THE IRRELEVANCE OF CONSTITUTIONAL AMENDMENTS

*David A. Strauss**

Article V of the Constitution specifies how the Constitution may be amended. Notwithstanding all the attention that constitutional amendments receive, however, our constitutional order would look little different if a formal amendment process did not exist. At least since the first few decades of the Republic, constitutional amendments have not been an important means by which the Constitution, in practice, has changed. Many changes have come about without amendments. In some instances, even though amendments were rejected, the law changed in the way the failed amendments sought. Several amendments that were thought to be important in fact had little effect until society changed by other means. Other amendments did little more than ratify changes that had already come about in other ways. If this thesis is correct, it suggests that precedents and other traditions are often as important as the text of the amended Constitution; that political activity, in general, should not focus on proposed constitutional amendments; and that American constitutional law is best seen as the result of a complex, evolutionary process, rather than of discrete, self-consciously political acts by a sovereign People.

I. CONSTITUTIONAL CHANGE AND CONSTITUTIONAL AMENDMENTS

A. What Amendments Do

At the time our Constitution was drafted, written constitutions were in many ways a new idea. The idea of a formal amendment process was, therefore, also new.[1] Article V specifies various ways in

---

* Harry N. Wyatt Professor of Law, The University of Chicago. This article had its inception in the Wilber Katz Memorial Lecture at the University of Chicago Law School, entitled "Does It Matter If We Amend the Constitution?" Many members of the audience on that occasion gave me helpful comments on the lecture. Michael Klarman provided very helpful comments at an early stage of the project. I am also grateful to Michael Dorf, Richard Fallon, Jack Goldsmith, Richard Posner, Geoffrey Stone, Adrian Vermeule, Keith Whittington, and participants in workshops at the University of Virginia, New York University, and Benjamin N. Cardozo Law Schools for comments on earlier drafts, and to Laura Grisolano, Crista Leahy, and Wesley Brown for comments and research assistance. I thank the Jerome F. Kutak Faculty Fund, the Lee and Brena Freeman Faculty Fund, and the Sonnenschein Fund at the University of Chicago Law School for financial support.

[1] On the complex question of the ways in which the idea of a written constitution was an American innovation, see generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 67–69, 175–84, 189–93 (enlarged ed. 1992); and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 259–68 (1998).

At the time of the Constitutional Convention in 1787, five states' constitutions had no provision for formal amendment. The others specified various means: legislative action of some form, conventions, or, in two states, a "council of censors" elected by cities and counties that would peri-

which the Constitution can be changed without the unanimous consent of the states, and in the ratification debates the supporters of the Constitution frequently mentioned the relative ease of amendment in urging the superiority of the new Constitution to the Articles of Confederation.[2] Latter-day successors to the Founders have also been enthusiastic about the Article V process: members of the most recent Congress proposed sixty-nine amendments, addressing more than sixteen subjects.[3]

It is certainly natural to think, as all these efforts suggest, that Article V sets out the principal way of changing the Constitution. The Supreme Court undoubtedly thought it was uttering a truism when it said: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."[4] But in fact, through most of our history, the amendment process has not been an important means of constitutional change. The Constitution, in practice, changes in many ways — but not because a supermajority makes a discrete, self-conscious decision to amend its text. On the contrary, the forces that bring about constitu-

---

odically determine if the Constitution should be revised. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 139–44 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973).

[2] *See, e.g.*, THE FEDERALIST NO. 43, at 246–47 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 85, at 492–94 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176–77 (Ayer Co. 1987) (Jonathan Elliot ed., 1888) (statement of Mr. Iredell in the North Carolina ratification debates).

The Articles of Confederation could be amended only by the unanimous consent of the states: "[N]or shall any alteration at any time hereafter be made in any of [the Articles]; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." ARTICLES OF CONFEDERATION art. XIII (U.S. 1781).

Article V of the Constitution 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 first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

George Washington, in his Farewell Address, listed the fact that the Constitution "contain[s] within itself a provision for its own amendment" as one of the principal reasons that the Constitution "has a just claim to your confidence and your support." George Washington, Farewell Address (Sept. 17, 1796), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 209 (James D. Richardson ed., 1897) [hereinafter Washington's Farewell Address].

[3] *See* Search of THOMAS, http://thomas.loc.gov/bss/d106query.html (Jan. 23, 2001) (search for joint resolutions containing "constitutional amendment" in Subject Term field).

[4] Ullmann v. United States, 350 U.S. 422, 428 (1956).

tional change work their will almost irrespective of whether and how the text of the Constitution is changed.

Many people have observed that our system has other ways of changing besides formal amendments: court decisions, important legislation, or the gradual accretion of power, as in the Presidency during the twentieth century. But these are not just *other* ways in which the Constitution changes. It is only a slight exaggeration to say that these are the only means of change we have.

To be precise: a case can be made that, subject to only a few qualifications, our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment. Of course this claim involves a degree of counterfactual speculation and cannot be proved with certainty: if the Constitution really contained no provision for formal amendment, much else about the way constitutional law has developed might be different.[5] And there are some qualifications and arguable exceptions to this proposition. But even taking into account all the qualifications and exceptions, there is a clear pattern: constitutional amendments have not been an important means of changing the constitutional order.

I will try to prove this thesis by establishing four propositions. First — a relatively familiar point — sometimes matters addressed by the Constitution change even though the text of the Constitution is unchanged. Second, and more dramatically, some constitutional changes occur even though amendments that would have brought about those very changes are explicitly *rejected*. Third, when amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment. The changes produce the amendment, rather than the other way around. Fourth, when amendments are adopted even though society has not changed, the amendments are systematically evaded. They end up having little effect until society catches up with the ambitions of the amendment.

This argument presupposes that there is a difference between what might be called the small-"c" constitution — the fundamental political institutions of a society, or the constitution in practice — and the document itself. This distinction (about which I say more below) is imprecise, but it is both coherent and useful.[6] When people try to

---

[5] On some of the issues raised by historical counterfactuals, see generally Niall Ferguson, *Introduction: Virtual History: Towards a 'Chaotic' Theory of the Past*, *in* VIRTUAL HISTORY 1 (Niall Ferguson ed., 1998).

[6] Many others have drawn a similar distinction. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION ch. 7 (forthcoming 2001); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for*

amend the Constitution — that is, the document — they are not ultimately concerned about the document; they are concerned about the institutional arrangements that the document is supposed to control. If those institutions do not change, then the constitution in practice — the small-"c" constitution, which I also call the constitutional order or the constitutional regime — has not changed, even if the text of the Constitution has changed. Similarly, as I discuss below, it is coherent to say (as people often do) that certain changes are of a kind and magnitude that amount to changes in the constitutional order even though the text remains the same. The proposition I am considering is that amendments to the text of the Constitution have been, at most, peripheral to the process of change in the constitutional regime — to the point that the small-"c" constitution would look the same even if there were no provision for formal amendment of the text.

Two qualifications are in order. First, I consider this claim about the irrelevance of the amendment process in the context of a mature democratic society, not a fledgling constitutional order. It is a claim about how a constitutional system changes, not about how one becomes established in the first place. For that reason I do not try to argue that the first twelve amendments to our Constitution made no difference, although such an argument may be stronger than it appears to be at first. The Constitution of 1787 built on a system that was already well established in many ways, and it might be possible to argue that the text of the original Constitution and the early amendments were relatively insignificant, compared to forces already operating in society, just as (I argue) the later textual amendments were relatively insignificant.

Be that as it may, when a constitutional system is first getting underway and making its shakedown voyage, so to speak, amendments are more properly seen as part of the initial establishment of the regime, rather than as a means of changing it.[7] When a regime is being established, formal texts are more important; the traditions, institu-

---

Constitutional Change, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 18 (Sanford Levinson ed., 1995); *see also* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707–08 (1975). The point has been made less recently as well. *See, e.g.*, CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 43–45 (New York, G.P. Putman's Sons 1890).

[7] The Twelfth Amendment is an example of a provision that corrected problems that became apparent only after the "shakedown voyage." Once George Washington retired, political parties emerged in full force, and the method of electing the President prescribed in the original Constitution became unworkable. *See, e.g.*, TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 172–73 (1994). The Twelfth Amendment might conceivably be treated as a "rule of the road" — an adjustment that could have been made by legislation even had the formal amendment process been unavailable, *see infra* Part IV, pp. 1486–89 — but it seems better to treat it as part of the establishment of the new political system.

tions, and understandings that bind a mature society together, and that make orderly change possible without formal amendments, are less well developed. But once a constitutional system has survived for, say, a generation or two, formal constitutional amendments of the kind Article V envisions become incidental to the main processes of constitutional change.[8]

The second qualification is that constitutional amendments do serve certain ancillary functions. For example, several constitutional amendments have played the familiar role of establishing "rules of the road" — settling matters that are not themselves controversial but that must be settled clearly, one way or another. The Twenty-fifth Amendment, which spells out what to do if a President is disabled, is an example. This is not a trivial function, but it is far from central to the process of constitutional change, and it probably does not require a formal amendment procedure. If a formal amendment process were unavailable, it seems likely that our system would develop some other way of settling these issues, at least in most cases.

Constitutional amendments also serve the distinct function of suppressing outliers. When the nation has reached a nearly universal consensus on a subject, the formal amendment process is a way of bringing the stragglers into line. It turns all-but-unanimity into unanimity. The Twenty-fourth Amendment, which bans poll taxes in federal elections, is an example: by the time it was adopted, only five states had poll taxes.[9] In this way, constitutional amendments do cause changes, but changes around the edges, as it were, rather than at the core.

This relatively minor function, too, may be even less significant than it appears. In each of these instances, the outliers might not have held out much longer against the nearly unanimous opposing consensus even if there had been no constitutional amendment. And again it seems reasonable to conjecture that, if there were no formal amendment process at all, the courts would allow Congress greater power to act in areas in which the national consensus was strong. As I discuss below, on at least two occasions — during the New Deal and during the civil rights era — a strong national consensus led to expansions in congressional power, even without a formal amendment — once even after an amendment formally authorizing the change was explicitly rejected. Legislation, rather than constitutional amendments, suppressed the outliers. Probably the most accurate description of amendments

---

[8] Along the same lines, I have argued elsewhere that the entire text of the Constitution (including the amendments) plays a limited role in the development of constitutional law in a mature democratic society. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879–91 (1996).

[9] DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 356 (1996).

that suppress outliers, then, is that they allow near-unanimity to become unanimity a little sooner than would otherwise have happened. Again this is a far cry from serving as the principal engine of constitutional change.

B. Why Don't Amendments Matter?

On reflection, perhaps it should not be so surprising that a formal, supermajoritarian amendment process matters so little in a mature constitutional regime. One characteristic of a mature liberal society is that there are ways other than formal amendments adopted by a supermajority to change the Constitution in fact if not in name. Those other mechanisms exist because over time people have developed institutions that they trust. By contrast, in a fledgling society that lacks well-established understandings, traditions, and patterns of mutual trust and accommodation, the formal, written text may be the only usable institution.

In this respect, a mature society might be compared to a long-term contractual agreement.[10] The parties to such contracts often do not rely solely, or even substantially, on the text of the contract to govern their day-to-day relationship; they have developed extratextual understandings. Similarly, in a mature society, people accept the acts of legislatures, courts, and executive agencies — and the political and nonpolitical acts of their fellow citizens — even when those acts augment or arguably conflict with the foundational text. In a newly formed political society, any apparent deviation from the words of a constitution might be seen as revolutionary and might cause the society to break apart; in a mature society, relationships and patterns of trust are so well developed that that does not happen.

As a result, by the time an Article V supermajority is galvanized into action, chances are good that much of society has already changed by one of these other means. And if a formal amendment process were unavailable, society would find another way to enforce the change it has determined to make — by legislation and judicial interpretation, or by alterations in social understandings and private sector behavior. The change might not be accomplished as neatly or as decisively; outliers might not be brought into line as quickly, for example. But relatively speaking, that is a detail. Those other institutions — not supermajoritarian constitutional amendments — will be the truly important means of constitutional change. This explains why, when

---

[10] *See generally* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 382–89 (1983).

society has changed enough to produce a supermajority in favor of a formal amendment, the amendment is probably unnecessary.

One cannot, however, just say simplistically that any set of political forces strong enough to bring about a constitutional amendment is strong enough to change society in some other way, because that is not always true. A supermajority might act, and adopt an amendment, even if society has not fundamentally changed. An amendment might represent a momentary high-water mark of popular sentiment on a question, or an effective effort by an interest group at the height of its power to secure its position.[11] At a later time, many people, even a majority, might decide that the amendment was a mistake — but there it is, entrenched in the Constitution.

On these occasions the formal amendment will be relatively insignificant for a different reason. When there is no lasting social consensus behind a textual amendment, the change in the text of the Constitution is unlikely to make a lasting difference — at least if it seeks to affect society in an important way — unless society changes in the way that the amendment envisions. Until that happens, the amendment is likely to be evaded, or interpreted in a way that blunts its effectiveness. This is, in a sense, the other side of the fact that a mature society has a variety of institutions, in addition to the text of the Constitution, that can affect how the society operates. Those institutions can change society without changing the Constitution; but they can also keep society basically the same — perhaps with some struggle, but still basically the same — even if the text of the Constitution changes. This was, most notoriously, the story of the Fourteenth and, especially, the Fifteenth Amendment. The Fifteenth Amendment was somewhat effective in the short run, but within a generation it had been reduced to a nullity in the South.[12]

It does not follow that, owing to some kind of historical necessity, formal amendments cannot ever cause important changes. Rather the point is that the formal amendment process will be the means of significant change only in certain limited circumstances that hardly ever occur in a mature society. In particular, three conditions must be present for the amendment process to make a difference.

---

[11] *See* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 122 (1993). Boudreaux and Pritchard seem too unequivocal, however, in predicting that a group will always, or generally, seek a constitutional amendment when it believes its strength is at its highest point. *See, e.g., id.* at 123. If (as I argue) formal constitutional amendments are neither necessary nor sufficient to bring about lasting change, a group might be better advised to devote its resources elsewhere: to judicial appointments, to establishing bureaucratic institutions that will continue to promote the group's interests, or to nonpolitical activity that alters society in a way that effectively determines future political decisions.

[12] *See infra* p. 1483.

First, a formal supermajoritarian amendment process is unlikely to be an important means of change unless the other usual means of change, such as legislation and judicial interpretation, are unavailable for some reason.[13] If other means of change are available, they will probably have effected the change to a significant degree before a supermajority can be assembled to amend the Constitution.

Second, a formal amendment process is likely to make a difference only when the supermajority that adopts the amendment is a temporary one that was assembled even though society had not fundamentally changed. Deep, enduring changes in society will find some way to establish themselves with or without a formal amendment — if not through legislation or changes in the composition of the courts, then through changes in private behavior. The formal amendment process will have its most significant effect when the supermajority sentiment does not persist.

Finally, for an amendment to matter, it must be unusually difficult to evade. An amendment that specifies a precise rule, for example, is more likely to have an effect than one that establishes only a relatively vague norm. If its text is at all imprecise, an amendment that is adopted at the high-water mark of public sentiment will be prone to narrow construction or outright evasion once public sentiment recedes, as the Fourteenth and Fifteenth Amendments were.

If all these circumstances occur together, a temporary supermajority's ability to adopt a formal amendment might bring about a permanent change that would not have occurred without the formal amendment. But this confluence of conditions is unlikely to happen very often. I suggest below one instance in which it might have happened — the Twenty-second Amendment, which limits presidents to two terms. Even that example is not entirely clear. But that may be the only occasion since the early days of the Republic when the formal amendment process seems to have made a substantial difference.

C. The Significance of Insignificance

This claim about the insignificance of the formal amendment process, if it is true, matters for several reasons. The first is that it undermines a popular way of thinking about the Constitution — that the written Constitution is in some meaningful sense the work of a deliberate act, or a series of discrete acts, by We the People.[14] The Consti-

---

[13] On how the existence of alternative means of constitutional change makes amendments less likely, see Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION, *supra* note 6, at 245–46.

[14] *See, e.g.*, Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION, *supra* note 6, at 275, 276 (stating that "[t]he

tution claims to speak in the name of "the People,"[15] and a central aspect of the constitutional thought of the founding era was that written constitutions derive their authority from the people, not from elected representatives or any other source.[16] It is natural to think of the formal amendments to the Constitution in the same way. The People, one might say, do not speak often; they spoke comprehensively in 1789, and on certain specific subjects in the subsequent amendments. But on those occasions when they do speak, their voice carries special authority. Constitutional amendments, on this view, are such occasions. Because a constitutional amendment is supported by a supermajority, unlike an ordinary statute, it reflects a decisive act by the people. George Washington spoke of constitutional amendments this way.[17]

However appropriate this view might be as an account of the Constitution at the founding, it no longer matches the reality of our constitutional order, and it may not match the reality of any mature liberal constitutional system. The constitutional principles that actually govern a mature society accumulate and evolve over time through a variety of complex means.[18] Discrete, decisive, formal amendatory acts, supposedly by the sovereign People, are at most a minor part of the process of constitutional change.[19]

---

traditional democratic answer" to the question of the source of "the constitutionally regulated power to revise constitutional regulations of power" is "'the people'").

[15] U.S. CONST. pmbl.

[16] *See* WOOD, *supra* note 1, at 372–89.

[17] *See* Washington's Farewell Address, *supra* note 2, at 212 ("If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates."); Letter from George Washington to Bushrod Washington (Nov. 10, 1787), *in* 29 THE WRITINGS OF GEORGE WASHINGTON 309, 311 (John C. Fitzpatrick ed., 1939) ("The warmest friends and the best supporters the Constitution has, do not contend that it is free from imperfections; but they found them unavoidable and are sensible, if evil is likely to arise there from, the remedy must come hereafter; . . . and, as there is a Constitutional door open for it, I think the People (for it is with them to Judge) can as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendments which are necessary . . . ."); *cf.* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 161–62 (1996) (quoting Lincoln's First Inaugural Address and concluding that Lincoln saw Article V as the only avenue for constitutional amendment).

For an argument that the framers and ratifiers of Article V saw amendments not at all as a means of bringing about change, but rather just as a way to "perfect" the Constitution by correcting defects, see Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 300–01 (1989).

[18] For a defense of this claim, see Strauss, *supra* note 8.

[19] Even if formal amendatory acts are not the principal means of constitutional change, constitutional change might still be the product of discrete, self-consciously political acts by the population, and not of an evolutionary process. The central argument of 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991), and 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998), is that certain discrete, self-consciously political acts by the population should be viewed as having changed the Constitution, even if they did not take the form prescribed in Article V. My

There are also more concrete implications that follow from the relative insignificance of the formal amendment process. It is sometimes said that the Constitution should be interpreted "as a whole." The amendments and the original provisions should, according to this view, all be read together, roughly as if the document were all written at one time by one author.[20] For example, many of the amendments concern the franchise and elections; few of the post-Bill of Rights amendments establish new substantive rights. Therefore (the argument runs), constitutional law should be concerned primarily with maintaining a well-functioning representative government rather than with establishing substantive rights.[21] Others have invoked the Nineteenth Amendment, which guarantees women's suffrage, as a reason for interpreting the Fourteenth Amendment to forbid gender discrimination across the board (an interpretation of the Fourteenth Amendment that appears inconsistent with the original understanding of that provision).[22] Still others have suggested that the Sixteenth, Seventeenth, and Nineteenth Amendments (authorizing an income tax, providing for the direct elec-

---

conjecture is that the same factors that prevent supermajoritarian textual amendments from being a significant means of change also make it unlikely that discrete, self-consciously political acts by the People that do not take the form of textual amendments will be an important means of change. But this is only a conjecture at this point (and it does not address Ackerman's normative argument that only certain actions by popular majorities can justify constitutional change). For another account of punctuated (rather than continuously evolutionary) extratextual constitutional change, see generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

20 For an impressive example of this approach, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). There are also suggestions of this approach in RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–12 (1996); in RONALD DWORKIN, LAW'S EMPIRE 361–63, 379–99 (1986); and perhaps in Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–93, 1237–51 (1987). For a trenchant criticism of this approach to interpretation, see Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730 (2000).

21 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 90–101 (1980).

22 For an example of this use of the Nineteenth Amendment, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1778–79 (1997). *Cf.* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 274 (1998) (arguing that the Fifteenth and Nineteenth Amendments should be read together to guarantee women the right to serve on juries).

Justice Sutherland made an argument of this kind in his opinion for the Court in the *Lochner*-era case of *Adkins v. Children's Hospital*, 261 U.S. 525 (1923):

> [T]he ancient inequality of the sexes, otherwise than physical, as suggested in [*Muller v. Oregon*, 208 U.S. 412 (1908)] has continued "with diminishing intensity." In view of the great — not to say revolutionary — changes which have taken place since [*Muller*], in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.

Id. at 553. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruled *Adkins*. *Id.* at 400.

tion of Senators, and enfranchising women, respectively) implicitly authorized the federal welfare and regulatory state.[23]

These arguments presuppose that amending the Constitution — and, by implication, failing to amend the Constitution — is a significant event. If this supposition is true, a formal, textual amendment might legitimately be read back into other provisions of the Constitution to produce a result that would not be warranted without the formal amendment.[24] But if the amendments carry no special significance — if they are not the principal means (or even an important means) by which the People change our constitutional order — then these interpretive approaches lose their foundation. It may be correct to interpret the Fourteenth Amendment to forbid gender discrimination, and the movement toward greater equality for women, including women's suffrage, may be a legitimate reason to interpret the Fourteenth Amendment this way. But the fact that women's suffrage was formally recognized by the Nineteenth Amendment — instead of coming about through, for example, state legislation or judicial interpretation — should not carry great weight.

One final implication is the most practical of all. If amendments are in fact a sidelight, then it will usually be a mistake for people concerned about an issue to try to address it by amending the Constitution. Their resources are generally better spent on legislation, litigation, or private-sector activities. It is true that the effort to obtain a constitutional amendment may serve very effectively as a rallying point for political activity. A constitutional amendment may be an especially powerful symbol, and it may be worthwhile for a group to seek an amendment for just that reason. But in this respect constitutional amendments are comparable to congressional resolutions, presidential proclamations, or declarations of national holidays. If they bring about change, they do so because of their symbolic value, not because of their operative legal effect.

The claim that constitutional amendments under Article V are not a principal means of constitutional change is a claim about the relationship between supermajoritarian amendments and fundamental, constitutional change. It should not be confused with the very different claim that judicial decisions cannot make significant changes without help from Congress or the President;[25] and it certainly should not

---

[23] *See, e.g.*, AMAR, *supra* note 22, at 300.

[24] *See id.* (suggesting that "ordinary citizens and lawyers alike" may find such an inference from a textual amendment more acceptable than a claim that the Constitution had changed without a textual amendment).

[25] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Symposium, *Twentieth-Century Constitutional History*, 80 VA. L. REV. 1 (1994).

be confused with a global skepticism about the efficacy of political activity generally. The point is that changes of constitutional magnitude — changes in the small-"c" constitution — are not brought about by discrete, supermajoritarian political acts like Article V amendments. It may also be true that such fundamental change is always the product of an evolutionary process and cannot be brought about by any discrete political act — by a single statute, judicial decision, or executive action, or (at the state level) by a constitutional amendment, whether adopted by majoritarian referendum or by some other means. What is true of Article V amendments may be equally true of these other acts: either they will ratify (while possibly contributing to) changes that have already taken place, or they will be ineffective until society catches up with the aspirations of the statute or decision.

Alternatively, it may be that majoritarian acts (or judicial decisions), precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot. A coalition sufficient to enact legislation might be assembled — or a judicial decision rendered — at a point when a society for the most part has not changed, but the legislation, once enacted (or the decision, once made), might be an important factor in bringing about more comprehensive change. The difference between majoritarian legislation and a supermajoritarian constitutional amendment is that the latter is far more likely to occur only after the change has, for all practical purposes, already taken place.

Whatever one thinks of these broader speculations, however, they certainly do not entail a general skepticism about whether political activity matters at all. On the contrary, legislation and judicial decisions — as well as activity in the private realm that may not even be explicitly political — can accumulate to bring about fundamental and lasting changes that are then, sometimes, ratified in a textual amendment. Sustained political and nonpolitical activity of that kind is precisely what does bring about changes of constitutional magnitude. My claim is that such changes seldom come about, in a mature democracy, as the result of a formal amendment adopted by a supermajority.

In the rest of this Commentary, I try to establish the propositions set out above: that in our system, constitutional changes occur without amendments, and that the amendments that have been added are, speaking generally, either unnecessary or ineffective. In Part II, I describe amendments that occurred in fact, even though the text of the Constitution did not change, including occasions when an amendment was proposed and rejected but the constitutional order changed anyway. Then I turn to the amendments that have been adopted. In Part III, I discuss the Civil War Amendments, ordinarily thought to be among the most significant amendments to the Constitution. In Part IV, I discuss amendments that are significant not because they worked important changes but only because they operate as "rules of the road."

In Part V, I turn to the Progressive Era amendments — those establishing the income tax, the direct election of Senators, and women's suffrage — and I try to show that these amendments, too, despite their apparent importance, were not the engines of significant change. Along the way I compare the Civil War and Progressive Era amendments to other existing or proposed amendments.

II. NON-AMENDMENT AMENDMENTS

The first indication that the role of formal amendments may be less than meets the eye is how often important changes — what have to be called, realistically, changes of constitutional magnitude — occur without any formal amendment. Even more dramatic are the occasions on which formal amendments were proposed and rejected, but the constitutional order then changed in the way that the failed amendment envisaged.

A. Change Without Amendment

Our constitutional history has seen many developments that must be regarded as changes in the constitutional order, or changes of constitutional magnitude, but that were unaccompanied by a formal amendment. This assumes, of course, that there is a difference between constitutional change, or change of constitutional magnitude, and other kinds of change, and it is difficult to define these notions precisely.[26] Still, it is useful to distinguish between changes of an ordinary kind and changes of more fundamental importance. This distinction is, at least in the first instance, only descriptive; it does not necessarily suggest which kinds of changes result from legitimate interpretation of the Constitution and which result from illegitimate, extralegal amendments that exceed the bounds of permissible interpretation. That question is one of the central issues of constitutional theory, and many people have addressed it. But whatever one's views on that issue, it should not be very controversial to say that certain fundamental changes have come about without a formal amendment.

One way to draw the necessarily imprecise distinction between constitutional or fundamental changes, on the one hand, and ordinary changes, on the other, is to identify the kinds of developments that an untutored reader of the Constitution would expect to be accompanied by a change in the text. These changes affect matters at the core of what the written Constitution addresses: for example, the allocation of power between the federal government and the states, or among the three branches of the federal government; the scope of individual

[26] For a leading discussion of this issue, see Levinson, *supra* note 6, at 13.

rights against government action; and the basic rules of representative democracy, such as who can vote and who elects which officials. In all of these areas, changes have occurred that have to be considered significant enough to be changes of constitutional magnitude.

One such change is the enormous growth in the permissible range of federal legislation. Congress may now regulate areas that a century ago were regarded as the exclusive province of the states — manufacturing and the employment relationship, land use and the environment, agriculture and the sale of consumer products, large areas of criminal law.[27] This expansion of Congress's power came about principally through judicial interpretation, especially of the Commerce Clause. Indirectly, of course, it came about because of insistent political and social forces that demanded legislation and ultimately would not tolerate judicial obstruction.

This change in the scope of federal power has to be regarded as a constitutional change.[28] The text of the Constitution defines Congress's powers in detail, and the scope of federal power was a principal issue at the Constitutional Convention. But no formal amendment to the Constitution authorized this great expansion of Congress's power. In fact, President Franklin Roosevelt, who was responsible for one great wave of this legislation, consciously rejected the use of Article V; he believed he could accomplish his objectives by other means.[29] And, as I discuss below, the Child Labor Amendment, which would have authorized a particular expansion of federal regulatory power in this direction, was proposed and rejected.[30]

This claim is descriptive, not normative; the point is not to suggest that the cases expanding Congress's power under the Commerce Clause and other provisions were usurpative or otherwise inappropriate. In fact, the Commerce Clause cases of the New Deal era, which

---

[27] The view that certain subjects were the exclusive province of the states, and off-limits to the federal government, was articulated and applied in some (now infamous, in many quarters at least) Supreme Court opinions — notably *Hammer v. Dagenhart*, 247 U.S. 251, 272–76 (1918); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). *See also* Keller v. United States, 213 U.S. 138, 144–45 (1909); United States v. De Witt, 76 U.S. 41, 44–45 (1869). Principally, however, this limit on congressional power was more a general understanding about the proper scope of Congress's role than a clearly articulated or consistently enforced doctrine of constitutional law. For a prominent expression of the position, see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). For an account of the evolution of Supreme Court doctrine in this area, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 228–33 (2000).

[28] *See* Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION, *supra* note 6, at 37, 38 ("I contend that change has occurred primarily through non-Article V means . . . .").

[29] *See, e.g.*, William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 383–86.

[30] *See infra* pp. 1475–76.

are usually thought to have authorized the ultimate expansion of congressional power,[31] had strong precedential roots, and they responded to the perception that the courts could draw no principled line that would substantially limit Congress's power.[32] But however sound those decisions were, and however strong the current Supreme Court's inclination to nibble at the edges of the Commerce Clause power, it is settled, in practice, that Congress may legislate about a far broader range of subjects today than a century ago.[33]

The expansion of the power of the President, especially in foreign affairs, is another constitutional change that occurred without a formal amendment.[34] Today the President is conceded broad power to use military force overseas without a declaration of war. The President can also enter into executive agreements, which in many respects have the force of treaties, without the Senate consent required for a treaty, and sometimes without any congressional participation at all. And the courts have consistently suggested that congressional delegations of power to the President may have a broader scope and are to receive a more liberal construction in the field of foreign relations than in domestic affairs.[35] None of these powers has a clear basis in the text of

---

[31] *See, e.g.*, Corwin, *supra* note 27, at 16–17; Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559–60 & n.56 (1954).

[32] *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 133–53 (1998).

[33] It is sometimes suggested that the failure to adopt a constitutional amendment entrenching the New Deal made the New Deal expansion of the federal government more vulnerable to subsequent erosion, such as in the recent decisions reviving limits on Congress's power. *See, e.g.*, KYVIG, *supra* note 9, at 480–84. Of course this is one of those counterfactual questions about history that is impossible to answer with much confidence. But in order to make the case for this proposition, one cannot simply suppose that an amendment might have been adopted that "ratified the New Deal" in general terms. One would have to identify specific language that might have been adopted, and then show that courts inclined to reduce federal power would have felt sufficiently restrained by that language. One of the reasons that President Roosevelt and his advisers did not seek the adoption of a constitutional amendment was precisely that they doubted one could be drafted — and adopted — that would be broad enough to permit them to accomplish their objectives and that would not embolden the Supreme Court to restrict federal power still further. *See* Leuchtenburg, *supra* note 29, at 324–86.

[34] These developments are described in Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999); and Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 791 & n.197 (1992) (reviewing 1 ACKERMAN, *supra* note 19).

[35] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), established this principle and famously referred, in a passage on which the Executive Branch has relied many times since, to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Id.* at 320; *see also* Dames & Moore v. Regan, 453 U.S. 654, 678 (1981); Haig v. Agee, 453 U.S. 280, 291 (1981) ("[I]n the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.").

the Constitution or the original understandings, but all have become well established, without the aid of any textual amendments.[36]

Similarly, the text of the Constitution does not anticipate the growth of an enormous federal bureaucracy with the power to make rules and adjudicate cases. The Constitution does refer to "executive Departments," but the great expansion of the federal bureaucracy, particularly in the twentieth century, has to be considered a change of constitutional magnitude.[37] In addition, the regulatory agency, a central feature of the modern federal government, came into being at the federal level about a hundred years ago: beginning in 1887 with the Interstate Commerce Commission,[38] Congress established a number of agencies that combined, in some form, executive, legislative, and judicial functions. The New Deal is famous for having greatly increased the number of these agencies, but the administrative state was already well established by 1933: the Federal Trade Commission, the Federal Power Commission, the Federal Radio Commission, the Commodities Exchange Authority, and other agencies already existed.[39] These agencies raised serious constitutional issues. They combined the functions of the different branches, in apparent contravention of the separation of powers; they engaged in adjudication, although their members were not judges appointed pursuant to Article III; and they assessed forms of civil liability without providing for a jury trial, arguably in violation of the Seventh Amendment.[40]

No constitutional amendment authorized either the expansion of the federal bureaucracy or the creation of the administrative state.

---

[36] *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 736 (1988) ("[T]he President today plays a dominant role in the national government completely beyond the understanding in 1789."). For a nuanced argument that the original understandings are more complex and closer to current practice, but one that does not deny that constitutional practices have evolved substantially, see H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999).

[37] In 1816, the federal government had fewer than 5000 civilian employees. By the end of the nineteenth century, the number was around 240,000. By 1930 — before the New Deal — there were already over 600,000 federal civilian employees. The number grew to over 1,000,000 by 1940 and around 2,000,000 by 1950. 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1102–03 (1975); *see* Kramer, *supra* note 27, at 232.

On a per capita basis the expansion of the federal bureaucracy is of course less striking, but still the kind of change that one would expect to be accompanied by a constitutional amendment: the fact that the population has grown, necessitating a larger government, is just the kind of change that, one would have thought, is properly addressed through the amendment process.

[38] Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).

[39] For a discussion of the growth of the administrative state before the New Deal, see STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1866–1920, at 121–62, 248–84 (1982).

[40] On the constitutional issues raised by administrative agencies, see, for example, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994).

But the expanded federal government is now a permanent part of our system, beyond any serious constitutional challenge.[41] The constitutionality of administrative agencies has been settled at least since the Supreme Court's 1932 decision in *Crowell v. Benson*.[42] In fact, because so many agencies were already well established by then, it seems fair to say that *Crowell* essentially ratified a fait accompli. This was a change of constitutional magnitude — one that is hard to reconcile with several provisions of the text — that took place without any formal amendment.

This pattern of extratextual amendments is not just a twentieth-century development. *M'Culloch v. Maryland*[43] upheld the constitutionality of the second Bank of the United States through a broad interpretation of the Necessary and Proper Clause of the Constitution, an interpretation that essentially permitted Congress to enact any law so long as it was not irrational to conclude that there was a connection between the law and an objective Congress was allowed to pursue.[44] Many people have characterized *M'Culloch* as an example of a Supreme Court decision that amended the Constitution without authorization.[45] According to James Madison, the most prominent member of the Constitutional Convention, the Constitution would not have been ratified if it had included an explicit authorization of congressional power as sweeping as that announced by Chief Justice Marshall in *M'Culloch*.[46] But this aspect of *M'Culloch* has endured as a foundational constitutional principle; indeed, it has been extended beyond the Necessary and Proper Clause to other grants of power to Congress.[47]

---

[41] *See* Griffin, *supra* note 28, at 54 ("Taken together, the various changes in the structure of the national government made through non-Article V means during the New Deal, World War II, and the Cold War amounted to a major program of constitutional reform.").

[42] 285 U.S. 22 (1932); *see id.* at 47–51 (upholding administrative adjudication of worker's compensation claims).

[43] 17 U.S. (4 Wheat.) 316 (1819).

[44] *Id.* at 415.

[45] *See, e.g.*, PETER SUBER, THE PARADOX OF SELF-AMENDMENT 197–206 (1990), *cited in* Levinson, *supra* note 6, at 22 & n.31; JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 263 (1984), *cited in* Levinson, *supra* note 6, at 22 & n.31.

[46] Madison wrote in 1819: "[T]hose who recollect, and, still more, those who shared in what passed in the State conventions, through which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification." Letter from James Madison to Judge Roane (Sept. 2, 1819), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 435, 435 (Max Farrand ed., rev. ed. 1966).

[47] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (interpreting the Thirteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 326–27 (1966) (interpreting the Fifteenth Amendment); Everard's Breweries v. Day, 265 U.S. 545, 558–59 (1924) (interpreting the Eighteenth Amendment). *But see* City of Boerne v. Flores, 521 U.S. 507, 519–29 (1997) (interpreting the Fourteenth Amendment's enforcement power more restrictively).

In fact, the evolution of Madison's views about the Bank of the United States shows that Madison — a principal author of the text of the Constitution — was also a principal author of the idea that the Constitution can be amended without changing the text. When Alexander Hamilton first proposed the Bank of the United States, Madison vehemently objected, saying that the Constitution did not authorize such an expansion of federal power.[48] Madison said at that time that any alteration of the Constitution would be a usurpation if not accomplished through Article V.[49]

After an extensive debate on its constitutionality, Congress enacted legislation establishing the Bank.[50] The term of the first Bank expired in 1811, and in 1815 Congress passed a bill rechartering it. Madison was President in 1815, and he vetoed the bill — but on explicitly nonconstitutional grounds. Twenty-four years had elapsed since Hamilton first proposed the Bank, and Madison explained that he considered the issue of constitutionality to be "precluded . . . by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."[51] A year later, he signed the bill creating the second Bank of the United States.

After Madison left office, the constitutionality of the Bank again became an issue; Andrew Jackson ultimately vetoed its rechartering on constitutional grounds. In 1831, Madison stated even more emphatically his view that a well-established practice could alter the constitutional regime. Declaring the Bank unconstitutional at that point would be, he said, "a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."[52] He asked:

> [W]hich, on the whole, is most to be relied on for the true and safe construction of a constitution; that which has the uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties; or that which depends upon the opinions of every

---

[48] 2 GALES & SEATON'S DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 1944–52 (1834), *reprinted in* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 11–13 (3d ed. 1992).

[49] *Id.*; *see also* Washington's Farewell Address, *supra* note 2.

[50] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 78–80 (1997).

[51] Veto Message from James Madison to the United States Senate (Jan. 30, 1815), *in* 8 THE WRITINGS OF JAMES MADISON 327, 327 (Gaillard Hunt ed., 1908); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS ch. 9, pt. I.B (forthcoming 2001).

[52] DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 81 (1989) (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 186 (Philadelphia, J.B. Lippincott & Co. 1865)).

> new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes[?][53]

Madison is credited with extraordinary foresight for his contributions to the Founding. But the later Madison — who envisioned that "the uniform sanction of successive legislative bodies"[54] could change the Constitution, even without a formal amendment — was equally visionary about the system he had helped create.

B. Rejected Amendments That Became the Law

Even more revealing than extratextual amendments are the proposed formal amendments that were rejected but that nevertheless became, for all practical purposes, part of the Constitution. That is, even though the proposed amendment failed, constitutional law changed almost exactly as it would have if the amendment had been adopted.

The Child Labor Amendment, which would have authorized Congress to enact laws regulating or forbidding labor by people under eighteen, was approved by Congress and sent to the states in 1924.[55] Congress proposed the amendment after the Supreme Court thwarted its repeated efforts to regulate child labor by statute. In 1916, Congress passed the Child Labor Act,[56] which restricted the shipment in interstate commerce of goods made by child labor.[57] Two years later, in *Hammer v. Dagenhart*,[58] the Supreme Court invalidated the Act on the ground that it exceeded Congress's power under the Commerce Clause.[59] The Court reasoned, as it had in some earlier cases concerning the Commerce Clause, that Congress lacked the power to regulate "purely local" matters, such as manufacturing. The Court also suggested that legislation purportedly enacted under the Commerce Clause would be invalid when Congress's intention was not to regulate commerce but rather to reach matters (such as the age of employees) that would ordinarily not be within Congress's power.[60]

---

[53] *Id.* at 81–82.

[54] *Id.* at 82.

[55] Section 1 of the proposed amendment provided: "The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age." Section 2 provided that "[t]he power of the several States is unimpaired by this article" except to the extent needed to give effect to congressional legislation. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–1995, at 48 (1996).

[56] Act of Sept. 1, 1916, ch. 432, 39 Stat. 675.

[57] *Id.* § 1, 39 Stat. at 675.

[58] 247 U.S. 251 (1918).

[59] *Id.* at 277.

[60] *Id.* at 271–76.

Congress tried again in 1919 to regulate child labor, enacting the Child Labor Tax Act;[61] three years later, the Supreme Court struck down that law, too.[62] In 1924, Congress proposed the Child Labor Amendment.[63] The proposed amendment got little support. Within a year, nineteen states had explicitly rejected it and only four had ratified it;[64] by 1932, the amendment was as good as dead, having been ratified by only six states and explicitly rejected by thirty-eight.[65]

By 1941, it might as well have been added to the Constitution. In *United States v. Darby*,[66] the Supreme Court upheld the Fair Labor Standards Act, which specified minimum wages and maximum hours for individuals engaged in producing goods for interstate commerce.[67] The Court in *Darby* explicitly overruled *Hammer v. Dagenhart* and rejected the reasoning of other decisions that limited Congress's power under the Commerce Clause.[68] It was as if the Child Labor Amendment not only had been adopted but also had been given an especially expansive reading — not just as authorizing laws forbidding child labor, but as repudiating the entire approach to the Commerce Clause that underlay *Hammer* and the cases on which that decision relied.

The leading recent example of this kind of amendment — rejected, yet ultimately triumphant — is the Equal Rights Amendment, which would have forbidden unequal treatment on the basis of sex. A version of the ERA was first proposed in 1923.[69] It was sent to the states in 1972, but not enough states ratified it; it died in 1982.[70] Today, it is difficult to identify any respect in which constitutional law is different

---

61 Act of Feb. 24, 1919, ch. 18, 40 Stat. 1057; *see id.* § 1200, 40 Stat. at 1138.

62 Bailey v. Drexel Furniture Co., 259 U.S. 20, 39, 44 (1922).

63 *See* KYVIG, *supra* note 9, at 257. For accounts of the history of the Child Labor Amendment, see CLARKE A. CHAMBERS, SEEDTIME OF REFORM: AMERICAN SOCIAL SERVICE AND SOCIAL ACTION, 1918–1933, at 29–46 (1963); and WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 163–86, 199–209 (1970). *See also* STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (1968).

64 ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 103 (1978).

65 To be more specific, at least one house of the legislature in thirty-eight states had voted to reject the amendment. KYVIG, *supra* note 9, at 307. Support for the amendment revived somewhat in the 1930s, producing a number of controversies about the validity of state ratifications. Eventually twenty-eight states purported to ratify the amendment. *See* VILE, *supra* note 55, at 48. On the revival of interest in the amendment, see KYVIG, *supra* note 9, at 307–13. The Supreme Court's decision in *Coleman v. Miller*, 307 U.S. 433 (1939), addressed issues about the validity of some of these ratifications. *See id.* at 447–56.

66 312 U.S. 100 (1941).

67 *Id.* at 109–10.

68 *Id.* at 116–17.

69 JANE J. MANSBRIDGE, WHY WE LOST THE ERA 8 (1986).

70 *See The Impact of the Equal Rights Amendment: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong. 92–93 (1983); KYVIG, *supra* note 9, at 408–19. For a general history of the ERA, see MANSBRIDGE, *supra* note 69.

from what it would have been if the ERA had been adopted.[71] For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender.[72] The Court requires an "exceedingly persuasive"[73] justification for gender classifications, and it invalidates gender classifications that rest on what it considers "'archaic and overbroad' generalization[s]," such as the view that women are less likely than men to work outside the home.[74] The Court does treat gender-based classifications differently from race-based classifications — the latter being the paradigmatic form of discrimination forbidden by the Fourteenth Amendment — but it has justified the difference not on the ground that the ERA was rejected, but rather on the ground that the two forms of classification sometimes operate differently.[75]

An exchange between Justices Brennan and Powell in *Frontiero v. Richardson*,[76] decided while the ERA was before the states, presaged the ultimate irrelevance of the amendment. Justice Brennan, in urging the Court to apply strict scrutiny to gender classifications, relied in part on Congress's "increasing sensitivity to sex-based classifications," revealed in antidiscrimination legislation and in the proposed ERA.[77] Justice Powell responded that the Court should wait until the fate of the ERA was determined before taking such a step;[78] he argued that the plurality was seeking to "pre-empt" a decision reflecting "the will of the people."[79] Both arguments are plausible: the fact that the ERA had substantial support meant, as Justice Brennan suggested, that the Court could not be accused of acting in a highly anti-majoritarian

---

[71] The view that "[t]here is no practical difference between what has evolved and the ERA" has been attributed to Justice Ginsburg. Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J. 52, 55 (1999); *see* Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 22 (2000).

[72] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–204 (1976). This development began, in the Supreme Court, with *Reed v. Reed*, 404 U.S. 71 (1971).

[73] United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

[74] Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)); *see also* United States v. Virginia, 518 U.S. at 533 (stating that differential treatment cannot be based "on overbroad generalizations about the different talents, capacities, or preferences of males and females").

[75] *See, e.g.*, United States v. Virginia, 518 U.S. at 532 & n.6 (discussing differences between race- and gender-based classifications). *Compare id.* at 533–34 & n.7 (suggesting that single-sex schools might be constitutional because of "'[i]nherent differences' between men and women" and because sex-based classifications might "advance full development of the talent and capacities of our Nation's people"), *with* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring racially segregated education "inherently unequal").

[76] 411 U.S. 677 (1973).

[77] *Id.* at 687 (plurality opinion of Brennan, J.).

[78] *Id.* at 692 (Powell, J., concurring in the judgment).

[79] *Id.*

way; the fact that the ERA had not been adopted meant, as Justice Powell suggested, that the Court was, in a sense, preempting the amendment process. In other words, the existence of substantial popular support for the proposed ERA provided reasonable arguments for diametrically opposed positions — suggesting that the ultimate fate of the ERA simply would not matter that much.

Again, it would be a mistake to say that an overly activist Court "ratified" the ERA in the face of a contrary verdict from the country. What "ratified" the ERA, in effect, was the same kind of thing that "ratified" the Child Labor Amendment: insistent pressure from society as a whole. In the case of the ERA, this took the form of the increasing presence of women in the workplace, in politics, and in other new roles.[80] Instead of saying that the courts imposed an agenda on society, it is probably more accurate to say that the opposite occurred: because of developments in society, the Court would have found it very difficult to continue treating gender classifications as unproblematic.

The recent decision in *United States v. Virginia*,[81] which invalidated the all-male admission policy at the Virginia Military Institute,[82] is an example. Twenty years before that case was decided, women were admitted to the service academies,[83] not because of a court order, but because of a decision that Congress made after extensive consideration.[84] In *United States v. Virginia*, the Supreme Court explicitly referred to the experience of the service academies, which made VMI seem more like an anachronism.[85] A variety of forces, then — changes in society, legislation and executive action, judicial decisions — combined to bring about what the ERA would have established.

III. THE CIVIL WAR AMENDMENTS (AND NON-AMENDMENTS)

Even if the Constitution can change without a constitutional amendment and rejected constitutional amendments can end up, in effect, becoming the law, it does not follow that the amendments that do get adopted are unimportant. Offhand one might say that it is impossible to deny the significance of the Civil War Amendments: the Thir-

---

[80] *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

[81] 518 U.S. 515 (1996).

[82] *Id.* at 555–58.

[83] *See* Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106, § 803, 89 Stat. 531, 537–38 (1975) (codified as amended at 10 U.S.C. §§ 4342, 6954, 6956(d), 9342 (1994)); JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 310 (rev. ed. 1992).

[84] *See Hearings on H.R. 9832 Before Subcomm. No. 2 of the House Comm. on Armed Servs.*, 93d Cong. (1974); HOLM, *supra* note 83, at 305–10.

[85] *See* United States v. Virginia, 518 U.S. at 544–45.

teenth Amendment, which abolished slavery;[86] the Fourteenth Amendment, which provides for national citizenship and contains the Due Process, Equal Protection, and Privileges or Immunities Clauses;[87] and the Fifteenth Amendment, which forbids discrimination in voting "on account of race, color, or previous condition of servitude."[88]

In fact these amendments changed things much less than one might think. The Civil War itself, needless to say, worked enormous changes. And ultimately the nation changed in many of the ways that the Civil War Amendments envisioned; today racial minorities are not excluded from voting, for example. But it was not the amendments that changed things. The amendments made relatively little difference when they were adopted; the changes they prescribed came about only when society itself changed. Again the true mechanism of constitutional change was not the distinct acts of a sovereign people expressing its will through formal amendments to the Constitution, but a different kind of process (or, in the case of the Civil War, a traumatic event) in which changes to the text of the Constitution were sidelights.

To begin with, it is not at all clear that the Civil War Amendments should be regarded as formal amendments of the kind Article V authorizes. The process by which they were ratified was highly irregular.[89] The Thirteenth Amendment received crucial ratification votes from state legislatures in ex-Confederate states that were controlled by governments installed by the North. The Confederate states were required to ratify the Fourteenth Amendment to be readmitted to the Union; those states still outside the Union were required to ratify the Fifteenth Amendment. Even the number of states in the Union — for purposes of determining whether three-fourths of the states had ratified the Amendments — was unclear.[90] In these circumstances, the Civil War Amendments are probably better seen not as formal amendments but as something in the nature of a treaty, reflecting the outcome of the war, including the subsequent political struggle to determine what the outcome of the war would be. The states of the Confederacy did not so much ratify the amendments as submit to

---

[86] U.S. CONST. amend. XIII, § 1.

[87] *Id.* amend. XIV, § 1.

[88] *Id.* amend. XV, § 1.

[89] For a comprehensive treatment (which concludes that the amendments were validly ratified), see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. (forthcoming Spring 2001).

[90] On the Thirteenth and Fourteenth Amendments, see the discussion in 2 ACKERMAN, *supra* note 19, at 99–119. On the Fourteenth Amendment, see, for example, ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 326–63 (1960). On the Fifteenth Amendment, see, for example, WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 84–85 (1969). *See also* RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 102–03, 109, 115 (1993).

them because they were the defeated parties and had little choice. The victors also bound themselves, in order to make the terms of peace more palatable and "to avoid charges of rank hypocrisy."[91]

However one characterizes the Civil War Amendments, the most conspicuous thing about them is how little they meant in the first century after they were ratified. This is not to say that they meant nothing. The Civil War Amendments did serve a limited role, comparable to the role that other amendments serve. But they were not the principal means of constitutional change.

A. The Thirteenth Amendment (With an Aside on the Poll Tax)

The practical effect of the Thirteenth Amendment was, at most, to abolish slavery only in the four border states (Delaware, Maryland, Kentucky, and Missouri) that had not joined the Confederacy. The Emancipation Proclamation (which applied to "the States and parts of States [then] in rebellion against the United States")[92] — and, more to the point, the Union army — had already emancipated the slaves elsewhere. As a Union army officer said in 1863: "Slavery is dead; that is the first thing. That is what we all begin with here, who know the state of affairs."[93] In this sense, the Thirteenth Amendment is an example of an amendment that suppressed outliers before they would have been suppressed by other means. As a practical matter, slavery probably could not have persisted in the border states for long after the end of the Civil War; in any event, Congress very likely would have outlawed it, and the Supreme Court might have upheld Congress's action.[94] Probably the most that can be said for the Thirteenth Amendment is that it hastened the end of slavery in a few border

---

91 Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 349.

92 Abraham Lincoln, A Proclamation (Jan. 1, 1863), *reprinted in* 12 Stat. app. at 1268, 1268.

93 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 7 (1988).

94 Before the Civil War, various arguments that the Constitution either forbade slavery or was hostile to it were seriously advanced. *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73–102 (1970) [hereinafter FONER, FREE SOIL]; WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 265–75 (1977). Frederick Douglass was one of the most famous of those who took this position, and his doing so contributed to his acrimonious split from William Lloyd Garrison and others who believed that the Constitution was irredeemably pro-slavery. FONER, FREE SOIL, *supra*, at 48–53, 64–65. For Douglass's position, see Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), *in* 2 PHILIP S. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, PRE-CIVIL WAR DECADE 1850–1860, at 467 (1950). *See id.* at 477–78 (relying on the Due Process Clause of the Fifth Amendment, the clause restricting suspension of the writ of habeas corpus, and the Bill of Attainder Clause). On the division among abolitionists on this issue, see, for example, FONER, FREE SOIL, *supra*, at 52–54. The Guaranty Clause and, perhaps, the Commerce Clause or the Due Process Clause of the Fifth Amendment could have been plausible bases for congressional action outlawing slavery if the Thirteenth Amendment had not been adopted. *See generally* Levinson, *supra* note 6, at 30–31 (outlining the Commerce Clause argument).

states by a few years. That is not trivial, but it is a far cry from being a principal means of constitutional change.

Among the more recent amendments, the Twenty-fourth Amendment, which outlaws the use of a poll tax in federal elections, most closely resembles the Thirteenth Amendment. When the Twenty-fourth Amendment was proposed, only five states had poll taxes at all.[95] The Twenty-fourth Amendment forbade those states from using the poll tax in federal elections — a clear example of an amendment that has the effect only of suppressing outliers.

Later events reveal even more about the Twenty-fourth Amendment. A few states continued to use the poll tax in state elections, which the amendment did not reach. But two years after the Twenty-fourth Amendment was adopted, the Supreme Court, in *Harper v. Virginia Board of Elections*,[96] invalidated the use of poll taxes in state elections, too.[97] The Court in *Harper* did not invoke the Twenty-fourth Amendment as a basis for its decision; nor did it explain why it was effectively expanding the Twenty-fourth Amendment beyond the text that was ratified. Rather, the Court followed a series of decisions, beginning with *Reynolds v. Sims*,[98] that established the principle of "one person, one vote" and invalidated a variety of state restrictions on the franchise.[99]

In view of *Harper*, the net effect of the Twenty-fourth Amendment was, at most, to abolish the poll tax in federal elections, in a few states, two years before it would have been abolished across the board anyway. Even that limited purpose probably could have been accomplished by federal legislation without amending the Constitution.[100] For that matter, federal legislation almost certainly could have abolished the poll tax in state elections as well.[101] The Voting Rights Act of 1965 outlawed literacy tests even in state elections in jurisdictions where there was reason to fear that literacy tests and other devices were being used to discriminate;[102] the poll tax, like the literacy test, had a close historical association with the de facto disenfranchisement

---

[95] Harman v. Forssenius, 380 U.S. 528, 539 (1965); KYVIG, *supra* note 9, at 356. Virginia changed its law in anticipation of the ratification of the amendment, although the Court declared the revised law unconstitutional. *Harman*, 380 U.S. at 540–42.

[96] 383 U.S. 663 (1966).

[97] *Id.* at 666.

[98] 377 U.S. 533 (1964).

[99] *Harper*, 383 U.S. at 667–70.

[100] This conclusion appears to follow from *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Court held that Congress could authorize eighteen-year-olds to vote in federal elections. *See id.* at 119–24 (opinion of Black, J.); *id.* at 135–44 (opinion of Douglas, J.); *id.* at 239–81 (opinion of Brennan, White, and Marshall, JJ.).

[101] Justice Black, who dissented vigorously in *Harper*, wrote that he had "no doubt at all" that Congress had this power. *Harper*, 383 U.S. at 679 (Black, J., dissenting).

[102] Voting Rights Act of 1965 § 4(a), 42 U.S.C. § 1973b(a) (1994).

of African-Americans.[103] So the Twenty-fourth Amendment, too, bears out the thesis that things would look much the same even if a formal amendment process were not part of the Constitution.

In fact, the Twenty-fourth Amendment may be another example — like the Equal Rights Amendment and the Child Labor Amendment — of a rejected amendment that nonetheless became the law. The fact that the Twenty-fourth Amendment was limited to federal elections suggests that the opponents of the poll tax did not think an amendment banning poll taxes in all elections would be ratified. Instead, Congress included a provision in the Voting Rights Act of 1965 that directed the Attorney General to challenge the constitutionality of poll taxes in state elections.[104] The omitted part of the Twenty-fourth Amendment was what the Supreme Court "adopted" in *Harper*. When one takes into account Supreme Court decisions, possible congressional legislation, and the states' own actions, the Twenty-fourth Amendment begins to look like window dressing.

It is true that ordinary legislation would not have formally entrenched the abolition of the poll tax in the way that an amendment did. But no state has tried to reenact poll taxes for state elections and get *Harper* overruled, and no state has tried to reinstitute literacy tests and have that provision of the Voting Rights Act repealed. In any event, the power of an amendment to entrench change should not be overstated. Even an amendment cannot guarantee that a change will be permanent, as the history of the other Civil War Amendments shows.

B. The Fourteenth and Fifteenth Amendments, and the Civil War's Greatest Non-Amendment

The Fourteenth and Fifteenth Amendments present a somewhat different story. Unlike the Thirteenth Amendment, the Fourteenth and Fifteenth Amendments did not target an institution that had already lost much of its importance by the time the Civil War ended. The Fourteenth and Fifteenth Amendments addressed matters of great importance to the post-Civil War South. But they were ahead of their

---

[103] *See Mitchell*, 400 U.S. at 118 (upholding a federal statute "prohibiting the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections"); South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (upholding provisions of the Voting Rights Act that outlawed literacy tests in certain jurisdictions). On the use of the poll tax to discriminate against African-Americans, see, for example, J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 63–72 (1974).

[104] Voting Rights Act of 1965 § 10(b), 42 U.S.C. § 1973h(b) (1994). The Attorney General's challenge led to the decision in *Harper*. *See* MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 23–24 (1997).

time, and they consequently ended up having little lasting effect until their time came around, in the mid-twentieth century.

The Fifteenth Amendment, barring discrimination against blacks and former slaves in voting, presents the more dramatic case. The Fifteenth Amendment was not nullified all at once. It had important effects in the South until the end of the nineteenth century. In addition, the Fifteenth Amendment helped blacks gain the franchise in the North.[105] But for the most part, the Fifteenth Amendment is the inverse of the Equal Rights Amendment: it was added to the Constitution's text but did not become part of the Constitution in operation.

The Fifteenth Amendment was ratified in 1870.[106] By the late 1880s, it was being blatantly subverted in much of the South. Southern states adopted a variety of devices, such as literacy tests and poll taxes, that did not explicitly deny blacks the vote but that were deliberately designed to disenfranchise them. When such ostensibly legal means did not work well enough, Southern whites used intimidation and outright violence. By the turn of the century, African-Americans were effectively disenfranchised throughout almost the entire region.[107] The Amendment continued to be nullified on a large scale until the middle of the twentieth century.[108]

If one were to read the Constitution and take the amendments at face value, one would conclude that the Fifteenth Amendment permanently enfranchised African-Americans. It did not. To a limited degree, the Union army and the political changes imposed on the South in the aftermath of its occupation did; but when those effects faded, the Fifteenth Amendment might as well not have been part of the Constitution. Not until one hundred years later did the Voting Rights Act — itself the product of long-term social and economic forces — genuinely enfranchise blacks. The Constitution, in practice, did not change with the Amendment. It changed only when deeper changes occurred in society.

The Fourteenth Amendment is a less dramatic case because its requirements are not as clear as those of the Fifteenth. It is easier to demonstrate that blacks were denied the vote on the basis of their race than to demonstrate that they were denied "equal protection" or "privileges or immunities," because the latter terms are more vague.

---

[105] On this point, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 793–99 (1991).

[106] FONER, *supra* note 93, at 422.

[107] Klarman, *supra* note 91, at 351–58.

[108] For state-by-state specifics, see QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 38–298 (Chandler Davidson & Bernard Grofman eds., 1994); and Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301–04 (2000).

But in many ways the Fourteenth Amendment presents the same pattern as the Fifteenth. And what it accomplished is swamped by what it did not accomplish.

The Fourteenth Amendment had one immediate legal effect: it outlawed the Black Codes, laws adopted throughout the South that more or less sought to reinstitute slavery by imposing various restrictions and disabilities on African-Americans.[109] But even in this respect, it is not clear that the Amendment was crucial. Congress believed it had the power to abolish the Black Codes without the Fourteenth Amendment.[110] The Reconstruction Congress enacted the Civil Rights Act of 1866, which was directed at the Black Codes, before the Fourteenth Amendment was adopted.[111] The Fourteenth Amendment was designed to ensure the Civil Rights Act's constitutionality, but many Republicans believed at the time that the Act was constitutional even without the amendment and that "the amendment was simply declaratory of existing constitutional law, properly understood."[112] Had the Supreme Court accepted this view, neither Section 1 of the Fourteenth Amendment, outlawing Black Codes and similar state legislation, nor Section 5, authorizing congressional action to enforce the Amendment, would have been needed at all.

Some of the members of Congress who thought that the Fourteenth Amendment was unnecessary invoked the Thirteenth Amendment instead. But most also relied extensively on the Guaranty Clause, "the jewel of the Constitution," in the words of one Radical Republican.[113] Some supporters of the Civil Rights Act also revived antebellum theories of the unconstitutionality of slavery or took the position that secession and civil war created their "own logic and imperatives."[114] In any event, even if the Fourteenth Amendment (or the Thirteenth and Fourteenth Amendments in combination) were instrumental in getting rid of the Black Codes, that limited accomplishment falls far short of working a substantial change. Massive denials of equality to African-Americans, of a kind that the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment were intended to prohibit, persisted until the 1950s and the civil rights revolution.

Still, it might be said, when the civil rights revolution of the 1950s did occur, it was important that the Fourteenth Amendment supplied a

---

109 *See* FONER, *supra* note 93, at 199–202.

110 *See id.* at 244.

111 President Andrew Johnson vetoed the bill that became the 1866 Act, and Congress overrode the veto. *See id.* at 250–51; MCKITRICK, *supra* note 90, at 323–24.

112 MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 91 (1986); *see* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

113 FONER, *supra* note 93, at 232 (quoting Sen. Richard Yates).

114 *Id.* (referring to Rep. Thaddeus Stevens).

textual promise of equality to which advocates, and ultimately the Supreme Court, could point. But even this limited effect cannot be attributed to the Fourteenth Amendment without qualification. When the Supreme Court declared state-sponsored racial segregation unconstitutional in *Brown v. Board of Education*[115] and its sequelae, the Court also ruled, in *Bolling v. Sharpe*,[116] that the Constitution barred the federal government from segregating the schools of the District of Columbia.[117] Of course the Equal Protection Clause applies only to the states, not to the federal government. The Court in *Bolling* relied on the Due Process Clause of the Fifth Amendment, but this was a notoriously questionable rationale: among other things, the Fifth Amendment was adopted at a time when slavery was legal and protection of the slave trade was entrenched in the Constitution.[118]

The Supreme Court's willingness to decide *Bolling* without a secure (or, many would say, even a plausible) textual basis in the Constitution suggests that events in the 1950s and 1960s would not have taken a dramatically different course if the victors of the Civil War had not added the language of the Fourteenth Amendment to the Constitution. It is difficult to believe that the Supreme Court would have ruled differently in *Brown* if the Fourteenth Amendment had not been adopted — if, for example, there had been a consensus after the Civil War that the Civil Rights Act of 1866 was constitutional even without the Amendment and if the Reconstruction Congress had turned its attention elsewhere instead of proposing an amendment. It seems more likely that the Court (with help, of course, from the litigators who brought the series of cases leading up to *Brown*) would have identified some other text in the Constitution as the formal basis for the claim of equality.[119] Of course this is all, again, necessarily speculative. Per-

---

115 347 U.S. 483 (1954).

116 347 U.S. 497 (1954).

117 *Id.* at 499–500.

118 A text-based argument in favor of *Bolling* is put forward in Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768–73 (1999), which invokes, in addition to the Due Process Clause of the Fifth Amendment, the Citizenship Clause of the Fourteenth Amendment, the Title of Nobility Clause, U.S. CONST. art. I, § 9, cl. 8, and the Bill of Attainder Clause, *id.* art. I, § 9, cl. 3. *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (suggesting the Title of Nobility Clause and the Bill of Attainder Clause as possible bases for applying equal protection principles to the federal government).

119 The possibilities include the clauses that the antebellum opponents of slavery and the Reconstruction Congress suggested, such as the Guaranty Clause, the Due Process Clause of the Fifth Amendment (which has always been interpreted to apply only to the federal government but is not explicitly so limited), and some of the candidates put forward by those who defend *Bolling* on textual grounds, *see, e.g.*, *supra* note 118.

In fact, it is possible that the Court in *Brown* and similar cases was already relying on the "wrong" provision — that the the Privileges or Immunities Clause, not the Equal Protection Clause, was intended to be the true equality-protecting provision of the Fourteenth Amendment. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED

haps if there had been no post-Civil War textual amendment to be invoked against racial segregation, the dynamics of the public and legal debate would have been different. But at least there are good reasons to believe that the absence of such a provision would not have stood in the way of outlawing segregation in 1954.

The most conspicuous Civil War non-amendment supports this conjecture. Before the Civil War, the question whether the Constitution permits a state to secede from the Union was a subject of lively debate. In the decades leading up to the Civil War, respected political and legal figures advanced serious legal arguments, claiming descent from Jefferson's Kentucky Resolutions, in support of the right to secede.[120] No amendment adopted after the Civil War settled this question, either expressly or by any reasonably direct implication.

Yet the question has, without doubt, been settled. The person on the street would say that the Civil War settled it, and that person would be right. The Civil War settled it, even though no formal amendment was added to the Constitution.[121] The Civil War settled the question of the constitutionality of slavery in the same way, and it settled (or, more accurately, began the process of settling) the question of racial equality. The Secession Amendment, by its absence, makes it difficult to argue that the Thirteenth, Fourteenth, or Fifteenth Amendments made as much difference as one might unreflectively think. The role of the formal Civil War amendments — which, because of the irregularities in the ratification process, might not even be correctly described as formal amendments — can be plausibly characterized as limited and incidental.

IV. RULES OF THE ROAD

Some constitutional amendments are remarkable for their relative lack of importance. The fluky Twenty-seventh Amendment, adopted 200 years after it was proposed, prohibits members of Congress from voting an increase in their own salaries effective before the next election of the House of Representatives; it seems safe to say that this

---

YEARS 1789–1888, at 342–51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433–34 (1992). The Court's decision in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), took the Privileges or Immunities Clause out of the picture. The Court's ability to invoke the Equal Protection Clause as a prohibition against race discrimination, even though it was apparently not originally intended to have that effect, is additional evidence that, even without a Fourteenth Amendment, the Court would have found some textual basis for *Brown*.

120 *See* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1779–1861, at 200–13 (1930); DAVID M. POTTER, THE IMPENDING CRISIS 1848–1861, at 479–84 (Don E. Fehrenbacher ed., 1976).

121 In *Texas v. White*, 74 U.S. 700 (1868), the Supreme Court declared that secession was an illegal act. *See id.* at 724–26.

Amendment has no significant effect. But many constitutional amendments, although not important in the way that amendments are usually thought to be, still serve a nontrivial purpose. They address matters that must be settled one way or another — but how they are settled is not so important. An analogy is to the rule that traffic must keep to the right.

The Twenty-fifth Amendment, which governs Presidential succession and disability, is a prime example.[122] Obviously it is very important that there be a clear answer to the question who can exercise the powers of the Presidency. Also there are better and worse ways to determine the answer to that question, should it be in doubt. In these ways the Twenty-fifth Amendment is certainly important.[123] But this is obviously a very different matter from working a fundamental change in society.

The Twentieth Amendment falls into the same category. This Amendment moved Inauguration Day from March 4 to January 20 and established that Congress is to convene on January 3 of each year unless Congress specifies a different date by law. (The Twentieth Amendment also addresses presidential succession when the President elect or a candidate dies.[124]) Of course, this amendment could, under certain circumstances, make an enormous difference. If a foreign power threatened nuclear war on February 1 of the year after an election, the adoption of the Twentieth Amendment might make literally all the difference in the world. But any rule of the road can be important in that way.

The Twentieth Amendment, in fact, reveals the limited role that formal textual amendments play. The Twentieth Amendment is commonly called the Lame Duck Amendment, because its proponents were concerned about Congress acting when some of its members had recently been defeated for reelection. An amendment that prohibited action (except, say, for emergency action) by lame duck Congresses might be said to have made a significant substantive change in the constitutional order, although it would be more of a clarification than a fundamental change. But the Twentieth Amendment did not actually forbid action by lame duck Congresses; a version that would have accomplished that result more directly was rejected.[125] It can be argued — indeed, it has been powerfully argued — that the Amendment re-

---

122 U.S. CONST. amend. XXV.

123 For a general discussion, see JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS (2d ed. 1992).

124 U.S. CONST. amend. XX, §§ 1–4.

125 BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 20–31 (1999); *see also id.* at 30–31 ("[T]he text of the twentieth amendment does not explicitly abolish lameduck sessions, or even restrict them to cases of clear and present national emergencies.").

flects a judgment that lame duck action should be avoided. But that argument relies on something more than the text of the Amendment.[126]

Still, the amendment process in our system does serve to settle matters of relative detail that need a decisive resolution. But this is not inconsistent with the claim that things would look the same even if there were no formal amendment process. If the Constitution could not be amended, it seems likely that the courts would interpret the Constitution to allow Congress to settle such matters by ordinary legislation. Why wouldn't they? Rules of the road are important, but the stakes are low; there is no reason to require a supermajority, as opposed to a simple legislative majority, to establish them.

Indeed, the Supreme Court's interpretation of Article V suggests that the Court would be receptive to the argument that a simple legislative majority should be allowed to establish rules of the road, especially when they are urgently needed. In *Coleman v. Miller*,[127] the Court ruled that certain questions about whether a state's ratification of a constitutional amendment is valid are political questions;[128] the Court will not overturn Congress's judgment on those issues. The reason the Court chose this allocation of authority seems clear: it is important to establish definitively how many states have ratified, and because constitutional amendments are a way of overturning a Supreme Court decision, the Court itself is not a suitable body to make that determination. If practical considerations like these led the Court to grant Congress the power to interpret Article V, why would the Court not similarly allow Congress to establish rules respecting, for example, Presidential disability, if that were the only way to set clear rules?[129]

The Twenty-sixth Amendment, which grants eighteen-year-olds the right to vote in all elections,[130] combines features of the amendments setting rules of the road and the amendments suppressing outliers. Someone who did not know the background of the Amendment might

---

126 *See, e.g.*, *id.* at 11 (invoking "the lessons of history and the teachings of fundamental principle"); *id.* at 42–66 (relying on precedent).

127 307 U.S. 433 (1939).

128 *Id.* at 450.

129 In fact, the text of the Constitution can be interpreted, without too much difficulty, to allow Congress to deal with both presidential disability and the lame duck issue. Article II, Section 1, Clause 6, combined with the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, could reasonably be interpreted to allow Congress to do everything that the Twenty-fifth Amendment did. *See also* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 128–30 (1999) (criticizing arguments to the contrary). Even before the Twentieth Amendment was adopted, Congress had the power to provide by statute when its session was to begin. U.S. CONST. art. I, § 4, cl. 2. The Constitution does not explicitly state when the terms of members of Congress expire, but various provisions in the Constitution arguably allow that to be determined by statute (as it was before the Twentieth Amendment), or by each house. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1; *id.* art. I, § 5, cl. 1; *id.* art. I, § 5, cl. 2.

130 U.S. CONST. amend. XXVI, § 1.

think of it as something much more significant — perhaps a decision by the People, during the Vietnam War and in response to the baby boom generation, that eighteen-year-olds should have the franchise. The People may have made such a decision, but if so, they made it before the formal amendment process began.

The Twenty-sixth Amendment was added to the Constitution because Congress and the Supreme Court together had created an untenable situation.[131] In 1970, Congress amended the Voting Rights Act to prohibit any state from denying the vote to eighteen-year-olds.[132] The Supreme Court upheld that legislation as applied to federal elections but invalidated it as applied to state elections.[133] The states thus confronted the administrative nightmare of conducting elections with two different electorates,[134] and they put up no resistance to lowering the voting age across the board. Congress approved the Twenty-sixth Amendment three months after the Court's decision; the states ratified it in three months.[135] No other amendment has ever been ratified so quickly.[136]

What would have happened if there were no formal amendment process? The lack of resistance to the Twenty-sixth Amendment suggests that inevitably most of the states, and probably all of them, would have changed their laws within a relatively short time. In fact, while ten states had specifically rejected proposals to lower the voting age to eighteen during the few years before the Twenty-sixth Amendment, eight of those ten then ratified the Amendment.[137] The formal amendment process was a way to effect change quickly and across the board, without further administrative messiness. But by the time Congress sent the Twenty-sixth Amendment to the states, it was already a foregone conclusion that eighteen-year-olds would soon be voting in all elections.

V. THE PROGRESSIVE ERA AMENDMENTS

Everyone knows that the Constitution has not been amended often. Perhaps even more striking, though, is that the amendments that have been adopted are concentrated in just a few periods in our history.

---

131 For a general discussion of the Twenty-sixth Amendment and its history, see KYVIG, *supra* note 9, at 363–68.

132 Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 302, 84 Stat. 314, 318 (codified as amended at 42 U.S.C. § 1973bb (1994)).

133 Oregon v. Mitchell, 400 U.S. 112, 130 (1970).

134 *See* CONSTITUTIONAL AMENDMENTS SUBCOMM., SENATE COMM. ON THE JUDICIARY, 92D CONG., LOWERING THE VOTING AGE TO 18: A FIFTY-STATE SURVEY OF THE COSTS AND OTHER PROBLEMS OF DUAL-AGE VOTING (Comm. Print 1971).

135 BERNSTEIN WITH AGEL, *supra* note 90, at 307.

136 KYVIG, *supra* note 9, at 367–68.

137 *Id.*

The first ten amendments were ratified in 1791; two more were added in 1798 and 1804, respectively, as the new constitutional order settled in.[138] After that, however — except for the three Civil War Amendments, which obviously arose from extraordinary circumstances — no amendments were adopted for almost 110 years.[139]

Then, beginning in 1913, the Constitution was amended four times in seven years.[140] All four of those amendments concerned important subjects: The Sixteenth Amendment authorized an income tax.[141] The Seventeenth Amendment provided that Senators would be elected directly by the people of each state, not by state legislatures.[142] The Eighteenth Amendment inaugurated Prohibition[143] (which the Twenty-first Amendment subsequently repealed[144]). The Nineteenth Amendment provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex."[145]

Surely, one might think, *these* amendments are significant. No one can deny the importance of the income tax or of women's suffrage. And many people trace the decline of state prerogatives, and the expansion of federal regulatory power, to the Seventeenth Amendment, on the theory that it weakened the connection between Senators and the governments of the states they represented.[146]

Here again, though, the story is more complicated than it appears, and the role of formal amendments is much less than meets the eye. The fact that such a high proportion of the substantive, controversial amendments to the Constitution were concentrated in this period is itself revealing. While the Progressive Era was an important time of change in the United States, there have been other important eras of change when no substantive amendments were adopted — the Jefferson and Jackson eras, the New Deal, the end of Reconstruction, the civil rights revolution. This suggests that the formal amendment process is not a central mechanism of change, a suggestion borne out by the history of the Progressive Era amendments.

---

138 BERNSTEIN WITH AGEL, *supra* note 90, at 305.

139 *Id.* at 305–06.

140 *Id.* at 306.

141 U.S. CONST. amend. XVI.

142 *Id.* amend. XVII, § 1.

143 *Id.* amend. XVIII, § 1.

144 *Id.* amend. XXI, § 1.

145 *Id.* amend. XIX, § 1.

146 *See, e.g.*, Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1009 (1994) ("The ratification of the Seventeenth Amendment . . . undermined the twin structural pillars of the Constitution: federalism and the separation of powers."); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (asserting that the Seventeenth Amendment and other factors have dulled Congress's sensitivity to state concerns).

A. The Income Tax (With an Aside on Presidential Term Limits)

The Sixteenth Amendment was a direct response to the Supreme Court's decision in *Pollock v. Farmers Loan & Trust*.[147] *Pollock* struck down a federal income tax on the ground that it was a "direct" tax, which under Article I, Section 2 must be apportioned among the states.[148] But *Pollock* was a surprising decision that did not reflect the way the law was understood at the time and did not much change the direction in which the law subsequently evolved.[149] Before *Pollock*, the Supreme Court had repeatedly rejected claims that the category of "direct taxes" — a particularly ill-defined notion[150] — included inheritance taxes, taxes on notes issued by state banks, or taxes on insurance premiums.[151] In 1881, just fourteen years before *Pollock*, the Supreme Court upheld an income tax that was imposed during the Civil War but not repealed until 1872.[152]

As a result, when the movement for a federal income tax gathered speed in the late nineteenth century, the constitutionality of the tax was not seen as an important question.[153] *Pollock* was widely and immediately condemned; one commentator, writing at the time, compared the hostility to *Pollock* to the reaction to the *Dred Scott* decision.[154] President and Chief Justice-to-be William Howard Taft said: "Nothing has ever injured the prestige of the Supreme Court more . . . ."[155]

After *Pollock* was decided, there was considerable sentiment in Congress for simply enacting an income tax statute — not so much as an act of defiance but because many were convinced that the Court would not adhere to *Pollock*.[156] The Court did little to dispel this conviction. A few years after *Pollock*, the Court upheld an inheritance

---

147 157 U.S. 429 (1895).

148 *Id.* at 582–83.

149 *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4–5, 25 (1999); *id.* at 28 (characterizing *Pollock* as "one of the Court's greatest breaches with the principle of stare decisis"). I am indebted to Nancy Staudt for discussion of the arguments in this section.

150 *See* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 46–71 (1999).

151 *See* Scholey v. Rew, 90 U.S. (23 Wall.) 331, 347–48 (1875) (inheritance taxes); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 546–47 (1869) (notes issued by state banks); Pac. Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433, 443, 446 (1869) (insurance premiums).

152 Springer v. United States, 102 U.S 586, 602 (1881).

153 *See* KYVIG, *supra* note 9, at 194 ("[I]n 1894 debate over a new federal income tax centered not on its constitutionality, which was assumed, but on whether it was good public policy.").

154 Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 576 (1915).

155 1 ARCHIBALD BUTT, TAFT AND ROOSEVELT 134 (1930) (quoting Taft, as reported in a private letter), *quoted in* Ackerman, *supra* note 149, at 5.

156 *See* KYVIG, *supra* note 9, at 201–02; Ackerman, *supra* note 149, at 33–34.

tax, reasoning that it was an excise tax and therefore indirect.[157] In accepting the Republican nomination for President in 1908, Taft endorsed an income tax and suggested that a constitutional amendment would be unnecessary, both because the Court's decisions might be interpreted to allow some kind of income tax and because the Court's membership had changed.[158]

After Taft became President he changed his view about the need for an amendment, and in 1909 — as part of a package of complex political maneuvers by both supporters and opponents of the income tax — Congress (with the Senate voting unanimously) proposed the Sixteenth Amendment to the states.[159] At nearly the same time, Congress enacted a tax on corporations that was measured by their income; while the proposed amendment was before the state legislatures, the Court upheld the corporate income tax, again narrowing *Pollock* by reasoning that the tax was not an income tax but an excise tax on the privilege of doing business in corporate form.[160] After the Sixteenth Amendment was adopted, the Court, in upholding the new income tax, characterized the amendment as restoring power that Congress had assumed to exist before *Pollock* was decided.[161]

In this instance, too, the primary mechanism of change was not the amendment process but the long-term development of popular opinion. The Supreme Court essentially accepted the income tax both before and after the Sixteenth Amendment. *Pollock* was a momentary aberration, as the Court itself all but admitted. It is true that the amendment dispatched *Pollock* cleanly and decisively; without an amendment, *Pollock* would have continued to cast a cloud over the income tax. But *Pollock* had all the earmarks of a precedent that was destined to be overruled: it was inconsistent with earlier cases, subsequent cases immediately construed it narrowly, and it faced strong popular opposition. The Sixteenth Amendment put an end to the sideshow that *Pollock* began, but a sideshow was all it was.

The Twenty-second Amendment, which limits a President to two terms in office,[162] is of course not a Progressive Era amendment — it

---

157 Knowlton v. Moore, 178 U.S. 41, 78–83 (1900); *see also* Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397, 412–15 (1904) (holding that a tax on sugar refining was an excise tax, not a direct tax).

158 SIDNEY RATNER, AMERICAN TAXATION, 1789–1913, at 268–69 (1942).

159 Ackerman, *supra* note 149, at 34–39 & n.149.

160 Flint v. Stone Tracy Co., 220 U.S. 107, 150–52 (1911).

161 *See* Stanton v. Baltic Mining Co., 240 U.S. 103, 112–13 (1916); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 17–18 (1916). On these events, see generally JOHN D. BUENKER, THE INCOME TAX AND THE PROGRESSIVE ERA (1985); RATNER, *supra* note 158, at 193–214, 298–320; EDWIN R.A. SELIGMAN, THE INCOME TAX (2d ed. 1914); and ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913 (1993).

162 U.S. CONST. amend. XXII, § 1.

was adopted in 1951 — but in certain respects it can be compared to the Sixteenth Amendment. Before President Franklin Roosevelt ran for a third term, there was an unbroken tradition that Presidents would not do so. The Twenty-second Amendment restored that tradition.[163] One might say that Roosevelt's decision was comparable to *Pollock*, an aberration that was inconsistent with the broad evolutionary course of constitutional history; the amendment merely restored a preexisting tradition and may even have been unnecessary, because the tradition might have reasserted itself without an amendment.

This account of the Twenty-second Amendment is plausible, but in fact the Twenty-second Amendment may be an occasion on which it really mattered that there was a process for formally amending the Constitution. To begin with, the Twenty-second Amendment did not simply establish a rule of the road: the precise length of a term may be a rule of the road, but a limit on the number of terms is an important substantive rule. In particular, a presidential term limit can have significant effects on politics even if no President ever actually seeks a third term, because it makes a reelected President a lame duck throughout his second term.

In the case of the Twenty-second Amendment, the three conditions that can potentially make amendments significant all coalesced. First, unlike slavery or the poll tax, for example, presidential term limits may not have been a subject on which the nation had reached closure. The amendment did pass with substantial support and relatively little public controversy, but it arguably was adopted at a high-water mark of anti-Roosevelt and anti-Truman sentiment.[164] The adoption of the Twenty-second Amendment was in some ways a highly partisan act, supported by Republicans (virtually unanimously) and by Southern Democrats (many of whom opposed the New Deal and the early civil rights initiatives of President Roosevelt's successor), but bitterly opposed by many supporters of the New Deal.[165] Popular sentiment about presidential term limits was, therefore, one-sided enough to make a constitutional amendment possible, but it did not remain one-

---

[163] For an argument that the "tradition" was not in fact well established, see Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-second Amendment*, 83 MINN. L. REV. 565, 574–84 (1999).

[164] On the circumstances surrounding the adoption of the Twenty-second Amendment, see generally Stephen W. Stathis, *The Twenty-second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61 (1990).

[165] *See* JAMES W. DAVIS, THE AMERICAN PRESIDENCY 406 (2d ed. 1995); LOUIS W. KOENIG, THE CHIEF EXECUTIVE 66 (1964); Peabody & Gant, *supra* note 163, at 570, 598–99. Only ten House Democrats from states outside the old Confederacy voted for the proposed amendment, and only two were urban liberals. One of those two was the newly elected John F. Kennedy of Massachusetts, whose father had become a virulent opponent of Roosevelt. KYVIG, *supra* note 9, at 331.

sided. Presidents Eisenhower, Nixon, and Reagan all, at some point, criticized the Twenty-second Amendment[166] — suggesting that the Amendment was adopted as public opinion crested and that public opinion may have since receded, leaving the Amendment in place.

This condition alone, however, is not enough to establish that the formal amendment mattered. The Fifteenth Amendment, for example, was also adopted at a high-water mark of public sentiment, and popular support for it likewise receded. When an amendment is adopted in such circumstances, one would expect it to be evaded, as the Fourteenth and Fifteenth Amendments were. The Twenty-second Amendment's specificity makes it hard to evade — the second characteristic that makes it an arguable exception to the proposition that constitutional amendments do not matter. A term-limit amendment that is carefully drafted, with precise numerical specifications, should be nearly evasion-proof, unlike such relatively vague provisions as the Privileges or Immunities Clause, the Equal Protection Clause, or the provision forbidding disenfranchisement "on account of" race or previous condition of servitude.

The third characteristic that makes the Twenty-second Amendment an arguable exception to the rule of unimportance is that it addresses a subject on which the other branches of government are not likely to speak authoritatively. Often the reason the formal amendment process does not matter is that some combination of legislative action and judicial interpretation of the Constitution can produce the same outcome without an amendment. It is essentially inconceivable, however, that the Supreme Court would have announced a two-term presidential limit without a constitutional amendment.[167] The problem is not that the two-term tradition was insufficiently well established. In other contexts the courts would have little hesitation in enforcing a tradition with such deep roots, even if it had no specific textual basis. But a presidential term limit presents such sensitive separation-of-powers issues that the courts could not possibly have enforced a limit that was based on tradition alone. In fact, it is not clear that the Supreme

---

166 *See* Peabody & Gant, *supra* note 163, at 602–10. Presidents Eisenhower and Reagan did subsequently disavow any interest in running for a third term, *id.* at 602–03, 607–09, and of course President Nixon never finished his second. *See also* Jann S. Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE, Dec. 28, 2000–Jan. 4, 2001, at 84, 88–89 (quoting President Clinton as saying that he "probably would have run again" were it not for the Twenty-second Amendment and expressing support for a change from a lifetime term limit to a consecutive term limit).

167 *Cf.* Peabody & Gant, *supra* note 163, at 611 n.211 ("Although a fair number of judicial opinions refer to the Twenty-second Amendment or describe it in passing, we could not find a single reported decision truly 'interpreting' the Amendment — by which we mean deciding a case or controversy in a way that turns on divining the meaning of the Amendment and determining its effects.").

Court would invalidate the election of a candidate to a third term even now, with the Amendment on the books; the Court might regard the validity of the election as a kind of political question, to be determined through the electoral process.[168] Nor would the courts be likely to allow Congress to make the two-term limit binding through legislation, again because the threat to the separation of powers is too great. Thus the three conditions needed to make the formal amendment process significant — the adoption of the Amendment at a high-water mark from which popular sentiment subsequently receded, the difficulty of evasion, and the fact that the other branches are out of the picture — were all present in this case to a substantial degree. Combined, they suggest that the Twenty-second Amendment is an exception to the generalization that the formal amendment process does not matter.

In a sense, however, this exception helps establish the general rule: it takes an unusual set of conditions to make the formal amendment process an important means of constitutional change. All three of these conditions must come together; otherwise an amendment will either be evaded, ratify an understanding that would have held anyway, or do work that the courts and Congress would have done in the absence of an amendment. Only rarely will all of these circumstances occur at once.

In fact, it is possible that even the Twenty-second Amendment made less of a difference than one might think. Despite appearances, term-limit provisions are not impossible to evade. The incumbent's spouse, or a crony, can seek election, with the understanding that the incumbent will continue to exercise power behind the scenes. Term-limited state governors have used this tactic.[169] In fact — as if to demonstrate just how hard it is to draft an evasion-proof provision of any kind — the Twenty-second Amendment actually provides that "[n]o person shall be *elected* to the office of the President more than twice,"[170] leaving open the possibility that a term-limited President could hold the office again if he were elected Vice President and then

---

[168] It is true that, in *Bush v. Gore*, 121 S. Ct. 525 (2000), the Court's decision may well have determined the outcome of the election, and the legal basis of the Court's decision was not uncontroversial (to say the least). If the Court were to enforce the Twenty-second Amendment against a President who sought to run for a third term, it would have explicit textual support for its decision. But the presidential election of 2000 did not have a clear winner. For the Court to enforce the Twenty-second Amendment and bar the clear winner of the election from assuming office would be, in that respect at least, far more of an intervention in the political process than *Bush v. Gore* was.

[169] Perhaps the most famous example occurred in 1966, when Lurleen Wallace succeeded her husband, the notorious segregationist George Wallace, as governor of Alabama. Lurleen Wallace ran for the office after her husband failed to obtain the repeal of a state constitutional provision limiting the governor to a single consecutive term. *See* STEPHAN LESHER, GEORGE WALLACE: AMERICAN POPULIST 352–70 (1994).

[170] U.S. CONST. amend. XXII, § 1 (emphasis added).

succeeded to the presidency, or if he were appointed Vice President under the provisions of the Twenty-fifth Amendment and then succeeded to the office without being elected, as President Ford did.[171]

The absence of any serious effort to evade the Twenty-second Amendment may simply indicate that such maneuvers would be an obvious sham, but it may also suggest that the barriers to a third presidential term are stronger than just the constitutional provision itself. "Time for a change" is a powerful electoral appeal, and it is not clear that any post-Roosevelt President could have won a third term. Moreover, the lame-duck effect that a term-limited President suffers is mitigated by the fact that a Vice President or other close political ally will often be a leading candidate to succeed the incumbent. The Twenty-second Amendment makes the two-term tradition more difficult to evade and probably impossible to defy outright. But all in all, the lesson of the Twenty-second Amendment is that the circumstances in which an amendment is likely to make a difference coalesce infrequently, and that even then the amendment's impact may be less than one might have originally thought.

B. The Direct Election of Senators

The Seventeenth Amendment requires the direct popular election of Senators — the Constitution originally specified that state legislatures elect Senators — and the direct election of Senators may have been a significant change in the nation's constitutional order. But once again, it would be a mistake to say that the Seventeenth Amendment was responsible for this change. The change occurred, for all practical purposes, before the Amendment was adopted; the effect of the Amendment was to ratify a change that had already taken place. At most, the Amendment served to mop up outliers that were few in number and would probably have fallen into line before long.

The direct election of Senators developed in stages, beginning as early as the 1830s. Until that time, candidates for the Senate typically did not campaign in any significant way until the state legislature was elected; then they campaigned among members of the new legislature. Beginning in the 1830s, however, aspiring Senators began appealing directly to the electorate to vote for state legislative candidates who were pledged to support them for the Senate.[172] The famous debates about slavery between Abraham Lincoln and Stephen Douglas in 1858 dramatized this development;[173] those debates took place before the

---

[171] These various possibilities are considered at length in Peabody & Gant, *supra* note 163, at 567–70, 611–33.

[172] *See* William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 463–64 (1955).

[173] *See id.* at 464.

general public, not the state legislature, even though Lincoln and Douglas were campaigning for the Senate. Not only did Lincoln and Douglas appeal directly to the electorate as a whole, but in that election the state parties endorsed their respective candidates for Senate before the state legislative elections took place. This pledged each party's state legislative candidates to the party's Senate candidate.[174] In effect the election of Senators resembled the election of a prime minister in a parliamentary system.

The Lincoln-Douglas election was atypical in the degree to which the candidates appealed directly to citizens, but support for direct election increased greatly in the latter half of the nineteenth century. Members of Congress proposed several constitutional amendments providing for direct election during this period.[175] Meanwhile, state governments, responding to popular sentiment in favor of direct election, instituted measures designed to bring about direct election in fact even if not in name. Beginning in 1875, Nebraska held a primary election to choose parties' candidates for the Senate. Other states followed suit, and in one-party states (notably in the South), victory in the dominant party's primary election became tantamount to election to the Senate. Those one-party states, then, had effectively instituted direct election well before the Seventeenth Amendment was even proposed.[176]

In 1904, Oregon took the next step by requiring candidates for the state legislature to include a statement on their nominating petitions either "solemnly pledg[ing]" to vote for the Senate candidate who received the most popular votes or declaring themselves free "wholly [to] disregard" the popular vote.[177] Not surprisingly, nearly all state legislative candidates took the pledge. In 1909, an Oregon state legislature with a Republican majority elected a Democratic Senator who had won the popular election, establishing that direct election existed in all but name.[178]

By 1911, a year before the Seventeenth Amendment was proposed, over half the states had adopted the Oregon system or something like it; in many states, the ballot for state legislative elections stated whether a candidate pledged to support the winner of the popular

---

[174] *See* GEORGE H. HAYNES, THE ELECTION OF SENATORS 133 (1906); Riker, *supra* note 172, at 464.

[175] *See* 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 97–98 (Russell & Russell, Inc. 1960) (1938).

[176] *See id.* at 99–104.

[177] *Id.* at 101. On modern efforts to promote term limit proposals in a similar way, see *Gralike v. Cook*, 191 F.3d 911, 914–15 & n.3 (1999), *cert. granted*, 120 S. Ct. 1669 (2000); and Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533 (1999).

[178] 1 HAYNES, *supra* note 175, at 102–03.

election for the Senate. At least three state constitutions explicitly required state legislators to elect the Senate candidate who received the most votes in the primary.[179] And the following exchange occurred on the floor of the Senate between Senators Albert Cummins of Iowa, who favored the Seventeenth Amendment, and Weldon Heyburn of Idaho, a rock-ribbed opponent:

> Mr. CUMMINS. [T]he Senator from Idaho is insisting . . . that if the voters of the United States be permitted to say who shall be their Senators, then this body will be overrun by a crowd of incompetent and unfit and rash and socialistic and radical men who have no proper views of government. I am simply recalling to his attention the fact that the people of this country, in despair of amending the Constitution, have accomplished this reform for themselves.
>
> Mr. HEYBURN. Like a burglar.
>
> Mr. CUMMINS. In an irregular way, I agree, but they have accomplished it.
>
> Mr. HEYBURN. Like a burglar.
>
> Mr. CUMMINS. And they have accomplished it so effectively that, whether the Constitution is amended or not, the people in many or most of the States will choose their own Senators.[180]

The Seventeenth Amendment, therefore, did not bring about the direct election of Senators; it ratified an already existing practice of de facto direct election.

It is true that the Seventeenth Amendment made this practice uniform before it otherwise would have become uniform. It prevented states from reversing themselves and returning to a more indirect form of election, although there appear to be no instances in which a state tried to do so before the adoption of the Seventeenth Amendment. The Amendment also eliminated any missteps that might have occurred in the states' makeshift forms of direct elections. The formal amendment process does serve these functions. But again the principal forces bringing about the direct election of Senators lay elsewhere, and they were on their way to prevailing, one way or another, with or without a formal constitutional amendment.[181]

---

[179] On these various devices and those mentioned above, see, for example, ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 76 (1978); HAYNES, *supra* note 174, at 130–52; 1 HAYNES, *supra* note 175, at 99–104; KYVIG, *supra* note 9, at 210–11; and Ronald D. Rotunda, *The Aftermath of* Thornton, 13 CONST. COMMENT. 201, 207–09 (1996).

[180] 47 CONG. REC. 1743 (1911), *quoted in* Riker, *supra* note 172, at 467.

[181] This conclusion — that the Seventeenth Amendment served primarily to ratify a change that had already occurred — has been reached by many other commentators. *See, e.g.*, Riker, *supra* note 172, at 468 ("[T]he Seventeenth Amendment thus simply acknowledged an already existing situation . . . ."); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 224 n.33 (2000) ("Ratification of the 17th Amendment merely completed and made nationally uniform a process that had been underway for more than a cen-

In a way it should not be surprising that the direct election of Senators was effectively implemented without a formal amendment. The Constitution envisions that presidents will be elected indirectly, by the electoral college. Nominally, they still are; but in reality they are elected directly, on a state-by-state basis. A direct election amendment — specifying that each state's electoral vote total would be cast automatically for the popular vote winner, with no intercession by the electors' judgment — would have no effect on the outcome of presidential elections.[182] State law brought about this change from indirect to direct election of the President,[183] and there is every reason to think that the indirect election of Senators would have suffered the same fate, even without the Seventeenth Amendment.[184]

C. Women's Suffrage (With an Aside on Flag Desecration)

The enfranchisement of women was not the first major change in the composition of the American electorate, even leaving aside the Fifteenth Amendment. Before the Revolution, all of the colonies limited the franchise to property owners.[185] Although some colonies had reduced or eliminated their property qualifications by the time of the Revolution, many had not.[186] Then, in several waves of reform in the

---

tury."); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354–55 (1996) ("I think it fair to say that even without ratification of the Seventeenth Amendment, direct election would be with us today in most if not all States. In reality then, the Seventeenth Amendment was a formalizing final step in an evolutionary process." (footnotes omitted)); *see also* HAYNES, *supra* note 174, at 133.

182 Direct election should be distinguished from the other prominent feature of the electoral college, its winner-take-all character within each state. An amendment providing for election by a nationwide popular plurality would have a significant effect on campaign tactics and would alter outcomes. But that is a change in how votes are aggregated, which is different from direct election. Simply providing for direct election — in the sense that each state's electoral votes would be counted automatically, so no one except the voters at large would exercise any discretion over who is elected — would not change the current system significantly (at least if one leaves aside truly extraordinary events like those that occurred in Florida in 2000).

183 The Supreme Court subsequently upheld these state laws regarding presidential election, arguably subverting the original constitutional design. *See* Ray v. Blair, 343 U.S. 214, 231 (1952). This decision is roundly criticized in DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 371 (1990).

184 *See* 1 HAYNES, *supra* note 175, at 98–99. Todd Zywicki has forcefully urged a contrary view. *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 201–19 (1997) (arguing that the Seventeenth Amendment was the product of interest group activity); *id.* at 192–93 (identifying differences between the Seventeenth Amendment and the state-by-state provisions for direct election that preceded it).

185 *E.g.*, Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19, 22–23 (Donald W. Rogers ed., 1992).

186 *See* ADAMS, *supra* note 1, at 293–307 (detailing various states' property qualifications before and after the Revolution). A few states, including Massachusetts, actually made property qualifi-

first decades of the nineteenth century, the states began eliminating property qualifications and adopting what was called "universal" suffrage (although it was limited to white males).[187] Many of these changes occurred in state constitutional conventions; others came about through legislation.[188] By 1840, property qualifications were no longer significant, and by 1860, they no longer existed anywhere.[189]

The abolition of property qualifications is arguably another change of constitutional magnitude that occurred without a formal amendment. The Supreme Court did eventually ratify this change; beginning in the 1960s, the Court, following the "one person, one vote" principle, held that property qualifications are unconstitutional except in elections to bodies that deal exclusively with matters of special importance to the property owners who are authorized to vote.[190] But by the time of those decisions, the basic principle of universal suffrage was already deeply entrenched. The Supreme Court's decisions in this area (like all of its "one person, one vote" decisions) relied on the Equal Protection Clause of Section 1 of the Fourteenth Amendment — even though there are strong arguments that Section 1 was never intended to limit the states' power over the franchise.[191] The Supreme Court's decisions defining the very limited circumstances in which property qualifications are permissible can be seen, therefore, as interpretations of the nontextual "amendment" that brought about so-called universal suffrage.

The rejection of property qualifications without a formal amendment suggests that there is less to the Nineteenth Amendment than meets the eye, just as the advent of the direct election of the President without a formal amendment suggests that the significance of the Seventeenth Amendment is easy to overstate. The Nineteenth Amendment was, of course, the product of a decades-long struggle for women's suffrage, in which the proponents sought to achieve their ob-

---

cations more stringent. Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787–1860*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 185, at 31, 33.

187 *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860, at 156–57, 181, 204–05 (1960); Wilentz, *supra* note 186, at 33.

188 *See* DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S (Merrill D. Peterson ed., 1966); ERIC FONER, THE STORY OF AMERICAN FREEDOM 52 (1998).

189 FONER, *supra* note 188, at 52.

190 *See* Ball v. James, 451 U.S. 355, 362–71 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 726–30 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204, 207–13 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704–06 (1969); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 630–33 (1969).

191 *See* Reynolds v. Sims, 377 U.S. 533, 590–608 (1964) (Harlan, J., dissenting); AMAR, *supra* note 22, at 216–17 & n.* (citing many sources). For a contrary view, see William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 38–85.

jective both at the state level and by means of a constitutional amendment. At first, their principal emphasis was on the states.[192] A women's suffrage amendment to the federal Constitution was introduced in Congress in 1868, and then repeatedly in subsequent Congresses, but it never came close to passage.[193] It received some attention from Congress until 1896, at which point it "virtually disappeared from the Congressional agenda and from public notice until 1913."[194]

During this period, suffragists had limited success at the state level. By 1913 women had full suffrage in only nine states. At that point suffrage supporters divided over whether to continue to seek changes at the state level or to concentrate on a federal constitutional amendment.[195] But around the same time, the current began to run more strongly in favor of women's suffrage. In 1916, both major parties' platforms endorsed women's suffrage "state by state."[196] Charles Evans Hughes, the Republican candidate for President, went beyond his party's platform to endorse a federal constitutional amendment.[197] President Wilson, who had initially opposed women's suffrage entirely and then said he thought it should be implemented by the states rather than by the federal Constitution, indicated for the first time during the 1916 presidential campaign that he would support a constitutional amendment.[198] In 1918 the House of Representatives, for the first time, voted in favor of the amendment by a two-thirds majority, but the Senate — after a debate in which "states' rights" was a recurrent theme — narrowly rejected it.[199] In 1919, the House again voted for the amendment — this time by a substantially larger margin — and

---

192 *See* ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 157–58 (enlarged ed. 1996) (1959). Between 1867 and 1920, suffragists initiated, by one count, 480 campaigns directed at state legislatures. *See* AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920, at 3–4 (Anchor Books 1971) (1965); *see also* DAVID MORGAN, SUFFRAGISTS AND DEMOCRATS (1972); ANNE F. SCOTT & ANDREW M. SCOTT, ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE 14–23 (1975) (describing the organization of women for suffrage rights).

193 FLEXNER & FITZPATRICK, *supra* note 192, at 165–67.

194 *Id.* at 167.

195 *See id.* at 265–67.

196 *Id.* at 270–71 & nn.5–6 (quoting the Democratic Party platform, as reported in *The New York Times*).

197 Christine A. Lunardini & Thomas J. Knock, *Woodrow Wilson and Woman Suffrage: A New Look*, 95 POL. SCI. Q. 655, 661 (1980).

198 In 1915, Wilson announced that he would vote in favor of women's suffrage in a referendum in his home state of New Jersey, although he added: "I believe that it should be settled by the State and not by the National Government . . . ." *Id.* at 660. Then, during the 1916 campaign, in a speech before a suffragist group, Wilson endorsed suffrage and added, "[W]e shall not quarrel in the long run as to the method of it," a remark that was taken to show that Wilson would not insist on proceeding state by state but would support the federal constitutional amendment. *Id.* at 662.

199 FLEXNER & FITZPATRICK, *supra* note 192, at 283, 303–04.

the Senate concurred. The amendment was ratified in 1920, after several dramatic moments in state legislatures.[200]

On the one hand, this history suggests that the availability of a formal amendment process was much more significant for women's suffrage than for the direct election of Senators or even for the income tax. The Nineteenth Amendment did not simply ratify a fait accompli as the Seventeenth Amendment did. The suffragists had relatively little success at the state level; the federal amendment process provided them a more hospitable arena. The amendment process nationalized the women's suffrage debate, and that may have been crucial. The national political parties were competing for current and future women voters nationwide and could not afford to ignore the suffrage issue. By contrast, in states where women did not have the right to vote, the parties had less incentive to favor suffrage; this was particularly true in one-party states, such as those of the solidly Democratic South, which was the strongest bastion of opposition to women's suffrage. While the national parties could influence the states, they were presumably more effective at the federal level. Wilson lobbied vigorously for the Amendment in 1917 and 1918,[201] and he too would presumably have been less influential if the campaign for the Amendment had been conducted entirely at the state level, although he apparently helped secure some state ratifications of the Amendment.[202]

On the other hand, the amendment process is not a national referendum;[203] it requires the independent assent of three-quarters of the states, and three-quarters of the states did ratify the Nineteenth Amendment. This suggests that a state-by-state campaign for women's suffrage might also have succeeded. A state ratification cannot necessarily be equated to a state's decision to adopt women's suffrage on its own — the latter might have required a supermajority or referendum, and enormous resources were concentrated on the marginal states in the ratification process. Still, the forces that led to the shift in opinion in favor of a constitutional amendment also changed the climate of opinion at the state level. During the period from 1916 to 1919, several states enfranchised women for some or all elections.[204] This happened even though, by then, most of the suffragists' efforts were directed toward Washington, D.C. With both major political parties strongly supporting women's suffrage and the President playing an active role even at the state level, it seems unlikely that many states would have held out much longer. The Nineteenth Amendment

---

200 *Id.* at 308–17.

201 Lunardini & Knock, *supra* note 197, at 664–68.

202 *See id.* at 669–70.

203 This point is emphasized in Monaghan, *supra* note 17, at 121–22.

204 FLEXNER & FITZPATRICK, *supra* note 192, at 304–07.

certainly suppressed outliers; it made women's suffrage uniform before it otherwise would have been. Beyond that, probably the best estimate is that if the suffragists had been forced to concentrate solely on the state level, they would have achieved substantial but not complete success within a few years.

The Nineteenth Amendment is revealing in other ways about the limited role of the formal amendment process in bringing about constitutional change. A naive reader of the text of the Constitution would think that racial minorities have voted since 1870 and that women have voted since 1920. That is true of women — there is no evidence of systematic subversion of the Nineteenth Amendment — but emphatically untrue of African-Americans. By 1920, American society really had changed to the point that it was willing to accept (and even insist on) women's suffrage. In 1870, society had not reached that point for African-Americans, and the Fifteenth Amendment could not securely enfranchise them. It is, therefore, not always or trivially true that any constellation of political forces powerful enough to bring about a constitutional amendment is powerful enough to change society. Sometimes amendments ratify a permanent shift in the political culture; sometimes they do not. The lack of resistance to the enforcement of the Nineteenth Amendment reveals that it fell into the former category. But in either event, what controls the pace of change is the culture, not the amendment.

This contrast between the Fifteenth and Nineteenth Amendments also sheds light on the recently proposed amendment to ban flag desecration. Opponents of the amendment sometimes paint a dramatic picture, suggesting that any such amendment would be a serious incursion on the First Amendment that might undermine our system of freedom of expression.[205] The amendment might have that effect — or it might not. It is possible that a flag desecration amendment would be interpreted narrowly, as allowing the government to ban flag desecration but not substantially affecting the law governing freedom of expression. In that case, the effect of the amendment would be minor. (Its principal effect would surely be to *increase* the amount of public flag desecration, because flag desecration becomes a much more attractive means of protest when it is illegal.[206])

Alternatively, a flag desecration amendment might be interpreted to give the government general authority to develop a conception of secular blasphemy — that is, to make it a crime to treat various national symbols disrespectfully. In that case the effects of a flag dese-

---

[205] *See, e.g.*, 141 CONG. REC. S18,256–57 (daily ed. Dec. 8, 1995) (statement of Sen. Feingold).

[206] *See* Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 765–66 (1998).

cration amendment would indeed be substantial. It is difficult to say which of these two scenarios would occur if the amendment were adopted; that would be determined by a complex array of forces that influence legislative and judicial action and public opinion. The amendment might be interpreted one way at first and another way after a few decades. And even a rejected flag desecration amendment might have the same fate as the rejected ERA: courts might allow the government to develop a secular equivalent of blasphemy laws without an amendment. In any event, if our experience with constitutional amendments is a guide, the adoption of the amendment is itself unlikely to be the crucial event in resolving these larger questions.

Finally, the events leading up to the Nineteenth Amendment reveal the tenuousness of the argument that the text of the Constitution should be read as an integrated whole, so that, for example, the Nineteenth Amendment read in conjunction with the Fourteenth Amendment would support a principle forbidding gender discrimination that would otherwise be harder to justify.[207] It is just a fortuity that there is a women's suffrage amendment: seeking a constitutional amendment just happened to be, in the specific political context of the time, the suffragists' best strategy. If political conditions had been more favorable in the states and women's suffrage had achieved an encouraging series of victories at the state level, as "universal suffrage" did in the early nineteenth century, the suffragists presumably would not have invested effort in trying to obtain a constitutional amendment.

It seems odd to say that if women's suffrage had fared better at the state level and the Nineteenth Amendment had never been needed, we would have less reason today for interpreting the Constitution to require gender equality. The nation's commitment to women's suffrage would have been just as profound and, arguably, just as appropriate an influence on the interpretation of the Equal Protection Clause if the states had adopted suffrage without the compulsion of the federal Constitution. The idea that that commitment should influence the interpretation of the Fourteenth Amendment is certainly plausible. But to assert that that commitment should influence the interpretation of the Fourteenth Amendment only because it happens to be enshrined in a constitutional amendment of its own, rather than in state and local laws, is to misunderstand the way our system changes and to attach too much importance to a contingency.

VI. CONCLUSION

There is great appeal to the idea that the written Constitution is the authentic voice of the People on matters of fundamental principle.

---

[207] *See* sources cited *supra* note 20.

But however true this idea was for the original Constitution and its early amendments, it presents a misleading picture of the constitutional development of the mature Republic. The fundamental changes in the constitutional order have occurred by means other than the amendment process. They have occurred without amendments, despite the rejection of amendments, or in ways that made amendments only incidentally important.

Formal amendments do help to settle matters that have to be settled one way or another. In addition, formal amendments serve the function of mopping up pockets of resistance to a national consensus, making what otherwise would be merely a dominant rule into the universal rule. But except for these two limited functions — which the system might have found other ways to accomplish even in the absence of a formal amendment process — our constitutional order would look little different if a formal amendment process did not exist.

This does not mean, however, that the constitution — the small-"c" constitution, properly understood — does not reflect the will of the people. It just means that the constitution, in practice, includes not just the text of the document, but also the settled understandings that have developed alongside the text. The people rule not through discrete, climactic, political acts like formal constitutional amendments, but in a different way — often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more. The ERA was rejected in the formal amendment process but was ratified in effect by women entering the workforce, running for political office, and seeking jobs once closed to them, as well as by the political and legal campaigns that paralleled those developments. The Fifteenth Amendment, formally adopted a century earlier, finally became a real part of the Constitution in the mid-1960s, as a result of more than a generation's worth of both political activity and economic and demographic change that supported that activity.

These are forms of popular rule that are less romantic than the idea of the People speaking with one voice to amend the Constitution. And these forms of popular rule may be less congenial to lawyers because they do not provide a canonical text to be scrutinized and interpreted. But they represent a deep and true form of popular rule in a mature republic.