THE POLITICAL IMPLICATIONS OF AMENDING CLAUSES*

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Imagine two written constitutions.[1] One sets out political structures and governmental empowerments and limitations; it concludes with a clause saying: "Anything in this constitution may be changed by the passage of ordinary legislation as spelled out in this constitution." To take the best known example, at least to Americans, this would allow change in the case of the United States Constitution by agreement of majorities in both houses of Congress and assent by the President or by a two-thirds vote in each house overriding a presidential veto. Our second constitution comes to a radically different conclusion: "[This] fundamental constitution[ ] . . . shall be and remain the sacred and unalterable form and rule of government . . . forever."[2] What can one say about these two constitutional schemes?

As to the first, one might be tempted to say that the polity described really doesn't have a "constitution" at all, at least if a "constitution" is in some ways supposed to stand "above" and in some sense even "outside" the everyday system of ordinary political decisionmaking. Thus Mark Tushnet has recently written that "[p]erhaps some degree of institutional stability is required for a system to warrant the name *constitutional*, which suggests

* The original version of this essay was prepared for a conference on "Constitutions and Constitutionalism," sponsored by the Murphy Institute of Political Economy, Tulane University, New Orleans, Louisiana, March 11-12, 1995. Subsequent versions were presented to the Constitutional Studies Colloquium of the University of Texas Law School and Government Department and to the faculty colloquium at the Fordham University School of Law. I am grateful to Jim Fleming, Doug Laycock, Hans Linde, Scot Powe, and Eugene Volokh for comments on earlier drafts of this essay, as well as for suggestions received from the participants at the Murphy Institute conference.

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1. The adjective is important, for it is obvious that *all* political systems can be said to have "constitutions" in the sense of constitutive conventions of practice and tradition. Yet most—all but seven current states, in fact—have chosen to have *written* constitutions, and this paper concerns only such systems and some of the problems attached to "putting it in writing."

2. From *The Fundamental Constitutions of Carolina § 120* (drafted by John Locke), microformed on English Books (1641-1700), Wing Reel 154 (University Microfilms, Inc.).

that it should not be too easy to amend all of a constitution's provisions, or perhaps any of its basic institutional prescriptions."[3] From this perspective, then, the first "constitution" is basically an initiating statute that is thoroughly "inside" the ordinary political order.

It is "inside" in a double sense: First, its mechanism for change differs not at all from the standard-form politics of legislation. Secondly, *only* those already inside the political system—i.e., elected officials—participate in the decision-making process, a point to which I shall return later. To be sure, even this constitution might in fact be difficult to change insofar as ordinary legislation is itself difficult to pass, as is the case in the notoriously complex system established by the United States Constitution, with its bicameral legislature and independent role for the President (not to mention the political implications of federalism and consequent hindrances to the establishment of a truly united national party system). But one can easily imagine alternatives to our present political structure, which has, indeed, been adopted by no other country in the world. One would, for example, predict both more legislation and more amendment in unicameral than in bicameral systems; similarly, one assumes that passage would be easier if the president (or monarch) played no role, especially when the formal system, as in the United States or France, for example, tolerates the possibility of an executive and legislature controlled by different political parties.

Perhaps even this "minimalist" constitution might have some special prestige because of the stature of its authors and the concomitant cultural hesitation to amend their handiwork. There is no logical reason why it could not receive the "veneration" thought by James Madison to be so important to the constitutional enterprise,[4] although, as an empirical matter, it may be that such "veneration" is, to some extent, a function of the difficulty of amendment. Cognitive dissonance theory might predict, for example, that one will tend to adjust and even find merit in structures that are in fact difficult to change, and the absence of difficulty might lead to a reduced level of affective commitment.

In any event, this hypothesized constitution presents no special obstacles to its own change. A bicameral system could, for example, become unicameral so long as both houses agreed to the change, the presidency could simply be abolished and re-

3. See Mark Tushnet, *The Whole Thing*, 11 Const. Comm. 223, 225 (1995).

4. See Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 Tex. Tech. L. Rev. 2443 (1990).

placed with a prime minister drawn from the legislature, and so on. Should we discover, after a suitable passage of time, that this constitution had remained unchanged we would, I think, be entitled to offer the lack of change as evidence of very high satisfaction, at least on the part of ruling elites, in regard to the original scheme.

The second constitution is, of course, at the opposite extreme. It announces its own imperviousness to change. Even the most modest change—at least where "change" is defined as formal amendment—would presumably require its "overthrow" inasmuch as modification of the text has been rendered impossible. Evidence of lack of formal change could be submitted only for the proposition that dissatisfaction had not risen to such a fever pitch that regime overthrow was found to be preferable to continuation of the system established by the constitution. It would, however, be foolhardy in the extreme to view non-amendment as any more positive an endorsement or reaffirmation than that.

Such a "perpetual," formally unamendable, constitutional structure would, moreover, force us to confront a subject of great theoretical importance: How precisely do we identify constitutional amendments? As Stephen Griffin, among others, has well pointed out, an ever-present alternative to *formal* amendment is *informal* amendment.[5] Least likely in a dynamic political system is *no* amendment, whether or not these changes take canonical textual form. Indeed, Noam Zohar, a young Israeli philosopher, has analyzed the theoretical problem of amendment within Jewish *halacha*, which lacks any formal process of amendment. After all, *halacha* is based on divine revelation, and it is untenable, both practically and perhaps even theologically, to suppose that God would have committed errors subject to correction by fallible humans. Yet Zohar points out that there is certainly a great deal of significant *change* in Jewish law, though it is almost never described as "amendment."[6]

I believe, therefore, that it is naive to identify "amendment" *only* as formal textual additions (or subtractions). Only an atheoretical person can confidently assert that the United States Con-

5. See *Constitutionalism in the United States: From Theory to Politics*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 37-62 (Princeton U. Press, 1995) ("*Imperfection*"). See also the superb essay by Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in id. at 237-74.

6. See Noam J. Zohar, *Midrash: Amendment through the Molding of Meaning*, in id. at 307-18.

stitution has exactly 27 amendments.[7] Moreover, one function of such almost literally thoughtless confidence is to blind us to the reality of non-Article V amendment within our own constitutional system.[8] In that sense, emphasis on Article V as the source of *all* amendments is truly *ideological*, reinforcing a certain kind of political understanding and promoting a false consciousness about our political reality.

Bruce Ackerman has been the most notable proponent of the presence of non-Article V (and non-textual) amendments within what any well-trained lawyer would today identify as "the United States Constitution."[9] He earlier focused on changes in the "domestic" power of the national government surrounding the post-Civil War period and the New Deal; most recently he has turned his attention to foreign affairs. He thus argues that the approval of the North American Free Trade and GATT agreements by majorities of both houses of Congress, rather than by two-thirds of the Senate, where the 1787 Constitution reposed the power to ratify treaties, is evidence of a profound "structural amendment" provoked by World War II and its aftermath.[10]

Still, even if one believes that it is foolish to assert that *only* formal changes count as amendments, it would be perverse to reject the importance of formal amending structures or of the formal additions to, and subtractions from, constitutional text. At the very least, any legal culture, like our own, that includes *textual argument* among the array of lawyerly rhetorics or modal-

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7. Jim Fleming has suggested to me that "a theoretical person certainly can assert this." It might be a "bad" theory, but "bad theorizing is not being atheoretical." There is certainly something to this. It is the case, though, that most people who offer the "confident" assertion suggested in the text are not theorists at all. That is, I think they are simply repeating a conventional wisdom that has been insufficiently theorized. I also believe that if they subject that conventional wisdom to theoretical analysis, then they will in fact reject the identification of "amendment" with "numbered textual additions."

8. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26 ; (C) 27; (D) >27*, in *Imperfection* at 13-36 (cited in note 5). For our purposes, I put to one side the difficulties in counting the 18th and 21st Amendments—one might well argue, for example, that the 18th Amendment, having been repealed, is therefore not part of the Constitution at all—and the question of whether the 27th Amendment was properly ratified. On this latter issue, see Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comm. 101 (1994).

9. See, e.g., Bruce Ackerman, *We the People: Foundations* (Harvard U. Press, 1991).

10. See Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995) (forthcoming in hardback with Harvard University Press). Laurence Tribe scathingly attacks the Ackerman-Golove analysis in *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995).

ities[11] must appreciate the advantage of being able to refer to specific text rather than having to make what some analysts would dismiss as appeals to "unwritten" general traditions or conventions. Opponents of President Bush's policy in the Persian Gulf were certainly helped by the presence of the declaration-of-war clause in Article I of the Constitution, and they would, concomitantly, have been significantly hindered had the "power to declare war" been placed in Article II.

Needless to say, to note the importance of text does not require that one believe either that texts are self-interpreting or that textual argument will necessarily prevail over, say, doctrinal or prudential argument. Still, it is impossible to believe that anyone in our legal culture (or others with written constitutions) believes that text is truly irrelevant. Otherwise why would one *care* whether, for example, a balanced budget amendment or any other proposal was in fact adopted? Similarly, the importance of text in our constitutional tradition presumably explains why supporters of equal rights for women committed themselves to the Equal Rights Amendment, even though few were willing to explain precisely what rights it would add beyond those already protected by (their version of) the Equal Protection Clause of the Fourteenth Amendment. Sophisticated post-structuralist critiques of the sufficiency of text do not at all negate the practical importance of texts within everyday political life.

Anyone thinking about constitutional design—consider, for example, someone flying to Eastern Europe or elsewhere to offer advice about constitutional design—must therefore address procedures for amendment every bit as much as the standard topics of institutional design.[12] Indeed, few topics are more important, whether as a theoretical or practical matter, than amendment clauses.

I return to our two model constitutions that establish the two ends of a spectrum. What might lead to adoption of one or the other of these two admitted extremes? To adopt the title of a recent book that I have edited, *Responding to Imperfection*, let me suggest that the authors of the first constitution would be maximally modest as to their own capabilities and maximally

11. See Philip Bobbitt, *Constitutional Fate* (Oxford U. Press, 1982); *Constitutional Interpretation* (Blackwell, 1991), which develop the notion of American constitutional law being constituted by specific rhetorical *modalities*, one of which is reliance on the explicit text of the Constitution.

12. For an excellent discussion, see Stephen Holmes and Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *Imperfection* at 275-306 (cited in note 5).

aware of their capacity for imperfect judgments. That is, they would acknowledge the relatively high probability that their notions of proper government, whether one is referring to institutional design or the authorization or prohibition of specific powers, are in fact subject to error, given the complexities of political life.

Consider the statement of Virginia's George Mason on June 11, 1787, as he opened the debate in Philadelphia on what amending procedure the delegates should adopt for the Constitution taking form that summer. "The plan now to be formed will *certainly* be defective," he told his fellow delegates. "Amendments therefore will be *necessary*, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."[13] Indeed, I drew the title *Responding to Imperfection* from a comment by Mason's fellow Virginian George Washington to his nephew, Bushrod Washington: "The warmest friends and the best supporters the Constitution has, do not contend that it is free from imperfections; but they found them unavoidable and are sensible if evil is likely to arise there from, the remedy must come hereafter."[14]

Those who accentuate the possibility of imperfection and adopt what might be termed a "statutory" mode of amendment accept the twin likelihoods as well, first, that future generations are likely to recognize the existence of these imperfections *and*, secondly, that these generations will be sagacious enough to correct them. In turn these successor generations will presumably also be wise enough to realize that they, too, will be imperfect in their political judgments and thus leave it open to *their* successors to engage in the same presumptively progressive response to imperfections, and so on *ad infinitum*. Thus, all successor generations would presumably feel empowered to change the constitutional rules whenever that seemed to be a good idea. Needless to say, such confidence was *not* expressed by Washington or his colleagues in Philadelphia, a fact to which I will return in the second half of this essay.

The second constitution would presumably be authored by persons who had an inordinate confidence in their own political wisdom coupled perhaps with an equally inordinate lack of confidence in successor generations. Locke's use of the word "sacred"

13. Max Farrand, ed., 1 *The Records of the Federal Convention of 1787* at 202-03 (Yale U. Press, 1966) (emphasis added).

14. Michael Kammen, ed., *The Origins of the American Constitution: A Documentary History* 83 (Penguin Books, 1986).

may be telling, moreover, insofar as it suggests a self-perception by the framers of themselves as (at least) demigods, whose work is entitled to the same awesome respect as that given "real" gods.

Although one might think that the first constitution is *maximally* open to change, that is not the case. One can imagine a third constitution that concludes not only with the postulated sentence but, in addition, states that "this constitution can also be amended by majoritarian popular referendum on initiatives propounded by 5% of the population." What political presuppositions might account for this addition?

One obvious answer is that the framers are familiar with contemporary public choice theory and its concern about "agency costs." That is, to limit constitutional amendment only to what gains the assent of those already ensconced within governmental institutions is, almost by definition, to lessen the possibility that the occupants of political office will be amenable to proposals that would significantly affect their interests or, in the language of public choice, diminish the possibility of engaging in successful rent-seeking for themselves and their supporters.[15]

One does not have to be modern to have this insight. Again one can turn to George Mason, who vigorously opposed initial drafts of Article V that placed exclusive power to initiate amendments in the hands of Congress. "As the proposing of amendments is . . . to depend . . . ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[16] It was therefore vital to create alternatives to Congress as the possible progenitors of constitutional amendments. Mason's opposite was New York's Alexander Hamilton, who trusted the States no more than Mason trusted Congress. After all, said this highest of Federalists, "The State Legislatures will not apply for alterations but with a view to increase their own powers"[17] and, presumably, weaken those of the national government. The solution found in Article V seems to address both of their concerns: Hamilton won the right of Congress to propose amendments, but Mason won the right of states to initiate a new constitutional convention upon petition of two-thirds of the states.

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15. See Donald J. Boudreaux and A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 Fordham L. Rev. 111 (1993).

16. Philip B. Kurland and Ralph Lerner, eds., 4 *The Founders' Constitution* 577 (U. of Chicago Press, 1987).

17. Id.

This latter mode of amendment has, of course, never in fact been undertaken, at least beyond petitions by various states that a constitutional convention be called.[18] Most mainstream analysts seem frightened to death by the very possibility, though I confess I do not share this view. In this regard, it would be especially helpful to recognize that the United States in fact includes 51 constitutions within its territory and to study the propensity of states to subject their constitutions to the more-or-less frequent scrutiny of constitutional conventions. Some analysts have recently argued that state constitutions are not "real" constitutions precisely because they are so little blessed by the "veneration" visited upon the national constitution, but this obviously begs the question as to how precisely we identify something as a constitution.[19]

It is also worth mentioning in this context the powerful argument of Akhil Reed Amar that the American idea of popular sovereignty *requires* the possibility that the United States constitution be amendable by a majority of voters in a popular referendum, in addition to the supermajoritarian procedures set out in Article V.[20] Even though, as a practical matter, Amar's method is not only untried but also, for most Americans, I suspect unthinkable, his argument is noteworthy insofar as it is built on seeing the role of Article V as protecting the people *en masse* against the corruption of their political agents rather than necessarily endorsing the political status quo itself. Thus for Amar the Article V requirement of extraordinary majorities in both houses of Congress and state legislatures is far less a commitment to the perfection of the existing constitutional scheme than an expression of the deep mistrust of political actors and fear that too-easy methods of change would provide simply a royal road to rent-seeking.

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18. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 764 (1993); Bruce M. Van Sickle and Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article V and Congress' Present Duty to Call a Convention for Proposing Amendments*, 14 Hamline L. Rev. 1, 46-56 (1990)

19. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's* Failed Discourse, 24 Rutgers L.J. 927 (1993). It would be interesting to see how many *national* constitutions would survive the tests imposed by those who reject the "constitutionness" of, say, the Illinois or New York constitutions. There is, to put it mildly, something distinctly odd about a theory of constitution-identity that would exclude most documents titled "the constitution of X."

20. See *Popular Sovereignty and Constitutional Amendment*, in *Imperfection* at 89-115 (cited in note 5).

Even the Article V possibility of convention-by-call-of-the-states does not entirely overcome the agency problem, for one might imagine circumstances when *all* political officials, regardless of the level of office held, would have interests in common against the civilian populace. Thus perhaps the Western states—most (in)famously California—teach an essential lesson by offering the possibility of amendment by direct initiative and referendum of the sovereign People themselves, freed of any requirement to beseech political intermediaries for their substantive approval (though some intermediaries must still presumably agree to place the measures on some official ballot and then to count the votes).[21] For what it is worth, it is not only the fevered states of the American West who have rejected the monopolization of amendment by state officials. Switzerland, presumably a symbol of boring stability, has been described as "the only nation in the world where political life truly revolves around the referendum. . . . The great political moments of modern Switzerland have occurred not in the following of bold statesmen but in the national debates that have drawn the masses to the polls to decide their country's future."[22]

What must one believe to endorse direct initiative and referendum as a mechanism of constitutional amendment? At the very least, support of any such scheme of amendment seems to require an unusually high, some might say paranoid, mistrust even of popularly-elected agents, who will presumably be corrupted once they take their seats in Washington, Sacramento, Albany, or Budapest, coupled with an equally remarkable, neo-Rousseauian faith in an uncorrupted People.[23] To adopt an initiative-and-referendum system like California's is, in addition, to

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21. See, e.g., Cal Const, Art. II, § 8; Ariz Const, Art IV, pt. 1, § 1; Mont Const, Art. XIV, § 9.

22. Kris W. Kobach, *Switzerland*, in David Butler and Austin Ranney, *Referendums Around the World: the Growing Use of Direct Democracy* 98 (The AEI Press, 1994).

23. Eugene Volokh has challenged my imputation to paranoid mistrust of popular agents as the motive force for reliance on initiatives. "The legislative process," he argues in a December 6, 1995, e-mail message, will often allow

> minorities who care deeply about a subject to overcome the will of majorities who care less deeply. This might, for instance, be why the anti-affirmative action campaigns are being waged more on the initiative front than the legislative front: If the minority that is pro-affirmative action is very passionate about its support, and the majority that is anti is more lukewarm in its opposition, then a legislator—a repeat player—may prefer to vote for affirmative action and mildly alienate the majority than vote against and strongly alienate the minority. And, of course, the minority will be able to cut legislative deals that it can't with the initiative.
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> This feature of the legislative process may often be a good thing, but I can see someone arguing that it isn't always—that there ought to be a mechanism for majority sentiments, even those more weakly held, to prevail over strongly

reject the importance placed by Madison on *representative* government and on multiple filters between the mass of the electorate and ultimate political outcomes. These filters, of course, range from the ostensibly virtuous characters of those likely to be elected to office to the encouragement of certain kinds of deliberation by the rules or practices of our political institutions. Indeed, it is just this escape from the filtration of republican deliberation that has led Hans Linde to suggest that the practice of initiative and referendum in the Western states at least on occasion violates the "republican form of government" clause in Article IV of the Constitution.[24] From one perspective, California is a Jeffersonian's dream,[25] even as one suspects (or hopes) that it would cause that Virginia eminence the most horrible of nightmares. But the question is whether the nightmare would be caused by the *theory* of initiative and referendum or, rather, by its *practice*, which appears to give great advantages to highly intense, well-organized and -financed groups as against the ordinary mass of the polity.

My impression—for I quickly confess that I have not sufficiently studied the matter[26]—is that popular referenda have supplanted legislative decisionmaking as the preferred method of constitutional change in California and, perhaps, in other Western states. I am thus interested in the following question: Imagine that the United States Constitution were like the California Constitution, and allowed amendment by popular initiative and referendum in addition to the procedures set out by Article V. What would the likelihood be that proponents of balanced budget or term limits amendments—or, indeed, of any other amendment that profoundly changed the political status quo—would invest in politics of the more-or-less Madisonian variety—

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held minority sentiments. A mixed legislative/initiative model would thus be a good idea.

There is certainly something to Volokh's argument, which of course, raises the general issue of the relevance of preference intensity within a democratic theory whose one person-one vote standard almost by definition ignores the question of intensity and the justice of allowing a majority with weak preferences to override a minority with intense ones. I presume, incidentally, that those who work to place initiatives on the ballot would have very intense feelings regarding the issue, though, obviously, that need not be true of those who vote for the proposal once it is on the ballot.

24. See Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19 (1993).

25. It was Jefferson, after all, who advocated frequent reconsideration of constitutional structures, a proposal that drew explicit attack from his close friend James Madison in *The Federalist* No. 49, who instead emphasized the importance of almost literally unreflective "veneration."

26. See, though, Thomas E. Cronin, *Direct Democracy: the Politics of Initiative, Referendum, and Recall* (Harvard U. Press, 1989).

i.e., focusing on *representative* government and gaining the required supermajorities at both national and state levels of politics—rather than in what might be called plebiscitarian politics—i.e., focusing on direct, unmediated democracy free of the filters provided by representation or of the particular kinds of deliberation fostered by institutional political processes? Given the immense difficulty of amendment through Article V procedures—to win the "amendment game," for example, one must win the approval of two national legislative bodies plus no fewer than 75 state bodies (assuming that one of them is Nebraska's unicameral legislature)—is it not readily predictable that rational agents, especially as conceived by contemporary public choice theorists, would focus their resources on initiatives and referenda? For better or worse, recent displays of congressional consideration of balanced budget amendments might become a thing of the past, as "We the People" instead were summoned to decide about the wisdom of constitutionalizing a particular theory of political economy.

That may as yet be only a dim specter on the horizon, but let me suggest that one highly thinkable outcome of the frustration over failure to gain the final vote needed to propose the balanced budget amendment—or of the earlier failure, in the 1970s and early '80s, to gain ratification of the Equal Rights Amendment in spite of the fact that over 60% of the states, containing an ample majority of the population, had given it their assent—will be the amendment of Article V itself. The juxtaposition of the ERA with the Balanced Budget Amendment should illustrate, incidentally, that dissatisfaction with the requirements of Article V does not necessarily assume a particular political coloration. What is protected by Article V is the status quo, whether liberal or conservative, whether "justice-seeking"[27] or, indeed, justice-destroying.

Stephen Griffin has recently suggested that the worst feature of the current United States Constitution is indeed Article V, precisely because it makes formal change so inordinately difficult.[28] Amendatory change is often masked as "constitutional interpretation," at immense costs in intellectual cogency or candor. This also gives to judges both responsibility and power that one might well think they are unsuited for, yet another political im-

27. See Lawrence Sager, *The Birth Logic of a Democratic Constitution* (February 9, 1995) (unpublished). Sager's paper is a ringing defense of the difficulties placed by Article V in the way of amendment.

28. Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 Const. Comm. 171 (1995).

plication of such a rigorous amending clause. Even worse, perhaps, is that highly desirable change is stifled because one cannot in fact figure out an alternative to use of the formal procedures.

Griffin made his comment in a symposium asking only for identification of the worst (or "stupidest") aspect of the Constitution; it did not ask for positive recommendations as to how to cure the suggested defects. But that is clearly the next step for anyone who *does* accept the view that the United States is not well served by its amending procedure. One might even make the radical suggestion that one might well find desirable alternatives through study of the constitutions of the American States, not to mention foreign constitutions, none of which have such difficult schemes of amendment. Actually, the sentence above is incorrect in one small respect: *One* country did have a more complicated scheme of amendment than that bequeathed us by the Philadelphia Convention of 1787. That country was Yugoslavia.[29]

In any event, I think it is worthwhile to take the next step and to imagine what kinds of changes one might advocate for Article V, as well as the likely political consequences of any such changes. One set of changes might simply involve greater specification of answers to a number of important conundrums suggested by our actual political history. The easiest example concerns the right of states to rescind their ratification of proposed amendments, at least prior to a declaration by the National Archivist that a sufficient number of ratifications has been received to make the proposed amendment "part of this Constitution."[30] Because the ERA never gained the assent of sufficient numbers of states under *any* theory, we never had to face the

29. See Lutz, *Toward a Theory of Constitutional Amendment* at 261 (cited in note 5). Lutz developed an "Index of Difficulty" based on the complexities of amending procedures. Yugoslavia's was highest, at 5.60. The United States follows with 5.10. Next come Switzerland and Venezuela with 4.75. Austria and Sweden have the "easiest" constitutions to amend, with Rates, respectively, of 0.80 and 1.00. This does not, obviously, include those few countries that do not have written constitutions, like Great Britain, New Zealand, or Israel.

It would be absurd to argue that the current difficulties of the Balkins are due to the formal difficulty of constitutional amendment. Can one, however, be entirely confident, in the absence of detailed study, that it played no role at all in making necessary political changes, following Tito's death, simply too difficult to realize through ordinary political processes? Even if formal constitutional process explains no more than 2% of the variance in accounting for contemporary South Balkan politics, is that not still a damning indictment, *unless* the rigidity in fact helped to purchase forty years of relative ethnic peace during the Tito years?

30. See Article V. On rescission, see Grover Rees III, *Comment, Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 La. L. Rev. 896 (1977).

question of the constitutionality of attempted rescissions by Idaho and other states.

My own view is that a state does indeed have a right to change its mind. Imagine that the Balanced Budget Amendment had been successfully proposed by Congress, and that several states had rushed to ratify it. (Indeed, New Jersey attempted to ratify it even *before* proposal, so eager were the legislators to have New Jersey become the first state to endorse it.) Imagine also that, like the ERA, it ran into some trouble, and that Democrats scored gains in the 1996 election because the electorate began to realize the full costs to them of a balanced federal budget by 2002. Does one really want to argue that a state should not be entitled, as a constitutional matter, to change its collective mind on a matter of such profound import? After all, a vote *not* to ratify does not prevent a future legislature from deciding to endorse a proposed amendment. Why does the option to switch work in only one direction? Whatever one's views on the merits, does one really want to leave this hanging as an open question, to be decided either by Congress or the Supreme Court as one's jurisprudence dictates?[31] The better course, it seems to me, is to come to some decision, while there is no amendment pending, and to codify it in the Constitution itself. It is true that the American way seems to be to await a full-blown crisis before acting, but that scarcely seems to be normatively desirable.

The most significant failures of Article V to provide any genuine guidance come in regard to the convention that could be called on petition of two-thirds of the states. As noted, this is as yet only a theoretical problem, but so long as we wish to leave open this possibility of a convention, it seems most unwise to leave open as well fundamental questions that would be raised by any actual convention. Would voting, for example, be by one state-one vote, as in Philadelphia, or by individual delegates? Would the agenda of the convention be controlled by the petitioning states or by Congress, on the one (actually two) hands, or only by choice of the "sovereign" convention itself, on the other? As should be obvious, once one gets started, a "corrective" Article V devoted only to filling in some of the blanks—and not even touching, for example, the basic structure of requiring supermajority votes in Congress and ratification by three-

31. See, e.g., Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983) (arguing for judicial review of such questions); Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433 (1983) (arguing that Congress has "plenary power" to decide on the legitimacy of rescissions).

quarters of the states—could well turn out to be almost as long as the existing Constitution itself.

But surely the most fundamental disputes would concern the basic structure of Article V. Griffin's complaint is not merely that Article V has some lacunae in it, but, rather, that some of the ways in which it is all too clear disserve the polity. So what direction might amendment of Article V take?

Would anyone, for example, suggest a process by which national-level officials alone could amend the Constitution? Consider, for example, a proposal to allow amendment by vote of two-thirds of each house of Congress *and* presidential approval, *or* by vote of three-quarters of each house (in order to prevent, for example, an absolute presidential veto of modification of presidential power itself). I assume that in fact few of us would be tempted by such a proposal, and I assume that what would animate most of us in our opposition would indeed be the lack of any formal state role and/or the lack of the possibility of popular participation as through a referendum. But what underlies that mistrust of a national power would, I think, be some version of the agency argument. Otherwise, if one's objection to the present Article V focuses on its role in preventing vitally needed changes, it is hard to see why one would not endorse simply eliminating the participation of the states, as by, amendments to be proposed by national political institutions—either Congress alone or Congress plus President—followed by a popular referendum on whether to ratify the proposals.

If one rejects such nationalism and endorses continued participation by states qua states, that simply forces one to confront the question of *how many* states should have to endorse an amendment before it is accepted as part of the Constitution. How can anyone seriously defend, in 1995, the present system that in essence allows one house of 13 states to block the desires of the remaining public? That is, the "amendment game" gives victory to those who can win 13 such houses against the side that prevails in as many as 86 legislative houses (i.e., both houses in 37 states and 12 in the remaining 13 states, excluding Nebraska). Quite frankly, I can think of *no* defense for the present rules of this particular game *unless* one is committed simply to making it extremely difficult to engage in formal amendment.

Does an alternative number suggest itself? One possibility, obviously, is a simple majority of states. The major problem with that is the theoretical possibility that such a majority could be gathered by aggregating states that themselves contain substan-

tially less than a majority of the American public. Is it adequate to overcome this fear to point out that any amendment must first gain the support of two-thirds of the House of Representatives, which is, of course, apportioned on the basis of population? One might respond, of course, that the apportionment is scarcely independent of political factors, ranging from incumbency to race, and one might not really believe that the support of two-thirds of the Representatives necessarily translates into even majority support by the public in general.

Unless one is a "high federalist" in a distinctly modern sense—that is, someone who really does accept the metaphysical integrity of Idaho qua Idaho, and so on—it seems hard to argue that actual population ought not play some role in the ratification process. One might well, therefore, adopt a version of the Australian rule, which is to require a majority of the states *and* that this majority include a majority of the national population. Note well, though, that this allows for the possibility that even if a *minority* of states containing a majority of the national population supported an amendment that, by stipulation, has gained the approval of Congress or a national convention, the amendment would nevertheless remain unratified.

At this point, then, we have to ask ourselves why we would care that even a majority of states ratify an amendment. The answer, presumably, would be to return to some of the original debates of 1787-88, where one finds rampant mistrust on the part of small states in regard to the potential conduct of large states. Still, we might ask ourselves why the organization of the Senate, based as it is on formal State equality, doesn't offer (more than) enough protection to "states *qua* states." How much protection *are* Wyoming, North Dakota, Alaska, and Rhode Island entitled to against the wishes of, say, California, Texas, Florida, and Michigan? Is it *only* the fact that I am a Texan (of sorts) that makes me unsympathetic to continuing the remarkable power given small states within our political system?

If one remains justifiably suspicious of exclusive national amendment, but is equally suspicious of maintaining the role of states in ratification, is an acceptable alternative the national referendum on amendments first proposed by Congress or by a national convention? Resistance to this notion could be based on fear by, say, people living in Mountain and Upper Midwestern states that they would simply be swamped by their fellow citizens who have chosen life in the mega-city. But, of course, more fundamental objections would be based on some of the earlier-ex-

pressed fears either about the corrupting role of money in politics, including national referendum campaigns, or about the unlikelihood that ordinary citizens would think reflectively about the kinds of issues appropriate for constitutional placement.

I have, up to now, been assuming the necessity of a two-thirds vote in each House of Congress. But why maintain the supermajority requirement at all, especially if one maintains a sufficiently strong role for states in the ratification process to guarantee some kind of barrier against a "rush to judgment"? Or, why not require a congressional supermajority *only* if the President formally opposes the proposed amendment? Otherwise, I'd be inclined to take my chances with congressional majorities *plus* presidential approval *plus* ratification by sufficient states to comprise a majority of the population *or* popular ratification.

I have also been assuming that a constitution establishes a *single* rule for constitutional amendment. There is clearly no necessity that this be the case, as demonstrated by Article V itself, which varies the difficulty of the amendment process with the perceived importance of given issues. Thus the drafters of Article V explicitly exempted two issues from the general rules regarding amendment set out at the beginning of the Article. First, a state must consent to its own loss of equal representation in the Senate.[32] Second, *any* amendment concerning congressional abolition of the slave trade prior to 1808 appears to have been precluded. Whatever one might think of these specific precedents, the latter one of which certainly points to one of the most horrific aspects of the Constitution, they nonetheless point to the possibility of further entrenchment by requiring a more difficult process of amendment for things we define as "basic rights of the people" than for all other constitutional provisions.

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32. Contrary to what is sometimes asserted, the Senate clause is *not* "unamendable" as a matter of theory, though, as a practical matter, that is almost certainly the case, given the extreme unlikelihood of, say, Wyoming agreeing to give up its excess of power in the Senate. This assumes, incidentally, that *only* Wyoming *must* consent to its reduced representation. But, of course, *all* states would be deprived of "equal Suffrage in the Senate," even if one assumes, reasonably enough, that the states that benefit would be delighted to accept the inequality. But, as a theoretical matter, this raises the possibility that Vermont's failure to consent to Wyoming's reduced representation in the Senate would doom the proposal, since otherwise one would be foisting an "*un*equal Suffrage" on Vermont, relative to Wyoming's, without its consent. There is, of course, no reason to believe that any of these theoretical conundrums will actually ever be tested in the crucible of actual political decisionmaking. What is even less clear, as a theoretical matter, is whether Article V could be amended to change the unanimity requirement by less than a unanimous vote. See, e.g., Douglas Linder, *What in the Constitution Cannot be Amended?*, 23 Ariz. L. Rev. 717 (1981).

There may be good reason to require very high super-majorities before limiting rights of freedom of speech or freedom of conscience. Does any such reason suggest itself in regard to term limits, whether of legislators or the President, or, for that matter, to any other structural feature of the Constitution? For me the question is rhetorical, for I can think of no good reasons to support the formal stasis engendered by Article V. No doubt the adoption of such a two-tier system would lead to significant wrangling about what might count as a "basic right," but such wrangling seems a small price to pay for what would be a distinct improvement in overall constitutional design and the increased possibility of cogently responding to significant structural imperfections.

Ultimately, though, all such discussions take us back to our simplistic, but not, I hope, simple-minded, models outlined at the beginning of this essay. That is, to what extent do we first acknowledge the possibility of imperfection and then have faith in our fellow citizens to respond adequately to such imperfections? Our answers to these questions, whether we are conscious of them or not, ultimately dictate where along the spectrum of possibilities we choose to place (and defend) our own procedures for constitutional amendment. As we embark on what appears to be some fundamental rethinking of certain premises of American government, we could do far worse than reflecting on the possibility that the existing amendment process found in Article V is itself one of the most basic imperfections in our scheme of governance.