

# AUTHORIZING CONSTITUTIONAL TEXT: ON THE PURPORTED TWENTY- SEVENTH AMENDMENT

*Sanford Levinson\**

This essay began as a teaching exercise for my first-year class on constitutional law; a version of it begins the 1993 Supplement to Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking*. The "27th Amendment" is a veritable godsend to all professors who focus on basic theories of constitutional interpretation, and I hope that the discussion below will be pedagogically useful. The uncertain status of the Amendment, however, also raises in an almost pure form the question of the role of the constitutional law professor as a possible "creator" (or at least partner in the creation) of the Constitution, which is the subject of the concluding section of this essay.

## I. THE BACKGROUND OF THE OSTENSIBLE 27TH AMENDMENT

Every casebook on constitutional law, not surprisingly, reprints the "Constitution of the United States." Some do it at the beginning of the text;<sup>1</sup> others put it at the end.<sup>2</sup> Whatever debates might be taking place about the "canon" within the field of American constitutional law,<sup>3</sup> all apparently agree that the text of Constitution itself is part of the canon.<sup>4</sup> So much is un-

---

\* W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School.

1. See, e.g., William Cohen and Jonathan D. Varat, *Constitutional Law: Cases and Materials* 2-16 (Foundation Press, 9th ed. 1993).

2. See, e.g., Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century*, Appendix I (West Pub. Co., 1993).

3. See Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 Chi. Kent L. Rev. 1087 (1993).

4. Though it would be an interesting question to examine as an empirical matter what aspects of the text are in fact taught or ignored by the bulk of the teaching professoriate. How many of us, for example, take the time to teach Article VII, which raises basic questions about the foundation of the Constitution? Also, as I learned several years ago in a visit to China, the Twenty-Second Amendment, with its two-term limitation in regard to the presidency, is of great interest to the Chinese. I confessed that I had never actually

problematic. But is it equally unproblematic what constitutes the canonical textual "Constitution" itself that is to be reprinted? At least at the present time, the answer, I suggest, is no. The reason for this surprising (or, for some, perhaps astounding and incomprehensible) statement is the controversy over the status of the purported Twenty-Seventh Amendment, which reads, "No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election for Representatives shall have intervened."<sup>5</sup>

The controversy surrounding the "27th Amendment" derives from the fact that it was initially proposed as the "second amendment" of the twelve sent by the First Congress to the states in 1789. It obviously was not ratified by the requisite number of nine states at that time,<sup>6</sup> though it was ratified by six states prior to 1800. It did not have a deadline for ratification; indeed, a seventh state ratified the Amendment in 1873. "Rediscovered" in the late 1970s by a student at the University of Texas, it was brought up in many state legislatures. Beginning with Wyoming's ratification on March 3, 1978, it was ratified by 32 states thereafter, with Michigan, on May 7, 1992, becoming the 38th state to ratify the 1789 proposal. A flurry of newspaper stories brought the Amendment, and questions about its status, to public attention. Several major members of Congress indicated their

---

"taught" the Amendment in my constitutional law courses, given that there is in fact no controversy about its meaning. At another level entirely, the "counterfeiting clause" of Article I, § 8, raises extraordinarily interesting questions about constitutional interpretation, including the possibility that the national government is without power to criminalize anything else than counterfeiting, piracy, and treason. See the wonderful article by William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 *Am. Crim. L. Rev.* 1737 (1989). In any event, what might be termed the "operative canon" of the constitutional text is surely more limited than the entire text reprinted in the casebooks.

5. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *Fordham L. Rev.* 497 (1992). Many of the theoretical issues considered in this essay are also discussed in Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 *Yale L.J.* 677 (1993). Lawrence Lessig refers to "the (what ought to be) questionable status of the Twenty-Seventh Amendment" in Lessig, *Fidelity in Translation*, 71 *Texas L. Rev.* 1165, 1168 n.14 (1993). See also Ruth Ann Strickland, *The Twenty-Seventh Amendment and Constitutional Change by Stealth*, 26 *PS: Political Science & Politics* 716 (1993).

6. Rhode Island did not ratify the Constitution, and therefore become a part of the United States of America, until May 29, 1790. See U.S.C.A., Constitution, Arts. 2-7 at 673 (West Pub. Co., 1987). Until that time, then, I presume that it would have taken only nine of the existing twelve states to ratify the amendments and make them part of the Constitution. Upon Rhode Island's joining, the number became 10. By 1992, of course, the constitutionally required number was three-quarters of 50, or 38. Should the District of Columbia (or Puerto Rico) ever become a state, then the number presumably would rise to 39.

doubts about the circumstances of “ratification,” and it appeared that a legislative debate would ensue.

Some legal commentators suggested that the Amendment had “died” in the two hundred years between its first and final ratifications. They emphasized in particular the Supreme Court’s assertion—in *dicta*, to be sure—in a 1921 case, *Dillon v. Gloss*,<sup>7</sup> which involved the then unprecedented placement by Congress of a seven-year time limit for the ratification of the Eighteenth Amendment imposing prohibition on the nation. A unanimous Court, through Justice Van Devanter, indicated that it found nothing in Article V “suggest[ing] that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective.” Indeed, said the Court, there is much “which strongly suggests the contrary.” For example, congressional proposal and state ratification “are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.” Moreover, the very process of amendment itself is presumably triggered by a perception of “necessity” in regard to the topic of amendment, “the reasonable implications being that when proposed they are to be considered and disposed of presently.”

Perhaps most important, though, is the third reason given by the court, the ostensible requirement of ratification “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.” Van Devanter quoted John Jameson’s leading text on the Constitutional Convention for the proposition “‘that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.’”

Indeed, the Court noted that the question of time limits for ratification was not entirely abstract or hypothetical, for it pointed out that rejection of the “contemporaneous ratification” requirement would lead to the conclusion that “four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending.” It therefore went on to offer an advisory opinion that “it is quite untenable” to believe that they

---

7. 256 U.S. 368 (1921).

could now be added to the Constitution after the passage of so many years since congressional proposal. The Court concluded “that the fair inference or implications from Article V is that the ratification must be within some reasonable time after the proposal.”<sup>8</sup>

Citing *Dillon*, among other authorities, Yale professor Paul Gewirtz wrote a letter<sup>9</sup> to Illinois Senator Paul Simon advising that “by concurrent resolution Congress

—formally decline to proclaim the amendment as a ratified part of the Constitution; but

—send the amendment back out to the states for ratification with an explicit ratification period of 7 years.”

Professor Gewirtz admitted that Article V is silent about time limits, but he noted that “[i]n law, virtually all documents are interpreted to contain an implicit reasonable time period. For example, when you extend an offer to someone to enter a contract, such offers are interpreted to be open only for a ‘reasonable’ time period, even in the absence of any explicit time restrictions.” He argued that it was especially important to read a “reasonable time” limitation into Article V: “The point of sending an amendment to the states for ratification is to test whether there is a broad consensus in support of the amendment. Only if the amendment is ratified within a generation or less can we be confident that a consensus has existed at a particular point in time.”

Other commentators endorsed the suggestion that, at the least, Congress hold formal hearings about the provenance of the “27th Amendment” and come to some conclusion about the issue, whether it be to agree with Professor Gewirtz and formally repropose it for new ratifications or to “declare” that the 1789 proposal had been truly ratified. Indeed, Professor Gewirtz wrote Senator Simon that “Congress clearly has the power” to decide “whether ratification has occurred within a reasonable period of time,” citing *Coleman v. Miller*.<sup>10</sup> That case dealt with the ratification process in regard to a Child Labor amendment proposed in 1924, without a time limit for ratification, and ostensibly ratified by the Kansas legislature in 1937. The Court, through Chief Justice Hughes, referred to a congressional authority to “promulgate” amendments—i.e., to declare them ratified—and

---

8. *Id.* at 374-75.

9. Which he was kind enough to share with me.

10. 307 U.S. 433 (1939).

went on to state that Congress “in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications.”<sup>11</sup> Justice Black, writing for a group of four Justices, stated with remarkable extravagance that “Congress has sole and complete control over the amending process,”<sup>12</sup> including the power to determine if an amendment “must die unless ratified within a ‘reasonable time.’”<sup>13</sup> There is, of course, no textual warrant whatsoever for the “promulgatory” function of Congress, let alone for the finality placed in Congress, a fact that seemed not at all to perturb the Justice who would in the course of his career become the greatest (and certainly most insistent) textualist in the history of the Supreme Court.

Arguments like Professor Gewirtz’s were answered in the *Wall Street Journal* by Harvard professor Laurence Tribe,<sup>14</sup> who presumably startled at least some of both his admirers and detractors by taking up the cudgels for a textualism that the later Black could well be proud of.

Article V says an amendment “shall be valid to all Intents and Purposes, as part of this Constitution” when “ratified” by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court’s suggestion, no speedy ratification rule may be extracted from Article V’s text, structure or history.

Tribe pointed to several “mysteries” that an inference of limited time for ratification would create, beginning with one “that a society profoundly divided over questions of when human life begins and ends should grasp quite readily: What would be satisfactory criteria for constitutional ‘life’ and ‘death?’” It is not clear, for example, that an amendment added as the result of a “political wildfire that sweeps the nation and then burns itself out”—consider, for example, the proposed flag-burning amendment of several years ago—would represent a greater consensus “than a ratification trajectory spanning the centuries and representing a considered judgment across generations.” Moreover, there are obvious problems of deciding whom to trust as the consensus recognizer. Does it make any sense to allocate such a role

---

11. *Id.* at 456.

12. *Id.* at 459.

13. *Id.* at 458.

14. Laurence Tribe, *The 27th Amendment Joins the Constitution*, *Wall Street Journal*, May 13, 1992, at A15.

to the National Archivist, who by statute must certify and publish ratified amendments?<sup>15</sup> As for Gewirtz's (and Black's) suggestion that Congress should play that role, Tribe answers that "the 102nd Congress . . . has an ax to grind regarding midterm pay raises" and is therefore "a dubious repository of power to veto ratifications."

For Tribe, Congress's role in the amendment process is limited to its Article V role of choosing a particular amendment process—ratification by legislatures or by special conventions—and to an authority given it by the Necessary and Proper Clause of Article I to include ratification deadlines in the amendments it proposes. Referring to the extension of the time for ratification in regard to the ill-fated Equal Rights Amendment, Tribe adds that Congress "*might* even be able to make midcourse adjustments by adding time limits to still pending amendments that lacked them originally."<sup>16</sup> But Congress has no further "post-hoc role in evaluating constitutional ratifications. It is not Congress's role to declare Michigan's 1992 ratification of the 27th amendment too recent or Maryland's 1789 ratification too ancient." He thus derided the proposal, endorsed by the editors of the *New York Times* among others, that the amendment be returned to the eight states that ratified it before 1980 for re-ratification, which would presumably cure the taint of lack of contemporaneity. "[W]hat," he bitingly asked, "would they be ratifying anyway? A dead amendment that Congress has not re-proposed? And if the amendment is *not* 'dead,' why are the earlier ratifications moribund?"

As it turns out, "Congress . . . rushed to bless the 27th Amendment to the Constitution with near unanimity."<sup>17</sup> Without holding a single day of hearings or, so far as one can tell, a serious debate on the issue, both the House and the Senate on May 20, 1992, pronounced the amendment to be "valid . . . as part of the Constitution of the United States" by votes of 414-3

---

15. See 1 U.S.C. § 106b (1988):

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

16. Emphasis added. One wonders if Professor Tribe really means to say that Congress only "might" have this power, which would entail that perhaps the conservatives were right after all in suggesting that the extension of time for ratification of the ERA was unconstitutional.

17. *Unfinished Constitutional Business*, N.Y. Times, May 24, 1992, § 4, at 10.

and 99-0, respectively. As described by a reporter for the *New York Times*:

Congressional leaders' early assertion that the House and the Senate would make the final decision on the validity of the pay-raise amendment had long since faded by the time both houses voted today. The issue had simply dried up in an environment of public anger over Congressional perquisites and pay raises, and as a result today's votes were regarded as entirely political, giving members a chance to be on record as in favor of the amendment.<sup>18</sup>

Interestingly enough, though, the *Times* article quoted earlier includes the sentence that "[t]he votes today came 24 hours after the 27th Amendment to the Constitution had already been made the law of the land with its publication in the Federal Register by Don W. Wilson, Archivist of the United States." (Indeed, Mr. Wilson had announced on May 13 that he would in fact certify the adoption of the amendment.) Lest we think that the legally untrained Mr. Wilson engaged in his independent analysis,<sup>19</sup> he in fact acted under the warrant of an opinion drafted within the Office of Legal Counsel of the United States Department of Justice.<sup>20</sup> Pointing to the existence within the text of the Constitution of a number of explicit time limits,<sup>21</sup> the memorandum argued that "[i]f the Framers had contemplated some terminus of the period for ratification of amendments generally, they would have so stated."<sup>22</sup> It also noted the special desirability that the procedures of constitutional amendment "must provide [clear rules] capable of mechanical application."<sup>23</sup> To put it mildly, a rule of "reasonableness" as to duration of time for ratification or

---

18. Richard Berke, *Congress Backs 27th Amendment*, N.Y. Times, May 21, 1992, at 26A.

19. Which I would not at all condemn him for doing, especially in regard to constitutional interpretation. See Sanford Levinson, *Constitutional Faith* (Princeton U. Press, 1988).

20. See 16 Op. Off. Legal Counsel 100, 100-36 (1992) (preliminary print).

21. Although the opinion points to such limitations as those regarding the terms of various offices, surely its strongest examples are those involving the ten-day limit on presidential vetoes, article I, § 7 and, within Article V itself, the provision preventing congressional abolition of the international slave trade until 1808. See *id.* at 104.

22. *Id.* at 104.

23. *Id.* at 113. One of the citations offered for this proposition was an article by then-Professor Walter Dellinger, who is now the head of the Office of Legal Counsel in the Clinton Administration. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 418 (1983):

"Attention to th[e] formalities [specified in Article V] is more likely to provide clear answers than is a search for the result that best advances an imputed 'policy' of 'contemporaneous consensus.'" The memorandum notes, however, that Dellinger had suggested that the proposed pay-raise amendment had in fact "died" at some point because of the

ascertainment of a suitable “contemporaneous consensus” does not count for most analysts as a sufficiently clear rule.

The OLC memorandum also skewered the notion that Congress had any role to play as an ultimate “promulgator” of proposed and ratified constitutional amendments.<sup>24</sup> There is only one example of such “promulgation” in our history, concerning the Fourteenth Amendment, and it is described, and dismissed, by the OLC as “merely an aberration.”<sup>25</sup> This explains not only why the Archivist declared that a new amendment had entered the Constitution, but also why he felt under no duty at all to wait for the Congress to weigh in with a view on the matter.

No case law offers any judicial opinions as to the propriety of the process by which the Twenty-Seventh Amendment ostensibly joined the Constitution. One case was filed,<sup>26</sup> subsequent to the certification of the amendment, challenging the constitutionality of certain automatic cost-of-living pay raises provided by the Ethics Reform Act of 1989, but the district court avoided any Twenty-Seventh Amendment questions by noting that an election had in fact intervened since passage of the challenged pay raises. Moreover, it questioned whether the Amendment would have retroactive application to legislation passed before its ratification. Although an amicus brief apparently raised the issue of the Amendment’s validity, none of the parties did; in any event, the court, no doubt properly, declined to reach out and address an issue that it deemed irrelevant to the case before it.

## II. THE ROLE OF THE LEGAL ACADEMIC AS CONSTITUTIONAL INTERPRETER AND CONSTITUTION-CREATOR

I have just described where “the law of the 27th amendment” stands as of this writing (September, 1993). Or perhaps I should say where the law, *as conventionally defined*, stands. In the remainder of this essay, I want to address the possibility—I would argue reality—of the legal academics’ role in serving as self-conscious legal decisionmakers. The issue is presented most clearly to those of us who have chosen to present casebooks on constitutional law for use by our colleagues in their classrooms. What should we do, when preparing our new editions or our sup-

---

many years that went by without any state debate or ratification at all. See 16 Op. Off. Legal Counsel at 113 n.14 (cited in note 20).

24. See *id.* at 118-26.

25. *Id.* at 126.

26. *Boehner v. Anderson*, 809 F. Supp. 138 (D. D.C. 1992)



plements to present editions, in regard to adding the Twenty-Seventh Amendment to the text of the Constitution that is found at the beginning (or end) of the casebook? Should the relevant sentence about congressional salaries simply be reprinted as "Amendment XXVII"? Or, if one agrees with Professor Gewirtz (among others), should that sentence be omitted, because it is not "really" anything we should call a constitutional amendment?

There is a third alternative: Duke law professor William Van Alstyne, in the supplement to his own casebook on the First Amendment, prints the purported Amendment with an asterisk, followed by a discussion of its provenance.<sup>27</sup> According to Van

---

27. William W. Van Alstyne, *First Amendment: Cases and Materials* vii (Foundation Press, Supp. 1992). An asterisk seems to be the preferred solution among editors of constitutional law casebooks who have published texts or supplements since May 1992. See William B. Lockhart, Yale Kamisar, Jesse H. Choper, and Steven H. Shiffrin, *Constitutional Law, The American Constitution, Constitutional Rights and Liberties* 187 (West Pub. Co., 7th ed. Supp. 1992). "Amendment XXVII [?]\*" What follows is a relatively brief footnote concluding with, "After all this time, is the ratification of the Twenty-Seventh Amendment valid? Does it matter that many of the states that ratified the Amendment did not exist at the time it was first proposed?" Fred Schauer also uses an asterisk to signal a long footnote in his Supplement to Gerald Gunther, *Constitutional Law and Individual Rights in Constitutional Law* 212 (Foundation Press, 12th ed. Supp. 1992). I might note at this point the observation of my irreverent colleague Scot Powe that the use of the asterisk to place into question the status of the Twenty-Seventh Amendment is reminiscent of baseball commissioner Ford Frick's decision to order that an asterisk accompany the listing of Roger Maris's 61 home runs as the record for one season, given that his season was eight games longer than the 154-game season played by Babe Ruth.

There is no asterisk in the Supplement to Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet 1 (Little, Brown and Co., 1993), but students are directed to a three-paragraph discussion of the episode at p. 22. The second paragraph begins, "Is the amendment now part of the Constitution?" The most extensive discussion can be found in Cohen and Varat, *Constitutional Law: Cases and Materials* (cited in note 1). A brief footnote following the text of "Amendment XXVII [1992]," sketches its history. *Id.* at 16. More importantly, students are directed to a four-paragraph discussion of the amendment that concludes a four page "digression" on "the amendment process" more generally. *Id.* at 146-50. Cohen and Varat focus particularly on the whether questions raised by the Article V amendment process, including that which generated the purported Twenty-Seventh Amendment, are justiciable. Thus they conclude the section with the question, "Was it inappropriate for the Court in *Dillon* to adjudicate the issue whether Article V implicitly requires ratification within a reasonable time?" *Id.* at 150.

Two other casebooks published since 1992 are Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* (West Pub. Co., 4th ed. 1993) and Farber et al., *Constitutional Law: Themes for the Constitution's Third Century* (cited in note 1). Rotunda includes brief "historical notes" after the text of each amendment. Although the note following the text of "Amendment [XXVII][1992]" (the standard form used by Rotunda in regard to the listing of amendments) includes reference to the fact that the period of ratification extended from 1789 to 1992, there is otherwise no indication that it is problematic. Rotunda, *Modern Constitutional Law: Cases and Notes* at lxx. Farber et al., at Appendix 1, page [18], reprint "Amendment XXVII [1992]," though a footnote directs students to "questions about the validity of the ratification of this amendment" at p. 1044 of their casebook. There students will read of the now "new[?]" amendment and its unusual provenance, and they are asked if "the original second amendment [is] now a valid

Alstyne,<sup>28</sup> his placing of the asterisk

is just a personal way of coping with the headache I've been unable to overcome in thinking about Congress and how it sometimes behaves in matters of constitutional law.

. . . . *Dillon v. Gloss* provided the Supreme Court's considered view of what Article V requires in order that an alteration or addition to the Constitution be deemed to satisfy the Constitution. It is also a compelling view, and it was measuredly ventured in a wholly noninflammatory way by a unanimous Supreme Court, a Court including Holmes, Brandeis, and Edward White, the Chief Justice of the United States. One might suppose Congress would provide good reason to suggest why it is not sound, if indeed it is not.

. . . . Does Congress actually believe the contrary, moreover, or is it that Congress doesn't actually have a belief at all? . . . . The view from Durham . . . , for whatever its worth, is to see Congress as through a glass, darkly, in the annals of its treatment of our constitutional law.

It is worth noting that Van Alstyne's dismay about Congress's performance presupposes that it had a constitutional role to perform at all. If, however, the OLC is correct, then Congress' response is wholly irrelevant. At that point, of course, Van Alstyne might shift his concern to the performance of the OLC. In any event, Van Alstyne's decision, and its defense by reference to "what one thinks one owes to others just as a teacher," suggests yet a fourth possibility, to print it, *and any other similarly problematic amendments*, with asterisks and discussions. Surely the most important additional candidate for an asterisk is the Fourteenth, proposed by what Bruce Ackerman has called a "rump" Congress that excluded representatives and senators elected by "state" legislatures and electorates recognized as legitimate by the President of the United States (and who had been counted in the array of states ratifying in 1865 the Thirteenth Amendment, abolishing slavery). In turn, when several of these "states" rejected the proposed amendment, Congress imposed military "reconstruction" of the "state" structures of governance and, further, required, as a condition of "readmission" of elected

---

Twenty-Seventh Amendment? Should anybody else get to consider this question now that Congress has accepted it?" *Id.* at 1045.

As already indicated, much of *this* article, in a somewhat different form, appears at the beginning of the 1993 Supplement to Brest and Levinson. I anticipate that our discussion will be (and will likely remain) by far the longest found in the casebook literature.

28. William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 *Duke Law Magazine* (1992), reprinted in 10 *Const. Comm.* 9 (1993).

Senators and Representatives to Congress, the ratification of the Amendment by the legislatures of the affected "states."<sup>29</sup> Among other things, the history of the Fourteenth Amendment raises serious questions as to what counts as comprising "two thirds of both Houses" or "three fourths of the several States" whose concurrence is necessary (or at least sufficient), under Article V of the Constitution, to "amend" the Constitution. Douglas Laycock has written that "the Reconstruction Congresses accomplished a true revolution—a fundamental change in favor of liberty, achieved by force of arms because it could not be achieved within the voting rules created by the original Constitution. Revolutions by definition violate positive law . . ."<sup>30</sup>

Professor Walter Dellinger has suggested that the extreme—and altogether questionable—assertion by Justice Black in *Coleman* that Congress enjoys plenary, i.e., unreviewable, power to decide on the validity or invalidity of proposed amendments came from his desire to leave buried in history any question about the legitimacy of the Fourteenth Amendment, an issue never seriously discussed by the Supreme Court. Black, an Alabaman, was deeply conscious of the critique of the Amendment's provenance and may have doubted the Court's ability to answer it successfully had the Justices ever been forced to engage in a full-scale review of the events of 1866-1868. Black later wrote, in a case dealing with the power of Congress to require state courts to exercise jurisdiction in cases arising under federal statutes, that "the fundamental issues over the extent of federal supremacy had been resolved by war."<sup>31</sup> Any student of constitutional interpretation should certainly reflect long and hard on Black's assertion, as well as on the fact that we so rarely explicitly address its implications in our courses on constitutional law and constitutional change.

Classroom presentation of the controversy about the status of the "Twenty-Seventh Amendment," especially if coupled by any expression of a professorial point of view as to its validity, highlights what has always been the somewhat peculiar role played by law professors in regard to the materials that they teach. Few professors are content to play the role of detached

---

29. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 500-07 (1989). Ackerman's very important general theory defending the legitimacy of the Fourteenth Amendment (as a non-Article V amendment of the Constitution) is laid out in Bruce Ackerman, *We The People: Foundations* (Harv. U. Press, 1991).

30. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 Yale L.J. 1711, 1729 (1990).

31. *Testa v. Katt*, 330 U.S. 386, 390 (1947).

presenters, without views of their own, regarding cases, presidential messages, views of other scholars, or whatever else may count as possible views of the Constitution. Instead, most professors profess: for better or worse, they succumb to the temptation of registering their own views about the topics debated within the community of constitutional analysts. One professor will insist, for example, that the intent of the Framers is the best—perhaps, even the only legitimate—source of guidance as to the meaning of a given patch of constitutional text; another, contrarily, will emphasize the impossibility of ascertaining the intent of long-dead inhabitants of a fundamentally different political culture and that, concomitantly, we should basically look to something else—judicial precedents, the best moral and political understandings of our own time, etc.—for guidance. And even when a judge is wise enough to adopt our own favorite decision-making modality,<sup>32</sup> we might still criticize its particular application in a given case and indicate, subtly or not, that the nation would be far better off were we filling the judicial office instead of the inept author of the opinion in question.

To some extent, then, most of us self-consciously engage in what might be termed attempts, with invariably mixed success in terms of our student and other audiences, to legitimate or delegitimize particular approaches to, or understandings of, the Constitution. Few of us find it sufficient blandly to convey positivistic information about the existence of these approaches or understandings and to indicate, without editorial comment, what their adherents and adversaries view as their respective strengths and weaknesses.

I believe that our role as (de)legitimizers is especially exemplified in regard to the purported Twenty-Seventh Amendment. To the extent that we present it as in fact an unproblematic addition to the constitutional text, then it will simply become part of our students' consciousness as to what constitutes "the Constitution." Arguments to the contrary will be unknown to them and, indeed, probably incomprehensible. If, on the other hand, we denounce the "amendment" as illegitimate, we might well be able to prevail, at least with our students and those they go on to influence, precisely because there is not now, and may never be, a judicial decision to tell them otherwise. To the extent that our students are, rightly or wrongly—I believe wrongly—juricentric, they might in fact be open to our delegitimation of the "27th

---

32. To adopt the language of my colleague Philip Bobbitt, *Constitutional Interpretation* 11-22 (Blackwell, 1991).

Amendment" in a way that they would never accept similar professorial delegitimation of well-established judicial doctrine. In any case, I believe that law professors have no alternative but to decide self-consciously what they will do in regard to the "27th Amendment"; there is, at least at this time, no consensually-agreed-upon, positivistic "given" that allows us to say that we are simply engaging in description when granting the amendment the status of "law."

A recurring debate in literary studies over the past few decades has concerned the claims of certain literary critics that they in effect are of equal status as creators of meaning with the poets or authors they study. This is distinguished from accepting a more limited status as humble servants of the poets and authors devoted simply to ascertaining the meanings embedded within their works. At least some of the debates about constitutional interpretation can be viewed within the same context: Is the law professor the servant of a pre-existing constitutional structure or in significant ways the creator of those structures? This question, of course, can be addressed in regard even to the central subject matter of the courses that most of us teach, cases and opinions of the United States Supreme Court. Do we teach our students that, say, *Roe v. Wade* or *Bowers v. Hardwick* is unequivocally the "law of the land" simply because the Supreme Court has said so, or do we challenge the authority of the Court to issue generally binding statements of the law? Although I am sympathetic with quite sweeping attacks on judicial supremacy and, therefore, a delegitimation of any given opinion as being necessarily "the law," I recognize that this is an extremely controversial position that is, in fact, rejected by most of my colleagues in the academy. But I do not see how the law professor can escape the legal-academic version of the "Heisenberg effect" in regard to the "27th Amendment." Whether it will become an unquestioned part of the Constitution may well depend on our own willingness to observe (and then teach) it as such.