Journal of Institutional Economics (2026), **22**, e35, 1–15
doi:10.1017/S1744137426100708

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

A transaction cost theory of constitutional change

Andrew T. Young

Rawls College of Business, Texas Tech University, Lubbock, USA
Email: a.t.young@ttu.edu

(Received 3 December 2025 UTC; revised 11 June 2026 UTC; accepted 14 June 2026 UTC)

Summary
How does a constitutional order change over time? What are the implications of such a change? Furthermore, how do answers to these questions inform de jure ('Big-C') Constitutional design? Virtually every country today has a written Constitution. However, formal Constitutional design is only one avenue through which a constitutional order can change. There are also, e.g., changes in constitutionally relevant norms and conventions, judicial review, and executive orders. In a zero-transaction costs world, whether constitutional change occurs via one avenue or another makes no difference. However, with positive transaction costs, the implications for one avenue versus another can be significant. I propose a theory of constitutional change rooted in the transaction costs approach. Changes will occur whenever (a) the benefits to creating new bundles of political property rights exceed the costs of creating them and/or (b) the same is true regarding the exchange of existing bundles of those rights. When it is efficient for constitutional change to occur, it will occur via the lowest-cost avenue. Furthermore, the relative transaction costs are endogenous to the use of certain avenues vis-à-vis alternatives. Specifically, avenues that are used more frequently become relatively cheaper. This has important implications for real world Constitutional design.

Keywords: Article V; constitutional design; constitutions; political economy; transaction costs

Introduction

The US has a written Constitution that is generally venerated by its citizens and their politicians. Regardless, since 1789 there have been significant changes in the constitutional order not associated with formal amendments to the document. For example, during the 1930s Franklin Roosevelt's 'New Deal' was associated with transformative legislation – initially rebuffed by the Supreme Court – that, with minor changes, became accepted as constitutional (Ackerman, 1998, ch. 10).

US President Donald Trump seems to be pursuing a similar strategy to changing constitutional boundaries in the US (though we have yet to know the ultimate outcomes). As just two examples, he has claimed authority to revoke birthright citizenship and to impose extensive tariff reforms without Congressional approval. These are issues that, if resolved in favor of the executive, will represent meaningful changes to the US constitutional order.

Generally, formal Constitutional design is only one avenue for constitutional change. However, Constitutional design is the avenue via which policymakers and scholars have the most direct input. Virtually every country has a written Constitution.[1] Substantial amounts of time and other resources

[1]There are currently 193 Constitutions in force across the globe: see the *Constitute* website (https://www.constituteproject.org/constitutions?lang=en&status=in_force) (accessed 2/18/25). I will use a capitalized 'Constitution' in reference to a written

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are put into drafting, debating, and ratifying these documents.[2] What is the relationship between the use of Constitutional design versus other avenues?

As an illustrative example of why the question above may be an important one, consider historical versus contemporary experiences with the US Constitution and its Article V procedures for amendment. Article V has not been successfully employed to propose and ratify a Constitutional amendment since 1971.[3] As such, many scholars of constitutional law argue that the US Constitution is the most difficult in the world to amend (Albert, 2022). Yet there were 11 successful amendments between 1909 and 1971 (about one every five and a half years).[4] It is unclear, then, that the complete drought of Article V usage over the past half century is due alone to its procedural burdens. It may instead be linked to the occurrence of constitutional change via other avenues.

Other avenues for constitutional change include relevant norms and conventions. Constitutional change can also occur via judicial review. Furthermore, executive orders and so-called 'super-statutes' (passed through ordinary legislative processes) can invite new interpretations of a constitutional order (Eskridge and Ferejohn, 2001).[5]

In this article I propose a framework within which to consider how the use of certain avenues for constitutional change relates to the use of other avenues. This is based on a theory of constitutional change rooted in the transaction costs approach (Coase, 1937, 1960; Demsetz, 1967; North, 1990). Changes in a constitutional order will occur whenever (a) the benefits to creating new bundles of political property rights exceed the associated costs and/or (b) the same is true regarding the exchange of existing bundles. The creation and/or exchange of political property rights will be considered in terms of the relative transaction costs associated with certain avenues.

The costs referred to above are indeed *transaction* costs. Allen (2015) defines transaction costs as '*the costs of establishing and maintaining property rights*' (p. 382; italics in the original). In the context of constitutional change, the relevant property rights are *political* property rights (Salter and Young, 2019, 2023; Salter, 2015). A property right is a claim to making choices regarding a resource.[6] Such choices typically concern the use, exclusion, and/or transfer of the resource. A political property right is just that, but one associated specifically with political authority and the returns to governance decisions. With constitutional change, then, the costs of establishing new political property rights, or exchanging existing ones, are indeed transaction costs in the sense defined by Allen.

This also fits comfortably with Berggren and Karlson's (2003) more applied definition of transaction costs (those of *contact, contract, and control*) as well as that of Cooter and Ulen (2016) (*search, negotiation, and enforcement*).[7] Using the latter terminology, agents wishing to affect constitution

document – as opposed to uncodified elements of a constitutional order. This convention has been usefully employed by scholars in constitutional law, political science, and economics (e.g., Brennan and Pardo, 1991; Elkins and Ginsburg 2021; Harris, 1993; Michelman, 1998; Young, 2023).

[2]These documents frequently have to be replaced. A national Constitution, on average, lasts only 19 years (Elkins et al., 2009). Also at substantial cost, about 30 countries each year amend their existing Constitutions (Ginsburg and Melton, 2015).

[3]Ratified in 1992, the Twenty-Seventh Amendment is an anomaly that was proposed in 1789 and only ratified 200-plus years later. It was sent to the states in 1789 and was only ratified by four states in the next three years; then another two before 1978. However, the proposed amendment did not have a formal expiration date for states' consideration. In a peculiar turn of events, a University of Texas at Austin undergraduate (Gregory Watson) wrote a 1982 class paper arguing that the amendment could still be ratified; he subsequently advocated for such, and, perhaps surprisingly, the movement obtained traction, and the two-century-plus proposal was added to the Constitution in 1992.

[4]This an appropriate time period to consider since it is post-Civil War and the Reconstruction Amendments that followed. The period is also one for which the US had the majority of states, which constitute to the current union.

[5]This is not an exhaustive list. For example, other extra-Constitutional codifications can have meaningful effects on a constitutional order (e.g., the Declaration of Independence (1776) in the US and both the Magna Carta (1215) and the Bill of Rights (1689) for the UK). There are also, of course, violent means via which constitutional change can be affected (e.g., Björnskov and Voigt (2025) study coups that lead to entirely new Constitutions).

[6]This is consistent with how Allen, immediately following his definition of transaction costs, defines a property right: '*the ability to freely exercise a choice*' (p. 382; italics in original).

[7]This being said, it is important to emphasize that I proceed in this paper based on Allen's (2015) definition of *transaction costs* and his use of the term *property rights* in that definition. The emphasis is important due to a lack of broad consensus on

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change must seek others in a position to provide certain rights (through relinquishing their own political property rights or having others do so), negotiate the terms of the exchange, and make all parties involved believe that a certain level of enforcement will be subsequent. (In the case of formal Constitutional change, for example, certain agents must seek out coalitions of citizens and political agents, negotiate a de jure proposal, and convince all involved that the exchange is mutually beneficial and enforceable moving forward.)[8]

To be clear, existing political property rights – and property rights generally – are not necessarily (and, indeed, rarely) perfectly defined nor enforced in terms of use, exclusion, and transfer. This will also be true regarding any new political property rights that emerge via constitutional exchange. Such prior and subsequent imperfections are certainly contemplated by parties to those exchanges. Based on such knowledge and expectations, it remains true that constitutional exchanges involve transaction costs.

Transaction costs are associated with all avenues for constitutional change. For example, there are resources expended on lobbyists and attorneys who aim to influence judicial review; there are also resources expended on organizing forums and participants to propose, debate, and ratify Constitutional amendments. Also, while we tend to think of norms as 'exogenously' evolving, individuals and organizations can expend resources in trying to change them.[9]

When constitutional change occurs, it will occur via the lowest-cost avenue. In this (and only this) sense such change will be efficient. However, only in a zero-transaction-cost world would it not matter whether a change occurs through Constitutional design or some other avenue (Coase, 1960).[10] Furthermore, in the zero-transaction cost case the outcome will be first-best by one avenue or another (Leeson, 2020). But in all real-world cases, the transactions costs associated with any avenue for constitutional change are positive and often large. Complicating the matter, the costs of different avenues will be contingent on one another.

This article is related to other works that have employed a transaction costs approach to understanding specific constitutional choices and episodes of constitutional change. For example, Buchanan and Tullock's (1962) theoretical framework considers choices of specific decision rules versus alternatives (e.g., majority rule versus more inclusive standards) in terms of a cost-minimization problem. For another, Elkins *et al.* (2009, ch. 4) highlight the importance of asymmetric/incomplete information in the costs of renegotiating constitutional bargains. Regarding constitutional *change* specifically, Voigt (1999a, 1999b, ch. 7) models constitutional change as a game between the judiciary and other branches

the meanings of these two terms. Allen conceives of property rights in terms of control over resources and transaction costs as those costs relevant to establishing and maintaining such control. (This includes the costs of establishing new property rights arrangements where other arrangements previously existed.) Alternatively, authors such as Coase, Demsetz, North, and Oliver Williamson emphasize legal rights and their exchange. For example, Coase (1992, p. 717) emphasizes that 'the [property] rights which individuals possess, with their duties and privileges, will be, to a large extent, what the law determines.' Also, North (1984, p. 256) describes 'Transaction costs [as] the costs of specifying and enforcing the contracts that underlie exchange[;]' and Williamson (1996, p. 379): 'A transaction occurs when a good or service is transferred across a technologically separable interface.' There may be some concern that this characterization of both transaction costs and property rights clashes with North who sometimes seems to characterize property rights as formal: e.g., institutions "consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)" (1991, p. 97).

[8]Many 'unamendability rules' make certain Constitutional provisions untouchable. Chilton and Versteeg (2025) discuss whether imposing prohibitive transaction costs in such cases is desirable.

[9]For example, members of the US Electoral College are pledged to vote for a specific presidential candidate, and adherence to those pledges is a long-standing norm. When Hillary Clinton lost the Electoral College (but won the popular vote) against Donald Trump in 2016, there was an unprecedented effort by Clinton supporters for electors to be 'faithless' and vote for her rather than Trump (Whittington 2017; Lessig and Seligman, 2024, ch. 4). While the effort was ultimately unsuccessful, it did result in faithless electors (which was 10-fold more than in any election since 1876).

[10]Coase was concerned with market contexts, but the 'Coase Theorem' logic has subsequently been extended to the realm of politics (Acemoglu, 2003; Buchanan, 1973; Munger, 2019; Parisi, 2003).

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of government, the former and latter both facing constraints and associated marginal costs. The present work builds off of these contributions but hopefully presents a more comprehensive approach.

Marginal analysis of *when* constitutional changes occur and *via which avenue(s) versus others* has been lacking. The Voigt (1999a, 1999b) contributions mentioned above are exceptions. However, the marginal analysis in the present paper goes further, confronting the endogeneity associated with the relative costs of certain avenues vis-à-vis others.

This article is organized as follows. In section 2, I develop the concept of a constitutional order. In relation to that concept, the part that a ('Big C') Constitution can play in such an order is discussed in section 3. In section 4, various avenues for constitutional change are identified and discussed. With the preliminaries in hand, a transaction cost theory of constitutional change is elaborated on in section 5. Based on that theory, an analysis of Constitutional design vis-à-vis other avenues is laid out in section 6, with a particular emphasis on the case of Article V of the US Constitution. Concluding remarks are found in section 7.

What is a 'Constitutional order?'

A society's constitutional order is *a self-enforcing set of constraints and prescriptions that are imposed on governance providers, as well as the individuals being governed*. A constitutional order defines (i) the structures through which governance is provided, (ii) the ends towards which governance is aimed, and (iii) what governance providers can and cannot do in pursuing those ends.[11]

Economists typically focus on the constraints (e.g., in the US Constitution: 'Congress shall make no law respecting an establishment of religion [. . .]'). However, prescriptions are also an important part of any constitutional order (e.g., 'free legal aid' and a 'living wage' are 'directive principles of state policy' in India's Constitution).[12] And even in the absence of a formal Constitution, there are norms that compel governance providers positively towards certain actions.

Economists also tend to focus on elements of a constitutional order that directly affect governance providers. However, elements that affect the governed are also important. For example, a constitutional order determines how the governed select their governance providers and, subsequently, remove them from power. Societies with formal Constitutions provide explicit structures along these lines.[13] However, norms and conventions also play a role. A complete picture of the 'rules of the game' within which governance providers operate necessarily includes the constitutional powers of the governed to install and remove them.

Importantly, note that this section begins by defining a constitution as a *self-enforcing* set of constraints and prescriptions. However, enforcement is always imperfect. (This is true regardless of whether we are considering self- or third party-based enforcement.) As such, whether a certain Constitutional provision, or a certain norm, or a certain court opinion (etc.) is an *effective* part of a society's constitutional order is not a black-or-white issue. (Any relevant constitutional constraint or prescription may be *more or less* binding on governance providers and/or the governed.) On the margins, then, degrees of enforcement must be considered.

And those enforcement margins will represent possibilities for constitutional change. For example, the precise meaning of any Constitutional provision is always open to interpretation, and, as such, enforcement is always contestable (Seidman, 2012; Young, 2023, ch. 3). This provides opportunities for interested agents to encourage enforcement according to their preferred interpretation vis-à-vis those of others. For example, the US constitutional order was fundamentally changed by Franklin Roosevelt's

[11]See Ginsburg (2010, p. 70): 'First of all, [constitutions] serve to constrain the government[. . . .] Second, constitutions express fundamental values of the polity. [. . .] Third, constitutions elaborate on the institutions of government[.]' Ginsburg is a commentator, most specifically, on written Constitutions, but the characterization fits most scholars' basic idea of a constitutional order more broadly.

[12]See part IV of the 2024 English translation (https://legislative.gov.in/constitution-of-india/).

[13]For example, the Seventeenth Amendment to the US Constitution in part states: 'The Senate [. . .] shall be composed of two Senators from each State, elected by the people thereof, for six years [. . .]').

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'New Deal' reforms. This involved a spate of initial legislation followed by Supreme Court rejections; then subsequent legislative efforts (combined with a 'court-packing' threat by FDR) that were then embraced by the Court with its well-known 'switch in time' (Ackerman, 1991, 1998). The new judicial interpretations embodied new understandings of the constitutional order that were subsequently embraced in the public psyche and practice.

The above example illustrates how there are various margins – alone or in combination – via which constitutional change may occur and/or be actively pursued. This foreshadows the discussion that begins in section 4 below and culminates in the transaction cost theory of constitutional change elaborated on in section 5. However, the implications of the discussion and theory for ('Big C') Constitutional design and change will be of particular interest. As such, in the next section I begin with a discussion of Constitutions and why such 'parchment barriers' can be important.[14]

What part can a 'Big C' constitution play?

A written Constitution is only one part of any constitutional order. And the importance of a Constitution for any specific society varies. Countries like New Zealand and the UK do not have a single document labeled 'Constitution'. Other countries might as well not have one since their Constitutions have little to no teeth (Law and Versteeg, 2013). Alternatively, the US Constitution has undeniably been relevant, and compliance with Constitutional provisions is quite high in many other countries (Gutmann *et al.*, 2024).

While their importance varies, Constitutions are of particular interest to social scientists. As we know from above, countries across the globe generally have Constitutions and significant resources are devoted to their drafting and ratification, as well as their amendment *ex post*. Furthermore, unlike relevant norms and conventions, the drafting, ratification, and amendment of Constitutions are matters regarding which concrete, actionable prescriptions can be made.

As such, the question of why a written Constitution can matter at all is nontrivial. Why might a mere parchment barrier constrain governance provision?

The most compelling arguments involve coordination. Written Constitutions can serve as focal points around which citizens and their political agents coordinate (Hadfield and Weingast, 2014; Hardin, 1989; Ordeshook, 1992; Weingast, 1997; 2005; Young, 2019; 2022):

> Conventions and norms are shared beliefs; but an individual will always have some uncertainty as to *the extent to which* those beliefs are shared with others. A de jure constitution puts those beliefs out in the open; it allows individuals to coordinate their expectations regarding behaviors by political agents that are unacceptable (Young, 2019: 285).

When Constitutions codify provisions that are consistent with existing conventions and norms, it makes their enforcement cheaper. To wit, a Constitution can emphasize the *shared* in shared beliefs.

Furthermore, Constitutions can put forth in writing elements for 'consideration.' These elements may be marginal – expanding on existing conventions/norms – that guide citizens and their political agents to new coordination equilibrium. They may also be elements that lead citizens and political agents back towards previously existing conventions/norms (and a prior coordination equilibrium). As an example of the latter, US citizens – by both popular vote and the electoral college – embraced Franklin Roosevelt running for a third presidential term in the aftermath of the Great Depression and facing the prospect of WWII. (And this carried over to a fourth term as well.) But George Washington's precedent of two terms was still adjacent to existing norms. The Twenty-Second Amendment (Congressional approval 1947; ratified by the states 1951) was then able to push the constitutional

[14]'Parchment barrier' is James Maddison's terminology: *Federalist 48*.

https://doi.org/10.1017/S1744137426100708 Published online by Cambridge University Press

order back towards Washington's precedent, and it has been binding for the nearly seventy-five years since.[15]

Avenues for constitutional change

But changes in Constitutional design are only one avenue through which, more generally, the constitutional order of a society may change. There are various avenues via which such change can occur: e.g., (1) Constitutional design; (2) changes in norms; (3) judicial review; and (4) executive orders. The above are not exhaustive but do fairly list the avenues which have received the most scholarly attention.

These various avenues lay on a spectrum in terms of formality (codification). Constitutional design (1) is purely formal with the explicit end of impacting the constitutional order. Alternatively, changes in norms (2) are clearly informal. But then there is the realm of mixes between the formal and informal. Judicial review (3) is formal to the extent that it is codified in court opinions, but it is also based on an interpretation of the Constitutional text (and that interpretation may be more or less within the 'four corners' of that text). Similarly, executive orders (4) are formal but then rely on acquiescence or pushback from the courts, which, again, falls back on interpretation.

Regardless, all of the above avenues are substitutes for one another. Moreover, the costs associated with one avenue vis-à-vis another are interrelated. In particular, all else equal, when one avenue is used more often over time, the relative cost of that avenue decreases. Of course, to be taken seriously, the above claims must be supported by a theory of constitutional change.

A transaction cost theory of constitutional change

Demsetz (1967) argued that, in the case of a particular resource, property rights will be established once the net benefits to doing so become positive. In the absence of property rights, coordinating on the use of a mutually beneficial resource is frustrated because externalities are ubiquitous. When established, property rights define which costs will be internalized by which individuals (Coase, 1960). Property rights, then, mitigate the frustrations by leading individuals to internalize the costs of specific actions. But that mitigation comes at the (transaction) costs associated with establishing those property rights.

Demsetz (1967, p. 350) succinctly expresses the key to thinking about the emergence of and/or change in property rights structures:

> If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or differential beneficial and harmful effects (p. 350).

As an illustrative example, Demsetz considers property rights in land amongst the indigenous peoples of the (present-day) Quebec region in the seventeenth century. He argues that property rights in land arose because the arrival of Europeans drove up the value of beaver pelts. Prior to that, there were not clear property rights associated with hunting grounds. This was efficient because the costs of establishing such rights were large relative to the benefits of internalization. But as beaver pelts rose in value relative to those costs, that was when property rights in land emerged.

The above is a case where benefits rose relative to costs of establishing property rights. However, the cost side of the equation also matters. For example, consider extraterrestrial resources. The planet Jupiter has 95 moons. At least some of those moons have, with high probability, valuable resources; yet no property rights have emerged associated with them.[16] Today, the costs of establishing property

[15]Elkins et al. (2009) emphasize that such a norm can be fuzzy/unclear. Since this is true, there could be the possibility that the norm established by Washington included an 'emergency exception' that the Great Depression invoked. However, even if that was the case, the authors of the Twenty-Second Amendment (successfully) sought to revoke that exception.

[16]For example, several of the moons are thought to contain helium-3, a potential source of nuclear power (Johnson, 2000).

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rights for any of those moons are prohibitive. But this may not always be so. Technologies relevant to space travel and homeostasis may significantly advance, as may financial markets that effectively provide for (*very!*) long-term options, etc. In a distant future, meaningful property rights over one or more of Jupiter's moons may very well be efficient.[17]

Demsetz's approach has been subsequently applied to the realm of political property rights (North, 1990). Here I apply it to questions of a constitutional order and changes in it. Constitutional change involves the establishment or exchange of political property rights. This will occur when the benefits of exchange or establishment exceed the associated costs. (Moving forward, I will refer to those simply as the *transaction costs* for ease of exposition.)

When considering property rights generally, they can be established and exchanged in various ways. For example, they can be codified in formal contracts. Alternatively, they can be set with a handshake and be a stable equilibrium based on repeated interactions. They can also be determined by long-standing tradition in use patterns. Regarding political property rights specifically, there are also various avenues through which they can be established or exchanged.

Efficient constitutional change will occur when there is some avenue via which there are positive net benefits to the change. Holding the benefits constant, there may only be one avenue for which the transaction costs are lower. This avenue would, of course, be efficient. However, there may be multiple avenues associated with positive net benefits. In that case, the one with the lowest transaction costs will be the efficient avenue. *Efficient constitutional change will be contingent on the relative transaction costs associated with different possible avenues.*

To be clear, efficient does not mean *first best*, *socially optimal*, or such. In particular, the relative transaction costs are expected to be a function of power asymmetries between different actors (e.g., Epstein and Knight, 2004; Knight, 1992). Which avenue for constitutional change is the lowest cost will be dependent on those power asymmetries, which are a legacy of (fortunate or unfortunate) historical events. An implication of this is that political elites will often be in a position of facing lower transaction costs. One way to indeed characterize political elites is that they are individuals who face low political transaction costs (Holcombe, 2018a, 2018b). When political elites (or certain groups of them) have an interest in certain constitutional change, they are in a better position to affect it. When they succeed, the change is efficient but not necessarily 'good' for the citizenry generally.[18]

Alternatively, constitutional change can be good (by some standard) for a citizenry. For example, Article V of the US Constitution places substantial burdens on amendments that involve popularly elected assemblies (e.g., two thirds of elected House of Representative members and elected Senators to propose; three fourths of elected state legislatures). This helps to ensure that any amendment is indirectly (through the assemblies) approved of by a supermajority of the nation's citizens; as well as majorities of states' citizens in a supermajority of states. Amendments will then hopefully be consistent with a generality norm (Buchanan and Congleton, 2003 [1998]; Congleton, 2004).[19] As a potentially more

[17]Similar arguments regarding extraterrestrial resources and territories have been made by 2018 and Salter and Leeson (2014); Salter (2017). In particular, Salter (2018) discusses how the increasing importance of the private sector in extraterrestrial activities threatens the self-enforcing nature of the 1967 multilateral Outer Space Treaty (OST) which prohibits its parties from making sovereign claims in space. Salter argues (citing Demsetz) that violation of the OST is soon likely to be efficient as governments and/or private agents find the establishment of property rights over certain resources to be net beneficial.

[18]A potential illustration of this point is a woman's right to abortion (or lack thereof) at the national level in the US. There have been two major Supreme Court decisions: *Roe v. Wade* (1973) declaring a constitutional right to abortion, and *Dobbs v. Jackson* (2022), which overturned *Roe v. Wade*. These were major constitutional changes, diametrically opposed, one made nearly half a century after the other. Yet according to Gallup polls, when citizens were asked in 1975 (the earliest available) whether 'abortion should be legal under any circumstances' only 21 percent answered yes; when *Roe v. Wade* was overturned the yes's were notably higher at 35 percent. (For 'legal only under certain circumstances' the percentage has trended around 55 percent the entire time.) *Prima facie* it would seem that the interests of (certain groups of) political elites better account for these changes than general shifts in citizens' constitutional preferences. (Source: https://news.gallup.com/poll/1576/abortion.aspx; last accessed March 6, 2026).

[19]'Hopefully' because there is still the opportunity of Constitutional capture by special interests and/or political elites. See Zywicki (1994) for an argument that the Seventeenth Amendment (providing for popular election of US senators) was driven by special interests.

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general example, public participation in Constitution-making has become increasingly prevalent since the 1970s (Blount, 2011; Choudhry and Tushnet, 2020; Elkins and Hudson, 2019; Widner, 2008). Public participation offers opportunities for Constitutional design to align with citizens' interests generally.[20]

While efficient constitutional change may or may not be socially desirable, identifying the lowest cost avenue as efficient is not merely tautological. As elaborated on below, a positive analysis of how the efficient avenue can be self-reinforcing is important for considering whether (by some standard) desirable avenues will or will not be utilized for constitutional change.

As discussed above, the possible avenues include formal Constitutional design, judicial review, executive orders, and changes in norms and conventions.[21] All of these avenues have associated transaction costs. For example, in the case of Constitutional design, the transaction costs will be a function of the relevant amendment rule (Article V in the case of the US Constitution). Along with that amendment rule, the transaction costs will also be a function of the size of the citizenry, available transportation and communication technologies, and the citizenry's familiarity with employing the amendment rule.

Complicating the matter, the relative transaction costs of a particular avenue are a function of the use or disuse of other avenues. There are at least three effects through which the frequency of an avenue's use can directly affect the transaction costs associated with using it. First, there can be *learning-by-doing* effects. An avenue can become easier for political agents and/or citizens to navigate as it is more frequently used. In the case of a formal Constitution, a *citizenry's familiarity with employing the amendment rule* was mentioned above. For example, employing Article V of the US Constitution requires political agents and activists with savvy in drafting amendments and organizing necessary voting blocs in the Congress and state legislatures. (Alternatively, after more than a half century of Article V's disuse, political agents and citizens lack lived experience in employing it).[22]

Second, more frequent use of a given avenue can have *legitimacy effects* that decrease the transaction costs associated with it. For example, if constitutional change occurs via judicial review with sufficient frequency for a sufficiently long time, citizens may embrace (or at least acquiesce to) that avenue as legitimate. Perceived as such, constitutional changes via judicial review become more effective focal solutions, promoting self-enforcement (Bologna Pavlik and Young 2026).

While learning-by-doing and legitimacy effects decrease the transaction costs associated with a given avenue, more frequent use of an avenue may also (third) have *backlash effects* that raise the associated transaction costs. This may be the case when 'too' frequent use results in political fatigue, leading people to call further use into question.[23] For example, during the Progressive Era there was backlash against the high frequency of formal amendments to the US Constitution (see section 6 below). As another example, before 2014 the US Supreme Court generally had a public approval rating above 60%; subsequently, that approval rating has decreased markedly to around 40% today. In accounting for this, one can point to two decades of the Court frequently revisiting and overturning prior precedent (Dodson, 2025).[24]

[20]Whether public participation into Constitution-making actually delivers is an open question. Bologna Pavlik and Young (2026) find that compliance with Constitutional provisions is not generally enhanced by public participation; however, higher compliance is found for property rights and rule of law provisions specifically. Alternatively, Negretto and Sánchez-Talanquer (2026) find that public participation may, when combined with Constitutional approval by representatives from competing political forces, lead to more and better-enforced civil rights and liberties.

[21]This list of avenues is not exhaustive. For example, Albert (2014) argues that Constitutional provisions sometimes lose their effective place in a constitutional order through sustained disuse and repudiation by political agents. Furthermore, in federalist countries, constitutional changes in lower-level units can be (imperfect) substitutes for changes at the national level. For example, Zackin (2013) argues that while few positive rights have been enshrined in the US Constitution, many are found in state constitutions.

[22]This is true at least in terms of carrying an amendment proposal all the way to successful ratification. Lepore (2023) has referred to formal amendment of the US Constitution as a 'lost art'.

[23]Sustained use of an avenue over time may lend it legitimacy, but 'overuse' of the avenue may undermine it.

[24]Gutmann et al. (2025) explore the introduction of COVID-19 policies that pushed constitutional boundaries. They report that public support for such policies decreased in countries where courts expressed doubts about their constitutionality. However, that effect is conditional on their trust in those courts.

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Each of the above effects is likely to be more or less important given the specific avenue being considered. Learning-by-doing effects are likely to be particularly important regarding formal Constitutional amendment. In that case, the collective action problems involve very large numbers of actors, even within the subgroups involved in proposal and ratification (e.g., in the US case with Article V, the two chambers of Congress and the state legislatures). Experience in navigating those processes is likely important. Alternatively, legitimacy effects may be particularly important for an unelected judiciary, the authority of which relies on its broad acceptance by the citizenry. For the same reason, backlash effects may be particularly important for a judiciary; they may also be particularly important for an executive branch that pushes constitutional boundaries.

The above three effects are all ways that frequency of use can directly affect the transaction costs associated with an avenue for constitutional change. There are also indirect *substitution effects* that should be noted. Different avenues for constitutional change are (imperfect) substitutes for one another. When one avenue is employed more frequently, ceteris paribus, its substitutes may be employed less frequently.[25] If this is the case, then the effect of the one avenue's more frequent use decreases the frequency of other avenues being used, which can lead (through the effects described above) to changes in the transaction costs associated with those other avenues.

Figure 1 provides a schematic that illustrates the above-described effects and how they create endogeneity in the relative transaction costs – and frequency of use – for the case of two avenues for constitutional change ('A' and 'B'). Applied to any empirical case, Figure 1 makes it clear that the researcher faces and an identification problem. For episodes of constitutional change, this will involve careful (and compelling) interpretations of events and trends. Notwithstanding this challenge, the theory provides a framework to guide and organize such interpretations.

Implications for constitutional design

The theory outlined above has implications for all avenues for constitutional change, individually and in relation to one another. However, in this section I focus the discussion on Constitutional design. Furthermore, I anchor the discussion to the empirical case of Article V of the US Constitution. Why?

Scholars have debated the extent to which entrenchment of Constitutional provisions is desirable. *Entrenchment* refers to the extent to which veto players and supermajority requirements make a Constitution difficult to amend (relative to passing ordinary legislation). Some scholars emphasize that Constitutional entrenchment is key to preventing special interest capture via self-serving amendments (Aghion and Bolton, 2003; Buchanan and Tullock, 1962; Ginsburg and Posner, 2010; Persson *et al.*, 1997). From this perspective, entrenchment helps to ensure that Constitutional change satisfies a generality norm (Buchanan and Congleton, 2003 [1998]; Congleton, 2004). Others have emphasized the role that entrenchment plays in making credible commitments to good governance over time (Elster 1979; Schelling, 1984).

Alternatively, many political philosophers and scholars of constitutional law claim that entrenchment thwarts democracy and the will of the people (Colón-Ríos, 2012; Dahl, 2001; Levinson, 2006; Seidman, 2012), particularly when unelected judges are the Constitutional interpreters who determine what the people can and cannot do through ordinary politics (Ackerman, 1998; Bickel, 1962; Ely, 1980).[26] Consistent with these concerns – and perversely contrary to arguments cited in the paragraph above – Schwartzberg (2013) argues that elites can use entrenchment to shield their special interests from popular will. Also, Versteeg and Zackin (2016) argue that detailed, unentrenched Constitutions allow for 'ongoing constitutional micromanagement' (p. 658) that is desirable in the face of socioeconomic change.[27]

[25]Among the ceteris paribus is the demand for constitutional change on the part of citizens and political actors.

[26]Alternatively, see Vanberg (2018; 2020) who argues that James Buchanan's work implies Constitutionalism is not only consistent with democracy but essential to it.

[27]The only empirical studies of how Constitutional entrenchment is related to observable outcomes are Callais and Young (2021a), 2021b which focus on, respectively, economic growth and economic freedom.

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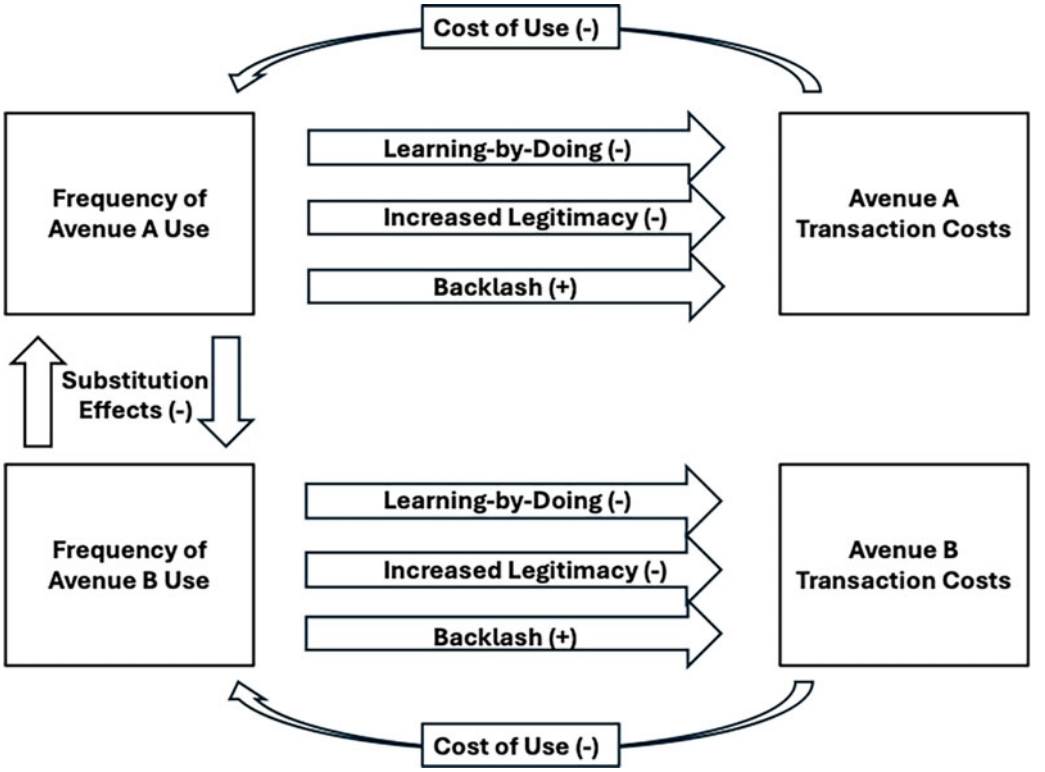


Figure 1. Relationships between relative transaction costs and frequency of use for two avenues for constitutional change.

An implication of the theory presented in section 5 above is that thinking about entrenchment in Constitutional design cannot be separated from consideration of the use of other avenues for constitutional change, along with the effects on relative transaction costs across avenues. For example, the choice to replace one Constitution with another that is more difficult to amend may be based on the perceived desirability of a more stable constitutional order. An unintended consequence of greater entrenchment may be to accelerate constitutional change via other avenues. That substitution of alternative avenues for Constitutional design can be associated with self-reinforcing changes in the relative transaction costs.

Alternatively, consider the claim that Article V creates an almost insurmountable barrier to amending the US Constitution (e.g., Ackerman, 1991, 1998; Levinson, 2006; Tushnet, 2010). Article V requires two-thirds supermajorities in both the House of Representatives and Senate to propose an amendment, then a three-fourth supermajority of state legislatures to ratify it.[28] However, there were 11 formal changes to the text between 1909 and 1971. The last two of these were proposed and ratified while the US had its current total of 50 states. Also, in both cases ratification quickly followed proposal.[29] The disuse of Article V for more than a half century since is therefore not clearly attributable to its (unchanged) procedural rules.

It is also interesting to note that the US Constitution was amended 4 times from 1913 to 1920. (Note that during the time there were 48 states, almost the current total.) This occurred within the

[28]Two-thirds of states can also compel the US Congress to call a convention to propose an amendment(s). However, this proposal procedure has never been employed.

[29]The Twenty-Fifth Amendment was proposed in 1965 and ratified in 1967; the Twenty-Sixth was both proposed and ratified in 1971.

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atmosphere of social and political activism that gave the Progressive Era its name. As Albert (2022, p. 2009) observes: 'The rapid succession of successful amendments caused observers to wonder whether the hyper-amendability of the Constitution risked making it as easily amendable as an ordinary statute.' Based on such sentiments, an amendment was actually introduced in Congress (though never ultimately proposed to the states) to *increase* the difficulty of the Article V procedures. (Article V apparently makes the US Constitution unamendable or hyper-amendable depending on the time period one considers.)

Why otherwise the post-1971 amendment drought then?[30] Papers by Albert (2022) and Jackson (2015) provide important insights. Jackson (2015, p. 576) emphasizes the 'self-reinforcing character such claims [of] the near impossibility of amendment' along with 'normative arguments that the Constitution's text should not be 'tinkered' with [along with] habits of constitutional 'veneration.' 'In contrast, she argues that 'US constitution culture accommodates a considerable amount of constitutional change through adjudication [judicial review] before the Supreme Court' (p. 582). Consistent with this, Albert (2022, p. 2011) suggests that the 'conventional path to conventional change may therefore have been rerouted from Article V to other avenues, including courts[,] legislatures where lawmakers can enact constitution-like super-statutes and the White House where executives can share and reshape the practices and norms underlying the Constitution'.[31]

The transaction cost theory of constitutional change provides a framework within which to systematically elaborate and expand upon these insights. If constitutional change is 'rerouted' from Constitutional design to other avenues, this is because (i) the transaction costs of Constitutional design increased relative to those of one or more other avenues; (ii) alternatively, the transaction costs of one or more other avenues decreased relative to those of Constitutional design. Furthermore, we explain why such a 'rerouting' can be 'self-reinforcing' in terms of relative transaction costs in relation to how frequently some avenues are used relative to others.

This has implications for how we study constitutional history. Constitutional change occurs via the lowest-cost avenue, and, all else equal, that reinforces differences in the relative costs of different avenues. As such, if we observe regular use of a particular avenue over a meaningful period, then a subsequent period of *dis*use, the theory suggests we look for a shock to relative costs. (The longer the prior period of regular use, all else equal, the larger the necessary shock.)

In the US case, this shifts attention away from the procedures of Article V (which have been constant and in effect since 1789) and towards the transaction costs of other avenues *or* informal (non-Article V) determinants of the transaction costs associated with Constitutional design. (Judicial review is an example of the former; the emergence (or strengthening) of an aversion to 'tinkering' with the Constitution's text is an example of the latter.) With this in mind, a researcher may want to ask if changes in attitudes about political activism and reform generally may have lowered the transaction costs of Constitutional reform specifically during the Progressive Era. Alternatively, a researcher may want to study if the Warren Court (1953 to 1969) reshaped the citizenry's expectations regarding judicial review and, therefore, the transaction costs of that avenue.

The two examples above are only illustrative. While each of the implied hypotheses is plausible (or at least not clearly implausible), I make no claim regarding the empirical support for either. Rather, they are specific examples of a sort of research that the theory generally points towards. To the best of my knowledge, that sort of research is lacking in the relevant literature.

[30]This is, again, excluding the peculiar case of the Twenty-Seventh Amendment. (See section 1 above).

[31]In the case of wholesale new Constitutional adoptions, Bisarya and Ginsburg (2026) explore the importance of 'transitional provisions' (i.e., ones designed to only be in force until permanent arrangements are established) in transitioning from one constitutional order to the next. These can be interpreted as conscious efforts to mitigate the transaction costs of the transition.

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Concluding remarks

How does a constitutional order change over time? What are the implications of such a change? Furthermore, how do answers to these questions inform *de jure* ('Big-C') Constitutional design?

In any society there are various avenues via which constitutional change can occur. We have lacked an overall theory of constitutional change that accounts for various avenues and their interrelations. In this paper I have attempted to remedy this by providing a transaction cost theory of constitutional change.

Transaction costs are the costs of establishing and maintaining property rights (Allen, 2015). Demsetz (1967) advanced economic theory significantly by developing a theory of how property emerges that is based on transaction costs. Scholars such as Buchanan (1973) and North (1990) demonstrated that a transaction cost approach can also be fruitfully applied to political economy analyses. The theory presented above is a logical extension of these contributions to the constitutional level.

According to the theory presented above, constitutional changes will occur whenever (a) the benefits to creating new bundles of political property rights exceed the costs of creating them and/or (b) the same is true regarding the exchange of existing bundles of those rights. When it is efficient for constitutional change to occur, it will occur via the lowest-cost avenue. Furthermore, the relative transaction costs are a function of the relative usage of different avenues. Specifically, avenues that are used more frequently become relatively cheaper.

The theory has important implications for real-world Constitutional design. For example, increased entrenchment of Constitutional provisions may, all else equal, be desirable for promoting generality and credible governance commitments. However, it may also increase the relative transaction costs of formal amendments, leading interested agents to substitute alternative avenues for constitutional change (e.g., executive orders). Conversely, when the degree of entrenchment is constant, accounting for changes in the frequency of formal amendment requires understanding why the transaction costs of alternative avenues changed.

When constitutional change occurs, it is efficient in the sense that all of a society's agents are optimizing given the benefits and costs – including transaction costs –they face (Leeson, 2020). However, efficiency does not necessarily imply desirable outcomes for a society. The relevant transaction costs will be different for different political coalitions (formal and informal) (Koppl, 2025). And those relative transaction costs will be a function of the power asymmetries between those different coalitions, many of which will be based on historical accidents and/or episodes of coercion (Epstein and Knight, 2004; Knight, 1992). Efficiency does not dictate policy prescriptions; however, insights from a transaction cost theory of constitutional change may inform beneficial prescriptions for a society.

Consider the case of the US Constitution and Article V (discussed in section 6 above). Jackson (2015) emphasizes citizens' beliefs that the Constitution should be 'venerated' and not 'tinkered' with can be self-reinforcing over time. This is consistent with the transaction cost theory: as such beliefs develop, the relative transaction costs for Constitutional design increase. (And as that avenue is used less, that effect on the relative transaction costs can itself be self-reinforcing.) Given such beliefs, the rerouting of constitutional change to different avenues is efficient.

But efficiency simply implies optimization based on, among other things, available information. Better information can, therefore, lead to a *different but better* efficient outcome (Leeson, 2020). Citizens' beliefs do not emerge exogenously; they are shaped in part by scholars, pundits, and other influencers. If there are good reasons to believe that more reliance on Article V (and less on other avenues such as judicial review) can potentially better US governance, then scholarly arguments can directly and indirectly (through, well, influencing the influencers) work to reshape citizens' beliefs through improving their information set.

It is beyond the scope of this paper to argue that more reliance on Article V is desirable or not. And that is not the point. However, given a particular position on the matter, the transaction cost theory of constitutional change provides a framework for understanding US history vis-à-vis that position.

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The same is true in regard to matters of Constitutional design generally, hopefully promoting some better parchment.

Acknowledgments. I thank the students from my Spring 2025 PhD 'Economics of Regulation Class' for workshopping an earlier version of this paper and providing me with valuable insights that have (to my best) been subsequently incorporated.

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Cite this article: Young AT (2026). A transaction cost theory of constitutional change. *Journal of Institutional Economics* **22**, e35, 1–15. https://doi.org/10.1017/S1744137426100708

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