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## Towards a More Perfect Union: Some Thoughts on Amending the Constitution

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## TOWARDS A "MORE PERFECT UNION": SOME THOUGHTS ON AMENDING THE CONSTITUTION

by Thomas E. Baker\*

### I. INTRODUCTION

Our constitutional tradition insists that a measure must run the Article V gauntlet to be deemed worthy enough to be added to the Constitution. Our experience with amending the Constitution demonstrates that such measures are few and far between. We must be mindful of these lessons whenever we contemplate a proposal to amend the Constitution. This essay provides an overview of the procedures for amending the Constitution, describes the long-run experience with those procedures, and reminds us of the wisdom of the Framers, as "We the People" contemplate the plethora of pending proposals to amend the Constitution of the United States.

### II. AMENDING THE CONSTITUTION

#### *A. Amendment Procedures*

The procedures for amending the Constitution represent the Framers' best efforts to reconcile the need for change with the desire for stability in government structures. In the words of James Madison,

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the father of the Constitution, the amending procedures are designed to "guard[] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."<sup>1</sup> The power to amend, an important responsibility of self-government, was essential and vital to them and remains so today.<sup>2</sup> As we shall see, however, the relative difficulty of amending the Constitution has proven over time to be one of its chief virtues.<sup>3</sup>

Article V provides for two procedural steps to amend the Constitution.<sup>4</sup> There are also two alternatives for each step, arranged in what Madison described as a process that is "partly federal and partly national."<sup>5</sup> First, amendments may be proposed either by a two-thirds majority in both houses of Congress or by a special convention called at the request of two-thirds of the state legislatures.<sup>6</sup> Second, amendments are ratified by three-fourths of the states, either by the existing state legislatures or by special state conventions, depending on which forum Congress designates.<sup>7</sup>

In recent years, some prominent professors of constitutional law have published books and articles to argue that the provisions of Article V may not be exclusive and that amendments might be proposed and adopted by other means—such as a popular referendum election or a coalescing consensus understood at some higher level of politics—which would make amending the Constitution easier and most probably more frequent and elaborate.<sup>8</sup> Other scholars seek to

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<sup>1</sup> THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

<sup>2</sup> Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209 (2000).

<sup>3</sup> *But see* Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171 (1995) (arguing that the difficulty of the Article V procedures is a "constitutional stupidity" of the highest order).

<sup>4</sup> U.S. CONST. art. V.

<sup>5</sup> THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

<sup>6</sup> U.S. CONST. art. V.

<sup>7</sup> *Id.*

<sup>8</sup> *E.g.*, 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994). Other constitutionalists have

revise our historical understanding, arguing that the actual amendments are of little constitutional consequence—failed amendments have been accepted and ratified amendments have been ignored as if Article V was not part of the Constitution. So what really counts as constitutional amendments are de facto changes in the small-c constitution in practice and not de jure changes in the text of the capital-C Constitution itself.<sup>9</sup> Those academic arguments go beyond the text and the history of the Constitution. Neither the Congress nor the Supreme Court has paid any attention to the theories of extra-constitutional amendments, and they are mentioned here only for the sake of completeness, except to observe that I find them more provocative than persuasive.<sup>10</sup> The Article V procedures are best understood to be the exclusive methods for formal amendment.<sup>11</sup>

### *B. Intent of the Framers*

Like so many other provisions of the Constitution, Article V was the product of some initial disagreement and an eventual compromise at the Constitutional Convention of 1787.<sup>12</sup> The historic fact that the

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responded dubitante. *E.g.*, Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 76 COLUM. L. REV. 121 (1996).

<sup>9</sup> Sanford Levinson, *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)*, 8 CONST. COMMENT. 409 (1991); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

<sup>10</sup> "My own view of Article V is that it means what it says, and it says all that it means." Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L. Q. 325, 344 n.61 (1995). *See also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-20, at 106 (3d ed. 2000) ("These arguments, while sophisticated, are, in the end, unconvincing.").

<sup>11</sup> Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 103 HARV. L. REV. 1221, 1244-45 (1995).

<sup>12</sup> *See generally* *Amendments to the Constitution: A Brief Legislative History: Hearing Before the Subcommittee on the Constitution of the U.S. Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (1985); DAVID E. KYVIG,

delegates were overstepping their own authority in Philadelphia by writing an entirely new constitution instead of merely proposing changes in the Articles of Confederation as they had been instructed to do by the Congress, perhaps, may have given the delegates pause to consider how best to provide for future changes without having to start all over again.<sup>13</sup> The two-step procedure was a deliberate compromise between two camps with opposing fears for the future: those who feared that the Congress would seek to increase its powers at the expense of the states and those who feared that the states would seek to truncate the powers of the fledgling federal government.<sup>14</sup> Like so many other Madisonian compromises at the Convention, the delegates resolved to align those competing jealousies in direct opposition to each other, to check and balance each other.<sup>15</sup> Neither the Congress nor the States would have an exclusive prerogative over amendments; rather, they would share the power to amend the Constitution. The final drafting finesse was worked out only a matter of hours before the adjournment of the Convention, with little formal debate, though the amending corollary in the Constitution would soon prove to be a useful and persuasive argument towards ratification by the states.<sup>16</sup> Indeed, the price of ratification—and the proof of the Constitution—was the immediate recourse to Article V to add a Bill of Rights.<sup>17</sup>

Thus, amending the Constitution was made difficult, but not impossible, in distinct contrast to the predecessor constitution, the Articles of Confederation, which had required the political impossibility of the unanimous consent of all the states for amendments.<sup>18</sup> The Framers of the Constitution did not anticipate

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EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 42-65 (1996); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197 (1994).

<sup>13</sup>See THE FEDERALIST NO. 40, at 247-55 (James Madison) (Clinton Rossiter ed., 1961).

<sup>14</sup>KYVIG, *supra* note 12, at 57.

<sup>15</sup>*Id.* at 57-58.

<sup>16</sup>*Id.* at 57-60.

<sup>17</sup>*Id.* at 87-109.

<sup>18</sup>ARTICLES OF CONFEDERATION of 1781, art. XIII.

frequent or detailed amendments. Rather, they understood that regular lawmaking in the form of statutes would respond to economic, political, cultural, and moral developments in American society. They understood the Constitution to be a permanent and higher law intended to last for the ages. Our two-century experience with their design in Article V has contributed significantly to the reconciliation of democracy and constitutionalism that defines us as a nation.<sup>19</sup> What amendments we have ratified and what proposed amendments we have rejected, as well as how we have gone about considering them, have helped to define our essential Constitution.<sup>20</sup>

### *C. Power and Responsibility*

Amending the Constitution is very much an exercise in representative self-government.<sup>21</sup> The whole responsibility for amendments is given over to the elected representatives of the people: the Congress in conjunction with the state legislatures.<sup>22</sup> The two supermajority requirements, to propose and to ratify amendments, respect majority rule and minority rights. Thirty-four Senators, 146 Representatives, or any combination of 13 state legislative chambers are enough opposition to keep an amendment from becoming part of the Constitution. There must be a national consensus to amend the Constitution, and the consensus must be as broad as it is deep.

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<sup>19</sup> See ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 167 (1987).

<sup>20</sup> "The amendment process is thus not peripheral to the [C]onstitution, but is its essence." Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1563 (1998) (reviewing DAVIDE, KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* (1996)).

<sup>21</sup> *But cf.* Cook v. Gralik, 121 S. Ct. 1029, 1036 (2001) (rejecting the argument that the people of an individual sovereign state have the reserved power to instruct members of their state's congressional delegation). See generally Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1 (1999).

<sup>22</sup> See, e.g., Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L. Q. 545 (1997).

There is no explicit role for the Executive in Article V: the Presentment Clause<sup>23</sup> does not apply to amendments; therefore, a President need not sign and cannot veto a congressional proposal.<sup>24</sup> Of course, there is nothing to prevent the President from initiating or participating in the formation of public opinion supporting or opposing a proposal to amend the Constitution. For example, President George Bush was out in front of public opinion arguing for an amendment that would have allowed Congress to prohibit flag burning after the Supreme Court had ruled that flag burning was a form of freedom of speech protected under the First Amendment.<sup>25</sup>

The amendment procedures are essentially political procedures, given over to the elected branches.<sup>26</sup> In numerous decisions, the Supreme Court has consistently ruled that Article V places the primary responsibility for amending the Constitution within the province of the legislative branch, so the courts should play no role whatsoever in the process of considering amendments.<sup>27</sup> Furthermore, the Supreme Court has repeatedly concluded that there are no implicit

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<sup>23</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>24</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (sustaining the validity of the Eleventh Amendment and holding that the Presentment Clause does not apply to amendments).

<sup>25</sup> *United States v. Eichman*, 496 U.S. 310, 312-19 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). See generally Kenneth L. Karst, *Faiths, Flags, and Family Values: The Constitution of the Theater State*, 41 UCLA L. REV. 1, 2-3 (1993); Daniel H. Pollitt, *The Flag Burning Controversy: A Chronology*, 70 N.C. L. REV. 553 (1992); Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 (1992).

<sup>26</sup> Compare Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) (arguing for judicial review of the constitutional amendment process) with Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (arguing against judicial review of the constitutional amendment process).

<sup>27</sup> *Coleman v. Miller*, 307 U.S. 433, 450 (1939); *United States v. Sprague*, 282 U.S. 716, 730 (1931). See generally CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900 243-56 (1972); Thomas Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 SANTA CLARA L. REV. 745, 763-66 (1983).

limits on the substantive content of amendments, thus accepting the seeming tautology that a provision properly added to the Constitution cannot be judicially ruled to be unconstitutional.<sup>28</sup> The Supreme Court also has routinely deferred to the Congress to determine issues about its own procedures for proposing amendments and about the states' procedures for ratifying amendments.<sup>29</sup> Congress alone determines such matters as whether the supermajority requirements have been satisfied in a timely fashion or whether or not to extend the time for ratification. For example, it was the Congress, ultimately, that decided that the 200-plus year delay between the proposal and the ratification of the Twenty-Seventh Amendment was constitutionally proper.<sup>30</sup> The

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<sup>28</sup> See *Leser v. Garnett*, 253 U.S. 130, 137 (1922) (rejecting the contention that extending the franchise to women violated the Senate's constitutional autonomy); *National Prohibition Cases*, 253 U.S. 350, 386-88 (1920) (rejecting the argument that the Eighteenth Amendment's program of Prohibition improperly interfered with the states' police powers). However, the remaining entrenchment clause provides "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V. See generally Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J. L. & SOC. PROBS. 251 (1996) (discussing whether an Amendment can be unconstitutional); Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717 (1981) (discussing the power to amend the Constitution and whether there are any limits to that power).

<sup>29</sup> E.g., *United States v. Sprague*, 282 U.S. 716, 733 (1931) (rejecting the argument that amendments affording the national government new direct powers over the people could be ratified only by the people themselves in state conventions); *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921) (holding that Congress had the authority to set reasonable time limits on state ratifications and seven years was not unreasonable); *National Prohibition Cases*, 253 U.S. 350 (1920) (holding two-thirds vote of quorum of each house, rather than of entire membership was sufficient to propose an amendment); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381-82 (1798) (sustaining the Eleventh Amendment by ruling that the Presentment Clause did not apply to amendments).

<sup>30</sup> See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L. J. 677 (1993); William Van Alstyne, *What Do you Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENT. 9 (1993).

Article V amendment power bears all the constitutional hallmarks of a nonjusticiable or political question which, as a matter of constitutional law, is beyond the pale of judicial review.<sup>31</sup>

The judicial branch, especially the Supreme Court, can alter constitutional understandings through the power of judicial review, the inherent power to interpret the Constitution. But even Supreme Court Justices must bow to the ultimate sovereignty of "We the People" expressed with supremacy in the written Constitution.<sup>32</sup> Six amendments have been successfully proposed and ratified to disapprove and set aside Supreme Court rulings, often in dramatic and even historic fashion. The Eleventh Amendment (1795) promptly and decisively set aside the controversial 1793 holding in *Chisolm v. Georgia*<sup>33</sup> that had interpreted Article III to authorize a federal court to entertain a suit brought against a sovereign state by a citizen of another state. The great Civil War Amendments—the Thirteenth Amendment (1865), the Fourteenth Amendment (1868), and Fifteenth Amendment (1870)—were proposed by the Reconstruction Congress and ratified by the states to restore the Union and to be rid of Supreme Court constitutional interpretations epitomized by the infamous *Dred Scott v. Sanford* decision.<sup>34</sup> The Sixteenth Amendment

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<sup>31</sup> The following is the classic exposition of a nonjusticiable or political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>32</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1 (1969).

<sup>33</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>34</sup> 60 U.S. (1 How.) 393 (1856).

(1913), for all intents and purposes, reversed *Pollock v. Farmers' Loan and Trust Co.*<sup>35</sup> and granted Congress an expressly-enumerated power to tax individual income. Most recently, the Twenty-Sixth Amendment (1971) effectively reversed *Oregon v. Mitchell*<sup>36</sup> to grant 18-year-olds the right to vote.<sup>37</sup>

### III. AMENDMENTS

#### A. *History and Tradition*

History and tradition play a central role in every effort to understand any part of the Constitution, including the amendment article, Article V.<sup>38</sup> The nation's experience with proposing and ratifying amendments, in turn, reveals a great deal about the Constitution.<sup>39</sup>

By some estimates, there have been more than 10,000 bills introduced in Congress to amend the Constitution.<sup>40</sup> Of these, only thirty-three garnered the necessary two-thirds vote in both houses and proceeded to the states, and only twenty-seven have received the necessary ratifications of three-fourths of the states.<sup>41</sup>

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<sup>35</sup> 158 U.S. 601 (1895).

<sup>36</sup> 400 U.S. 112 (1970).

<sup>37</sup> Three other amendments could be understood to impliedly reject earlier Supreme Court understandings of the Constitution: the Seventeenth Amendment (1913) (direct election of Senators); the Nineteenth Amendment (1920) (women's suffrage); and the Twenty-Fourth Amendment (1964) (abolition of poll taxes in federal elections). See Baker, *supra* note 10, at 342 n.53.

<sup>38</sup> See generally JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995* (ABC-CLIO, Inc. 1996).

<sup>39</sup> See generally RESPONDING TO IMPERFECTION—THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995). The meaning and substance of the twenty-seven ratified amendments are beyond the scope of this essay. See generally GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION—A COMMENTARY* (1995).

<sup>40</sup> RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA—IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* xii (1993).

<sup>41</sup> But see Levinson, *supra* note 9; Strauss, *supra* note 9.

There has never been a convention for proposing amendments.<sup>42</sup> All twenty-seven amendments have been proposed by Congress, although during the 1980s thirty-two states had at one time or another issued a variety of calls for a constitutional convention to consider an amendment to require a balanced budget for the federal government.<sup>43</sup> All but one of the twenty-seven amendments have been ratified by the state legislatures.<sup>44</sup> Only the Twenty-First Amendment—which repealed the Eighteenth Amendment’s failed experiment with Prohibition—was ratified by state conventions upon the stipulation of Congress.<sup>45</sup>

Significantly, ever since the initial historic precedent of the Bill of Rights in 1791, amendments have been added at the end of the document, rather than incorporated directly into the text they amend.<sup>46</sup> This practice symbolizes the fact that an amendment is a separate exercise in constitution writing and serves to remind us of the importance of the occasion, that it is a *constitution* we are amending.<sup>47</sup>

It seems constitutionally significant how relatively few successful amendments there have been and how, more often than not, multiple amendments have been proposed and ratified in constellations drawn

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<sup>42</sup> *Amendment of the Constitution By the Convention Method Under Article V*, 1974 A.B.A. SPECIAL CONST. CONVENTION STUDY COMMITTEE 1; RUSSELL CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* vii (1988); COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 103d CONG., *IS THERE A CONSTITUTIONAL CONVENTION IN AMERICA’S FUTURE?*, at 1 (Comm. Print 1993); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972).

<sup>43</sup> CAPLAN, *supra* note 42, at vii.

<sup>44</sup> A.B.A., *supra* note 42, at 1.

<sup>45</sup> *Id.*

<sup>46</sup> James Madison had argued that amendments ought to be interlineated into the text of the Constitution, but the first House of Representatives decided to add them at the end of the document, which has been the practice ever since. Edward Hartnett, *A "Uniform and Entire" Constitution; or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 252 (1998); Price Marshall, *"A Careless Written Letter"—Situating Amendments to the Federal Constitution*, 51 ARK. L. REV. 95 (1998).

<sup>47</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a constitution we are expounding."). *Id.* See also Tribe, *supra* note 26, at 445.

to resemble the political issues and national priorities of four distinct eras in American history.<sup>48</sup> Between 1789 and 1804, the "Anti-federalist" or "Jeffersonian" amendments were adopted.<sup>49</sup> The first ten amendments, popularly known as the Bill of Rights (1791), secure the fundamental rights of the individual against the national government.<sup>50</sup> The Eleventh Amendment (1795) prevents federal courts from entertaining lawsuits against the states.<sup>51</sup> The Twelfth Amendment (1804) sought to harmonize political parties with the electoral college to avoid the problems the House of Representatives had with the election of 1800 between Thomas Jefferson and Aaron Burr.<sup>52</sup>

The "Civil War Amendments," the Thirteenth, Fourteenth, and Fifteenth Amendments, were ratified during Reconstruction in the years 1865, 1868, and 1870, respectively.<sup>53</sup> Ratified in the aftermath of a cataclysm that shook the constitutional structure to its foundations, those mighty provisions ended slavery, enforced due process and equal protection against the states, and guaranteed new freedmen the right to vote.<sup>54</sup>

The populist and progressive movements at the beginning of the century produced four ratifications: the federal income tax in the Sixteenth Amendment (1913), the direct election of Senators in the Seventeenth Amendment (1913), the national Prohibition in the Eighteenth Amendment (1919), and women's suffrage in the Nineteenth Amendment (1920).<sup>55</sup>

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<sup>48</sup> Walter Dellinger, *Amending Process*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 72, 74 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); see also Kathleen Sullivan, *Amending Process (Update)* in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 75, 75 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); John R. Vile, *Constitutional Amendments*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 181, 181 (Kermit L. Hall et al. eds., 1992).

<sup>49</sup> Dellinger, *supra* note 48, at 72.

<sup>50</sup> U.S. CONST. amends. I-X.

<sup>51</sup> U.S. CONST. amend. XI.

<sup>52</sup> VILE, *supra* note 38, at 313.

<sup>53</sup> Dellinger, *supra* note 48, at 72.

<sup>54</sup> Vile, *supra* note 48, at 181-82.

<sup>55</sup> Dellinger, *supra* note 48, at 72.

The most recent set of ratifications have dealt thematically with federal elections: the Twenty-Second Amendment (1951) set a two-term limit for the office of the President; the Twenty-Third Amendment (1961) awarded three electoral college votes to the District of Columbia; the Twenty-Fourth Amendment (1964) abolished poll taxes; the Twenty-Fifth Amendment (1967) revised the constitutional rules for presidential succession and devised a new procedure for presidential disability; and the Twenty-Sixth Amendment (1971) extended the franchise to 18-year-olds.<sup>56</sup>

This patterning is not perfect, and a few amendments cannot be drawn into these four groupings: the Twentieth Amendment (1933) limited the lame duck session of Congress, and the Twenty-First Amendment (1933) repealed Prohibition.<sup>57</sup> The Twenty-Seventh Amendment (1992)—which requires that any pay increase for members of Congress can go into effect only after the next regular election—has the most idiosyncratic ratification story.<sup>58</sup> It was proposed by the first Congress as part of the original Bill of Rights and was all but forgotten for more than 200 years before it was dusted off and ratified by the requisite number of states<sup>59</sup>—something that is not likely to happen again because the modern practice is for Congress to include a time limit, usually seven years, in proposed amendments.<sup>60</sup>

### *B. Lessons From Failed Amendments: the Case of the ERA*<sup>61</sup>

Congress has voted to propose six amendments that have failed to be ratified by the requisite three-fourths of the states.<sup>62</sup> An

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<sup>56</sup> *Id.* at 72-73.

<sup>57</sup> Dellinger, *supra* note 48, at 73.

<sup>58</sup> Sullivan, *supra* note 48, at 75.

<sup>59</sup> *Id.* at 75-76.

<sup>60</sup> Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 437 (1999).

<sup>61</sup> This discussion of the ERA relies substantially on Judge Daughtrey's James Madison Lecture delivered at N.Y.U. law school. Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1 (2000). The author was present when Judge Daughtrey revisited this subject at Drake University Law School on September 28, 2000, as part of the Distinguished Speakers Series sponsored by the Constitutional Law Center.

<sup>62</sup> See Sullivan, *supra* note 48, at 75.

amendment proposed along with the Bill of Rights would have set a population limit for congressional districts which, given today's population, would have required more than 5,000 members in the House of Representatives.<sup>63</sup> In the early nineteenth century, an amendment was proposed that would have automatically expatriated anyone who accepted a title or honor from any foreign government without the consent of Congress,<sup>64</sup> a measure that would have played havoc with Nobel prize winners and knighted former Presidents. There was a desperate and futile effort on the eve of the Civil War to appease the southern states by proposing to prohibit any future amendment that would eliminate slavery.<sup>65</sup> As part of the progressive movement in the 1930s, a proposed amendment would have authorized Congress to regulate child labor in the face of an unwilling Supreme Court, but the Justices eventually got around to finding the power in the Commerce Clause.<sup>66</sup> In the 1970s, a democrat-majority in Congress proposed to grant congressional representation to the District of Columbia, but the political reality that the measure would result in the election of at least three more democrats to Congress was enough for republicans to stall the measure in the statehouses.<sup>67</sup>

The most important recent showdown over a proposed amendment was the ten years of debate whether to add an amendment for sex or gender equality—the Equal Rights Amendment.<sup>68</sup> Congress proposed the ERA in 1972 with the usual seven-year deadline for ratifications, then extended the period for three more years.<sup>69</sup> After some early momentum, however, in the end only thirty-five states ratified the measure—three short of the number needed—and some

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<sup>63</sup> BERNSTEIN & AGEL, *supra* note 40, at 45–46.

<sup>64</sup> *Id.* at 177.

<sup>65</sup> *Id.* at 86.

<sup>66</sup> *Id.* at 179–80. *See* United States v. Darby, 312 U.S. 100 (1941), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918).

<sup>67</sup> BERNSTEIN & AGEL, *supra* note 40, at 143–48.

<sup>68</sup> *See generally* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986); Debra Baker, *The Fight Ain't Over*, 35 A.B.A. J. 52 (Aug. 1999); Daughtray, *supra* note 61.

<sup>69</sup> H.R.J. Res. 203, 92d Cong. (1971); S.J. Res. 3, 92d Cong. (1971); H.R.J. Res. 638, 95th Cong. (1978) (extending ratification period). *See generally* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 371 (1971).

states that had ratified the proposal went back to try to rescind their earlier ratifications.<sup>70</sup>

The ERA proposal galvanized opponents at the time to warn of "dire social consequences" like unisex bathrooms, women in combat, and the end of alimony.<sup>71</sup> Even though the measure failed ratification, American social arrangements have, in fact, developed along these policy tangents.<sup>72</sup> Unisex bathrooms are found on almost every college campus and in *Ally McBeal's* law firm, women have served in combat, and no-fault divorce laws have replaced alimony.

The Supreme Court has decided a series of cases striking down state laws that discriminate against women and men under the Equal Protection Clause of the Fourteenth Amendment, which was ratified in 1868.<sup>73</sup> Interestingly, Justice Ruth Bader Ginsburg, who brought many of those landmark cases to the Supreme Court as an advocate before she was appointed to that bench in 1993, believes "[t]here is no practical difference between what has evolved and the ERA."<sup>74</sup>

Over the years since, several states have added an equal rights amendment to their state constitution, and each year other states take up similar measures.<sup>75</sup> Today, more women than ever serve at all levels of government. Still, women's rights organizations and feminists continue to press Congress to resubmit the ERA to the states to preserve political gains and to serve as an important symbol to the nation. Justice Ginsburg herself continues to insist "[i]t belongs in our Constitution as a norm society embraces. It's what you'd like to teach ninth graders in civics class."<sup>76</sup> But opponents continue to resist and

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<sup>70</sup> *But cf.* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997) (arguing that if the requisite additional states were to approve the ERA then the amendment should be deemed ratified).

<sup>71</sup> Baker, *supra* note 68, at 53.

<sup>72</sup> *Id.*

<sup>73</sup> *E.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>74</sup> Baker, *supra* note 68, at 55.

<sup>75</sup> *See* Daughtrey, *supra* note 61, at 24 nn.122 & 123 (listing seven state constitutions with their own equal rights amendments and thirteen additional state constitutions with a general provision for equality).

<sup>76</sup> *Id.* at 22 n.113 (quoting David Harper, *Justice Assesses Gender Issue*, TULSA WORLD, Aug. 29, 1997, at A10).

worry out loud what the measure would mean for abortion policy and go on to imagine that an Equal Rights Amendment could lead to a genderless, unisex society with the legitimization of gay marriages and the like.<sup>77</sup> Opponents also link their opposition to their background mistrust of activist judges who might be emboldened to insinuate themselves and their subjective policy preferences into all aspects of the private sphere in the name of a new right of gender equality.<sup>78</sup>

### C. Current Pending Amendments

The amendments being debated in Congress at any given time represent the most divisive issues of the day. One side or the other, sometimes both sides of a contentious issue, often seeks to ratchet their point of view up to the next level of politics with the hope of constitutionalizing their policy preference once and for all. Frequently, proponents of constitutional amendments have been disappointed in the regular lawmaking process in Congress or the courts.<sup>79</sup> They regularly try to use Article V to attempt to trump a controversial Supreme Court decision with which they disagree.<sup>80</sup>

To its critics, today's Congress seems to be suffering from a bad case of "amendmentitis."<sup>81</sup> Consider some of the amendments

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<sup>77</sup> Baker, *supra* note 68, at 55.

<sup>78</sup> See generally Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

<sup>79</sup> See generally Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993) (analyzing the economics of amending the Constitution).

<sup>80</sup> See Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated By Some Current Proposals to Amend the Constitution*, 1996 BYUL. REV. 611. See also *supra* text accompanying notes 28-33.

<sup>81</sup> See generally John Conyers, Jr., *Is the United States Constitution a "Rough Draft"? An Open Letter to the 105th Congress*, 6 WIDENER J. PUB. L. 323 (1997); Kathleen M. Sullivan, *Constitutional Amendmentitis*, THE AMERICAN PROSPECT, Fall 1995, at 20; Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691 (1995); *The Constitution Project*, "Great and Extraordinary Occasions":

currently being considered by Congress. One proposal would effect a wholesale overruling of the Supreme Court's Establishment Clause jurisprudence.<sup>82</sup> Another that has passed the House, but not the Senate, with the requisite two-thirds majority would have given the Congress the power to prohibit and punish flag burning.<sup>83</sup> Other bills currently before Congress include a proposal to authorize a line-item veto for the President,<sup>84</sup> a proposal to require that federal judges be reconfirmed every ten years,<sup>85</sup> a proposal to abolish the electoral college to provide for the direct election of the President,<sup>86</sup> several proposals for various versions of term limits for members of Congress,<sup>87</sup> and a proposed amendment to guarantee rights to victims of crimes.<sup>88</sup> As with all things political, different people assign different value and importance to these various proposals to change the nation's fundamental law.<sup>89</sup> The wisdom—or the folly—of a proposal to amend the Constitution often is in the eye of the beholder.<sup>90</sup>

Some amendments go out of fashion while they are under consideration, disappearing from popular concern.<sup>91</sup> For example, the balanced budget amendment was in the headlines and looked close to

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Developing Guidelines for Constitutional Change (1999) at <http://www.constitutionproject.org/cai/guidelines/index.html> (last visited Apr. 17, 2001) (on file with the Widener Journal of Public Law).

<sup>82</sup>H.R.J. Res. 66, 106th Cong. (1999).

<sup>83</sup>H.R.J. Res. 33, 106th Cong. (1999).

<sup>84</sup>H.R.J. Res. 9, 106th Cong. (1999).

<sup>85</sup>H.R.J. Res. 11, 106th Cong. (1999).

<sup>86</sup>H.R.J. Res. 23, 106th Cong. (1999).

<sup>87</sup>H.R.J. Res. 2, 106th Cong. (1999); H.R.J. Res. 18, 106th Cong. (1999).

<sup>88</sup>H.R.J. Res. 64, 106th Cong. (1999).

<sup>89</sup>See, e.g., Bruce Fein, *Victims' Rights Amendment Needs a Quick Death*, NEWSDAY, July 23, 1998, at A48; Stuart Taylor, Jr., *Victims' Rights: Leave the Constitution Alone*, NATIONAL JOURNAL, Apr. 22, 2000, at 1254; Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, LOS ANGELES TIMES, July 6, 1998, at B5.

<sup>90</sup>See, e.g., Ross K. Baker, *Legislators Out of Control on Foolish Constitutional Amendments*, CHICAGO TRIBUNE, Apr. 30, 2000, at C21; Kristin Loiacono, *Amending the Constitution*, TRIAL, Jan. 2001, at 12.

<sup>91</sup>See J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (tracing the ups and downs of the "EQA").

passing Congress just a few years ago, partly as a consequence of pressure felt from the calls of thirty-two states for a constitutional convention to consider it.<sup>92</sup> But when the burgeoning economy began to yield consistent federal surpluses, the political pressure for passage lessened and the measure disappeared from view, at least for now. And by now, the bills introduced annually over the last so many years proposing amendments to permit prayer in public schools,<sup>93</sup> to outlaw school busing,<sup>94</sup> and to ban abortions<sup>95</sup> have become more like symbolic rituals than realistic efforts to change the Constitution. They are rallying points for organizations on their side for purposes of direct mail fundraising and membership recruitment, but they are not perceived by the other side as a genuine political threat any more.

#### *D. Difficulty and Rarity of Amendments*

Ultimately, it is the Constitution that unites us as "We the People"; thus, only matters of a lasting national consensus fully deserve our constitutional allegiance.<sup>95</sup> Everything else is merely politics. Just as all politics is said to be "local," all politics is temporary and always in play—always debatable and always subject to another vote. Most things Congress and the state legislatures do can be undone by the next election—that is to say that the people can "vote the rascals out" and replace them with new legislators who can repeal the unwise or unwanted laws. This is not so with constitutional amendments, which must be repealed by the arduous procedure of ratifying another amendment. Only one amendment has ever been

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<sup>92</sup> Brendon Troy Ishikawa, *The Stealth Amendment: The Impending Ratification and Repeal of the Federal Budget Amendment*, 35 TULSA L. J. 353, 356 (2000). See generally David E. Kyvig, *Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution*, 28 AKRON L. REV. 97 (1995).

<sup>93</sup> H.R.J. Res. 7, 106th Cong. (1999).

<sup>94</sup> H.R.J. Res. 13, 104th Cong. (1995).

<sup>95</sup> H.R.J. Res. 4, 106th Cong. (1999).

<sup>95</sup> Of course, the contents of the Constitution are always open to debate and rightly so. See, e.g., CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. et al. eds., 1998).

repealed: Prohibition was ratified in 1919<sup>97</sup> and eventually repealed in 1933.<sup>98</sup>

There is a reason that there have been only 27 amendments over more than 200 years: Constitutional amendments must have the sustained and one-sided support of great majorities in the Congress and across the states. Very few issues ever garner such importance and support.

Constitution-amending certainly is no sport for the short-winded. According to the account of one of the historic champions of the Nineteenth Amendment, the effort to guarantee women the franchise took 72 years and included 56 state-referenda campaigns, 480 state-legislative campaigns, 47 state-constitutional conventions, 277 state-party conventions, 30 national-party conventions, and 19 campaigns before 19 successive Congresses—just to get the measure before the states for ratification.<sup>99</sup>

Most issues of public policy are too evanescent or too closely contested to achieve and sustain the necessary supermajorities at the national and state levels. Such issues neither merit nor permit constitutional amendment. That is how most issues in our constitutional democracy properly are left to ordinary politics—to simple and temporary majorities of the legislative branches to determine and to change through the ordinary legislative process. Democracy, after all, "is a method of finding proximate solutions for insoluble problems."<sup>100</sup> We must keep trying to do right by ourselves and others.

#### IV. CONCLUSION

The Constitution is different, so constitution-amending must be different. "We the People" ought to be convinced that a proposed amendment moves us as a nation and a people "towards a more perfect union." The true genius in Article V, therefore, is found in the

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<sup>97</sup>U.S. CONST. amend. XVIII.

<sup>98</sup>U.S. CONST. amend. XXI.

<sup>99</sup>Daughtrey, *supra* note 61, at 5 (quoting CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS* 107-08 (1923)).

<sup>100</sup>REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1944).

elegant difficulty of its procedures to amend the Constitution and to place an issue beyond majority politics where legislatures and elections cannot reach. In this, as in so many other constitutional things, history has demonstrated the wisdom of the founding generation. A measure that successfully runs the Article V gauntlet rightly belongs in the Constitution. Our experience with amending the Constitution demonstrates beyond peradventure that such measures are few and far between.

