ACCOUNTING FOR CONSTITUTIONAL CHANGE (OR, HOW MANY TIMES HAS THE UNITED STATES CONSTITUTION BEEN AMENDED? (A) <26; (B) 26; (C) >26; (D) ALL OF THE ABOVE)

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The notion of a living constitution—especially when coupled with developmental or evolutionary notions—is one of our central metaphors, not to say cliches. It is hard to find anyone who is truly willing to reject it, given that the alternative seems to be a *dead* Constitution, an option which, so far as I know, has no explicit supporters. Still, as then Justice Rehnquist once said, "the phrase 'living Constitution' has about it a teasing imprecision that makes it a coat of many colors,"[1] not all of them, it may be presumed, equally pleasing to the eye (or the analytical temperament).

However, even the Chief Justice, whom some of us would identify with a rather deadly conception of constitutional interpretation, was happy (or at least willing) to quote Justice Holmes's famous comment from *Missouri v. Holland* about the framers of the Constitution having performed "a constituent act," "call[ing] into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[2] The "organism" that was "created" in Philadelphia thus took on a life of its own. Like most children it could (and did) grow up in ways that might well surprise its parents. Not for Holmes is a sterile form of "originalism" that would limit constitutional meaning to the first-order "intentions" of the framers, their specific hopes and dreams as to how

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1. William Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).
2. 252 U.S. 416, 433 (1920).

their progeny might develop. Instead there is a due recognition of those later developments that in turn require more expansive and generous interpretation of the Fathers' handiwork than would have been thought likely (or possibly even tolerated) at the time of gestation. Interestingly enough, as the reference to Rehnquist suggests, it is hard to find someone who *does* reject this version of the Holmesian insight. Raoul Berger probably does, but Robert Bork, for example, certainly does not, as witnessed by his insistent, and presumably heartfelt, argument before the Senate Judiciary Committee that *Brown v. Board of Education* was perfectly consistent with his "jurisprudence of original understanding."[3]

What the Chief Justice—as well as Bork and former Attorney General Edwin Meese, the primary popularizer of the "jurisprudence of original intent"[4]—object to is not the fact of organic development as such, including the surprises sometimes presented by the fragile child who turns out to be a strapping mountain-climber. Rather, what they oppose is the de facto creation—or substitution—of a *new* organism on the basis that the earlier one turns out to have defective genes. Similarly, even one willing to use developmental metaphors might nonetheless profess to be able to distinguish between, on the one hand, development that, however unexpected (and thus unforeseen), can be shown to have been gen-

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3. See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Judiciary Committee Part I, 100th Cong., 1st Sess. 284-86 (1989).

> [P]assing that historical evidence, which I think casts some doubt on the flat assumption that the 14th amendment really meant separate but equal, let me say this. They wrote a clause that does not say anything about separation. They wrote a clause that says 'equal protection of the laws.'
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> I think it may well be true . . . that they had an assumption which they did not enact, but they had an assumption that equality could be achieved with separation. Over the years it became clear that that assumption would not be borne out in reality ever. Separation would never produce equality. I think when the background assumption proved false, it was entirely proper for the court to say 'we will carry out the rule they wrote' and if they would have been a little surprised that it worked out this way, that is too bad. That is the rule they wrote and they assumed something that is not true.
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> . . . You could suppose they had written a clause that said 'we want equality and that can be achieved by separation and we want that too.'
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> By 1954 it was perfectly apparent that you could not have both equality and separation. Now the court has to violate one aspect or the other of that clause, as I have framed it hypothetically. It seems to me that the way the actual amendment was written, it was natural to choose the equality segment, and the court did so. I think it was proper constitutional law, and I think we are all better off for it.

Id. at 286.

4. See Edwin Meese III, "Address before the D.C. Chapter of the Federalist Society Lawyers Division," reprinted in Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* 25, 30 (Northwestern U. Press, 1988). Meese also proclaimed his support for *Brown*. See Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979, 983 (1987).

erated in substantial part by the organism's internal structure and, on the other, outright mutation generated by exogenous causes.

Thus I arrive at the central topic of this article, which is to unpack some of the various meanings packed within the term "amendment." Americans, at least, confront the notion of amendment in the context of our commitment to a legal order presumptively structured by reference to some set of basic norms that are independent of the *ordinary* political process. These norms are at once the pride and bane of (a distinctively American) political theory.[5] They are our pride insofar as they stand for the protection of the rights of unpopular minorities against the desire of legislative majorities to restrict them; they are our bane insofar as they serve by definition to restrict popular democracy, itself a basic norm of our system. At the very least, it is often argued, popular sovereignty should be honored in the absence of constitutional limitations. What these limitations are is, of course, the central issue of American constitutional theory.

I

Acquaintance with the ordinary operations of our legal system makes us aware of the crucial contrast ordinarily offered between ordinary development by "interpretation" and extraordinary development by "amendment." The former is, almost by definition, unexceptional; the latter signifies something out of the ordinary, something truly *new*. Thus the Supreme Court, through Felix Frankfurter, has insisted that "[n]othing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without with same process."[6] "New," in this context, is clearly a term of art, since presumably no one would deny that law could change and in that sense be "new": different at time T_1 from what it was at time T. The contrast between interpretation and amendment is akin to that between organic development and the *invention* of entirely new solutions to old problems. From this

5. I agree with Bruce Ackerman both that American thought *is* distinctive in its conceptualization of law *and* that we are tempted to forget its distinctiveness and try to fold it into the two central traditions bequeathed us by European thought, a focus on natural justice, on the one hand, or simple acquiescence to parliamentary sovereignty, on the other. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 455-56, 461-86 (1989). Ackerman elaborates his argument in *We the People* (Harvard University Press, 1991).

6. *Ullmann v. United States*, 350 U.S. 422, 428 (1956). I owe my awareness of this quotation to Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change* 163 (Peter Lang Pub., 1990). Suber's book came to my attention only after the preparation of this article, though it is clearly relevant to many of the themes I want to address.

perspective "interpretations" are linked in specifiable ways to analyses of the text or at least to the body of materials conventionally regarded as within the ambit of the committed constitutionalist.[7] "Amendments" are something else.

Perhaps the simplest way of conceptualizing what we mean by an amendment is to describe it as a legal invention not derivable from the existing body of accepted legal materials. Consider in this context James Madison's plaintive argument to the First Congress, while attacking the legitimacy of chartering the first Bank of the United States, that the Constitution must be interpreted within an ideological framework that accepts as "[t]he essential characteristic of the Government" its composition only from "limited and enumerated powers." By way of exemplifying his view that "no power, therefore, not enumerated could be inferred from the general nature of Government," he stated that "[h]ad the power of making treaties . . . been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."[8]

Assuming that one needs additional proof of the sincerity of Madison's strong distinction between what can legitimately be inferred from the Constitution and what would require amendment for its realization, it is surely provided by his 1817 veto of a bill providing for internal impovements. Though acknowledging "the great importance of roads and canals" and the "signal advantage to the general prosperity" of their improvement, he nonetheless saw it as beyond the enumerated powers even while "cherishing the hope that its beneficial objects may be attained by a resort for the necessary powers" to the procedures "providently marked out in the instrument itself [as] a safe and practicable mode of improving it as experience might suggest."[9] Madison thus had no objection in principle to federally financed internal improvments; he simply believed that Congress was without power to call them into being until what Bruce Ackerman would identify as "we the people" fabricated new powers for the national government and signified that fabrication through formal amendment. And such notions are not found in the United States alone. Thus German Chancellor Kohl justified the refusal of Germany to send troops to the Persian Gulf on the

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7. See Philip Bobbitt, *Constitutional Fate* (Oxford U. Press, 1982) for an elucidation of six "modalities" of constitutional interpretation, all of which are joined *as* "interpretations."

8. Madison's speech to the House of Representatives is reprinted in Paul Brest & Sanford Levinson, *Processes of Constitutional Decisionmaking* 11 (Little, Brown, 2d ed., 1983). The quoted passages can be found at 12, 13.

9. Richard B. Morris & Jeffrey B. Morris, eds., *Great Presidential Decisions* 81 (Richardson, Steirman & Black, Inc., 1988).

grounds that the German constitution prevents the deployment of German troops outside the territory of the North Atlantic Treaty Organization. Yet we are told that the Chancellor wishes "to overcome" this constitutional hurdle, and "Mr. Kohl advocates a constitutional amendment specifically allowing German troops to join international alliances."[10]

In many contexts, therefore, to describe something as an amendment is thus at the same time to proclaim its status as a legal invention and its illegitimacy as an interpretation of the pre-existing legal materials. To designate something as an interpretation, even if one is ultimately not persuaded by it, is to accord it a certain legal dignity that is absent if one rejects the very possibility of its having been offered as a "good faith" exercise in interpretation. The latter will probably be described as an attempt to "amend" the Constitution surreptitiously, in violation of the approved procedures by which inventions are accepted into the constitutional fabric.[11] This may be what Madison meant to suggest when he stated that "it was not possible to discover in [the Constitution] the power to incorporate a Bank,"[12] though perhaps he meant simply that it was indeed "possible"—Alexander Hamilton showed exactly how one could do it—but ultimately unpersuasive. A pervasive problem in analyzing legal rhetoric, of course, is knowing when statements should be read as mere hyperbole—as in regular denunciations by one or another Supreme Court justice of a colleague's position as "without merit"—or as something else presumably far more serious, challenging either the professional competence or moral integrity of those who reject one's own proferred interpretations.

I think that those of us interested in constitutional hermeneutics can especially profit from asking what sorts of changes in our political system could, on the one hand, be authorized through ordinary legislation and/or judicial interpretation (or, for that matter, activity by the executive branch in the absence of explicit statutory authorization) and what sorts, on the other hand, would require the inventiveness of "amendment." For example, could Congress simply authorize by legislation, or the Court otherwise legitimize through judicial decision, the election to office of a foreign-born 23-

10. See John Tagliabue, *A Threat to Kohl*, N.Y. Times A1, A8, col. 1 (April 23, 1991) (late edition).

11. Though see Suber's discussion of "amendment by interpretation" in *The Paradox of Self-Amendment* at 197-206 (cited in note 6) and his comment that "[s]ince the New Deal era the fact of judicial amendment has become commonplace." Id. at 415 n.3. However, he adds that "the debate has shifted from its occurrence to its desireability and legitimacy," id., which suggests, among other things, that there is still more than a little resistance to the acceptance of this "commonplace" practice.

12. Brest and Levinson, *Constitutional Decisionmaking* at 11 (cited in note 8).

year-old as President? Most analysts no doubt would believe this to be impossible, suggesting that this is a paradigm instance where "amendment" would be necessary and plausible "interpretation" unavailable. Even this may not be self-evident, as Professor D'Amato has recently argued,[13] although D'Amato's clever argument doesn't overcome the fact that most persons within the contemporary interpretive community would regard his argument, if presented within ordinary discourse, as "off-the-wall" and demonstrative of an inability to understand the working conventions of our constitutional system (one of which is the important distinction between interpretation and amendment and the entailed position that not *everything* can be inferred from pre-existing legal materials).

Though I am primarily interested in raising our consciousness about how we construct in our constitutional discourse the boundaries between interpretation and amendment, I should note that the latter is a gross category that can be subjected itself to further refinement. Walter Murphy, for example, adopts an argument from West German (now presumably German) constitutional law that a true "amendment" does not "materially change" the pre-existing structure of government, but merely "supplement[s]" or otherwise perfects the structure.[14] Such a distinction rapidly takes us into the higher metatheoretical question of whether a purported constitutional amendment could itself be unconstitutional as going beyond the implicit limitations on amendment generated by a correct understanding of the Constitution. Murphy's argument, albeit unusual, is not original.

As early as 1865, during congressional consideration of what became the thirteenth amendment, abolishing slavery, there was an attack on the constitutional propriety of any such amendment. Representative C.A. White, for example, presented "[t]he very term 'amendment' [as] itself a word of limitation," disallowing a "plenary, omnipotent, unlimited power over every subject of legislation."[15] Representative White therefore attacked the proposed amendment for invading the entrenched powers of the state to control property and domestic institutions. Interestingly enough, Rep-

13. See Anthony D'Amato, *Aspects of Deconstruction: The 'Easy Case' of the Under-Aged President*, 84 Nw. U.L. Rev. 250 (1989).

14. See Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. Cal. L. Rev. 703, 754-57 (1980). See also Sotirios A. Barber, *On What the Constitution Means* 43 (Johns Hopkins U. Press, 1984) ("In our everyday discourse we distinguish amendments from fundamental changes because the word *amendment* ordinarily signifies incremental improvements or corrections of a larger whole.").

15. See Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 282 (West Pub., 1990), as well as the other speeches collected at 278-289 canvassing the issue.

resentative Boutwell, a warm supporter of the amendment, agreed with the proposition that the amendment power was not unlimited. Thus he suggested that article V did not authorize amendments that would "establish slavery, or . . . invite the King of Dahomey to rule over this country" insofar as they would contravene the purposes of the Constitution as laid out in the Preamble.[16] This controversy did not die with the Reconstruction debates.

Thomas M. Cooley, certainly among the leading constitutional commentators of his generation, argued that a genuine amendment must "in the very nature of the case . . . be in harmony with the thing amended, so far at least as concerns its general spirit and purpose. It must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it."[17] He wrote, therefore, that "[t]o convert a democratic republic into a government ruled by a privileged aristocracy or by a king, through an amendment of its constitution, is simply an impossibility. The change would not be an amendment but a revolution."[18] Indeed, for Cooley

> *any* step in the direction of establishing a government which is entirely out of harmony with that which has been created under the constitution, or which is in the direction of taking the power of the state from the people and of substituting principles of government which were rejected when the constitution was established, though it may be taken in the most formal and deliberate manner, and in precise conformity to the method of amendment established by the constitution, is inoperative in the very nature of things, unless it be taken expressly as a revolutionary proceeding, to be accepted if need be, and upheld, by force.[19]

Baltimore attorney William Marbury made a similar argument in a 1919 Harvard Law Review article,[20] where he distinguished

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16. Id. at 285-86.

17. Thomas M. Cooley, *The Power to Amendment the Federal Constitution*, 2 Mich. L.J. 109, 118 (1893). See also *Correspondence*, id. at 334 for a letter by Cooley briefly reiterating his argument. I owe these references to Professor Stephen Siegel, whose article, *Lochner Era Jurisprudence and The American Constitutional Tradition*, when published, will be a major contribution to the understanding of American constitutional theory. See also *Livermore v. Waite*, 102 Cal. 113, 119, 36 Pac. 424, 426 (1894): "[T]he term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."

18. Cooley, 2 Mich. L.J. at 118 (cited in note 17).

19. Id. at 119 (emphasis added).

20. William L. Marbury, *The Limitations Upon the Amending Power*, 33 Harv. L. Rev. 223 (1919). The article is discussed in a very helpful article by John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 Am. J. Leg. Hist. 44, 60-61 (1991). See also John R. Vile, *The Amending Process: Alternative to Revolution*, 11 Southeastern Pol. Rev. 49 (1983).

between the power to "amend" the Constitution and "the power to *destroy* it."[21] Unlike Cooley's essay, Marbury's was directed at concrete legal controversies, particularly the eighteenth and nineteenth amendments, both of which he deemed illegitimate inasmuch as they fundamentally "destroy[ed] the states, by taking from them, directly, [some] of their legislative powers."[22]

Most of the contemporary adherents of limitations on the amending power have been distinguished non-lawyer students of the Constitution, such as Murphy, Sotirios Barber, and Will Harris. It is thus worth mentioning that they have more recently been joined by well-established members of the legal academy. Yale Law School Professor Akhil Reed Amar, for example, distinguishes "between true constitutional amendments (changes within the pre-existing deep structure of the document) and constitutional repudiations (which may formally seem to fit Article V, but in fact reject the Constitution's essence of deliberative popular sovereignty)."[23] And Yale student Jeff Rosen, responding to the recent controversy concerning the proposed Flag Burning Amendment, has argued that should it have been proposed by Congress and ratified by the requisite number of states, it should nonetheless have been deemed unconstitutional by the judiciary inasmuch as it abrogates a right "retained by the people" and protected by the ninth amendment.[24]

Nor are our difficulties over even if we concede that a particular change does not constitute a revolutionary transformation (and thus finesse the question whether it would be illegitimate if it *were* such a transformation). Some of the metatheoretical questions at the core of this discussion turned up to constitute the very core of a recent decision of the California Supreme Court, *Raven v. Deukmejian*.[25] That case concerned the legitimacy of Proposition 115, passed by popular referendum, which required multiple amendment of California's criminal code in both its substantive and procedural aspects. Several challenges were mounted against the Proposition, the most important, for our purposes, being one predicated on Article 18 of the California Constitution. That provision allows California's "electors" to "amend the Constitution by initia-

21. Marbury, 33 Harv. L. Rev. at 225 (emphasis in original) (cited in note 20).

22. Id. at 228.

23. Akhil R. Amar, *The Amendment Process (Outside Article V)*, Supplement to the Encyclopedia of the American Constitution (forthcoming).

24. See Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?* 100 Yale L.J. 1073 (1991). See especially pp. 1084-1089 for a discussion of "Natural Rights Limitations on the Amendment Power" and references to some of the recent literature concerning the scope of the amendment power under article V.

25. 52 Cal. 3d 336, 801 P.2d 1077 (Cal.), 276 Cal. Rptr. 326 (1990).

tive," but it goes on to require that a "revision" of the Constitution first be proposed either by a constitutional convention or by the legislature, followed by popular ratification. An "amendment" is presumably only a relatively marginal change, in contrast to far more substantially transformative "revisions." The Court pronounced one section of the Proposition just such a "revision," so that it was therefore unconstitutional given its origin simply in a popular referendum. It was precisely an example of the "comprehensive changes" requiring "more formality, discussion and deliberation than is available through the initiative process."[26]

So we now have, at the very least, the following spectrum of possibilities in regard to describing any given legal development X: (1) It is, especially if the result of a judicial decision, simply a recognition, called "interpretation," of what was already immanent within the existing body of legal materials; (2) It is, especially if a statute passed by a legislature, a change not disallowed by the constraints established by the Constitution and thus what might be termed an allowable "interpretation" of the powers allowed legislatures by the Constitution; (3) It represents a genuine change not immanent within the pre-existing materials or allowable simply by the use of the powers granted (or tolerated) by the Constitution, although the change, being fairly marginal, allows one to speak of it unproblematically as an "amendment"; (4) It represents a genuine change of such dimension as to be described as a "revision"—i.e., a special kind of amendment—but that change, nonetheless, is congruent with the the immanent values of the constitutional order. Still, given its dimensions, it might require some special procedures to give it validity, such as those set out by the very text of the California Constitution or, perhaps, in what can be validly inferred from the existence of multiple paths to constitutional amendment set out in Article V of the United States Constitution;[27] (5) It represents a change of such fundamental dimension as to be called truly revolutionary and thus taken out of the language of amendment at all.

All of these distinctions merit more discussion, but what follows will concentrate only on the first three, the clarification of what is immanent that we call "interpretation" and the addition to what is immanent through amendatory change. Presumably one must accept at least the plausibility of *that* distinction in order to proceed further into the intellectual thickets set out above.

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26. 52 Cal. 3d at 342.

27. See William Harris, *The Interpretable Constitution* ch. 4 (forthcoming).

II

Having already introduced, through James Madison, the issue of the United States Bank, let me turn to John Marshall's opinion upholding the Bank in *McCulloch v. Maryland*,[28] justifiably regarded as perhaps the most majestic single opinion of the Supreme Court in our two-century history. Technically, of course, it concerned only the constitutionality of the Second Bank of the United States, given that the First Bank had expired in 1811. But I think it fair to say that *McCulloch* also serves as an advisory opinion that the First Bank was perfectly constitutional as well, thus joining the First Congress in rejecting Madison's advice that it was not. Just as important, of course, is the host of congressional legislation that could be now passed under the broad reading of national powers articulated by Marshall, who took the occasion to spell out an overarching theory of national power that can be read as assigning basically plenary authority to Congress. I will not rehearse all of what is surely familiar to most of you, including the functional elimination of the tenth amendment and the necessary and proper clause as meaningful limits on the federal government. I cannot resist, though, quoting one of the single most famous sentences of the opinion, where Marshall emphasizes that he is expounding "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[29] Interestingly enough, the word Marshall emphasizes is "crises." I prefer, on the other hand, to put a bit more stress on the word "adapted."

The theory, even if not the particular result, of *McCulloch* concerned, indeed appalled, many eminent Americans of the time. For my purposes, among the most interesting reactions was that of Madison himself. Although Madison, sometimes denominated "the father of the Constitution," acquiesced in the constitutional legitimacy at least of the bill establishing the Second Bank of the United States, which he had signed as President, he had never formally repudiated his opposition, on constitutional grounds, to the First Bank, and he was clearly disturbed by the breadth of Marshall's opinion. Writing the great Virginia Justice Spencer Roane following *McCulloch*, Madison wondered what might have happened some three decades earlier had the supporters of the new Constitution frankly articulated "a rule of construction . . . as broad and pliant as what has occurred." He could not "easily be persuaded that the avowal of such a rule [at the state ratifying conventions]

28. 17 U.S. (4 Wheat.) 316 (1819).
29. 17 U.S. at 415.

would not have prevented its ratification."[30]

Consider in this context, then, a comment by Professor James Boyd White, who somewhat laconically writes that Marshall's opinion in *McCulloch* "seems to be less an interpretation of the Constitution than an amendment to it, the overruling of which is unimaginable."[31] The "amendment" presumably involves not the legality of the Bank *per se*, for there are a number of routes by which that could have been upheld,[32] but rather the doctrine by which Marshall justified it, which operated to give Congress (and the national government) much more power than a more limited reading of the Constitution would have.

I think it is important that Professor White, who is unusually careful in his use of language, does not appear to be leveling a criticism against either the opinion or Marshall, even as he offers a kind of support to Madison's skepticism about the provenance of Marshall's opinion. White comes truly to praise Marshall rather than to criticize him. But if White captures our common understanding—i.e., if we share *both* his perception of *McCulloch* as a *de facto* amendment *and* his willingness to commend Marshall's performance in *McCulloch*—then we need, I believe, to integrate that understanding into the contemporary debate about constitutional interpretation. This debate in substantial measure concerns the limits on the authority of constitutional interpreters, whether judges or others. It was Marshall, of course, who in *Marbury v. Madison* had defined the importance of a written constitution—the "greatest improvement on political institutions" put forth by the new American nation—as consisting in the specification of powers (and limits) of the government.[33] The problem, of course, is how we decide disputes about what the "writing" actually means. Is *McCulloch* an example of remembrance or forgetting? And does Marshall exhibit

30. Letter of September 2, 1819, in Max Farrand, ed., 3 *Records of the Federal Convention of 1787*, 435 (Yale U. Press, 1911).

31. James White, *When Words Lose Their Meaning* 263 (U. Chi. Press, 1984). Professor White is certainly not the first person to view Marshall as something other than the mere applier, through interpretation, of constitutional commands. Thus Peter Suber quotes from an 1890 report of the New York State Bar Association that states, "It is almost incorrect to say that throughout this period [1804-65] the Constitution was unamended, for it was so expanded by the decisions of Marshall that they amounted to virtual amendments to its text." Peter Suber, *The Paradox of Self-Amendment* 199 (Peter Lang Pub., 1990).

32. Marshall could have, for example, stated that the "necessary and proper clause" required a determination by Congress that the Bank was extremely important (and not merely convenient) and that Congress had done so, or he might have engaged in an independent determination of the "compelling interest" (to use a thoroughly anachronistic term) behind the Bank and found that there was indeed such a compelling interest. The fundamental importance of *McCulloch*, of course, is that he did neither.

33. 5 U.S. (1 Cranch) 137, 178 (1803).

a mastery of judicial craft or a much more ominous (to some) Nietzschean (or Humpty-Dumptyish) mastery of text and language?[34]

In any case, we must decide on our own appellation for Marshall's exercise in constitutional argument in *McCulloch*. Marshall's own word to describe *McCulloch* is "adaptation"; White's is "amendment"; Jefferson, always more plain-spoken, might well have used the word "usurpation,"[35] given his description in 1820 of the judiciary as a "subtle core of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."[36]

The problem posed by Marshall and *McCulloch* is, of course, repeated in many other cases. Consider, as only one example, our treatment of the constitutional text stating that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Most contemporary analysts "know" (and teach) that the "proper" reading of this patch of text is that states shall not pass laws *unreasonably* impairing the obligation of contracts. Recall the important opinion by Chief Justice Hughes in the *Blaisdell* case[37] that crucially interpreted the Contract Clause to mean less than the categorical prohibition the "naive" reader might have thought it required. Though Hughes' opinion is suffused with reference to the "emergency" facing the nation, he blandly insisted that "[e]mergency does not create power" but provides only the "conditions" for exercising otherwise legitimate power. That is, no "amendment" was necessary in order for the Minnesota legislature to meet the threat to economic stability posed by the Great Depression; ordinary interpretation sufficed to supply the power. But it is obvious that one could describe the result in *Blaisdell* (and its justification by Hughes) in the terms White applied to Marshall's opinion in *McCulloch*.

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34. Even Robert Bork is hesitant to condemn Marshall. In his book *The Tempting of America: The Political Seduction of the Law*, Bork labels Marshall "an activist judge," but asserts that "his activism consisted mainly in distorting statutes in order to create occasions for constitutional rulings that preserved the structure of the United States. Although he may have deliberately misread the statutes, he did not misread the Constitution. His constitutional rulings, often argued brilliantly, are faithful to the document." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 21 (Free Press, 1990). Bork would presumably vigorously disagree with White's analysis of *McCulloch*, not to mention Madison's criticisms as expressed to Spencer Roane. It is obvious, of couse, that this raises significant problems for anyone who is, like Bork, committed to so-called "original intent" as the authoritative guide to constitutional meaning, for one can hardly resist asking why Marshall is a more authoritative guide to constitutional meaning than "Pops" Madison.

35. See Letter to Spencer Roane (Sept. 6, 1819), in Merrill D. Peterson, *The Portable Thomas Jefferson* 562 (Viking Press, 1975).

36. Letter to Thomas Ritchie (Dec. 25, 1820), in Dumas Malone, 6 *Jefferson and His Time* 356 (Little, Brown, 1981).

37. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

There is nothing "special" about a case like *Blaisdell*, save for its particular dramatic import within the context of the New Deal. The identical problem, of course, is posed by any first amendment case that ends up in fact allowing an infringement of speech. But it is well known that not even ardent members of the ACLU believe that false proxy statements or perjurious testimony should in fact be protected against federal sanctions, and few believe that "amendment" of the first amendment is a prerequisite to regulation.

Can we hope to achieve a principled (and is this the same thing as saying "disinterested" or "non-political"?) resolution of the dispute about how we should describe cases like *Blaisdell* or its first amendment equivalents? Are there formal criteria, teachable by constitutional adepts, that can be learned by students of the Constitution, that will allow us to agree, as a presumed "factual" matter, on what constitute interpretations and amendments? (We could still disagree, of course, on the "value" attached to any particular proferred example.) If one answers, with me, that the answer is no, what might that tell us about our overarching topic—the implications for constitutional theory of grappling with the issue of constitutional amendment?

III

I thus (finally) arrive at an explanation of the title of this article and its request that the reader supply the number of amendments to the United States Constitution. If White is correct and the doctrine enunciated—dare one say the constitutional reality brought into being?—by *McCulloch* is "in fact" an amendment to the Constitution, then it would seem to follow that the answer to my multiple choice question *cannot* be "(b) 26," however common that answer might be.[38] In my multiple choice test, "26" refers simply—and, I want to argue, *merely*—to the number of explicit textual additions to the 1787 document. Even this way of putting it is not without its ambiguities, given the multiple thrusts of several of the amendments. There is, for example, no theoretical reason for the inclusion in the fifth amendment of the right to a grand jury before indictment together with the right to compensation for a taking,[39] nor would it have violated any sense of organic integrity to join what we call the

38. Or, more precisely, it might be said that the answer could be 26 only if by some sheer coincidence that turned out to be the final number after applying a sophisticated theory of constitutional amendment.

39. As Akhil Reed Amar has recently suggested, there may be a good political reason, i.e., the "bundling" of the compensation clause, which apparently only James Madison thought particularly important, with other provisions much more popular. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1181 (1991).

fourth and sixth amendment, together with the grand jury and self-incrimination portions of the fifth, into a single amendment dealing with criminal procedure. Nor would it have been jarring for the fourteenth amendment to have been broken down into several separately numbered amendments.

What I want to argue (perhaps "assert" is the more accurate term) is that it is almost literally thoughtless to believe that the best answer to my conundrum is "26" at least if one means to be asking a theoretically interesting question. The only question to which one can be confident that that can be the best answer is "how many explicitly numbered textual additions to the Constitution have occurred since 1787?" Perhaps it is a part of what E.D. Hirsch might call "cultural literacy" to know that the answer to *that* is "26," but I will be so bold as to say that that answer, without more, demonstrates a theoretical illiteracy that is far more alarming than would be the failure to remember, say, that we have a twenty-fifth amendment to the Constitution. Knowing that there have been twenty-six explicit numbered textual additions to the Constitution demonstrates no more understanding of the American government than the knowledge of how many vice-presidents we have had (knowledge that I will freely confess I do not now possess). Central to understanding the American government—whether as lawyer or political scientist—is recognition, and concomitant assimilation, of the extent to which the Constitution has indeed been amended, been the subject of political inventiveness, by means other than the addition of explicit text.[40]

You could certainly be excused if you believed, on the basis of my harsh criticism of "26" as the answer, that the answer at least cannot be "(a) [fewer than] 26." This would seem to follow from the proposition that there have been at least the 26 specifically numbered inventions plus *at least one more* (*e.g.*, Marshall's opinion in *McCulloch*, which would, of course, suggest that the best answer is "(c) [more than] 26"). Alas, I don't think we can so readily reject "(a)" as a candidate for the best answer. How can this be, given the existence of 26 numbered textual additions? The answer lies in determining if all of these numbered textual additions genuinely differed from what was already immanent in the pre-existing understandings or if at least some of them merely "declared" or "recognized" what was already there for anyone with a gift of interpretive insight to grasp. Unless the numbered textual addition is

40. This is obviously the crux of Bruce Ackerman's extraordinary work, though, as shall be indicated below, I believe that he has failed to confront the importance of the interpretation-amendment distinction for his own enterprise.

thought by a competent lawyer to change the pre-existing legal reality, then I am hesitant to deem it an "amendment" in any theoretically interesting sense.

Surely the very existence of the numbered textual additions is presumptive evidence that they were thought to be required and interpretation unavailing? Well, yes and no. Perhaps they are evidence that *someone* at the time of their adoption thought they were required, though an entirely separate question is whether *we* think they were required. But it is not even clear that supporters of several of the textual additions believed that the additions genuinely changed the meaning of the Constitution as correctly understood.

This issue of the "necessity" of amendment was present at the very beginning of the Constitution. After all, the principal impediment to ratification was the failure of the Convention to include a bill of rights. The supporters of the Constitution insisted that no such bill was necessary, for the national constitution, unlike its state counterparts, was adopted under a theory of "assigned powers." That is, the national government was not plenary, lacking only that power specifically excluded by the foundation document. Instead, it had only those powers specifically granted by the constitutional text. Alexander Hamilton made this the crux of his argument in the 84th Federalist: How could anyone seriously believe that Congress could have the power to regulate the press, given that it was nowhere assigned any such power? "[T]he constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given."[41] James Wilson, who played a far more important role than Hamilton at the Philadelphia convention and became one of the first members of the United States Supreme Court, had made a similar argument to the citizens of Philadelphia in regard to demands for the addition of a specific protection of freedom of the press: "The proposed system possesses no influence whatever upon the press; and it would be been merely nugatory, to have introduced a formal declaration upon the subject."[42]

Indeed, to call it "nugatory" might be to compliment the first amendment. James Iredell pronounced it "not only useless, but *dangerous*, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation."[43] From this

41. Federalist 84 (Hamilton) in Jacob E. Cooke, ed., *The Federalist Papers* 575 (Wesleyan U. Press, 1961).

42. James Wilson, An Address to a Meeting of the Citizens of Philadelphia (1787), quoted in Lucas A. Powe, *The Fourth Estate and the Constitution* 44 (U. Cal. Press, 1991).

43. Speech of July 29, 1788, before the North Carolina ratifying convention, quoted in

perspective, the first amendment does indeed drastically change the constitutional understanding, though *not* by prohibiting Congress from regulating speech or the press; rather, it is by implicitly adding to Congress's powers the ability to regulate everything that is not specifically named in the Bill of Rights.[44]

If one accepts the more moderate version of the Hamilton-Wilson argument,[45] though, then the first amendment is rendered wholly "unnecessary"; proper interpretation would preclude conscientious members of Congress from passing, the President from signing, or the judiciary from enforcing, a bill abridging speech, establishing a national church, or whatever, inasmuch as such power was not specifically assigned the Congress in Article I. It may be jarring to suggest that the first amendment contributes nothing, strictly speaking, to the Constitution.[46] That may be evidence, however, only of the distance we have traveled from the original understanding of the Constitution as creating only a limited government of assigned powers. In any event, there is no reason to believe that even all of the representatives who voted for the first amendment did so in the belief that it was "required" in order to preserve the liberties enunciated. They just as likely may have believed that it was required as a political gesture to anti-Federalists who might, if not appeased, use the very procedures of Article V to bring into being a new constitutional convention that would reconsider the Philadelphia handiwork ostensibly ratified by the state

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Farber & Sherry, *A History of the American Constitution* at 224 (cited in note 15) (emphasis added).

44. Indeed, the ninth amendment was added specifically to forestall such an interpretation. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1162-64 (1987).

45. One problem with this analysis, of course, was the existence of Article I, Section 9, which specifically prevents the Congress from, among other things, passing bills of attainder or creating titles of nobility. Indeed, Hamilton specifically emphasizes the importance of Section 9 as providing basic protection; he does not, however, address the point that if Section 9 is in fact "necessary" in order to prevent such legislation, then the Wilson-Hamilton argument fails. Many opponents of the Constitution were not so restrained and gleefully pointed out the tension between Section 9 and the argument that the Constitution should be construed only as a grant of explicitly assigned powers.

46. Fred Schauer has suggested to me that perhaps the real importance of the first amendment is its incorporation into the fourteenth amendment as a limitation on the states. If one predicate of eighteenth century constitutional theory was the limitation of the national government only to its assigned powers, another was the basically plenary powers of the states, which indeed made it crucial to establish bills of rights in state constitutions against the power of the otherwise unconstrained state. Without the textual presence of the first amendment, it would have been much harder to impose its norms on states. Perhaps, but surely one could have reached many of the same results either through interpretation of the "privileges of immunities" clause of the fourteenth amendment or the "republican form of government" clause in Article IV. It is undeniable that the existence of the first amendment provided a powerful rhetorical resource, but this is quite different from arguing that it was "necessary" to attaining the ends sought.

conventions.[47]

It may be a nice thing to have a clear specification of the inability of Congress to regulate the press or establish a religion, but that is a stylistic more than a legal insight, for nothing would be lost, according to the Hamiltonian argument, by the absence of the amendment. From this perspective, as a matter of law the amendment may be little more than a "guide to the dimwitted" who need the aid of textual specification, even though the rest of us would arrive at precisely the same destination through the use of acceptable techniques of constitutional interpretation. There is one other, somewhat more generous, explanation available, though it scarcely emphasizes the "necessity" of the amendment. Amar has noted the importance that James Madison placed on the inclusion of "fundamental maxims of free government" within the constitutional text itself as a means of popular education.[48] Hamilton rather acerbically dismissed such didactic "aphorisms which make the principal figure in several of our State bills of rights"; he deemed them more suited to "a treatise of ethics than . . . a constitution of government."[49] Perhaps one finds Madison more plausible than Hamilton, and this would make the addition of the first amendment to the Constitution of some genuine *political* significance in terms of the socialization of the citizenry. But the rigorous lawyer would presumably find this of relatively little importance when trying to decide its *legal* significance.

One may resist the view that the first amendment adds nothing of legal importance to the Constitution. But surely it is difficult to disagree with Madison's own concession that the *tenth* amendment "may be considered as superfluous."[50] Indeed, Amar notes that "the congressional resolution accompanying the Bill [of Rights] explicitly described it as containing 'declaratory' as well as 'restrictive' provisions."[51] Consider in this context the careful statement by then-Justice Rehnquist that "an express *declaration*" of federalistic limits on Congressional power "is *found* in the Tenth Amend-

47. See Professor Paul Finkelman's important article, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 328-47, which offers just such a "political" interpretation of Madison's support for the Bill of Rights and rejects the oft-argued view that Jefferson had persuaded Madison that such amendments were desirable on the merits.

48. See Amar, 100 Yale L.J. at 1208-09 (cited in note 39). The quoted phrase comes from an October 17, 1788 letter of Madison to Thomas Jefferson.

49. Id. at 1208 n.344, quoting Federalist 84.

50. Id. at 1154 n.109, quoting Madison's speech to the House of Representatives of June 8, 1789.

51. Id. at 1154 n.109, quoting 2 *Documentary History of the Constitution* 321 (Dept. State, 1894).

ment"[52] rather than, say, "*granted*" or "*established*" by that amendment.

Imagine, then, asking supporters of a textual addition to indicate *precisely* why they thought it was required. It is far different to say, on the one hand, "because the Constitution cannot legitimately be interpreted to allow X, and the new text will authorize X" or, on the other, "because even though the Constitution, correctly interpreted, already contains X within it, we nonetheless should add a patch of text either to control the stupid or politically malevolent judge or to educate the citizenry who look to the Constitution for memorizable maxims of government." I presume, for example, that many more supporters of the ERA believed that it was "required" for one of these second reasons than for the first. (Among other things, incidentally, this model, if accurate, speaks to the priority that even sophisticates might give to "textualism" as what my colleague Philip Bobbitt calls a "modality" of interpretation. Other techniques seem so fancy, while reference to a text seems to eliminate any problems.)

One cannot say, then, with any particular confidence that all of the textual additions were thought even by their supporters at the time to be legally necessary. But the problem becomes even more complex when we address certain textual additions from our own contemporary perspectives as well-trained lawyers. Take, for example, the thirteenth amendment, abolishing slavery. Surely those who believed, with Frederick Douglass, that the Constitution never allowed slavery in the first place, could scarcely have believed that an amendment was necessary to abolish it.[53] Still, Douglass undoubtedly represented a minority position, and most partisans of the thirteenth amendment, including Abraham Lincoln, believed that it was legally necessary. But we in 1991 certainly need *not* believe, as a legal proposition, that the thirteenth amendment is "necessary" in order to abolish slavery. To hold such a view would require rejection of the propriety of practically every important commerce clause decision since 1937. Can it conceivably be the case, for example, that a Congress authorized to tell the Darby Lumber Company that it must pay a minimum wage to its laborers is without the power to transform chattel slavery? If we accept the legitimacy of decisions like *Darby, NLRB v. Friedman-Harry Marks Clothing Co.* (the fascinating companion case to the more famous

52. *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976) (emphasis added).

53. For Douglass's argument (which was not original with him), see *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* in Philip Foner, ed., 2 *The Life and Writings of Frederick Douglass* 467-80 (International Pub., 1950), discussed in Sanford Levinson, *Constitutional Faith* 31, 76-77 (Princeton U. Press, 1988).

Jones & Laughlin decision), and *Wickard v. Filburn*, then we simply cannot believe that the thirteenth amendment is of much more than symbolic importance.[54] (I do not berate symbolism: that was a good enough reason to support the Equal Rights Amendment, but there is an obvious difference between praising either the thirteenth amendment or the ERA as a symbolic artifact and asserting that it was "necessary" to transform legal possibility.)

I am even more confident that few contemporary analysts—about the same number who believe that a constitutional amendment was necessary in order to disallow school segregation—believe that the fifteenth and nineteenth amendments are "necessary," given contemporary intepretations of the fourteenth amendment in regard to racial and gender classification concerning fundamental rights. And, if the Supreme Court was correct in *Harper v. Virginia Board of Elections*,[55] which found Virginia's poll tax for state elections to violate the Constitution, then surely the twenty-fourth amendment, which two years before barred a poll tax in federal elections, is wholly unnecessary. Only if one agrees with Justice Harlan's considerably less generous reading of the fourteenth amendment would it be the case that we would lose something legally significant were the fifteenth, nineteenth, and twenty-fourth amendments suddenly to disappear from the text of the Constitution. Indeed, ironically (but fittingly) enough, there were some supporters of the fourteenth amendment who nonetheless argued that *it* was not at all necessary because it simply spelled out what a correct interpretation of the Constitution already required.[56] Let me quickly concede that an accurate historical portrayal of the back-

54. Both Fred Schauer and Akhil Reed Amar have reminded me that I am overlooking one important legal consequence of the thirteenth amendment, at least given the argument in the text concerning the power of Congress to abolish slavery under the (modern reading of the) commerce clause: The thirteenth amendment *entrenches* that abolition of slavery; thus, Congress loses the option it has under the commerce clause of acquiescing to the use of slave labor in the states. Ordinary legislation, by definition, can be overridden by a subsequent legislature. Thus the thirteenth amendment is not a genuine parallel to the Equal Right Amendment unless one adopts Douglass's view that the unamended Constitution, correctly read, was as hostile to slavery as the unamended Constitution, correctly read, is supportive of gender equality.

55. 383 U.S. 663 (1966).

56. See Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954). Graham begins his article by noting that "[a] 'declaratory constitutional amendment' is today almost as baffling and incongruous a concept as an 'unconstitutional constitution.'" For contemporary readers, "[t]o *amend* [the Constitution] is to revise it and change it, not to discover or 'declare' an antecedent meaning, much less to define or redefine some pre-existent natural right or rights." He immediately argues, however, that "it often was squarely otherwise with our ancestors" and that we must recapture that understanding, however alien to current sensibility, if we are to understand the theory underlying the fourteenth amendment on the part of at least some of its most important supporters. (I am grateful to Akhil Amar for reminding me of Graham's article.) For a more recent statement of the

ground of all of those amendments would take into account the perception of some of the best constitutional analysts of the day that they were indeed "necessary." But this is only to highlight one of the central mysteries of the doctrinal operation of what I call "constitutional faith": the process by which "best constitutional analysis" is subtly transformed by the passage of time so that a given legal doctrine, say the power of Congress under the Commerce Clause, becomes radically transformed without formal amendment ever being deemed necessary.

Someone who disagrees with Professor White's designation of *McCulloch* as an amendment—and disagrees as well with the description of any *other* decision as a *de facto* amendment—might well have an interpretive theory sufficiently generous to view many of the explicit textual additions as unnecessary and spelling out what was already "in" the Constitution to be teased out through legitimate interpretation. Once that move is taken, then "(a) [fewer than] 26" is clearly the best answer, certainly more sophisticated theoretically than "(b) 26." Indeed, the central premise of my argument is that practically *any* answer is more sophisticated theoretically than "(b)."

IV

I want to be clear in what I am arguing (and what I am *not* arguing). I have proferred a distinction—an opposition—between interpretation and amendment even as I have indicated my belief that I cannot provide formal criteria by which to distinguish the two. Furthermore, I strongly suspect that clever analysts can repeatedly show that what are thought to be "interpretations" are "amendments" and, of course, just the opposite, that what were thought to be great constitutional inventions—such as woman's suffrage—were "in fact" not necessary at all because they were already immanent in the existing constitutional regime. Thus it may be that the opposition I am suggesting is what my colleague Jack Balkin has recently termed a "nested opposition,"[57] by which he refers to basic notions that structure our thought even as they are constantly subject to conceptual revision and "deconstructive" analysis. The philosophy from which such an approach is drawn is what has come to be called non-foundational pragmatism. That is, regardless of our inability to provide an allegedly firm, and formalistic, conceptual grounding of our terms, we nonetheless find that we make

"declaratory" thesis, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 90-91 (Duke U. Press, 1986).

57. J.M. Balkin, *Nested Oppositions*, 99 Yale L.J. 1669 (1990).

our way through the world—or, more accurately, through the forms of life that comprise *our* worlds—by recurrence to basic notions that we simply seem unable to leave behind.

Balkin suggests that the public-private distinction is one such nested opposition. Even as the latest analyst proves once more that the distinction is, according to some abstract scheme, untenable, he or she will almost inevitably reinvent it, as even more untenable (and truly unthinkable) is a world that indeed collapses the two notions into one undifferentiated concept. So, I suggest, is it the case with the distinction between interpretation and invention-amendment. As Stanley Fish would be the first to point out, each of us at every moment is quite able to construct—and even believe in—such a distinction so far as our own analyses are concerned. Certainly one cannot make the slightest sense of Bruce Ackerman's enterprise, which I believe to be the most important and imaginative work now being done in the area of constitutional theory, without accepting the distinction.[58] I do not know if Ackerman accepts White's description of *McCulloch* as an amendment (signifying a "constitutional moment," in Ackerman's language). But he must surely believe this to be the case of cases like *West Coast Hotel v. Parrish* and the previously mentioned *Darby Lumber Co.*, even if he would correctly argue that the decisions must be placed within the context of a supple and complex process of amendment of which they were simply the final step. Ackerman rejects *in toto* the earlier New Deal historiography by which the decisions of 1937 were simply restorations of the initial (and presumptively legitimate) Marshallian vision as spelled out in *McCulloch* and *Gibbons v. Ogden*.[59] Were they merely restorations, then there would be no need for him to construct his marvelously complex account of Publian politics and constitutional moments that provide an alternative rendering of the American political process.

The most significant alternative, from the perspective of the traditional lawyer, concerns the relative displacement of Article V as the mechanism by which amendments occur. Not only have Americans been inventive in their use of Article V; more significant, their inventiveness has been manifested in the very process of invention itself. Just as the "scientific method" itself has been transformed in the process of conducting the operations of "science" itself, so has the method of constitutional governance been trans-

58. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989).

59. For a discussion of this point see Sanford Levinson, Review, 75 Va. L. Rev. 1429, 1449-50 (1989).

formed in the process of actually governing ourselves over the past two centuries. It is our ignorance about the methods and procedures that we have actually used to provide the framework of constitutional governance that so disturbs Ackerman and drives his project. Our ignorance is not merely an academic affront; according to Ackerman, it leads to a fundamentally stunted view of political possibility and of our own capacities as potentially Publian citizens who can engage not only in constitutional "interpretation," but, more importantly, constitutional fabrication.

V

I conclude with two comments. The first is that Ackerman has made not the slightest effort to delineate the method by which he recognizes something as an "amendment" rather than a legitimate "interpretation." He can hardly believe that we know it when we see it; his own historiography of the New Deal, as already suggested, contradicts the conventional restorationist understanding of the period. I obviously think that it would be unfair to expect Ackerman to present a fully worked out, formalizable theory that could be applied transhistorically and transculturally. But is it equally unfair to expect him to say more than he has? Does not a theory so dependent as his on the perceived difference between interpretation and amendment require an acknowledgment of the interpretive dilemmas just outlined in this particular paper? After all, unless one believes that the New Deal cases *do* signify amendments, there is literally no need for the complex apparatus of Ackerman's argument.

This first comment is directed at those interested in constitutional theory *per se* and, perhaps most particularly, at Bruce Ackerman himself. But my second comment is directed more at a broader audience, including, at the very least, political scientists and historians. One reason I am so fascinated by Ackerman's project is the sweep of his reconceptualization of American politics and the way it "really works." It is not irrelevant that Ackerman has a joint appointment in the Yale political science department, not heretofore known for its commitment to normative political theory *per se*. His central project is to establish the existence within the operative paradigms of American politics an alternative to Article V as a process of amendment. This alternative process involves a complex mixture of behaviors and perceptions by President, Congress, and the electorate. To examine adequately the plausibility of Ackerman's account requires immersion in the literatures, among

others, of presidential leadership, public opinion, and the operation of the electoral process.

There may still be some political scientists who would respond that the purported distinction between interpretation and amendment is of no interest to them, that it can be freely ignored by those interested in the hard-stuff of political behavior. Most of us, though, by now have been persuaded that this is an implausible account of the doing of political science, that one can scarcely ignore a culture's own self-understanding if one wishes to understand its behavior. Indeed, the very notion of behavior, we have been taught by Clifford Geertz and many others, can hardly be separated from the interpretive understandings attached to winks, raised hands, and other physical actions presumably the focus of our attentions. But one need not resolve this theoretical debate in order to believe that the distinction between amendment and interpretation is of import even to the most tough-minded political scientists. I would be astonished, for example, if the standard textbooks purporting to introduce "American government" to students did not, at some point, make implicit recourse to the distinction by way of teaching the young how amendments are added to the Constitution. To the extent that such discussions focus exclusively on Article V they are, to put it bluntly, wrong. But to expand the discussion beyond Article V demands *some* kind of structured analysis that rapidly leads into just the kinds of distinctions suggested in this paper. Or at least this is my own central thesis.

I hope that I have demonstrated the genuine problems, well worth the investment of our intellectual energies, packed into the conundrum that provides the title for my paper. More particularly, I hope I have demonstrated why "(b) 26" is intellectually bankrupt as *the* correct answer, though it is defensible as *an* answer, so long as one concedes the potential legitimacy of at least one other answer and, perhaps, both (which would justify "(d) all of the above" as the best answer). But, most importantly, I hope to have demonstrated as well why I believe that there is no work going on within the legal academy that so truly leads us into the depths of constitutional inquiry and invites, for their illumination, the interdisciplinary meeting of departments across the entire university community.