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The Law and Economics of Entrenchment

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THE LAW AND ECONOMICS OF ENTRENCHMENT

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Should law respond readily to society's evolving views, or should it remain fixed? This is the question of entrenchment, meaning the insulation of law from change through supermajority rules and other mechanisms. Entrenchment stabilizes law, which promotes reliance and predictability, but it also frustrates democratic majorities. Legal scholars have long studied this tension but made little progress in resolving it.

This Article considers the problem from the perspective of law and economics. Three arguments follow. First, majority rule can systematically harm society—even when voters are rational (i.e., not passionate) and no intense minority is present. This is because of a collective action problem created by transition costs. Second, entrenchment is unnecessary when bargaining is easy, but it offers a second-best solution when bargaining is hard. This helps explain why some laws are entrenched but not others. Third, the optimal degree of entrenchment depends on a distinction existing scholarship ignores: whether the transition costs associated with a change in law are variable or fixed. Given variable costs, the argument for entrenchment is even stronger than scholars realize. But given fixed costs, the argument weakens. To overcome fixed costs, outdated laws require major change, but entrenchment

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encourages only minor change. This mismatch relates to an age-old question: when, if ever, should judges update entrenched law through interpretation? In one sense, judges can beneficially update in a way that democracy cannot.

These ideas cast doubt on work by originalists, living constitutionalists, and others. They have implications for legal design and constitutional law, and they plant seeds for a new and fruitful field: the law and economics of entrenchment.

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I. INTRODUCTION

Can one generation bind another? Thomas Jefferson thought the answer no, arguing that "[e]very constitution[,] . . . and every law, naturally expires at the end of 19 years."[1] James Madison disagreed, contending that making law "too mutable" would invite disorder and violence.[2] Each generation, Madison wrote, gives "tacit assent . . . to established Constitutions and laws."[3] These titans confronted a foundational question: how changeable should law be? Should it respond readily to society's evolving views, or should it remain fixed? This is the question of entrenchment.

Entrenchment pits constitutionalism against democracy, and it runs through legal debates old and new, from constitutional design and judicial review to the countermajoritarian difficulty. Constitutions, treaties, and other laws feature entrenchment in fact. Entrenchment goes to the heart of contemporary, burning debates. Can the British exit the European Union—and unwind a lot of law—with a bare majority vote?[4] Must we amend the Constitution to reform the Electoral College, which has recently produced anti-democratic results?[5]

Given the stakes, one might suppose that jurists have a well-developed theory of entrenchment. But this is wrong. Scholars have made extensive arguments but little progress. They "place one or the other value—legal stability or democracy—in the foremost position" and make their normative case,[6] but they offer no mechanism for reconciling these competing values or determining the best level of entrenchment in practice.

This Article applies law and economics to the problem. It begins with a fundamental idea in democratic theory. Suppose a majority

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[1] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 454, 459 (Albert Ellery Bergh ed., 1907).

[2] Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 147, 148 (Julian P. Boyd ed., 1961).

[3] *Id.* at 149.

[4] *See, e.g.*, Kenneth Rogoff, *Britain's Democratic Failure*, PROJECT SYNDICATE (June 24, 2016), https://www.project-syndicate.org/commentary/brexit-democratic-failure-for-uk-by-kenneth-rogoff-2016-06 ("The real lunacy of the United Kingdom's vote to leave the European Union . . . was the absurdly low bar for exit, requiring only a simple majority.").

[5] *See generally* Akhil Reed Amar, *The Inaugural Abraham Lincoln Lecture on Constitutional Law: Electoral College Reform, Lincoln-Style*, 112 NW. U. L. REV. 63 (2017) (considering Electoral College reforms without a constitutional amendment).

[6] John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 L. & SOC. INQUIRY 501, 503 (1997).

approves a change in law that the minority opposes. If the average member of the majority gains less than the average member of the minority loses—if an asymmetry exists between the two sides—then majority rule can harm society.[7] The losses to the minority can exceed the gains to the majority. For convenience, I will call this the Asymmetry Theorem. Scholars (including those in law and economics) understand that this theorem can justify the entrenchment of minority rights.[8] What scholars do not understand is that the theorem can justify the entrenchment of law much more broadly.

To see why, consider a puzzle. A central purpose of entrenchment is to stabilize law.[9] Stability, the argument goes, has great value. But "[i]f people value legal stability, then simple majorities should be hesitant to change laws."[10] In other words, if we care about stability, we will oppose legal change on our own with no need for a demanding amendment procedure. One might respond with an argument about passions, which sometimes overtake us. Impassioned people do not appreciate legal stability,[11] but that answer provides only a partial explanation. Countless laws about which people are unlikely to become passionate—from speed limits to government leases—are entrenched, if not in constitutions, then with other mechanisms like bicameralism, presentment, and the Senate filibuster.

Law and economics can justify the entrenchment of law on stability grounds, even when passions run cold. The argument has just one ingredient: transition costs.[12] When laws change, people incur transition costs—they must change their behavior, draft new plans, update their equipment, and so on. Supporters of a change in law, the majority, gain the *difference* between the policy benefit of

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[7] *See, e.g.*, THE FEDERALIST NO. 51, at 265 (James Madison) (Ian Shapiro ed., 2009) ("If a majority be united by a common interest, the rights of the minority will be insecure."); JAMES M. BUCHANAN & GORDON TULLOCK, 3 THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 85–96, 163, 210–30 (Univ. of Mich. Press 1962) (analyzing majority rule).

[8] *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 32–35, 243–46 (Princeton Univ. Press 2000) (analyzing minority rights and asymmetric intensity of preferences from a law-and-economics perspective).

[9] *See infra* Part II.

[10] ADAM PRZEWORSKI, DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT 139 (Cambridge Univ. Press 2010).

[11] *See infra* Part II.

[12] For a fuller discussion, see *infra* Section III.B.

the change and the transition costs they pay. Opponents of the change, the minority, lose the *sum* of the policy loss change brings and the transition costs they pay. Because of this asymmetry, the majority may gain less than the minority loses. This asymmetry does not grow from differences in the intensity of opinion. This is not like, say, laws prohibiting same-sex marriage, which a majority might weakly support and a minority strongly oppose. The asymmetry identified here emerges from something different and ubiquitous: transition costs. Given the Asymmetry Theorem, transition costs make majority rule inefficient—even when people are dispassionate, and even when no intense minority is present. These ideas provide a law and economics justification for widespread entrenchment.

Well, almost. Law and economics uncovers the collective action problem inherent in legal transitions, but it does not point inevitably to entrenchment as the solution. Consider that mainstay of legal scholarship, the Coase Theorem: given zero transaction costs, parties will bargain to efficiency regardless of the legal rule.[13] I can restate that idea as the Coase Amendment Theorem: given zero transaction costs, parties will achieve efficiency in legal transitions regardless of the amendment rule. According to this theorem, the majority will only amend the law if the benefits exceed the costs. Thus, bargaining can solve asymmetry. It can prevent the inefficiencies that result from combining majority rule with either transition costs or intense minorities. Later, I will provide examples to prove this point.[14]

For bargaining to work its magic, transaction costs must be low. Bargaining must be easy. In practice, transaction costs are often high.[15] The minority may be unable to strike a deal with the majority. In that case, entrenchment offers a second-best solution. Some simple but fundamental propositions follow. The benefit of entrenchment grows as the transaction costs of bargaining increase. The case for entrenchment is weak when bargaining is easy. To solve the fundamental problems of instability and minority

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[13] *See* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 14 (1982) ("The basic idea of the [Coase] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil . . . ."). *See also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1 (1960) ("This Paper is concerned with those actions of business firms which have harmful effects on others.").

[14] *See infra* Part IV.

[15] *See infra* Part IV.

exploitation, legal designers can entrench law—*or* lower the costs of bargaining among the people law governs.

Together, transaction and transition costs justify a minimum degree of entrenchment in law. What is the *optimal* degree of entrenchment? Should the U.S. Constitution, for example, be easier or harder to amend? The answer depends on a factor overlooked in the literature: the nature of transition costs. Those costs can be fixed or variable. A fixed transition cost arises in a set amount every time law changes, whether the change is minor or major. To give a simple example, when the sales tax increases, all cash registers must be reprogrammed, which takes the same effort regardless of the size of the increase. A variable cost grows with the size of change, so major changes are costlier. As voting rights expand, politicians make increasingly drastic changes to their platforms.

Suppose a law is outdated but modernizing it would create transition costs. If those costs are variable—the bigger the change, the higher the cost—then small change is better. In this case, deep entrenchment is optimal because deep entrenchment forces law to change in small steps.[16] Later, I will explain why with rigor; here I just illustrate with an example. Suppose the law requires people to be at least 29 years old to run for president. Three legislators have authority to change the law. They prefer minimum ages of 30, 40, and 50, respectively. If the legislators make decisions using majority law—the law is not entrenched—they may make the minimum age 40. Two of three legislators prefer 40 to 29. If the legislators require unanimous agreement to change the minimum age—the law is entrenched—they cannot make such a move because the first legislator opposes it. That legislator will support an incremental increase from 29 to 30 but not a substantial increase to 40. Entrenchment forces law to change in small steps.

Fixed costs muddy the water. If transition costs are fixed, the optimal change to law is *large*, not small. To overcome those fixed costs, an out-of-step law must change a lot, not a little. Entrenching law promotes small change, and un-entrenching law (i.e., making it easy to amend, as with bare majority rule) promotes large change, but neither approach does both. The level of entrenchment that works well given variable costs might fail given fixed costs. I capture these ideas with the Transitions Theorem: variable costs support

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[16] *See* Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631, 654–59 (2017) (studying entrenchment and the scope of legal change).

smaller legal change and deeper entrenchment; fixed costs support larger legal change and shallower entrenchment.

This theorem illuminates a final question, one closely tied to entrenchment: when, if ever, should judges "update" constitutional text? Assuming it counted as updating (people disagree), was the Supreme Court right to find in the Constitution a right to same-sex marriage?[17] Or should the Court have waited for the democratic process to create the right, perhaps through constitutional amendment?[18] This analysis offers fresh perspective. When entrenchment is deep, as in the U.S. Constitution, and fixed transition costs are high, a conundrum can arise. Only minor amendments are possible, but only major amendments are desirable. Entrenchment permits only minor change, but to overcome fixed transition costs, major change is needed. Judges, but not the democratic process, can make that major change. In this scenario, updating is not a substitute for formal amendment. Updating alone can achieve the desirable change.

These ideas cast doubt on work by originalists, living constitutionalists, and others. They diminish the clash of values by relating entrenchment to background conditions in a way that scholars with different beliefs and ideological views can agree on. This Article cannot resolve the entrenchment debate, but it offers a law and economics account of it with new implications for legal design and constitutional law.

This Article proceeds as follows. Part II briefly reviews the debate on entrenchment. Part III analyzes minority rights, transitions costs, and the collective action problem they have in common. Part IV applies the Coase Theorem to entrenchment. Part V studies the problem of optimal entrenchment and its relationship to transition costs. Part VI applies these ideas to constitutional updating, including through interpretation. Part VII concludes the Article.

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[17] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that the U.S. Constitution grants a right to same-sex marriage).

[18] *See id.* at 2625 (Roberts, C.J., dissenting) ("By deciding this question [of same-sex marriage] under the Constitution, the Court removes it from the realm of democratic decision.").

II. THE ENTRENCHMENT DEBATE

Aristotle stated that "a readiness to change from old to new laws enfeebles the power of the law."[19] Madison called "irregular and mutable legislation . . . an evil in itself."[20] Locke's *Fundamental Constitutions*, written for the colony of Carolina in 1669,[21] declared: "[This] . . . shall be and remain the sacred and *unalterable* form and rule of government . . . forever."[22] These enlightened thinkers reached a common conclusion: law, and especially constitutional law, should remain stable.

The virtues of stability are legion. It protects reliance interests[23] and the "security of expectations."[24] Those expectations include the right to property, without which "the most violent struggles" ensue.[25] It tempers "the recurrent need to establish a basic framework for political life."[26] Stability promotes reasoned deliberation and defuses "sudden and violent passions."[27] It permits governments to make credible commitments to themselves, their citizens, and other governments.[28] The list goes on.

Constitutions tend to stabilize law. The linchpin, or at least *a* linchpin,[29] of constitutional stability is a demanding amendment

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[19] Aristotle, *The Politics*, *in* THE POLITICS AND THE CONSTITUTION OF ATHENS 11, 49 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1996) (350 B.C.E.).

[20] THE FEDERALIST NO. 37, *supra* note 7, at 181 (James Madison).

[21] *See* David Armitage, *John Locke, Carolina, and the* Two Treatises of Government, 32 POL. THEORY 602, 603–07 (2004) (describing Locke's role in Carolina).

[22] Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMMENT. 107, 107 (1996) (alteration in original) (emphasis added) (quoting JOHN LOCKE, THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA § 120, *microfilmed in* English Books 1641–1700, Wing Reel No. 154 (Univ. Microfilms, Inc.)).

[23] *See generally* Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69 (2003) (discussing the negative impact that legal transitions have on reliance).

[24] MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE 9 (2014) ("[I]nstitutional stability is ostensibly attractive because of the 'security of expectations . . . .'").

[25] *See* Letter from James Madison to Thomas Jefferson, *supra* note 2, at 148–49 (describing the importance of stability with respect to property rights).

[26] STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 153 (1995). This point relates to coordination, which I address below.

[27] *See* THE FEDERALIST NO. 62, *supra* note 7, at 315 (James Madison) (describing the Senate's role in stability).

[28] *See generally* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000).

[29] Stability also depends on the heterogeneity of preferences. *See* Gilbert, *supra* note 16, at 647–49 (developing the "heterogeneity principle").

rule, like the supermajority requirements in the U.S. Constitution.[30] In addition to supermajority rules, law (whether constitutional or sub-constitutional) can be entrenched through other mechanisms like bicameralism, presentment, and the Senate filibuster.[31] In short, making law hard to change entrenches it, and entrenchment promotes stability.

In addition to stability, entrenchment promises a second benefit: protecting the minority from the majority. Madison developed the argument in *The Federalist Papers*,[32] and many scholars have elaborated on it since.[33] The logic is straightforward. In a pure democracy—that is, a system whereby a bare majority can alter law—the minority faces a grave risk of exploitation and harm.[34] Enacting laws to protect the minority is not, by itself, sufficient because the majority can simply repeal them.[35] The protections (often called rights) must be entrenched, as with the Thirteenth and Fifteenth Amendments.

So far, the discussion has focused on two prominent benefits of entrenchment: stability and minority protection. Now consider the cost. Getting law, and especially constitutional law, right presents a challenge. Washington did not consider the Constitution "free from imperfections,"[36] and Hamilton "never expect[ed] to see a perfect work from imperfect man."[37] The challenge compounds as society evolves. Jerome Frank captured the idea:

> The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it . . . . Even in a relatively static society, men [and women] have never

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[30] *See* U.S. CONST. art. V (laying out amendment procedure).

[31] *See, e.g.*, ELSTER, *supra* note 28, at 88–174.

[32] *See* THE FEDERALIST NO. 51, *supra* note 7, at 265 (James Madison) ("If a majority be united by a common interest, the rights of the minority will be insecure.").

[33] *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522–26 (1990) (cataloging the threats of majority rule to minorities).

[34] *See* THE FEDERALIST NO. 51, *supra* note 7, at 265 (James Madison).

[35] *See, e.g.*, Eule, *supra* note 33, at 1529–30 (explaining how "filtering" majority will, as through supermajority requirements, protects minorities).

[36] *See* Sanford Levinson, *Introduction: Imperfection and Amendability* (quoting Letter of George Washington to Bushrod Washington (Nov. 10, 1787), *in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 83 (Michael Kammen ed., Penguin Books 1986)), *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 1 (Sanford Levinson ed., Princeton Univ. Press 1995).

[37] THE FEDERALIST NO. 85, *supra* note 7, at 442 (Alexander Hamilton).

> been able to construct a comprehensive, eternalized set of rules . . . . How much less is such a frozen legal system possible in modern times.[38]

Jefferson argued that law must "keep pace,"[39] and Frank agreed, writing "[o]ur society would be strait-jacketed" if we were not constantly "overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions."[40]

Thus, a tension exists: entrenchment has value, but so does modernization. We want law to be hard to change but not too hard. The tension is starkest for constitutions, which must both "function as our fundamental law" and "remain democratically responsive."[41] The tension arises with sub-constitutional laws as well.[42]

This tension underpins a staggering amount of scholarship. Popular constitutionalism holds that citizens should take "active and ongoing control over the interpretation and enforcement of constitutional law."[43] Living constitutionalism claims that constitutions do and should "adapt[] to new circumstances, without being formally amended."[44] Professor Ackerman argues that the U.S. Constitution has changed without formal amendment and that we must respect those changes,[45] while Professor Amar argues that citizens can amend the Constitution through popular vote.[46] Professor Levinson wants to fix "the many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy."[47] Professor Bickel and

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[38] JEROME FRANK, LAW AND THE MODERN MIND 6 (1931).

[39] Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 32, 41 (Albert Ellery Bergh ed., 1907).

[40] FRANK, *supra* note 38, at 6–7.

[41] Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, at 28 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[42] *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 *passim* (2002) (analyzing the entrenchment of statutes).

[43] Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004).

[44] DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010); *see also* JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) (promoting interpretation that is "both originalist and living constitutionalist").

[45] *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 23–33 (1991).

[46] *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457 (1994) ("We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum . . . .").

[47] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 6 (Oxford Univ. Press 2006).

many others worry about judges' countermajoritarian decisions.[48] The common concern in this work is law's democratic responsiveness.

On the other side, jurists have spent decades developing the influential theory of originalism, which holds that the meaning of the U.S. Constitution was fixed at the time of adoption.[49] Prominent writers in this vein include Judge Bork,[50] Justices Rehnquist and Scalia,[51] and many distinguished scholars.[52] Many of these writers oppose judicial activism, support demanding amendment processes, and object to circumvention of Article V.[53] Much of this work celebrates stability.[54]

As this brief tour shows, many enduring debates relate to entrenchment.[55] Given this, one might suppose that amendment rules, which directly affect law's entrenchment, have attracted scholars' attention. This is partially correct. Social scientists have provided theories and evidence on how amendment rules operate.[56]

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[48] *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH *passim* (1962).

[49] For a definition of originalism, discussion of its history, and citations to classic works, see generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

[50] *E.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (arguing that "certain enduring principles" contained in the Constitution are "placed beyond the reach of majorities").

[51] *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849 (1989).

[52] *See generally* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398–401 (1992); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

[53] *See, e.g.*, JOHN O. MCGINNIS & MICHAEL D. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 37 (2013) (discussing the benefits of a supermajority amendment rule).

[54] *See, e.g.*, Scalia, *supra* note 51, at 862 (defending originalism and stating, "[t]he purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable" (emphasis omitted)).

[55] *See infra* Part III.

[56] *See, e.g.*, BUCHANAN & TULLOCK, *supra* note 7, at 85–96, 211–31 (presenting a germinal analysis of qualified majority rules); *see also generally* Dennis C. Mueller, *Constitutional Rights*, 7 J.L. ECON. & ORG. 313 (1991) (studying voting thresholds and transaction costs); Yves Balasko & Hervé Crès, *The Probability of Condorcet Cycles and Super Majority Rules*, 75 J. ECON. THEORY 237 (1997) (studying voting thresholds and Condorcet cycling); Ruth C. Ben-Yashar & Shmuel I. Nitzan, *The Optimal Decision Rule for Fixed–Size Committees in*

But on the normative question that preoccupies legal scholars—what is the optimal level of entrenchment given the value of stability?—research is thin. Even Professors McGinnis and Rappaport, who spent a decade on the question, remain uncertain. They report that achieving certain constitutional goals "ordinarily requires a supermajority rule [for amendment] in the range of at least two-thirds or three-quarters."[57]

In addition to the sheer complexity of the problem, one tendency stifles headway: "value creep." Before the ink dries on the core debate, scholars tend to introduce new complications, like the importance of consensus,[58] veils of ignorance,[59] politicization,[60] the link between amendment and judicial legitimacy,[61] and so forth. These ideas may matter, but they rest on an unstable foundation.

This Article returns to the central, fundamental choice between entrenchment and modernization in law. The analysis focuses on constitutions (the locus of the entrenchment debate), but it applies to statutes, treaties, and other forms of law as well.[62]

Dichotomous Choice Situations: The General Result, 38 INT'L ECON. Rev. 175 (1997) (studying voting thresholds and decision-making skill); Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem* (studying voting thresholds, legislative size, and the rate of constitutional amendment), *in* COMPARATIVE CONSTITUTIONAL DESIGN 195 (Tom Ginsburg ed., 2011); Mark Fey, *A Note on the Condorcet Jury Theorem with Supermajority Voting Rules*, 20 SOC. CHOICE & WELFARE 27 (2003) (studying voting thresholds and supermajority voting rules); Brett Graham & Dan Bernhardt, *Flexibility vs. Protection from an Unrepresentative Legislative Majority*, 93 GAMES & ECON. BEHAV. 59 (2015) (studying voting thresholds and misrepresentation as a result of an unchecked legislature); Richard Holden, Supermajority Voting Rules (July 31, 2015) (unpublished manuscript) (on file with the author) (studying the relationship between voting thresholds and the size of decision-making bodies); Dennis C. Mueller, *The Importance of Uncertainty in a Two-Stage Theory of Constitutions*, 108 PUB. CHOICE 223 (2001) (studying voting thresholds and uncertainty in collective decision making).

[57] MCGINNIS & RAPPAPORT, *supra* note 53, at 37.

[58] *See id.* at 38–39 (stressing the importance of consensus as a distinct consequentialist and constitutional value).

[59] *See id.* at 42–43 (arguing that entrenchment creates a veil of ignorance that generates entrenchments with good consequences).

[60] Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (1995), https://prospect.org/article/constitutional-amendmentitis (opposing amendments because they "trivialize or politicize the Constitution").

[61] *Compare id.* (explaining that "[i]ncreasing the frequency of constitutional amendment would undermine the respect and legitimacy the Court now enjoys"), *with* Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (criticizing the argument that constitutional amendments undermine the Supreme Court's legitimacy), *in* THE LEAST EXAMINED BRANCH 229, 242–56 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[62] This Article is mostly an exercise in ideal theory, not historical explanation. It analyzes how entrenchment works, not how particular entrenched laws like the U.S. Constitution

III. THE ECONOMICS OF INSTABILITY

This Part considers the problems that entrenchment aims to solve—instability and minority interests—from an economic point of view. Translating the concern over minority rights is straightforward; economic intuitions match common sense. But translating the concern over stability is harder. After explaining why, I offer a new account of instability—one rooted in transition costs instead of passions. This account does a better job of explaining and justifying the widespread entrenchment we observe in practice, including in areas bereft of intense minorities and passionate majorities.

A. MINORITIES AND THE ASYMMETRY THEOREM

A core justification for entrenchment, especially in constitutional law, is to protect minorities from the majority.[63] The intuition is simple; if a bare majority can make and change law, then the majority can cause grave harm to the minority. Entrenchment, and especially entrenched rights, can prevent this.[64] The rights protect the minority, and entrenching the rights makes it harder for the majority to take them away.[65]

These ideas can be reframed in economic terms. Imagine seven voters. Four of them, the majority, support a change in law. The change would give each of them a benefit (psychological, financial, or whatever) of +1 for a total gain of +4. The other three voters, a

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came to be. The analysis focuses on formal entrenchment, not informal or "functional" entrenchment. *See generally* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015).

[63] *See, e.g.*, Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977) ("The concern that democratic government will provide inadequate protection for minorities is as old as the nation—perhaps as old as the idea of democracy itself."). Sometimes we might have the opposite worry. An organized minority might exploit a disorganized majority. *See, e.g.*, COOTER, *supra* note 8, at 66–73 (explaining the connection between group size, free riding, and representation). That is a serious concern, but entrenchment is not usually assumed to help with it, so I do not address it.

[64] *See generally* N.W. Barber, *Why Entrench?*, 14 INT'L J. CONST. L. 325, 325 (2016) (presenting stability and minority interests as arguments for entrenchment).

[65] *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("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 . . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

minority, oppose the change in law. The change would impose a cost on each of them of –3 for a total loss of –9. In this situation, economists (and many others) would oppose making the change. Yes, the majority gains, but the minority suffers even more, so the overall effect is negative.

The root problem is an asymmetry in the voters' preferences. The minority cares more than the majority. If they cared the same—if their preferences were not intense—the problem would disappear. The proposed change would benefit members of the majority +1 apiece, and it would cost members of the minority –1 apiece. The net effect would be positive (+1). The asymmetry makes it negative. For convenience, I capture this idea with the Asymmetry Theorem: if the majority gains less from a change in law than the minority loses, majority rule is inefficient.

To prevent the inefficiency of majority rule, we can entrench the law, perhaps with a supermajority rule. Return to the example above with intense preferences: four voters would gain +1 apiece from a change in law, and three voters would lose –3 apiece. Under bare majority rule, the change will happen, but under a five-vote supermajority rule it will not. This is efficient. Instead of the majority gaining +4 and the minority losing –9 (net of –5), the proposal will fail, and the majority and minority will each get zero (net of 0). Getting nothing is more efficient than losing 5.

B. STABILITY AND TRANSITION COSTS

Translating the concern of minority rights into economics is easy but translating the concern over instability is harder. Before explaining why, it will help to review and reframe some ideas around instability using language from economics.

"Stability in government," Madison wrote, "is essential to national character and to . . . that repose and confidence in the minds of the people."[66] If stability has benefits, then instability has costs. Here is a brief description of some of those costs. New laws must be researched, which often requires experts to testify, lobbyists to cajole, and legislators to listen. They must be drafted, reviewed, amended, and voted on, which requires time and resources from legislators and their staffs. New laws must be implemented, which requires training for enforcement agents,

[66] THE FEDERALIST NO. 37, *supra* note 7, at 181 (James Madison).

adapting by lawyers and regulated parties, and adjudicating in court. To demonstrate, consider the Affordable Care Act.[67] Passage of that law remade the market for health insurance, causing states, insurers, and millions of consumers to change their behavior.[68] It also triggered rule-making by bureaucrats,[69] disputes in state and federal court,[70] and at least one statewide ballot initiative.[71]

Changing law comes with other costs that lawyers fear—so much that they feature in every law student's education. Changing law can squander reliance.[72] A whiskey distillery built today becomes inoperable when a constitutional prohibition on alcohol gets enacted tomorrow. Farmers must change their facilities and practices, possibly in drastic ways, when citizens approve new laws on the treatment of chickens and pigs.[73]

Looking ahead, shifts in law may undermine predictability.[74] However stable parties thought law was before, they may think it less stable after a change. That undermines their ability to plan—or more precisely, causes them to incur extra costs to address uncertainty while planning.[75] Current events exemplify this idea.

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[67] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012).

[68] *See generally* David Blumenthal, Melinda Abrams & Rachel Nuzum, *The Affordable Care Act at 5 Years*, 372 NEW ENGL. J. MED. 2451 (2015) (examining the effects the Affordable Care Act has had since its enactment 5 years prior).

[69] *See generally* Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 J. HEALTH POL. POL'Y & L. 441 (2014) (describing agency rulemaking and other actions under the Affordable Care Act).

[70] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (upholding the individual mandate in the Affordable Care Act).

[71] *See* Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1621–22 (2013) (describing Issue 3—a ballot initiative to undercut part of the Affordable Care Act).

[72] *See generally* Epstein, *supra* note 23 (examining the negative consequence legal transitions can have on the reliance interest).

[73] For a general statement of the point, see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 518 (1986) ("The crucial yet simple conclusion is that changes in government policy—or, more generally, changes in the prospects for reforms—will affect the value of investments made prior to those changes to the extent that such changes were not fully anticipated."). For examples of legal changes that might have this effect, see *id.* at 517, which lists instances of unexpected legal changes affecting the value of investments.

[74] *See, e.g.*, Joseph Raz, *The Rule of Law and Its Virtue* ("[T]he law should be such that people will be able to be guided by it."), *in* THE AUTHORITY OF LAW 212, 213 (Joseph Raz ed., 1979); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4 (2012) (equating "constancy and predictability in the law" with "rule-of-law ideas").

[75] *See* Kaplow, *supra* note 73, at 517 ("Moreover, not only do reforms themselves trigger changes in value, but significant changes in the likelihood of reforms do so as well." (citing

Following British citizens' surprise vote to exit the European Union, employers, investors, and many others in the United Kingdom and throughout Europe have spent time and money planning for uncertainty in a way they previously did not.[76]

As this discussion shows, the costs of instability come in many forms. To simplify, I refer to all costs of legal change as "transition costs."[77] Transition costs capture everything jurists worry about when defending stability and opposing legal change.[78]

C. THE PUZZLE OF INSTABILITY

Without entrenchment, fickle majorities will change law on a whim, satisfying themselves but imposing great harm on society through destabilization.[79] In the language above, they will approve legal change even when the transition costs are so high that they

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Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 587 (1984))).

[76] *See* Steven Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html?partner=bloomberg (describing the vote as a "stunning turn of events . . . accompanied by a plunge in the financial markets" and carrying "profound implications for Britain's legal system . . . and for Britain's economy").

[77] The term is not original. *See, e.g.*, John Quinn & Michael J. Trebilcock, *Compensation, Transition Costs, and Regulatory Change*, 32 U. TORONTO L.J. 117, 117 (1982) (discussing transaction costs and the classes of them); *see also* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 789 (2002) (cataloging transition costs).

[78] Should people receive compensation when a legal change forces them to incur transition costs? Professor Kaplow argues no because compensation would discourage people from anticipating changes in law. *See* Kaplow, *supra* note 73, at 519 (arguing against compensation for legal changes). Kaplow's article, which builds on Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977), sparked literature on transition policy. *See* Kaplow, *supra* note 73, at 519 (discussing Graetz's theories). That literature studies how to minimize transition costs by improving incentives. *See, e.g.*, William B. Tye & Frank C. Graves, *The Economics of Negative Barriers to Entry: How to Recover Stranded Costs and Achieve Competition on Equal Terms in the Electric Utility Industry*, 37 NAT. RESOURCES J. 175, 176 (1997) (arguing that "[a]llowing incumbents a fair opportunity for recovery of stranded costs . . . during a transition to deregulation is not an impediment to competition on equal terms"). For purposes of this Article, it does not matter whether transition costs are minimized, just that they exist. I am unaware of any paper relating transition costs to entrenchment.

[79] *See, e.g.*, ELSTER, *supra* note 28, at 119–22 (discussing Athenian fears of majorities acting on passion); HOLMES, *supra* note 26, at 134–35 (discussing the need to "tie the community's hands").

swamp any benefit.[80] To prevent this calamity, entrench law.[81] Then majorities, or at least bare majorities, will be constrained, law will remain stable, and society will not incur transition costs.[82]

This logic (if not this exact language) provides a standard justification for entrenchment.[83] Scholars have recited it since the Founding.[84] Today, it qualifies as conventional wisdom, even a truism. But the whole argument begs a question. Society qua society does not incur transition costs. *Individuals* incur transition costs. And if individuals incur transition costs, they should hesitate to change laws when transition costs—which they pay—are high. Professor Przeworski captured this point: "If people value legal stability, then simple majorities should be hesitant to change laws . . . . [S]imple-majority rule is sufficient to prevent capricious legal changes."[85]

A defender of the truism might respond as follows. Rational people will not change law—and incur high transition costs—on a whim, but *passionate* people will.[86] In lawmaking, and especially in constitutional lawmaking, people get passionate.[87] In the heat of the moment, they not only mistake bad policies for good ones, they forget or ignore transition costs.[88] Entrenchment protects against such short-sighted behavior.[89]

The danger of passion is well known and widely accepted.[90] But passion only partly solves the puzzle. One can imagine lawmakers and citizens getting passionate about security, taxes, immigration, religion, abortion, and so on. Entrenching law on those matters might make sense. But governments entrench so much more. Every federal statute is sheltered by bicameralism and presentment,[91]

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[80] *See* ELSTER, *supra* note 28, at 119–22 (discussing the issues of majority passions); HOLMES, *supra* note 26, at 135 (discussing how majorities would "inevitably shipwreck themselves").

[81] *See* ELSTER, *supra* note 28, at 117–18 (discussing the need for precommitment); HOLMES, *supra* note 26, at 135 (discussing the Constitution's remedy of removing "certain decisions from the democratic process").

[82] *See* HOLMES, *supra* note 26, at 134–77.

[83] *See, e.g.*, ELSTER, *supra* note 28, at 117–22; HOLMES, *supra* note 26, at 134–77.

[84] *See supra* notes 20, 25, and 27 and accompanying text.

[85] PRZEWORSKI, *supra* note 10, at 139.

[86] *See supra* Part II.

[87] *See supra* Part II.

[88] *See supra* Part II.

[89] *See supra* Part II.

[90] *See* ELSTER, *supra* note 28, at 119–23.

[91] U.S. CONST. art. I, § 7.

both standard mechanisms of entrenchment.[92] Yet many of these statutes—I suspect a substantial majority—will rarely, if ever, engender passion. Consider, for example, the federal statute addressing leases for government hospitals.[93] Next to the freedoms of speech and religion, the U.S. Constitution addresses mundane topics like postal roads.[94] In Alabama, the state constitution addresses traffic,[95] bingo,[96] and shrimp sales.[97]

Again, defenders of the truism might offer a response. They might say that the justification for entrenching these kinds of provisions lies elsewhere.[98] By making law hard to change, entrenchment promotes deliberation, a virtue distinct from stability.[99] They might say entrenchment supplies individuals with a focal point to coordinate their behavior.[100] These arguments might well have merit, but they chip away at the truism until we are left with a mismatch. To many jurists, the primary justification for entrenchment is stability,[101] yet stability alone cannot explain much of the entrenchment we observe in practice.[102]

D. TRANSITION COSTS AND THE ASYMMETRY THEOREM

In fact, the stability argument is strong—stronger than scholars realize—and a main contribution of this Article is to explain why. Recall that society qua society does not incur transition costs, individuals do.[103] Even if individuals incur transition costs, and even if they account for those costs when making decisions (i.e., even

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92 *See, e.g.*, ELSTER, *supra* note 28, at 133–40 (discussing bicameralism and presentment as methods of entrenchment).

93 See 38 U.S.C. § 8103 ("The Secretary [of Veterans' Affairs] may enter into a lease for the use of any facility described in paragraph (2)(B) of this subsection for not more than 35 years . . . .").

94 *See* U.S. CONST. art. I, § 8.

95 *See* ALA. CONST. amend. 756.

96 *See* ALA. CONST. amends. 743, 744.

97 *See* ALA. CONST. amend. 766.

98 *See, e.g.*, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1990); HOLMES, *supra* note 26, at 169–72.

99 *See, e.g.*, HOLMES, *supra* note 26, at 169–72 (relating constitutionalism to public debate).

100 *See* HARDIN, *supra* note 98, at 82–140 (conceptualizing constitutions as coordination devices).

101 *See, e.g.*, ELSTER, *supra* note 28, at 155 ("The stabilizing effect of requiring supermajorities for amending the constitution is arguably the most important aspect of constitutional precommitment.").

102 *See supra* Part I.

103 *See supra* Section III.C.

if they are not impassioned), they may still approve changes to law that harm society. This is easy to see in the extreme case. Suppose the majority supports a change in law and the minority opposes it. Suppose further that the majority can force the minority to bear all of the transition costs. The minority faces a double loss: they suffer from the substance of the change in law, and they suffer from all the transition costs the change requires. That double loss might outweigh the benefit to the majority. But members of the majority will support the change anyway because they only see benefits, not costs.[104]

This is an extreme and unlikely case, but the logic holds in more plausible circumstances as well. Consider another example. Four out of seven voters, a majority, support a change in law. For them, the change would provide a benefit of +1 apiece. The other three voters oppose the change in law, as it would come with a cost of –1 apiece. These costs and benefits flow from the substance of the new law itself—some people like it, other do not. Separate from the substance, the change in law would also produce a transition cost. This time the majority cannot stick the minority with that cost; the voters bear it pro rata. The cost is 0.25 apiece. The majority will still support the change, as it delivers a net benefit of 0.75 apiece. If law is not entrenched, the majority will enact the change. But this will harm society. The gains to the majority total +3 (*0.75 x 4*), while the losses to the minority total –3.75 (*–1.25 x 3*).[105]

The root problem is transition costs. They create an asymmetry between the winners and losers following a change in law. The people who support a new law, a majority, gain the *difference* between their benefit from the new law and the transition cost they pay. The people who oppose the change, a minority, suffer the *sum* of their loss from the new law and the transition cost they pay. Each loser loses more than each winner wins. When this is true, the Asymmetry Theorem kicks in. Majority rule may do more harm than good.

Scholars have long recognized this kind of problem. In *The Calculus of Consent*, Professors James Buchanan and Gordon

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[104] This resembles an example in BUCHANAN & TULLOCK, *supra* note 7, at 164–67. My argument extends Buchanan and Tullock's conclusion.

[105] I assume that the majority does not compensate the minority for its losses. This assumption often holds in practice and matches Kaplow's prescription. *See* Kaplow, *supra* note 73, at 542 (explaining that non-compensation improves the injured parties' incentives).

Tullock provided a path-breaking analysis of majority rule.[106] They showed that the coercion inherent in majority rule—the minority must abide by the majority's decision—can lead to social harm.[107] Take one of Buchanan and Tullock's examples: three voters decide on a bill that would tax each of them $0.33 and build roads that provide a benefit of $0.42 to the first voter, $0.42 to the second voter, and no benefit to the third voter.[108] Total costs equal $0.99, and total benefits equal $0.84 for a net loss of –$0.15, so the bill is inefficient.[109] Under majority rule, the bill nevertheless passes, as the first and second voters each gain $0.09.[110]

Whereas Buchanan and Tullock focused on taxes, legal scholars focus more abstractly on the intensity of preferences.[111] As explained above, if members of the minority—racial, religious, or otherwise—feel more strongly than others, then majority rule can be inefficient.[112] Though few in number, minorities may suffer large losses from changes in law while the majority makes only modest gains.[113] Consider prohibitions on same-sex marriage. They may have provided a small benefit to members of the majority, but they imposed a greater harm on an oppressed minority.

My argument is in the same spirit. Like the earlier work, I argue that majority rule can make society worse off. The difference lies in the mechanism: transition costs. This mechanism does not involve taxes or other extractions whereby the majority redistributes from the minority, as in *The Calculus of Consent*.[114] Transition costs do not build roads; they are a social loss. Nor do transition costs involve

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106 BUCHANAN & TULLOCK, *supra* note 7, at 160–69.

107 *Id.*

108 *Id.* at 161–62.

109 *Id.*

110 *Id.*

111 Buchanan and Tullock appreciate that different intensities of preference can affect the desirability of majority rule. *See id.* at 163 (introducing asymmetry to the equation depending on the "imputed values" of an individual's opinion on the public work project).

112 Though not expressed in the language of efficiency, this idea appears in the literature. *See, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 13 (1978) (discussing how elected officials are responsive to "minority pressures" and thus "may vote for . . . a civil rights or social reform bill with full knowledge that a majority of their constituents oppose the measure"); Eule, *supra* note 33, at 1556 (arguing the political system structure requires legislators to "bring[] minorities into the process"). Traces of the idea appear in classic works. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 7, at 264–67 (James Madison) ("[T]he private interest of every individual may be sentinel over the public rights.").

113 *See supra* Section III.A.

114 *See supra* Section III.C.

minorities with intense preferences. I assume everyone has equally intense preferences (in the seven-voter example,[115] each voter gained or lost 1). Under this assumption, when changing law provides a policy benefit to the majority and a policy loss to the minority, and when everyone pays transition costs, each loser loses more than each winner wins. That point is essential to the conclusion that majority rule can harm society.

This mechanism is different and ubiquitous. Some changes to law assess new taxes or redistribute from the minority to the majority, as in Buchanan and Tullock's example,[116] but others do not. On some issues, the minority has more intense preferences than the majority.[117] Sometimes intense minorities occupy both sides of an issue and cancel each other out—advocates and opponents of abortion rights might fit this scenario. For these reasons, the asymmetry that scholars usually worry about may be uncommon. In contrast, the asymmetry identified here must arise constantly: there are *always* transition costs. This makes majority rule problematic in a larger set of circumstances than we appreciate. Even when voters rationally account for transition costs, and even with no intense minority present, voters may still approve net-negative changes to law.

This idea helps explain and justify the widespread use of entrenchment. It does so by showing that instability does not require irrationality.[118] It also shows that concerns with instability and minority rights grow from a common source: collective action problems.[119] Decisions that are individually rational for members of the majority are destructive for the whole society. The analysis resuscitates and strengthens the truism.[120] The stability

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[115] *See supra* p. 80.

[116] *See supra* p. 81.

[117] *See supra* notes 94–95 and accompanying text.

[118] *See supra* Section III.B.

[119] *See supra* Section III.A.

[120] It also casts a shadow on an institution deeply embedded in the United States: direct democracy. Twenty-four states and more than half of American cities permit citizens to make law directly using ballot initiatives. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 695 (2010). The usual requirement for passage of a statutory initiative is simple majority support. *See State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/states.cfm (last visited Nov. 23, 2019) (displaying a state-by-state grid of initiative and referendum provisions)**Error! Hyperlink reference not valid.**. In California, for example, a majority of citizens can use initiatives to amend the state constitution. CAL. CONST. art. II, §§ 8, 10. Because of transition costs, initiatives can cause

justification for entrenchment is strong even when passions are in check.

IV. ENTRENCHMENT: A COASEAN APPROACH

The last Part analyzed and united two fundamental challenges to majority rule: minority interests and instability.[121] These challenges remain as serious under a law and economics framework as under conventional thinking. In fact, law and economics make the concern over instability even more pressing. Here, I reconsider the solution. Entrenchment can mitigate the two challenges, but so can something else: bargaining. As I will explain, when bargaining succeeds, entrenchment is unnecessary.[122] My objective is not to critique entrenchment but to draw out its deepest justification.

A. THE COASE THEOREM IN BRIEF

The Coase Theorem sits at the heart of law and economics. The theorem has animated generations of scholarship on property, contracts, and torts.[123] More recently, scholars have applied it to public law topics like federalism.[124] I apply it to entrenchment.

The theorem can be stated succinctly: if the transaction costs of bargaining are zero, parties will achieve efficiency on their own, regardless of the legal rule.[125] Consider an example.[126] If a nightclub plays music after midnight, it will earn $500, but the neighbor will

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social harm, even when intense minorities are not present. This is especially likely when initiatives pass by a narrow margin.

[121] *See supra* Part III.

[122] *See infra* Section IV.B.

[123] For a work that connects the Coase Theorem to all of these fields, see ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (6th ed. 2012).

[124] *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 139 (2010) ("The Federal Coase Theorem describes a condition—zero transaction costs—under which the allocation of powers to different levels of government makes no difference to the efficient supply of public goods.").

[125] *See* Coase, *supra* note 13, at 10 ("With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources."). Coase did not actually use the phrase "transaction costs," but many others have. *See, e.g.*, Cooter, *supra* note 13, at 14 ("The basic idea of the [Coase] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil . . . .").

[126] This example is developed in Robert D. Cooter & Michael D. Gilbert, *Constitutional Law and Economics, in* RESEARCH METHODS IN CONSTITUTIONAL LAW: A HANDBOOK (Malcolm Langford & David S. Law eds., forthcoming 2020) (manuscript at 12–13), **Error! Hyperlink reference not valid.**https://ssrn.com/abstract=3123253.

suffer a loss from noise of $100.[127] Thus, operating produces net value of $400, whereas not operating produces net value of $0.[128] Operating is the efficient choice.[129] If the legal rule is "club's right," the nightclub will operate.[130]

Reconsider the scenario with a different legal rule, "neighbor's right."[131] The club cannot operate after midnight unless the neighbor waives her right to quiet.[132] One might suppose that the neighbor will not waive her right, so the club will not operate. But this is not necessarily true. The nightclub could pay the neighbor $300 in exchange for permission to play music. The neighbor would make $200 ($300 in cash minus $100 in harm from noise) instead of nothing, and the nightclub would make $200 ($500 in earnings minus $300 paid to the neighbor) instead of nothing. Both parties prefer this arrangement.[133] Even if the law is "neighbor's right," the club will play music.[134]

For the club and the neighbor to strike this deal, they must be able to bargain with one another.[135] This might be easy; the club's owner and the neighbor could be sisters on good terms. Or bargaining might be hard. Perhaps the owner and the neighbor speak different languages or are engaged in a bitter divorce.[136]

When bargaining is hard—in the lingo, when the transaction costs of bargaining are high—the legal rule determines efficiency.[137] If the rule is "club's right," the club will operate, and efficiency will result. If the rule is "neighbor's right," the club will not operate, and inefficiency will result. When bargaining is easy—transaction costs are zero—the legal rule is *irrelevant* to efficiency.[138] Whether the rule is "club's right" or "neighbor's right," easy bargaining means

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127 *Id.* at 12.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 12–13.
134 *Id.* at 13.
135 *Id.*
136 *Id.* at 12–13.
137 *See, e.g.*, Cooter, *supra* note 13, at 18–20, 28 (explaining that when people cannot cooperate "legal rights should be structured to eliminate the most destructive noncooperative outcomes"—in other words, structure law to prevent inefficiency).
138 *See* Cooter & Gilbert, *supra* note 126, at 13 (explaining when bargaining costs are low, the efficient outcome will prevail regardless of the legal rule).

the club will operate, as in the example above.[139] In both cases, the total value of $400 will be realized.[140]

The Coase Theorem makes predictions about when law matters for efficiency and when it does not.[141] It also leads to prescriptions. Suppose efficiency is the state's objective. Given this and the facts above, the state wants the nightclub to operate. How can the state achieve this? One option is that the state can make the legal rule "club's right." Then the club will definitely operate, and it does not matter if bargaining is easy or hard. Here, the state *imposes* the efficient solution. Alternatively, the state can lower the transaction costs of bargaining. For example, it can make contracts between nightclubs and neighbors easier to sign and enforce. Then, the club will definitely operate. It does not matter if the rule is "club's right" or "neighbor's right;" the parties will agree to bargain around the law if it gets in the way of their profits. Here the state *facilitates* the efficient solution.[142]

Should the state impose or facilitate? The answer depends on many factors, and this Article will not explore it beyond the following observation. Imposing solutions can lead to errors when facts are heterogeneous. To explain, suppose the state makes the rule "club's right." Then, nightclubs will operate. This promotes efficiency in the case above, but it might undermine efficiency down the block where another nightclub operates and where the gains from its music are outweighed by the losses to the neighbor. If the state could facilitate, this error would evaporate. In the first case, the parties would bargain as needed and the club would operate. In the second case, the parties would bargain as needed and the club would not operate. Costless bargaining implies efficiency in *every* individual case.

B. THE COASE AMENDMENT THEOREM

Usually scholars apply the Coase Theorem to problems in private law, like the nuisance in the music example.[143] The logic of the

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139 *Id.*

140 *Id.* at 12–13.

141 *Id.* at 13.

142 For a discussion of imposing versus facilitating, see *id.* at 14–15.

143 *See generally* COOTER & ULEN, *supra* note 123 (applying Coase Theorem to private law).

theorem, however, applies across the board from mundane disputes among neighbors to grand dilemmas in public law.[144]

Consider again the problem of intense minorities.[145] We have seven voters. Four of them support a proposed change in law, and the change would give each of them a benefit of +1. The other three voters oppose the proposal, as it would impose a cost on each of them of –3. Changing the law would be inefficient. Is it possible to prevent the change and achieve efficiency?

The Coase Theorem gives us two choices: impose or facilitate. The state (probably through the Constitution) could impose by requiring a supermajority to change the law. Instead of a bare majority of four votes, it takes a supermajority of five. This blocks the proposal. Instead of the inefficient outcome (proposal passes, net of –5), we get the efficient outcome (proposal fails, net of 0).

Instead of imposing with a supermajority rule, the state could facilitate. It could retain a bare majority rule and encourage the parties to bargain. The minority could make the following offer to the majority: vote against the proposal, and we will pay each of you +1.5 (this could be money from the minorities' pockets, political favors, etc.). Instead of enacting the proposal and getting +1 apiece, members of the majority can vote down the proposal and get +1.5 apiece. They prefer the bargain. The minority does too. Instead of being stuck with the new law and collectively losing –9, they can prevent the proposal with the bargain and collectively lose –6 (*–1.5 x 4*). The collective losses to the minority (–6) exactly equal the collective gains to the majority (+6). Thus, we achieve efficiency. Instead of the proposal passing (net of –5), the proposal fails (net of 0).

Bargaining can prevent the inefficiency associated with intense minorities and majority rule.[146] In fact, bargaining works better

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[144] *See* Cooter & Gilbert, *supra* note 126, at 13 (articulating the "Public Coase Theorem"); Cooter & Siegel, *supra* note 124, at 139 (developing the "Federal Coase Theorem"). In a valuable article, Professors McGinnis and Rappaport recognize the relevance of the Coase Theorem to amendment rules. John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1118 (2007) ("In the absence of transaction costs, it also does not matter from an efficiency perspective what proportion of the legislature is required to enact a law."). This Article develops and extends the idea.

[145] *See supra* Section III.A.

[146] Bargaining cannot, however, prevent redistribution. In the example, the total payoff to the group is 0 under supermajority rule and 0 under bargaining. But supermajority rule gives the minority a payoff of 0, while bargaining gives the minority a payoff of –6 (and the majority

than the alternative, the supermajority rule. Like "club's right," the supermajority rule makes mistakes when facts are heterogeneous. In the example above, the supermajority rule prevents the inefficient law from passing. But one can reach a different result by changing the facts. Suppose the four voters in the majority would gain +3 apiece from the change in law, while the three voters in the minority would lose –1 apiece. Now efficiency requires the law to pass, but the supermajority rule might prevent the law from passing. Bargaining does not create this problem. If the parties can bargain, they will always get it right.

Bargaining can solve the problem of transition costs too. Recall the example.[147] Four voters support a change in law that would provide a policy benefit of +1 apiece. Three voters oppose the change in law, as it would come with a policy cost of –1 apiece. If the law changes, every voter bears a transition cost of –0.25 apiece. Thus, four voters would each gain +0.75 (net benefit of 3), and three voters would each lose –1.25 (net cost of –3.75), from changing the law. We could prevent the inefficient change with a supermajority rule. Only a bare majority, four of seven, would vote for the new law. Alternatively, we could prevent the change with a bargain. The minority could make the following offer to the majority: vote against the proposal, and we will pay each of you +0.8. Members of the majority prefer +0.8 to +0.75, so they prefer the bargain. Members of the minority would rather make the payments and lose –3.2 (*–0.8 x 4*) collectively than have the law enacted and lose –3.75 collectively. The total losses to the minority (–3.2) exactly equal the total gains to the majority (+3.2). Thus, we achieve efficiency. Instead of the proposal passing (net of –0.75), the proposal fails (net of 0).

Again, bargaining works better than the supermajority rule. The supermajority rule can make mistakes. If the transition cost is sufficiently low—say, 0.1 apiece in the example above—the change is efficient, but the supermajority rule might prevent it. Bargaining will not. If the parties can bargain, they will always get it right.

To summarize, given intense minorities or, more commonly, transition costs, majority rule can lead to inefficient changes in law. To prevent those inefficient changes, the state can impose a solution

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an offsetting payoff of +6). Distribution is important in general but irrelevant to the argument here, which is that bargaining can prevent *inefficiency* under majority rule.

147 *See supra* Section III.D.

by entrenching the law, as with a supermajority rule. Alternatively, the state can facilitate a solution by encouraging the parties to bargain. If the parties can bargain, they will always achieve efficiency on their own. To state the point more fully, consider the Coase Amendment Theorem: given zero transaction costs, parties will achieve efficiency in legal transitions regardless of the amendment rule.[148] Whether changing law requires a bare majority or a supermajority, whether the relevant legislature is unicameral or bicameral, whether the executive has a veto or not, the parties will bargain to efficiency if transaction costs are low.

C. TRANSACTION COSTS AND ENTRENCHMENT

If bargaining can solve the inefficiency of majority rule, and solve it better than entrenchment, why do we observe so much entrenchment? For bargaining to succeed, transaction costs must be zero, or at least low. Sometimes, transaction costs might in fact be low. But often they will be high.[149] The seven people in the examples above might find negotiating with one another difficult:[150] they might dislike each other or they might doubt one another's trustworthiness.[151]

Now, move from the simple example to reality. A million-person minority cannot bargain with a ten-million-person majority. No conference room can hold them. Most of those people must be strangers to one another, and bargaining among strangers is usually harder than bargaining among friends. Unlike the club owner and the neighbor, millions of people cannot sign a contract enforceable in court. Who would draft it? Who would litigate it when conflicts arise? Who would collect from the minority to pay off the majority? The trust problems multiply.

Now we have a fuller account of the inefficiency of majority rule. The problem is not asymmetry—winners win less than losers lose—by itself. The problem is asymmetry coupled with high transaction costs.

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[148] *See supra* Section III.B.

[149] *See* McGinnis & Rappaport, *supra* note 144, at 1124 ("Our political world . . . is plagued by transaction costs.").

[150] *See supra* Sections III.A, III.D.

[151] *See generally* Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMPARATIVE ECON. 620, 642 (2003) (analyzing the inability to make credible political commitments and the implications for bargaining).

As with the nightclub and the neighbor example,[152] the state can promote efficiency by imposing a solution or facilitating a bargain. Facilitating means lowering transaction costs. A great deal of public law can be conceptualized as lowering transaction costs. Creating a legislature, electing people to it, ensuring minorities have a seat at the table—these efforts and many others lower the costs of bargaining among society's groups. Sometimes, those efforts might be enough but not always. We can lower transaction costs but not always enough to ensure efficiency. Thus, we supplement facilitation with imposition. Imposition in this context means entrenchment. Entrench the law so a bare majority cannot change it. Unlike bargaining, entrenchment cannot get every case right. Sometimes, it will prevent efficient change.[153] But if bargaining is impossible, entrenchment is the next-best option.

These ideas lead to some simple, but important, propositions. The case for entrenchment grows as transaction costs increase. The case for entrenchment is weak when bargaining is easy. This may explain why entrenchment is perhaps more common in national law, which involves many people, than local law, which involves relatively few. To solve the problems of instability and minority exploitation, entrench law—or, if possible, lower the costs of bargaining among the people law governs.

V. ON OPTIMAL ENTRENCHMENT

The central points above can be summarized in short order. If changing law comes with transition costs, as it usually does, then bare majority rule can lead to inefficient lawmaking. This is true even when voters are rational (i.e., not impassioned) and no intense minority is present. If the transaction costs of bargaining are high, as they often are, then parties cannot bargain to efficiency. They will simply vote. Entrenchment can mitigate the problem by making law harder to change and thus resistant to inefficient transitions.

These ideas justify a minimum level of entrenchment for many laws, including laws unlikely to provoke passions. But what is the *optimal* level of entrenchment? What is the solution to Jefferson and

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[152] *See supra* Section IV.A.

[153] Likewise, it will sometimes fail to prevent inefficient change, as when the supermajority benefits from a new law, but the small minority suffers even more.

Madison's dilemma?[154] The answer depends on something scholars have overlooked: the nature of transition costs.

A. THE MODERNIZATION PRINCIPLE

Before discussing transition costs, I address benefits (and benefits only—assume for now that transition costs equal zero). The argument runs as follows: moving from an existing, out-of-date law toward a new, ideal law benefits society. The closer one moves to the ideal law, the better. Expressed this way, the argument is simple and intuitive. Nevertheless, it will help to work through some details. I will explain the details with words and a graph.

Imagine again our seven voters.[155] It will help to give them names: *j*, *k*, *l*, *m*, *n*, *o*, and *p*. The voters range from very conservative (voter *j*) to very progressive (voter *p*). To begin, the law matches what *j* likes. Thus, the law makes *j* happy, but the other six voters are unhappy. The ideal law—not just for *j*, but for the seven voters as a group—lies somewhere in the progressive direction.

Suppose the law moves in the progressive direction a little. This makes *j* unhappy; the new law is a little too liberal for him. He loses –1. But the new law makes the other six voters happier. Each gains +1, so the net gain is +5.

Suppose the law moves in the progressive direction again. This makes the two most conservative voters, *j* and *k*, unhappy. The new law is too liberal for their tastes, and they each lose –1 apiece. The new law, however, makes the other five voters happier. Each gains +1 for a net effect of +3.

Figure 1 captures these ideas. The x-axis reflects the political spectrum. The further one moves to the right, the more progressive law becomes, and vice versa. The voters appear at their preferred points. The y-axis reflects the collective benefit of updating the law, which begins at *j*.[156] If law moves from *j* to *k*, voter *j* suffers –1 and the remaining six voters benefit +6 for a net effect of +5. The curve shows this net effect. If law moves from *k* to *l*, voters *j* and *k* suffer –1 apiece, and the remaining voters benefit +1 apiece for a net effect

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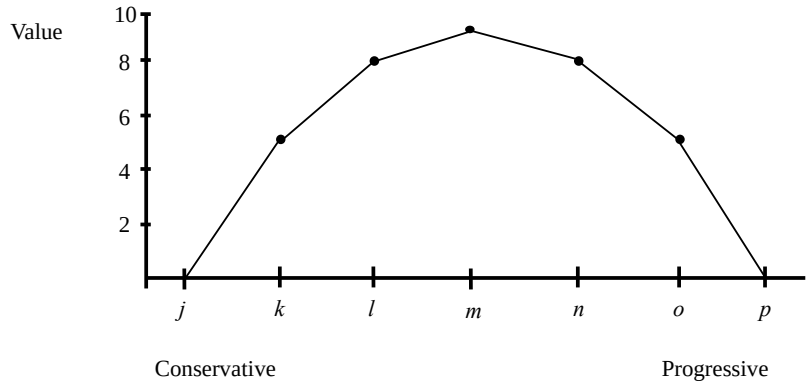
[154] *See supra* Part II.

[155] *See supra* Section III.A.

[156] To simplify, I abuse notation by using the same letters to refer both to people and to the location of laws.

of +3. Again, the curve shows this. Moving from *k* to *l* corresponds to a +3 increase on the curve.

Figure 1: The Modernization Principle



The ideal law in this example matches the political center, *m*. Replacing the outdated law at the fringe of society with a law closer to the center creates a social benefit, as the curve shows. The closer one moves to the center, the better. But note the slope of the curve—it flattens. The benefit grows, but at a decreasing rate. The first step toward the center (from *j* to *k*) helps six people and hurts only one, the second step (*k* to *l*) helps five people and hurts two, and so on.

I call this the modernization principle. As an outdated law is modernized, meaning its substance evolves from the old status quo toward what works best for today, society benefits but at a decreasing rate. The first step in the evolution generates more good than the last.[157]

Like all analyses of entrenchment and updating, Figure 1 makes some assumptions. These assumptions are common and unobjectionable but somewhat technical, so I explain most of them in the footnote.[158] One assumption, however, should be drawn out.

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[157] This idea, if not this particular label, is already known to scholars. *See, e.g.*, COOTER, *supra* note 8, at 33–34 (explaining the connection between "strong symmetry" in preferences and social welfare, which together lead to what I call the modernization principle).

[158] Figure 1 assumes that the issue is one-dimensional (e.g., tax rates, greenhouse gas emissions, abortion restrictions); voters are situated symmetrically around the median voter, *m*; and voters prefer laws closer to their ideal points, meaning their preferences are single-peaked and symmetrical. These are common assumptions. *See, e.g.*, DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM JIMMY CARTER TO GEORGE W. BUSH 12–48 (2d ed. 2006); COOTER, *supra* note 8, at 25–41, 154–61, 215–39; KEITH KREHBIEL,

Figure 1 assumes that all voters have equally intense preferences. When law moves rightward, each person who suffers loses exactly the same amount as each person who gains. I have assumed away intense minorities.

This assumption simplifies the analysis without limiting it. What if voter *j* had intense preferences? When law moves rightward, he suffers more than anyone else gains or loses. To capture this intensity, the curve would skew leftward. The curve's peak, which corresponds to the ideal law, would be between *j* and *m* instead of directly above *m*. Different assumptions about who has intense preferences, and the intensity of those preferences, would move the peak to other places.

Regardless of the location of the peak, though, the modernization principle holds. The first step toward the ideal law generates a greater net benefit than the last.

B. FIXED VERSUS VARIABLE COSTS

I have focused on the benefits of legal transition. Now I will consider the costs. Transition costs can be fixed or variable.[159] A fixed transition cost arises in a set amount every time law changes whether the change is minor or major.[160] For example, cash registers must be reprogrammed, which costs the same amount of time and money whether the sales tax changes by one percentage point or ten. Likewise, election officials must change their forms and procedures if the voting age jumps from 18 to 19 or to 29. A change to entitlement programs might interject a baseline of insecurity for recipients.

Variable costs accrue with the magnitude of legal change.[161] As the sales tax rises, consumers make increasingly drastic changes to

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PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 20–48 (1998); GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (Princeton Univ. Press 2002); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 641–64 (1991); 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).

159 *See supra* Part I, p. 73.

160 *See supra* Part I, p. 73.

161 *See supra* Part I, p. 73–74.

their consumption patterns.[162] As the voting age rises, politicians make greater changes to their platforms, and citizens make greater adjustments to their lives in anticipation of new representation and policies.[163] Slashing Social Security causes more disruption than trimming it.[164]

As these examples demonstrate, many costs that accompany changes to law probably have both fixed and variable components. Nevertheless, it will help to ignore this complication, at least to start, and focus instead on the polar cases.

C. ON OPTIMAL LEGAL CHANGE

I have discussed independently the benefits and costs of modernizing an outdated law. This Section combines the discussions. To clarify, I use an example with the same seven voters.[165]

Suppose the law permits tractors to use low grade gasoline. The law permits dirty fuel, which is bad. But, by driving down the cost of running tractors, it promotes food production, which is good. The law aligns with voter *j*, who is on the end of the spectrum. Thus, voter *j* is happy, but the other six voters are not. They would prefer a different balance between the environment and food. They would prefer a law requiring costlier but cleaner fuel.

Suppose that, as above,[166] the ideal law aligns with voter *m*, who sits in the political center. This is the ideal law as a matter of substance; it ignores transition costs. Once we account for those costs, a question arises. Should the law move from *j*, the political fringe, toward *m*, the ideal? Do the benefits exceed the costs?

The ideas above provide a framework for answering those questions. To begin, suppose that transition costs are variable. The

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[162] *See* David R. Agrawal, *The Tax Gradient: Spatial Aspects of Fiscal Competition*, 7 AM. ECON. J. 1, 1 (2015) (finding that "[d]ifferences in sales tax rates may lead consumers to cross-border shop").

[163] *Cf.* Kelsey Piper, *The Case for Changing the Voting Age to 0*, VOX (Sept. 10, 2019, 7:50 AM), https://www.vox.com/future-perfect/2019/9/10/20835327/voting-age-youth-rights-kids-vote (arguing that lowering the voting age would change how both citizens and politicians behave).

[164] *See* DEAN BAKER & DAVID ROSNICK, CTR. FOR ECON. & POLICY RESEARCH, THE IMPACT OF SOCIAL SECURITY CUTS ON RETIREE INCOME 1–2 (2010) (examining several proposals to cut Social Security benefits and how each would affect current and future retirees).

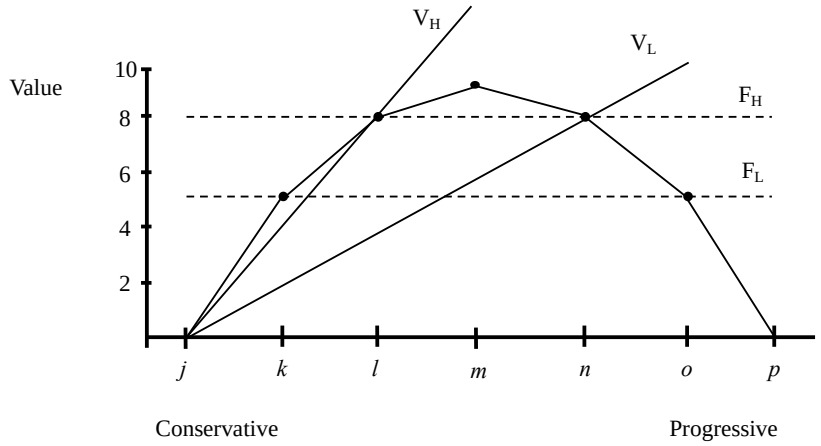
[165] *See supra* Section III.A.

[166] *See supra* Section V.A.

intuition is simple enough: as fuel requirements become increasingly stringent, the costs of adaptation continually increase. Meanwhile, benefits shrink. This follows from the modernization principle: moving law toward the ideal increases benefits at a decreasing rate.[167]

Figure 2 makes this clearer. As before, the seven voters appear on the x-axis. The status quo law aligns with *j*. Moving the law from *j* toward *m*—adopting a cleaner fuel requirement—would come with benefits captured by the curve. But it would also come with variable transition costs reflected in the line V_L (the subscript means "low").[168]

Figure 2: Optimal Legal Change



The benefit curve lies above V_L between *j* and *n*. This means that moving the law from *j* to any point between *j* and *n* would be a net positive. The benefits of modernization exceed the transition costs. I call the set of points between *j* and *n* the welfare set.

Every point in the welfare set represents an improvement over the status quo of *j*. Only one point, however, represents the biggest improvement: *l*. Starting at *j*, the move to *l* would come with the largest net benefit. At *l*, the difference between the benefit and the

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[167] *See supra* Section V.A.

[168] To simplify, I assume that variable transition costs are linear. Non-linearity would not affect the basic analysis as long as the function is monotonic.

transition cost is greatest.[169] In the example, fuel standards should move away from the status quo toward the ideal, but they should not move all the way to the ideal. The transition costs are too high.

Suppose that stability in the law becomes even more valuable. This is equivalent to saying that transition costs (which I still assume are variable only) rise. Figure 2 captures this by replacing V_L with V_H (the subscript means "high"). Starting at *j*, any move in the law comes with a higher cost than before.

The increase in transition costs shrinks the welfare set. Given costs of V_L, the welfare set stretched from *j* to *n*. Given costs of V_H, it only stretches from *j* to *l*. Every point in the new welfare set represents an improvement over the status quo. The point representing the biggest improvement is *k*. Starting at *j*, and given transition costs of V_H, the move to *k* would come with the largest net benefit.

To generalize, when variable costs increase, the welfare set not only shrinks, it recedes toward the status quo. This is not a fluke of this particular example. It follows from the combination of variable transition costs and the modernization principle. Because of the variability, larger changes to law come with higher costs. Because of the modernization principle, larger changes to law come with diminishing benefits. At some point, the costs overtake the benefits. As variable costs rise, that point comes sooner.

Variable transition costs have a straightforward implication: law should modernize incrementally. As variable costs increase, the optimal changes to law get smaller and smaller.

Now consider the opposite case: transition costs are fixed. This means that when law moves from *j*, a fixed transition cost accrues in the same amount, regardless of whether it moves near or far. To clarify with the tractor example, suppose that any change in the fuel standard will necessitate an engine modification. The modification costs the same amount whether the fuel standard changes a lot or a little.

Figure 2 captures the fixed transition cost with the flat, dashed line labeled F_L. The benefit curve lies above F_L between *k* and *o*. This means that moving the law from *j* to any point between *k* and *o* would be a net positive. The point with the greatest net payoff is *m*. In the tractor example, fuel standards should move from the

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[169] To restate, the distance between the curve and the line V_L is maximized at *l*.

status quo all the way to the ideal. This is intuitive: the fixed cost is the same whether the law moves a little (so there is a small modernization benefit) or the law moves a lot (so there is a large modernization benefit). Society is better off with the larger benefit.

Suppose that stability in the law becomes even more valuable. This is equivalent to saying that transition costs (which I still assume are fixed only) rise. Figure 2 captures this by replacing F_L with F_H. From the status quo of *j*, any change in law comes with a higher cost than before. The increase in transition costs shrinks the welfare set. Now it only stretches from *l* to *n*. The welfare set has shrunk, but the optimal change to the law remains the same. The point with the greatest net payoff is *m*.

To generalize, when fixed costs increase, the welfare set not only shrinks, it collapses on the ideal law. This follows from the combination of fixed transition costs and modernization benefits. Because costs are fixed, large changes to law are no costlier than small changes. Because more modernization means more benefit—the curve keeps sloping up, albeit at a diminishing rate—the largest benefit accrues when law moves from the status quo to the ideal.

Fixed transition costs have a straightforward implication: law should modernize fully. Given fixed transition costs, the optimal change to law requires moving from the status quo to the modern ideal, even if that means drastic change.

To summarize, the optimal change to an outdated law depends critically on the nature of the transition costs involved. If those costs are variable, the old law should move incrementally toward the modern ideal. A small step is best. If transition costs are fixed, the old law should move all the way to the modern ideal. A relatively large step is best.

Three clarifications are in order. First, the analysis has assumed that the outdated law should change—that there are some alternatives to the status quo for which the benefits of modernizing law exceed the costs (in other words, there *is* a welfare set). In reality, this is not always the case. Sometimes the costs of a legal transition, whether variable or fixed, must be so high that they exceed the benefit. In such cases, the law, though outdated, should of course remain in place.

Second, I have assumed that transition costs are purely variable or purely fixed. In reality, most legal transitions probably come with both kinds of costs. This does not fundamentally alter the analysis.

To see why, imagine a new cost line on Figure 2. To capture fixed costs, the line begins above *j*, not on top of *j*. To capture variable costs, the line slopes upward, so costs increase as law moves further from *j*. As this imaginary cost line gets steeper—as variable costs go up—the optimal change to law gets closer to the status quo. The optimal step is smaller. As this imaginary cost line shifts upward—as fixed costs go up—the optimal change to law stays the same. Combining costs complicates the analysis, but it does not change the basic conclusion. The optimal change to law is relatively small given variable costs and relatively large given fixed costs.

Third, I have written as though both transition costs and modernization benefits accrue once. But this is too simple. While transition costs plausibly accrue once, modernization benefits are ongoing. Future work could address this complication. For now, I sidestep it by simply assuming that the costs and benefits described and graphed above reflect present values. In other words, they capture all present *and future* costs and benefits.

D. THE TRANSITIONS THEOREM

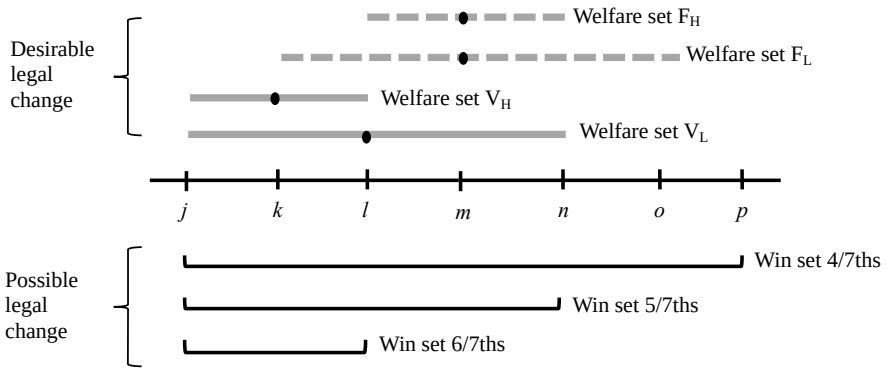
The previous Section analyzed what changes *should* be made to law. An outdated law should change if the modernization benefits exceed the transition costs. This Section analyzes legal design. The question is: what kind of amendment procedure will facilitate those net-beneficial changes? As discussed, we cannot rely on people to get this right on their own, at least not when the transaction costs of bargaining are high. We need to impose a solution in the form of a well-designed amendment rule.

Finding such a rule, it turns out, is harder than it seems. The rule that works well given variable transition costs might fail given fixed costs. To see why, return for the last time to our seven voters.[170] The status quo law is outdated; it aligns with voter *j*, who is on the fringe. Law can move from *j* and, in doing so, create a net benefit. Where exactly the law should go depends on transition costs. Figure 3—the top-half of which just summarizes Figure 2—illustrates. If transition costs are variable and low, then law should move from *j* to some point in the space labeled "welfare set V_L." Every point in that set represents a net-beneficial change in law (of those, the darkened point represents the best change in law). If

[170] *See supra* Section III.A.

transition costs are fixed and low, then law should move from *j* to some point in the space labeled "welfare set F_L." And so on.

Figure 3: The Paradox of Entrenchment



We know where law should go; where can it go? The answer depends on the amendment rule. Suppose someone proposes to replace the status quo law at *j* with a new law at *o*. This represents a big swing from one end of the spectrum to the other. If a bare majority, meaning just four of seven voters, can change the law, then the proposal will pass. Four voters—*m*, *n*, *o*, and *p*—prefer *o* because it lies closer to them than the status quo.[171]

The point *o* is not the only alternative that would defeat *j*. Every point in the space labeled "win set 4/7ths" would defeat *j* in a vote under majority rule. That space is very wide, spanning the entire range of preferences. Majority rule gives the voters maximum flexibility.[172]

Now change the amendment rule. Instead of four votes, suppose it takes five to change the law. The voters use a supermajority rule, a common form of entrenchment. In this scenario, the proposal to

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[171] To simplify, I assume voters do not vote strategically.

[172] The wide win set follows from the median voter theorem. *See generally* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958) (setting forth the "median voter theorem"); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (providing a descriptive account of party politics and voter behavior); KENNETH A. SHEPSLE, ANALYZING POLITICS 91–99 (2d ed. 2010) (articulating majority rule through geometric models). Although the win set is wide, the unique equilibrium lies at *m*, assuming no agenda setting power. This is irrelevant for my purposes.

replace *j* with *o* will fail. Only four voters, *m*, *n*, *o*, and *p*, prefer *o*. The other three voters prefer *j*.

This does not mean the law is stuck at *j*. Consider a proposal to enact *m*. Five voters, *l*, *m*, *n*, *o*, and *p*, prefer *m* to *j*, so this proposal will pass. To generalize, every point in the "win set 5/7ths" would defeat *j* under a 5/7ths voting rule.

Consider a final possibility: deep entrenchment. It takes six votes to change the law. In this scenario, the proposal to replace *j* with *o* will fail, as only four voters, *m*, *n*, *o*, and *p*, prefer *o*. Likewise, the proposal to replace *j* with *m* will fail, as only five voters, *l*, *m*, *n*, *o*, and *p*, prefer *m*. Given a 6/7ths voting rule, law *cannot* move from *j* to the political center. The furthest it can go is *l*. Every point in the "win set 6/7ths," and nothing else, would defeat *j* under a 6/7ths voting rule.

The win sets at the bottom of Figure 3 display a pattern.[173] As entrenchment deepens, the win sets get smaller. Not only do they get smaller, they collapse on the status quo. From *j*, law can change a lot under majority rule, some under a 5/7ths rule, and very little under a 6/7ths rule.

To see the intuition behind this result, return to a simpler version of the fuel example. Suppose the status quo law requires fuel to have a cleanliness rating of 9, which is low. Three legislators have authority to change it. They prefer ratings of 10, 20, and 30, respectively. If the legislators make decisions using majority rule—the law is not entrenched—they may make the rating 20. Two of three legislators prefer 20 to 9. If, however, the legislators require unanimous agreement to change the rating—the law is entrenched—they cannot make such a drastic move because the first legislator opposes it. That legislator may support an incremental increase from 9 to 10, but not a substantial increase to 20. The deeper the entrenchment, the smaller the possible change.

These ideas uncover the power and the paradox of entrenchment. Start with the power. We already understand that when legal transitions are sufficiently costly, law should not change, and

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[173] I study this pattern at length elsewhere. Gilbert, *supra* note 16, at 654–71; *see also* McGinnis & Rappaport, *supra* note 147, at 1148–58 (presenting spatial models of supermajority rule). Neither of those articles relates voting patterns under majority and supermajority rule to transition costs, which is the focus here. To simplify, the win sets in Figure 3 are drawn with the assumption that voters do not consider transition costs when voting. The Appendix shows that this does not affect the basic analysis. *See infra* app.

entrenchment tends to stop it from changing. This is the first virtue of entrenchment. But entrenchment has a second virtue as well. Suppose that the law should change. Despite the transition costs, modernization would, on balance, be beneficial. If transition costs are variable, law should change incrementally—which entrenchment forces it to do.

To visualize the argument, return to Figure 3. When variable transition costs increase, the solid welfare sets collapse on the status quo at *j*. When entrenchment deepens, the win sets collapse on the status quo at *j*. The changes to law we *should* make correspond to the changes to law we *can* make.

This analysis uncovers a deep and novel logic for entrenchment. Not only can entrenchment prevent law from changing when, because of transition costs, law should not change. Entrenchment can encourage exactly the right adjustments when law should change. *Given variable transition costs, incremental change is best, and entrenchment promotes incremental change.*

Now consider the paradox of entrenchment. Suppose that the law should change, as modernization would on balance be beneficial. If transition costs are fixed, law should change drastically—but entrenchment prevents drastic change.

Figure 3 shows the problem. When fixed transition costs increase, the dashed welfare sets collapse on the optimal law, *m*. When entrenchment deepens, the win sets collapse on the status quo, *j*. A wedge opens between the changes to law we should make and the changes to law we can make. To see this starkly, suppose fixed transition costs are high and the voters use a 6/7ths voting rule, meaning entrenchment is deep. The top welfare set shows the beneficial changes to law, and the bottom win set shows the possible changes to law. They do not overlap. Every possible change to the law—every proposal that six of seven voters would support—would create more costs than benefits.

This uncovers a deep and novel flaw in entrenchment. Entrenchment can prevent law from changing when, because of transition costs, law should not change. But entrenchment can encourage exactly the *wrong* adjustments when law should change. *Given fixed transition costs, major change is best, but entrenchment prevents major change.*

To appreciate the depth of the paradox, consider a thought experiment. A status quo law is outdated. A legal designer with

power to choose an amendment rule for that law is told that legal stability is very valuable. In other words, transition costs are high. The legal designer's intuition is to deepen entrenchment to keep the law steady. But if transition costs are fixed, this intuition might lead to exactly the wrong decision. If the law is going to change for the better, it must change a lot, not a little. To ensure the law can change a lot, the best decision for the designer might be to entrench *less*, not more.

I capture these ideas with the Transitions Theorem: variable costs support smaller legal change and deeper entrenchment; fixed costs support larger legal change and shallower entrenchment. As the theorem makes plain, optimal entrenchment is contingent. It depends on the nature of the transition costs involved.

E. A GENERALIZATION

The prior sections worked out ideas with seven voters and one mechanism of entrenchment, a supermajority rule. In reality, there are often many more voters, and they operate under different (and sometimes multiple) entrenchment mechanisms: bicameralism, presentment, filibusters, and so on. Those complications do not change the basic analysis. Amending entrenched law requires a certain number of actors (voters, legislative chambers, executives) to agree. The greater the number of actors who must agree, the smaller the possible change from the status quo.[174] Meanwhile, changing the mechanism of entrenchment does not alter the analysis of transition costs. Variable costs support incremental change, while fixed costs support larger change. The presentation above is simple, but the analysis is general.

VI. THE ECONOMICS OF CONSTITUTIONAL CHANGE

The analysis above develops general ideas with broad applications. This Part narrows the focus. It addresses a particular question, albeit one close to the hearts of many legal scholars: how to change the U.S. Constitution? Because of its generality, the analysis above can contribute to an answer. I do not purport to provide an all-things-considered answer, but I am able to make

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[174] *See* Gilbert, *supra* note 16, at 649–51. This is the central insight of an important book: TSEBELIS, *supra* note 158.

some progress, in part by pointing out weaknesses in existing accounts.

Originalists and some others tend to support the demanding amendment rules in Article V, and they tend to oppose efforts by judges to sidestep those rules through interpretation.[175] The analysis here provides some tools to assess this broad view. If the status quo that the amendment rules protect is not too far from the ideal law (typically originalists and others present no evidence on this score), if transition costs are sufficiently high (same), and, critically, if those costs are mostly variable in character (a distinction originalists and others ignore), then their position is strong—stronger than they know. Under these facts, the deep entrenchment of Article V not only freezes most of the U.S. Constitution in place, it encourages amendments to be incremental, which is optimal given those variable costs. If these conditions fail to hold, then their position weakens. If transition costs are mostly fixed, then Article V encourages harmful changes and discourages beneficial changes.

Living constitutionalists and some others face the opposite criticism. Their calls for faster, grander legal change, whether through amendment or judicial interpretation, ring true when the status quo is far from today's ideal law, transition costs are low, and, critically, those costs are mostly fixed. They usually offer no evidence on these scores. If transition costs are mostly variable, then legal change should be small and their prescription reversed. In that case, deep entrenchment—even as it protects an unpopular status quo, even as it promotes plodding legal change—gets it exactly right.

These narratives often address Article V as a whole. Some scholars might want to claim that Article V overall is too strict, too lenient, or just right.[176] Such positions seem untenable. One can mitigate this problem by assessing Article V case-by-case rather than as a whole. More generally, one can lessen the challenge of entrenchment design by having different amendment rules for different laws. It must be easier to get the rule right case-by-case

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[175] Like this Article, many of their arguments are rooted in consequentialism. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 53, at 19 ("Our normative approach to constitutions and interpretation is welfare consequentialist.").

[176] *Cf. id.* at 202 ("Only an uninhibited Article V that fully engages the whole people can ensure that changes in our fundamental law reflect the crystallized consensus of their views.").

than in the aggregate. Perhaps this explains why the U.S. Constitution has a higher threshold for amending some parts than others.[177] Likewise, this may justify why California has a lower voting threshold for constitutional "amendments" than constitutional "revisions."[178] The analysis here supports heterogeneity in voting rules, and it casts light on how to design them.

Rather than varying the voting threshold, one could vary the process. Article V provides two methods for changing the U.S. Constitution: amendments and conventions.[179] Amendments generally proceed issue-by-issue, foreclosing bargaining across issues,[180] while conventions promote bargaining across issues. This distinction is critical. When citizens can bargain across issues, entrenchment does not constrain legal change to the same degree. A person otherwise opposed to changing the law on *X* may approve a significant change to it if she gets a law on *Y* in exchange. Thus, conventions offer a way out of misalignment. That problem arises when entrenchment promotes incremental change but, because of fixed transition costs, only drastic change is beneficial. Through bargaining in a convention, one can make that large, beneficial change, even with deep entrenchment. This generates a proposition: given deep entrenchment, lawmakers should use amendments

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[177] Article V provides a supermajority rule for amending most of the U.S. Constitution but effectively an unanimity rule for amending the provision granting states equal representation in the Senate. *See* U.S. CONST. art. V.

[178] *See* CAL. CONST. art. II, § 8 (describing initiative measures in California); *id.* art. II, § 10 (establishing the effectiveness of provisions passed or amendments made through referenda); *id.* art. XVIII (establishing California's constitutional amendment procedures). On constitutions with multiple amendment rules, see Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 442 (2018) (proposing a "tiered design" for understanding the Constitution to avoid rigidity or amorphousness in analysis).

[179] *See* U.S. CONST. art. V (establishing that conventional amendments require support from state legislatures, while changes proposed by a convention may require support from state conventions).

[180] *See* THE FEDERALIST NO. 85, *supra* note 7, at 443 (Alexander Hamilton) ("[E]very amendment to the Constitution . . . would be a single proposition . . . . There would then be no necessity for management or compromise, in relation to any other point—no giving nor taking."). Legislators often pass multi-issue bills, but multi-issue amendments are rarer. This is in part because of "single subject rules," which exist worldwide. *See generally* Cooter & Gilbert, *supra* note 126 (discussing the single subject rule as applied to constitutional initiatives); Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single Subject Adjudication*, 40 J. LEGAL STUD. 333, 345–46 (2011) (finding evidence that single subject rules deter multi-issue initiatives); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006) (discussing the single subject rule as applied to legislation in the American states).

when transition costs are variable and conventions when transition costs are fixed.

Separate from amendments and conventions, judicial updating offers a third process for changing entrenched law. To illustrate, the text of a constitution can change to grant same-sex couples a right to marry, or judges can interpret existing text to grant that right, as the U.S. Supreme Court did in *Obergefell v. Hodges*.[181] These methods of change are linked. When a constitution is entrenched and difficult to amend, judicial discretion—and therefore the capacity to update—grows.[182]

Scholars have long debated the merits of judicial updating.[183] One group claims that Article V provides the exclusive mechanism for changing the U.S. Constitution and that judicial updating violates this principle and produces bad results.[184] This view is closely associated with originalism.[185] The other side rejects originalism[186] and embraces a more active role for courts. Professor Strauss, for example, argues that Article V presents "just too difficult a process" and "living constitutionalism"—meaning judicial updating—"is inevitable, and necessary."[187] In support of updating, scholars argue that judges, at least in U.S. federal courts, tend to update the U.S. Constitution in incremental, common law fashion.[188]

In a sense, both sides are wrong. Judicial updating can do more good than harm. And judicial incrementalism is not necessarily a virtue. To illustrate, suppose a constitutional provision is badly outdated. Modernizing it could create more benefits than costs. If transition costs are variable, then minor change is best. If entrenchment is deep, then only minor change is possible and there

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[181] 135 S. Ct. 2584, 2604 (2015) (finding that the right to marry is fundamental under the Constitution).

[182] COOTER, *supra* note 8, at 232 ("In general, lowering the obstacles to changing the constitution, such as requiring a simple majority instead of a super-majority, decreases the discretionary power of the courts to interpret the constitution.").

[183] *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 53; STRAUSS, *supra* note 44; Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691 (1996); Vermeule, *supra* note 61.

[184] *E.g.*, MCGINNIS & RAPPAPORT, *supra* note 53, at 85–99; Scalia, *supra* note 51, at 854.

[185] *E.g.*, Scalia, *supra* note 51, at 854.

[186] *But see* BALKIN, *supra* note 44, at 277 (developing a theory of originalism that reserves a place for judges in constitutional construction).

[187] STRAUSS, *supra* note 44, at 115.

[188] *See, e.g.*, *id.*

is no need for judicial updating. If, however, entrenchment is shallow—in California, for example, one can amend the constitution with a bare majority[189]—then major change is possible. Lawmakers who do not understand or care about transition costs might propose a major amendment. Judges who do understand and care about transition costs might preempt that amendment with minor updating. Scholars critique judges for preempting the legislature—for making a change by fiat instead of letting democracy work. In this scenario, however, fiat is preferable. As with rights protections, courts can protect society from the dangers of democracy.

The scenario I just described begs questions of institutional competence. Compared to legislators, I imagined judges having better information (or at least caring more) about transition costs. This will not always, and perhaps only rarely, be true. But imagine a different scenario. Modernizing the outdated provision could create more benefits than costs. If transition costs are fixed, then major change is best. If entrenchment is deep, then only minor change is possible. If lawmakers do not understand or care about transition costs, they might enact minor change, harming society. If they do understand and care about transition costs, they might propose major change, but it will fail. Judges can correct the problem with dramatic updating.

This scenario is especially intriguing. It does not require judges to have better information than legislators. Furthermore, it shows that judicial incrementalism is not always a virtue. Here, judges should initiate a major change in law, not a minor one. A proposition follows. If judges are going to update constitutional text, they should attend to transition costs. As variable costs increase, they should temper the pace of legal change, and as fixed costs increase, they should speed it up.

Claiming that judicial updating can improve social welfare is one thing; claiming that it *does* is another. To make that claim requires strong assumptions about what information courts possess and what actions they tend to take.[190] I do not make that claim. The objective is not to show that updating necessarily outperforms amendment, just to show when and why it can.

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[189] *See* CAL. CONST. art. II, §§ 8, 10 (specifying that a majority of voters can amend the constitution by initiative).

[190] Of course, making the opposite claim—that judicial updating decreases social welfare—also requires strong assumptions.

VII. CONCLUSION

Scholars have debated entrenchment for centuries.[191] They lob claims about stability and democratic responsiveness like artillerymen on the Western Front, making noise but no progress.[192] The problem runs deeper than epistemology. It is not a lack of information about the values of stability and responsiveness—in the language above, modernization benefits and transition costs—that stalemates the debate, though that problem looms large. More fundamentally, we lack theory. Without data, theory becomes more important, not less. It must be better to have poor information and clear theory than poor information and no theory. Using law and economics, this Article provides the beginnings of a clear theory of entrenchment.

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[191] *See supra* Part II.
[192] *See supra* Part II.

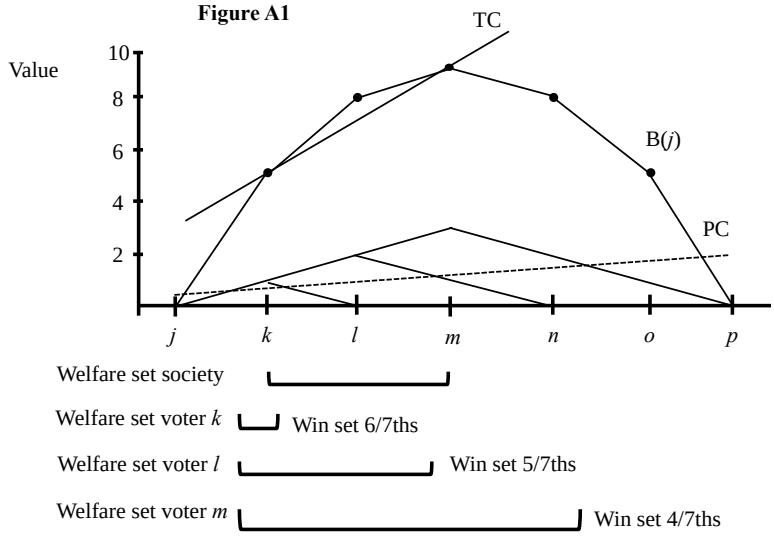
VIII. APPENDIX

Section V.D developed the Transitions Theorem with the aid of Figure 3, which includes win sets. To simplify, those win sets assumed that voters do not account for transition costs when deciding whether to support or oppose legal change. That simplification does not change the basic analysis, as this appendix shows.

In Figure A1, the status quo law equals *j*. Changing the law would create benefits captured by the curve. Total transition costs borne by all citizens are indicated by the line TC. The welfare set stretches from *k* to *m*. The figure includes two new features. First, it shows the benefits of legal change for three individual voters, *k*, *l*, and *m*. Voter *k*'s benefit is captured by the triangle that peaks above *k*. Moving law from *j* to *k* would increase her payoff by one, and moving law from *k* to *l* would decrease her payoff by one. Citizen *l*'s benefit is captured by the triangle that peaks above *l*. Moving law from *j* to *k* would increase her payoff by one, moving law from *j* to *l* would increase it by two, and so on. Citizen *m*'s benefit peaks above *m*. Similar triangles could be drawn for the other citizens. Second, the figure shows pro rata transition costs with the dashed line PC.[193] As law moves rightward from *j*, every citizen pays that pro rata cost.

[193] Multiplying PC by seven (because there are seven citizens) yields TC.

Figure A1



Consider voter *k*. As a matter of pure policy preference, she prefers every point between *j* and *l* to a status quo law of *j*. Once she accounts for her own transition costs, however, this ceases to be true. She only prefers points in her welfare set to *j*. These points generate enough benefit to offset her transition costs. Figure A1 shows welfare sets for *l* and *m* as well, which follow from the same logic.

The individual welfare sets are nested, meaning each starts at the same place. Welfare sets for citizens *n*, *o*, and *p* start at the same place too, though they are not pictured. These welfare sets map onto win sets. Suppose the voting rule equals 6/7ths. Because the status quo matches citizen *j*'s ideal point, she will never support change. Thus, to change law under this rule requires support from *k*, *l*, *m*, *n*, *o*, and *p*. The only alternatives that all six of them prefer to *j* lie in citizen *k*'s welfare set. Her welfare set equals the win set under the 6/7ths rule. Citizen *l*'s welfare set equals the win set under the 5/7ths rule, and so on.

Now revisit the claims from above. I argued that even rational citizens who account for transition costs may approve welfare-reducing changes to law, and Figure A1 supports this. Every voting rule permits small, harmful changes to law (changes to points left of society's welfare set), and the 4/7ths rule permits large, harmful changes to law (changes to points right of society's

welfare set). I argued that given variable transition costs, entrenchment should deepen, as that causes the range of possible changes to law to track the range of welfare-enhancing changes. That idea still holds. As the transition cost lines get steeper (variable costs increase), the welfare sets recede toward the status quo, and as entrenchment deepens, the win sets do too. I argued that given fixed costs misalignment can result. That idea is apparent in Figure A1. Deepening entrenchment by switching from a 5/7ths to a 6/7ths rule causes society's welfare set and the win set to diverge.

When citizens account for their own transition costs, the analysis gets richer, but its central features do not change.