ARTICLES

AMERICA'S AMORAL CONSTITUTION

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The celebrated United States Constitution does not derive its legitimacy from morality. Its legitimacy is rooted in an amoral code structured around the peculiar value of outcome-neutrality. By design, the Constitution does not evaluate whether a lawful choice is morally right or wrong; it evaluates only whether the choice satisfies the procedures the Constitution requires for it to have been made. What matters, then, is not the content of the choice. It is the very act of choosing. These fiercely democratic foundations serve as both the font of the Constitution's popular legitimacy and more ominously the greatest threat to the liberal democratic principles that define the Constitution in its common perception at home and abroad. In this Article, I show that the amorality of the Constitution permeates every part of the country's constitutional amendment apparatus. I draw from text, theory, and history to reveal an important if shocking truth about the Constitution: no principle is inviolable, no right is absolute, and no rule is unamendable.

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What lies at the core of the American project of democracy is an underappreciated reality about the United States Constitution: no principle is inviolable, no right is absolute, and no rule is unamendable. The only rule binding upon political actors is that there are no limits on what may be done by constitutional amendment. Neither the religious freedom upon which the nation was founded, nor the criminal defense protections that keep at bay the intrusive incursions of the State, nor even equal protection, which remains today the grandest achievement of Reconstruction—none is immune to the constitutional amendment procedures codified in Article V.[1]

1. U.S. CONST. art. V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first

Congress and the States could, for instance, repeal the Establishment Clause and proclaim the United States a Christian nation.[2] Congress and the States could amend the Constitution to authorize torture in the interest of national security. Congress and the States could just as well adopt as the Twenty-Eighth Amendment the core of the Defense of Marriage Act,[3] the now obsolete federal law adopted not too long ago in 1995 defining marriage as the union of a man and a woman to the exclusion of all others.[4] Congress and the States could even abolish the Thirteenth Amendment protection against indentured servitude,[5] amend the Fourteenth Amendment protections against discrimination,[6] and subsequently return to the States the power once again to trade in America's original sin of slavery. This wide latitude to change the Constitution is just as the Framers intended. Though they recognized that "[t]he evils we experience flow from the excess of democracy,"[7] their uncompromising commitment to creating a Republic rooted in the consent of the governed prevailed over any fears about the menace of majoritarianism. The Constitution was built to endure, yet also to change however the constitutional winds happen to blow.

The very first principle of America's higher law is that the Constitution must always be changeable. George Washington spoke to the interrelationship between the Constitution's sacrality and its susceptibility to amendment in his farewell address to the nation as he completed two terms as president. "The basis of our political systems," he said, "is the right of the people to make and to alter their Constitutions of Government."[8] But, he added, until the Constitution is duly amended, it "is sacredly obligatory upon all."[9] Washington was stressing a key point: whether the choices Americans make are good or bad, the choices are theirs to make, and those choices demand fidelity until the

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Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

2. *Id.* amend. I.

3. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. 7 and 28 U.S.C. 1738C (2000)).

4. Obergefell v. Hodges, 576 U.S. 644, 662 (2015).

5. U.S. CONST. amend. XIII.

6. *Id.* amend. XIV.

7. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed.) (Elbridge Gerry).

8. HORACE BINNEY, AN INQUIRY INTO THE FORMATION OF WASHINGTON'S FAREWELL ADDRESS 215 (1859).

9. *Id.*

people decide in the future to displace a prior choice. It is not the actual choice that matters, though. What matters is the very act of choosing. The Constitution does not make a judgment about whether a choice is politically right or wrong; it evaluates only whether the choice is supported by the popular approbation the Constitution requires for it to have been made. The Supreme Court confirmed this fact of American constitutionalism after Reconstruction, observing of the infrastructure of slavery embedded deep within the Constitution that "right or wrong politically, no one can deny that the constitution is supreme."[10] Constitutional supremacy surely does not turn on substantive outcomes when any choice—whether morally right or wrong—is credited as constitutional.[11]

Some constitutional scholars interpret Article V more narrowly. In their view, Article V cannot be used to make any amendment at all.[12] They understand Article V as authorizing only constitutional amendments that are consistent with the current presuppositions of the Constitution. On this theory, Article V permits no more than "fine-tuning what is already in place."[13] Article V, the argument continues, sets implicit boundaries around the power of amendment beyond which no proposal may venture without risking unconstitutionality.[14] It is accordingly impossible to use Article V to revisit oppression upon the nation and its people,[15] precisely because Article V does not grant

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10. Dodge v. Woolsey, 59 U.S. 331, 348 (1856).

11. Akhil Reed Amar, *Civil Religion and Its Discontents*, 67 TEX. L. REV. 1153, 1164–65 (1989).

12. *See, e.g.*, WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 183 (1985); Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163 (Sanford Levinson ed. 1995); Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 VA. L. REV. 771, 777 (1930); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 190, 192–200 (1972); Wm. L. Frierson, *Amending the Constitution of the United States*, 33 HARV. L. REV. 659, 659–60 (1920); Landon W. Magnusson, *Selling Ourselves into Slavery: An Originalist Defense of Tacit Substantive Limits to the Article V Amendment Process and the Double-Entendre of Unalienable*, 87 U. DET. MERCY L. REV. 415, 424 (2010); William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 229–30 (1919); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 173–75 (1996).

13. Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1751 (2005).

14. *See* JOHN RAWLS, POLITICAL LIBERALISM 231–39 (2d ed. 1996).

15. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 112 (1893).

free reign to change the Constitution however political actors see fit—even if those changes are endorsed by the legislative or popular majorities required by the textual expectations of Article V.[16] The Constitution, some of these arguments continue, is emphatically moral and good, oriented toward normatively noble outcomes that frustrate the possibility of evil.[17]

Yet neither the text of Article V, nor its origins nor its historical development supports the moral reading that constitutional scholars have ascribed to it. On the contrary, as I will show, just as Article V may be used to expand the range of popular choice and freedom, it may likewise serve as a vehicle to trample over America's most cherished rights and liberties. The Constitution is, therefore, something of a paradox. It is understood in the public imagination as a guarantor of the rights and liberties the people regard as essential, but it does not in fact guarantee—because it cannot guarantee—that those rights are forever secure from repeal.

This raises a crucial question: what is the moral foundation of American constitutionalism? The answer will surprise most readers: the vaunted United States Constitution does not rest its legitimacy in morality. The logic that kindles the courtship between the constitutional text and constitutional politics is a distinctly amoral code that is anchored in the proceduralist value of outcome-neutrality. The architecture of Article V makes it possible that today's constitutional virtue will become tomorrow's constitutional vice, precisely because the Constitution makes no final judgment as to right or wrong, good or evil, virtuous or vicious. That is the consequence of basing the Constitution's legitimacy on popular choice.

Some will believe it is dangerous to set the nation's moral compass toward process instead of content. They will resist the reality that the Constitution blesses with legitimacy any amendment that successfully navigates the procedural strictures in Article V because, then, everything, indeed anything, becomes possible. Yet that is the design and intent behind constitutional amendment in the United States Constitution.

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16. *See, e.g.*, Stephen Townley, *Perspectives on Nation-Building*, 30 YALE J. INT'L L. 357, 365 (2005); Cass R. Sunstein, *American Advice and New Constitutions*, 1 CHI. J. INT'L L. 173, 185 (2000); Howard Newcomb Morse, Note, *May an Amendment to the Constitution Be Unconstitutional?*, 53 DICK. L. REV. 199, 199 (1949).

17. *See* PAUL DEHART, UNCOVERING THE CONSTITUTION'S MORAL DESIGN 274 (2007).

When read together, text, theory and history teach us an important truth about the United States Constitution: Article V knows no bounds on the content of the amendments it may be used to make. The Constitution accordingly sees no frontiers, only horizons, which reach as far as the imagination allows. To put the point another way, the legitimacy of the Constitution derives only from the act of successfully mobilizing the supermajorities required to amend the country's higher law. These fiercely democratic foundations of the constitutional amendment rules in Article V therefore serve as both the font of the popular legitimacy that sustains the Constitution and more ominously the greatest threat to the liberal democratic principles that today define the Constitution in its common perception at home and abroad.

In this Article, I show that the amorality of the United States Constitution permeates every part of the country's constitutional amendment apparatus. I begin, in Part I, with a careful reading of the founding design of Article V to demonstrate that today it recognizes no limitations on the power of amendment. I then explain, in Part II, that federal courts have reinforced this founding design of Article V by repeatedly declining to review the content of constitutional amendments when faced with the argument that a given amendment is unconstitutional. In Part III, I track historical and modern amendment activity to illustrate that political actors, in their self-understanding of the Constitution, possess the unfettered authority to amend any part of the country's higher law. I then conclude with reflections on America's constitutional culture of choice.

I. THE PLENARY AMENDMENT POWER

It has been written, and correctly so, that "Article V speaks simply."[18] It says what it means and means what it says: there are no barriers to constitutional change in the United States except purely procedural ones. A careful review of its text confirms that only a few rules constrain constitutional change in the United States. What is more, there is no external source of legitimacy against which to judge the legitimacy of an amendment. Article V itself creates that standard and reflects it in its text. This "wild west" design of constitutional change is certainly not the only one in the world, but it is growing

18. David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 29 (1990).

increasingly atypical when compared with more modern constitutions that expressly declare in the constitutional text that certain rules are formally unamendable.[19]

A. The Architecture of Article V

Amending a constitution is a "peculiarly American" idea.[20] From the country's first national constitution to the second, now in operation, higher law in the United States has always offered a way to make changes to it.[21] The Articles of Confederation made amendment possible with the approval from the Continental Congress and each of the thirteen States,[22] though in reality amendment became a "virtual impossibility" since each State was given veto power over all changes and did not hesitate to use or threaten to use it.[23] The country's modern text—the United States Constitution—likewise codifies a package of onerous amendment rules, though political actors have managed to use them in several occasions in the past.[24]

The Constitution creates a multi-track structure of constitutional amendment. Unlike the German Basic Law or the Japanese Constitution—both of which create a single-track structure authorizing only one method to initiate an amendment[25]—the United States Constitution authorizes multiple methods of initiation. Each house of Congress may propose an amendment; then, if two-thirds of both houses approve the proposal, the next step requires ratification by three-quarters of the States, either in legislative or convention votes,

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19. *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] art. 4; 1958 CONST. art. 89 (Fr.); QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 177.

20. LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 1 (1942).

21. For a discussion of amendment design, see RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS; MAKING, BREAKING, AND CHANGING CONSTITUTIONS 175–227 (2019).

22. ARTICLES OF CONFEDERATION, art. XIII.

23. William A. Platz, *Article Five of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 18 (1934).

24. Article V is formally less demanding than the amendment rule in the Articles of Confederation insofar as it does not require unanimity. The United States Constitution nonetheless remains formally one of the world's most difficult constitutions to amend. *See* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 171, 174 (2006).

25. Grundgesetz [GG] [Basic Law], art. 79 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/3XZX-QCWP]; NIHONKOKU KENPO [KENPO] [Constitution], art. 96 (Japan); *see* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 937–39, 967, 972 (2014).

the choice being up to Congress.[26] In addition, any State may initiate an amendment by petitioning Congress to call a constitutional convention; then, if two-thirds of all States follow suit, Congress may then convene that convention, where any proposed amendment will become valid when ratified by three-quarters of the States, either in legislative or convention votes, the choice again being up to Congress.[27] Article V therefore offers many points of entry to amend the Constitution.

But all roads for amending the Constitution run through Congress. None of these multiple methods of amendment initiation can proceed without, at some stage, securing the blessing of Congress. For amendments initiated in either the House of Representatives or the Senate, the larger Congress must approve the proposal in a supermajority vote of each chamber. And for amendments initiated by the States, Congress will call a convention only if it recognizes the validity of the petitions made by the States. Congress is therefore the gatekeeper for amendments proposed through Article V, as it holds the ultimate power of veto over any and all proposed amendments. Congress has another important power: Article V gives Congress the power to choose whether States must ratify an amendment proposal in state legislatures or in constitutional conventions.[28]

The design of Article V is powerfully minimalist but not uncomplicated. It is minimalist insofar as it does not specify much more than these basic procedures. Yet these plain procedures reveal a great deal about the architecture of constitutional change in the United States. For one, Article V does not point to any external source for guidance about how to interpret its rules. The procedures of change are enumerated in a self-contained package of simple vocabulary that makes clear what is required to change the higher law. The procedures of change are moreover oriented to process alone, with no reference to any subject-matter or content-specific standard against which to judge the validity of any amendment made to the Constitution. The enabling clause of Article V explains in no uncertain terms when an amendment to the Constitution becomes final: a proposal to amend the Constitution becomes "valid to all Intents and Purposes, as Part of this Constitution,"[29] when approved by the majorities required in

26. U.S. CONST. art. V.
27. *Id.*
28. *See id.*
29. *Id.*

Congress and the States. That is the extent of the amendment design, with no role given to any organ to evaluate the amendment itself.

Some complications in Article V revolve around the constitutional convention. Where would it be held? How would participants be chosen and how many would each State send? Would the number of participants each State can send vary by state population or would the convention apply the principle of equal representation irrespective of state population differences? And what would be the rules of debate? And the proposal rules? Or the ratification rules? Another series of questions concerns the subject-matter of the convention. Could it be limited to a single subject, for instance a convention on the question whether to propose a balanced budget amendment or a campaign finance amendment? Or would the convention have unlimited scope, leaving all parts of the Constitution susceptible to change? And would the convention be permitted only to propose constitutional amendments, or could it also propose an altogether new constitution? These are crucial questions but political actors are unlikely to have to answer them since the odds of convening a convention are quite low.

There have been several conventions in American history but only once has a constitutional convention been held on the national scale, and that of course was the Philadelphia Convention of 1787.[30] All others have been held at the state level, starting as early as 1776 and continuing through the present era.[31] The Philadelphia Convention suggests at least one answer to a thorny question about holding a modern constitutional convention: may the convention be limited in its scope?

Nothing illustrates more clearly than the Philadelphia Convention that everything in American constitutionalism is negotiable. When the Framers gathered on May 25, 1787, they were authorized only to propose amendments to the Articles of Confederation, not to write an entirely new constitution.[32] That was the first rule they broke. They

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30. For a detailed discussion of the founding convention, *see* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

31. *See, e.g.*, JOHN F. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 8–10 (2006) (illustrating the use of constitutional conventions in the state); W.F. Dodd, *The First State Constitutional Conventions, 1776–1783*, 2 AM. POL. SCI. REV. 545, 546 (1908) (examining the earliest state constitutional conventions).

32. THE FEDERALIST No. 40, at 259 (James Madison) (Jacob E. Cooke ed., 1961) ("[F]or the sole and express purpose *of revising the articles of confederation* . . . .").

violated another rule, perhaps a more important one, in the course of designing a new constitution: they dispensed with the requirement that any amendment to the Articles of Confederation must secure the approval of all thirteen States.[33] Though the Framers had been required by law to honor this rule of unanimity for any constitutional change, they departed from that rule when they instead set a supermajority standard to ratify the new constitution they proposed to the States: "[t]he ratification of the conventions of nine [of thirteen] [S]tates," begins the Enactment Clause of the United States Constitution, "shall be sufficient for the [e]stablishment of this Constitution between the States so ratifying the [s]ame."[34] Scholars have described this deviation as either unconstitutional or illegal.[35]

But neither unconstitutionality nor illegality necessarily entails illegitimacy. Edmund Randolph gestured to this point, admitting that the Convention may have gone beyond its charge but that "[t]here are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it,"[36] especially where, as in this case, "the best exercise of power is to exert it for the public good."[37] James Madison likewise defended the actions of the Convention, explaining that "[t]he charge against the convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted but required, as the confidential servants of their country, to [exercise independent judgment]."[38] The "one instance" to which Madison referred was the Convention's deviation from its commission, which

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33. *See* ARTICLES OF CONFEDERATION, art. XIII, cl. 1 (1781) ("And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

34. U.S. CONST. art. VII.

35. *See, e.g.*, Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 874 (2007); George Anastaplo, *Constitutionalism, the Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 24–25 (2001); Michael J. Klarman, *What's so Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 184–85 (1998); Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1586 (1987).

36. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 262 (Edmund Randolph).

37. *Id.* at 263.

38. THE FEDERALIST No. 40, at 267 (James Madison) (Jacob E. Cooke ed., 1961).

Madison conceded it had violated.[39] Yet Madison saw the violation as easily remediable retrospectively, since securing the blessing of voters in a supermajority of the States could disinfect the Convention's illegal acts.[40] Had voters wished to repudiate the Convention's disregard for the Articles of Confederation, they could have made their opposition clear by refusing to ratify the proposed constitution. In the end, the voters did not refuse; they ratified the Convention's proposal by the required supermajority.

There is a profound message behind the proposal and ratification of the United States Constitution and the simultaneous repudiation of the Articles of Confederation. *The Federalist* papers echo that message and its theme time and again: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included."[41] There are two important points here. First, the doctrine of necessity in the national interest is critical to validating the Framers' violation of the rule of unanimity in the Articles of Confederation. The Framers believed they were acting in the public interest, doing what they thought best served the Union. In their view, "[t]he safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed,"[42] argued Madison. But their reasoning had to find favor from the voters on whose behalf the Framers were acting. And this leads to the second point: for the Framers, the ends justified the means. The ends of preserving and strengthening the Union justified the circumvention of the Articles of Confederation. But justification could come only where the ends had been achieved through means regarded as legitimate.

We have now arrived at the cardinal rule in the American tradition of constitutionalism: the ends justify the means only insofar as those

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39. *Id.* at 263.

40. *See* THE FEDERALIST No. 43, at 296 (James Madison) ("'To provide for amendments to be ratified by three fourths of the States under two exceptions only.' That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. *The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.*" (emphasis added)).

41. THE FEDERALIST No. 44, at 304–05 (James Madison) (Jacob E. Cooke ed., 1961).

42. THE FEDERALIST No. 43, at 297 (James Madison) (Jacob E. Cooke ed., 1961).

means are approved by some form of popular approval, whether contemporaneous or retrospective. The legitimacy of a given constitutional outcome therefore derives from popular or popularly legitimated procedures. Only the "express authority of the people alone could give due validity to the Constitution"[43] once the Convention had departed from the rule of unanimity. As Jack Rakove writes, "the ex post ratification of a constitution was a more authoritative expression of popular sovereignty than the ex ante authorization of a convention to propose a constitution."[44] In this light, we can understand why the process of popular ratification ultimately sufficed to silence most critics who protested when the Philadelphia Convention bypassed the clear rules in the Articles of Confederation.

In many ways, the adoption of the United States Constitution was revolutionary.[45] Though the transition from the Articles of Confederation to the new Constitution was not accompanied by the violence we typically associate with revolutions,[46] the change exhibited other features of revolutions, namely irregularity or illegality, important features of modern political revolutions.[47] The new Constitution changed the structure of the American state considerably, creating new public institutions and recasting the relationship between citizens and their State. For Bruce Ackerman, those changes—most notably how they were accomplished—amount to a constitutional moment, what we might describe as a constitutionalized form of revolution.[48]

Just as the Framers intended. Their break from the rules in the Articles of Confederation was both solemn and precedential. It was grave insofar as the Framers defied the existing constitutional rules

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43. *Id.* at 296.

44. Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1943 (1999).

45. *See, e.g.*, Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 728 (2011); Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 195–96 (1995).

46. *See, e.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 21 (1983); PETER CALVERT, REVOLUTION AND COUNTER-REVOLUTION: CONCEPTS IN SOCIAL THOUGHT 15 (1990); JOHN DUNN, MODERN REVOLUTIONS: AN INTRODUCTION TO THE ANALYSIS OF A POLITICAL PHENOMENON 12 (2d ed. 1989); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 264 (1968); CHALMERS JOHNSON, REVOLUTION AND THE SOCIAL SYSTEM 10 (1964).

47. *See, e.g.*, JEFF GOODWIN, NO OTHER WAY OUT: STATES AND REVOLUTIONARY MOVEMENTS, 1945–1991, at 9 (2001).

48. BRUCE ACKERMAN, WE THE PEOPLE—VOLUME II: TRANSFORMATIONS 32–34, 67–68 (1998).

that should have merited their fidelity. Yet their defiance set a precedent for constitutional change that would inform the future course of American constitutional development.[49] It was "a sacred act—an act of universal jurisdiction—at a Messianic moment,"[50] writes one scholar, gesturing to the extraordinarily creative and compelling choices the Framers made to forge a new constitutional identity at a critical moment in American history. The Framers memorialized their sacred act in the text of Article V, which constitutionalizes something approaching the supermajority rule on which they conditioned the ratification of the constitution.

Article V in turn domesticates revolution.[51] The Framers saw in their own experience a blueprint for future constitutional redesign, renewal, or simple tinkering. Article V makes dramatic political transformations possible without recourse to arms, just as the Framers accomplished in their own time. It also provides a mechanism to make more targeted changes to the Constitution and the polity. For the Framers, there would be no methodological distinction among amending the Constitution, revising the frame of government, and reinventing America.[52] Article V was designed to accommodate all

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49. *See* BRUCE ACKERMAN, WE THE PEOPLE—VOLUME I: FOUNDATIONS (1991).

50. Christopher Tomlins, *The Threepenny Constitution (And the Question of Justice)*, 58 ALA. L. REV. 979, 989 (2007).

51. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983).

52. Scholars have noted, theorized, and developed the distinction between amendment and revision, the former concerned with basic changes that conform to the existing constitutional text and structures of government, the latter implicating more far-reaching changes that depart from the presuppositions of the existing constitutional order. *See, e.g.*, Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 215, 221–36 (Sanford Levinson ed. 1995); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1639–51 (2010); Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1520 (2009); William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 498–501 (2006); Dave Donley et al., Bess v. Ulmer—*The Supreme Court Stumbles and the Subsistence Amendment Falls*, 19 ALASKA L. REV. 295, 297 (2002); Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 583, 596–97 (1997); Julia Anne Guizan, *Is the California Civil Rights Initiative a Wolf in Sheep's Clothing?: Distinguishing Constitutional Amendment from Revision in California's Initiative Process*, 31 LOY. L.A. L. REV. 261, 295 (1997); Susan M. Johnson, *Measure for Measure: Amendment and Revision of the Oregon Constitution*, 74 OR. L. REV. 1065, 1067–72 (1995);

constitutional changes on either extremity of the constitutional spectrum. And indeed it has been used since then to make all manner of constitutional changes. It has been used to make relatively straightforward constitutional changes that simplify or make more efficient the administration of government, for instance, advancing the installation dates for the new Congress and the incoming President.[53] It has also been used to make significant structural changes to how citizen principals elect their legislative and executive agents in Washington.[54] More radically, Article V has been deployed to visit seismic changes to civil society, from prohibiting slavery,[55] to introducing new classes of voters,[56] to resetting the balance of powers between the national and state governments.[57] All of these changes—small, big, and some in between—were the product of Article V amendments.

B. Codified Unamendability

The founding precedent rings true today: nothing in America's modern Constitution is legally immune to change. This has not always been true, however. When the Framers gathered in Philadelphia to ultimately write a new Constitution, their final text made two rules unamendable in law. These two rules were written shrewdly to hide their purpose in plain sight within the technical details of Article V: Congress and the States may amend the Constitution however they wish "[p]rovided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article."[58] Most readers quickly skim this dense and impenetrable language, assuming that it involves still more of the mechanistic details of the majorities and procedures required to amend the text. But a careful reading reveals precisely what was at stake—and exposes

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Arthur J. Sills & Alan B. Handler, *The Imbroglio of Constitutional Revision—Another By-Product of Reapportionment*, 20 RUTGERS L. REV. 1, 14–15 (1965).

53. U.S. CONST. amend. XX.

54. *See id.* amend. XII (changing the procedures for electing the President and Vice President under the Electoral College); *id.* amend. XVII (changing how United States Senators are elected).

55. *Id.* amend. XIII.

56. *Id.* amend. XV (extending franchise to free men); *id.* amend. XIX (granting right to vote to women); *id.* amend. XXVI (lowering voting age to 18).

57. *Id.* amend. XIX.

58. *Id.* art. V.

what the Framers saw as a central preoccupation that could foil their plans to give America a new constitution.

The Framers' text declares that neither Clause 1 nor Clause 2 in Article I, Section 9 of the Constitution may be amended until the year 1808, roughly twenty years after the Constitution went into force. If we follow the trail the Constitution traces from Article V to Article I, we read that Clause 1 in Section 9 explains that

> the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[59]

Following the same trail to Clause 4 in the same section, we learn that "no Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[60] The subject of Clause 1 is the slave trade—"the migration or importation" of persons—and the related subject of Clause 4 is taxation.

Neither Clause could be amended until the year 1808. They were codified in the Constitution as unamendable. The Migration or Importation Clause, which permits the slave trade, was expressly shielded from amendment. In practical terms, this meant that the Constitution's rules in Article V prohibited any restrictions on the power of States to engage in the slave trade for a specific duration of time, although it did permit a tax levied for each enslaved person imported into the United States. Congress ultimately passed a law prohibiting the slave trade starting on January 1, 1808[61]—as soon as the clock ran out on the unamendable rule in Article V—but the law did not affect the legality of slavery within the United States itself. America's original sin endured for many decades longer.

The impetus for codifying an unamendable rule on census-based taxation followed from the Migration and Importation Clause. Both were part of the broader constitutional design to make the least possible disturbance for slavery, alongside the Three-Fifths Clause, the Fugitive Slave Clause, the Insurrection Clause, and the Domestic

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59. *Id.* art. I, § 9, cl. 1.

60. *Id.* art. I, § 9, cl. 4.

61. An Act to Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, from and After the First Day of January, in the Year of Our Lord One Thousand Eight Hundred and Eight, Pub. L. No. 9–22, 2 Stat. 426 (1807).

Violence Clause.[62] These rules and others combined to protect the infrastructure of slavery in the States that wished to avail themselves of this evil practice. As one scholar has written, "[a]lthough the Constitution made oblique references to slavery at several places, the protection of slavery was very much built into its structure."[63] The Census-Based Taxation Clause fit right into the mold. It prevented Congress from imposing a direct tax on citizens along any other basis but in proportion to the population of each state, a number that had of course been distorted by the Three-Fifths Clause in the Constitution, which in turn counted enslaved persons as three-fifths a person for purposes of representation.[64]

The Framers of the Constitution chose to make both of these clauses—the Migration and Importation Clause and the Census-Based Taxation Clause—temporarily unamendable. Temporary unamendability is one variation in the larger category of codified unamendability. To understand temporary unamendability, assume the relevant part of Article V had instead read as follows: "Provided that no Amendment which may be made [] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." This hypothetical passage omits the temporal limitation on unamendability—"prior to the Year One thousand eight hundred and eight"—and as a consequence transforms what had been a prohibition on amending both clauses until the year 1808 into an all-embracing prohibition conditioned on no temporal constraint.

Had the Framers wanted to make either clause absolutely unamendable without an expiration date, they could have done so. The temporary amendment ban was the result of a grand compromise between the free and unfree States. James Madison expressed his regret that this bargain was a necessary condition to create the American Republic, writing that "it were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation."[65] Madison explained that it gave needed reassurance to the unfree States that Congress would

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62. U.S. CONST. art. I., § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2; *id.* art. IV., § 2, cl. 3, *amended by id.* amend. XIII, § 1; *id.* art. 1, § 8, cl. 15; *id.* art. 4, § 4.

63. J.M. Balkin, *Does the Constitution Deserve Our Fidelity: Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1707 (1997).

64. *See* U.S. CONST. art. 1, § 9, cl. 4; *id.* art. I., § 2, cl. 3, *amended by id.* amend. XIV, § 2.

65. THE FEDERALIST No. 42, at 281 (James Madison) (Jacob E. Cooke ed., 1961).

not interfere with their internal matters. Evil as they were, the unfree States would not have agreed to join the Union: "it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed."[66]

We can be certain that the Framers were well aware of codified unamendability as a constitutional design for one major reason: at the time, it appeared in American state constitutions. When the Framers convened in the State House, they had before them a vast cache of reference materials to guide their deliberations. Foremost among these were the constitutions of the several States, the thirteen former colonies that had sent their own delegates to Philadelphia to participate in the design and drafting of what would become the United States Constitution.[67] Early state constitutions reflected the industry standards in constitutional design of the day. State constitutions, then, are a useful point of reference for identifying what kinds of texts and design strategies the Framers had already encountered by the time they arrived in Philadelphia.

Many of the thirteen state constitutions codified at least one unamendable rule. Of the thirteen state constitutions in force at the time of the Philadelphia Convention, eight of them codified rules suggesting unamendability. Delaware protected a number of rights, legislative rules, and the religious non-establishment norm.[68] Georgia did the same for the rule of regular legislative dissolution as well as the freedom of the press and the right to trial by jury.[69] Maryland, South Carolina, and Virginia all protected the liberty of the press.[70] In Pennsylvania and North Carolina, declarations of rights were protected against amendment.[71] Massachusetts barred amendments to rights—including the rights to compensation for a public taking, to access to courts of law, to trial by jury, to free speech and peaceable assembly—where the amendment began by popular initiative or referendum.[72] The Framers knew well each of these state constitutions,[73]

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66. *Id.*

67. Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2126, 2162 (1995–1996). But Rhode Island chose not to participate. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 11–12 (1913).

68. DEL. CONST. art. 30 (1792).

69. GA. CONST. arts. III, LXI (1777).

70. MD. CONST. art. 38 (1776); S.C. CONST. art. XLIII (1778); VA. CONST. § 12 (1776).

71. N.C. CONST. art. XLIV (1776); PA. CONST. § 46 (1776).

72. MASS. CONST. art. XLVIII, § 2 (1780).

but ultimately chose not to import this design of codified unamendability into the new United States Constitution.

Today, the freely amendable United States Constitution finds itself in the minority when compared to modern constitutions around the world. Since 1989, over half of all national constitutions codify at least one unamendable rule.[74] Countries have codified all types of unamendable rules in their constitutions. For example, Cuba makes socialism unamendable,[75] France makes the territorial integrity of the State unamendable,[76] Iran and Afghanistan make theocracy unamendable,[77] Indonesia and Kazakhstan make unitarism unamendable,[78] Jordan and Kuwait make monarchism unamendable,[79] and El Salvador and Guatemala make term limits unamendable.[80] In addition, Greece makes the separation of powers unamendable,[81] Romania makes political pluralism unamendable,[82] and Turkey makes the country's national flag unamendable.[83] This is just a small sample of the many different types of constitutional commitments countries make unamendable.

Codified unamendability serves many purposes. The most important is to express constitutional values. Constitutional designers choose to elevate some rules over others—by making them unamendable—as a

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73. For example, there are many references to various state constitutions in *The Federalist* paper. *See, e.g.*, THE FEDERALIST No. 47, at 327–31 (James Madison) (Jacob E. Cooke ed., 1961) (discussing Constitutions of Delaware, Georgia, Maryland, Massachusetts, North Carolina, Pennsylvania, South Carolina, and Virginia).

74. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 20–21 (2017).

75. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA art. 4.

76. 1958 CONST. art. 89 (Fr).

77. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN art. 149; QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 177.

78. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [CONSTITUTION] art. 37 (Indon.); CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN art. 91.

79. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN art. 126; CONSTITUTION OF THE STATE OF KUWAIT art. 175.

80. CONSTITUCION DE LA REPUBLICA DE EL SALVADOR [CONSTITUTION] arts. 154, 248; CONSTITUCION POLITICA DE LA REPUBLICA DE GUATEMALA [CONSTITUTION] arts. 187, 281.

81. 2008 SYNTAGMA [SYN.] [CONSTITUTION] 110(1) (Greece).

82. CONSTITUȚIA ROMÂNIEI [CONSTITUTION] art. 152, § 1 (Rom.).

83. TÜRKIYE CUMHURIYETI ANAYASASI [CONSTITUTION] arts. 3, 4 (Turk.). For more examples of unamendable rules, see generally Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010), illustrating several uses, illustrations, and limitations of unamendable rules.

way of proclaiming to the country and to the world beyond that these special rules represent the highest commitments of the polity. Other rules are subject to revision or repeal, but the ones designers make unamendable are special and reflect the constitution's foremost values and bargains, each non-negotiable and unalterable even in the face of massive supermajorities that may wish to amend the unamendable rule. The only legal means available for revising or repealing an unamendable rule is to write an altogether new constitution.

Codified unamendability opens a window into the soul of a constitution. It reveals the polity's deepest and most fundamental commitments. These promises a polity makes to itself are sometimes lofty ambitions exhibiting the best aspirations of modern constitutionalism. For instance, the German Basic Law makes human dignity unamendable,[84] the Portuguese Constitution makes secularism unamendable,[85] the Italian Constitution makes republicanism unamendable,[86] the Czech Republic makes democracy unamendable,[87] while Algeria, Brazil, and Ukraine each make all of their constitutional rights unamendable.[88] Meanwhile in the United States, the only rules made unamendable protected the slave trade.

The Framers made an informed decision against availing themselves of absolute unamendability as a constitutional design strategy, save for the temporary unamendability of two rules that were crucial to reaching agreement on a new Constitution. Apart from those two rules, everything else was left up for grabs, freely amendable by any generation of political actors who could manage to assemble the majorities required by Article V. The continued negotiability of the Constitution reflected the founding generation's high regard for revolutionary constitutionalism, public deliberation, and political entrepreneurship—three foundational pillars in the creation of the new Republic. Under the new American Constitution, nothing would be irreversible and everything would have to pass the continuing test

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84. Grundgesetz [GG] [Basic Law], BGBL I, art. 1(1) (Ger.); *id.* BGBL I, art. 79(3).

85. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] [CONSTITUTION], art. 288 (Port.), English translation available at https://dre.pt/constitution-of-the-portuguese-republic.

86. COSTITUZIONE [COST.] [CONSTITUTION] art. 139 (It.).

87. ÚSTAVNÍ ZÁKON c. 9, Ústava Ceské Republiky [CONSTITUTION OF THE CZECH REPUBLIC].

88. CONSTITUTION OF THE DEMOCRATIC AND PEOPLE'S REPUBLIC OF ALGERIA art. 212; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.); Конституція України [CONSTITUTION] art. 157 (Ukr.).

of popular choice. In light of the careful design of Article V, it is incorrect to claim that unamendability "never occurred"[89] to the Philadelphia Convention. On the contrary, the Framers confronted its possibility but refused to codify it in the freely amendable Constitution.

C. Constructive Unamendability

Although nothing in the Constitution is legally unamendable, there is one rule that we can describe as *constructively* unamendable. A rule can be labelled constructively unamendable when reformers cannot practically meet the requirements to amend it even though the rule is, in theory, freely and legally amendable.[90] The conditions for constructive unamendability derive sometimes from an unwillingness or inability to satisfy the codified rules of amendment, at other times from deep divisions among political actors, and at still other times from the structural design of the constitution and its amendment rules. Constructive unamendability can also be an impermanent feature of a codified rule, meaning that at Time One a constitution could easily be amended but at Time Two it becomes constructively unamendable. Constructive unamendability can alternatively be a permanent fixture in a constitution, meaning that it is unalterable through its lifespan, though not by design. In either case, just like a rule codified in the constitution and made unamendable by the Framers, a rule is unchangeable when it is constructively unamendable. Functionally, then, codified and constructive unamendability exert the same effect. It is in their form that they differ.

In the United States Constitution, the Equal Suffrage Clause is constructively unamendable. Its text, located in Article V, specifies that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[91] The conventional wisdom has construed this provision as a substantive prohibition on amendment,[92] precisely as an instance of a subject-matter restriction on what in the

89. Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 732 (1981).

90. RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 158 (2019).

91. U.S. CONST. art. V.

92. *See, e.g.*, J.M. Balkin, *The Constitution as a Box of Chocolates*, 12 CONST. COMMENT. 147, 149 (1995); Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 562 (2002); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697 n.128 (2011).

Constitution can be amended. The better reading, though, is to interpret this restriction as a procedural one. The Equal Suffrage Clause does no more and no less than simply to require a State's approval to change the size of its Senate delegation relative to that of other States. This is a procedural amendment condition that constrains only the process of the amendment. It therefore falls outside the family of substantive codified amendment prohibitions that exist in other constitutional states around the world.

The Equal Senate Suffrage Clause has federalist origins. Madison explained that it was designed "as a palladium to the residuary sovereignty of the States,"[93] many of which were reluctant to enter into a new agreement that would eviscerate the existing Articles of Confederation.[94] After all, the States had been dominant under the Articles, and the new Republic would shift of the locus of power from the States to the center in the form of a new national government with new institutions to execute and reinforce its powers. Yet the Convention was attentive to the political imperative of conserving "the federal aspect of the national legislature against future nationalizing impulses."[95] This rings true when we notice that the Senate is the only national institution given a role in making all three forms of federal law identified in the Supremacy Clause.[96] This was not happenstance. The Senate was designed as an institution oriented to the interests of the several States.[97] As Bradford Clark writes, "under the compromise reached at the Constitutional Convention, the States' representatives agreed to the supremacy of federal law (and the corresponding displacement of state law) only on the condition that the Senate (structured to represent the States) would have the opportunity to veto all forms of supreme federal law."[98] Article V in particular was designed as a protection for States, as each amendment procedure required federalized agreement—both the Congress and the States would have a role in any successful

93. THE FEDERALIST No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

94. Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1849–50 (2010).

95. Jamin B. Raskin, *Is There a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U. L. REV. 591, 645 (1999).

96. Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 702–03 (2008).

97. *Id.* at 703.

98. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1605–06 (2007).

amendment. Article V was meant to be what Brannon Denning describes as a "federalism-reinforcing" barrier to constitutional change.[99] This assured that no amendment would come to pass without deep agreement across the nation and between the national and state governments.[100] For their part, the smaller States agreed to ratify the Constitution in significant part because the Equal Suffrage Clause helped convince them that their interests would not be overridden by their larger and more populous counterparts.[101] The Equal Suffrage Clause was therefore a "constitutional essential,"[102] a condition to the momentous agreement reached in Philadelphia.

Yet the Equal Suffrage Clause is not expressly unamendable. The reason why is evident from its own terms: Article V allows a change to the composition of the Senate, and therefore to the Equal Suffrage Clause, where a State waives its right to equal suffrage.[103] Put another way, the Equal Suffrage Clause implies an exception to itself: if a State consents to being denied its equal representation in the Senate, that State may lawfully be deprived of its equal suffrage.[104] Though it is unlikely that a State would ever accept a diminution in its Senate representation, it nevertheless remains a possibility, at least in theory. In reality, the Equal Suffrage Clause is constructively unamendable given the practical realities of American politics.[105] The Equal Senate Suffrage Clause is therefore a procedural limitation on *how* the Constitution may be amended; it does not constrain *what* may be

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99. Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 178 (1997).

100. RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA 15 (1993).

101. Brendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 U.C. DAVIS J. INT'L L. & POL'Y 267, 273–74 (1996).

102. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 322 (1997).

103. Miriam Galston, *Theocracy in America: Should Core First Amendment Values Be Permanent?*, 37 HASTINGS CONST. L.Q. 65, 107 (2009).

104. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 122 (1996). Amending the Equal Suffrage Clause may be even more difficult than its text suggests because it may in fact *require* the unanimous agreement of all states to change the suffrage of a single state. *Id.* at 122 n.32.

105. *See, e.g.*, Joel I. Colón-Ríos, *De-Constitutionalizing Democracy*, 47 CAL. W. L. REV. 41, 52–54 n.53 (2010); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 328 (2008); Frances E. Lee, *Geographic Representation and the U.S. Congress*, 67 MD. L. REV. 51, 61 (2007); Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 291 (2005).

amended.[106] The larger point remains true: the United States Constitution today makes nothing unamendable. The text of Article V itself is the best evidence against the argument that there are substantive content-based limits to what may be amended under the Constitution.

II. JUDICIAL SELF-LIMITATION

Of course, the constitutional text has rarely ever been enough to constrain courts in the United States. Think only of the absolutist rights language in the Constitution, for instance the First Amendment's insistence that "Congress shall make no law . . . abridging the freedom of speech."[107] The Supreme Court has interpreted this definitive language as incorporating an unwritten rule that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"[108] may be regulated by law, even though the text of the Speech Clause suggests no such limitations. We might also point to the Contracts Clause, whose text acknowledges no exceptions in prohibiting States from "impairing the [o]bligation of [c]ontracts."[109] The Supreme Court has interpreted this airtight clause as permitting States to do precisely what it prohibits: to intrude into contracts.[110] Yet the Court has not interpreted Article V in any other way but how its plain text reads. The Court has interpreted Article V's strict rules for constitutional amendment as establishing the only ones it can apply in any constitutional challenge to an amendment. The Court has accordingly not recognized the possibility that it can invalidate an amendment in any case where the amendment has been approved according to the precise rules in Article V. The Court has not exercised any role beyond examining whether political actors have followed the procedures of Article V. If any amendment proposal is ratified by the required supermajorities, the amendment becomes valid, whether or not it reflects a purpose that one could describe as good or bad.

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106. Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional?*, 33 OKLA. CITY U. L. REV. 667, 685 (2008).

107. U.S. CONST. amend. I.

108. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

109. U.S. CONST. art. I, § 10, cl. 1.

110. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426, 428 (1934).

A. An Unconstitutional Amendment?

In a growing number of countries around the world, high courts have defended a hard-wired moral reading of the constitution by invalidating procedurally perfect constitutional amendments that, in the view of judges, undermine the moral commitment the constitution makes. Sometimes the Court invalidates an amendment on the strength of a rule that is codified in the constitution as unamendable. For instance in the Czech Republic where the Constitutional Court has interpreted an unamendable rule protecting "the essential requirements for a democratic state" as justifying striking down a constitutional amendment that had proposed to shorten the term of the Chamber of Deputies.[111] The court saw its role as protecting the democracy principle codified in the constitution, whether that meant striking down an ordinary law passed by a simple legislative majority or, as here, invalidating a procedurally valid amendment to the higher law.[112]

Sometimes courts invalidate an amendment even where the constitution specifies that nothing is unamendable. For example, the codified rules in the Indian Constitution impose no content-based barriers to amendment by a simple majority vote in both houses of the legislature, as long there is a two-thirds quorum.[113] Yet after first declaring in 1951 that the amendment power was unlimited,[114] the Indian Supreme Court interpreted the Constitution as authorizing it to invalidate procedurally perfect amendments that violate the "basic structure" of the Constitution.[115] The organizing logic of this "basic structure" doctrine, according to the Chief Justice at the time, was that "every provision of the Constitution can be amended provided in

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111. Nález Ústavního soudu ze dne 09.10.2009 (ÚS) [Decision of the Const. Court of Sept. 10, 2009], sp.zn. PI. ÚS 27/09. For a full English translation, see *2009/09/10-Pl.: ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*, § I, ÚSTAVNÍ SOUD, https://www.usoud.cz/en/decisions/2009-09-10-pl-us-27-09-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-deputies [https://perma.cc/W2A9-J28Q].

112. *Id.*

113. INDIA CONST. art. 368, § 2. There are exceptions for certain classes of amendment that require state ratification. *Id.*

114. *See* Sri Sankari Prasad Singh Deo v. Union of India, (1951) 1952 SCR 89 ("'All powers' in article 379 include power to amend the Constitution and there is no reason to restrict the import of these words by excluding amendment of the Constitution from their ambit.").

115. Kesavananda Bharati Sripadagalvaru v. Kerala, (1973) 4 SCC 225.

the result the basic foundation and structure of the Constitution remains the same."[116] The Court has since defined the basic structure as consisting of various principles, including constitutional supremacy, the republican and democratic forms of government, the secular character of the State, the separation of powers and federalism.[117] These principles of basic structure are not defined in the text of the Indian constitution. Nor do they spring from a judgment of the people or of their elected representatives as to which principles should take priority over others in a hierarchy of constitutional authority. These and other principles of the basic structure doctrine come from the Indian Supreme Court's own interpretation of the Constitution. After having first introduced the basic structure doctrine, the court later invoked it to invalidate amendments.[118]

We have seen a similar dynamic in Taiwan. The Constitution codifies no rule against amendment. The only rules are procedural ones concerning how and when to assemble the required majorities to adopt an amendment.[119] Yet even in the face of this plenary amendment power giving the National Assembly no boundaries within which to limit its amendment activity, the Taiwanese Constitutional Court nonetheless struck down a series of constitutional amendments on both procedural and substantive grounds.[120] Courts in various parts of the world have likewise invalidated amendments, including courts in Belize,[121] Colombia,[122] and Turkey.[123]

The United States Supreme Court has had the opportunity to exercise this extraordinary power to invalidate an amendment that had passed the procedural tests of Article V. But the Court has declined every occasion, in the process adopting a process-based approach to determining the validity of a constitutional amendment. For the Supreme Court, the text of Article V is the sole source of authority on the legality of constitutional amendments. As long as a constitutional amendment adheres to the procedural strictures

116. *Id.*
117. *Id.* ¶ 316.
118. Minerva Mills Ltd. v. Union of India, (1981) 1 SCR 206.
119. *See* MINGUO XIANFA [CONSTITUTION], art. 174 (1947) (Taiwan).
120. *See* SHIZI NO. 499 JIESHI [Judicial Yuan Interpretation No. 499] (2000).
121. Brit. Caribbean Bank Ltd. v. Att'y Gen. Belize, Claim No. 597 of 2011, ¶ 45 (2012).
122. MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 602–03 (2017).
123. Constitutional Court decision, E. 2008/16, K. 2008/116, June 5, 2008, *Resmi Gazete*, Oct. 22, 2008, no. 27,032.

specified in Article V, it is valid and binding. On this point, there are several cases, most notably on the Eighteenth and Nineteenth Amendments, each of which was in its day subject to claims of unconstitutionality. Both amendments passed and ultimately became inscribed in the text of the Constitution. The claims against their constitutionality failed, and the Supreme Court's judgments offer compelling evidence that it looks only to process, not content, to judge the constitutionality of a constitutional amendment.

First, consider the Eighteenth Amendment, which imposed Prohibition.[124] In a series of cases before the Supreme Court, the Court dismissed arguments about its unconstitutionality, holding that the Eighteenth Amendment, "by lawful proposal and ratification, has become part of the Constitution, and must be respected and given effect the same as other provisions of that instrument."[125] The amendment was challenged on grounds that it intruded onto state police powers[126] and moreover that it impermissibly allowed the federal government to interfere with private lives.[127] The Court did not credit any of these arguments.[128] The Court instead ruled straightforwardly that "[t]he prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution"[129] and moreover that the "Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument."[130] The procedural correctness of the Eighteenth Amendment was sufficient for the Court to conclude that it was constitutional. Although the

124. U.S. CONST. amend. XVIII (repealed 1933).

125. Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920).

126. *See* Fred B. Hart, *The Amendatory Power Under the Constitution, Particularly with Reference to Amendment 18*, 90 CENT. L.J. 229, 232 (1920).

127. Henry S. Cohn & Ethan Davis, *Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 QUINNIPIAC L. REV. 327, 372 (2009); Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 951 (1997); Everett V. Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 185–87 (1920).

128. *Nat'l Prohibition Cases*, 253 U.S. at 386–87.

129. *Id.* at 386.

130. *Id.*

amendment was ultimately repealed,[131] it was repealed via Article V itself, not as a result of the Court declaring its unconstitutionality.

The same outcome followed when the Court was asked to judge the constitutionality of the Nineteenth Amendment,[132] which granted women the right to vote.[133] Maryland had refused to ratify the amendment on federalism grounds and also because its own state constitution restricted voting to men alone.[134] At the Court, a central argument was that the amendment was of such a character that it was beyond the amending power that Article V authorizes.[135] The Court was asked to rule that the result of the amendment, "so great an addition to the electorate, if made without the [s]tate's consent, destroys its autonomy as a political body."[136] Referring to the earlier Fifteenth Amendment, which had extended the franchise to all irrespective of race, the Court declared that "this [a]mendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid."[137] There had also been arguments levelled at the Nineteenth Amendment as the measure was being drafted and debated. Observers argued that it was unconstitutional because it divested non-ratifying States of their power over the administration and regulation of elections.[138] The Tenth Amendment, it was argued, prevented a State from being deprived of that power.[139] But pushing through the amendment, and in so doing trampling upon the Tenth Amendment, represented an unlawful and unconstitutional displacement of sovereignty away from the States.[140] None of those arguments succeeded. They had been doomed to failure from the very beginning because federal courts do not invalidate constitutional amendments on substantive grounds.

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131. U.S. CONST. amend. XXI.
132. Leser v. Garnett, 258 U.S. 130 (1922).
133. U.S. CONST. amend. XIX.
134. *Leser*, 258 U.S. at 135.
135. *Id.* at 136.
136. *Id.*
137. *Id.*
138. *See* William L. Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 2–3, 28–29 (1920).
139. Everett P. Wheeler, *Limit of Power to Amend Constitution*, 7 A.B.A. J. 75, 78 (1921).
140. Geo. Stewart Brown, *The Amending Clause Was Provided for Changing, Limiting, Shifting or Delegating "Powers of Government." It Was Not Provided for Amending "The People." The Amendment Is Therefore Ultra Vires.*, 8 VA. L. REV. 237, 239–41 (1922).

What mattered for the Supreme Court was whether the amendment had been proposed and ratified in accordance with Article V. Seeing that it had, the Supreme Court concluded that that the amendment was constitutional:

> The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislature of thirty-six States, and that it "has become valid to all intents and purposes as part of the Constitution of the United States."[141]

Therefore, for the Supreme Court, conformity with Article V is the only test the Constitution imposes on constitutional amendments. As long as an amendment proposal is supported by the federal and state majorities required under Article V, the amendment will face no third-party test to its constitutionality because Article V does not acknowledge the possibility of an unconstitutional amendment on substantive grounds.

B. Deference to Congress

Two other cases together reinforce the point that the Court has chosen the path of self-limiting its power, in contrast to a path of self-empowerment that some courts around the world have chosen when they have exercised the power to invalidate a constitutional amendment. In 1921, the Court heard *Dillon v. Gloss*,[142] an appeal from a denial of a habeas petition in connection with the National Prohibition Act.[143] The petitioner argued that the Eighteenth Amendment, pursuant to which the Act had been passed, was constitutionally void because it had been authorized by a constitutional proposal imposing a seven-year time limit for ratification.[144] In ultimately affirming the lower court's judgment, the Court spoke to the relationship between timeliness and ratification: "[T]here is a fair implication that [ratification] must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[145] The Court continued: "We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the

141. *Id.* at 137.
142. 256 U.S. 368 (1921).
143. *Id.* at 370.
144. *Id.* at 370–71.
145. *Id.* at 375.

proposal."[146] The Court in this case therefore held that there is an unwritten expectation of "reasonableness" in the time between proposing and ratifying a constitutional amendment. This may suggest that the Court had entered the fray, ready to evaluate whether an amendment was ratified according to a standard set by an unwritten rule. But a subsequent case explains that the Court is not the primary actor in any such evaluation.

The Supreme Court decided the controlling case twenty years later in *Coleman v. Miller*.[147] That case concerned the Child Labor Amendment. Rolla Coleman, a State Senator from Kansas, sought a writ of mandamus compelling Clarence Miller, the Secretary of State of Kansas, to refrain from authenticating a resolution passed by the Kansas Senate and House of Representatives ratifying the Child Labor Amendment.[148] Coleman argued that Kansas's failure to ratify the amendment proposal within a reasonable time—in this case it had taken thirteen years from proposal to ratification, 1924 to 1937—had rendered the amendment null.[149] Yet Congress had not insisted on a time limit for its ratification.[150] Coleman therefore sought to convince the Court that "in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had."[151] The Court disagreed with Coleman, and also narrowed its previous holding in *Dillon*. The Court limited *Dillon* to its facts, stating that although it had affirmed in *Dillon* "that ratification must be within some reasonable time after the proposal"[152] by Congress, "it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications."[153]

The Court then articulated the rule that continues to hold today: constitutional amendments raise political questions not for judicial determination. According to the Court, it should not judge the validity of a State's ratification of an amendment proposal because

146. *Id.*
147. 307 U.S. 433 (1939).
148. *Id.* at 435–36.
149. *Id.* at 451.
150. *Id.*
151. *Id.* at 452.
152. *Id.*
153. *Id.* at 452–53.

such a dispute is a political question not amenable to judicial evaluation: "The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."[154] According to the Court, Congress is better placed to judge the merit of a ratification: "Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province."[155] And that decision, added the Court, should be immune from judicial reversal: "The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment has been adopted within a reasonable time would not be subject to review by the courts."[156] This pair of cases confirms that the Court has chosen not to venture into the realm of evaluating the constitutionality of an amendment, and instead to affirm that this power belongs to Congress. And when combined with the Court's cases on the Eighteenth and Nineteenth Amendments, we see just how reluctant the Court has been when confronted with the question whether an amendment can be substantively unconstitutional. For the Court, there has been only one answer: it has no power to invalidate a federal amendment.

The Court takes a different posture when confronting state constitutional amendments thought to violate the United States Constitution. In fact, the Court has invalidated several amendments made to state constitutions. On one occasion, the Court invalidated a properly passed state constitutional amendment in Colorado that sought to deny protected class status to sexual orientation.[157] A year earlier, the Court had struck down a state constitutional amendment to impose term limits on congressional candidates.[158] The Court has also held unconstitutional a state referendum prohibiting fair and open housing laws.[159] Other examples of federal courts overturning

154. *Id.* at 454.
155. *Id.*
156. *Id.*
157. Romer v. Evans, 517 U.S. 620, 623–24 (1996).
158. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995).
159. Reitman v. Mulkey, 387 U.S. 369, 370–73 (1967).

state constitutional amendments include the Supreme Court invalidating a voter initiative that ended mandatory busing in the service of racial integration,[160] the Sixth Circuit overruling a constitutional amendment in Michigan that would have prohibited the use of affirmative action in public institutions,[161] and the Ninth Circuit rejecting a constitutional amendment in California that defined marriage exclusively in heterosexual terms.[162]

There is a further contrast worth noting about state constitutions. State constitutions and state courts sometimes recognize the possibility of a substantively unconstitutional amendment. Some state constitutions establish clear subject-matter limits on the content of amendments proposed under the state regime. For instance, certain States prohibit amendments restricting the taxing power of government,[163] while others bar amendments permitting the alteration of civil and political rights using the initiative process.[164] Still others prevent amendments giving powers or duties to a private corporation,[165] while some disallow amendments to dramatically transform the state constitution.[166] Some States accordingly authorize state courts to

160. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 461–63, 467, 470–71 (1982).

161. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 652 F.3d 607, 610, 614, 633 (6th Cir. 2011).

162. Perry v. Schwarzenegger, 591 F.3d 1126, 1132 (9th Cir. 2009).

163. *See, e.g.*, FLA. CONST. art. XI, § 3 ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.").

164. *See, e.g.*, MISS. CONST. art. XV, § 273, cl. 5(a) ("The initiative process shall not be used . . . [f]or the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution . . . .").

165. *See, e.g.*, CAL. CONST. art. II, § 12 ("No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.").

166. *See, e.g.*, ARK. CONST. art. XIX, § 22 ("But no more than three amendments shall be proposed or submitted at the same time"); COLO. CONST. art. XIX, § 2(2) ("[B]ut each general assembly shall have no power to propose amendments to more than six articles of this constitution"); KAN. CONST. art. XIV, § 1 ("One amendment of the constitution may revise any entire article, except the article on general provisions, and in revising any article, the article may be renumbered and all or parts of other articles may be amended, or amended and transferred to the article being revised."); OKLA. CONST. art. XXIV, § 1 ("No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more

invalidate amendments that violate these content restrictions.[167] This rule is foreign to federal courts as to federal amendments.

It is therefore incorrect to characterize as "hopelessly circular"[168] the question whether a constitutional amendment can be unconstitutional. There is a definitive answer, at least under the United States Constitution. And that answer is that there is no such thing as a constitutional amendment that is unconstitutional by reason of its content. But why is *this* the Court's answer to the possibility of an unconstitutional constitutional amendment? Why is conformity with the procedures of Article V—and not compliance with higher or unwritten principles—the only test the Constitution applies to prospective amendments? Any argument in support of substantive limits on constitutional amendments must contend not only with the plain terms of Article V, whose permissive language does not preclude any outcome so long as its procedural strictures are respected, but moreover with the prevailing principle underlying Article V: outcome-neutrality.

C. The Challenge of Institutional Consolidation

To understand why the Court does not invalidate procedurally perfect amendments to the United States Constitution—to understand why the Court elevates process over content—we must first understand that the greatest feat in American constitutional politics is to achieve institutional consolidation across the complex structure of federalism the Constitution creates. Institutional consolidation occurs when the various amending actors and institutions converge in their interests

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than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition.").

167. *See, e.g.*, Taomae v. Lingle, 118 P.3d 1188, 1189 (Haw. 2005) (invalidating state constitutional amendment for violating amendment procedures); Armstrong v. Harris, 773 So. 2d 7, 12, 21–22 (Fla. 2000) (invalidating state constitutional amendment for failure to abide by accuracy requirement of state constitution); Ruiz v. Hull, 957 P.2d 984, 987 (Ariz. 1998) (invalidating referendum successfully amending state constitution to make English official language); Armatta v. Kitzhaber, 959 P.2d 49, 51 (Or. 1998) (invalidating constitutional amendment for departing from amendment rules under state constitution); Graham v. Jones, 3 So. 2d 761, 777, 782, 784 (La. 1941) (finding state constitutional amendment unconstitutional for violating "single object" rule).

168. Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 540 (1995).

and subsequently express their agreement. That extraordinary agreement may trigger the adoption of a significant piece of transformational legislation by Congress and the President, it may result in a filibuster-proof supermajority in the Senate, and it may similarly lead to the confirmation of presidential appointments by an overwhelming margin.

The clearest and most compelling example of institutional consolidation is the successful proposal and ratification of an amendment to the Constitution. No amendment can succeed without federal actors and institutions converging behind an amendment, their interests and ambitions aligning with those of their state counterparts and the citizens they represent. And all of that must survive the long gestation period between the moment an amendment is proposed and when it is finally ratified. This is no small task.

The key point to highlight is that the default position in American constitutional politics is not institutional consolidation but rather institutional conflict. The separation of powers, federalism, checks and balances, bicameralism—these devices are intended to instigate institutional conflict and to insert barriers in the way of institutional consolidation. The separation of powers and federalism disperse power and frustrate the possibility of concentrating power in the hands of one branch or set of actors. Checks and balances, for their part, ensure that no actor may act unilaterally without the approval or acquiescence of another actor. And bicameralism occupies a similar function: to introduce veto gates along the path to legislative or constitutional decisionmaking. That is why achieving institutional consolidation is a remarkable feat in American constitutional politics. The Constitution makes it an event of such rare incidence that its occurrence is reason to take note.

The subject around which actors and institutions coalesce in agreement is not nearly as important as the fact of the agreement itself. The significance of the moment derives from the strictures of the procedures those actors and institutions have successfully navigated and ultimately overcome on their way to arriving at their agreement. The intensifying partisanship in American politics only makes institutional consolidation even more exceptional.[169] Hurdling the obstacles standing in the way of institutional consolidation to

169. For more on the relationship between partisanship and institutional separation, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

complete an amendment is quite unusual, and the Supreme Court has recognized that this achievement commands an unassailable force of reason under the United States Constitution. That is the predicate of Article V: legitimacy derives from the act of successfully assembling the supermajorities required to amend the text.

It is not actual agreement itself but more specifically the act of agreeing that breathes legitimacy into the amendment. The difficulty of successfully amending the Constitution, or more generally the challenge of scaling the great procedural heights the Constitution requires for constitutional consolidation and change, is itself the source of the legitimacy of the Constitution.

Consider how difficult it is to amend the Constitution. Political actors have ratified only twenty-seven amendments since the Constitution was adopted in 1789, an extraordinarily low number given that there have been well over ten thousand amendment proposals in the same period.[170] The ratio of proposals to ratifications has only increased over the years, highlighting the difficulty and decelerating frequency of amendments under Article V. The last amendment was ratified roughly thirty years ago in 1992,[171] and the next-most recent was ratified twenty years prior in 1971.[172] There were four in the preceding forty-year period,[173] six in the preceding seventy years,[174] and fifteen in the first eighty years of the Republic.[175] This trend reflects a modern legal reality in the United States: constitutional change today occurs "off the books."[176] This results in the informal change of the

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170. Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996).

171. *See* U.S. CONST. amend. XXVII (stating that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened").

172. *Id.* amend. XXVI (stating that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

173. *See id.* amend. XXV (1967); *id.* amend. XXIV (1964); *id.* amend. XXIII (1961); *id.* amend. XXII (1951).

174. *See id.* amend. XXI (1933); *id.* XX (1933); *id.* amend. XIX (1920); *id.* amend. XVIII (1919); *id.* XVII (1913); *id.* amend. XVI (1913).

175. *See id.* amend. XV (1870); *id.* amend. XIV (1868); *id.* amend. XIII (1865); *id.* amend. XII (1804); *id.* XI (1795); *id.* amend. X (1791); *id.* amend. IX (1791); *id.* VIII (1791); *id.* VII (1791); *id.* amend. VI (1791); *id.* amend. V (1791); *id.* amend. IV (1791); *id.* amend. III (1791); *id.* amend. II (1791); *id.* amend. I (1791).

176. Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995).

Constitution, where its authoritative meaning is transformed, for instance by judicial interpretation, without a corresponding alteration to its text.[177] Amending the Constitution requires such an overwhelming aggregation of political consent that it makes amendment success itself the reason why constitutional amendments are accepted as valid.[178]

The difficulty of amendment in the United States should not come as a surprise. The Philadelphia Convention wanted to make the Constitution difficult to amend, though neither too difficult nor too easy, as James Madison explains: "[Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[179] At the founding, John DeWitt anticipated that the Constitution would create too difficult a ratification procedure for formal amendment. He feared that the dissimilarities among states would undermine any effort to achieve the required three-quarters agreement to any future amendment proposal. Articulating his fears, DeWitt explained that "such is the difference of interest, different manners, and different local prejudices, in the different parts of the United States, that to obtain that majority of three fourths to any one single alteration, essentially affecting this or any other State, amounts to an absolute impossibility."[180] DeWitt suggested that the future impossibility of amendment raised the stakes in the choice to ratify the proposed Constitution. States should ratify the Constitution, he warned, only on the understanding that it could be permanent and unalterable. The States' unwillingness or inability to agree to any significant constitutional change would make the Constitution unalterable. And the Constitution would moreover be permanent because mounting a revolution to adopt a new constitution—the only recourse in light of the Constitution's unalterability—would be discouraged given the disruption revolution would entail. His advice was accordingly clear. Ratify the Constitution only if prepared for it to endure for all times:

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177. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925, 929 (2007).

178. Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 274 (2002).

179. THE FEDERALIST No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

180. John DeWitt, *Essay II* (October 27, 1787), *reprinted in* THE COMPLETE ANTI-FEDERALIST 194, 194–95 (Herbert J. Storing ed., 1981).

> Where is the probability that three fourths of the States in that Convention, or three fourths of the Legislatures of the different States, whose interests differ scarcely in nothing short of everything, will be so very ready or willing materially to change any part of this System, which shall be to the emolument of an individual State only? No, my fellow-citizens, as you are now obliged to take it in the whole, so you must hereafter administer it in whole, without the prospect of change, unless by again reverting to, a state of Nature, which will be ever opposed with success by those who approve of the Government in being.[181]

Patrick Henry agreed that amendment would be impossible, declaring that "the way to amendment is, in my conception, shut."[182] Where DeWitt worried about the problems with ratifying an amendment, Henry worried about both the proposal and ratification stages. Henry feared that small but organized minorities could obstruct amendment efforts, first at the proposal stage where "the most unworthy character[s] may get into power, and prevent the introduction of amendments,"[183] and second at the ratification stage, where "[a] trifling minority may reject the most salutary amendments."[184] Henry explained how:

> For four of the smallest States, that do not collective contain one-tenth part of the population of the United States, may obstruct the most salutary and necessary amendments: Nay, in these four States, six tenths of the people may reject these amendments; and suppose, that amendments shall be opposed to amendments (which is highly probable) is it possible, that three-fourths can ever agree to the same amendments? A bare majority in these four small States may hinder the adoption of amendments; so that we may fairly and justly conclude, that one-twentieth part of the American people, may prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to amendments.[185]

The central and prevailing fact in America's amendment difficulty is the role of States in Article V. The Constitution as written was not perfect, and the Framers knew that. They had before them a difficult task in defending the design of Article V to the States that would be

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181. *Id.* at 195.

182. Patrick Henry, *Speech Before the Virginia Ratifying Convention* (June 5, 1788), *reprinted in* THE COMPLETE ANTI-FEDERALIST 199, 203 (Herbert J. Storing ed., 1981).

183. *Id.* at 204.

184. *Id.*

185. *Id.*

called to ratify the proposed constitutional text. The Framers gave a spirited defense of Article V. In response to objections about proposing and requesting the ratification of an imperfect document—"'why,' say they, 'should we adopt an imperfect thing?,'"[186] questioned the critics—the Framers responded by pointing to the protections in Article V. The constitutional text would not be perfect, Alexander Hamilton cautioned when he observed that defects would "probably appear in the new System."[187] The Framers therefore resolved to create a process that would allow Americans to fix those imperfections: "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."[188]

First, as Mason explains, the Framers wanted to ensure the document's flexibility and its receptiveness to change. Recognizing that they could not conceive of all contingencies that might arise in the life of the Republic—future contingencies were, in the Framers' words, "illimitable in their nature"[189]—they deliberately chose to create a procedure that would allow actors to change the Constitution. Elbridge Gerry, for example, explained that "defects may be amended by a future convention."[190] But the Framers did not intend flexibility to correspond to extreme ease of amendment. They instead chose the compromise position between a statutory constitution, which can be revised like an ordinary law, and an absolutely entrenched constitution, which cannot be lawfully amended: "The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[191]

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186. THE FEDERALIST No. 85, at 590 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

187. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 558 (Alexander Hamilton).

188. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 202–03 (George Mason).

189. THE FEDERALIST No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

190. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 7, at 519 (Elbridge Gerry).

191. THE FEDERALIST No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961).

In addition to its intrinsic value, flexibility also served an instrumental purpose: to secure the endurance of the Constitution. The more malleable the document, the more likely its survival and continued appeal as a lodestar in constitutional politics. In contrast, the more rigid the document, the more likely it would invite its own defiance as an antiquated relic unable to facilitate the resolution of social and political conflict. Worse yet, rigidity would risk descending the nation into violence and instability. The threat of violence continued to worry George Washington as he left the presidency, but he saw in Article V the promise for channeling popular sentiment into a structured, rather than unruly, response:

> If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which it designates; but never let it be by usurpation as this is the instrument by which free governments are destroyed.[192]

The design of Article V gave everyone a point of entry into the discussion on how to improve the Republic. Citizens could act through their legislators to request a new convention, state legislators could petition Congress for changes to the constitutional framework, and Congress itself could propose amendments to the Constitution.

For the Framers, the greatest virtue in the design of Article V was its neither completely national nor entirely federal character. Insofar as Article V required the approval of the national legislature and of sub-national states, the Framers saw this requirement of joint concurrence as an internal check that would thwart nefarious efforts to hijack the amendment process, and the Constitution itself. But quite apart from reflecting a defensive posture toward the possibility of evil, the mix of national authority and federal security represented the two great defining features of the United States Constitution. On the one hand, the Framers saw the collective body of the people as the preeminent source of legitimacy in their design of the new Republic yet, on the other, they quite clearly tempered the problems inherent in majoritarian democracies by folding within their constitutional design the helpful constraint of federalism.[193] The result is a rigid Constitution.

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192. Louis Julian Wise, *Flexibility of the Federal Constitution*, 8 LAW. & BANKER & S. BENCH & B. REV. 106, 113 (1915) (quoting George Washington).

193. Brendon Troy Ishikawa, *Amending the Constitution: Just Not Every November*, 44 CLEV. ST. L. REV. 303, 314–15, 342 (1996).

The enormous difficulty of amending the Constitution doubles as a reason why the Court does not exercise the power to invalidate amendments on substantive grounds and precisely why it will uphold the procedural requirements in Article V. If the many various actors and institutions in Article V manage to approve an amendment—having survived the amendment gauntlet the Constitution creates—the Court has no standing to deny the validity of that amendment. The amendment has earned the support of both direct legislative approval and of indirect popular consent, and both with an overwhelming degree of agreement. The impetus for the unconstitutional amendments doctrine is at its most convincing, if it is convincing at all, where amendment is relatively easy, as in India, where only a legislative majority is needed for most amendments.[194] That is not the case in the United States where amendment is extraordinarily difficult by design.

III. HISTORICAL AND MODERN AMENDING ACTIVITY

The constitutional text specifies no limits on the amendment power nor does the Court recognize restrictions on the content of an Article V amendment. Yet this does not exhaust the possible legal or political sources of substantive limitations on amendments to the United States Constitution. Because it could well be that amending actors themselves—Congress and the States—have developed through practice a norm or expectation that certain kinds of amendments will be inadmissible if they violate a moral commitment the Constitution makes. But no such norm or expectation exists. Indeed, amendment activity in the United States offers evidence of the contrary norm. Both historical and modern amendment activity show that amending actors feel themselves unbound by any expectation or norm that narrows the scope of their power to amend the Constitution without restriction.

A. The Evil Amendment

The Constitution gives the President of the United States no formal role in the Article V amendment process. Yet the President has felt unfettered in voicing support for amendments that span the entire range of possibilities, including amendments that might today be perceived as either good or evil. For instance, President Barack Obama called for an amendment to reverse the Supreme Court's

194. INDIA CONST. art. 368(2).

ruling in *Citizens United v. Federal Election Commission*,[195] a case holding in relevant part that corporations are not restricted in how much they can lawfully spend independently in federal elections.[196] Immediately before him, President George W. Bush endorsed an amendment to codify a heterosexual definition of marriage in the Constitution, declaring that "the union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith."[197] His predecessor President Bill Clinton expressed his support for an amendment to entrench victims' rights in the Constitution.[198] Before him, President George H.W. Bush backed an amendment to ban flag burning.[199] And his own predecessor, President Ronald Reagan, was a strong advocate for a balanced-budget amendment to the Constitution.[200]

Earlier in American history, two presidents supported an amendment that, then and now, must be described as evil—still more evidence that nothing is off the table when it comes to amending the United States Constitution. Return to the year 1861, just before the Civil War. Representative Thomas Corwin chaired a committee responsible for finding ways to defuse the risk of civil war.[201] In an effort to placate the South and to contain secessionist sentiment along with the attendant bloodshed that would accompany the struggle to secede,[202] Corwin proposed the following amendment in

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195. 558 U.S. 310, 372 (2011).

196. *See* Fredreka Schouten, *President Obama Wants to Reverse Citizens United*, USA TODAY (Feb 9, 2015, 3:39 PM), https://www.usatoday.com/story/news/politics/onpolitics/2015/02/09/president-obama-wants-to-reverse-citizens-united/81582308 [https://perma.cc/U4CB-PMX3].

197. David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004; *Bush Calls for Ban on Same-Sex Marriages*, CNN (Feb. 25, 2004, 5:05 AM), https://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage [https://perma.cc/E8D3-6L5E].

198. *See* John M. Broder, *Clinton Calls for Victims' Rights in Constitution*, L.A. TIMES, June 26, 1996, at A1.

199. David Lauter & Paul Houston, *Bush Urges Flag Amendment but Does It with Less Fanfare*, L.A. TIMES, June 13, 1990.

200. *See* Edward Cowan, *Reagan Supports Law to Balance Budget*, N.Y. TIMES, Mar. 12, 1982, at D3 (stating his support to force reduced spending by Congress to balance the budget).

201. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 269 (2010).

202. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 540 (2002).

hopes that it might quiet the mounting fears of war rising in the nation: "No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[203] This amendment proposal had three principal components. First, it legally authorized slavery in the country by conferring on each of the States the power to regulate the "domestic institutions" within their internal borders.[204] This was an enticing carrot for the slave States; they would promise to remain in the Union in exchange for the right to keep their highly profitable practice of slavery. Second, the amendment denied Congress the power to "abolish or interfere" with slavery in the States.[205] And third, the amendment purported to make itself an unamendable, unalterable, permanent part of American federalism as long as the Constitution survived. This was the effect of the instruction that "[n]o amendment shall be made to the Constitution" ever to "authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof."[206]

The amendment passed both congressional chambers by a required two-thirds margin, the final vote being 133 to 65 in the House and 24 to 12 in the Senate.[207] The amendment proposal even garnered the support of a Congress overwhelmingly comprised of Northern States.[208] President James Buchanan subsequently signed the congressional act proposing the amendment before it was sent to the States for their ratification.[209] Ohio and Maryland then ratified the amendment by state legislative vote, and Illinois ratified it by constitutional convention.[210] Newly-elected President Abraham

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203. H.R. Res. 80, 36th Cong., 12 Stat. 251 (1861).

204. *Id.*; Michael J. Lynch, *The Other Amendments: Constitutional Amendments that Failed*, 93 LAW LIBR. J. 303, 306–07 (2001).

205. H.R. Res. 80.

206. *Id.*

207. Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 846 (2011).

208. Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1141–42 (2001).

209. Rogers M. Smith, *Legitimating Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039, 2059 n.89 (1999).

210. Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 276 n.103 (1996). It is an open question, though, whether the Illinois vote was constitutionally unsound because Congress had specified in transmitting the constitutional proposal to the

Lincoln defended the right of States to adopt this constitutional amendment.[211] In his inaugural address as President, Lincoln reiterated his willingness to support the amendment, insisting that he had "no objection to its being made express and irrevocable."[212] But the onset of the Civil War interrupted the ratification process.[213] Had the amendment been ratified, it would have become the Thirteenth Amendment to the United States Constitution.[214] In one of the remarkable twists of American history, an amendment abolishing slavery is now in the Constitution in its place.[215] Yet the Evil Amendment contains no expiration date for its ratification, and some could argue, shockingly, that it is now resting dormant, ready to be reawakened when States resume its ratification.[216]

That this amendment was proposed in Congress, then approved by Congress, and subsequently ratified by some States suggests, as a matter of political practice, that there are no limits on the amendment power in the United States. But the purported unamendability of the Evil Amendment undermines the point since it sought to disable the amendment power altogether by making itself unchangeable. The question, then, is whether this Evil Amendment as designed actually made itself unamendable?

There is no dispute that the amendment would have been binding on amending actors had it been adopted by the required three-

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States that ratification occur by legislative vote, not constitutional convention. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 327–28 (1994).

211. Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 HOW. L.J. 313, 393 (2006).

212. Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861).

213. GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 36 (2010).

214. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 2 (2004).

215. *See* U.S. CONST. amend. XIII ("Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party have been duly convicted, shall exist within the United States, or any place subject to the jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.").

216. For the best discussion of this possibility, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 699–704 (1993), explaining the rationale why the Corwin Amendment is still available for ratification.

quarters of the several States.[217] But it is less clear whether the amendment really would have been irrevocable, unchangeable, and therefore unamendable. Scholars have interpreted its text as creating a substantively unamendable provision that would forever shield it from reversal, even by a subsequent Article V amendment.[218] This, however, is an incomplete reading. A closer reading of the amendment's proposed text shows that it was not unamendable in the sense of being fully shielded from the possibility of future amendment.

Recall the text of the amendment:

> No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.[219]

Its text plainly prevents Congress from initiating an Article V constitutional amendment to be sent to the States. But nowhere in the text do its words preclude the possibility of calling a constitutional convention—the second way of amending the Constitution under Article V—to repeal the amendment, assuming it had been ratified by the States. The Evil Amendment was just as much about limiting congressional power as it was about protecting slavery in the States. In fact, the States would not have felt reassured to remain in the Union without this diminution in congressional power. But States could well have chosen of their own accord later to initiate a repeal amendment. This would have been a knowing waiver

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217. Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 385 n.151 (2005).

218. *See, e.g.*, Andrew Friedman, *Dead Hand Constitutionalism: The Danger of Eternity Clauses in New Democracies*, 4 MEXICAN L. REV. 77, 80 (2011) (calling the Corwin Amendment an "entrenched amendment" that could not be altered by later amendments); Stephen Kantrowitz, *The Other Thirteenth Amendment: Free African Americans and the Constitution that Wasn't*, 93 MARQ. L. REV. 1367, 1370 (2010) (stating that the Corwin Amendment would have prohibited Congress to pass subsequent legislation abolishing slavery); Lester B. Orfield, *Sovereignty and the Federal Amending Power*, 16 IOWA L. REV. 504, 515 (1931) (asserting that the Corwin Amendment would prevent a subsequent amendment's ability to abolish slavery); Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 56–57 (2014) (stating that the Corwin Amendment would have "permanently entrenched slavery"); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2047 (2003) (calling the Corwin Amendment an "unamendable" amendment).

219. H.R. Res. 80, 36th Cong. 12 Stat. 251 (1861).

of a right the Constitution had granted to States. When read this way, the design of the Evil Amendment aligns with its predecessor amendments, most if not all built to restrict congressional but not state authority.[220] To interpret the Evil Amendment as unamendable is therefore to misread its careful design to constrain only Congress but not the States.

To construe the Evil Amendment as unamendable is moreover to misread the source and unfolding of the American constitutional tradition. The notion of constitutional irrevocability is repugnant to the founding culture and foundations of American constitutionalism. The Framers knew and understood what absolute unamendability meant and what it entailed, but they rejected it in their own constitutional design. The Framers instead created the very converse of a text that would be frozen in both time and meaning. They created a living organism whose charge was then, and remains today, to mediate the nation's ever-evolving desires and dispositions. The Constitution was written with an eye toward endurance, the foremost feature of its design being its flexibility, a recurring theme echoed by the Framers in their grand debates on the form and content of the nation's higher law. The Constitution, then as now, makes no rule unbreakable, establishes no principle as everlasting, and champions no principle as a permanent part of the text.

B. Amendment Proposals, Dead and Alive

The Evil Amendment is not the only proposal that was sent to the States but never ratified. There are three other outstanding constitutional amendments open for ratification, perhaps even a fourth, as I discuss below. Three of them contain no expiration date in their text. A plain reading, then, suggests that each remains a viable amendment proposal while pending ratification by the required supermajority of states. The political reality that amendment proposals approved long ago remain today open to ratification further reinforces the point that the Constitution is ever changeable, always alterable, and subject to no limitations on how it can be amended.

Three proposed amendments have been outstanding for decades and are arguably still ratifiable by the States. The first outstanding amendment proposal, proposed in 1789, governs the number of

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220. Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1028 (2008).

members in the House of Representatives.[221] The second outstanding amendment proposal would strip American citizenship from anyone who would accept a foreign title of nobility, honor or dispensation without congressional permission.[222] It was proposed in 1810 by a margin of 19-5 in the Senate and 87-3 in the House.[223] The third outstanding amendment proposal concerns the regulation of child labor.[224] It is closer to adoption than any of the others, having been

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221. The congressional membership amendment reads as follows:

> After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

1 Stat. 97 (1789).

222. The Anti-Title Amendment reads as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, two thirds of both houses concurring, [t]hat the following section be submitted to the legislatures of the several [S]tates, which, when ratified by the legislatures of three fourths of the [S]tates, shall be valid and binding, as a part of the [C]onstitution of the United States.
>
> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

2 Stat. 613 (1810).

223. Curt E. Conklin, *The Case of the Phantom Thirteenth Amendment: A Historical and Bibliographic Nightmare*, 88 LAW LIBR. J. 121, 123 (1996).

224. The Child Labor Amendment reads as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein).* That the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:
>
> Article—
>
> Section 1. The Congress shall have the power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

proposed in 1924 and ratified by twenty-eight States,[225] most recently in 1937.[226] None of these contains a ratification deadline and each is in theory ratifiable by the States.

These three outstanding amendment proposals have something in common beyond the absence of an expiration date in their text: they were written, proposed, and transmitted to the States long ago. 1789, 1810, and 1924—these years now seem like distant eras in the American experience. Given the long interval between proposal and ratification, it is appropriate to ask whether these proposals have not lost the currency they once enjoyed. Put another way, does an amendment whose text contains no expiration date nonetheless perish with the passage of a significant period of time? The answer is no, according to both political practice and the Court. Time does not negate the ratifiability of a constitutional amendment duly passed by Congress and proposed to the States. And even if the passage of time does pose a concern, the Supreme Court has indicated that it is a political question best left to resolution by political actors.[227]

Political practice is a crucial point, and fortunately there is a recent precedent. The Twenty-Seventh Amendment on congressional salaries was ratified in 1992—over two hundred years after Congress first transmitted it to the States. The amendment states that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[228] James Madison initially proposed the amendment in the First Congress on June 8, 1789.[229] Congress adopted a resolution proposing the amendment to the States in the same year, six states had ratified the amendment by 1792, and a seventh state ratified it in 1873.[230] It was not until 1978 that another

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> Sec[tion] 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

H.R.J. Res. 184, 68th Cong., 43 Stat. 670 (1924).

225. Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDIS. L.J. 577, 580 n.20 (1999).

226. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 544–45 (1992).

227. I have earlier discussed the Court's caselaw on this point. *See supra* Section II.A.

228. U.S. CONST. amend. XXVII.

229. 1 Stat. 97 (1789).

230. Gideon M. Hart, *The "Original" Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 MARQ. L. REV. 311, 327 n.88 (2010).

state ratified the amendment; that subsequently lead to another thirty states jumping aboard in the intervening fourteen years.[231] In 1992, Michigan became the 38th state to ratify the amendment proposal, in so doing reaching the three-fourths requirement for state ratification.[232] After the Archivist of the United States certified the ratification—a bureaucratic procedure that is not dictated by the constitutional text but is nonetheless necessary in order to keep a record of the States ratifying an amendment proposal—the amendment became codified in the constitutional text.[233] There were few doubts about its legality: Congress saw no constitutional infirmity in the timing of the amendment's proposal and ratification processes,[234] the Department of Justice issued a memorandum defending its constitutional soundness,[235] and a federal court refused to hear an amicus claim on its validity.[236]

A more modern amendment proposal has stirred some controversy as to its ratifiability. In January 2020, Virginia became the 38th state to ratify the Equal Rights Amendment.[237] Thirty-eight is the magic number because it amounts to three-quarters of the States—precisely what is needed to make an amendment "valid to all Intents and Purposes,"[238] according to Article V. But it is now a live question whether the Equal Rights Amendment has in fact become official

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231. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 209 n.157 (2008).

232. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 851 n.449 (1994).

233. *See* Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 502–03 (1994) (stating that the Amendment was "recognized as part of the supreme law of the land").

234. *See* Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2431 (2001) (providing examples where Congress acted as though Article V imposed no time limits on amendments).

235. *See* Memorandum Opinion for the Counsel to the President, 16 Op. Off. Legal Counsel 87 (Nov. 2, 1992) (stating the amendment was ratified in accordance with Article V).

236. *See* Boehner v. Anderson, 809 F. Supp. 138, 144 (D.D.C. 1992) (denying the plaintiff's motion because the amendment was ratified in accordance with Article V), *aff'd*, 30 F.3d 156 (D.C. Cir. 1994).

237. Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html.

238. U.S. CONST. art. V.

because the amendment was initially proposed in 1972 with an expiration date that has since lapsed.

Congress proposed the Equal Rights Amendment to codify gender equality in the Constitution. Here is the text of the amendment proposal transmitted to the States for ratification:

> Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein). That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> Article—
>
> Section 1. Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.[239]

Congress embedded a seven-year ratification deadline within its proposal to the States.[240] The days immediately following congressional approval of the amendment suggested the amendment would sail to ratification in the States. Within one week, seven States had ratified the amendment; within one month, fourteen; and within one year, thirty—only eight fewer than the magic number of thirty-eight.[241] But then only five more States ratified the amendment, leaving the total ratifications to thirty-five, three fewer than needed to make the amendment official.[242] The seven-year deadline was fast approaching and lawmakers worried that time was running out.[243] Congress therefore

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239. H.R.J. Res. 208, 92nd Cong., 2nd Sess., 86 Stat. 1523 (1972).

240. *Id.*

241. Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J. L. & PUB. POL'Y 19, 19–20 (1979).

242. *Id.* at 20.

243. *See* Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979, 981 (1977); Hatch, *supra* note 241, at 20 (explaining that proponents of the Equal Protection Amendment suggested extending the ratification deadline after ratification by the States stalled).

mobilized its forces and approved a resolution to extend the ratification period for three more years, now giving States until 1982 to ratify the amendment rather than the original deadline of 1979. The new resolution acknowledged the earlier ratification deadline but expressly repealed it:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982.[244]

This was an unusual move. At the time, scholars debated whether Congress had the power to extend the period of ratification and if so by what margin, whether the rule of presentment required the President to sign the measure, and whether it was proper for Congress to change a deadline after it had already been set.[245] The Equal Rights Amendment ultimately failed to gather the required ratification by the extended ratification deadline. Years later, some relied on the 200-year ratification of the Twenty-Seventh Amendment to argue that the time limit had been unconstitutional all along and that the Equal Rights Amendment remained open indefinitely for States to ratify until they achieved the three-quarters mark for ratification.[246]

Today, even though the congressional ratification deadline of 1982 remains on the books, Virginia's ratification of the Equal Rights Amendment has revived the debate whether the amendment remains ratifiable. On the one hand, the Department of Justice has issued a memorandum concluding that "the ERA Resolution has expired and is no longer pending before the States" because "when Congress uses

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244. H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978) (enacted).

245. *See generally* Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979); J. William Heckman, Jr., *Ratification of a Constitutional Amendment: Can a State Change its Mind?*, 6 CONN. L. REV. 28 (1973); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980).

246. *See* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 135–36 (1997) (arguing that the last State to ratify is the determinative point in the amendment process). *But see* Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT. 593, 594–98 (2000) (arguing that the Equal Rights Amendment proposal expired when the deadline passed without ratification).

a proposing clause to impose a deadline on the States' ratification of a proposed constitutional amendment, that deadline is binding and Congress may not revive the proposal after the deadline's expiration."[247] On the other, the House of Representatives has disregarded the conclusions of the Department of Justice and since voted to remove the ratification deadline in the original amendment proposal, hoping to clear the way for the amendment to become official.[248] In the Senate, a similar vote is possible, as Senators representing both parties have been working to persuade their fellow Senators that the ratification deadline should be removed from the original amendment.[249] What is more, national polling indicates that an overwhelming majority of seventy-eight percent of Americans favors making the Equal Rights Amendment an official part of the Constitution.[250] The battle over the ratification of the Equal Rights Amendment appears far from over and, for some, this is a surprise given the strict ratification deadline in the original amendment proposal that once seemed airtight to all.

The current debate on the Equal Rights Amendment confirms the absence of a substantive lodestar in the popular self-understanding of the United States Constitution. Whether there is a long interval between proposal and ratification and whether there are rules seemingly standing in the way ratification, the central teaching about the United States Constitution is that it allows for change when social and political will for it exists. Here, then, the ultimate rule of law in the United States presents itself: anything, indeed everything, is changeable.

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247. Memorandum Opinion for the General Counsel, *Ratification of the Equal Rights Amendment*, Slip Op. (Jan. 6, 2020).

248. Clare Foran, *House Votes to Eliminate Equal Rights Amendment Ratification Deadline*, CNN (Feb. 13, 2020, 11:34 AM), https://www.cnn.com/2020/02/13/politics/equal-rights-amendment-house-vote-ratification-deadline/index.html [https://perma.cc/423T-Q8LJ].

249. Lisa Murkowski & Ben Cardin, Opinion, *It's Time to Finally Pass the Equal Rights Amendment*, WASH. POST (Jan. 25, 2019, 4:19 PM), https://www.washingtonpost.com/opinions/its-time-to-finally-pass-the-equal-rights-amendment/2019/01/25/54b3626e-20d0-11e9-9145-3f74070bbdb9_story.html [https://perma.cc/S8K9-2JM6].

250. Juliana Horowitz & Ruth Igielnik, *A Century After Women Gained the Right to Vote, Majority of Americans See Work to Do on Gender Equality*, PEW RSCH. CTR. July 7, 2020.

C. Amendment Proposals, Past and Present

Historical and modern amendment activity in the United States confirms that amending actors themselves recognize no boundaries around their power of amendment. The amendment proposals introduced in Congress and in state legislatures span the entire range of possibilities for altering the Constitution in ways that some might regard as either clearly good or clearly bad. The point here is plain: there is no norm or expectation that certain kinds of amendments are impermissible. Even amendments that would undermine the core principles taken to reflect the fundamental modern commitments of the Constitution, including some that would effectively remake the Constitution, have been introduced for consideration in Congress and the States.

Consider some examples. Amendment proposals have tried to repeal the Fourteenth Amendment,[251] ban marriage between persons of different races,[252] prohibit the use of foreign or international law in courts,[253] establish English as the national language,[254] and since 1947 there have been over fifty-five proposals introduced in Congress to recognize the United States officially as a Christian nation.[255] Amendment proposals have also sought to define marriage as the union of a man and a woman,[256] prohibit abortion,[257] repeal the Second Amendment,[258] authorize States to repeal any federal law or regulation,[259] preclude birthright citizenship as a passage to U.S. citizenship,[260] limit federal expenditures on entitlement programs,[261] create an Eighth Amendment exemption for the death penalty,[262] authorize Congress to prohibit flag burning,[263] and eliminate the

251. H.R.J. Res. 342, 93rd Cong. (1973).
252. H.R.J. Res. 54, 42nd Cong. (1871).
253. H.R.J. Res. 54, 113th Cong. (2013).
254. H.R.J. Res. 17, 110th Cong. (2007).
255. *See* John R. Vile, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 64–65 (2003).
256. S.J. Res. 12, 114th Cong. (2015); H.R.J. Res. 106, 108th Cong. (2004).
257. H.R.J. Res. 155, 101st Cong. (1989).
258. H.R.J. Res. 438, 102d Cong. (1992).
259. H.R.J. Res. 102, 111th Cong. (2010).
260. S.J. Res. 4, 113th Cong. (2013).
261. H.R.J. Res. 126, 113th Cong. (2014).
262. H.R.J. Res. 51, 111th Cong. (2009).
263. H.R.J. Res. 19, 113th Cong. (2013).

power of Congress to declare war.[264] In addition, amendment proposals have been introduced to remove presidential term limits,[265] withhold congressional salaries unless Congress has agreed to a budget,[266] repeal the Sixteenth Amendment,[267] and require a balanced budget.[268]

Congresspersons have moreover proposed amendments to make health care a constitutional right,[269] limit the applications of enumerated constitutional rights to natural persons,[270] allow sixteen-year-olds to vote,[271] forbid the President from making recess appointments,[272] change the term of office and the election frequency for members of the House of Representatives,[273] change the rules of presidential election in the Electoral College,[274] grant the President a line-item veto,[275] codify a right to work and to decent pay,[276] authorize recall elections,[277] and entrench a right to a clean, safe, and sustainable environment.[278]

States have likewise been the site of significant amendment activity. A proposal from Arizona would have amended the Constitution to define marriage as the union of one man and one woman.[279] One from Louisiana would amend the Constitution to require electing federal judges.[280] A Colorado amendment proposal would repeal the Affordable Care Act,[281] an amendment proposal from Idaho would

264. H.R.J. Res. 73, 100th Cong. (1987).
265. H.R.J. Res. 15, 113th Cong. (2013).
266. H.R.J. Res. 10, 116th Cong. (2019).
267. H.R.J. Res. 47, 116th Cong. (2019).
268. S.J. Res. 1, 105th Cong. (1997).
269. H.R.J. Res. 17, 116th Cong. (2019).
270. S.J. 736, 116th Cong. (2019).
271. H.R.J. Res. 23, 116th Cong. (2019).
272. H.R.J. Res. 96, 114th Cong. (2016).
273. H.R.J. Res. 114, 113th Cong. (2014).
274. H.R.J. Res. 121, 112th Cong. (2012).
275. H.R.J. Res. 15, 112th Cong. (2011).
276. H.R.J. Res. 35, 112th Cong. (2011).
277. H.R.J. Res. 71, 111th Cong. (2010).
278. H.R.J. Res. 33, 112th Cong. (2011).
279. H.R. Con. Mem'l, 47th Leg., Reg. Sess. (Ariz. 2005) (passing the Concurrent Memorial urging Congress to "propose an amendment to the Constitution of the United States to acknowledge marriage as between one man and one woman").
280. H.R. Res. 120, 1997 Leg., Reg. Sess. (La. 1997) (passing a House Resolution urging Congress to propose an amendment "to provide for election of members of the federal judiciary").
281. H.R. Res. 12-1003, 68th Gen. Assemb., Reg. Sess. (Colo. 2012) (petitioning Congress for an amendment repealing the Affordable Care Act).

ban abortion,[282] and another from Rhode Island would reform the rules of campaign finance.[283] An amendment proposal from Oregon would repeal the rule of direct senatorial election in the Seventeenth Amendment,[284] and amendment proposals from Texas would prohibit abortion,[285] require a congressional majority to enact a federal regulation,[286] and authorize States to overturn Supreme Court decisions.[287] These state proposals, as well as the congressional ones, are truly a drop in the bucket of all amendment proposals introduced to amend the United States Constitution, as there have been quite literally thousands of amendments introduced in legislatures across the country in the years since the Constitution became official.[288]

CONCLUSION—A CONSTITUTIONAL CULTURE OF CHOICE

On the Bicentennial of the United States Constitution, Justice Thurgood Marshall delivered a major address in San Francisco to mark this important occasion for America's higher law. He began by acknowledging the significance of the moment: "1987 marks the 200th anniversary of the United States Constitution," adding that "[p]atriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers . . . ."[289]

His speech then took an unexpected turn. In the midst of this national celebration sweeping across the land, Justice Marshall looked out into the crowd and said plainly but powerfully: "I cannot accept this invitation . . . ."[290] He could not accept the invitation to join the country's celebration of the founding constitution. He

282. S. Con. Res. 132, 45th Leg., Reg. Sess. (Idaho 1980) (petitioning Congress for a right-to-life amendment).

283. S.J. Res. 2656, 88th Gen. Assemb., Jan. Sess. (R.I. 2012) (passing a Joint Resolution urging Congress "to pass and send to the States a constitutional amendment permitting state and federal regulation and restriction of independent political expenditures").

284. S.J. Mem'l 19, 76th Legis. Assemb., Reg. Sess. (Or. 2011).

285. H.R.J. Res. 104, 85th Leg., Reg. Sess. (Tex. 2017).

286. S. Con. Res. 47, 85th Leg., Reg. Sess. (Tex. 2017).

287. S.J. Res. 37, 85th Leg., Reg. Sess. (Tex. 2017).

288. Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996).

289. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1337 (1987).

290. *Id.* at 1338.

explained why. He did not "find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start . . . ."[291] For Justice Marshall, the founding Constitution was defective. Yet he understood that everyday citizens had a different perspective because "[w]hen contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago."[292]

For Justice Marshall, it is the modern Constitution, not the founding text, that merits honoring. The Constitution achieved many of its great advancements in rights and liberties on the strength of massive mobilizations of the people in politics and in war. And many of these victories that democratized America's higher law were won by constitutional amendment, using the rules of constitutional change in the Constitution. Yet the journey the Constitution took from 1787 to 1987, and to the present day, was not fated to be the freedom-expanding project that it turned out to be. The Constitution did not have to evolve in the direction of more rights and more liberties. It could have evolved in the opposite direction. It could have made things worse rather than making things better.

The reason why the Constitution could have evolved in either direction is now clear: there are no restrictions on the content of amendments in the United States. The Constitution entrenches no final judgment as to good or evil. It commands no particular result to political deliberation and decision-making. Nothing warrants a special dispensation as constitutionally sacred. What is right today may be wrong tomorrow, and today's virtue may be tomorrow's vice. Amorality, then, is the very first of all first principles of American constitutionalism. What follows from this cardinal principle of outcome-neutrality is an underlying constitutional value of popular choice. No end sustained by popular consent is foreclosed. What the people want, they may have. The people "are the only legitimate fountain of power,"[293] proclaims *The Federalist* papers, adding that "[t]he fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE."[294]

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291. *Id.*

292. *Id.*

293. THE FEDERALIST No. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961).

294. THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

Legitimacy in American constitutionalism is defined not by what the people choose but by their act of choosing.[295] The only qualification to the rule of government-by-the-people is that the people must express their preferences in conformity with procedures perceived by the people themselves to be just, representative, and faithful to the architecture of American constitutional politics. In this way, the Constitution is oriented toward agreement, not content, blessing with legitimacy any constitutional amendment that successfully navigates the procedural strictures standing in the way of constitutional change. Here, then, is the essence of constitutional amendment in the United States: where the people recognize as valid a change to higher law made in their name, the constitutional culture of American self-government credits this choice as authoritative no matter its subject-matter—until a future popular choice is made to change it. For better or worse, that is both the origin and the continuing source of the legitimacy of the United States Constitution.

295. THE FEDERALIST No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961) (defending proposition that "ultimate authority, wherever the derivative may be found, resides in the people alone").