

Constitutional Workarounds

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I. Setting the Stage: Examples of Constitutional Workarounds

Consider these constitutional “problems,” some hypothetical but based on actual events and some that really have arisen recently.

A. *Shortening the Presidential Term*

Suppose a President running for reelection suffers a massive defeat because the public holds him responsible for an ongoing domestic economic crisis and for what the public has come to regard as an ongoing foreign policy crisis. Public-opinion surveys show that the people would strongly prefer to have the newly elected President take office almost immediately, so that she can design, introduce, and implement new economic and foreign policies. Politicians from both parties agree that the public is right and that it would be a good thing were the newly elected President to become President rather than President-elect before January 20th.¹ They notice the Twenty-Fifth Amendment. Section Two of that Amendment provides, “Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress,” and Section One provides, “In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”² They propose and carry out the following plan: the current Vice President will resign; the President will nominate and the Congress will confirm as the new Vice President the person who was chosen as President in the November elections; and the President will thereupon resign. Voilà—the President-elect becomes President before January 20th.³

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1. See U.S. CONST. amend. XX (“The terms of the President and Vice President shall end at noon on the 20th day of January . . .”).

2. *Id.* amend. XXV.

3. The problem to which this solution responds is created by the statutory designation of the Tuesday after the first Monday in November as the date on which the presidential election is to be held, 3 U.S.C. § 1 (2006), but in the future, the length of the period between election and January 20th can be reduced by pushing the election into December or January. Note, however, that this solution is not available in the hypothesized setting and would, on the facts imagined, exacerbate rather than solve the problem of having a president in office who had been (decisively) repudiated. The parenthetical qualification responds to the observation that a president’s repudiation might not be thought decisive without an election.

B. Electing the President by a National Popular Majority

The California legislature enacts a statute directing that the presidential electors who are chosen by a popular majority (or plurality) in the state cast their votes for the person who wins more votes nationwide—even if that person received fewer votes in California than her rivals—but only if legislatures in states with electoral votes totaling somewhere over 270, the majority needed to elect a president, enact similar statutes.⁴ Other states do enact such statutes, to the point where the statutes are on the books in states with more than 270 electoral votes.⁵ Assuming that electors will follow the statutory directions,⁶ the candidates direct their attention during the next presidential campaign to securing a national popular majority and not simply to attaining enough electoral votes to win. Each campaigns in states they

4. This proposal is from the organization National Popular Vote. See National Popular Vote!, Explanation of National Popular Vote Bill, <http://www.nationalpopularvote.com/pages/explanation.php>. This organization describes the proposal as follows:

Under the National Popular Vote bill, all of the state's electoral votes would be awarded to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. The bill would take effect only when enacted, in identical form, by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538).

Id.

5. Critics of the proposal have argued that conditional enactments of this sort are functionally equivalent to interstate compacts, which require congressional consent to be legally effective under Article I, Section Ten, Clause Three of the U.S. Constitution. See Stanley Chang, *Recent Development: Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 214 (2007) (arguing that a relevant test is whether the National Popular Vote would enhance state power relative to that of the federal government); Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 372 (2007) (“The diminished political effectiveness of the non-compacting states’ electoral votes is a sufficient interest to invoke the procedural safeguard of congressional consent and render the Interstate Compact unconstitutional in the absence of that consent.”); Daniel P. Rathbun, *Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008) (arguing that any agreement between states disrupts the vertical balance between the states and the federal government). However, in *U.S. Steel Corp. v. Multistate Tax Commission*, the Court found no violation of the Compact Clause in the actions taken by a body created by conditional statutes providing that the body would come into being when seven or more states enacted similar statutes. 434 U.S. 452, 479 (1978). For an example, see ALASKA STAT. § 43.19.010, art. X (2008), which provides that “[the] compact shall enter into force when enacted into law by any seven states.” The Court in *U.S. Steel* noted that congressional consent had been sought but not obtained. 434 U.S. at 458 n.8. According to the Court, the Compact Clause was aimed at agreements among the states that “would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States” or that “authorize[d] the member States to exercise . . . powers they could not exercise in [the agreements’] absence.” *Id.* at 472–73. I am skeptical of the claim that the proposal is a compact requiring congressional consent, but for present purposes we can simply assume that it was submitted to and approved by Congress (admittedly, an unlikely outcome given the adverse effects of the proposal on “swing” states with small populations).

6. The proposal rests on the assumption that the moral pressure exerted by the existence of the statutes and the popular support for their enactment will lead nearly all electors to do “voluntarily” what the statute purports to require. For the suggestion that state legislatures cannot control the votes cast by presidential electors by, for example, imposing criminal sanctions on the “faithless elector,” see Vasana Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 124–25 (2001).

regard as “safe” for the other, in the sense that they are sure that the other candidate will get a popular majority in those states. They campaign in such states nonetheless to reduce the margin of local victory and thereby decrease the possibility that their opponent will attain a national popular majority. After the presidential election is held, the electors cast their votes as directed by their state statutes. Voilà—a president (necessarily) elected by a national popular majority.

C. *The Emoluments Clause*

Senator Hillary Rodham Clinton was reelected to the Senate in 2006, with her new term beginning on January 3, 2007.⁷ A previously enacted statute authorized the President to adjust the salaries of cabinet secretaries for cost of living increases by executive order.⁸ In January 2008, during Senator Clinton’s term, President George W. Bush signed such an executive order.⁹ In 2009, Senator Clinton became Secretary of State.¹⁰ The Constitution provides, “No Senator . . . shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, . . . the Emoluments whereof shall have been increased during such time.”¹¹ Senator Clinton became Secretary of State because Congress, employing a technique that has become known as the Saxbe fix,¹² enacted a statute returning the Secretary of State’s salary to its amount prior to the cost of living increase.¹³ The Saxbe fix is thought to work even though it seems inconsistent with the precise grammar of the Emoluments Clause: “shall have been increased” appears to refer to a fact about what has occurred in the past, and subsequent legislation cannot change past facts.¹⁴ Voilà—the Secretary of State that the President wants.

7. See U.S. CONST. amend. XX, § 1 (“[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January . . . and the terms of their successors shall then begin.”).

8. See 5 U.S.C. § 5303(b)(1) (2006) (authorizing the President to adjust pay rates). The provision was enacted in 1990, before Senator Clinton took office. Pub. L. No. 101-509, 104 Stat. 1389 (codified at 5 U.S.C. § 5303); see Adam Nagourney, *Bush and Gore Vie for an Edge with Narrow Electoral Split; Hillary Clinton Goes to Senate; Big Victory for First Lady in Contest With Lazio*, N.Y. TIMES, Nov. 8, 2000, at A1 (announcing Clinton’s victory in 2000).

9. Exec. Order No. 13,454, 73 Fed. Reg. 1,481 (Jan. 8, 2008).

10. See 155 CONG. REC. S693 (daily ed. Jan. 21, 2009) (confirming Senator Clinton’s nomination).

11. U.S. CONST. art. I, § 6, cl. 2.

12. For a discussion of the Saxbe fix and other relevant practices, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 909–11 (1994).

13. Compensation and Other Emoluments Attached to the Office of Secretary of State, Pub. L. No. 110-455, 112 Stat. 5036 (2008).

14. I put aside here the argument, which I think plausible though not much more than that, that Senator Clinton’s becoming Secretary of State did not violate the Emoluments Clause because the salary was increased pursuant to an action authorized by a statute enacted before her relevant term of service began.

D. NAFTA

In 1992, after several years of negotiating, the political leaders of the United States, Canada, and Mexico signed the North American Free Trade Agreement (NAFTA).¹⁵ To go into effect, the agreement had to be adopted as law by each nation pursuant to its own constitutionally mandated procedures.¹⁶ President Bill Clinton supported the agreement, but many in his own party did not.¹⁷ President Clinton sought to temper disagreement about NAFTA by negotiating additional agreements about labor rights and environmental protection.¹⁸ Even with those side agreements, however, the President could not be sure that he could find enough votes in the Senate to ratify the agreement as a treaty.¹⁹ He therefore chose to submit the agreement as a statute to be enacted by ordinary majorities in the House and the Senate.²⁰ By making the agreement an important part of his political agenda, the President was able to secure its adoption in November 1993 by a narrow majority in the House²¹ and by a vote of 61 to 38 in the Senate, short of the two-thirds majority required for the adoption of a treaty.²² Constitutional scholars differed over whether NAFTA was adopted in a constitutionally permissible manner, with some taking the position that international obligations with such an extensive scope had to be adopted as treaties.²³

15. For a more comprehensive discussion of the background summarized here, see NAFTA: FINAL TEXT, SUMMARY, LEGISLATIVE HISTORY & IMPLEMENTATION DIRECTORY 1–4 (James R. Holbein & Donald J. Musch eds., 1994).

16. See MARYSE ROBERT, NEGOTIATING NAFTA 42–44 (2000) (describing the process of ratifying NAFTA in the United States, Canada, and Mexico).

17. See *id.* at 42–43 (observing that Clinton endorsed a free trade accord with Canada and Mexico even though “a large number of Democrats” were opponents of NAFTA).

18. NAFTA: FINAL TEXT, SUMMARY, LEGISLATIVE HISTORY & IMPLEMENTATION DIRECTORY, *supra* note 15, at 3.

19. See ROBERT, *supra* note 16, at 43 (noting that approval of NAFTA was uncertain in Congress because of opposition from labor and environmental groups).

20. See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1304 (11th Cir. 2001) (explaining that NAFTA was adopted by “simple majorities in both Houses, pursuant to the procedures reserved for ordinary legislation” and not by use of the Treaty Clause, which requires a Senate supermajority).

21. See 139 CONG. REC. H10,048 (daily ed. Nov. 17, 1993) (reporting that the bill passed the House 234 to 200).

22. 139 CONG. REC. S16, 712–13 (daily ed. Nov. 20, 1993).

23. For this view, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995). For the view that NAFTA was properly adopted as a congressional–executive agreement, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 802 (1995). Ackerman and Golove agree with Tribe that under the Constitution as adopted in 1789, NAFTA would have to have been enacted as a treaty but argue that constitutional changes after World War II effectively amended the Constitution to allow its adoption as a congressional–executive agreement. *Id.* at 802–03. A more conventional view is that such agreements are allowed by the Constitution for international trade agreements and that treaties must be used as a means of undertaking international obligations only in connection with agreements of a political nature, mutual defense agreements, and similar military agreements. For a summary of the positions taken by academics,

Notwithstanding these doubts, by 2009 NAFTA and its legal status were clearly settled. Voilà—an international obligation undertaken by statute rather than treaty.

E. The Origination Clause

Suppose the House of Representatives votes for a bill raising some taxes and lowering others, all very modestly, and sends the bill to the Senate. The President prefers a much larger tax package, raising some taxes that the House bill would lower, reducing some taxes the House bill would raise, and much more. A sympathetic Senator introduces an “amendment” to the House-passed bill striking everything after the bill’s number and title and substituting the President’s proposal. The Senate adopts the amendment and then the revised bill. After the bill is returned to the House, the House too votes in favor, and the President signs it. The Constitution provides, “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”²⁴ Notwithstanding the fact that the enacted statute shares only a number and title with the bill adopted originally by the House, it is generally accepted that the new statute complies with the requirements of the Origination Clause.²⁵ Voilà—a tax bill that any sensible person would say originated in the Senate.

Although these problems and hypotheticals deal with quite different parts of the Constitution and—as we will see—although some raise rather different issues than others, they do have some common characteristics. They arise (a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution’s text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution. The solutions—the routes to the goal—are what I call “constitutional workarounds.” Finding some constitutional text obstructing our ability to reach a desired goal, we work around that text using *other* texts—and do so without (obviously) distorting the tools we use.²⁶

Constitutional workarounds raise important questions about the Constitution and constitutional theory.²⁷ They can occur only if the

see Steve Charnovitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT’L L. 696, 702–04 (2004).

24. U.S. CONST. art. I, § 7, cl. 1.

25. See ERIK M. JENSEN, *THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 171 (2005) (asserting that “practice” has made the Origination Clause “a nullity,” and commenting that “in practice the Senate’s power to amend is generally understood to be so broad that the Senate can replace the entire text of a bill that technically originates in the House”).

26. For a discussion of cases in which there is some distortion of the texts used in the workarounds, see *infra* text accompanying notes 28–29.

27. In this Article, I focus on workarounds as legislative devices and do not consider how the courts should respond to them, for several reasons. Challenges in court to some workarounds would

Constitution is in some sense at war with itself: One part of the text prohibits something,²⁸ other parts of the text permit it, and the Constitution itself does not appear to give either part priority over the other.²⁹ And to the extent that workarounds occur when there is political pressure to accomplish a goal blocked by parts of the Constitution's text, workarounds place under severe pressure the idea that a constitution is a form of commitment to avoid improvident actions that we are inclined to take because of perhaps passing political considerations. The first bit of text expresses our commitment not to do something in response to immediate political pressures, but the work-around allows us to succumb to those pressures.³⁰

Part II of this Article offers a simple classification of workarounds: true, fraudulent, and contested. Part III then discusses the prerequisites for workarounds, which include general agreement that the constitutional texts obstructing action no longer make much sense and, perhaps related to the existence of such agreement, some substantial degree of bipartisan agreement that using the workaround is constitutionally appropriate. The Article concludes with some thoughts about the implications of workarounds for constitutional theory.

undoubtedly face serious justiciability objections. Courts could uphold some workarounds on the merits, which would deprive those enactments of their status as workarounds. And judicial interpretation can itself be a workaround. *See infra* text accompanying notes 36–37. But assessing whether the courts would or should uphold specific workarounds would involve a tedious exercise in suggesting the best interpretations of a diverse and probably large number of constitutional provisions. Finally, the most interesting workarounds involve actions plainly consistent with the Constitution's text when we consider only the texts on which the workarounds are based. If workarounds involve using one part of the text to overcome another, a judicial decision finding a workaround impermissible would use the latter to overcome the former.

28. In comments on an earlier version of this Article, Richard Primus observed that “prohibits” is sometimes too strong a characterization. Sometimes the first textual provision assumes an outcome—that the President will take office on January 20—but does not prohibit other outcomes.

29. In informal conversations, Vermeule and Bradley have discussed the possibility that the courts could develop what they call “anticircumvention rules,” the effect of which would be to require that one part of the text prevail over the other so as to block some workarounds. Again, determining when one provision of the Constitution has priority over another seems to me an extremely difficult if not impossible task. They also suggested that such rules arise when courts are concerned that the workaround is motivated improperly. For a discussion of that suggestion, see *infra* text accompanying notes 38–39.

30. Note the importance of the requirement that neither constitutional provision appears to have priority. A proposed workaround might be unconstitutional if, for example, it purported to rely on a general constitutional provision to overcome a more specific obstructive one. So, for example, Congress could not rely on the Commerce Clause to enact a nonuniform rule of bankruptcy even though bankruptcy rules clearly “regulate Commerce . . . among the several States,” U.S. CONST. art. I, § 8, cl. 3, because the more specific Bankruptcy Clause gives Congress the more specific power to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” *Id.* cl. 4. There may be other ways of giving one constitutional provision priority over another, but my sense is that the domain left for constitutional workarounds would remain quite substantial even taking such priorities into account.

II. Classifying Workarounds

There are some important differences among the workarounds described in Part I. The Saxbe fix seems simply *fraudulent*. Without locating some other constitutional text to use in working around the obstructive text of the Emoluments Clause,³¹ it just ignores the latter.³²

Other workarounds might be called *contested*. Consider the Origination Clause example. Those who would allow the Senate to replace a tax bill originating in the House with a completely different one would point to the provision granting the Senate the power to amend revenue bills “as on other bills,” arguing that it gives the Senate plenary power to amend.³³ Or suppose that the United States entered into a treaty requiring that it maintain a registry of weapons owners and that Congress implemented that treaty by requiring that local law enforcement officers obtain the names and addresses of weapons purchasers and forward the information to a central, national registry. Without the treaty, the statutory requirement might well be unconstitutional.³⁴ The treaty-based statute might then be seen as an effort to work around that constitutional restriction. But there is a credible constitutionality argument based on *Missouri v. Holland*.³⁵ A statute that would otherwise be unconstitutional because it is outside the scope of Congress’s powers enumerated in Article I, Section Eight, might be constitutional if it is enacted pursuant to the treaty and if the only constitutional objection is that the statute violates “some invisible radiation from the general terms of the Tenth Amendment.”³⁶

In these cases, the workaround is simply an application of the Constitution’s text in what might initially seem an unusual way, but one that is plainly defensible—even if not ultimately compelling—as a matter of ordinary constitutional interpretation.³⁷ In these circumstances, calling what

31. This is notwithstanding the text giving Congress the power to set salaries generally. An alternative view of the fraud inherent in the Saxbe fix is that it relies on Congress’s general power to set salaries to overcome the obstruction created by the more specific Emoluments Clause. I thank Adrian Vermeule for pointing out this view to me.

32. I am hard-pressed to come up with other fraudulent workarounds, perhaps because Congress rarely acts in ways that reflect its judgment that a specific constitutional text can be ignored. I suspect that some would treat the modern expansion of the Commerce Clause as a fraudulent workaround, but—given the Supreme Court’s endorsement of that expansion—it seems to me that the expansion should be treated as at most a contested workaround.

33. U.S. CONST. art. I, § 7, cl. 1; *see also* *Rainey v. United States*, 232 U.S. 310, 317 (1914) (establishing that the Senate can propose, as an amendment, a new section to a revenue bill provided that the bill originated in the House).

34. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding unconstitutional a statute enacted under the Commerce Clause imposing such an obligation on local law enforcement officers).

35. 252 U.S. 416 (1920).

36. *Id.* at 434.

37. The very fact that there is disagreement about when congressional–executive agreements can substitute for treaties, if they ever can, establishes that those agreements are examples of contested workarounds.

Congress does a workaround might be misleading: the action at most reflects a contestable judgment about how we should interpret the Constitution when two of its provisions seem in some tension.³⁸

Finally, there are the *true* workarounds: methods that achieve results inconsistent with one constitutional provision by taking advantage of the opportunities provided by other constitutional provisions. True workarounds, such as the one shortening the presidential term, involve actions that are unquestionably consistent with the Constitution's formal requirements. And yet, the fact that they can readily be characterized as yielding results inconsistent with the Constitution explains why the term workaround might have a slightly seedy resonance.

One possible explanation for that resonance is that workarounds are transparent efforts to evade constitutional restrictions. Their purpose, in other words, is to avoid the obstructing constitutional provision. And frequently we might be nervous about the *reasons* Congress might have in seeking to work around those provisions: the patent purpose might reflect bad motivations.³⁹ Contested workarounds might be routine when people disagree about the wisdom of some outcome as a matter of policy, with those objecting to the outcome on policy grounds citing the obstructive constitutional provision as an additional reason for opposing the outcome.⁴⁰ Yet pinning down what might make the motivation bad is tricky. We could define workarounds away by labeling any motive to work around a constitutional obstruction as bad. Equivalently, we could do so by requiring some reason for the action other than the desire to work around an obstruction. That, however, seems to solve the problem by definition and, along the way, to ignore the other constitutional provisions that license the congressional action.⁴¹

38. Perhaps contested workarounds should be understood in this way: rather than one constitutional provision being used to work around an obstructive provision, judicial interpretation is used as a way of working around that provision by interpreting it to eliminate the apparent obstruction.

39. Again, this thought was first suggested in informal conversations between Vermeule and Bradley.

40. I owe this suggestion to Richard Primus.

41. This response to the definitional move is particularly acute in connection with true workarounds and has some bite in connection with contested ones, where the definitional move seeks to resolve discrete problems of constitutional interpretation wholesale. I believe that the latter point deals with a question posed to me by Adrian Vermeule. Consider this passage from *Boumediene v. Bush*:

The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the

A more promising path, I think, would distinguish between what I have elsewhere called the thin and the thick Constitutions.⁴² The thick Constitution consists of the organizational details such as the Emoluments and Origination Clauses. These provisions set up and regulate the national government and, though they do rest on policy judgments about how a good government is best organized, they do not reflect deep commitments of political philosophy and theory—perhaps more precisely, they reflect judgments about political philosophy and theory that could readily be satisfied by other organizational choices.⁴³ The thin Constitution, in contrast, consists of constitutional provisions that do directly reflect such deep commitments, implementing the commitments truly basic to the Constitution.⁴⁴ The distinction has bite in the present context because working around the thin Constitution’s provisions might be worrisome in a way that working around the thick Constitution’s provisions is not. It is not the purpose or motive that leads to concern about workarounds but rather their target.

Alternatively, we might not worry about workarounds when the institution that a constitutional provision is designed to protect participates or acquiesces in the workaround, but we would be nervous about a workaround that cuts such an institution out of the process of making effective laws. For example, the congressional–executive agreement as a way of working around the Treaty Clause’s requirement that treaties receive support by two-thirds of the Senate might be worrisome because it takes away the power of one-sixth of the Senate⁴⁵ (the difference between the supermajority required to ratify a treaty and the simple majority required to enact a congressional–executive agreement).⁴⁶ There is surely something to this suggestion,⁴⁷ but it is more

political branches have the power to switch the Constitution on or off at will is quite another. . . .

. . . The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

128 S. Ct. 2229, 2258–59 (2008). This suggests that maintaining the U.S. detention facility at Guantánamo Bay might be justified by the government’s power to keep the nation secure by placing the detention facility in the most secure location available but cannot be justified by a simple desire to ensure that detainees there do not have access to the federal courts. Yet, why can the power to “acquire, dispose of, and govern territory” not be the basis for working around the Suspension Clause? I believe that the answer must lie in the Suspension Clause itself and not in anything generic about workarounds. But, I should add, I am willing to be persuaded otherwise.

42. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9–14 (1999).

43. So, for example, the Emoluments Clause reflects a judgment about how best to combat the risk of congressional corruption and self-dealing, and the Origination Clause reflects a judgment that efforts to impose taxes on the people should begin with a decision by a legislative chamber close to the people.

44. In this aspect, the idea of a thin Constitution is similar to the “basic structure” doctrine in Indian constitutional law. According to that doctrine, amendments to the Constitution can be unconstitutional if they alter the nation’s basic structure. *Kesavananda Bharati v. Kerala*, A.I.R. 1973 S.C. 1461, 1535 (India).

45. U.S. CONST. art. II, § 2.

46. *See id.* art. I.

47. The suggestion originated in comments by Mark Graber on a draft of this Article.

useful for identifying worrisome workarounds than for identifying permissible ones.⁴⁸ In addition, many constitutional provisions have what we might call direct institutional beneficiaries as well as indirect beneficiaries in the public at large. As Justice O'Connor observed with respect to federalism, the Constitution's structural arrangements do not protect institutions for their own sake, but for the public's.⁴⁹ The participation or acquiescence of direct institutional beneficiaries does not establish that the public benefits from "waiving" the institution's constitutional protections.

If these suggestions point in the right direction, a great deal of weight rests on the characterization of the provisions being worked around as part of the thick or the thin Constitution and on identifying the institutions whose interests are in the first instance protected by specific constitutional provisions. Part IV of this Article suggests that the characterization and identification emerge from politics. In practice, political leaders identify provisions as parts of the thick Constitution when they promote statutes that work around those provisions without raising serious objections.⁵⁰ At this point, though, it is enough to note that the workarounds that Congress has actually adopted do not seem to me to implicate the thin Constitution's provisions.⁵¹

III. Understanding Workarounds

Perhaps workarounds can be understood as mechanisms located somewhere between ordinary legislation and constitutional amendments. Overcoming the constitutional text that blocks the ability to reach a goal directly might take more political energy or capital than is used to enact ordinary legislation but less than is needed to amend the Constitution. More precisely, assembling the political coalition to enact the workaround might be more difficult than assembling a coalition to enact ordinary legislation but less difficult than assembling a coalition to adopt a constitutional amendment.⁵² That might be true of some workarounds, like the National Popular Vote proposal, but it seems reasonably clear that it is not true of all

48. Cf. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) ("It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for . . . exclusion . . .").

49. *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

50. They may do so no matter what external observers such as legal academics might say about the propriety or constitutionality of any specific workaround.

51. Some contested workarounds might be exceptions. See *supra* text accompanying notes 33–38 (observing that contested workarounds actually involve reasonable disputes about what a constitutional provision means).

52. I take this formulation from a blog post by Jack Balkin. Posting of Jack M. Balkin to BALKINIZATION, <http://balkin.blogspot.com/2008/11/theory-of-constitutional-workarounds.html> (Nov. 20, 2008, 10:17 EST).

of them. When the political need to enact a Saxbe fix arises, doing so is no more difficult than enacting any other statute.⁵³

Perhaps, though, we can classify workarounds by evaluating the political costs associated with different types. A crude first cut would be to distinguish between workarounds that are essentially free and those that are relatively costly. All workarounds have some start-up costs: someone has to design them and convince politicians that the workaround is both effective and constitutional. Once those start-up costs are incurred, later uses might be relatively inexpensive in political terms, in part because legislators who want to use a workaround can point to the precedent to justify their actions to skeptics. These disputes can arise in connection with the thin Constitution's provisions.

What of ongoing political costs of a workaround? Those costs might depend on the simplicity or complexity of the workaround, measured perhaps by the number of institutional actors who must agree to it.⁵⁴ For example, the Saxbe fix requires nothing more than ordinary legislation does,⁵⁵ whereas the National Popular Vote proposal requires agreement by a number of state legislatures and governors.⁵⁶ I argue later that workarounds are characterized by a reasonably high level of bipartisan agreement,⁵⁷ and it is almost certainly true that the political costs associated with a course on which there is such agreement are relatively low. Consider here the congressional–executive agreement as a workaround of the Treaty Clause: Ratifying a treaty requires sixteen more Senators than enacting a congressional–executive agreement *in the Senate*, but it also requires obtaining agreement from a majority in the House of Representatives.⁵⁸ Without substantial bipartisan

53. Some authors have observed that treaties might authorize action beyond the powers enumerated in Section Eight of Article I, for two reasons: (1) the treaty enactment process is actually more difficult than obtaining majorities in both houses, and (2) congressional–executive agreements should be limited to subjects within the scope of the enumerated powers so that the overall point of the enumeration is not worked around or evaded. See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1568 n.47 (2003) (citing the relevant scholarship on this distinction).

54. Balkin suggests that there might be *different* “veto players” for workarounds than for ordinary legislation, which should be distinguished from the proposition that some workarounds require agreement by a larger number of veto players. Balkin, *supra* note 52. I do not see why this should be systematically so for workarounds generally. Statutory workarounds are simply statutes, although a particular workaround might go through a different congressional committee—and so a different veto point—than would a proposed constitutional amendment to eliminate the constitutional difficulty to which the workaround responds.

55. This is subject to the possibility of objections (at the outset) on constitutional grounds. See *supra* text accompanying notes 31–32 (discussing the constitutional issues raised by a Saxbe fix).

56. We might describe the costs here as (political) transaction costs, increasing as the number of participants required for a successful workaround increases. Such costs might decrease somewhat when the required participants interact frequently on matters other than workarounds, both because familiarity might make bargaining easier and because repeated interactions allow the participants to develop trades across the workaround and the other matters on which they deal.

57. See *infra* text accompanying notes 74–75.

58. See *supra* notes 45–46 and accompanying text.

agreement on the propriety of using such an agreement, the workaround might not cost less in political terms than using the Treaty Clause.⁵⁹

Yet another way of understanding constitutional workarounds is to see them as a method of *amending* the Constitution without altering its text, in the same family as judicial interpretation and “constitutional moments.”⁶⁰ One difficulty with this view of workarounds is that it suggests that resisting a workaround amounts to refusing to acknowledge that the Constitution has been amended. Yet, I doubt that we would find outrageous a judicial opinion holding the Saxbe fix unconstitutional or a congressional refusal to enact one on the ground that the “fix” does not overcome the constitutional difficulty created by the Emoluments Clause. And perhaps more important, workarounds can be eliminated and the “original” constitutional text adhered to simply by congressional decision, producing the odd result that the Constitution can be amended by workarounds and then amended again simply by refusing to use them.

Perhaps, though, we should not see workarounds as amending the Constitution but rather as *interpreting* it by historic practice. For example, whatever we might think the Emoluments Clause’s text means when read in ordinary grammatical terms, practice going back more than one hundred years instructs us that “shall have been increased” means something like “shall have been increased on net.”⁶¹ Similarly with congressional–executive agreements: Practice establishes that treaties are not the exclusive method of incurring international obligations, at least in connection with trade and like matters.

This approach might be adequate to deal with well-established workarounds, with the usual qualifications needed to explain away how practice can allow us to do things seemingly barred by the Constitution’s text.⁶² It will not help, though, in new cases such as that of the shortening of the presidential term or the National Popular Vote proposal. This is striking because the “interpretation” approach seems to work for contested

59. Analysis of this claim is complicated by the fact that votes on adopting a congressional–executive agreement take two positions simultaneously: on the merits of the agreement and on the propriety of using such an agreement rather than a treaty.

60. I draw this suggestion from the previously mentioned correspondence between Vermeule and Bradley. See *supra* note 29. For a discussion of “constitutional moments,” see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022, 1022–24 (1984) and John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEXAS L. REV. 703, 705 (2002).

61. See, e.g., Paulsen, *supra* note 12, at 909–11 (reviewing and criticizing the historical practice of remedying facial violations of the Emoluments Clause by later repealing a pay increase and so preventing a net increase in pay).

62. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss . . . [although p]ast practice does not, by itself, create power . . .”) (Frankfurter, J., concurring) (quoting *Youngstown Steel & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1953)).

workarounds—because practice helps resolve interpretive ambiguity—but not for true workarounds, where there is no ambiguity to be resolved.

My earlier suggestion that workarounds are worrisome when—and now I add, only when—they work around the thin Constitution’s provisions exposes another way of understanding them. Assume that working around a provision of the thick Constitution is *not* worrisome. Why might that be so? The basic answer is that we today do not think that the provision matters much in the structure of a well-functioning government. Consider the Emoluments and Origination Clauses. Perhaps in 1789 the Emoluments Clause was a useful device to guard against congressional corruption and self-dealing. Today, however, whatever opportunities there are for such corruption and self-dealing are for all practical purposes completely unrelated to the salaries attached to federal employment.⁶³ The Emoluments Clause simply does not do anything important anymore. The Origination Clause is slightly different. Again, in 1789 the Clause might have made sense as a method of ensuring that the congressional chamber closest to the people would take the policy initiative rather than having to decide whether to reject a proposal from the Senate.⁶⁴ Direct election of Senators, adopted in 1913, places Senators closer to the people than their selection by state legislators in the 1789 Constitution—although the shorter terms served by members of the House of Representatives continues to place them closer to the people.⁶⁵ Still, perhaps the distance between the people and their Senators is close enough to justify giving the Origination Clause’s reference to the Senate’s power to amend revenue bills an expansive reading.

The preceding paragraph sketches reasons for thinking that the Emoluments and Origination Clauses no longer make much sense. Yet, the account of workarounds being developed actually does not require that *readers* accept those reasons. All the account requires is that political elites—members of the House and the Senate—think that the clauses being worked around are no longer important enough to justify their failure to accomplish a policy goal Congress today thinks desirable. The very fact that

63. Note that the claim is not that opportunities for corruption and self-dealing have become too small to worry about. Although I have made this claim elsewhere. *E.g.*, TUSHNET, *supra* note 42, at 35. The claim here is that the ban the Emoluments Clause imposes is not significantly related to the opportunities that actually do exist. Jacob Gersen, commenting on an earlier version of this Article, pointed out that one might have to worry that the Emoluments Clause was part of a package of provisions dealing with the risk of executive domination of the legislature and that a full-scale assessment of that Clause’s contemporary significance would have to consider the extent to which it interacted with the rest of the package.

64. *But see* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 375–76 (2004) (recounting reliance in the Constitutional Convention on existing practices to explain the insertion of the Origination Clause in the proposed Constitution); *id.* at 423–24 (observing that some members of the Constitutional Convention argued that the Origination Clause as drafted would be ineffective).

65. *See* U.S. CONST. art. I, § 2, cl. 1 (requiring elections for each member of the House of Representatives to occur “every second year”); U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII (providing for the direct election of Senators to serve six-year terms).

Congress adopts a workaround is an indication that those political elites indeed hold that view.⁶⁶

Of course, agreement among *some* political elites cannot be what distinguishes workarounds from ordinary legislation because every enacted statute reflects that sort of agreement. We would not want to say that we are observing a workaround whenever Congress enacts a statute in the face of constitutional objections.⁶⁷ What may distinguish workarounds from ordinary statutes is that there is substantial, *bipartisan* agreement that the workaround is constitutionally permissible and that, in many and perhaps all cases, being able to work around the obstructive text is desirable from a policy point of view.⁶⁸ Here the hypothetical workaround to reduce the presidential term may be a better example than actual workarounds. If that workaround is to succeed, the repudiated President and Vice President have to agree to a reasonably complicated set of steps the effect of which would be, ordinarily, to switch partisan control of the presidency.⁶⁹ This analysis, in turn, confirms the now relatively widespread understanding that the working U.S. Constitution depends heavily on the operation of the political party system.⁷⁰

Yet seen in that perspective, workarounds raise important questions about the equally standard account of constitutions as commitment devices. On that account, a constitution's authors know that their successors will feel political pressures to take some actions that, while seemingly sensible in the immediate circumstances, will prove improvident in the long run.⁷¹

66. Substantial bipartisan agreement on a workaround might be understood as the contemporary mechanism by which the American people agree to disregard an obstructive constitutional provision, i.e. as a form of popular constitutionalism. On popular constitutionalism generally, see LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

67. Similarly, we would not want to say we are attempting a workaround if the statute is later held unconstitutional by the courts.

68. Modern Emoluments Clause workarounds have been adopted without more than a handful of opposing votes (the fix for Senator Clinton was adopted by unanimous consent in the Senate). 154 CONG. REC. S10,885 (daily ed. Dec. 10, 2008) (statements of Sen. Durbin and the Presiding Officer). I suspect that Origination Clause workarounds may have met more opposition, but on the merits of the revenue-raising legislation the Senate was substituting for the House's proposal and not on the acceptability of the workaround device.

69. The qualification "ordinarily" is necessary because it is barely possible that the repudiated President might have been defeated by a defector from her own party running as an independent candidate.

70. For my effort to present that understanding in a reasonably comprehensive account of the U.S. Constitution, see MARK TUSHNET, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS* (2009). For the foundational works on this subject see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) and Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

71. The actions might be improvident on the merits, that is, because they are bad components of constitutional design or because they introduce the possibility of political contention over an issue that will consume so much attention that political energy will not be available to deal with other, perhaps more important, issues.

Constitutional provisions block those later decision makers from succumbing to the immediate political pressures. The problem workarounds pose for this account is obvious: Workarounds occur precisely when political actors feel pressure to do something that one constitutional provision blocks and enable them to succumb to those immediate pressures without regard to whether their action will be improvident in the long run.

The commitment account of constitutions relies on two enforcement mechanisms: (1) the courts and (2) the legislative and executive officials who take their obligation to uphold the Constitution seriously. Neither is an especially attractive mechanism to deal with workarounds. Consider again the situations in which workarounds arise. The obstructive constitutional provision seems to make only a small contribution to the effective functioning of the contemporary government overall, but there is neither the political will nor, perhaps more important, the time to adopt a constitutional amendment.⁷² The Supreme Court once said that some constitutional provisions had to be honored even if they made the government “unworkable,”⁷³ but immediately added that this was true only when “[t]here is no support in the Constitution . . . for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided”⁷⁴ Workarounds are permissible when there *is* “support in the Constitution” for that proposition.

More generally, reveling in the Constitution’s unworkability does not seem defensible.⁷⁵ Perhaps we might ask courts to develop what Vermeule and Bradley call “anticircumvention rules” applicable to some but not all workarounds.⁷⁶ Workarounds would be permissible when, in the courts’ judgment, the obstructive provision does not actually play an important role in constructing a workable government today but impermissible—not to be circumvented—when, again in the courts’ judgment, the obstructive

72. The lack of political will can be quite understandable and probably defensible. Some, perhaps many, workarounds deal with relatively “small” constitutional provisions, and it would be undesirable to insist that each time we discover a problem associated with such a provision, we must use the Constitution’s difficult amendment procedures to eliminate the problem—at least in a context where a workaround is available.

73. See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”).

74. *Id.*

75. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a *workable government*.”) (emphasis added).

76. For further discussion of these anticircumvention rules, see *supra* note 29 and accompanying text.

provision continues to play a constructive role.⁷⁷ It is not clear to me, though, that we want courts to examine constitutional provisions with an eye to determining whether they make sense today.⁷⁸

The fact that workarounds occur when there is substantial bipartisan agreement on them suggests that a court decision invoking an anticircumvention rule is unlikely to be successful on the grounds that either the politicians will ignore the decision or they will devise some other technique of working around the obstructive constitutional provision.⁷⁹ And, for obvious reasons, that bipartisan agreement means that the alternative enforcement mechanism is likely to be ineffective as well.

IV. Conclusion

Workarounds undermine the commitment account of constitutions. Perhaps, though, they erode only a small part of that account. Yet recall that one way of understanding workarounds is as a technique of constitutional revision without altering the constitution's text. It is part of a family of such techniques, which includes judicial interpretation as well. Or to put the point another way, our practice of judicial interpretation uses Article III to work around the obstruction to good governance produced by the difficult amendment procedures of Article V. The existence of that family suggests that the commitment account has a small scope indeed. Workarounds may help to bring into view the proposition that commitments can be overcome when there is the will to do so and that the only interesting questions concern the circumstances in which that will exists and the institutional actors who must have that will. Workarounds have another characteristic. Why do Congress and the President agree that they have to reduce the Secretary of State's salary for a while instead of blowing by the Emoluments Clause? More generally, why do Congress and the President work around a constitutional provision rather than ignore it?⁸⁰ Perhaps they do so because the workaround demonstrates a kind of fidelity to the Constitution that ignoring it would not and yet allows us to get on with the everyday work of governance in the most

77. In my view, that is the real ground of the decision in *Chadha* and not that the obstructive constitutional provisions there had to be honored even though they made the government unworkable.

78. Consider the civil jury trial right, for example. Its trigger—"where the value in controversy shall exceed twenty dollars"—could not be defended on any rational grounds today. U.S. CONST. amend. VII.

79. That is one way to understand the general perception that the Supreme Court's invalidation of legislative vetoes in the *Chadha* decision did not effectively eliminate the device or devices essentially equivalent to it. See LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE VETOES AFTER *CHADHA* (May 2, 2005), https://www.policyarchive.org/bitstream/handle/10207/4116/RS22132_20050502.pdf ("Congress no longer relies on one-house or two-house vetoes, but committee and subcommittee vetoes continue to be a part of executive legislative accommodations.").

80. Both Jacob Gersen and Richard Primus raised this point in their comments on an earlier version of this Article.

effective way we can now imagine. To adapt a famous phrase from Charles Darwin, there is grandeur in this view of the Constitution.⁸¹

81. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* 396 (Gillian Beer ed., Oxford Univ. Press 1996) (1859).