

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

7-2015

Comment on Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution

James Fleming

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#)



**COMMENT ON *AMENDMENT-METRICS: THE
GOOD, THE BAD AND THE FREQUENTLY
AMENDED CONSTITUTION***

Boston University School of Law
Public Law & Legal Theory Paper No. 15-44

July 2015

James E. Fleming
Boston University School of Law

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2015.html>

Comment on *Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution*

James E. Fleming*

Abstract

This comment assesses Xenophon Contiades and Alkmene Fotiadou's critique of arguments that long, frequently amended constitutions tend to be bad constitutions. It also criticizes their analysis of the purposes of amendment, arguing that most amendments, in some way, aim to respond to imperfections or correct flaws in existing constitutions. Furthermore (drawing on the analysis of John Marshall), the comment sketches some general criteria for a good constitution: that it should be a "great outline," not a detailed legal code; that it should be difficult to amend; and that it should not be amended frequently. Finally (building on the analysis of Jack Balkin), it maintains that a good constitution would be capable of serving as "basic law," "higher law," and "our law."

I. Introduction: Does the Frequency of Amendment Relate to Constitutional Quality?

I am grateful for the opportunity to comment on Xenophon Contiades and Alkmene Fotiadou's instructive paper, "Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution."¹ They open by asking, "Does the frequency of amendment relate to constitutional quality?" In particular, they ask, "Can frequent amendment be used to detect bad

*I prepared this comment for the BC-IACL Workshop on Comparative Constitutional Amendment, held by the Boston College Law School's Clough Center for the Study of Constitutional Democracy, May 15, 2015. I wish to thank Richard Albert for inviting me to participate. I also want to express my admiration for and appreciation of all that Richard together with Vlad Perdu do through the Clough Center to promote important scholarship and to enrich the greater Boston intellectual community. Thanks finally to my research assistant, Mike DiMaio, for helpful comments.

¹Xenophon Contiades and Alkmene Fotiadou, "Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution," in this volume.

constitutions?” They observe that some empiricists, enamored of the project of “leximetrics,” have seized upon “amendment rate” as an empirical datum on which to build theories. For those empiricists, a frequently amended constitution is a bad constitution. Contiades and Fotiadou dispute this claim, especially in so far as its proponents may “offer[] criteria to constitutional designers.” More worrisome still, Contiades and Fotiadou observe, some of these empiricists have sought to link the rigidity level of the constitution to its word length and correlate both to the economy. Such scholars assert that long constitutions harm the economy and thus are bad constitutions.²

Contiades and Fotiadou undertake to “pin[] down the fallacies underlying such approaches.” In particular, they seek to “cast[] doubts on the neutrality of the empirical finding that long constitutions are bad” and to explain “why frequent amendment cannot be used as an indicator of bad constitutional quality.” Furthermore, they challenge the claim of a recent paper, by George Tsebelis and Dominic Nardi, based on empirical evidence from Organization for Economic Co-operation and Development (OECD) countries.³ Tsebelis and Nardi argue that “a lengthy, difficult to formally amend constitution is a bad constitution, which affects negatively the economy and the corruption level.”⁴

²Contiades and Fotiadou, “Amendment-Metrics,” p. 1 (n 1).

³Contiades and Fotiadou, “Amendment-Metrics,” p. 2 (n 1) (criticizing George Tsebelis and Dominic Nardi, “A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries,” *British Journal of Political Science*, Available on CJO 2014 doi: 10.1017/S0007123414000441).

⁴Contiades and Fotiadou, “Amendment-Metrics,” p. 3 (n 1).

My first reaction to Contiades and Fotiadou's summary of Tsebelis and Nardi's arguments was bewilderment and incredulity concerning those arguments. In the abstract, it sounds absurd to suggest that a long constitution, as such, is bad, or that a frequently amended constitution, as such, is bad. Furthermore, in the abstract, such an analysis certainly invites a "what's the world coming to" response—we might wonder whether Tsebelis and Nardi were writing a parody of leximetrics (or amendment-metrics) analysis—just as I sometimes have wondered whether certain law and economics scholars were writing parodies of law and economics scholarship. Contiades and Fotiadou clear-headedly expose some problems with and fallacies in the use of leximetrics or, as they put it, "amendment-metrics." I share their skepticism concerning whether this "newly bred comparative empiricism" can "take the lead in constitutional law, casting a shadow over the importance of qualitative criteria and normative analysis."⁵ But, on further reflection, I wonder whether Tsebelis and Nardi may be onto something important, at least at a general level. Moreover, I would be less hesitant than Contiades and Fotiadou are about offering criteria for a bad constitution or a good constitution. And I would be more open than they are to the possibility that a long, frequently amended constitution may, in certain circumstances, be a bad constitution (or, at any rate, not a good constitution).

II. The Notion of a Bad Constitution

Contiades and Fotiadou observe that "numbers . . . appear value-neutral" and that "metrics are presented as an infusion of value-free data in the constitutional design dialogue."⁶

⁵Contiades and Fotiadou, "Amendment-Metrics," p. 3 (n 1).

⁶Contiades and Fotiadou, "Amendment-Metrics," p. 6 (n 1).

Fair enough as a criticism of leximetrics scholarship in general. But I would caution them here concerning their critique of Tsebelis and Nardi. Just because Tsebelis and Nardi use numbers does not necessarily mean that they claim to be value-neutral. In fact, it seems that they are not, and do not aspire to be, value-neutral. They do not seem to be putting an “empirical cloak” over “purely ideological choices.”⁷ To the contrary, they seem to be making an avowedly normative argument that it is bad to restrict a government in a detailed way concerning economic arrangements and its ability to respond to economic challenges and crises. Furthermore, they seem to be making the overtly normative argument that it is bad when government, before addressing an immediate and pressing economic crisis, has to secure an amendment to the Constitution, especially through onerous procedures.⁸ If this is what Tsebelis and Nardi are saying, then there may be something to their argument.

At this point, Contiades and Fotiadou ask, “Can a constitution be characterized as a bad one, harmful to the state and the economy on the basis of metrics and without a profound analysis of its content?”⁹ They suggest that it cannot, and they are surely right in doing so. But again, it seems that Tsebelis and Nardi are making precisely an analysis of a constitution’s content rather than just tallying the metrics: They are criticizing certain OECD constitutions for saddling their governments with burdensome, detailed provisions that make it difficult to respond to economic crises.

⁷Contiades and Fotiadou, “Amendment-Metrics,” p. 6 (n 1).

⁸See Tsebelis and Nardi, “A Long Constitution is a (Positively) Bad Constitution,” pp. 13-15 (n 3).

⁹ Contiades and Fotiadou, “Amendment-Metrics,” p. 7 (n 1).

Pressing the point, Contiades and Fotiadou ask, “Does harm to the economy, even if proved, suffice or even matter to characterize a constitution as ‘bad’?”¹⁰ Since they put “bad” in skeptical quotation marks, they imply that a constitution’s contributing to harm to the economy does not entail that it is a bad constitution. I would argue that contributing to harm to the economy—at least in a sustained or catastrophic way—certainly does matter to characterizing a constitution as bad. For example, if the people of the United States were to amend the U.S. Constitution specifically to adopt Justice Clarence Thomas’s narrow view of Congress’s power to regulate interstate commerce—taking us back to understandings that were repudiated during the Great Depression—that would make the Constitution a bad constitution.¹¹ For doing so would render the Congress incapable of addressing problems arising in a Twenty-first Century national and international economy. I will return to this point below.

Contiades and Fotiadou continue: “It is noteworthy that the notion of a bad constitution is not commonly used by constitutional scholars.”¹² They seem taken aback by Tsebelis and Nardi’s overtly normative judgments about bad constitutions and good constitutions. They find it odd to speak of constitutions being bad. Why would this be so? Now, I am a normative constitutional theorist who primarily writes about U.S. constitutional law. In my corner of the world, we certainly do make normative constitutional judgments about good and bad

¹⁰Contiades and Fotiadou, “Amendment-Metrics,” p. 7 (n 1).

¹¹See *United States v. Morrison*, 529 U.S. 598, 627, 120 S. Ct. 1740, 1759 (2000) (Thomas, J., concurring); *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, ___, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting).

¹²Contiades and Fotiadou, “Amendment-Metrics,” p. 7 (n 1).

constitutions: good and bad provisions, good and bad decisions interpreting provisions, good and bad approaches to interpretation, and the like. For example, John McGinnis and Michael Rappaport, in *Originalism and the Good Constitution*, argue that a supermajoritarian constitution like the U.S. Constitution, which is difficult to amend, is a good constitution, provided that we interpret it according to original methods originalism (generally, discovering and applying the original meaning using the original methods that the founders used and accepted as legitimate).¹³ In criticism, I argue that original methods originalism promotes a bad constitution that would not be worthy of our fidelity. Instead, I argue that what Ronald Dworkin called a moral reading, or what I call a Constitution-perfecting theory, promotes a good constitution: or at least promotes interpreting an imperfect Constitution so as to make it the best it can be.¹⁴ Moreover, in U.S. constitutional law and political science at the present time, people openly argue that the U.S. Constitution is bad because it has caused or contributed to political dysfunction; indeed, there is a widespread discourse of constitutional failure.¹⁵ And the discourse about dysfunction is not just

¹³John McGinnis and Michael Rappaport, *Originalism and the Good Constitution* (Cambridge: Harvard University Press, 2013).

¹⁴Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996); James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: University of Chicago Press, 2006).

¹⁵See "Symposium: America's Political Dysfunction: Constitutional Connections, Causes, and Cures," *Boston University Law Review* 94 (2014): 575-1199; James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (New York: Oxford University Press, 2015), pp. 167-70.

functional talk; it is normative talk expressing judgments that the arrangements that are not functioning are bad (democratically unjustifiable).

Therefore, I would resist the claim that we cannot make judgments about good and bad constitutions. Perhaps Contiades and Fotiadou are not troubled by normative judgments as such—after all, they say we have to engage in normative analysis—but instead by normative judgments cloaked as value-neutral empirical findings. But here, again, I question whether Tsebelis and Nardi claim to make only value-neutral empirical findings. To the contrary, they seem to be making overtly normative judgments—that, in the context of OECD countries, long constitutions and frequently amended constitutions are (or at least are more likely to be) bad constitutions.

Contiades and Fotiadou certainly are right that “history and political culture [correlate] to constitutional length.” Length is not simply an abstract matter of good or bad. They also surely are right that “the multi-faceted approach of the routes of constitutional change suggest that one-dimensional understandings of the reasons behind constitutional change are quite problematic.” They further contend: “Each polity has its own requirements with regard to the delimitation and allocation of the state power.” To be sure, one size does not fit all. They also state: “Constitutions perform specific functions, practical as well as symbolic, and they can only be judged in light of their ability to perform these functions.” Finally, our authors say “the notion of a good constitution is inescapably context-sensitive. It all depends on the ability of a constitution to perform its functions in a given environment.”¹⁶

As an outsider—a U.S. normative constitutional theorist who is not primarily a comparative constitutional law scholar—let me offer several related speculations concerning why

¹⁶Contiades and Fotiadou, “Amendment-Metrics,” pp. 12, 18, 24, 25, 27 (n 1).

Contiades and Fotiadou find it odd to speak of constitutions being bad. Perhaps comparative constitutional law, as a field, tends toward relativism, historicism, or functionalism—or at least the idea that, to understand a constitution, we have to view it in its context, in light of its history, and in relation to its functions. And perhaps comparative constitutional law scholars shy away from big normative pronouncements about bad constitutions and good constitutions because they are relativist, historicist, and functionalist. Here I fear that a comparative constitutional law relativism, historicism, or functionalism (as reflected in the passages quoted in the previous paragraph) has blinded our authors to the desirability of having normative criteria for what is a good constitution and what is a bad constitution.

“Nonetheless,” Contiades and Fotiadou argue, “criteria for constitutional design can be developed.” They explain: “In creating rules for constitution-writing, normative, conceptual and empirical approaches of the constitution have a role to play, each offering different conceptual lenses.” So far so good. But then they say: “By contrast, the attempt to make generalizations with regard to the optimal content of a constitution is a dangerous path, leading to a slippery slope.” Next, they write: “What is remarkable about the Tsebelis and Nardi approach is the attempt to put forth a substantive criterion to assess the quality of constitutions.”¹⁷ I just don’t see the dangerous path, I don’t get the slippery slope, and I don’t see what is remarkable about putting forward a substantive criterion to assess the quality of constitutions. This would seem like a dangerous path or a slippery slope only to someone who is overly relativist, historicist, and functionalist. (I am doubly confused when our authors go from criticizing Tsebelis and Nardi for pretending to be value-neutral to criticizing them for putting forth a substantive criterion for

¹⁷Contiades and Fotiadou, “Amendment-Metrics,” p. 24 (n 1).

assessing the quality of constitutions.)

III. Criteria for a Good Constitution

I shall make some observations, growing out of what I shall call the Marshallian tradition in U.S. constitutional law, bearing on the questions of length, amendment rate, and criteria for a good constitution. In *Marbury v. Madison* (1803), Chief Justice Marshall wrote: A Constitution—that is, “The exercise of [the] original right [to establish a Constitution]”—“is a very great exertion; nor can it, nor ought it, to be frequently repeated.”¹⁸ I, like Marshall, conceive the establishment of the Constitution as “a very great exertion” not to be frequently repeated. For I, like Marshall, conceive the Constitution as a charter of abstract principles, powers, and ends, not a code of detailed rules.¹⁹

In *McCulloch v. Maryland* (1819), Chief Justice Marshall further argued that the “nature” of a constitution “requires that only its great outlines should be marked,” and that it not “partake of the prolixity of a legal code.”²⁰ In other words, a constitution should be a “great outline,” not a detailed legal code. He also added, famously: “We must never forget that it is *a constitution* we are expounding.” Well, what is a constitution? Again, it is a great outline, not a detailed legal code. He explained that a constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”²¹

The Marshallian tradition entails several criteria for a good constitution. First, as a very

¹⁸*Marbury v. Madison*, 5 U.S. 137, 176 (1803).

¹⁹Fleming, *Fidelity to Our Imperfect Constitution*, pp. 10, 37, 62 (n 15).

²⁰*McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

²¹*McCulloch*, 17 U.S. at 415 (n 20).

great exertion, it ought not to be frequently repeated. This desideratum applies not only to the making of a constitution in the first place, but also to its amendment. Second, as a great outline, a constitution ought not to be interpreted to be, or amended to become, a detailed legal code. Third, if a constitution is designed to endure for ages to come and to be adapted to the various crises of human affairs, the constitution ought not to make it difficult for the government to respond to crises (including economic crises).

But I must acknowledge that there is a competing Jeffersonian tradition in U.S. constitutional law. The Jeffersonian argument prescribes letting the people frame a new constitution from time to time, even if we think that the present constitution has not failed but, to the contrary, is successful or at least adequate. Doing so would be an exercise not only in responsible constitutional self-government but also in maintaining the people's capacities to make and reform constitutions. In recent years, scholars like Sanford Levinson, who has criticized Article V for making it so difficult to amend the U.S. Constitution, have represented this Jeffersonian tradition in U.S. constitutional law.²²

In support of Article V, I would make two points. First, I would give two cheers for Article V in a *defensive* sense, for it has protected the Constitution and its citizens against the recent rash of "amendmentitis" (a term that Kathleen Sullivan has used).²³ Numerous illiberal

²²Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006).

²³Kathleen M. Sullivan, "Constitutional Amendmentitis," *American Prospect* 20 (Fall 1995). I have developed these two points in Fleming, *Fidelity to Our Imperfect Constitution*, p. 54 (n 15).

and ill-conceived amendments that would erode basic liberties or limit important powers have been introduced in Congress in recent years: the Flag Burning Amendment, the Balanced Budget Amendment, the Parental Rights Amendment, the Religious Freedom Amendment, the Human Life Amendment, and the Federal Marriage Amendment, to name a few. Fortunately, none has been approved by the two-thirds vote of both houses of Congress required by Article V to submit a proposal to the states for consideration for ratification. Thus, Article V's requirements have protected the Constitution and its citizens from such measures.

Second, there is much to be said for Article V in an *affirmative* sense. As Lawrence Sager has cogently argued, the obduracy of Article V to ready and easy amendment of the Constitution has encouraged and fostered broad interpretation of the Constitution's rights-protecting and power-conferring provisions.²⁴ It has underscored the character of the Constitution as a "great outline" or charter of "majestic generalities"²⁵—abstract principles, general powers, and general frameworks and structures—as opposed to a code of relatively specific original meanings (as original expected applications). Thus, Article V has underwritten approaches to constitutional interpretation like those of Ronald Dworkin's moral reading, Sager's justice-seeking constitutionalism, and my own Constitution-perfecting approach.²⁶

²⁴Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004), pp. 164, 183-87, 213-19.

²⁵I allude to Justice Jackson's famous formulation in *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943).

²⁶Dworkin, *Freedom's Law* (n 14); Sager, *Justice in Plainclothes* (n 24); Fleming, *Securing Constitutional Democracy* (n 14); Sotirios A. Barber and James E. Fleming,

My argument in support of Article V's onerous procedure for amendment, I hasten to add, applies in the first instance to U.S. constitutional practice—and it applies in the context of a relatively brief constitution (a great outline, not a prolix legal code). If you will, I go halfway with Tsebelis and Nardi—(1) in favor of a brief constitution (and against a long constitution)—but (2) in favor of a constitution that is hard to amend. And I make that argument because I think that such arrangements make it more likely that we can promote a good constitution through the ways we build it out over time in light of experience and in pursuit of the aspiration to interpret a constitution so as to make it the best it can be, to mitigate its imperfections.²⁷

Finally, in the grand Marshallian tradition of conceiving a constitution as a great outline or general framework, Jack Balkin, in his book, *Living Originalism*, has propounded three criteria for a good constitutional theory. These might also serve as three criteria for a good constitution. Balkin argues that a good theory should conceive the Constitution as being capable of serving as “basic law,” “higher law,” and “our law.”²⁸ He argues that conventional, “non-living” originalisms fail abysmally on all of these criteria, particularly the second and third. Originalisms fail to show why we should respect the Constitution as “higher law” (as an expression of worthy aspirations) and why we should affirm it as “our law” (as distinguished from viewing it as an authoritarian imposition by people who are long dead and gone). His

Constitutional Interpretation: The Basic Questions (New York: Oxford University Press, 2007); Fleming, *Fidelity to Our Imperfect Constitution* (n 15).

²⁷Fleming, *Fidelity to Our Imperfect Constitution*, pp. 62-63 (n 15).

²⁸Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011), pp. 59-73.

abstract “living originalism”—which conceives the constitution as a framework of commitments to be built out and redeemed over time—fares better on these criteria.

What are the implications of Balkin’s analysis for good constitutional design? First, a good constitution should be capable of serving as basic law: As such, it should focus on fundamentals, not be a detailed legal code, and it should be hard to amend. Second, it should also be capable of serving as higher law, as an expression of worthy aspirations: Again, it should commit us to abstract principles, frameworks, and ends, not be a detailed legal code. Finally, a good constitution should be capable of serving as “our law:” The people in the here and now should be able to affirm it as their law, rather than conceiving it as the law of the fathers who long ago made our decisions for us and ordered us to follow their commands and expectations. All other things being equal, a long constitution that is frequently amended might have more difficulty satisfying these criteria for a good constitution than would a Marshallian great outline that is hard to amend and that is designed to endure for ages to come.

IV. The Purposes of Amendment

Contiades and Fotiadou also object to Tsebelis and Nardi’s evident view of constitutional amendment “as a corrective mechanism aimed at remedying shortcomings,” correcting “flaws,” or fixing problems.²⁹ I do not understand what is objectionable about such formulations. I always suppose that the main reason for adopting a formal amendment is—in terms of the title of Levinson’s book on the theory and practice of constitutional amendment—“responding to imperfection.”³⁰ Again, I work within the Marshallian tradition. Why would a people amend a

²⁹Contiades and Fotiadou, “Amendment-Metrics,” pp.5, 10 (n 1).

³⁰*Responding to Imperfection: The Theory and Practice of Constitutional Amendment*,

constitution if not to respond to an imperfection, or to attempt to make the constitution better in some way? To be sure, I can imagine a Jeffersonian saying, a people should amend the constitution every generation simply to make it their own constitution, without regard for whether the new constitution or amendments adopted are good or whether the old constitution or provisions repudiated were bad. Within the Jeffersonian tradition, we might argue that a self-governing people living under a constitution need to exercise their muscles for self-government from time to time: just to keep their capacities for constitutional self-government toned. Here the people might amend the constitution for a reason other than to correct a flaw: They might do so in order to make it, in Balkin's formulation, "our law."

In a similar vein, Sotirios Barber, in his recent book, *Constitutional Failure*, argues that the most important constitutional virtue of a self-governing people is the capacity to reform a constitution.³¹ But Barber contemplates that this important capacity to reform a constitution should be exercised precisely in making constitutional reforms to avert constitutional failure and, short of that, to correct flaws or at least to improve the constitution.

What purposes besides correcting shortcomings or responding to imperfection might amending a constitution serve? Our authors acknowledge: "[I]t is true that formal amendment is used to correct problems in the constitutional text, when these are held responsible for malfunctions." "Nonetheless," they contend, "this is merely one of the functions served by constitutional amendment." They list several other functions, but I would interpret all of them as

edited by Sanford Levinson (Princeton: Princeton University Press, 1995).

³¹Sotirios A. Barber, *Constitutional Failure* (Lawrence, KS: University Press of Kansas, 2014), pp. 111.

responding to imperfections or as correcting shortcomings.

- “Formal amendments allow constitutions to evolve along with an evolving reality.”

As I see it, these amendments respond to the imperfection that the constitution did not correspond to that evolving reality.

- “Constitutional maintenance and updating through the amendment process ensure that constitutions are efficient and workable.”

That is, these amendments address inefficiency and unworkability to insure that the constitution is efficient and workable!

- “Most importantly, constitutional amendment enables people to revisit their constitution through the exercise of constituted amending power. Constitutions draw legitimacy through this process, which in turn allows them to perform their functions better.”³²

Here our authors track Balkin’s third criterion for a good constitution: that the people conceive it as “our law.” Even here, it seems that the people are amending the constitution to address a problem of legitimacy and, in our authors’ own words, to allow the constitution to perform its functions better. That sounds to me like amendment is responding to imperfection or correcting shortcomings.

V. The Fallacy of Confusing Correlation with Causation

Finally, I believe Contiades and Fotiadou are generally on the mark in pointing out the

³²Contiades and Fotiadou, “Amendment-Metrics,” p. 11 (n 1). For insightful analysis of the expressive function of formal constitutional amendment rules, see Richard Albert, “The Expressive Function of Constitutional Amendment Rules,” *McGill Law Journal* 59 (2013): 225-81.

risks of confusing correlation with causation—in particular, of committing the “after *this*, therefore on account of this” fallacy when it comes to analyzing the length of constitutions and the difficulty and frequency of amendment. They are certainly right to argue, for example, that it is preposterous to claim that a long constitution, as such, or a frequently amended constitution, as such, would cause poverty. They are certainly right to observe in general that the relation, if there is one, is instead correlation; for example, the same factors that contribute to poverty might contribute to having a long constitution and a frequently amended constitution.³³

Contiades and Fotiadou charge Tsebelis and Nardi with committing this fallacy in claiming that “longer constitutions cause poverty.”³⁴ Whatever may be the case with Tsebelis and Nardi’s particular argument, I want to generalize the analysis and suggest that there may be something to the line of argument that detailed constitutional provisions regarding the economy—worse yet, detailed constitutional provisions that are difficult to amend—make it more difficult for a government to respond to economic problems and crises. First of all, these detailed provisions themselves restrict government’s freedom of action in responding to the problem or crisis. That sounds like causation to me: in the sense that the restrictions might exacerbate economic harm. Second, stringent amendment rules make it difficult to amend the detailed provisions that restrict government’s freedom of action, thus making it even more difficult for government to respond to the problem or crisis. Again, that sounds like causation to me: that the stringency might contribute to economic harm.

Here, I may expose my parochialism as a U.S. constitutional law scholar. In U.S.

³³Contiades and Fotiadou, “Amendment-Metrics,” p. 8-10 (n 1).

³⁴Contiades and Fotiadou, “Amendment-Metrics,” p. 13-14 (n. 1).

constitutional law, aside from libertarians, scholars and judges generally believe that it is bad to interpret the Constitution as imposing thick limitations on governmental regulation of the economy that restricts government's authority to respond to economic problems or crises. The ghost of *Lochner v. New York* haunts U.S. constitutional law: Judges and scholars vow never to go back to those bad old days when the Supreme Court interpreted the Constitution to embody a libertarian economic theory and accordingly invalidated regulations of the economy, including economic programs during the crisis of the Great Depression.³⁵ (Aside from the libertarians who argue that *Lochner* in fact was rightly decided and should be revived.³⁶) For this reason, there may be good grounds for believing that a constitution with detailed restrictions relating to the economy is—for that reason—a bad constitution. And for believing that such a constitution that is difficult to amend is—for the more compelling reason—a bad constitution. And for concluding that such a constitution might cause (in the sense of contributing to or exacerbating), not merely be correlated with, economic harm.

To move beyond Tsebelis and Nardi's particular analysis and invocations of the ghost of *Lochner*, let me generalize and hypothesize a modest claim about causation, not merely correlation. Let us imagine circumstances in which a country has a very long constitution—one that partakes of the "prolixity of a legal code," rather than the brevity of a great outline, to recall Marshall's formulation. And let us imagine further that the country's constitution is very difficult

³⁵See Fleming, *Securing Constitutional Democracy*, pp. 7-8, 27-28, 41-43, 55 (n 14) (analyzing *Lochner v. New York*, 198 U.S. 45 (1905)).

³⁶See, e.g., David Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011).

to amend. Finally, let us imagine that the country faces an economic crisis that the political officials feel obligated to address through immediate action. It seems that, in such circumstances, a long constitution, with detailed provisions concerning the economy, including detailed limitations upon governmental action, would be a bad constitution. In these circumstances, it would be better to have a brief constitution—a “great outline”—that could more readily be “adapted to the various crises of human affairs,” to recall Marshall again. And I daresay that in these circumstances onerous procedures for amendment might make it a worse constitution. It would not be the length as such that would make it bad—as if editing out some words at random would make it better. Nor would it be the onerous requirements for amendment standing alone that would make it bad. It would be the combination of detailed provisions and onerous requirements constraining governmental action that would make it bad.

VI. Conclusion

Deeper still, it would reflect poorly on the country that it had designed such a constitution in the first place: that it purported to resolve so many economic matters in advance, as a matter of basic law. And that it made it so hard to address economic problems or crises. A practice of frequently amending such a detailed, obdurate constitution might make for an even worse constitution—incapable of serving as basic law, higher law, and our law. On these criteria, a good constitution should be brief rather than prolix, and it should be infrequently amended.