THE CHALLENGE FOR COURTS IN A MODERATELY RIGID CONSTITUTION

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While the challenges with highly flexible and highly rigid constitutions are well-known, comparatively little is understood about the challenges that may arise with moderately rigid constitutions. This article argues that moderately rigid constitutions increase the challenge for courts in two related respects. First, it places them between competing normative and practical demands. A moderately rigid constitution weakens the normative case for the judiciary to develop the constitution to, for example, expand protection for rights and freedoms, yet places considerable practical demands on courts to undertake such developments. Second, a moderately rigid constitution introduces an additional point of uncertainty into the law because its degree of rigidity is capable of supporting diametrically opposed conclusions depending on whether formal amendment is interpreted as being largely available or largely unavailable. The article illustrates this challenge by reference to Australia's experience with a moderately rigid constitution.

CONTENTS

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I Introduction

The challenges with constitutions that are exceptionally easy and exceptionally difficult to amend are well-known.[1] Highly flexible constitutions are vulnerable to instability (ie constant revisions to the system of government) and abuse (ie elected officials using formal amendments to entrench themselves in power). Highly rigid constitutions are vulnerable to the 'dead hand of the past' problem (ie the inability of the people to revise their system of government) and unnecessary replacement (ie the need to resort to disproportionate measures to update the constitution). Comparatively little is understood about the challenges that may arise with moderately rigid constitutions — constitutions that are neither highly flexible nor highly rigid.

The purpose of this article is to examine an underappreciated challenge for courts that can arise in a moderately rigid constitution. Courts are often faced with decisions about whether or not to develop the constitution — for instance, to adopt a new interpretation of a provision, or to imply a new rule or principle into the text. For many of these decisions, the counter-majoritarian difficulty potentially looms large in the calculus. Take, for instance, the decision to develop the constitution by implying a new right or freedom into the constitution or by considerably expanding the scope of an existing one. This type of decision amounts to a transfer of power from an elected arm of government (the legislature) to an unelected arm of government (the judiciary) to resolve an issue that is subject to reasonable, good faith disagreement. The counter-majoritarian difficulty provides grounds for challenging the legitimacy of this decision on the basis that issues over which there is reasonable, good faith disagreement should be resolved by the arm of government that represents members of society on the most equal basis — that is, by the legislature, not the judiciary.

Highly flexible and highly rigid constitutions reduce the strength of the counter-majoritarian difficulty. A highly flexible constitution does so by reducing the counter-majoritarian effect of the judiciary's decisions. The majority is able to reverse those judicial developments with which it disagrees by means of formal amendment. A highly rigid constitution does so by supplying a response based on the concept of necessity. The impossibility or near impossibility of formal amendment means it is possible to claim that it is necessary for the judiciary to develop the constitution because it is the only institution capable of

[1] See, eg, Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86(2) *George Washington Law Review* 438, 450–73.

doing so — judicial development is, despite its problems, normatively superior to constitutional obsolescence.

By contrast, in a moderately rigid constitution the counter-majoritarian difficulty has considerable strength because formal amendment is sufficiently unavailable to undermine the claim that it is a plausible means of reversing those judicial decisions with which the majority disagrees. Furthermore, necessity cannot be invoked to answer the counter-majoritarian difficulty because formal amendment is sufficiently available to undermine the claim that, without judicial development, the constitution will atrophy. In a moderately rigid constitution, therefore, formal amendment forms part of the normative case *against* judicial development of the constitution because it is neither reversable nor necessary.

At the same time, a moderately rigid constitution places considerable practical demands on the judiciary to develop the constitution — that is, the constitution's rigidity makes it challenging for the judiciary to avoid the issue by simply declining to develop the constitution. A moderately rigid constitution is sufficiently difficult to amend such that many developments are unlikely to occur unless the judiciary undertakes them. While it cannot plausibly be claimed that the judiciary is the *only* institution capable of developing the constitution, in practice there may be few other available ways of achieving the types of development that give rise to the counter-majoritarian difficulty (ie the creation and expansion of rights and freedoms that limit the scope of legislative power). For those judges that are of the view that the constitution requires development, they are faced with the stark reality that, if they do not bring about developments of this type, no one else likely will.

The article thus argues that a moderately rigid constitution is apt to place the judiciary in a difficult constitutional position in two respects. First, a moderately rigid constitution subjects the judiciary to competing practical and normative demands. While the constitution's rigidity weakens the normative basis for the judiciary to develop the constitution to, in particular, impose novel limits on legislative action, it also generates considerable practical demand for the judiciary to undertake such developments. Second, a moderately rigid constitution introduces an additional point of uncertainty into constitutional law. As its degree of rigidity is fundamentally ambiguous, it can support diametrically opposed conclusions. With a moderately rigid constitution, it is possible to interpret formal amendment as largely available — it is difficult, but *not impossible* — and therefore conclude that it is illegitimate for courts to develop the constitution (ie development should be left to formal amendment). However, it

is also possible to interpret formal amendment as largely unavailable — it is *difficult* even if not impossible — and therefore conclude that it is legitimate for courts to develop the constitution (ie it is not practicable to leave development to formal amendment). The article illustrates these two difficulties by reference to Australia's experience with a moderately rigid constitution.

The article proceeds in six principal Parts. Part II sets out the definition of a moderately rigid constitution. Part III explains why Australia has a moderately rigid constitution. Part IV provides an overview of the burden of justification that is imposed on courts when they develop the constitution. Part V evaluates how highly flexible and highly rigid constitutions help meet that burden of justification. Part VI considers how a moderately rigid constitution makes it harder to meet the burden and how this places the judiciary in a difficult constitutional position. Part VII demonstrates how this challenge can be seen in the Australian experience. The conclusion briefly discusses whether this argument affects the desirability of a moderately rigid constitution from the standpoint of constitutional design.

II What Is a Moderately Rigid Constitution?

Before discussing the challenge that arises with a moderately rigid constitution, it is necessary to say something about what amounts to a moderately rigid constitution for the purposes of this article. Constitutional rigidity can be mapped along a spectrum that spans from highly flexible to highly rigid. Highly flexible constitutions are those where it is only slightly more difficult to bring about formal amendment to the constitution than it is to bring about the enactment of ordinary legislation. Highly rigid constitutions are those where it is almost impossible to bring about formal amendment to the constitution. Moderately rigid constitutions refer to those that are towards the middle of the spectrum where it is neither easy nor almost impossible to bring about formal amendment to the constitution. Two points need to be made about this definition.

First, the definition is deliberately imprecise. As is well-known, it is not easy to evaluate the rigidity of constitutions.[2] Evaluations will depend on whether rigidity is assessed by reference to the frequency of formal amendment, the significance of formal amendments, or some combination of the two. The task is

[2] Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 95, 105.

further complicated by the fact that in some countries different parts of the constitution are subject to different levels of entrenchment.[3] The difficulty of measuring constitutional rigidity is reflected in the fact that a number of political scientists have attempted to comparatively evaluate the phenomenon and each has arrived at a different set of rankings.[4] Given this difficulty, this article does not propose to place constitutions into very precise categories, especially because it is not necessary for the purposes of the argument. As will be seen below, the argument is developed through a process of exclusion — the challenge this article discusses arises in constitutions that are neither highly flexible nor highly rigid.

Second, the definition focuses on the rigidity of constitutions in practice, not the rigidity of formal amendment procedures. It is well-known that there is a difference between the two types of rigidity because constitutional design choices do not fully determine the operation of constitutions in practice. A moderately rigid formal amendment procedure may not necessarily produce a moderately rigid constitution in practice. A moderately rigid constitution in practice may not necessarily have a moderately rigid formal amendment procedure.[5]

The reason for focusing on practical rigidity is that the experience with formal amendment is ultimately what drives conclusions about constitutional rigidity. It would, for instance, make little sense to describe a constitution as highly rigid if, in practice, it was frequently amended. It is particularly important to focus on rigidity in practice for the purposes of this article because it is the lived experience with formal amendment that shapes the challenge that will be set out below. With that said, the article's argument may have implications for debates about constitutional design insofar as the aim of installing a moderately rigid formal amendment procedure is to produce a moderately rigid constitution in practice. The potential implications of the article's argument for constitutional design are discussed in the conclusion.

A consequence of the article's focus on constitutional rigidity in practice is that each jurisdiction is capable of shifting categories over time. A jurisdiction with a moderately rigid constitution might, for example, need to be reclassified

[3] Dixon and Landau (n 1).

[4] See below nn 16–21 and accompanying text.

[5] For one attempt to measure the impact of amendment procedures on constitutional rigidity, see Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty' (2015) 13(3) *International Journal of Constitutional Law* 686.

as a jurisdiction with a highly rigid constitution if formal amendment becomes increasingly rare in practice and actors within the jurisdiction come to view formal amendment as impossible or near impossible to achieve.

III Does Australia Have a Moderately Rigid Constitution?

As the challenge with a moderately rigid constitution will be illustrated by reference to the *Australian Constitution*, it is necessary to explain why Australia has a moderately rigid constitution. With eight amendments since its enactment in 1901,[6] no one would say Australia has a highly flexible constitution. In this regard, Australia stands in clear contrast to countries such as Colombia and India.

Article 375 of the *Constitution of the Republic of Colombia* empowers the legislature to make constitutional amendments by an affirmative vote of both Houses of Congress in two consecutive congressional sessions.[7] The first vote must be approved by a simple majority and the second vote must be approved by an absolute majority.[8] Over 40 distinct packages of amendments were passed in the 24 year period between 1991 and 2015 alone.[9] Article 368 of the *Constitution of India* empowers the legislature to amend most provisions of that constitution by a vote of both Houses of Parliament. Each vote must be approved by two thirds of the members present and voting.[10] One hundred and four amendments have been passed in the 70-year period between 1950 and 2020.[11] Both countries are, on this article's definition, examples of systems with highly flexible constitutions.

One could, however, argue that Australia has a highly rigid constitution, especially since it has only been amended twice since 1950, with the last set of

[6] See generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 88.

[7] *Constitución Política de Colombia 1991* [Political Constitution of Colombia] art 375 [tr Max Planck Institute, 'Colombia's Constitution of 1991 with Amendments through 2015'] ('*Colombian Constitution*'). There are other means of amending the *Colombian Constitution* (n 7), but this method is the most common: Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017) 327.

[8] *Colombian Constitution* (n 7) art 375; Espinosa and Landau (n 7) 329.

[9] Espinosa and Landau (n 7) 327. However, several amendments were partially or wholly invalidated by the Constitutional Court.

[10] *Constitution of India 1949* (India) art 368.

[11] See *The Constitution (One Hundred and Fourth Amendment) Act 2019* (India).

amendments being made in 1977.[12] In addition to the infrequency of amendment, most amendments have not been major in significance. Almost all have been technical or minor amendments. Even the one set of amendments of significance — the 1967 amendments removing two provisions that discriminated against Aboriginal Australians[13] — was less important than is sometimes thought. The amendments did not give Aboriginal Australians the right to vote[14] and they did not prevent Commonwealth Parliament from enacting laws that discriminate against Aboriginal Australians.[15] As Australia's constitutional document has, therefore, remained mostly unchanged since 1901, there is a case to be made that Australia has a highly rigid constitution.

The empirical literature on comparative constitutional rigidity is largely inconclusive on the issue. Professor Donald Lutz' study of 32 'true constitutional systems'[16] ranked Australia as having the fourth most difficult constitutional amendment process.[17] Professor Astrid Lorenz's study of 39 'fully established, peaceful democracies'[18] ranked Australia as equal fifth.[19] Professor Emeritus Arend Lijphart evaluated 36 democracies for the difficulty of their formal amendment procedures and placed Australia in the most difficult group along with seven other countries.[20] By contrast, Professor Tom Ginsburg and James Melton have found, drawing on data from nearly every constitution in the world, that 58% of constitutions are never amended and that 'most amendments changed very little substance in the constitution'.[21] It should be noted that their data also show that most constitutions do not survive for long periods of

[12] See *Constitution Alteration (Aboriginals) 1967* (Cth) ('*Aboriginal Australians Amendment*'); *Constitution Alteration (Senate Casual Vacancies) 1977* (Cth); *Constitution Alteration (Retirement of Judges) 1977* (Cth); *Constitution Alteration (Referendums) 1977* (Cth). See also Williams and Hume (n 6) 273–7.

[13] *Aboriginal Australians Amendment* (n 12) ss 2–3.

[14] The right of Aboriginal Australians to vote in Commonwealth elections was granted in 1962 by statute: *Commonwealth Electoral Act 1962* (Cth).

[15] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Kartinyeri*'). See also below n 93 and accompanying text.

[16] Donald S Lutz, 'Towards a Theory of Constitutional Amendment' (1994) 88(2) *American Political Science Review* 355, 356.

[17] Ibid 369.

[18] Astrid Lorenz, 'How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives' (2005) 17(3) *Journal of Theoretical Politics* 339, 348.

[19] Ibid 358–9.

[20] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 2nd ed, 2012) 208.

[21] Ginsburg and Melton (n 5) 705.

time, with the median lifespan of a constitution being 19 years.[22] But that is not always the case. Some constitutions that have never been amended are considerably old, with the *Constitution of Japan*, enacted in 1946, being the most prominent example.[23] One could interpret these figures as helping establish either that Australia has a nearly impossible constitution to amend, especially when drawing on the studies of Lutz, Lorenz and Lijphart, or that Australia has a difficult, but by no means impossible, constitution to amend, especially when considered against the background of Ginsburg and Melton's figures. One's view might also vary with how accurate one considers these studies to be as a measure of constitutional rigidity.[24]

There is, however, one important reason for thinking that the *Australian Constitution* is more accurately characterised as moderately rigid rather than highly rigid. A key factor in determining a constitution's rigidity is the *attitude* towards amendment. Few, if any, formal amendment procedures impose requirements that are, solely in their own terms, impossible or near impossible to obtain (eg a procedure that requires proposed amendments to be approved by 100% of the people). A constitution becomes impossible or near impossible to amend as a result of the formal amendment procedure's interaction with the environment in which it is situated. For example, if a formal amendment procedure requires proposed amendments to be approved by both the national and subnational governments, a prolonged political impasse between the two levels of government may lead the constitution to become impossible to amend. If a formal amendment procedure requires proposed amendments to be approved by a majority of the people at a referendum, a dysfunctional drafting process that leads to low quality proposals being put to the people may render the constitution near impossible to amend. Some environmental conditions will be easier to address than others (eg it is arguably easier to address a dysfunctional drafting process than it is to address an intergovernmental impasse). Indeed, some environmental conditions may not be within anyone's direct control and may only abate for brief periods of time (eg an intergovernmental impasse may not be in the direct control of any one set of actors and may only abate when there is a rare alignment of political parties in power at both levels of government).

[22] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 2.

[23] Ginsburg and Melton (n 5) 687.

[24] Professor George Williams and David Hume have, for example, challenged Lutz's ranking of Australia: Williams and Hume (n 6) 11.

As a result, the attitude towards formal amendment is crucial. If politicians, scholars and the public view formal amendment as possible, even if difficult, they will work to address those environmental conditions impeding formal amendment that are within their control and to take advantage of those rare moments when the other environmental conditions temporarily abate. Amendment will consequently be infrequent, but not impossible. By comparison, if those actors view formal amendment as impossible, they will not work to address those environmental conditions that are within their control and to take advantage of the moments when the other environmental conditions abate. They will concentrate their time and energy on alternative means of constitutional change. Amendment will consequently become impossible or near impossible.

Professor Vicki Jackson suggests that the United States is an example of a country where the latter dynamic appears to have emerged in recent decades. She claims that the *United States Constitution*'s formal amendment procedure does not impose requirements that are, solely in their own terms, impossible to obtain.[25] Indeed, the 27 amendments that have been made to the *Constitution* suggest as much. However, she notes that in recent decades it has become incredibly difficult, and perhaps even impossible, to amend the *Constitution* due to the widespread belief that it is incredibly difficult, and perhaps even impossible, to amend.[26] This belief is demonstrated in the views of scholars.[27] They have largely abandoned formal amendment in favour of alternative means of constitutional change, such as judicial development of the *Constitution* and constitutional statutes.[28] It is also observable in the actions of politicians. The

[25] Vicki C Jackson, 'The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism' (2015) 13(3) *International Journal of Constitutional Law* 575, 579.

[26] See ibid 584.

[27] See, eg, Richard H Fallon Jr, 'Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0' (2012) 65(1) *Maine Law Review* 77, 92; Miguel Schor, 'Judicial Review and American Constitutional Exceptionalism' (2008) 46(3) *Osgoode Hall Law Journal* 535, 540; Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (Oxford University Press, 2006) 160; Eric Posner, 'The US Constitution Is Impossible to Amend', *Slate* (Web Page, 5 May 2014) <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html>, archived <https://perma.cc/Y9JM-CVDT>.

[28] For an account of the rise of constitutional statutes as a substitute for formal amendments, see generally Bruce Ackerman, *We the People: The Civil Rights Revolution* (Belknap Press, 2014) vol 3. Even scholars that believe the only solution is to update the constitutional text have

formal amendment procedure is not used to put forward seriously considered proposals that have realistic prospects of success. Instead, consistent with the view that no proposal is ever likely to succeed, politicians inundate the system with large numbers of proposals, many of which are not seriously considered and have no realistic prospect of success. For example, '[i]n nine straight Congresses … Rep Jose Serrano, D-NY, introduced resolutions to end presidential term limits by repealing the 22nd Amendment'.[29] Every term, an average of 75 amendments are proposed by Members of Congress, with almost all failing to pass even the committee stage.[30] The last time a proposal acquired the necessary two thirds support of the House of Representatives and Senate to be sent to the states for ratification was in 1978.[31]

Australia is not, by comparison, a country where a similar attitude towards formal amendment has taken hold.[32] As with the United States, there is nothing in the terms of Australia's formal amendment procedure that necessarily makes amendment impossible to achieve. To be ratified, a proposed amendment to the *Australian Constitution* needs to be approved by (i) Commonwealth Parliament,[33] (ii) a majority of voters, and (iii) a majority of voters in a majority of states.[34] The first two requirements of legislative approval and popular approval

entertained the idea of abandoning formal amendment in favour of a new constitutional convention: see, eg, Levinson (n 27) 177.

29 Drew DeSilver, 'Proposed Amendments to the US Constitution Seldom Go Anywhere', *Pew Research Center* (Web Page, 12 April 2018) <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/>, archived at <https://perma.cc/674G-7KRU>.

30 Ibid. See also Amy Myrick, 'Writing Constitutional Rules: How Textual Norms Shaped Popular Advocacy for Amendments to the United States Constitution, 1900–2011' (PhD Dissertation, Northwestern University, 2015), cited in Ginsburg and Melton (n 5) 700.

31 DeSilver (n 29).

32 The most prominent statement to the contrary would be the well-known one of Geoffrey Sawer describing Australia as '[c]onstitutionally speaking … [a] frozen continent': Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208. The fact that Sawer wrote this statement in 1967 diminishes the accuracy of it. By the end of 1967, the *Constitution* had been amended five times in six and a half decades, which indicates that the *Constitution* was by no means impossible to amend. It is only in the decades since Sawer wrote that statement that it could now be considered to be accurate. The counter-argument is set out below at nn 37–38 and accompanying text.

33 Alternatively, a proposed amendment can be put to the people if it is approved by one House of Parliament and rejected twice by the other House with an interval of at least three months between the two rejections: *Australian Constitution* s 128.

34 Ibid. Amendments that directly affect the parliamentary representation or geographic limits of a state must be approved by a majority of voters of that state.

are found in many countries around the world.[35] The third requirement of state-based approval is more unusual, but is rarely the reason why a proposed amendment fails. Of the 36 proposed amendments that have been put to the people and failed, only five have failed at the third requirement[36] — that is, the proposal was approved by a majority of people, but not a majority of people in a majority of states.

In contrast to the United States, Australian politicians, scholars and the people continue to view formal amendment as possible, even if difficult, and act in a way that is consistent with that view. While there have been problems with the way in which proposed amendments have been drafted and put to the people, especially with the benefit of hindsight, the formal amendment procedure has almost always been used for seriously considered proposals that have realistic prospects of success.[37] Importantly, actors continue to hold the view that the formal amendment procedure is a plausible avenue for constitutional change as the contemporary campaigns for Indigenous recognition and a republic attest. It is rare to find scholars that view the *Australian Constitution* as impossible to amend. There are scholars that lament the lack of constitutional change in Australia, but even they generally see the formal amendment procedure as being both the appropriate and achievable way of rectifying this issue.[38]

The precise reasons for Australia's low rate of amendment are the subject of debate among scholars.[39] However, significantly, they tend to be environmental

[35] See Ginsburg and Melton (n 5) 690. For data on the formal amendment procedures of different countries, see Comparative Constitutions Project, *Constitute* (Web Page) <https://www.constituteproject.org/>, archived at <https://perma.cc/R7PL-UYCB>.

[36] Scott Bennett, 'The Politics of Constitutional Amendment' (Research Paper No 11, Department of the Parliamentary Library, 23 June 2003) 7.

[37] It is, of course, possible to identify flaws with the process for adopting some proposed constitutional amendments. For example, the 1988 constitutional referendum was based on recommendations of an interim report of the Constitutional Commission. The government chose to act on the interim report to ensure the referendum coincided with the bicentenary of English settlement in Australia in 1988 rather than wait for the final report: George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, 11 May 1999) 8–9.

[38] See, eg, Williams and Hume (n 6) vii–viii.

[39] See, eg, ibid 203–31; Graeme Orr, 'Voluntary Voting for Referendums in Australia: Old Wine, New Bottle' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 359; Scott Stephenson, 'Reforming Constitutional Reform' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 369; Lael K Weis, 'Does Australia Need a Popular Constitutional Culture?' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 377.

conditions that are capable of being addressed (eg the problematic process for generating and drafting proposals, the lack of public involvement in the constitutional reform process, the poor quality of proposals put to the people) or that will likely abate at certain points in time (eg the lack of bipartisanship on particular proposals). This enduring belief in the possibility of formal amendment suggests that the *Australian Constitution* is unlikely to be impossible or near impossible to amend, even if it may remain difficult to do so. In short, Australia should be viewed as having a moderately rigid constitution even if, within that part of the spectrum, it is one that sits towards the more, rather than less, rigid end.

IV The Burden of Justification

The counter-majoritarian difficulty is a well-known, longstanding challenge to the legitimacy of judicial review, broadly referring to the concern of unelected judges being able to invalidate the decisions of elected legislators.[40] It applies most prominently in relation to rights-based judicial review because there is reasonable, good faith disagreement about the appropriate scope and limits of fundamental rights and freedoms in society, which suggests that those disagreements should be resolved by the arm of government that represents members of society on the most equal basis: the legislature.[41] However, there are many other issues that arguably raise the same concern as they are also subject to reasonable, good faith disagreement, such as the separation of powers and the federal division of powers.[42]

The counter-majoritarian difficulty is first and foremost conceptualised as an issue that arises at the institutional level — it presents a challenge to the legitimacy of the *institution* of judicial review. Why is it legitimate to have an institutional arrangement — or, in the case of a new constitution, why is it legitimate to establish an institutional arrangement — that allows the unelected few (ie the judiciary) rather than the elected many (ie the legislature) to resolve issues that are the subject of reasonable, good faith disagreement?[43]

[40] See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346 ('The Case against Judicial Review').

[41] See Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999).

[42] Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28(1) *Oxford Journal of Legal Studies* 1.

[43] Waldron, 'The Case against Judicial Review' (n 40).

However, the counter-majoritarian difficulty[44] also arises at the decisional level — it too presents a challenge to the legitimacy of some types of judicial decision-making. The most prominent, but by no means only, example is a decision where a court constitutionally prohibits the legislature from infringing a fundamental right or freedom that is not expressly found in the constitutional text, either by implying a new right or freedom into the text or considerably expanding an existing one found in the text.[45] In this instance, the court has expanded the power of the unelected arm of government (ie the judiciary now has the power to decide whether the legislature has violated the new or expanded right or freedom) and reduced the power of the elected arm of government (ie the legislature's determinations in relation to that right or freedom are now subject to judicial supervision) to resolve an issue subject to reasonable, good faith disagreement (ie the scope and limits of that right or freedom). In this situation, the court is unable to rely on the ordinary means available to a court to answer the counter-majoritarian difficulty — text. When a court enforces a right or freedom expressly found in the constitutional text, the counter-majoritarian difficulty is a challenge for the constitutional designer, not for the court. The constitutional designer has to explain why it is legitimate for the court, and not the legislature, to be given the power to resolve the issue. The court is simply doing the job it has been assigned by the constitution.[46]

The situation is different for judicial decisions that go beyond the express text of the constitution — that develop the constitution — to impose novel limits on the legislature's power to resolve issues subject to reasonable, good faith disagreement. These contestable judicial developments of the constitution, as this article will call them, impose a burden of justification on judges seeking to make them and on non-judicial actors seeking to defend them. As the primary means of answering the counter-majoritarian difficulty is not available (ie the constitutional text), another means must be found. Courts and scholars have

[44] As *the* counter-majoritarian difficulty is a challenge to the institution of judicial review, it is arguably more accurate to describe it as a critique that is counter-majoritarian in character — it is not *the* difficulty discussed in the literature, but it is of a similar character because it is grounded in the same concern. However, as the nomenclature does not affect the article's argument, the same term — 'the counter-majoritarian difficulty' — will be used for the sake of simplicity.

[45] There is, of course, room for reasonable, good faith disagreement about what is expressly found in the constitutional text. The point is that the force of the counter-majoritarian difficulty increases the further one moves away from the constitutional text.

[46] There are, of course, still grounds for challenging the legitimacy of the decision, for example, that it is an incorrect interpretation of the text.

developed a range of ways of attempting to meet that burden of justification. They might claim that, for instance, the new restriction on the legislature can be logically inferred from the constitutional text. Or that it is necessary to maintain the system of government established by the constitutional text. Or that it is required to protect the constitution's fundamental principles or basic structure. Or that it ensures the constitution remains aligned with the popular will. Or that it is essential to maintaining the viability of the system of government established by the constitutional text in light of changing political, social or economic circumstances. While case law and scholarship are replete with arguments of this nature,[47] none is an unassailable means of meeting the burden of justification. It is generally possible to question whether it is, in fact, necessary for a particular implication to be adopted to maintain the system of government or required to protect the constitution's fundamental principles. It is generally possible to question whether the judiciary is, in fact, in a better position than the legislature to ascertain the popular will or determine how to adapt the constitution in light of changing circumstances.

The object of this article is to consider whether a constitution's rigidity affects the extent of the burden of justification and the ease of meeting it. Can a judge point to the ease or difficulty of amending a constitution to help justify a contestable judicial development of the constitution? Does the ease or difficulty of amending a constitution affect the ability of non-judicial actors to reasonably criticise a contestable judicial development of the constitution? While the focus of this article will be on the effect of moderately rigid constitutions on the burden of justification, it is necessary to first consider the effect of highly flexible and highly rigid constitutions.

V The Effect of Highly Flexible and Highly Rigid Constitutions

A *Highly Flexible Constitutions*

Highly flexible constitutions reduce the extent of the burden of justification imposed by contestable judicial developments of the constitution because they reduce the strength of the counter-majoritarian difficulty. They reduce its strength by rendering the judiciary's decisions more susceptible to reversal by the majority. In general, a constitution's formal amendment procedure

[47] See, eg, Stone (n 42); Dixon and Landau (n 1) 450–5. See also the cases discussed below in Part VII.

empowers the legislature (or the legislatures in the case of a federation), the people[48] or some combination of the two to change the constitution — that is, the majority and/or its elected representatives. Thus, the easier it is to amend the constitution, the easier it is for majorities to reverse those judicial decisions with which they disagree, in turn reducing the strength of the counter-majoritarian difficulty.

A highly flexible constitution thus creates a version of what has come to be known as weak-form judicial review.[49] The ability of weak-form judicial review to address the counter-majoritarian difficulty is the subject of some debate in the scholarly literature,[50] but it is clear that weakening judicial review by subjecting it to majority override does reduce the strength of the counter-majoritarian difficulty even if it does not entirely eliminate it. For instance, Professor Jeremy Waldron, a self-described 'fanatical opponent' of judicial review,[51] concedes that the 'core case against judicial review' applies only to constitutional systems with strong-form rather than weak-form judicial review.[52] More directly, Professors Rosalind Dixon and Adrienne Stone have argued that highly flexible constitutions mitigate the ability to oppose the legitimacy of judicial review on democratic grounds.[53] They cite Colombia and India as two examples of countries where there is 'an extensive—and quite recent—history of constitutional amendment being used as a means of overriding constitutional decisions by courts in constitutional democracies'.[54] They suggest that in such countries formal amendment has functioned as a mechanism 'allowing for the reassertion of democratic decision-making in the constitutional process'.[55]

[48] An example of an amendment procedure that empowers the people to amend the constitution with no or minimal involvement of the legislature is the popular initiative: see, eg, *California Constitution* art XVIII § 3. Proposals to empower the people to reverse judicial decisions by popular assembly can also be found in the scholarly literature: see, eg, Joel I Colón Ríos, 'The Counter-Majoritarian Difficulty and the Road Not Taken: Democratizing Amendment Rules' (2012) 25(1) *Canadian Journal of Law and Jurisprudence* 53.

[49] See, eg, Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38(2) *Wake Forest Law Review* 813; Rosalind Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38(6) *Cardozo Law Review* 2193.

[50] See, eg, Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38(2) *Wake Forest Law Review* 451.

[51] Jeremy Waldron, 'Compared to What?: Judicial Activism and New Zealand's Parliament' [2005] (11) *New Zealand Law Journal* 441, 442.

[52] Waldron, 'The Case against Judicial Review' (n 40) 1351–7.

[53] Dixon and Stone (n 2).

[54] Ibid 106.

[55] Ibid 95.

This scholarship is directed to the legitimacy of the institution of judicial review rather than individual judicial decisions — that is, at the institutional rather than decisional level. However, the same line of reasoning applies to individual judicial decisions. If a court undertakes a contestable judicial development of the constitution, it is difficult to reasonably criticise the decision on the basis of its counter-majoritarian effect if the legislature can reverse it with little more effort than it takes to enact ordinary legislation.[56] While the decision can still be criticised for other reasons (eg a decision can still be criticised on the basis that it is not, as the reasons for judgment claim, a necessary implication from the constitutional text), a highly flexible constitution diminishes the ability to criticise the decision on counter-majoritarian grounds. The burden of justification that arises with the unelected few restricting the actions of the elected many is significantly reduced when the elected many can remove that restriction at any time with ease.

Indeed, the challenge for courts in a highly flexible constitution often does not emanate from formal amendment being inaccessible, but from it being too accessible. A highly flexible constitution makes it so easy for the majority to reverse judicial decisions and otherwise change the constitution that there is a risk of misuse of formal amendment. While there is considerable scope for disagreement as to what constitutes misuse of the power to amend the constitution, the burgeoning literature on democratic decline catalogues some of the more commonly employed techniques that arguably fall into this category, at least when they are stated at a high level of generality.[57] They include amendments that unfairly reduce electoral competition (eg making it more difficult for opposition parties to form and get elected), that unreasonably limit fundamental human rights, especially those rights that are closely connected to the electoral process (eg curtailing freedom of political speech), and that substantially undermine the capacity of other institutions to hold the executive and legislature to account (eg reducing the independence and impartiality of the judiciary).

The challenge for courts in highly flexible constitutions is, if majorities seek to introduce amendments of this type, whether or not to intervene to attempt

[56] This is not to deny that it is also possible to *unreasonably* criticise a decision by, for example, labelling it as counter-majoritarian when it is subject to readily available majoritarian override.

[57] See, eg, David Landau, 'Abusive Constitutionalism' (2013) 47(1) *UC Davis Law Review* 189; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65(1) *UCLA Law Review* 78; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *University of Chicago Law Review* 545.

to stop them and, if so, how to justify the intervention. In Colombia and India, the judiciary has taken precisely this step, developing the substitution of the constitution doctrine (in Colombia)[58] and the basic structure doctrine (in India)[59] to limit what the legislature can change by means of formal amendment. This intervention has created a burden of justification for the courts that have made this move and the scholars seeking to defend it.[60]

Highly flexible constitutions thus reduce the most common burden of justification by introducing *reversibility* into the picture. The strength of the counter-majoritarian difficulty is reduced by allowing the majority to reverse the judiciary's decisions. However, reversibility has the potential to create an alternative burden of justification as a result of increasing the constitution's vulnerability to majoritarian misuse of the formal amendment procedure.

B *Highly Rigid Constitutions*

At the other end of the spectrum, the counter-majoritarian difficulty has considerable strength in systems with highly rigid constitutions due to the impossibility or near impossibility of reversing judicial decisions by means of formal amendment. It is no coincidence that the counter-majoritarian difficulty has preoccupied scholars in the United States more than in any other country.[61] However, highly rigid constitutions also make it easier to meet the burden of justification imposed by contestable judicial developments of the constitution.

One premise of the counter-majoritarian difficulty is that some other means of developing the law exists.[62] The counter-majoritarian difficulty presumes that there is a majoritarian form of lawmaking. In systems with highly rigid constitutions, the majoritarian avenue of constitutional lawmaking — formal amendment — is all but foreclosed. In these circumstances, it is possible to argue that the judiciary must be able to develop the constitution beyond what the text expressly requires because no one else can. A constitution that is incapable

[58] Mario Alberto Cajas-Sarria, 'Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016' (2017) 5(3) *Theory and Practice of Legislation* 245.

[59] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2009).

[60] See, eg, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017). See especially at 190–3.

[61] See generally Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty' (Pt 5) (2002) 112(2) *Yale Law Journal* 153.

[62] See Waldron, 'The Case against Judicial Review' (n 40) 1349–50.

of change poses a considerable threat to society because it inhibits the system of government's ability to respond to new demands from the people and to new circumstances.[63] The necessity of ensuring that the constitution does not atrophy trumps, on this argument, concerns about the judiciary being the institution that is keeping the constitution up to date. *Necessity* is, in short, a means of addressing the burden of justification.[64]

The experience of the United States is instructive. Despite the force of the counter-majoritarian difficulty, the Supreme Court has not refrained from going beyond the text to bring about significant developments of the *United States Constitution* to respond to new circumstances, with its changes in response to the emergence of the administrative state and the civil rights revolution being prominent examples.[65] The *United States Constitution*'s rigidity has formed a part of the justification for these developments. 'Living constitutionalism' is the most well-known approach to constitutional interpretation that endorses the development of the constitution to respond to new circumstances.[66] The justifications for living constitutionalism are many,[67] but one element is that the alternative mode of constitutional change — formal amendment — is not available. In one of the most well-known defences of living constitutionalism by a member of the Supreme Court, Justice William Brennan summarily dismissed reliance on the alternative form of constitutional lawmaking on the basis that it is not readily available: 'While the Constitution may be amended, such amendments require an immense effort by the people as a whole.'[68] Professor Andrew Coan has made the point even more explicitly, stating that originalists — the principal source of opposition to living constitutionalism — claim that

[63] See Dixon and Landau (n 1) 450.

[64] As with reversibility, it is not a complete answer to the counter-majoritarian difficulty. An alternative answer might be to let the executive and legislature develop the constitution. However, that has its own shortcomings, for example, that it does not provide a convincing way of resolving disputes about the distribution of power between legislatures (in a federal system) and between the executive and legislature. See Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Freedom' (2008) 27(1) *University of Queensland Law Journal* 129, 140–1. Cf Stone (n 42) 24–5, 27–9.

[65] See Dixon and Landau (n 1) 452.

[66] See generally Charles A Reich, 'Mr Justice Black and the Living Constitution' (1963) 76(4) *Harvard Law Review* 673.

[67] For example, Professor Jack Balkin argues that living constitutionalism is consistent with the original meaning of the *United States Constitution*: Jack M Balkin, *Living Originalism* (Harvard University Press, 2011).

[68] William J Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1986) 27(3) *South Texas Law Review* 433, 437.

> the People are free to amend the *Constitution* any time. But this freedom is largely illusory. The deck is so heavily stacked against amendment—and stacked not by us but by the very dead ancestors whose grip amendments are supposed to shrug off—that the *Constitution* is, in almost all important respects, frozen in its current form.[69]

Finally, Jackson has suggested that 'it is hard to see how interpretation could be anything other than "living" in a system with a relatively more "rigid" constitution, like that of the United States, which imposes extraordinarily high barriers to constitutional amendments'.[70]

A similar view has been expounded in Canada. The *Constitution of Canada* is another that might be characterised as highly rigid, with Professor Richard Albert suggesting that 'the *Constitution of Canada* may be even harder to amend'[71] than the *United States Constitution*, such that 'we might more accurately speak of amendment *impossibility* in Canada rather than mere difficulty'.[72] Members of the Supreme Court of Canada in support of living constitutionalism — more often called 'living tree' interpretation there — have justified their approach on the basis of the *Constitution*'s rigidity. In *Hunter v Southam Inc*, for example, Dickson J said:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. *Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers*. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[73]

[69] Andrew B Coan, 'Talking Originalism' [2009] (4) *Brigham Young University Law Review* 847, 853 (citations omitted).

[70] Vicki C Jackson, 'Constitutions as "Living Trees"?: Comparative Constitutional Law and Interpretive Metaphors' (2006) 75(2) *Fordham Law Review* 921, 926 n 22.

[71] Richard Albert, 'The Difficulty of Constitutional Amendment in Canada' (2015) 53(1) *Alberta Law Review* 85, 86.

[72] Ibid 87 (emphasis in original).

[73] [1984] 2 SCR 145, 155 (emphasis altered).

To avoid any doubt, the claim is not that reversibility or necessity provide a complete or unchallengeable answer to the counter-majoritarian difficulty.[74] However, they do provide assistance with either easing or meeting the burden of justification. In highly flexible and highly rigid constitutions, formal amendment *strengthens* the normative case for contestable judicial developments of the constitution.

VI The Effect of Moderately Rigid Constitutions

While highly flexible and highly rigid constitutions are capable of strengthening the normative justification for contestable judicial developments of the constitution, the situation is precisely the opposite with moderately rigid constitutions. Neither reversibility nor necessity are available to help answer the counter-majoritarian difficulty. In contrast to highly flexible constitutions, contestable judicial developments of the constitution are not easily reversed. In contrast to highly rigid constitutions, contestable judicial developments of the constitution cannot be said to be necessary — the judiciary is not the only institution capable of updating the constitution. To the contrary, in moderately rigid constitutions, formal amendment *weakens* the normative case for contestable judicial developments of the constitution. The difficulty of using formal amendment to reverse judicial decisions means that the counter-majoritarian difficulty has considerable strength. Yet the availability of formal amendment means that it is difficult to claim that the judiciary must take responsibility for updating the constitution. In short, in a moderately rigid constitution, formal amendment provides two reasons for the judiciary *not* to develop the constitution — the difficulty of reversibility and the absence of necessity.

While a moderately rigid constitution weakens the normative basis for contestable judicial developments of the constitution, it does not diminish, and arguably even strengthens, the practical demand for such developments. Some practical demand for the judiciary to develop the constitution exists in every system of government regardless of the constitution's rigidity. It is generated from individuals and groups seeking to expand protection for their rights, from one arm or level of government seeking to defend exercises of their power from encroachment by the other arms or level of government, from scholars making

[74] For example, Justice Grant Huscroft argues that the difficulty of amendment suggests courts should be more, not less, circumspect in developing the constitution: Grant Huscroft, 'The Trouble with Living Tree Interpretation' (2006) 25(1) *University of Queensland Law Journal* 3, 8.

cogent arguments about new interpretations and implications, and so on. However, some demand is a direct product of the constitution's rigidity. In a moderately rigid constitution, there are not insubstantial barriers to achieving constitutional change by means of formal amendment — it is not impossible, but it is nevertheless difficult. As a result, some types of constitutional change are unlikely to occur by means of formal amendment in a moderately rigid constitution, including the types of change that present the most acute counter-majoritarian concerns — that is, new limits on the legislature's power to resolve issues over which there is reasonable, good faith disagreement.

The executive and legislature are unlikely to expend the considerable time, effort and resources necessary to amend a moderately rigid constitution to impose new limitations on their own power, especially if the primary beneficiaries are a politically unpopular group or set of individuals (eg new rights for prisoners or non-citizens). While these types of constitutional change are unlikely to occur by means of formal amendment in a moderately rigid constitution, they are by no means impossible. The executive or legislature might, for example, initiate a comprehensive review of the constitution that leads to a set of proposed amendments that include new limitations on the legislature's power over rights and freedoms.[75] Consequently, the judiciary is the most likely, but by no means the only, actor capable of bringing about these types of constitutional change. This situation presents judges with the stark reality that, if they do not develop the constitution to strengthen protection for rights and freedoms, it is very possible that no one else will.

This practical demand will not be felt by all judges. For those judges that understand their constitutional role not to include development of the constitution, the path forward is clear — leave development to the formal amendment process even if that means, in all likelihood, that certain constitutional developments may never occur. However, for judges that are sympathetic to developing the constitution in at least some circumstances, a moderately rigid constitution strengthens the practical pull of engaging in constitutional development by diminishing the viability of the principal alternative means of development — formal amendment.

[75] This is arguably what occurred in Canada in 1982 when major changes to the Constitution were introduced, including a judicially enforceable bill of rights: *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'). It was also what was proposed in Australia in 1988 in the *Final Report of the Constitutional Commission* (Final Report, 1988) vol 1, 447 [9.13], 492 [9.210]–[9.213].

A moderately rigid constitution thus makes the judiciary's constitutional position more difficult in two respects. First, it increases the competing pressures that are placed on the judiciary. Unlike with highly flexible and highly rigid constitutions, where the constitution's rigidity contributes to answering the counter-majoritarian difficulty (in the form of reversibility and necessity respectively), a moderately rigid constitution weakens the normative basis for contestable judicial developments of the constitution. The constitution's rigidity means it is difficult to reverse the judiciary's decisions (ie they have considerable counter-majoritarian effect) and it is not necessary for the judiciary to develop the constitution (ie formal amendment is not completely foreclosed as an option for developing the constitution). Yet the constitution's rigidity also strengthens the practical demand for the judiciary to undertake such developments. It may not be necessary for the judiciary to develop the constitution, but it is unlikely that anyone other than the judiciary will develop the constitution, in particular by increasing limits on legislative power. For those judges that are sympathetic to judicial development of the constitution, a moderately rigid constitution provides a practical reason to consider engaging in such development. A moderately rigid constitution thus helps create practical and normative demands that point in competing directions.

With that said, it should be noted that this difficulty is contingent on a number of factors that may or may not be present in a particular jurisdiction. In some jurisdictions, the counter-majoritarian difficulty may not resonate in the constitutional culture. If no one is concerned with judges developing the constitution, the counter-majoritarian difficulty does not pose a normative challenge to the judiciary. In other jurisdictions, the judiciary may be completely unreceptive to the practical demands for judicial development of the constitution. As mentioned above, if judges understand their constitutional role not to include development of the constitution under any circumstances, the difficulty dissolves. This first difficulty — between the competing normative and practical demands — is, consequently, one that *may*, but does not necessarily have to, arise.

Second, a moderately rigid constitution makes the judiciary's constitutional position more difficult because it introduces an additional point of uncertainty into constitutional law. As its degree of rigidity is fundamentally ambiguous, it can support diametrically opposed conclusions. With a moderately rigid constitution, it is possible to interpret formal amendment as largely available — it is difficult, but *not impossible* — and therefore conclude that it is illegitimate for courts to develop the constitution (ie development should be left to formal

amendment). However, it is also possible to interpret formal amendment as largely unavailable — it is *difficult* even if not impossible — and therefore conclude that it is legitimate for courts to develop the constitution (ie it is not practicable to leave development to formal amendment).

As assessments of constitutional rigidity are not an exact science, both interpretations are reasonable and therefore both conclusions are plausible even though they are in opposition to each other. This point of ambiguity presents a challenge for those judges that are inclined to consider rigidity relevant to the interpretation of the constitution — does a moderately rigid constitution help legitimate or illegitimate contentious judicial development of the constitution? To avoid any doubt, the claim is not that judges must consider the constitution's degree of rigidity to be relevant to their approach to constitutional interpretation. Instead, the claim is that, for those judges that do consider it to be relevant, a moderately rigid constitution makes it particularly difficult to determine *how* its rigidity is relevant.

Furthermore, the claim is not that highly rigid and highly flexible constitutions are free from ambiguity. There will, for example, be disagreements in a highly rigid constitution about whether the constitution is either practically impossible or exceptionally difficult to amend. The difference is that, with a moderately rigid constitution, the point of ambiguity can be used to support diametrically opposed conclusions. Characterising a highly rigid constitution as being either practically impossible or exceptionally difficult to amend does not lead to radically different conclusions about the legitimacy of undertaking contentious judicial developments of the constitution. While a constitution that is practically impossible to amend provides the strongest basis for arguing that it is necessary, and therefore legitimate, for the judiciary to develop the constitution, the same argument can still be made if the constitution is considered to be exceptionally difficult to amend.

To illustrate these two points of difficulty that a moderately rigid constitution is apt to produce, the next Part of the article considers the Australian experience.

VII The Australian Experience

In Australia, the late 1980s and early 1990s provide a particularly vivid illustration of the competing normative and practical demands that a moderately rigid constitution can place on the judiciary. By that time, the world had seen a significant constitutional change — the imposition of new limitations on

legislatures through the widespread adoption of bills of rights conferring courts with powers of rights-based judicial review — including in some of Australia's closest constitutional relatives. Canada had adopted one in 1982,[76] New Zealand in 1990,[77] and momentum was building towards one in the United Kingdom after the prime ministership of Margaret Thatcher ended in 1990.[78] However, it looked unlikely that Australia would follow suit given the results of the 1988 constitutional referendum. In it, the Australian people were asked if they supported amending the *Constitution* to, among other things, (a) guarantee fair elections by prohibiting malapportionment and gerrymandering, and (b) protect rights and freedoms by extending the *Constitution*'s existing protections for jury trials, freedom of religion and property to the states.[79] The answer was a resounding no. The fair elections proposal was approved by 38% of voters and rejected by 62%.[80] The rights and freedoms proposal was approved by 31% of voters and rejected by 69%.[81] Both proposals failed to obtain a majority in even one of the six States.[82]

On the one hand, the referendum's failure did not dampen the practical demands placed on the High Court to develop the *Constitution* in a way that afforded greater protection for rights and freedoms and thus expanded restrictions on legislatures. Persons were still having their rights and freedoms affected by legislative actions and, more generally, supporters of rights-based judicial review still existed. Indeed, the referendum's failure only strengthened that demand because it meant that the Court was likely to be the only actor capable of expanding the *Constitution*'s protection for rights and freedoms. It was unlikely that the cause of formal amendment, especially on the issue of the protection of rights and freedoms, would be taken up again in the near future given the resounding defeat in 1988. For those judges sympathetic to engaging in development of the *Constitution* (eg for those that think there are plausible yet contentious arguments for implying new rights and freedoms from the text

[76] *Canadian Charter of Rights and Freedoms* (n 75).

[77] *New Zealand Bill of Rights Act 1990* (NZ). The limitations imposed on legislatures were, however, minimal: at s 4.

[78] David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010) ch 7.

[79] Williams and Hume (n 6) 168–9.

[80] Parliamentary Library, Department of Parliamentary Services, *Parliamentary Handbook of the Commonwealth of Australia 2020: 46th Parliament* (35th ed, 2020) 441.

[81] Ibid 442.

[82] Ibid 441–2.

and structure), the *Constitution*'s moderate rigidity strengthened the case for undertaking these developments because the difficulty of formal amendment suggested that it was off the table.

On the other hand, the referendum's failure further weakened the normative case for the Court to undertake any such developments. The invocation of the formal amendment procedure demonstrated that no argument from necessity could be made — it could not be said that the *Constitution* was at risk of atrophy if the judiciary declined to act given that the formal amendment procedure had, at that time, been used to address if and how the *Constitution* should be changed. Indeed, the results of the 1988 referendum would give any judicial development of the *Constitution* a particularly strong counter-majoritarian taste. If the Court were to enhance protection for rights and freedoms, it would arguably be acting at variance with a vote of the majority of voters that indicated the opposite preference. It is difficult to draw general conclusions from the particular results of the 1988 referendum given that there were problems with its management, which meant the proposal was not put to the people in the strongest possible terms.[83] Nevertheless, the result suggested that the majority of voters were not supportive of even small increases in rights-based restrictions imposed on legislatures. Any judicial expansion of rights-based restrictions on legislatures would, therefore, be vulnerable to the criticism that it was counter-majoritarian not only in theory, but also possibly in fact.

The subsequent two decades saw the Court face these competing demands. Litigants brought cases before the Court seeking to expand protection for their rights and freedoms, making plausible yet contentious arguments that the *Constitution* should be developed to expand restrictions on legislatures in order to, for instance, protect freedom of political communication,[84] guarantee the right to equal justice,[85] prevent discrimination against Aboriginal Australians,[86] prohibit bills of attainder,[87] and limit the administrative detention of non-

[83] See generally Williams and Hume (n 6) 211–16.

[84] See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

[85] *Leeth v Commonwealth* (1992) 174 CLR 455.

[86] *Kartinyeri* (n 15).

[87] *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Kable v DPP (NSW)* (1996) 189 CLR 51.

citizens.[88] These types of constitutional change were prime examples of those that, following the results of 1988, the Court was likely to be the only actor capable of bringing about.

On some occasions the arguments put before the Court succeeded, on other occasions they failed.[89] When the arguments succeeded (in part or in whole) and the Court developed the *Constitution* by restricting legislative action on a novel basis that the constitutional text did not expressly require, it did not take long for the legitimacy of these decisions to be contested. The *Constitution*'s moderate rigidity meant that they could be challenged on counter-majoritarian grounds. It was not possible to deflect this challenge by invoking reversibility. At the same time, the possibility of amendment made it difficult to invoke necessity to meet the burden of justification. Indeed, a number of commentators during this period invoked the availability of formal amendment to criticise the legitimacy of the Court's decisions. Professor Nicholas Aroney, for instance, noted that the framers of the *Constitution* deliberately chose not to include a right to free speech and thus the Court's decisions recognising an implied freedom of political communication in 1992 went directly against this choice.[90] He added 'that the Australian people voting at referenda have repeatedly rejected amendments to the *Constitution* which would entrench further Bill of Rights-type guarantees'.[91]

The Court was well-aware of this normative challenge. In a number of cases, members of the Court acknowledged the availability of formal amendment as one reason for limiting the development of the *Constitution* in the area of rights and freedoms. In *Al-Kateb v Godwin*, McHugh J rejected an argument to interpret the *Constitution* in line with fundamental rights and freedoms, saying that, '[i]f Australia is to have a Bill of Rights, it must be done in the constitutional way — hard though its achievement may be — by persuading the people to

[88] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1.

[89] For an overview of which arguments were successful and unsuccessful, see generally Scott Stephenson, 'Rights Protection in Australia' in Adrienne Stone and Cheryl Saunders (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 922–4.

[90] Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18(2) *University of Queensland Law Journal* 249, 261–2.

[91] Ibid 262. See also Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 106, 147–8.

amend the *Constitution* by inserting such a Bill'.[92] In *Kartinyeri v Commonwealth*, a majority of the Court construed the Commonwealth's power to make laws with respect to race to allow the enactment of legislation that disadvantaged 'people of the Aboriginal race'.[93] Justice Gaudron, and Gummow and Hayne JJ, rejected the argument that the effect of the 1967 constitutional amendment to the provision was to limit the power to the making of laws that benefitted the people of the Aboriginal race.[94] An implication of their finding was that, not only is formal amendment the only avenue for pursuing a constitutional change of this type, but that any such amendment seeking to bring about this effect must be in express terms. In *Momcilovic v The Queen*, Heydon J said that

> [t]he insertion of a bill of rights into the *Commonwealth Constitution* by an amendment supported by the necessary popular majorities under s 128 could give the courts a role in interpreting statutes which departed from the separation of powers. But as the *Constitution* stands that is impermissible.[95]

Courts encounter the challenge of managing competing demands in every constitutional system. The claim is, however, that the *Australian Constitution*'s degree of rigidity increases the size of the challenge. In comparison to highly flexible constitutions, the counter-majoritarian difficulty has significant strength because any judicial development of the constitution is difficult for the majority to reverse. In comparison to highly rigid constitutions, it is more difficult to invoke necessity to help answer the counter-majoritarian difficulty because formal amendment is still possible. While the *Constitution*'s moderate rigidity increases the normative challenge for the judiciary, it does not decrease the practical demands placed on the judiciary to develop the *Constitution*. Given the difficulty, but not impossibility, of amending the *Constitution*, the judiciary is placed in the position that, if it does not update the *Constitution*, no one else is likely to do so.[96]

[92] *Al-Kateb* (n 88) 595 [73].

[93] *Kartinyeri* (n 15) 361–2 [30] (Gaudron J). See also at 357–8 [17]–[20] (Brennan CJ and McHugh J), 380 [86]–[87] (Gummow and Hayne JJ).

[94] Ibid 361–63 [28]–[32] (Gaudron J), 381–3 [90]–[94] (Gummow and Hayne JJ). Justice Kirby dissented on this point: at 406–9 [142]–[147], 413 [157].

[95] (2011) 245 CLR 1, 173 [433].

[96] As mentioned above in Part VI, the degree of difficulty will depend on the extent to which these demands are felt by the judiciary. If a judge considers their constitutional role not to include development of the constitution beyond the express text, there is no difficulty to resolve.

The Australian experience also vividly illustrates the second difficulty that arises with a moderately rigid constitution — the point of uncertainty that arises from the ambiguity that surrounds the *Constitution*'s degree of rigidity. Consider the following two decisions decided by the same seven judges a mere two months apart. *Re Wakim; Ex parte McNally* ('*Re Wakim*') concerned a challenge to the constitutional validity of state legislation conferring state jurisdiction on the Federal Court and Commonwealth legislation consenting to the conferral of that jurisdiction.[97] The legislative provisions formed part of a larger cross-vesting scheme that was designed to remove unnecessary delays, costs and inefficiencies arising from jurisdictional issues.[98] In the 1990s, family law was a commonly cited example of an area of law that would benefit from the scheme.[99] For instance, the dissolution of a relationship might give rise to a legal dispute about the custody of children (a matter arising under federal jurisdiction) and a legal dispute about a child protection order (a matter arising under state jurisdiction). Cross-vesting legislation would allow a single court in a single set of proceedings to deal with both matters rather than have multiple proceedings in multiple courts dealing with different aspects of the dispute.[100]

In *Re Wakim*, members of the Court noted that the cross-vesting scheme was a product of cooperation between the Commonwealth, state and territory Parliaments[101] that would increase convenience and decrease the expensiveness and length of litigation.[102] There is no express provision in the *Australian Constitution* prohibiting the states from conferring state jurisdiction on federal courts or prohibiting the Commonwealth from consenting to the conferral of

97 (1999) 198 CLR 511 ('*Re Wakim*').

98 See *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).

99 See, eg, Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) ch 15. See especially at 359–63 [15.7]–[15.19], 366–8 [15.29]–[15.33].

100 Even without cross-vesting legislation, a federal court does have the ability to resolve issues of state law '[i]f the substratum of fact which gives rise to a matter in federal jurisdiction cannot be effectively disposed of without the application of State law … [t]he determination of State law issues in such circumstances is part of the "accrued jurisdiction" of the federal court': *Re Wakim* (n 97) 562–3 [71] (McHugh J). However, as the enactment of comprehensive cross-vesting legislation indicates, the ability of a federal court to exercise accrued jurisdiction did not solve all the jurisdictional difficulties that could arise: at 617–18 [229] (Kirby J).

101 See ibid 540 [2] (Gleeson CJ), 572 [105] (Gummow and Hayne JJ).

102 See ibid 548 [34] (McHugh J), 602–3 [193] (Kirby J). But see at 579–80 [121] (Gummow and Hayne JJ).

that jurisdiction.[103] The constitutional validity of the cross-vesting scheme had split the Court 3:3 the year before.[104]

The case for developing the *Constitution* in a way that permitted the cross-vesting scheme was, consequently, powerful. Interpretation of the *Constitution* to invalidate the cross-vesting scheme would be on the basis of a judicial implication, would cause considerable inconvenience with few, if any, benefits, and would undo the cooperative efforts of every legislature in Australia. That is, however, exactly what the Court did. By a majority of six judges to one (Kirby J dissenting), the Court held that the cross-vesting scheme was constitutionally invalid[105] on the basis that it violated an implication derived from ch III of the *Constitution*.[106]

Importantly, Gleeson CJ, Gummow and Hayne JJ, and McHugh J, emphasised that there was only one means of changing the *Constitution* to permit such a scheme — formal amendment.[107] The fact that any such formal amendment might be difficult to achieve was of no relevance. McHugh J, for example, said:

> Change to the terms and structure of the *Constitution* can be carried out only with the approval of the people in accordance with the procedures laid down in s 128 of the *Constitution*. Until change is made, the function of the judiciary is to give effect to the present terms and structure of the *Constitution*.[108]

By contrast, Kirby J suggested that the practical difficulty of obtaining formal amendment should be considered when interpreting the *Constitution*

> because of the oft-demonstrated difficulties of securing formal amendment to the *Constitution*, and the consequent necessity of adapting its text to rapidly changing national and international circumstances, it is important to approach

[103] Furthermore, consideration was given to whether s 51(xxxix) of the *Constitution* was a potential source of legislative power that could be construed as allowing the Commonwealth Parliament to enact the legislation consenting to the conferral of jurisdiction: see *Re Wakim* (n 97) 561–2 [68] (McHugh J).

[104] *Gould v Brown* (1998) 193 CLR 346 ('*Gould*').

[105] In particular, the Court held that the Commonwealth legislation authorising the conferral of State jurisdiction was invalid for attempting to confer jurisdiction on the Federal Court contrary to ch III of the *Constitution*.

[106] See especially *Re Wakim* (n 97) 555 [51]–[52], 557 [56], 558 [59] (McHugh J), 574–75 [111] (Gummow and Hayne JJ, Gleeson CJ agreeing at 546 [25], Gaudron J agreeing at 547 [30]), 600–1 [189]–[190], 603 [195] (Kirby J).

[107] Ibid 540 [2] (Gleeson CJ), 549 [35] (McHugh J), 577 [113] (Gummow and Hayne JJ).

[108] Ibid 550 [39].

> its meaning with a full appreciation of its function as an enduring instrument of democratic and effective government.[109]

Later in his Honour's judgment, Kirby J stated:

> If the arguments of the challengers are accepted, [they] would appear to consign those seeking to restore the benefits of cross-vesting legislation, enjoyed these past dozen years, to the highly problematic and expensive task of proposing and securing a formal amendment to the *Australian Constitution*. The inconvenience of such a rigid construction of Ch III is then shown in sharp relief. The amendment would be necessary not to delete offending words nor to overcome an expressly stated prohibition. It would be needed to reverse an implication which this Court (in my view needlessly) reads into the Chapter.[110]

Abebe v Commonwealth ('*Abebe*'), a case decided in the same year as *Re Wakim*, concerned a challenge to the constitutional validity of Commonwealth migration legislation conferring jurisdiction on the Federal Court to review decisions of the Refugee Review Tribunal.[111] Section 476(1) of the *Migration Act 1958* (Cth) permitted the Federal Court to review these decisions on some grounds, but not on other grounds that would be available if the decision were challenged before the High Court under s 75(v) of the *Constitution*.[112] Coincidentally, this legislation created the opposite scenario to that which the legislation in *Re Wakim* sought to create. In practical terms, the legislation at issue in *Abebe* meant a person might have to commence proceedings in two different courts if they wanted to challenge a decision on more than one ground.[113] The plaintiff submitted that this was constitutionally impermissible.

Section 77(i) of the *Constitution* confines the Commonwealth Parliament's power to enact legislation conferring jurisdiction on the Federal Court to the 'matters' set out in ss 75–6. The plaintiff argued that, when the Parliament invests the Federal Court with jurisdiction to determine a 'matter', the Parliament cannot limit the grounds on which the Court deals with the 'matter'.[114] The

[109] Ibid 599 [185].

[110] Ibid 609–10 [207].

[111] (1999) 197 CLR 510 ('*Abebe*').

[112] See also ibid 522 [21] (Gleeson CJ and McHugh J).

[113] See ibid 546 [92] (Gaudron J).

[114] Ibid 523 [22].

Parliament cannot, the plaintiff submitted, confer jurisdiction on the Federal Court to resolve only part of a justiciable controversy.[115]

By a majority of four justices to three, the Court held that the legislation was constitutionally valid. Gleeson CJ and McHugh J said that '[n]othing … in s 77 or ch III of the *Constitution* require[s] a federal court dealing with a legal controversy to have authority to deal with every legal ground that a party wishes to put forward'.[116]

Importantly, in comparison to *Re Wakim* where Gleeson CJ and McHugh J both paid no regard to the practical difficulty of formal amendment and thus implied that it was irrelevant to the interpretation of the *Constitution*, in *Abebe* they said:

> *In construing provisions such as s 77(i), it is necessary to keep in mind that the Constitution* is an instrument of government, *not easily or readily amended*, and intended to endure indefinitely. To hold that the Parliament cannot confer federal jurisdiction in respect of the matters mentioned in ss 75 and 76 unless the Parliament gives the relevant court jurisdiction to dispose of the whole controversy between the parties would create immense practical problems for the administration of federal law which the makers of the *Constitution* can hardly have intended.[117]

Justice Kirby, now in the majority, expressed a similar view to that expressed in *Re Wakim*. In *Abebe*, he said:

> The *Australian Constitution* is expressed in statutory form. The elucidation of its meaning must therefore observe the basic principles followed in the construction of any statute. But a constitution is a special kind of statute. This fact requires that it should always be construed with its constitutional character in mind. Our *Constitution* is notoriously difficult to amend by formal process. It is intended to operate indefinitely and in a fast-changing world. In elucidating ambiguities, the constitutional text should therefore be approached as a 'facility of rational and efficient government' for the people of Australia.[118]

[115] Ibid 523 [23].

[116] Ibid 525 [26]. Also in the majority were Kirby J and Callinan J: at 590 [231] (Kirby J), 605–6 [282] (Callinan J). In dissent were Gaudron J, and Gummow and Hayne JJ: at 598–9 [129] (Gaudron J), 564 [143] (Gummow and Hayne JJ).

[117] Ibid 531 [41] (emphasis added).

[118] Ibid 581 [203] (citations omitted).

The views of Gleeson CJ and McHugh J in these two cases demonstrate the ambiguity with a moderately rigid constitution's degree of rigidity. In both cases, formal amendment was considered to be relevant to determining what the Court can and cannot do, but the conclusions reached from this observation were diametrically opposed. In *Re Wakim*, McHugh J proceeded from the view that formal amendment is *available* and that it was therefore inappropriate for the Court to develop the *Constitution*. In *Abebe*, Gleeson CJ and McHugh J proceeded from the view that formal amendment is *unavailable* and that this consideration was relevant to interpretation of the *Constitution*. The contrast in views is particularly striking given that both cases involved broadly the same interpretive issue arising from the same part of the *Constitution* — the scope of the Commonwealth Parliament's power to determine the jurisdiction of federal courts under ch III.

As mentioned above in Part VI, the ability to reach different conclusions about the relevance of formal amendment is not unique to moderately rigid constitutions. However, moderately rigid constitutions are particularly susceptible to uncertainty over the relationship between formal amendment and judicial interpretation because their degree of rigidity sits at the midpoint of the spectrum. As a result, it is not unreasonable to reach diametrically opposed conclusions about formal amendment. One person can stress the availability of formal amendment as a plausible option for pursuing constitutional change, another person can stress the unavailability of formal amendment as a plausible option for pursuing constitutional change, and *both views can be reasonably considered to be correct*. The difficulty with Australia's moderately rigid constitution is that McHugh J's two statements were *both accurate* even though they provided support for opposite conclusions about the judiciary's legitimate constitutional role.

VIII Conclusion

This article discusses a challenge for courts in a moderately rigid constitution. In highly flexible and highly rigid constitutions, their degree of rigidity helps normatively legitimate contentious judicial developments of the constitution — that is, those developments that go beyond the express terms of the text to impose novel restrictions on legislatures to deal with issues over which there is reasonable, good faith disagreement. By contrast, in moderately rigid constitutions, their degree of rigidity weakens the normative legitimacy of contentious judicial development of the constitution because these

developments are not easily reversed and cannot be claimed to be necessary for ensuring that the constitution does not atrophy. At the same time, moderately rigid constitutions continue to generate considerable practical demand for courts to develop the constitution in this way. As a result, courts are placed between competing normative and practical demands. Furthermore, the ambiguity as to whether formal amendment is either available or unavailable means a moderately rigid constitution provides simultaneous support for opposite conclusions about the judiciary's legitimate role in developing the constitution.

This challenge raises a question: does it call into question the merits of seeking to establish a moderately rigid constitution? As mentioned in the introduction, the challenges with highly flexible and highly rigid constitutions are well-known. As a result, it is common to find constitutional designers recommending the creation of a moderately rigid constitution.[119] The findings in this article do not, however, necessarily call into question the merits of this recommendation.

All constitutions create challenges for courts regardless of their degree of rigidity. As mentioned in Part V(A), courts in highly flexible constitutions can be faced with the difficulty of legitimating restrictions on the use of the formal amendment procedure if it is misused by legislatures. Courts in highly rigid constitutions are faced with the difficulty of legitimating the particular constitutional developments they make. While they can invoke necessity as a justification for developing the constitution, it does little to help legitimate each individual development — for example, necessity cannot legitimate a court's decision to develop the right to privacy while declining to develop the right to free speech. Furthermore, the challenge for courts posed by a moderately rigid constitution might very well be considered to be smaller in gravity than those posed by highly flexible and highly rigid constitutions. But the article does suggest that we must be careful not to assume that a moderately rigid constitution represents a 'sweet spot' in the area of constitutional design that is completely free of challenge.

[119] See, eg, Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633, 664–7, 680; Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72(1) *Current Legal Problems* 1, 30–2.