Lake Accord was indeed subject to the three-year time limit in the general amendment procedure.[95] The uncertainty arose from the Meech Lake amendment package itself, parts of which on their own would trigger the general amendment procedure while others would fall under the unanimity procedure. Only the general amendment procedure requires that an amendment be ratified within three years of its initiation; the unanimity procedure does not. Yet constitutional actors proposed the Meech Lake Accord as an omnibus bill of amendments and subjected it to the most exacting requirements of both the general and unanimity procedures, requiring Parliament and each of the provinces to approve the proposal within three years. As Warren Newman argues, it may not have been constitutionally necessary to subject the entire Meech Lake Accord to the three-year requirement.[96] Constitutional actors could have split the package into two parts: one with amendments in relation to matters under the unanimity rule in Section 41, which does not impose a deliberation requirement; and

88 See Peter W Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) at 3-4.

89 David Cameron & Richard Simeon, "Intergovernmental Relations in Canada: The Emergency of Collaborative Federalism" (2002) 32:2 Publius 49 at 52.

90 The 1987 Constitutional Accord, Ottawa, Ontario, June 3, 1987, at Schedule s 1 ("Meech Lake Accord") (not ratified).

91 *Ibid* at Schedule s 2.

92 *Ibid* at Schedule s 3.

93 *Ibid* at Schedule s 13.

94 *Ibid* at Schedule s 9.

95 Compare Gordon Robertson, "Meech Lake — The myth of the time limit" (1989) 11:3 *Choices* 1 (arguing that time limit should not apply), with RE Hawkins, "Meech Lake — The Reality of the Time Limit" (1989) 35:1 McGill LJ 196 (arguing that time limit should apply) and FL Morton, "How Not to Amend the Constitution" (1989) 12:4 Can Parliamentary Rev 9 (arguing that entire debate was flawed).

96 See Warren J Newman, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 400.

another with amendments in relation to matters under Section 38, which does. Nonetheless, Mary Dawson, the lead advisor to the Government of Canada on constitutional matters at the time recently explained her reasoning: "The Meech Lake Accord included some amendments that called for the general procedure and others that required unanimous approval. The draft amendments were part of one interrelated package. I advised that both the three-year limitation period and the need for unanimity would apply simultaneously."[97] Constitutional actors therefore chose, correctly or not, a ratification strategy reflecting the concept of *cumul*, which refers to the informal combination of requirements in two or more amendment procedures.[98]

Soon after its negotiation in 1987, the Meech Lake Accord seemed on its way toward ratification, with Parliament and over two-thirds of the provinces having ratified it.[99] But the Accord began to show signs of distress in the face of opposition from constitutional actors across the country.[100] As the deadline approached, with three provinces yet to ratify the amendment package, the first ministers gathered to negotiate a way toward ratification. They arrived at an agreement: in exchange for the three premiers putting the Accord to a vote before the expiration of the deadline, all premiers in turn agreed to place before their legislatures a separate resolution that would address the concerns of the three holdouts.[101] Despite these eleventh-hour efforts, two provincial legislatures failed to ratify by the deadline, leading to the defeat of the entire package.

The outcome may seem perplexing for some observers. After all, the Accord had remarkably been approved by all parties in the Parliament of Canada as well as 8 of 10 provinces representing almost 95 percent of the entire population of Canada.[102] The unraveling of the Meech Lake Accord cannot of course be

97 See Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57:4 McGill LJ 955 at 983.

98 For a discussion of *cumul*, see Jacques-Yvan Morin & José Woehrling, *"Les constitutions du Canada et du Québec – du régime français à nos jours"* t 1 (Montreal: Les Éditions Thémis, 2004) at 531.

99 See Bruce P Elman & A Anne McLellan, "Canada After Meech" (1990) 2:2 Const Forum Const 63 at 64.

100 See Michael B Stein, "Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds" (1997) 30:2 Can J Political Science 307 at 320

101 Ronald L Watts, "Canadian Federalism in the 1990s: Once More in Question" (1991) 21:3 Publius 169 at 178.

102 See CES Franks, "The Myths and Symbols of the Constitutional Debate in Canada" (1993) Queen's University Institute of Intergovernmental Relations Reflections Paper No 11, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/reflectionpapers/Reflection11CDFranksMythsandSymbols.pdf>.

explained by one factor alone but, as Peter Oliver observes, "as the last days of that three-year period elapsed and as two small provinces succeeded in blocking the way forward for the others, the amending formula came to be seen as more than just a procedure, but in fact part of the problem."[103]

IV. Designing Temporal Limitations

These contrasting Canadian and American experiences with constitutional amendment expose the trade-offs involved between political brinkmanship and constitutional contemporaneity when constitutional actors choose or not to associate temporal limitations to the ratification of an amendment proposal. The risk of political brinkmanship rises as a ratification deadline approaches, but the absence of a ratification deadline makes possible inter-generational ratification, which might undermine the political and moral value of contemporaneity between proposal and ratification. The question whether constitutional designers should entrench deliberation requirements does not yield a definitive answer as to the better practice in constitutional design. The best answer can come only from deep reflection on the purpose of constitutional amendment and the values most important to the formation of constitutional consensus. In either case, the choice to entrench or reject temporal limitations is not one that would be wise to recommend for universal application. The choice must instead fit the unique cultural, historical, legal, political, and social specificities of a given jurisdiction, as with all matters of constitutional design. The choice need not always be a trade-off between brinkmanship and contemporaneity; one can imagine a middle path that strikes a constructive balance between both ends. Exploring the trade-offs between brinkmanship and contemporaneity can nonetheless help inform the choice.

A. Time and Brinkmanship

The United States has encountered its own Meech Lake moment. The failure of the Equal Rights Amendment in the United States likewise demonstrates the risk of political brinkmanship when a ratification deadline approaches. In 1972, Congress adopted an amendment proposal to formally entrench gender equality. The text of the proposal transmitted to the states read as follows:

> *Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),*

103 Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49:4 UTLJ 519 at 592.

> That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> Article —
>
> Section 1. Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.[104]

Congress attached a seven-year ratification deadline to its proposal to the states.[105] Just like the Meech Lake Accord, early days proved promising for the Equal Rights Amendment: within one week, seven states had ratified it; within one month, 14 states; and within one year, 30 states — just eight states fewer than the 38 required for ratification — had ratified the proposal.[106] Yet in subsequent years, only five additional states ratified the proposal, bringing the number to 35.[107] As the seven-year ratification deadline approached and it seemed unlikely that three more states would ratify the amendment,[108] Congress passed a resolution extending the ratification period for just over three more years:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.[109]

This congressional extension attracted significant attention at the time. Scholars debated whether Congress had the authority to extend the period of ratification and if so by what margin, whether the rule of presentment

104 US, HRJ Res 208, *Proposing an Amendment to the Constitution of the U.S.*, 92nd Cong, 1972.

105 *Ibid.*

106 Orrin G Hatch, "The Equal Rights Amendment: A Critical Analysis" (1979) 2 Harv JL & Pub Pol'y 19 at 19-20.

107 *Ibid* at 21.

108 See Leo Kanowitz & Marilyn Klinger, "Can a State Rescind its Equal Rights Amendment Ratification: Who Decides and How?" (1977) 28:4 Hastings LJ 979 at 981.

109 US, HRJ Res 638, *Joint Resolution Extending the Deadline for the Ratification of the Equal Rights Amendment*, 95th Cong 1978.

required the president to sign the measure, and whether it was proper for Congress to change the deadline after it had already been set.[110] The Equal Rights Amendment ultimately failed, even with the ratification extension — although some later relied on the 200-year ratification of the Twenty-Seventh Amendment to argue that the time limit had been unconstitutional all along and that the Equal Rights Amendment remained open indefinitely for states to ratify until they achieved the three-quarters mark for ratification.[111] In the end, however, the deliberation requirements complicated the task of ratifying the amendment proposal.

There may nonetheless be good reason for constitutional designers to entrench deliberation requirements. In Canada, the one-year deliberation floor was a complement to the right of provincial legislatures to opt-out of certain amendments from whose effect the Constitution of Canada authorizes provinces to withdraw even if the requisite initiation and ratification thresholds are otherwise met.[112] The right to opt out is available for amendments that are made using the general amendment procedure and that derogate from provincial legislative powers, proprietary rights, or any other provincial rights or privileges.[113] Where a province chooses to exercise this opt-out right, the provincial legislature must properly register a timely dissent,[114] in which case it will be eligible for reasonable compensation if the amendment concerns the transfer of educational or cultural matters from provincial to federal jurisdiction.[115] The choice to opt out is a serious one. A province requires a reasonable amount of time to evaluate whether to opt out of amendments in this category, and less than one year might not be long enough.[116]

110 See Ruth Bader Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time" (1979) 57:6 Tex L Rev 919; J William Heckman Jr, "Ratification of a Constitutional Amendment: Can a State Change its Mind?" (1973) 6:1 Conn L Rev 28; Grover Rees III, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension" (1980) 58:5 Tex L Rev 875; "The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues", Comment, (1978) 127:2 U Pa L Rev 494.

111 See Allison L Held, Sheryl L Herndon, & Danielle M Stager, "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States" (1997) 3 Wm & Mary J Women & L 113. However, the more persuasive view is that the Equal Rights Amendment proposal expired when the deadline — either the first or the second — passed without ratification. See Brannon P Denning & John R Vile, "Necromancing the Equal Rights Amendment" (2000) 17:3 Const Commentary 593.

112 *Constitution Act, 1982*, *supra* note 14, s 38(2)-(4), 40.

113 *Ibid*, s 38(2)-(3).

114 *Ibid*, s 38(3).

115 *Ibid*, s 40.

116 Swinton, *supra* note 80 at 146.

The three-year deliberation ceiling is not as closely connected to another amendment rule in the Constitution of Canada but it nonetheless derives from a theory of how to manage the formation of constitutional consensus. The rule was anchored in three rationales: first, to ensure a definitive end, whether rejection or entrenchment, of an amendment proposal; second, to foreclose the possibility of ghost amendments that are proposed and then languish for some time only to be revived much later to the surprise of constitutional actors; and third, to focus public awareness and political decision making on an amendment proposal in the time it is initiated.[117] Yet although the theory seems soundly rooted in good reason, there was little thought given to how these temporal limitations would apply in practice at the time of the design of the *Constitution Act, 1982*.[118]

It is worth asking whether three years is too little time to ratify an important amendment.[119] The late Richard Simeon observed that the failure of the Meech Lake Accord "was more likely a result of the brinkmanship tactics employed than of the rule itself" and, therefore, that three years is not necessarily too short.[120] But perhaps the nature of the relationship between time limits and brinkmanship is altogether different — not correlative but rather causative. Perhaps rather than understanding brinkmanship as something to which constitutional actors have recourse independently of and without instigation by time limits, we should consider that time limits may cause constitutional actors to engage in brinkmanship when their objective is either to defeat the amendment subject to the time limit or to extract concessions on the amendment itself or on other issues, related or not. On this understanding, the fragmentation of power across time gives constitutional actors an important weapon to fight an amendment proposal or to improve their bargaining position as the deadline approaches and their vote increases in value. This strategy would better explain the fate of the Meech Lake Accord and the Equal Rights Amendment. Each gave constitutional actors a roadmap to a winning strategy where their own interests were concerned: either to seek concessions on the amendment or on

117 *Ibid.*

118 See Richard Simeon, "Why did the Meech Lake Accord Fail?" in Ronald L Watts & Douglas M Brown, eds, *Canada: The State of the Federation 1990* (Kingston: Queen's University Institute of Intergovernmental Relations, 1990) 15 at 28.

119 One might also ask whether three years is too long. Following the defeat of the Meech Lake Accord, a special parliamentary committee recommended shortening the time limit to two years. See Canada, Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada* (Ottawa: Supply and Services Canada, 1991) at 30-31.

120 *Simeon*, *supra* note 118.

some other matter of consequence to them, or alternatively to hold out until time expires should their demands go unfulfilled.[121]

This risk of political brinkmanship need not dissuade constitutional designers from entrenching deliberation ceilings. Although deliberation ceilings may aggravate the possibility of amendment failure, they nonetheless offer important advantages — though whether reward outweighs risk is a judgment for constitutional designers to make with due regard to local norms. In addition to the three advantages above — ensuring a definitive end, foreclosing ghost amendments, and focusing decision-making — deliberation ceilings concentrate the formation of constitutional consensus within a defined period of time. Where amendment rules fragment power across political institutions and actors by dispersing the initiation and ratification powers, deliberation ceilings promote both contemporary and representative consensus. Ratification on these terms fosters representative consensus insofar as the ratifying actors differ in form and interest from the initiating actors. Ratification on these terms also reflects intra-generational contemporaneity in their independent judgments of the amendment, provided the deliberation ceiling directs constitutional actors to act within some narrow period of time. Contemporaneity and representativeness both reinforce the sociological legitimacy of the amendment.

B. Time and Contemporaneity

Inter-generational ratification may also itself generate sociological legitimacy. Where an amendment is ratified across generations, its entrenchment may be said to reflect the considered intertemporal judgment of the constitutional community. Inter-generational ratification is consistent with Jed Rubenfeld's thesis that "written self-government does not demand that new constitutional principles be adopted whenever a majority so wills" but rather "only when a people is prepared to make a significant *temporal* commitment to them."[122] Rubenfeld argues that our understanding of self-government should require something more than the support of "actual people of the here and now"[123] and be anchored in a less presentist notion of sovereignty. He suggests that we must instead reimagine the formation and sustainability of constitutional consensus,

121 The "height" of the deliberation ceiling is relevant. Where the ceiling is high — and for instance extends beyond electoral term limits — the incentives for constitutional actors would be different from the incentives under a lower ceiling. These differences are worth exploring in greater detail, as is the relative effect of the height of the ceiling as compared to the very presence of a ceiling, whatever its height.

122 Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven: Yale University Press, 2001) at 175.

123 *Ibid* at 11.

that it takes shape over time and that, in order to reflect the sociological legitimacy that only the people's popular will can confer, it cannot privilege the consent of the governed today over the consent of the governed over time. On this theory, constitutional actors should seek legitimacy for decisions made in the name of the people "not in governance by the present will of the governed, or in governance by the a-temporal truths posited by one or another moral philosopher, but rather in a people's living out its own self-given political and legal commitments over time — apart from or even contrary to popular will at any given moment."[124]

This view counsels pause in answering the question whether an amendment proposal should remain ratifiable for generations. Intra-generational ratification may not necessarily reflect the considered judgement of the constitutional community where the ratifying supermajority is fleeting and unsustainable, and also where the people and their representatives are pressed to action by special circumstances, such as a national emergency or crisis. In these circumstances, the supermajority approval of an important constitutional amendment may not in fact reflect stable and representative support. This situation is precisely why many national constitutions expressly prohibit constitutional actors from amending the constitution during periods of great insecurity, for instance war or siege or succession, when passions may move the people to make decisions that they would not otherwise make in non-crisis times.[125] Not even extraordinary supermajorities may withstand this critique if they are temporary and susceptible to collapsing quickly after their formation.

Inter-generational ratification may make it possible to respond to this concern, though it would not necessarily solve it.[126] Assume an amendment rule is silent on whether an amendment must be ratified within a defined period of time, as is the case with the United States Constitution. This permissive amendment rule would allow an extended ratification period not unlike the two centuries it took to ratify the Twenty-Seventh Amendment. However, it would also authorize instantaneous ratification that would not test the durability of the supermajorities that had expressed their support for the amendment. Constitutional designers must therefore be explicit in their design of amendment rules if they wish to force inter-generational ratification. They may, for instance, prohibit ratification prior to the expiration of a certain period of time,

124 *Ibid.*

125 See Part II.A, *above*.

126 It has been suggested that an effective design to combat the problem of fleeting supermajorities in constitutional democracies is the Scandinavian model of intervening election, which requires multiple ratification by successive legislatures. See Albert, *supra* note 17.

such as an extended deliberation floor. An inter-generational deliberation floor would be unusual: imagine a deliberation floor prohibiting constitutional actors from ratifying an amendment within one generation, or 20 years after its initiation. By the time the ratification deadline had expired, the people may have adopted an entirely new constitution altogether.[127]

Perhaps instead of *requiring* inter-generational ratification, constitutional designers could adopt the United States Constitution's model of *allowing* it.[128] But other rules should be entrenched alongside the open-ended amendment ratification rule — additional rules that would make it possible for both constitutional actors and the public to verify that the constitutional consensus behind an amendment has indeed remained stable and representative over time. We can verify the durability of the constitutional consensus behind a constitutional amendment by designing rules requiring constitutional actors to confirm a prior rescission or ratification where the ratification process extends across more than one generation or some other significant period. Without the power to confirm a prior rescission or ratification, we cannot *really* speak of inter-generational ratification because the successful ratification of an amendment across generations would reflect separate generations acting in isolation rather than in conversation.

The United States Constitution exposes a design flaw on this point because it does not state clear rules on whether a state has the power, while an amendment is pending, to rescind a prior ratification or to ratify an amendment that it has in the past rejected. As a consequence, an amendment ratified across generations in a regime where the constitutional text imposes no ratification deadline creates a serious risk of creating the artificial appearance of considered supermajority approval for the amendment. This constitutional design conceals the reality that there had never existed, in any single period, a durable supermajority to ratify an amendment. Sanford Levinson calls the silence of the Constitution on this point the "easiest example" of something to change in the design of Article V.[129] Indeed, the Constitution's silence on the power to rescind a prior ratification has generated significant scholarly interest in explor-

127 The average lifespan of a constitution is 19 years. See Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009) at 2.

128 Indeed, this was suggested by Clyde Wells, Premier of Newfoundland and Labrador. See Clyde Wells, "Constitutional Amendment and Constituent Assemblies" (1991) 14:3 Can Parliamentary Rev 8 at 9-10.

129 Sanford Levinson, "Designing an Amendment Process" in John Ferejohn, Jack N Rakove & Jonathan Riley, eds, *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001) 271 at 281.

ing whether states should have the power to change their mind on a pending amendment.[130]

To avoid uncertainty, constitutional designers should be explicit about whether ratifying bodies — state legislatures, state conventions, or indeed others — possess the right to rescind a prior amendment ratification or to ratify an amendment previously rejected before constitutional actors arrive at the ratification threshold required to entrench a constitutional amendment.[131] To illustrate, where the ratification threshold in a federalist constitution requires two-thirds of subnational states to consent to the amendment proposed by the national government, it should be clear from the text of the constitution whether and how a state may negate its prior ratification of an amendment, or do the opposite, as long as the two-thirds ratification threshold has not been met. If the objective of designing amendment rules in this way is to foster the kind of non-presentist sociological legitimacy that comes from inter-generational ratification, then it would not be enough simply to authorize subnational states to rescind or ratify a prior decision. Here it would be advisable for constitutional designers either to require subnational states to confirm or reject their prior decision if significant time has passed between the original amendment proposal and the final ratification satisfying the three-quarters threshold, or to state a presumption that the prior decision remains valid unless the subnational state choses to reverse it.

The first option would be more difficult to design and to oversee. It would require constitutional designers to designate a specific period of time after which final ratification of a pending amendment would require confirmations of prior ratifications or rejections. Identifying the right period of time may prove difficult, but constitutional actors regularly draw lines in their work, and there is no apparent reason why they should not be trusted to make this choice. The second option would be less difficult both in terms of constitutional design and political enforcement. It would require no specific designation of the period of

130 See e.g. Charles L Black Jr, "On Article I, Section 7, Clause 3 — and the Amendment of the Constitution" Correspondence, (1978) 87:4 Yale LJ 896; Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97:2 Harv L Rev 386 at 421-24; Philip L Martin, "State Legislative Ratification of Federal Constitutional Amendments: An Overview" (1974) 9:2 U Rich L Rev 271; Robert M Rhodes & Michael P Mabile, "Ratification of Proposed Federal Constitutional Amendments — The States May Rescind" (1977) 45:1 Tenn L Rev 703.

131 Note here that ratifying bodies have two ways of rejecting an amendment: they may adopt a resolution expressly rejecting it or they may refuse to take action on it. In the case of inaction, it is difficult to conceptualize how a ratifying body could confirm its prior rejection of an amendment proposal unless inaction after a certain period of time were taken to mean rejection or they were required to memorialize their rejection in some verifiable way.

time for which a prior ratification or rejection remains valid and until it must be confirmed, nor would it pose challenges as to its application because there would be an understanding that the original decision on ratification remains valid until the relevant constitutional actors make an intervening decision reflecting the contrary intent, specifically to reverse a ratification or rescission.

Three other considerations in the design of temporal limitations merit some mention. First, constitutional designers may vary the duration of time for which a pending amendment remains valid according to the importance of the subject matter of the amendment. For matters of heightened importance, constitutional actors and the people could be required to deliberate for a longer period of time than they would devote to less important matters.[132] The variability of temporal limitations within the larger structure of amendment rules is not unusual, as many constitutional democracies vary the amendment thresholds according to the amendable subject matter.[133] Second, temporal limitations such as deliberation ceilings and floors should not be associated exclusively with federal states like Canada and the United States; they may be used as well in unitary states, parliamentary and presidential forms of government, republics and constitutional monarchies, and indeed all democratic states where amendment rules are taken seriously, as they should be. Third, deliberation ceilings and floors may not in fact be *deliberative*. Establishing minimum or maximum periods of time for ratifying an amendment does not on its own ensure that the choice will be informed or even debated, nor does it encourage deliberative decision-making. The manipulation of time in these ways is therefore another important feature of constitutional amendment rules that constitutional designers should consider incorporating in how they structure the requirements for constitutional change.

V. Conclusion

I have sought in this article to explain and evaluate some of the options available in the design of deliberation requirements in constitutional amendment, part of a larger category of temporal limitations that also includes safe harbours.[134] My purpose has been to diagnose, not to prescribe, in an effort to highlight some of the considerations that constitutional designers must confront in fragmenting or consolidating the constitutional amendment power.

132 Constitutional designers may also vary the method of amendment according to the importance of the amendable matter. See Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 247-57.

133 See Albert, *supra* note 20 at 942-46.

134 See Part II, *above*.

Amendment rules commonly fragment or consolidate powers along branches of government, political parties, geographic boundaries, federalism, ethnic differences, and linguistic divisions. Time, as I have shown, is an additional dimension along which to fragment or consolidate the amendment power. My larger purpose has been to suggest a research agenda for further inquiry into some of the questions associated with time and change.

Many new lines of inquiry present themselves. As for Canada and the United States, perhaps the distinction between inter- and intra-generational ratification maps onto the deeper divide between originalism and living constitutionalism. The implications of the unity or diffusiveness of the body of amending actors is also worth exploring for its implications in designing deliberation requirements: the more unified the constitutional actors, the more time constitutional designers could perhaps afford to build into the amendment process; in contrast, the more diffuse they are, the higher the risk of brinkmanship as the ratification deadline approaches. Relatedly, the process of constitution-making may raise an instructive parallel inasmuch as it may be profitable to compare the comparative risk and reward of imposing temporal limitations in designing and amending constitutions. Separately, legal systems and their cultural contexts may affect how time is perceived and structured, which may explain variations in the use of time in common and civil law jurisdictions. Analogous questions in other fields may also provide useful insights, namely in connection with the ratification of treaties. Interdisciplinary perspectives from political science, history, and philosophy would both complicate and perhaps clarify the analysis. There remains much to learn about the options and implications of manipulating time in the design of formal amendment rules. The ideas presented here are hopefully a useful beginning.