

ESSAY

Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a “Republican Veto”*

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My reader should be aware that this paper was originally composed as a speech and was subject to strict length (ten pages) and time (thirty minutes) restrictions. If you were listening to this speech, rather than reading it, you would hear only the text without the footnote digressions. Therefore, I ask you to read it that way for the intended effect. The footnotes are marginalia for law professors, in large part, elaborations, qualifications and defenses that respond to the thoughtful queries of several reviewers. Footnotes simply get in the way of communication between the author and the reader, unless the reader is a member of the species of law professor: “If footnotes were the preferred mode of writing, Darwinian selection would have produced readers whose eyes are placed on a vertical rather than horizontal plane.” Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1367 (1988).

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I. The Framers' Design

Chief Justice Charles Evans Hughes once observed that the Supreme Court of the United States is “distinctly American in concept and function.”¹ The High Court wields the power of judicial review—the most original contribution of the United States to constitutionalism—within the framework of the separation of powers. It is an important piece of James Madison’s wondrous clockwork design of checks and balances.² The underlying premise of this “judicial veto” of the legislative and executive branches, however, is that ultimate sovereignty in our Republic lies with “we the people.”³

The conclusion that a statute or executive action is unconstitutional and thus void is grounded in the hierarchy of written laws and the legitimacy of the judicial role. The people’s will as expressed in the Constitution controls over the will of their elected agents; it is the duty and the province of the judicial branch to interpret and to apply the people’s highest law. This is the constitutional catechism as believed and professed by the great Chief Justice John Marshall in *Marbury v. Madison*.⁴ Indeed, at the time of the founding, Alexander

1. SUPREME COURT HISTORICAL SOCIETY, *THE SUPREME COURT OF THE UNITED STATES* 3 (1980) (Pamphlet prepared by the Supreme Court of the United States with the Supreme Court Historical Society).

2. Glen Thorow stated, in commenting on the concept of judicial review:

Because the separation of powers is so central to the character of the Constitution, affecting nearly all of its provisions, the whole *Federalist* might be considered a commentary on the separation of powers. The discussion of each of the particular branches of government in essays 52-83, for example, throws much light on the separation of powers. However, the heart of the *Federalist’s* presentation of the separation of powers is found in essays 47-51, all written by James Madison. These papers make the separation of powers their explicit theme.

Glen E. Thurow, *The Separated and Balanced Constitution*, 21 *TEX. TECH L. REV.* 2389, 2391 (1990). See also Sanford Levinson, “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 *TEX. TECH L. REV.* 2443, 2443 (1990) (“That the United States has a written constitution is accounted one of its glories.”).

3. See Richard D. Parker, “Here, the People Rule”: A Constitutional Populist Manifesto, 27 *VAL. U. L. REV.* 531 (1993).

4. 5 U.S. (1 Cranch) 137 (1803). See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *DUKE L.J.* 1.

Hamilton promised that the proposed judicial branch “may truly be said to have neither force nor will but merely judgment.”⁵

II. A Perceived Problem

Two hundred years later, there is a growing consensus that the Justices too often force their will on the Nation by constitutional interpretation. The consensus of criticism from both sides of the political spectrum is that modern constitutional law is indeterminate and hence no longer legitimate.⁶ Critics insist that the reasoning of the Justices is characterized by “malleability, pliability, contingency, instability, indeterminacy, and general uncertainty” and that their decisions are resolved at such high levels of abstraction that they “can make any case or virtually any case come out any way they wish.”⁷ Under the guise of robed interpreters, the Justices have become Delphic rulers.⁸ Before becoming Chief Justice, Charles Evans Hughes once observed, “We are under a Constitution, but the Constitution is what the judges

5. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989).

In one of the most historic exegeses of “[t]he judicial power of the United States,” U.S. CONST. art. III, § 1, cl. 1, Chief Justice Marshall echoed Hamilton:

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824). See generally JACK N. RAKOVE, *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (1990).

6. Gene R. Nichol, Jr., *The Left, The Right, and Certainty in Constitutional Law*, 33 WM. & MARY L. REV. 1181 (1992) (summarizing and answering the criticisms).

7. *Id.* at 1181-82. See also Daniel A. Farber, *Messing the “Play of Intelligence,”* 36 WM. & MARY L. REV. 147 (1994); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

8. See HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990); Lino A. Graglia, “Constitutional Theory”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789 (1987). The Justices do not merely think of the Constitution as a protean document, rather they have come to treat it as a parchment phantasm. They leave behind even the academic theorists. “Constitutional theory is irrelevant, that is, to constitutional law—and the reason for the irrelevance is that the Constitution itself has become irrelevant to constitutional law.” Stephen L. Carter, *Why the Confirmation Process Can’t Be Fixed*, 1993 U. ILL. L. REV. 1, 2 (1993); see also Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990).

say it is.”⁹ Associate Justice Antonin Scalia recently described the cynic’s Constitution: “with five votes anything is possible.”¹⁰

III. The Inadequacy of Traditional Limits

The Framers sought to create a federal judiciary that was independent, but neither too much nor too long at odds with popular sovereignty. Thus, the President nominates, and with the advice and consent of the Senate, appoints Justices who “hold their offices during good behaviour.”¹¹ What limits there are to be found in the text are modest because the Framers were naive about the threat of government by the judiciary.¹²

The House of Representatives can impeach and the Senate can remove a Justice upon conviction of “high Crimes and Misdemeanors.”¹³ Early in our history, however, impeachment became what

9. CHARLES EVANS HUGHES, *Speeches before Elmira Chamber of Commerce in 1907*, in *ADDRESSES AND PAPERS* 133, 139 (1908). See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982). But see generally Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

10. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184-85 (1989).

It is, of course, *possible* to establish general rules, no matter what theory of interpretation or construction one employs. As one cynic has said, with five votes anything is possible. But when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.

Id.

11. U.S. CONST. art. III, § 1.

12. The Framers were preoccupied with cleaving the judicial branch from the executive and with empowering an independent judiciary. Also, issues of judicial federalism, how the federal and state courts would work together, were more worrisome back then than they are today. See generally THOMAS E. BAKER, *THE GOOD JUDGE* 25-36 (1989) (Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility).

A relevant legislative power remains merely a potential.

While the constitutionality and wisdom of many proposals have been debated over the years, there is little consensus on congressional authority to reduce the jurisdiction of the Supreme Court and the lower federal courts or on how to assess the efficacy of reductions in jurisdiction. . . . [T]here [are] virtually no limits to be found anywhere in the Constitution to Congress’s power to make exceptions to the appellate jurisdiction of the Supreme Court and the original jurisdiction of the lower federal courts.

Id. at 69. See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 187-92 (1994); PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 379-87 (3d ed. 1988).

13. U.S. CONST. art. II, § 4. Under Article I, the sole power of impeachment lies with the House of Representatives and the sole power to try all impeachments rests with the

Thomas Jefferson called "a mere scarecrow."¹⁴ It would be unthinkable today for the Congress to impeach and remove a Justice because the majority did not agree with that Justice's decisions.¹⁵

Nomination and confirmation have become the primary external restraints on the Supreme Court.¹⁶ Historically, predicting what specific issues will come before the Court has been impossible, except in the short term, and then in the most general terms. Furthermore, pre-

Senate. U.S. CONST. art. I, §§ 2-3. See *Nixon v. United States*, 113 S. Ct. 732 (1993). See generally Symposium, *Disciplining The Federal Judiciary*, 142 U. PA. L. REV. 1 (1993).

14. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 295 (1922). Jefferson's most developed discussion of the constitutional problems with Article III tenure are to be found in his autobiography. THOMAS JEFFERSON, *AUTOBIOGRAPHY, MEMORIAL EDITION*, in 1 *WRITINGS OF THOMAS JEFFERSON* 120-22 (1903). Jefferson objected to the required two-thirds vote for impeachment because it was "a vote so impossible, that our Judges are effectually independent of the nation." *Id.* at 120-21. Jefferson suggested an alternative solution to retool the impeachment mechanism to make the Judges accountable to Congress for their decisions:

I do not charge the judges with wilful and ill-intentioned error; but honest error must be arrested, where its toleration leads to public ruin. As, for the safety of society, we commit honest maniacs to Bedlam, so judges should be withdrawn from their bench, whose erroneous biases are leading us to dissolution. It may, indeed, injure them in fame or in fortune; but it saves the Republic, which is the first and supreme law.

Id. at 122.

15. See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992). Chief Justice Marshall's incumbent successor concluded that Marshall would have been willing to abandon the practice of judicial review in order to shield the federal judiciary and himself from legislative attacks. *Id.* at 118. Within a year after *Marbury v. Madison*, Marshall wrote to Justice Chase to endorse the concept of a legislative veto over judicial decisions as the lesser of the constitutional evils:

I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.

Id. at 126 (quoting 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 177 (1919)). See also ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* (1992). As a contemporary check on abuse of judicial power,

impeachment is impossible because it would be improper suddenly to take the Justices to task for doing what they have long been permitted, if not encouraged to do. Congress may someday develop sufficient will and political coherence to declare convincingly an end to the Court's exemption from censure; such a Congress, however, would probably find easier ways than impeachment to impress its will upon the Court.

Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331, 1341 (1985) (book review).

16. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 50-56 (1991); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 345-49 (1990). The most significant internal restraint on an individual Justice, of course, is the need to obtain the agreement of four associates. Cf. *supra* note 10.

dicting how any jurist will interpret the Constitution has been next to impossible.¹⁷ The only regular limitations on the Court's power therefore amount to surreal exercises in constitutional soothsaying.

No political institution, least of all a Court composed of nine lawyers appointed for life, should be expected to exercise near-absolute power over such a wide range of public policy without widespread political legitimacy. The people of the United States, from the beginning, have been committed to the rule of law, to republican government, and to a written Constitution—in short, to a Lockean system based on the consent of the governed. The Supreme Court has led our debates about self-government like a republican schoolmaster, but the people ultimately have determined the outcomes.¹⁸ The constitutional task today is to readjust the system of checks and balances to preserve and enhance popular sovereignty.¹⁹

IV. A Proposed Solution

There is a constitutional solution to this problem to be found in the text; the amending power in Article V can be used to disapprove of individual Supreme Court decisions.²⁰ By invoking the Article V

17. *But see* LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 138-41 (1985).

18. *See* Thomas E. Baker, 10 *CONST. COMMENTARY* 167, 170 (1993) (book review); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 *SUFFOLK U. L. REV.* 751 (1986).

19. "In the 1980's, Article V is very nearly a dead letter. The contention that it provides a realistic check on judicial activity is at best wishful thinking, certainly somewhat naive, and at worst disingenuous." Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 *YALE L.J.* 821, 842 (1985). Given these choices, color me hopeful that regular efforts to consider smaller, negative amendments might result in a rejuvenation of the amendment process. *See also* George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 *LOY. U. CHI. L.J.* 631 (1992); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 *COLUM. L. REV.* 2121 (1990). Realistically, however, any call for judicial self-restraint is "destined to be a vain request." JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 114-15 (1984).

20. Article V provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the

power, "WE THE PEOPLE" may exercise a "republican veto" to check the High Court's hermeneutical tendency toward judicial oligarchy.²¹

first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

U.S. CONST. art. V.

See generally HERMAN AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES (1970); ARKES, *supra* note 8; RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA (1993); THOMAS M. DURBIN, CONGRESSIONAL RESEARCH SERV., AMENDING THE U.S. CONSTITUTION: BY CONGRESS OR BY CONSTITUTIONAL CONVENTION (1992); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION (1978); LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION (1942); M.A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION: 1889-1928 (1929); JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT (1991); CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900 (1972).

21. Justice Frankfurter once delivered a lecture from the bench about the threats of judicial oligarchy:

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people But there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as "an irresponsible body" and "independent of the nation itself." The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the "press conference." But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.

American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 553-56 (1949) (Frankfurter, J., concurring) (footnotes omitted). Justice Frankfurter was greatly influenced by James Bradley Thayer, calling him "our great master of constitutional law," and calling his work, *The Origin and Scope of the American Doctrine of Constitutional Law*, "the most important single essay" published on constitutional law. ALPHEUS T. MASON & DONALD G. STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW* 285 (8th ed. 1987); *see also* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697, 730-31 (1993) (discussing Thayer's influence on Frankfurter);

Article V represents the Framers' effort to reconcile the need for change with the desire for stability—in Madison's words, "guard[ing] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."²²

There are two steps in amending the Constitution. There are also two alternatives for each step, arranged in what Madison described as a procedure that is "partly federal, partly national."²³ 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. 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. This is the method the Framers designed to keep the Constitution in tune with the times, not judicially-inspired addenda published in the United States Reports.²⁴

The proposal offered here is that Congress draft amendments in form. "The decision of the Supreme Court of the United States in *Doe v. Roe*, decided on February 25, 1993, is disapproved and set aside."²⁵ Congress should fix a relatively brief period for ratification.

THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

22. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

23. THE FEDERALIST NO. 32, at 246 (James Madison) (Clinton Rossiter ed., 1961).

24. "The framers and ratifiers did not want the Constitution to change in adaptation to the economic, political, cultural, or moral developments of American society. . . . For them a very different conception of constitutional law seemed appropriate. Constitutional law was permanent law. It did not change according to circumstances." Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 325, 327 (1989).

While there is no express role for the Executive, of course, there is nothing to prevent the President from initiating or participating in the formation of public opinion supporting a proposal to amend the Constitution. See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079 (1989).

25. See generally Neil MacCormick, *Why Cases Have Rationales and What These Are*, in PRECEDENT IN LAW 155-82 (Laurence Goldstein ed., 1987).

An earlier draft proposed the amendment to read, "[T]he judgment and decision. . . ." The choice to limit the amendment to Supreme Court decisions, and not judgments was made to ensure that outcomes for litigants before the Court remained undisturbed. The judgment or mandate from the Supreme Court will be the law of the case and will bind litigants. This approach is consistent with general principles of issue preclusion, claim preclusion, and finality. This approach also is reminiscent of the view Abraham Lincoln took of the infamous *Dred Scott* decision. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 984-85 (1987) (citing Lincoln's response to the *Dred Scott* holding, and distinguishing a constitutional decision from the Constitution). See *infra* note 64.

Preferably, the ratification period would last anywhere from seven months to one year, from the end of the Supreme Court's annual Term in June to the beginning of the next session of Congress in January. This deadline will help focus public attention during these constitutional moments.²⁶

A. Arguments From First Principles

It should be enough that this proposal is provided for in the text of our written Constitution.²⁷ If somehow that is not enough, the proposal is republican in that elected representatives in Congress would

26. "The Madisonian moment was special not because those participating in 'The Founding' thought they had possessed perfect knowledge of what the new Constitution meant, but rather because they understood the remarkable opportunity they were enjoying." Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 504-05 (1988).

The term "constitutional moment" describes the relatively brief but focused interlude during which the Congress and the state legislatures first consider the constitutional appropriateness of recent Supreme Court decisions. This meaning is different from Professor Ackerman's larger, more provocative thesis, see generally ACKERMAN, *supra* note 16, in several important respects. First, constitutional moments according to Ackerman are much rarer than Supreme Court overrulings. Second, under the Ackerman conception, moments are longer, each taking place over a number of years. Finally, according to Ackerman, moments are far more momentous than the typical "republican veto" being contemplated herein. See also *infra* note 60.

27. This proposal does not urge that text and history be ignored as does the argument that the exercise of a line-item veto would not require a new amendment. See J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39, 39 (1992) (discussing the executive power of line-item veto without a constitutional amendment authorizing it).

Furthermore, implementing this proposal would not require a constitutional amendment as would Senator Robert La Follette's proposal. La Follette proposed to amend Article V to authorize Congress to override a Supreme Court decision by a two-thirds majority. See Jonathan L. Walcoff, Note, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525, 1533 n.56 (citing H.R. Doc. No. 551, 70th Cong., 2d Sess. 193-94 (1929) and noting that the proposed change "was never considered seriously."). Such a proposal might have damaged the Court's legitimate authority. See also Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972).

Finally, this proposal would not harm federalism as would Senator Strom Thurmond's "States' Rights Amendments," which would have amended Article V to allow the states to alter the Constitution without any participation by Congress. See WARD E. Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY* 133-34 (1974); see also ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 419-26 (1968); Dennis J. Mahoney, *States' Rights Amendments*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1757 (Leonard W. Levy et al. eds., 1986) (both discussing proposed states' rights amendments).

act to propose a veto.²⁸ It is representatively democratic in that either the legislatures or the state conventions would have the final say on ratification.²⁹ The proposal also respects principles of majority rule and minority rights in the supermajority requirements in Congress and before the States. Thirty-four Senators, or 146 Representatives, or any combination of thirteen state legislative chambers can defeat a "republican veto," for good, bad, or no reason at all.³⁰ Federalism and separation of powers principles were built into Article V. Under our Constitution, the people can elect representatives to amend the Constitution because our government rests on the consent of the governed.

This proposal fits neatly into the constitutional system of checks and balances. In Article I, the President is afforded the explicit power of an executive veto, subject to a two-thirds "override" vote in an exercise of legislative supremacy.³¹ In *INS v. Chadha*,³² the Supreme Court invoked the separation of powers and rejected the proposition that the legislative branch had any implicit veto power over the executive. The power of judicial review, however, may be understood to be an implicit veto power vested in the judicial branch. But, the judiciary should be able to "veto" Congressional and state legislative acts so long as judicial decisions are subject to the explicit override provision found in Article V.³³ The analogy to statutory interpretation, while imperfect, supports this approach. Congress may exercise the final

28. See Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). See generally WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972).

29. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). See also TIP H. ALLEN, JR. & COLEMAN B. RANSOME, JR., *CONSTITUTIONAL REVISION IN THEORY AND PRACTICE* (1962); W.F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321 (1921); Philip L. Martin, *State Legislative Ratification of Federal Constitutional Amendments: An Overview*, 9 U. RICH. L. REV. 271 (1975).

30. This much of a "nullification doctrine" is found in the supermajority requirements within the express terms of Article V. See generally Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229 (1990).

31. U.S. CONST. art. I, § 7.

32. 462 U.S. 919 (1983). See generally BARBARA HINKSON CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* (1988).

33. See generally ROBERT L. CLINTON, *Marbury v. Madison* and Judicial Review (1989); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986). The Framers explicitly and repeatedly rejected proposals to create a Council of Revision, composed of the Executive and members of the Supreme Court, to review the wisdom and validity of proposed legislation. See

decision in interpreting what a statute means.³⁴ On the constitutional level, the Article V procedure gives the constitutional last word to Congress in conjunction with the states.³⁵

FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 208, 242, 254 (1985).

To recognize as the constitutional norm that Supreme Court decisions are the equivalent of the Constitution and can be set aside only by constitutional amendment is to allow "the least democratic political institution [to] use its powers to govern and direct the polity unless reversed by the one process least available to that democracy." AGRESTO, *supra* note 19, at 109.

34. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 *CAL. L. REV.* 729 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 *TEMP. L. REV.* 425 (1992). "It is customary to think of case-law reasoning as inductive and the application of statutes as deductive. The thought seems erroneous but the emphasis has some meaning." EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 27 (1972 ed.). *But cf.* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). See also William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 *COLUM. L. REV.* 1902 (1993).

One occasion for statutory overruling has to do with the so-called "Dormant Commerce Clause" power, by which the Supreme Court has struck down some state regulation, even though Congress has failed to enact any federal statute preempting state law. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 274-303 (4th ed. 1991). It is conceded that Congress can overrule these judicial invalidations simply by passing a statute authorizing the state regulation. MARVIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 63 (1995).

35. It is noteworthy to describe how Congress has oftentimes attempted to deviate from a Supreme Court decision by passing a statute with the intended effect of undoing a constitutional interpretation of the Supreme Court. *E.g.*, 18 U.S.C. § 3501 (purporting to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)). See generally Mark E. Herrmann, Note, *Looking Down From the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 *WM. & MARY L. REV.* 543 (1992).

Congress most often claims this statutory authority under § 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. The Supreme Court itself has interpreted § 5 as an empowerment equivalent to the "necessary and proper clause." U.S. CONST. art. I, § 8, cl. 18. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966); *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879). The Due Process Clause of the Fourteenth Amendment grants the power to enforce those provisions of the Bill of Rights which have been incorporated and applied to the states. The prevailing understanding of the § 5 legislative power, sometimes called the "ratchet theory," is that Congress, by statute, may give greater protection to individual constitutional rights, but may not infringe on those minimum rights recognized by Supreme Court interpretation. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212, 1230 (1978).

The most recent invocation of this power is The Religious Freedom Restoration Act of 1993. Pub. L. No. 103-141, 107 Stat. 1488 (1993). See generally Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 *TEX. L. REV.* 209 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 *B.Y.U. L. REV.* 221 (1993); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 *B.Y.U. L. REV.* 73 (1993). Congress used the § 5 power to disapprove of the Supreme Court's holding in *Employment Div., Dep't of Human Resources v. Smith*, 494

U.S. 872 (1990), which held that a lower, more deferential standard of review would be applied to general exercises of the police power that impacted the free exercise of religion. The 1993 Act called for a less deferential compelling interest test that is more protective of free exercise rights. The new statute, however, does not overrule the Supreme Court's holding in *Smith*. Rather, Congress created a new statutory right where the Supreme Court had refused to find a constitutional right. Laycock, *supra* this note, at 246. This ratchet theory may appear to be an attractive alternative to the "republican veto," but the statutory approach is limited in application. *Id.* at 249-52. First, Congress cannot use the § 5 power to restrict, abrogate, or dilute protections of individual civil rights and liberties. Second, any statute must comport with other provisions in the Constitution. Third, Congress cannot invoke § 5 as a pretext for accomplishing policy goals unrelated to the Fourteenth Amendment. Thus, unlike the proposed "republican veto," which is by definition constitutionally valid once duly ratified, each turn of the statutory ratchet is subject to substantial constitutional challenge. See Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislation Power*, 73 TEX. L. REV. 247 (1994). Indeed, as this article was being edited, a United States district judge declared that the 1993 Act violated the separation of powers and was unconstitutional. Lyle Denniston, *Judge in Texas Nullifies Religious-freedom Law*, BALT. SUN, Mar. 14, 1995, at 6A.

Furthermore, there are inherent problems with the § 5 technique. *Id.* at 254-57. The statute is subject to amendment, exception and avoidance by other legislation. By analogy, the legislative and judicial history of the Anti-injunction Act, 28 U.S.C. § 2283 (1988) suggests how problematic this process can be. See Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289 (1990). Furthermore, the ratchet theory may deprive the Supreme Court of the opportunity to reconsider the offending decision. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2240 (1993) (Souter, J., concurring) (expressing "doubts about whether the *Smith* rule merits adherence"). But see Laycock, *supra* this note, at 256.

The federal dimension creates another problem. An exercise of the § 5 power to enforce § 1 of the Fourteenth Amendment does not allow the statute to restrain federal governmental conduct. Theoretically, the equal protection/due process/reverse incorporation holding in *Bolling v. Sharpe*, 347 U.S. 497 (1954), may be used to enforce legislation against the federal government. This theory, however, would likely be unsuccessful where the issue of race remedies is not involved. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Textually, there is the "necessary and proper clause" to overlay onto the First Amendment; but the prohibition in the First Amendment, like the other prohibitions found in the Bill of Rights, cannot be misread as a grant of power. Rather, proponents of the overruling statute are obliged to invoke other, more general clauses, perhaps including the "general welfare" phrase in the Preamble. Regardless, the constitutional theory for federal application of such a statute is necessarily more elaborate.

Therefore, the ratchet theory is related to, but different from, the proposal of the "republican veto" in constitutionally important ways. See generally Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993); Matt Pawa, Note, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of § 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993).

The "republican veto" endorses the proposal that Congress play a greater role in constitutional decision-making by adopting "[c]ongress[ional] resolutions and other expressions of congressional opinion" on constitutional issues before the Supreme Court. See SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 205 (1984). The republican veto does not destroy the necessity of Article V amendments because amendments under Article V involve the states and are therefore far more authoritative than a mere resolution.

B. Arguments from History

History and tradition play a central role in every effort to understand any part of the Constitution,³⁶ including Article V.³⁷ Since 1789, more than 10,000 bills have been introduced in Congress to amend the Constitution. Of these, only thirty-three received the necessary two-thirds votes in both houses and proceeded to the states and only twenty-seven have received the necessary ratifications of three-fourths of the States.³⁸ To date, no convention for proposing amendments has been called, and only one amendment—the Twenty-First Amendment, which repealed the Eighteenth Amendment's failed experiment with prohibition—has been ratified by state conventions.³⁹

Proposals for amendments have been relatively numerous. It is constitutionally significant how relatively few successful amendments

36. See generally Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Richard A. Champagne, Jr., *The Problem of Integrity, Tradition, and Text in Constitutional Interpretation*, 72 NEB. L. REV. 78 (1993); W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

37. Walter Dellinger, *Amending Process*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 47 (Leonard W. Levy et al. eds., 1986); John R. Vile, *Constitutional Amendments*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 181 (Kermit L. Hall et al. eds., 1992).

38. But see 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. COMMENTARY 409 (1991).

39. In theory, a "republican veto" amendment could bypass Congress if two-thirds of the state legislatures call for a convention to propose such an amendment. There has not been a successful call for such a convention since 1787 because Congress has taken action on issues that would appeal to a large number of state legislatures. The most recent debate in Congress over the so-called "balanced budget amendment" demonstrates how Congress treats a proposal more seriously when the number of state applications approaches the two-thirds requirement. See generally AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974); AMERICAN ENTERPRISE INSTITUTE, A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? (1979); RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988); WILBUR EDEL, A CONSTITUTIONAL CONVENTION: THREAT OR CHALLENGE (1981); PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION (1989); JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (4th ed. 1972); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979); John T. Noonan, Jr., *The Convention Method of Constitutional Amendment—Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641 (1979); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AMER. J. LEG. HIST. 197 (1994); *Symposium on the Article V Convention Process*, 66 MICH. L. REV. 837 (1968). See generally Adam Clymer, *Victor of Budget Battle, Byrd Invokes An Army of Kings, Poets and Patriots*, N.Y. TIMES, Mar. 3, 1994, at A16; Norman J. Ornstein, *Constitutional Crisis: Glut of Amendments Threatens Document*, ROLL CALL, Mar. 10, 1994.

there have been, by comparison, and how more often than not, amendments have been ratified in constellations drawn to resemble the political priorities of distinct eras in American history.⁴⁰ Indeed, constitutional amendments are the best litmus of fundamental change in the social, economic, and political order of the United States.

Like so many other provisions in the Constitution, Article V was the product of debate, disagreement, and compromise.⁴¹ Its sparse language left many questions for subsequent generations to resolve

40. Dellinger, *supra* note 37, at 49. Between 1789 and 1804, what might be called the "Anti-federalist" or "Jeffersonian" amendments were adopted: the first ten amendments, popularly known as the Bill of Rights (1791), followed by the Eleventh Amendment (1795) and the Twelfth Amendment (1804). The "Civil War Amendments," the Thirteenth, Fourteenth, and Fifteenth Amendments, were ratified during Reconstruction, in the years 1865, 1868, and 1870, respectively. The populist and progressive movements gave rise to Amendments Sixteenth through Nineteenth, ratified between 1913 and 1920. The fourth and most recent period lasted between 1961 and 1971 and accounted for the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. The few that do not fit neatly into these temporal groupings are: Twentieth Amendment (1933), Twenty-First Amendment (1933), Twenty-Second Amendment (1951), and the Twenty-Seventh Amendment (1992). See also Daniel L. May, *The Third Vice President of the United States of Earth*, A.B.A. J., Sept. 1, 1987, at 76.

41. See generally STAFF OF HOUSE COMM. ON THE JUDICIARY, 103D CONG., 1ST SESS., *IS THERE A CONSTITUTIONAL CONVENTION IN AMERICA'S FUTURE?* (Comm. Print 1933). The House Committee on the Judiciary stated:

The fact that they were overstepping their authority in writing a whole new Constitution was not lost on the framers, who took care to include a way to remedy shortcomings in the document without having to totally rewrite it. After considering several alternatives, the framers agreed upon the language now found in Article V. The final product was a compromise between those who feared that Congress would seek to increase Federal powers at the expense of the States, and those who feared that the States would seek to increase their powers to thwart the efforts of the Federal Government. As originally written, Article V vested sole amending power in a Convention, which would be called by Congress upon application of two-thirds of the states. Complaints that this mode threatened the power of the Federal Government resulted in its being rewritten. On the suggestion of James Madison the Convention adopted wording which gave Congress the sole power to propose amendments, either when two-thirds of each House deemed it necessary or when two-thirds of the states applied. This version, too, met with disapproval from delegates who feared that Congress could simply refuse to submit for ratification amendments it disapproved. Finally, the Convention compromised only hours before concluding its work. Despite the objections of Madison who feared the power of conventions and wondered why Congress would be more likely to call a convention than to offer amendments upon application of two-thirds of the States, the Convention adopted the current wording which granted the power to propose amendments jointly to the Congress and the Convention.

The debate over Article V is not extensive and came in the waning hours of the Convention's deliberations. It is not surprising that commentators today find Article V's meaning vague and offer disparate interpretations of the "intent of the framers."

through custom and usage.⁴² Practical political considerations about specific measures, more than grand theory, have provided what answers we have on many procedural issues.⁴³

The amendment procedure is a purely political process. The familiar "case or controversy" limitations in Article III, including the prohibition on advisory opinions, apply to the Supreme Court's power to interpret Article V but not to the political procedures established in the amending language. In numerous decisions over the past two centuries, the Supreme Court has maintained this distinction by respecting a broad understanding of the congressional powers under Article V.⁴⁴ Indeed, the Court has invoked the political question or nonjusticiability doctrine to acknowledge a constitutional prohibition against judicial review of issues that might be considered and resolved by Congress in the performance of its Article V responsibilities to propose amendments, to supervise the ratification process, and to promulgate amendments.⁴⁵ Supreme Court majorities have consistently and repeatedly concluded that there are no implicit limits on the content of amendments that may be proposed and ratified,⁴⁶ thus evi-

42. See John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENTARY 373 (1985).

43. For example, although state legislatures derive their authority to ratify amendments from the Constitution, whatever procedures there are for voting, including any requirement of an supermajority, are matters of state law. *Hawke v. Smith*, 253 U.S. 221, 230 (1920).

44. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (sustaining the validity of the Eleventh Amendment; holding that the Presentment Clause does not apply to amendments); *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); *Dillon v. Gloss*, 256 U.S. 368 (1921) (holding that Congress has the authority to set reasonable time limits on state ratifications, and seven years was not unreasonable); *United States v. Sprague*, 282 U.S. 716 (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). Compare Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) with Laurence H. Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983). See also LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 22-28 (1985).

45. *Coleman v. Miller*, 307 U.S. 433 (1939); *United States v. Sprague*, 282 U.S. 716 (1931). See generally Thomas Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 SANTA CLARA L. REV. 745 (1983).

46. *National Prohibition Cases*, 253 U.S. 350 (1920) (rejecting the argument that the Eighteenth Amendment's "Prohibition" improperly interfered with the states' police powers); *Leser v. Garnett*, 258 U.S. 130 (1922) (rejecting the contention that extending the franchise to women violated the Senate's constitutional autonomy). "The constitutional appropriateness of the *substance* of proposed amendments, however, is undoubtedly a matter entirely committed to judicially unreviewable resolution by the political branches of

dencing the seeming tautology that a provision properly added to the Constitution cannot be unconstitutional.⁴⁷

Article V sets no time limit for the States to act on proposed amendments. The Framers supposed that the ratification process would be contemporaneous with congressional proposal and roughly simultaneous in the States. The Constitutional Convention did not set a deadline on ratification of the Constitution itself, but ratification actually took roughly nine months. The first set of amendments, the Bill of Rights, was ratified in just over two years. Most amendments since have been ratified relatively quickly—usually within eighteen and thirty months.⁴⁸ The exception is the most recent and most aberrational Twenty-Seventh Amendment, which was declared ratified in 1992 after being proposed back in 1789.⁴⁹ Excluding that oddity, the

government.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-13, at 102 (2d ed. 1988).

47. Of course, there are two entrenchment clauses in Article V: one clause, prohibiting amendment of the slavery provisions, expired in 1808 and since has been superseded by the Thirteenth, Fourteenth, and Fifteenth Amendments; the other clause is still in force and provides, “no State without its Consent, shall be deprived of its equal Suffrage in the Senate.” Presumably, such provisions do not contemplate a disingenuous two-step process, first to amend the Entrenchment Clause and then to work the change in a second amendment. See GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 192-95 (1989). The conceptual possibility that a provision in the Constitution is unamenable is reminiscent of the historical requirement of unanimity for amending the Articles of Confederation. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047 (1988); Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J.L. REF. 409, 440 (1987). That provision, as a practical matter, prevented any amendments and helped to necessitate the Constitutional Convention. Eventually, it was ignored in Article VII and essentially negated by the political fact of ratification of the Constitution of 1787. See generally, *RATIFYING THE CONSTITUTION* (Michael A. Gillespie & Michael Lienesch eds., 1989); Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717 (1981).

48. Compare Dennis J. Mahoney, *Ratification of Constitutional Amendments*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1510, 1511 (Leonard W. Levy et al. eds., 1986) (“The average time for ratification of a constitutional amendment has been eighteen months.”) with John R. Vile, *Constitutional Amending Process*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 179-80 (Kermit L. Hall et al. eds., 1992) (“the average [period of ratification] is about two and a half years”). See also BERNSTEIN, *supra* note 20, at 305-07 (Appendix C contains the dates amendments were proposed and ratified).

49. James Madison originally included the measure with the other proposals that became the Bill of Rights. Thus, 203 years went by between the first state ratification (Maryland, December 19, 1789) and the 38th State ratification (Michigan, May 7, 1992). The Archivist of the United States declared the amendment part of the Constitution pursuant to § 106b of Title 1 of the United States Code. 57 Fed. Reg. 21,187 (May 19, 1992). Both Houses of Congress passed resolutions declaring their assent to the new amendment. S. Con. Res. 120, 102d Cong., 2d Sess. (1992). See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM*

longest ratification took forty-eight months for the Twenty-Second Amendment; the shortest took only four months for the Twenty-Sixth Amendment. Several amendments have been ratified in less than a year.⁵⁰ Recently Congress has established seven-year deadlines, although a period less than a year would be presumptively valid.⁵¹ Congress could establish this deadline either in the joint resolution proposing the amendment or in the text of the amendment itself.⁵²

L. REV. 497 (1992); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENTARY 101 (1994); Michael S. 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. COMMENTARY 9 (1993).

50. The following amendments were ratified within one year of being proposed: Eleventh Amendment (11 months); Twelfth Amendment (7 months); Thirteenth Amendment (11 months); Twenty-First Amendment (9 months); Twenty-Third Amendment (9 months); and Twenty-Sixth Amendment (4 months). See BERNSTEIN, *supra* note 20, at 305-06. The Bill of Rights, which includes the first ten amendments, was ratified twenty-seven months after first being proposed in 1789, the first time Congress and the states used the procedure in Article V. *Id.* "Exactly when the Bill of Rights took effect is a matter of some dispute." David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 485 n.187 (1983) (elaborating on disagreements among compilers).

51. See *Coleman v. Miller*, 307 U.S. 433 (1939); *Dillon v. Gloss*, 256 U.S. 368 (1921). The concern that a "fast-track" one-year deadline would not allow for sufficient deliberation for an issue of constitutional dimension is misplaced. First, actual historical experience demonstrates that a one-year ratification deadline is politically possible. Whether there has been sufficient debate over a particular proposal can always itself be one of the relevant political reasons for supporting or opposing the measure. A cursory examination of those state legislatures which still follow a biennial schedule will disclose frequent, even regular, calls for special sessions during off years. Second, some of the appeal of having ratification periods run on for longer terms of years may be misdirected nostalgia for the 18th and 19th Century experiences. Any consideration of modern communication and travel and the power of the media in contemporary politics suggests that one year is a sufficient period for a national constitutional debate. If anything, a one year period is longer than the American people's normal attention span. Third, delay would favor the status quo against precipitous amendments on the fast track. A proposed amendment, however, would fail if not ratified within the one year ratification deadline. Finally, while it might arguably be sound to extend the ratification period beyond the next general election to prevent "political grandstanding," there is no traditional or Article V requirement that ratification deadlines be prolonged. To the contrary, there is a respectable tradition of constitutional grandstanding vis-à-vis the amendment process down to the present day. Further, voters are certainly free to later take into account their representatives' positions on constitutional amendments the next time they cast their ballots for Congress and the state legislature. Therefore, the one year deadline does not eliminate political accountability. It ought to pass rational review under Article V.

52. The Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments contain time limits in their texts. Alternatively, Congress prescribed the time limit for adoption in recent amendments, setting the limit at seven years, in the joint resolutions proposing the amendment. When the Equal Rights Amendment expired in 1979, Congress, by less than a two-thirds majority, voted to extend the deadline for another three years. The issue of the validity of the extension was mooted by the failure of the measure to be ratified within the extended deadline. See Bernstein, *supra* note 49, at 544; Adam

The judicial branch can alter constitutional understandings through interpretation, but the principle that the Supreme Court is subject to the checks and balances of constitutional amendments is demonstrated beyond peradventure by the six amendments ratified to reverse Supreme Court holdings.⁵³

For present purposes, the Eleventh amendment is most important for establishing the amending process in Article V as a means for overruling judicial decisions than for its substantive provisions.⁵⁴ Significantly, this was accomplished in 1795 by state legislatures and a Congress heavily incumbent with the men who wrote and ratified Article V. A second historical analogy for the "republican veto" may be found in the text of the Twenty-First Amendment, which simply states the repeal of the Eighteenth Amendment by citing it chapter and verse, in a form very similar to that being proposed for disapproving and setting aside Supreme Court decisions.⁵⁵

Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 504 n.110 (1992).

53. The Eleventh Amendment (1795) reversed *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), to guarantee that a state could not be sued in federal court by a citizen of another state. The Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments collectively overruled High Court rulings dealing with slavery, civil rights, and suffrage exemplified by the infamous *Dred Scott v. Sandford*, 60 (19 How.) U.S. 393 (1857). The Sixteenth Amendment (1913) effectively reversed *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895), and gave the federal government the express power to tax income. Most recently, in 1971, the Twenty-Sixth Amendment was ratified to reverse, in part, *Oregon v. Mitchell*, 400 U.S. 112 (1970), by granting the franchise to 18-year olds in state elections. Three "reversals by implication" might be added to the list: the Seventeenth Amendment (1913) providing for direct elections of U.S. Senators; the Nineteenth Amendment (1920) granting women's suffrage; and the Twenty-Fourth Amendment (1964) abolishing the poll tax in federal elections.

54. See generally CHARLES C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972). Indeed, the byzantine bizarreness of the "interpretations" of the Eleventh Amendment are "exhibit A" in support of the present proposal to adopt a simple "veto" message, as opposed to an attempt to draft an affirmative statement overruling a Supreme Court decision. The leading historian of the Amendment has concluded:

By the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity "The case law of the Eleventh Amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions." Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges.

J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 11 (1987) (citations omitted), quoted in *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 520 n.20 (1987) (Brennan, J., dissenting).

55. "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI.

C. Arguments from Function

The fact that so few amendments—only 27 from among more than 10,000 proposals—have successfully run the Article V gauntlet can be treated as *prima facie* evidence that the amendment process, or at least the historical approach, is decidedly biased against amendments.⁵⁶ Therefore, it is easy to discount any general threat of releasing a “flood of amendments” that allegedly might threaten a constitutional upheaval.⁵⁷

At the same time, it should be noted that many constitutionally bad ideas have deservedly failed. Important constitutional concerns of the day are debated in Congress, in the States, and before the body politic. Recent examples include: state legislative apportionment, school prayer, abortion, busing, balancing the budget, and flag burning. Article V thus serves an important safety-valve function; citizens’ zeal for change is channeled into a deliberative constitutional process.⁵⁸ At a minimum, regular repair to the “republican veto” would serve this function.⁵⁹

56. The failure of the Equal Rights Amendment is the most recent example of the difficulty of amendment. See *TRIBE, supra* note 46, § 16-30, at 1585-88.

An enlightening historical comparison can be drawn to the nineteenth amendment, which gave women the vote. The ratification of that amendment in 1920 was the culmination of 72 years of political struggle, including 56 state referendum campaigns, 480 legislative campaigns to get state suffrage amendments submitted, 47 state constitutional convention campaigns, 277 state party convention campaigns, 30 national party convention campaigns to get suffrage planks written into the party platforms and 19 campaigns addressed to 19 successive Congresses to get the amendment submitted to the states.

Id. at 1587 n.8. See generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

57. This is one area where Congress has proven itself constitutionally worthy. Only six more amendments (33) have been proposed than have been ratified (27); the other 9,977-plus bills have died in the Congress. We should expect Congress to act as responsibly with “republican vetoes.” James Madison, responding to a suggestion from Thomas Jefferson to allow amendments to be made more easily and more frequently, wrote, “[A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.” *THE FEDERALIST* NO. 49 at 314 (James Madison) (Clinton Rossiter ed., 1961). In addition, the Constitution today is more than two-hundred years old and deservedly much-venerated, while at least some of the Supreme Court’s interpretations are neither.

58. George Mason described the importance of this function: “The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.” 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 202-03 (Max Farrand ed., 1966).

59. Taking the long view, one must conclude that the “increases in the number and variety of demands for constitutional change reflect a strong public commitment to the

Recently, there have been important academic arguments that the provisions in Article V are not exclusive and that amendments might also be proposed and adopted by other means which would make amending the Constitution easier and more frequent.⁶⁰ Those arguments, however, certainly go beyond the text and probably go beyond the intentions of the Framers,⁶¹ but they serve to highlight the legitimacy and the propriety of the “republican veto.” The “republican veto” approach, by comparison to the extra-textual approach, is consistent with the language and original meaning as well as the two century-long functioning of Article V. The “republican veto” is merely a variation on familiar, well-established constitutional themes.⁶²

Congress should impose an abbreviated deadline on the “republican veto” for several reasons. First, Congress will have sufficient time during a Supreme Court Term to evaluate recent decisions and to propose amendments before the congressional summer recess.⁶³ Second, the States should be expected to act with celerity to consider an amendment of this type, since it adds nothing affirmative, but only vetoes a Court decision. Both the Congress and the States can rely on the opinions of the Justices to frame the relevant issue. Third, the

Constitution as much as they do growing public discontent with the actual workings of the constitutional system.” BERNSTEIN, *supra* note 20, at xiv. See also Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993).

60. See Bruce Ackerman, *The Storrs Lectures Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Levinson, *supra* note 2, at 2460. See also *supra* note 35.

61. My own view of Article V is that it means what it says, and it says all that it means. David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990).

62. See George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1053-60 (1991).

63. See Sup. Ct. R. 3 (“a continuous annual Term commencing the first Monday in October”); 28 U.S.C. § 2 (1993).

Of course, Congress has many other important responsibilities, but as a co-equal branch, it should give priority to how it participates in the constitutional dialogue. As a practical matter, we could expect Congress to perform this role as it otherwise generally conducts itself: through designated committees and with the assistance of staff. A serious proposal to amend the Constitution has at least as much a claim on the Congress as the matter of impeaching and removing a single errant interpreter, such as a lower court federal judge. See REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 32-68 (1993); BAKER, *supra* note 12, at 64-70. If experience proves the abbreviated timetable to be too short, there is nothing but impudence and politics to prevent Congress from taking more time.

short ratification period will serve to reduce the likelihood of a “flood” of “republican vetoes.” Amendments of the type being proposed are perhaps best limited to decisions of the Supreme Court from the most current Term in order to protect the integrity of stare decisis.⁶⁴ This sort of congressional self-restraint would respect the

64. *Compare* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-09 (1992) *with id.* at 2881 (Scalia, J., dissenting).

Consider the argument made by Abraham Lincoln:

And now as to the Dred Scott decision . . . It was made by a divided court—dividing differently on the different points. Judge [Stephen A.] Douglas does not discuss the merits of the decision; and, in that respect, I shall follow his example, believing I could no more improve on McLean and Curtis, than he could on Taney.

He denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?

Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called “precedents” and “authorities.”

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country . . .

Speech at Springfield, Illinois (June 26, 1857), in II THE COLLECTED WORKS OF ABRAHAM LINCOLN 400-01 (R. Basler ed., 1953). *See also* Speech at Chicago, Illinois (July 10, 1858) *in id.* at 494-96. *See generally* AGRESTO, *supra* note 19, at 90-92.

Likewise, we should expect that Congress will exhibit some self-restraint and common sense at the opposite extreme. A proposal to disapprove of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), simply would not do. *But see* Neil B. Cohen, *What if There Were No Judicial Review?*, in *WHAT IF THERE WERE NO WRITTEN CONSTITUTION AND BILL OF RIGHTS?* (Herbert M. Levine ed., 1992). In between these extremes, prudence ought to govern. For example, while he was Solicitor General, Erwin Griswold routinely instructed his assistants never to cite to a Supreme Court decision more than 25 years old. His theory was that, if the proposition was still “good law,” other recent precedent could be found and

separation of powers and would preserve the independent federal judiciary guaranteed in Article III. Congress should not rely on the “republican veto” so often or so boldly as to encroach on the core judicial function.⁶⁵

It would be up to Congress whether to add an express requirement that each of the fifty states actually vote on the proposal before the end of the specified time period. The second step in Article V is a textual recognition of the states’ power to choose whether to ratify or to reject any proposed amendment. This power, however, has not always been honored. Ratification of the Fourteenth amendment was secured, in part, because Congress made ratification a condition precedent to readmission for the states of the former Confederacy.⁶⁶ The Reconstruction Congress operated at, if not beyond, the outermost limits of Article V. Perhaps this exercise of a power, dictating ratification to the sovereign states, includes a lesser power to require that each state ratify or reject a duly proposed amendment before a stated deadline, without dictating the actual vote of any State.⁶⁷ Imposing

if not, then it was probably no longer the law. Letter from Charles Alan Wright to Thomas E. Baker (February 22, 1994). See *infra* notes 84 & 97.

65. See Frederick A.O. Schwarz, Jr., *The Constitution Outside the Courts*, 14 *CARDOZO L. REV.* 1287 (1993).

66. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 40-63 (1988). See also Herman Belz, *The Constitution and Reconstruction*, in *THE FACTS OF RECONSTRUCTION* 189 (Eric Anderson & Alfred A. Moss, Jr. eds., 1991).

67. An argument may be made that for Congress to impose a requirement that state legislatures conduct an actual vote within the one-year deadline is beyond the powers of Congress and unconstitutional. This argument might be based on Article V itself, which strictly delimits the power of Congress over the amendment procedures. Under this rationale, however, the Supreme Court would be obliged to deal with the unmistakable history of the Fourteenth Amendment and 200-plus years of rather deferential precedents. The argument might be based, alternatively, on the Tenth Amendment or the Guaranty Clause. The Tenth Amendment is dead letter for the present intents and purposes. The Guaranty Clause is nonjusticiable and judicially off limits for the most part. See *infra* notes 88 & 97. For some time now, and likely for some time to come, the operative rule of constitutional law in the Supreme Court is that states lose and Congress wins, although there are rare rule-proving exceptions. Compare *U.S. Dep’t of Commerce v. Montana*, 112 S. Ct. 1415 (1992) (the rule) and *South Dakota v. Dole*, 483 U.S. 203 (1987) with *New York v. United States*, 112 S. Ct. 2408 (1992) (the exception).

A more interesting, and less certain, issue is how Congress could influence a recalcitrant state legislature. Federal “carrots and sticks” are commonplace. Congress sometimes simply commands what it wants done or not done, and relies on federal criminal or civil sanctions for enforcement. Other times, Congress attaches strings to federal funds to accomplish its bidding on everything from affirmative action in higher education to minimum drinking ages and interstate highways. Often, what Congress wants done requires the sovereign state legislature to act. Finally, Congress might simply acquiesce and interpret a failure to answer by the deadline as a “no” on the measure. The feature of requiring a vote by each state is not absolutely necessary for the “republican veto.”

such a mandatory voting requirement on the states would render the relatively short deadline suggested far more feasible. Such a requirement would also have the desirable effects of focusing attention on the particular "republican veto" and further reducing the likelihood that too many or untoward amendments would be ratified.

The constitutional beauty of this proposal for negative amendments is that it is ideologically neutral, regardless of the divisiveness of the issue. Hypothetically, those of a pro-life persuasion could have vetoed *Roe v. Wade*,⁶⁸ the 1973 decision affording a pregnant woman a fundamental right to terminate her pregnancy. Hypothetically, those of a pro-choice persuasion could have vetoed *Harris v. McRae*,⁶⁹ the 1980 decision that denied an indigent woman the right to a government-provided abortion.

The limits on this technique are ultimately political and contextual. One might speculate that had this been the approach when *Plessy v. Ferguson*⁷⁰ was decided, the "republican veto" could have prevented the whole regime of "Jim Crow" and would have withheld the constitutional imprimatur on racial apartheid. Such a revisionist

Alternatively, Congress could direct the proposed amendment to the attention of conventions in the states. In 1933, Congress submitted the Twenty-First Amendment, which repealed prohibition, to state conventions. This is the only occasion on which this option has been designated. In almost every state, elections of delegates to the ratifying convention amounted to a referendum on the proposal. It is also noteworthy that all this was accomplished in less than ten months. See BERNSTEIN, *supra* note 20, at 306. This is historical precedent for the Congress, if the extraordinary majority see fit, to submit a "republican veto" to a similar arrangement of state by state referenda. See generally *Constitutional Convention Procedures, Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (July 31 & Sept. 23, 1985). The relative ease and unquestioned representativeness of the convention method have much to recommend.

68. 410 U.S. 113 (1973).

69. 448 U.S. 287 (1980). The textual examples raise a more general question. Suppose, for example, that a negative amendment that disapproved of *Harris* was ratified in a timely fashion. Would that amendment have the constitutional effect of immunizing *Roe* from being overruled, either by the Supreme Court or by a subsequent "republican veto"? The answer to this question is "no" because properly understood, the negative amendment stands only for the explicit disapproval of the designated decision. The design of the "republican veto" proposal does not contemplate what logicians call a negative pregnant proposition. Furthermore, the Supreme Court, through the power of judicial review, should be able to sort out the meaning and effect of a negative amendment. The Court demonstrates as much when it overrules one of its own precedents. See also *infra* note 97 (discussing political question doctrine decision making). Finally, the relevance and influence of an earlier negative amendment in a later debate over a related "republican veto" is best left to the Article V political process in Congress and the states. See also *supra* note 64 (concerning the validity of an argument based on the passage of time, settled expectations, and societal reliance).

70. 163 U.S. 537 (1896).

speculation, however appealing, is fraught with presentism and is both unrealistic and ahistorical. At the same time, one should worry that the “republican veto” might have been used to set aside *Brown v. Board of Education* in 1954.⁷¹ The so-called “Southern Manifesto” expressed the view that the *Brown* holding was “unwarranted” and the 101 members of Congress who were signatories solemnly and ominously pledged “to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution.”⁷² It is noteworthy that those sentiments did not even come close to the extra-majorities required to propose and ratify an amendment, despite the level of controversy and the intensity of the opposition at the time. The Article V procedures have proved to be sufficient safeguards against unto-ward vetoes of Supreme Court decisions.

Gauging the threat of this proposal to civil liberties and civil rights is important yet difficult. The very existence of the Article V procedure, however, represents the exact same potential threat. In theory, even preferred freedoms could be eliminated by a properly proposed and duly ratified amendment. The remote likelihood of such an occurrence should be a matter of common sense and constitutional faith. The same conclusion can be reached about the “republican veto:” the proposal relies on using the existing, proven procedures in Congress and before the states, with their built-in extra-majority requirements. The worry that coalescing factions would succeed in destroying the First Amendment can be dismissed as far-fetched. Recent scholarship has suggested that the Supreme Court itself might exercise some extra-textual power to void any amendments that would take away the most fundamental rights or that would entrench on the essential role of the third branch.⁷³ Such a fail-safe, however, will not be necessary because the “republican veto” will not occasion this sort of constitutional showdown. After all, the Bill of Rights itself owes its very existence to the Article V procedure, and the empirical

71. 347 U.S. 483 (1954).

72. 102 CONG. REC. 4515-16 (1956). See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality* 752-53 (3rd ed. 1987).

73. Walter Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130 (M. Judd Harmon ed., 1978); Guido Calabresi, *The Supreme Court, 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 113 n.87 (1991); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073 (1991). These “arguments should be rejected and courts should steer clear of imposing implicit limits on the substance of amendments, even in the extreme circumstances” these scholars imagine. Vile, *supra* note 42, at 381-82.

experience with Article V since 1791 further supports this conclusion.⁷⁴

The proposal here is best understood as protective of fundamental rights, especially because of its case-specific quality. Consider a recent case history. In 1989, the Supreme Court decided *Texas v. Johnson*,⁷⁵ holding that the Constitution protected the act of publicly burning a United States flag as a means of political protest. It did so by a narrow five to four majority, and over strident dissents. Reactions in the Congress, from the White House, and in public opinion, were immediate and angry. Bills were introduced in Congress to change the language of the First Amendment. Many defenders of the Court and the Constitution worried that overwhelming public support would allow those proposals to succeed with the consequence that settled, even sacred, understandings of free speech might be undone. A federal statute was offered to placate public opinion,⁷⁶ but the Supreme Court the very next year held the statute unconstitutional. In overruling the statute, the Supreme Court relied on the same reasoning as in *Texas v. Johnson* and voted according to the same divided vote.⁷⁷ The whole episode shed more heat than light on our basic charter.

Had Congress invoked the "republican veto" in the aftermath of the *Johnson* case, the nation would have fared much better. Debate

74. While amendments might threaten civil rights and civil liberties in theory, a review of the more than 10,000 amendments considered since the Constitution was adopted indicates that only a few would have limited rights. John R. Vile, *Proposals to Amend the Bill of Rights: Are Fundamental Rights in Jeopardy?*, 75 JUDICATURE 62 (1991). Those added measures proposed by Congress and ratified by the states, by and large, have extended individual liberties. *Id.*

75. 491 U.S. 397 (1989).

76. Professor Karst's assessment is most apt:

Let me suggest a two-sentence opinion that might have disposed of the second flag case:

The only real purpose in enacting this law was to dramatize some politicians' devotion to the flag. Sending people to jail for political expression is a serious business, and we are unwilling to do that just to allow the Congress and the President to take a curtain call.

Of course, the majority opinion was more restrained.

Kenneth L. Karst, *Faiths, Flags, and Family Values: The Constitution of the Theater State*, 41 UCLA L. REV. 1, 3 (1993). See also Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990). That the measure was a statute created additional problems. Mark E. Herrmann, Note, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543, 544-45 (1992); see also *supra* note 35.

77. *United States v. Eichman*, 496 U.S. 310 (1990). The incident raised in the mind of one student of the Constitution "the bizarre possibility of an unconstitutional amendment . . ." See Rosen *supra* note 73, at 1073.

over the measure could have diffused the public's reaction. In the supposed worst-case scenario for civil liberties—if a veto measure had been proposed and ratified—a single 5 to 4 Supreme Court decision, without which the nation had survived for 200 years, would have been overruled; but, the First Amendment, without which the United States would not have been the country that it has been over the last two centuries, would have been preserved in whole and intact.

D. Arguments from Role

Would the nation adapt to the regular overruling of Supreme Court decisions? If the practices of the Court itself are any indication, there is little to fear.⁷⁸ The Supreme Court has overruled as many of its own prior decisions during the author's lifetime as it did during the previous 160 years of the Republic.⁷⁹ By their own count, the Justices have overruled in whole or in part thirty-four of their previous constitutional decisions in the last twenty years.⁸⁰ If the guardians of the Constitution themselves do not perceive a threat in this frequency of overrulings, others should not be heard to raise a hue and cry against against proposing republican vetoes from time to time.⁸¹ The Supreme Court once claimed for itself the mantle of judicial supremacy in *Cooper v. Aaron*⁸² and equated its opinions with the text of the Constitution. Of course, this judicial rhetoric was necessary to

78. The technique itself is not wholly unlike a citation technique the Supreme Court has used in UNITED STATES REPORTS. Following *Brown*, the Court applied desegregation to a multitude of public activities beyond education in brief *per curiam* opinions, some merely citing *Brown*. E.g., *Schiro v. Bynum*, 375 U.S. 395 (1964) (*per curiam*); *State Athletic Commissioner v. Dorsey*, 359 U.S. 533 (1959) (*per curiam*); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (*per curiam*); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (*per curiam*); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (*per curiam*); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (*per curiam*). A one-citation *per curiam* opinion was also used to reverse obscenity convictions, even though the Justices could not agree on a rationale. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting) (citing more than thirty cases that were "*Redrup-ed*").

79. DAVID O'BRIEN, *STORM CENTER* 63 (3d ed. 1993). See generally Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992).

80. *Payne v. Tennessee*, 501 U.S. 808, 828-30 n.1 (1991) (counting 33 decisions). See *United States v. Dixon*, 113 S. Ct. 2849 (1993) (34th constitutional overruling since decided).

81. See generally Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

82. 358 U.S. 1 (1958).

the times if not the decision.⁸³ Supreme Court opinions help the people to discover faults in the Constitution and to deliberate and decide when to seek correction before the Court or through the amendment process.⁸⁴ Nonetheless, there is a distinction between drafting and debating an amendment of the text, which obliges full discussion and elaboration, and merely setting aside a single reported opinion of the Supreme Court.⁸⁵ The smaller constitutional task can be accomplished with an economy of words and within an abbreviated time period.

Indeed, the best use of this "republican veto" would be to set aside a Supreme Court decision that itself overrules a prior decision. This would have the immediate effect of reinstating the preferred earlier interpretation. For example, Congress and the state legislatures by vetoing either *National League of Cities v. Usery*⁸⁶ or *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁷ could have settled the de-

83. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 285-310 (1992); Daniel H. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1983 U. ILL. L. REV. 387 (1983); Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85 (1991). See generally Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987).

84. JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 7 (1992). The method advocated here is similar to the Supreme Court practice of policing its own precedents. Consider two modern examples. Within five years of the only majority opinion invalidating state legislation under the privileges and immunities clause, the decision was overruled. *Madden v. Kentucky*, 309 U.S. 83 (1940), *overruling in part Colgate v. Harvey*, 296 U.S. 404 (1935). A 1976 majority, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), chose between two indistinguishable state action decisions. The members of the Court deciding those two cases, however, had previously reconciled them with an earlier decision. These instances of unravelling and reweaving *stare decisis* did not seem to threaten the Republic, and today are an accepted part of the hornbookery of constitutional law. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.2, at 359 n.20 & § 12.2, at 460-61 (4th ed. 1991). Interestingly, in both these instances older and more established precedents were overturned than is being recommended for the "republican veto." See *supra* note 64.

85. The "republican veto," negating a Supreme Court decision, would be somewhat analogous to a practice and procedure used by many state appellate courts to withdraw a previously published opinion, a technique sometimes labelled "depublication." See generally Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469 (1988); Paige Merrill Baker, Comment, *Depublication: The New Starchamber*, 18 W. ST. U. L. REV. 313 (1990). The Federal Circuit often enters a "vacatur" to vacate the judgment and opinion of the district court, usually upon the motion of the parties as part of a settlement agreement. See *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992), *cert. granted sub nom. Kaisha v. Philips Corp.*, 113 S. Ct. 1249 (1993), *cert. dismissed*, 114 S. Ct. 425 (1993). See generally Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229 (1993).

86. 426 U.S. 833 (1976).

87. 469 U.S. 528 (1985).

bate over the Tenth Amendment, at least for this generation. That would have avoided the constitutional consternation that resulted from the Court's yo-yoing of its own precedents.⁸⁸

This usage to set aside judicial overrulings has the potential to reclaim valuable constitutional precedent at only an incremental cost to the Court as an institution.⁸⁹ The Supreme Court's recent internal debate over stare decisis for constitutional questions is instructive and provides Congress with some helpful criteria to consider in deciding whether to veto a Supreme Court decision. Such criteria include the narrowness of the margin of the decision, the persuasiveness of the dissents, the lack of allegiance by present members of the Court, the difficulty of consistent application by the lower courts and subsequent Supreme Courts, the extent of reliance on the ruling within the legal community and in society at large, how related doctrines have affected the ruling, and whether the facts and assumptions relied on in the decision have been overcome by subsequent developments.⁹⁰ The debate over the particular proposal ought to take place on this level of pragmatic argumentation, with full consideration afforded to all relevant and prudential factors,⁹¹ including the threshold assumption that there is a higher burden for constitutional change than for legislative matters. Constitutional politics ought to claim the best wisdom of our nation, expressed through the Congress and the state legislatures.

88. See Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENTARY 341 (1985). See generally Maurice Keltman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (1985); Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 (1980). Of course, precedent is not the only input for Supreme Court decision making and there may be some conflict between precedent and the others. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

89. There is an imperfect but relevant correspondence between the inquiry into constitutional stare decisis and the Article V inquiry into the appropriateness of proposing and ratifying a "republican veto." Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1361 (1990). See also Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183-216 (Laurence Goldstein ed., 1987).

90. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2808-09 (1992); *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991). See also generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667 (1993); Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67 (1988).

91. "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

How can the Supreme Court be expected to act in response to the exercise of the “republican veto” if the practice becomes routine? If an amendment is proposed by Congress and ratified by the states, then the Court is oath-bound⁹² to respect the outcome of the political process.⁹³ In fact, each time Article V has been relied on to overrule a Supreme Court decision, the Justices have adhered to their oaths.⁹⁴ The Supreme Court, no less than the political branches, must adhere to the rule of law; indeed, the Court as an institution has the most to lose under the rule of man.⁹⁵

The constitutional dialogue would be enhanced by regular repair to the “republican veto.”⁹⁶ Under settled understandings of the principle of separation of powers, the decisions when and what to propose and ratify in a “republican veto” are wholly given over to the Article V procedures. The judicial task of interpreting any amendment, including a new amendment setting aside a specific Court decision, nec-

92. “Why otherwise does [the Constitution] direct the judges to take an oath to support it?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (Marshall, C.J.). The Justices take an oath to uphold the Constitution, “not the gloss which [the Supreme Court] may have put on it.” *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

93. See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

94. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (Eleventh Amendment); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (Thirteenth Amendment); *The Civil Rights Cases*, 109 U.S. 3 (1883) (Fourteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (Fifteenth Amendment); *William E. Peck & Co. v. Lower*, 247 U.S. 165 (1918) (Sixteenth Amendment); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (Nineteenth Amendment); *Harman v. Forssenius*, 380 U.S. 528 (1965) (Twenty-Fourth Amendment). See *supra* note 53.

95. See *Morrison v. Olson*, 427 U.S. 654, 697 (1988) (Scalia, J., dissenting) (“It is the proud boast of our democracy that we have ‘a government of laws and not of men.’”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). See generally Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988).

96.

Nothing in the Constitution itself, of course, specifies that a search for consensus must play a paramount constitutional role. In significant part, the Constitution creates a process less of consensus than of controlled conflict. The regime it creates gives a central place to a judiciary that speaks not always in one voice but often in many, and whose pronouncements are best understood not as final answers but as parts of an ongoing discourse—a discourse with the other levels and branches of government, with the people at large, with courts that have gone before and courts yet to be appointed. It is this constitutional discourse, and the role it plays in subjecting governmental practices to continuing critique in terms of our fundamental law, that gives the institution of judicial review such legitimacy as it may enjoy.

TRIBE, *supra* note 46, § 3-6, at 66. See also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.15(2), at 109-11 (4th ed. 1991).

essarily resides with the Supreme Court, as does the continuing obligation to interpret the scope of the underlying provision of the Constitution.⁹⁷ The implied veto of judicial review is subject to the explicit veto of Article V, but the awesome responsibility to interpret the Constitution will remain with the Supreme Court. Once ratified, a “republican veto” will become part and parcel of the same constitutional dynamic.⁹⁸ Arguably, an amendment that is negative should be

97. This process of post-adoption interpretation resembles the Supreme Court’s application of the political question or nonjusticiability doctrine: a textual commitment of an issue within the power of one of the two coordinate political branches makes the matter off-limits to the judicial branch; likewise, the power of judicial review obliges the Supreme Court to determine whether there is such a textual commitment and to define the scope of the power of judicial review. The Court’s conclusion, however, omits whether the Constitution allows for judicial review of the result of the political process. Compare *Baker v. Carr*, 369 U.S. 186 (1962) with *Powell v. McCormack*, 395 U.S. 486 (1969).

The Supreme Court similarly will determine the meaning and application of the “republican veto” amendment. A “republican veto” amendment will present the Supreme Court with important and often difficult interpretation issues. For example, each time the Court deliberates on an issue subsequently affected by a “republican veto,” the Court will need to decide whether the amendment repudiating the specified decision also repudiates the general principle underlying the disapproved decision. If so, the negative amendment could be understood to be much broader than a narrow provision merely setting aside a single decision. Opponents of the proposal likely will have made that negative pregnant argument in their unsuccessful efforts against ratification, making it part of the legislative history of the measure. Proponents likely will have rejected such arguments, and their debate will be part of the record as well. Thus the Supreme Court will need to conclude whether the general underlying principles that, in the Justices’ views, led to the disapproved decision, were nonetheless left undisturbed by the negative amendment.

A controversial example illustrates this point. Suppose that shortly after *Roe v. Wade*, 410 U.S. 113 (1973), a “republican veto” was ratified disapproving of the decision. The Supreme Court could easily and legitimately conclude that the right of privacy underlying *Griswold v. Connecticut*, 381 U.S. 479 (1965), had been left undisturbed. Such arguments over applications of principles are found elsewhere in the field of constitutional law. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Theoretically, it also would be possible for the Court to reconsider the disfavored precedent under arguments that previously were not addressed if they were properly presented in a subsequent case. See *Bowers*, 478 U.S. at 188 n.1, 196 n.8.

The interpretive dilemma presented by a “republican veto” is not any different from that confronted by the Court daily. The perennial debate over the meaning and intent behind the Fourteenth Amendment that has raged in the UNITED STATES REPORTS and the law reviews from 1868 to the present illustrates the interpretation problems the Court is typically confronted with. See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). This is consistent with the role of the Supreme Court as proclaimed by Justice Jackson, “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). If the Supreme Court “just doesn’t get it,” a second “republican veto” disapproving of the decision interpreting the previous negative amendment would be theoretically possible. Such a second veto, however, would be less likely given the attention span of public opinion and elected officials.

98. There is no reason why the Supreme Court’s interpretive methodology should be different for a “republican veto.” See Julian N. Eule, *Judicial Review of Direct Democracy*,

preferred over an amendment that attempts affirmatively to state a new constitutional rule for decision. What is needed is a different interpretation, not different language.⁹⁹ In our constitutional theater, the Supreme Court always will perform center stage, but Article V makes Congress the director, and the people in the states the playwrights. A "republican veto" will oblige the Justices to reinterpret their part as they perform their ongoing role. This is a constitutionally creative collaboration which is textually preferred over the common law methodology within the exclusive domain of the Justices.¹⁰⁰

If a particular "republican veto" is proposed by the Congress but fails ratification, the Supreme Court will benefit from the views of a coordinate branch and may choose to revisit the area on its own.¹⁰¹ Even bills that fail in Congress provide some modest dialogue appro-

99 YALE L.J. 1503 (1990). *But see* *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (State Supreme Court holding that initiative process could not be used to implement a fundamental change in the framework of state government); Walter F. Murphy, *Staggering Toward the New Jerusalem of Constitutional Theory: A Response to Ralph F. Gaebler*, 37 AM. J. JURIS. 337 (1992).

99. Consider Professor Levi's insight:

It may be suggested that the doctrine should be otherwise; that as with legislation so with a constitution, the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention or the amending process, to make a change. But the answer lies not only in the difficulties of obtaining an amendment, nor the difficult position of a court which obdurately refuses to interpret common words in a way ordinary citizens believe to be proper. The more complete answer is that a written constitution must be enormously ambiguous in its general provisions. If there has been an incorrect interpretation of the words, an [affirmatively stated] amendment would come close to repeating the same words. What is desired is a different emphasis, not different language. This is tantamount to saying that what is required is a different interpretation rather than an amendment.

LEVI, *supra* note 34, at 42. *See also supra* note 54.

100. Professor Levi discounts the need for what might be labelled "a foolish consistency," and explains the desirability of constitutional back-and-forth:

Thus constitutional interpretation cannot be as consistent as case-law development or the application of statutes. The development proceeds in shifts; occasionally there are abrupt changes in direction. Within a period and a subject matter there will be some consistency. The training of judges is reasoning by example in any event, and within certain areas cases will be compared and developed. Consistency cannot be overlooked entirely. The word of Justice Roberts is evidence of that. His change in vote produced one of the most dramatic shifts in recent Supreme Court history; yet he later was to complain that too many reversals tend "to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." [*Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).] There will be some consistency, but it is not the consistency of case law or statute.

LEVI, *supra* note 34, at 42 (footnote omitted).

101. An amendment dealing with child labor was proposed in response to Supreme Court holdings, but failed ratification and became unnecessary when the Court reversed earlier holdings. *See United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

priate for the Supreme Court to hear, if not to heed. Such is the constitutional tradition expressed in Article V.¹⁰²

V. A Final Argument

The Constitution of the United States is now in its third century. The oldest written and continuous constitution in the world, it has survived far longer than even the most optimistic of its 18th-century Framers imagined. The Supreme Court has necessarily performed a most critical role throughout this constitutional history. But Article V is the procedure designed with republican genius and with the hope to avoid the awesome choice stated in the Declaration of Independence "to alter or to abolish" the government.¹⁰³ The Framers so tasked themselves and their posterity.

Our constitutionalism obliges "WE THE PEOPLE" to keep the promise of the Preamble to "form a more perfect Union" by amending the written version of our social compact. Each generation bears the sovereign responsibility to preserve the integrity of the text as a means towards the end of self-government.¹⁰⁴ We cannot allow the

102. See Akhil R. Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 291-92 (1987); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1097 (1989).

For me, signing the Constitution commits one not to closure but only to a process of becoming, and to taking responsibility for constructing the political vision toward which I, joined, I hope, with others, strive. It is less a series of propositional utterances—for I, at least, have proved singularly unsuccessful in reducing the Constitution to some essentialist distillation — than a commitment to taking political conversation seriously. I would want to distinguish this from an entirely "Article V" view of the Constitution, however, because I do indeed believe that the Constitution is best understood as supportive of such conversations and of government predicated on respect for their maintenance.

Sanford Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 143-44 (1987). See also Marcia Coyle, *How Americans View High Court*, NAT'L L.J., Feb. 26, 1990, at 12; Louis Fisher, *Looking for the Last Word*, LEGAL TIMES, Aug. 7, 1989.

103. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See WOOD, *supra* note 29, at 613. "In sum, amending provides the opportunity to modify the Constitution so as to prolong the effectiveness of our two-hundred-year-old charter and avoid its wholesale abandonment." David E. Kyvig, *Alternative to Revolution: Two Hundred Years of Constitutional Amending*, in THE EMBATTLED CONSTITUTION: VITAL FRAMEWORK OR CONVENIENT SYMBOL 135, 148 (Adolph H. Grundman ed., 1986).

104. "Each generation of Americans must define what it means to be an American." *We Force the Spring: Transcript of [Inaugural] Address by President Clinton*, N.Y. TIMES, Jan. 21, 1993, at A15. See generally PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS* (1968).

Constitution to be deconstructed into post-modern meaninglessness¹⁰⁵ as a result of either judicial usurpation or republican abdication.¹⁰⁶ At the close of the Constitutional Convention, Benjamin Franklin was asked what kind of government the people were getting. He replied, "A Republic, if you can keep it."¹⁰⁷ The Constitution needs the "republican veto" today . . . to keep it a Republic.

105. See John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987). In constitutional law, "brilliant scholarship has recently become rampant," but there is "a flaw endemic to brilliant constitutional theories:"

Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. Who would know better than the average person what the average person has consented to? How can someone have consented to a position that is so novel and clever that only one person on earth has ever thought of it?

Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924-25 (1986).

106. "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), reprinted in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 144 (Edward Dumbauld ed., 1955). Jefferson had no fondness for judicial review:

His faith in improvement found its constitutional home in the amending system adopted as part of the Constitution. He argued that "the real friends of the constitution in its federal form, if they wish it to be immortal, should be attentive, by amendments, to make it keep pace with the advance of the age in science and experience." This process would allow peaceful change and demonstrate how our superior system of government moved forward

Charles T. Cullen, *Thomas Jefferson: Writings on the Constitution*, THIS CONSTITUTION, Winter 1986, at 27, 32. See also AGRESTO, *supra* note 19, at 83.

107. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 85 (M. Farrand ed., 1966).

