Theocracy in America: Should Core First Amendment Values Be Permanent?

by MIRIAM GALSTON*

> The ultimate measure of a constitution is how it balances entrenchment and change.
>
> *Erwin Chemerinsky*[1]

Introduction: The Threat of Theocracy in America

The Supreme Court's decision in *Lawrence v. Texas*,[2] holding a Texas statute criminalizing consensual sexual relations between same-sex individuals as unconstitutional, unleashed a storm of protest. Those most alarmed feared the Court's reasoning could be used to challenge laws prohibiting same-sex marriage, polygamy, or worse.[3] The decision renewed calls for a constitutional amendment to define marriage as the union of one man and one woman.[4] Some proposals for a marriage amendment would, in addition, deny public entities the

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1. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. Rev. 1561, 1561 (1998).

2. Lawrence v. Texas, 539 U.S. 558 (2003).

3. *See id.* at 590 (Scalia, J., dissenting) (asserting that the holding jeopardizes previous rulings upholding state laws "against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.").

4. *See* H.R.J. Res. 56, 108th Cong. (2003) (defining marriage in the United States as consisting only of a union between one man and one woman); Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004). Similar proposals have been introduced in each successive year. *See, e.g.*, H.R.J. Res. 22, 110th Cong. (2007). All versions have failed to pass either house. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U.L.Q. 611 (2004).

authority to accord same-sex unions or other domestic partnerships the civil rights and benefits ordinarily bestowed upon married couples.[5]

This is not the first time a portion of the public contemplated overturning a Supreme Court decision by constitutional amendment,[6] although it may be the first attempt to do so preemptively. In recent decades, many such attempts have been motivated by the desire to constitutionalize religious values the Supreme Court found at variance with the Constitution. Notably, *Roe v. Wade*,[7] which afforded constitutional protection to certain abortions, sparked a flood of proposals to amend the Constitution to curtail or eliminate this protection. Several of the abortion proposals explicitly prohibit abortion based on the proposition, elevated to constitutional status, that the right to life as a human being begins at the moment of conception.[8] Similarly, the Court's determinations that voluntary

5. *See* H.R.J. Res. 22, 110th Cong. § 2 (2007); H.R.J. Res. 39, 109th Cong. § 2 (2005).

6. Only a decade after the Constitution was ratified, the Eleventh Amendment was approved in order to overturn *Chisholm v. Georgia*, which had permitted a citizen of one state to sue the government of another state. 2 U.S. (2 Dall.) 419 (1793) (upholding the plaintiff's claim to recover an amount owed by the State for goods it purchased and received). The Sixteenth Amendment was approved in response to the Supreme Court decision striking down a federal income tax enacted in 1894. *See* Pollack v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895). During the *Lochner* era, the Supreme Court frequently invalidated protective social legislation as outside the scope of Congress' powers under the Commerce Clause. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating minimum wage law for women because it violated freedom of contract); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (invalidating federal tax statute enacted to regulate child labor); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating the Child Labor Tax). These decisions gave rise to numerous attempts to amend the Constitution to overrule the Court's holdings. *See* H.R.J. Res. 354, 75th Cong. (1938) (all proposing child labor amendments); H.R.J. Res. 184, 68th Cong. (1924); S.J. Res. 1, 68th Cong. (1924); S.J. Res. 262, 67th Cong. (1923); S.J. Res. 256, 67th Cong. (1923); S.J. Res. 232, 67th Cong. (1923); S.J. Res. 224, 67th Cong. (1923); S.J. Res. 200, 67th Cong. (1923). More recently, decisions upholding the right to burn the U.S. flag on free speech grounds, *see* United States v. Eichman, 496 U.S. 310 (1990) (holding the 1990 federal Flag Protection Act unconstitutional as a violation of the First Amendment's protection of expressive conduct);Texas v. Johnson, 491 U.S. 397 (1989) (holding that state laws prohibiting desecration of the flag violated the Free Speech clause of the First Amendment), gave rise to two decades of attempts to amend the Constitution to prohibit flag burning and other forms of flag desecration. One of these proposals passed the House by the requisite two-thirds majority. *See* H.R.J. Res. 12, 109th Cong. (2005).

7. Roe v. Wade, 410 U.S. 113 (1973).

8. *See, e.g.*, H.R.J. Res. 294, 96th Cong. (1979); H.R.J. Res. 427, 93rd Cong. (1973); H.R.J. Res. 261, 93rd Cong. (1973); S.J. Res. 3, 98th Cong. (1983); S.J. Res. 110, 97th Cong. (1982). *See also* H.R.J. Res. 4, 109th Cong. (2005).

school prayer violates the Establishment Clause[9] provoked numerous bills to amend the Constitution to permit school prayer and allow public officials to include voluntary prayer at official events.[10]

These developments are disturbing because they seek to stipulate, as a matter of constitutional law, the veracity of religious beliefs not shared by all Americans and to impose or prohibit practices whose justification depends upon those beliefs. The proposed conception amendment provides a dramatic illustration of the danger. Under Jewish law, for example, human life does not begin at conception,[11] and a pregnancy may be terminated within forty days without violating Jewish strictures.[12] Relatedly, because "the traditional Jewish perspective does not accord an embryo outside of the womb the full status of humanhood," Orthodox Jewish authorities have concluded that stem cell research is not only permitted; such research is a moral obligation, because of its potential to fulfill the religious command to heal the sick.[13] Thus if enacted, amendments to establish the right to life at conception could interfere with the ability of those who observe Jewish law, as well as others who disagree with the amendment's premise, to exercise their religion freely.

These recent attempts to constitutionalize religious values have a long lineage. During the founding period, critics frequently attacked

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9. *See* Engel v. Vitale, 370 U.S. 421 (1962) (invalidating a daily recitation of "denominationally neutral" prayer); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating a moment of silence in the classroom). *See also* Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290 (2000) (invalidating school led prayer at high school athletic events).

10. *See, e.g.*, H.R.J. Res. 307, 99th Cong. (1985); H.R.J. Res. 279, 99th Cong. (1985); H.R.J. Res. 201, 99th Cong. (1985); H.R.J. Res. 55, 99th Cong. (1985); H.R.J. Res. 4, 99th Cong. (1985); S.J. Res. 2, 99th Cong. (1985). These efforts have continued to the present day. *See, e.g.*, H.R.J. Res. 41, 110th Cong. (2007); H.R.J. Res. 21, 109th Cong. (2005); S.J. Res. 11, 110th Cong. (2007).

11. *See* Rabbi Moshe Dovid Tendler, *Stem Cell Research and Therapy: A Judeo-Biblical Perspective*, *in* 3 ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH H-1, H-3–H-4 (National Bioethics Advisory Commission, 2000) (stating that the "Judeo-biblical tradition does not grant moral status to an embryo before forty days of gestation . . . The proposition that humanhood begins at zygote formation, even in vitro, is without basis in [Jewish] biblical moral theology.").

12. *See* Rabbi Yitzchok Breitowitz, *The Preembryo in Halacha*, http://www.jlaw.com/Articles/preemb.html (last visited September 13, 2009) (noting the distinction made in Talmud between embryos before the 40th day of the pregnancy and embryos after that time).

13. *See* Letter from the Union of Orthodox Jewish Congregations to Members of the House of Representatives, Jan. 8, 2007, http://www.ouradio.org/images/uploads/StemCell_07_hr3.pdf.

the Constitution's failure to mention God, religion, or the Scriptures.[14] Subsequently, the "Christian amendment movement" emerged around the time of the Civil War,[15] and in the ensuing decades, bills were regularly introduced in Congress to amend the Constitution to acknowledge the existence of God, establish Christianity as the religion of the United States, and/or recognize the authority of Jesus Christ or the Old and New Testament.[16] As recently as 1967, members of Congress proposed an amendment to establish that "[t]his Nation devoutly recognizes the authority and law of Jesus Christ, Saviour and Ruler of nations, through whom are bestowed the blessing of Almighty God."[17]

Although they no longer attempt to amend the Constitution to affirm the authority and law of Jesus Christ explicitly, members of Congress continue to introduce resolutions recognizing the importance of Christianity.[18] In the latter half of the twentieth century, the majority of religiously motivated proposed amendments aimed to constitutionalize religious values by affirming both specific practices and rights, such as school prayer, or the right to life from the moment of fertilization,[19] and more general rights, such as the right "to recognize . . . religious beliefs, heritage, or traditions on public property, including schools."[20]

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14. *See* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 32–37 (1996) (describing criticism expressed during the ratifying conventions); FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 254–58 (2003). On attitudes toward religion and government during the colonial period, see LEO PFEFFER, CHURCH, STATE, AND FREEDOM 63–80 (1953). *See also infra* note 18.

15. *See* KRAMNICK & MOORE, *supra* note 14, at 144–48.

16. *See* JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES 1789–1995, 49–51 (1996); KRAMNICK & MOORE, *supra* note 14, at 144–48; Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996).

17. H.R.J. Res. 223, 90th Cong. (1967).

18. *See, e.g.*, H.R. Res. 847, 110th Cong. (2007) (recognizing the importance of Christianity and Christians in the founding of the United States and in the United States and the rest of the world today, asserting that Christianity is one of the world's great religions, and acknowledging the "international religious and historical importance" of Christmas).

19. *See supra* notes 8, 10.

20. H.R.J. Res. 78, 105th Cong. (1997). *See* H.R.J. Res. 161, 104th Cong. (1996) (stating that "[n]othing in this Constitution shall prohibit either public or private acknowledgment of God, the Creator; and neither the United States nor any State shall

This Article is inspired by these recent developments. Although ostensibly less sweeping than the earlier proposals of the Christian amendment movement, the recent efforts to constitutionalize the practices or beliefs of certain religious denominations could propel the United States toward theocracy in significant ways. Specifically, if ratified, some of these amendments will deny the free exercise of religion to those who do not share those beliefs by preventing them from acting in accordance with their own religious beliefs. Although the protection afforded by the religion clauses is not absolute, restricting it in the name of one population's religious beliefs, rather than a compelling state interest, would be contrary to the nation's longstanding commitment to freedom of conscience. Thus, on a theoretical level, the adoption of such amendments would redefine a core feature of the nation's constitutional identity—namely, the conception of religious liberty embodied in the religion clauses of the First Amendment.[21]

This Article examines ways to prevent such a change from occurring. Constitutional theorists have elaborated two distinct legal strategies to ensure the perpetuation of fundamental constitutional norms threatened by potential or recently ratified amendments. Some commentators, such as constitutional scholar Laurence Tribe, argue that certain substantive principles implicit in the Constitution are responsible for its coherence and identity and that the content of these implicit substantive norms would prevent inconsistent subsequent amendments from being valid.[22] Other legal theorists, such as Bruce Ackerman, suggest formally entrenching First Amendment or other constitutional values by ratifying an

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make any law, nor any Judicial System issue any judgment which restricts the recognition of the Almighty God and our individual and joint dependence on Him.").

21. *See* Schneiderman v. United States, 320 U.S. 118, 132–39 (1943) (emphasizing the centrality of freedom of conscience, belief, and thought among the "principles of the Constitution"). This Article does not presuppose that the religion clauses require an absolute separation of church and state. For the view that, at the time of the Founding, the establishment clause was understood to permit support of religion by the national government as long as it fell short of establishment, *see* MICHAEL MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978). *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 63, 481 (2002); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157, 1161–62 (1991) (suggesting that the First Amendment was intended to protect states' rights to establish religions and also to recognize states' control over education); John S. Baker, Jr., *The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 41, 41–42, 45–47 (Eugene W. Hickok, Jr., ed. 1991).

22. *See infra* Part I.

amendment that explicitly declares such provisions unamendable. Such formal entrenchment would obstruct, if not render impossible, attempts to use Article V to modify or eliminate the values guaranteed by the entrenching amendment.[23]

This Article explores the strengths and weaknesses of both of these approaches to prevent efforts to constitutionalize religious values. Part I of this Article considers the concept of implicit substantive constraints that would limit constitutional change, examines its historical antecedents, and reviews different legal materials that could serve as sources of such constraints. Part I also discusses the practical difficulties in identifying core constitutional values and the absence of an appropriate institution with which to entrust this determination. It concludes that, although reasonable arguments exist in support of the existence of implicit, self-limiting constitutional principles, they are outweighed by the fact that there is no institution that could make such determinations in an authoritative fashion.

Part II considers an alternative method of protecting core constitutional values—namely, making them unamendable through entrenching amendments. This Part begins by explaining the concept of express constitutional entrenchment, i.e., ratifying a constitutional amendment making certain constitutional values unamendable. It then reviews what the drafters of the Constitution and others who influenced the character of the emerging republic thought about the desirability of the Constitution being resistant to change. The final two sections of Part II analyze both the constitutionality and the desirability of adopting unalterable constitutional provisions. Part II concludes that there are genuine benefits as well as potential dangers of having constitutional provisions entrenched through an explicit entrenching amendment. It also argues that implementing such amendments would pose less of an institutional problem than enforcing implicit substantive constraints. However, formal constitutional entrenchment poses numerous problems that call its feasibility into question.

Because of the difficulties inherent in both of the approaches discussed, this Article recommends proceeding along other, less formal paths to ensure the permanence of particular constitutional norms. It sketches the type of educational and civic initiatives that

23. *See infra* Part II. For a discussion on the possibility that formal entrenchment might not be effective in preventing changes to constitutional norms through means other than Article V see *infra* Part II.D.2.

could be employed to decrease the current threat to the religion clauses.[24] Just as religiously based proposals to amend the Constitution have been motivated by non-legal norms, establishing countervailing non-legal norms will be necessary to assure the permanence of the religion clauses' current legal protections. Because the American public's commitment to the Constitution is, in general, widespread and deep, I suggest pursuing the goal of entrenchment by building upon this commitment and educating Americans about the essential connection between the constitutional norm of religious freedom and the need to refrain from constitutionalizing a particular denomination's religious beliefs.

I. Constitutional Fundamentals and Self-Limiting Principles

For a formal amendment to the Constitution to be enforceable, it must be adopted in accordance with the procedural requirements set forth in Article V.[25] Nonetheless, some scholars, and concerned citizens have argued that an amendment to the Constitution could be invalid based on its content, even if it were adopted following Article V procedures. This invalidation might occur if the amendment proved inconsistent with existing provisions that comprise foundational principles or core values intrinsic to the form of government established by the Constitution. According to this view, foundational principles or core values represent an essential part of the specific constitutional order that defines the United States political community. By virtue of their essential place in the American form of constitutional democracy, such principles or values are, in effect, unamendable. Only a change of regime could remove provisions, principles, or values of this kind.

This Part discusses this idea of implicit substantive constraints preventing the adoption of possible amendments to the Constitution based on their content. It examines the ways in which such

24. *See infra* Part II.E.

25. *See* Ullmann v. United States, 350 U.S. 422, 428 (1956) (asserting that "[n]othing new can be put into the Constitution except through the amendatory process."). *See also* David A. Strauss, *Commentary: The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001). However, numerous commentators believe that the Article V procedures are not the *exclusive* means to amend the Constitution. *See, e.g.*, Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that under certain conditions, changes in the national consensus about fundamental principles should be considered as an amendment and should be binding upon courts); Akhil Reed Amar, *Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (justifying a national referendum as a valid way to ratify an amendment); *see also infra* notes 233–38 and accompanying text.

constraints, if they exist, would entrench certain features of the Constitution. It reviews the historical instances in which the concept of implicit substantive constraints has been advanced—usually in response to the ratification of a formal amendment that opponents view as running counter to the spirit of the established regime. This Part also discusses several theories about how the source or locus of such limiting principles or values can be identified. The last section analyzes practical obstacles to enforcing implicit substantive constraints on constitutional change even when such constraints can be justified on the level of constitutional theory.

A. The Concept of Implicit Substantive Constraints on Amendments

As the following discussion explains, implicit substantive constraints can be unwritten or part of the written text of the Constitution. Even if expressly stated in the text of the document, they will nonetheless be "implicit" constraints insofar they are considered foundational or otherwise essential to the American constitutional order in a way that other explicit constitutional provisions are not. For example, it is unlikely that anyone would challenge a proposal to amend the Constitution to raise the minimum age for holding certain public offices by five years on the ground that to do so would significantly alter the character of the American form of government, whereas one can imagine such a challenge if the Free Exercise Clause were the target of a proposed amendment. In the latter case, the argument against the proposed amendment would likely include the claim that the Free Exercise Clause is central to the American form of governance in a way that the age of the chief executive is not.[26] In other words, the implicit nature of the Free Exercise Clause is its trumping character, i.e., its ability to preclude constitutional amendments that conflict with it in a significant way. A second category of limiting principles or values could be implicit in two respects: because they are not part of the written text and because of their trumping character.

The following example illustrates the idea of an express provision of the Constitution precluding certain types of properly adopted amendments from being valid. Assume that two or more provisions of the Constitution are inseparable analytically. If an

26. Sanford Levinson cautions that changes to minimum ages of public officials could alter the character of the regime if the new minimums were in the 50–60 years range, as could a constitutional amendment to require Presidents to have two citizen parents in order to qualify for that office. Personal communication from Levinson to author (August 12, 2009) (on file with author).

amendment eliminated only one of the provisions, it would generate a contradiction within the document. As a consequence, even if the amendment had been adopted in accordance with Article V procedures, it could nonetheless be viewed as invalid by virtue of its content.

To see how this could occur in practice, consider a passage in Justice Rehnquist's dissent in *Richmond Newspapers, Inc. v. Virginia*:

> The right of access to places traditionally open to the public . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen.[27]

Rehnquist based his assertion of the connection among the three First Amendment rights on an earlier Court's argument that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[28] Similarly, the majority in *Richmond Newspapers* noted "there was no need separately to assert the right of assembly because it was subsumed in freedom of speech."[29] The statements from both the majority and the dissent suggest that an amendment written to eliminate the constitutional protection for the right of assembly could not take effect because the right of assembly would still be entailed by the surviving cognate right of free speech. Along similar lines, constitutional theorist Lawrence H. Tribe has argued that an amendment repealing the No Test Oath Clause of Article VI by making belief in God a qualification for federal office would nonetheless be inconsistent with the Establishment Clause as well as the implicit protection for freedom of conscience.[30]

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27. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) (Rehnquist, J., dissenting) (although agreeing with the majority that the First Amendment guaranties had implicit in them the right to attend criminal trials, disagreeing about the Court's role).

28. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

29. *Richmond Newspapers*, 448 U.S. at 577 n.13 (attributing the view to the founding period).

30. *See* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 439–440 (1983). This may appear to make the difficulty posed by cognate rights no more than a drafting problem. In some instances that might be the case. But it is also possible that a national consensus could exist to eliminate the right of assembly without a concomitant consensus to eliminate the

Implicit substantive limitations on amendments could also be derived from non-express aspects of existing constitutional provisions, e.g., the principle(s) or purpose(s) of an explicit provision that is the target of a hypothetical new amendment.[31] For example, the Supreme Court has repeatedly indicated that the right of free speech and the right of freedom of religious worship are grounded in a more fundamental concept: The individual's freedom of conscience or freedom of mind.[32] So understood, the implicit "right of freedom of thought" is conceptualized as the foundation of the right of free speech,[33] or as one of its foundations,[34] and it is equated with the freedom of conscience that is the basis of the free exercise of religion and "the counterpart . . . right to refrain from accepting the creed established by the majority."[35] Of course, there is no right to freedom of thought or conscience stated in the text of the Constitution, which refers explicitly only to rights that presuppose the importance of the unstated right.

To illustrate the cognate rights approach, consider a new amendment authorizing state and local districts to permit or require prayer in public schools. Although ratified using Article V procedures, the amendment could be seen as significantly altering the

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rights of speech and press. If so, the presence of cognate rights surviving in the Constitution would serve as a barrier to the effectiveness of the amendment adopted to eliminate the right to assembly.

31. Walter F. Murphy is a prolific defender of implicit substantive constraints limiting constitutional change. *See, e.g.*, Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163, 175–81 (Sanford Levinson ed., 1995); Walter F. Murphy, *Slaughter House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1 (1987); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 SO. CAL. L. REV. 703, 754–57 (1980). For the opposing view, including a direct repudiation of Murphy's arguments, see John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*, *in* RESPONDING TO IMPERFECTION, *supra*, at 191. For additional authorities endorsing or rejecting the possibility of implicit substantive constraints, see *infra* note 133.

32. *See* Wallace v. Jaffree, 472 U.S. 38, 50–52 (1985); Webster v. Reprod. Health Servs., 492 U.S. 490, 572 (1989) (Stevens, J., dissenting); *infra* note 34.

33. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

34. Freedom of speech can also be seen as fundamental in its own right in a democracy because of its role in facilitating an enlightened citizenry that participates in the political life of the community. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 93–94 (1980). *See also* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1750 (2005) (asserting that freedom of speech and press are so "essential to democracy" that they cannot be amended away).

35. *Wallace*, 472 U.S. at 52.

free exercise clause as well as the establishment clause.[36] Consequently, the hypothetical school prayer amendment could be deemed unconstitutional because it would conflict with the unstated but *surviving* principle of freedom of conscience or thought that informs the free speech and free press provisions as well as the Free Exercise Clause.[37] Alternatively, an amendment prohibiting abortion on that basis that human life begins at conception could be invalidated as conflicting with the Free Exercise and Establishment Clauses since some religions do not fix the beginning of life at birth and, consequently, would permit abortions prohibited under the amendment.[38]

A third version of implicit substantive constraints derives the limitations on future amendments from features of the basic structure of the American form of government, rather than from specific fundamental rights. Take a simple hypothetical: an amendment ratified in accordance with Article V procedures that transferred a portion of the powers of the President to some kind of constitutional monarch or king who would govern for life, unless impeached. Assuming that the hypothetical amendment would expressly modify Article I, Section 9, Clause 8 (no titles of nobility), the Twenty-Second Amendment (term limits), and any other provisions that might be deemed inconsistent with the kingship amendment, there would be no "cognate provision" problem. In addition, the position of king for life would not, in and of itself, necessarily prevent the resulting constitutional order from being a democracy.[39] Nonetheless, it would be possible to view the terms of the new amendment as so inconsistent with core values of the *American* form of democracy established by the Constitution as to make the amendment invalid

36. The amendment would undermine the Free Exercise Clause, even if no student would be required to say the prayer, because of the atmosphere of coercion created by the mandatory reading. *See, e.g.*, Brief of Petitioners, Murray v. Curlett, 374 U.S. 203 (1963) (No. 62-119), 1962 WL 115516 (arguing to invalidate a state statute mandating Bible reading in public schools). *Cf.* H.R.J. Res. 46, 108th Cong. (2003) (proposing an amendment to the Constitution to guarantee people's right to pray, etc., on public property, including in the pledge of allegiance to the flag, while also stating no person would be "required" to join in any prayer or religious activity).

37. Not all legal theorists, much less constitutional scholars, would view a law's purpose as itself part of the law rather than as an extralegal source of the law. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 627–29 (1958).

38. *See supra* notes 11–13 and accompanying text.

39. Consider, for example, the Principality of Monaco, the Kingdom of Morocco, and the Principality of Liechtenstein, all of which have constitutional monarchs, but popularly elected parliaments with legislative powers.

based upon its content. To take a related example, would it be possible to subordinate significant aspects of the powers of the executive and judicial branches to the legislative by means of an Article V amendment so that the form of government would be a parliamentary democracy such as exists in Great Britain?[40] Answering the latter question requires deciding whether separation of powers is an essential feature of democracy in America or simply one possible technique for achieving certain goals.[41] Thus, the analysis would go beyond identifying which rights are fundamental to the regime to considering which structural features, if any, are necessary components of the American constitutional order.

Issues of this kind were raised in India when Parliament adopted an amendment initiated by Prime Minister Indira Gandhi that limited the judiciary's ability to review amendments and relieved Gandhi of liability for election fraud.[42] The amendment was challenged, in part, as conflicting with the basic structure of the country's constitutional order. In a decision rendered in 1973, the Indian Supreme Court stated that an amendment to the Indian constitution would be invalid if it was inconsistent with the constitution's "basic structure," even though it was adopted in accordance with the constitution's amending procedures.[43] Most of the Justices wrote separate opinions, but a majority of the Court endorsed the general proposition affirming

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40. *See* John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 56 (1991) (describing a proposal in the 1860s to enable Congress to pass amendments). *See also* Justin Dupratt White, *Is There an Eighteenth Amendment?*, 6 VA. L. REG. 573, 574–81 (1920). White quotes Joseph Story's COMMENTARIES and several Supreme Court opinions to the effect that an amendment would be invalid if it destroyed the existence or sovereignty of the Union or the several states.

41. Madison thought separation of powers was essential. *See* THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (asserting that "no political truth is certainly of greater intrinsic value" than the separation of powers among the three branches of government). *See also infra* Part II.C.3.

42. The events surrounding Parliament's amendment, including the subsequent judicial challenge, are described in GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 370–90 (1999); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution: A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 471–76 (2006). The Indian situation is very different from that of the United States in that the amendments in question were adopted by Parliament and directly prohibited the Court from reviewing certain actions of Parliament.

43. *See* His Holiness Kesavananda Bharati v. The State of Kerala, 1973 S.C.R. 1461. According to the majority decision, the "basic structure" includes a republican and democratic form of government, a secular and federal constitutional order, and the separation of powers.

both the existence of the "basic structure" doctrine and its ability to prevent conflicting amendments from becoming effective.[44]

Analytically, limiting the content of procedurally valid constitutional amendments based on a basic structure or a core values theory depends on the Constitution, or the regime it has established, containing an identifiable nature or core, rather than it being a collection of discrete propositions deriving authority from an act of public will or consent. William Harris, a constitutional theorist, posits that the possibility of such unconstitutional amendments depends upon "the logic of the constitutional scheme."[45] In his view, the Constitution does have such a logic or "design" because in order to "configure" a political arrangement that the community's members will accept as binding, the Constitution cannot "speak like a fitfully sleeping drunk, in disconnected words and phrases that act as free-standing decrees."[46] Harris sees Article V as part of a larger whole and reasons that the changes made using Article V "must continue to make sense *within* the preexisting scheme of constitutional meaning." He also argues that the idea of a coherent whole is implied by the word "constitution" itself, since the constitution is what constitutes the community governed by it in the strong sense of setting out the community's identity rather than merely describing its discrete characteristics.[47] Of course, not all commentators would agree that the American Constitution has a design or a core of fundamental principles; and among those who do, some would characterize the

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44. *See Kesavananda Bharati* , *supra* note 43. *See* Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107 (B.N. Kirpal, et al. eds., Oxford Univ. Press 2000). The Court has used the basic structure doctrine to invalidate amendments in several cases since *Kesavananda Bharati* . *See* Jacobsohn, *supra* note 42, at 474–76.

45. WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 169 (1993).

46. *Id.* at 13. Harris attributes the view that the Constitution reflects a "project," rather than a series of "sentences," to the Federalists. "The text was to be found in the character of the *project*, not in its *sentences*." The Anti-Federalists, in contrast, saw the document "in terms of provisions, not project." *Id.* at 171–72. Harris's own view is that the constitutional system seems to contain both integrated provisions, reflecting a distinctive character, and provisions not necessarily related to the core. *Id.* at 172 (noting that "the settled persistence of the interpretive styles of both genres suggests that they overlap in this constitutional order").

47. *Id.* at 183. The document's inner coherence is also presupposed by the idea that the Constitution is "interpretable" without recourse to external truths. *See id.* at 14. An "inherent tension" in the Constitution would not necessarily be inconsistent with the idea of coherence, although an inherent contradiction would be. *See infra* notes 50, 106, 208–09 and accompanying text. Discussion of this issue is beyond the scope of this Article.

core exclusively in terms of procedural rather than substantive principles.[48]

The various theories of implicit substantive constraints discussed in this section all take the peculiarly American system of constitutional democracy as their starting point—that is, the positive law of a specific regime. Additionally, it is possible to look more broadly beyond the American system to essential features of the generic idea of "constitutional democracy,"[49] "all free governments,"[50] "all democratic governments,"[51] or republican government and use these features to identify foundational elements of the American regime that should be considered unamendable.

B. Historical Antecedents

The idea that certain aspects of the American Constitution are foundational and permanent harkens back to the founding period. Thomas Jefferson might be thought to have rejected this idea because he proposed that a Constitutional Convention be held every nineteen years to reassess the fitness of the Constitution for each new generation.[52] In addition, he believed that the amending process was a critical component of the constitutional design because it preserved the ultimate authority of the people and because it provided a mechanism for constitutional change in light of changing circumstances.[53] Yet in the same letter that discusses the importance of constitutional change, Jefferson also asserted that "[n]othing then

48. *See* David Fontana, *A Case for the Twenty-First Century Canon:* Schneiderman v. United States, 35 CONN. L. REV. 35, 42–53 (2002); *see also infra* notes 200–204 and accompanying text.

49. *See* Murphy, *Merlin's Memory*, *supra* note 31, at 173–75. Muphy and others have written about the inherent tension in this concept due to the fact that "democracy" and "constitutionalism" frequently pull in different directions. *See* Walter F. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 130, 133–34 (M. Judd Harmon, ed., Kennikat Press 1978). *See also* Christopher L. Eisgruber, *Justice and Text: Rethinking the Constitutional Relation between Principle and Prudence*, 43 DUKE L. J. 1 (1993) (arguing that the tension between justice and constitutionality dissolves when constitutional norms are interpreted in light of public opinions about justice).

50. *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1874). *See also infra* note 75.

51. *See infra* note 102.

52. *See infra* notes 172–74 and accompanying text.

53. *See infra* notes 173, 176–77 and accompanying text.

is unchangeable but the inherent and unalienable rights of man."[54] This statement suggests that his assertions about the importance of keeping open the possibility of constitutional change should be understood as qualified by his belief that certain aspects of the American form of government were permanently binding.

Jefferson's writings also identify various substantive precepts that he refers to as "obvious principles" of the Constitution or "true principles."[55] Some of these coincide with the inherent or inalienable rights,[56] while others appear to qualify as principles because they are essential to the particular form of regime established by the Constitution.[57] For example, for Jefferson, the principle of the separation of powers, although not expressly stated, was "clearly the spirit of the Constitution" and an integral part of "free government" more generally. This statement, together with his views about popular sovereignty and the importance of the Article V amending power, reveal his understanding that certain features of the regime established by the Constitution were core elements of the regime's basic character.

James Wilson, one of the drafters of the Constitution and subsequently a Justice on the Supreme Court, is also well known for emphasizing the power of the people to amend the Constitution. Yet it is possible that, like Jefferson, he acknowledged constraints on this power. After noting that "[a] majority of the society is sufficient for [the purpose of amending the Constitution],"[58] Wilson added the proviso that "if there be nothing in the change which can be considered as contrary to the act of the original association, or to the intention of those who united under it; all are bound to conform to

54. Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 42, 47–48 (Andrew A. Lipscomb & Albert Ellery Bergh, eds. 1904) [hereinafter JEFFERSON, WRITINGS].

55. *See infra* note 187 and accompanying text; 28 PAPERS OF THOMAS JEFFERSON 508 (John Catanzariti ed., 2000).

56. Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), *in* 9 JEFFERSON, WRITINGS, *supra* note 54, at 367–68.

57. *See infra* notes 87, 88 and accompanying text.

58. Whether Wilson meant literally that a simple majority of the people could change the Constitution has provoked a lively debate. *See* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 153 (1996) (arguing that Wilson believed that the people's power to alter the Constitution was adequately expressed in Article V); Amar, *supra* note 25 (arguing that for Wilson, a majority of the people retained their ability to alter the Constitution by means other than Article V). Amar appears not to have attached any importance to the qualifications Wilson added, discussed in the text.

the resolution of the majority."[59] The proviso reveals his view that the majority's amending power is limited by substantive constraints implicit in the nature of the original compact and its animating purposes.

Other writers are more clearly identified with the idea that the Constitution contains core principles. In *Calder v. Bull*, for example, Justice Chase derived limits on the powers of state legislatures from "the nature and ends of legislative power," "the very nature of our free Republican governments," and "the genius, the nature, and the spirit of state government."[60] Writing in the first half of the nineteenth century, John C. Calhoun argued that a state would be justified in seceding from the Union if an amendment to the Constitution was passed that was not "fairly within the scope of the amending power" because it would "radically change the character of the constitution or the nature of the system."[61] For Thomas Cooley, a legal theorist writing at the end of the nineteenth century, for an amendment to be valid, it "must be in harmony with the things amended," by which he meant not inconsistent with "the democratic principles that underlie our constitution."[62] Cooley concluded from this general principle that no amendment would be valid, even if approved using Article V procedures, were it to create a nobility or a monarchy. By the same token, a properly approved amendment would be invalid if it sought to remove some states from the United States or to tax some states differently than others.[63]

Debate about the existence of implied substantive limitations on constitutional change arose several times in the first two decades of the twentieth century as part of challenges to the constitutionality of the Eighteenth (prohibition) and Nineteenth (woman's suffrage) Amendments. Some of the opposition to the Eighteenth Amendment was based on the precept that "the power to 'amend' the Constitution was not intended to include the power to *destroy* it" or "to destroy the states" by robbing them of their power to legislate in matters

59. 1 JAMES WILSON, THE WORKS OF JAMES WILSON 373, 375 (James Dewitt Andrews ed., Callaghan & Co. 1896) [hereinafter WILSON, WORKS].

60. Calder v. Bull, 3 U.S. 386, 388 (1798).

61. JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 86 (1992) (quoting 1 THE WORKS OF JOHN C. CALHOUN 300, 301). *See also id.* at 157. Calhoun was motivated in large part by the desire to protect the ability of states to maintain the institution of slavery.

62. *See id.* at 158 (quoting Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 117–120 (1893)).

63. *See id.*

peculiarly within their provenance.[64] These opponents also argued that Article V was never intended to authorize constitutionalizing "ordinary *legislation*."[65] Others claimed that the amendment interfered with the natural right of individuals to pursue happiness.[66] When it upheld the amendment against such attacks in the *National Prohibition Cases*, the Supreme Court expressly noted that the subject of the challenged amendment was within the Article V amending power.[67] The Court's observation implies that properly approved amendments could be unconstitutional based on their content.[68] Two years later, in upholding the constitutionality of the women's suffrage amendment, the Court addressed the plaintiffs' argument that the Nineteenth Amendment was unconstitutional "because of its character,"[69] i.e., it would destroy the state's "autonomy as a political body" by greatly increasing the size of the electorate without its consent.[70] The Court rejected this claim on the grounds that the amendment was identical in "character" and

64. *See id.* at 159 (quoting from William L. Marbury, *The Limitations Upon the Amending Power*, 33 HARV. L. REV. 223 (1919)). Marbury argued that states would cease to exist *as states* if one by one their powers were removed by amendments to the Constitution. *See id.* at 229. *See also* National Prohibition Cases, 253 U.S. 350 (1920) (statement of Mr. McCran, for the State of New Jersey; statement of Mr. Levy Mayer and Mr. Wm. Marshall Bullitt). For a modern exponent of this view, see Mazzone, *supra* note 34.

65. *See* National Prohibition Cases, 253 U.S. 350 (statement of Mr. Root); *see also Marbury*, *supra* note 64, at 229–30.

66. *See* Everett v. Abbott, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 185–87 (1920), *cited in* Scott Dodson, *The Peculiar Federal Marriage Amendment*, 36 ARIZ. ST. L.J. 783, 785 n.8 (2004).

67. *See National Prohibition Cases*, 253 U.S. at 386.

68. *See id.* at 388 (White, CJ., concurring) (professing "profound[] regret" that the majority opinion offered no reasons for its conclusions).

69. *See* Leser v. Garnett, 258 U.S. 130, 136 (1922).

70. William L. Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 2–3, 28–29 (1920). Marbury did, however, believe that the *people* of the United States had the power to authorize such amendments, but that an amendment would not be attributable to the *people* unless Congress initiated the process by calling a national convention to propose the amendments or the people approved amendments in conventions called for this purpose in the states. *See* William L. Marbury, *The Proposed Woman Suffrage Amendment and the Amending Power*, 65 U. PENN. L. REV. 403, 405–06 (1917). The concern that small, but well organized, interest groups could force state legislatures to adopt amendments not favored by the majority of a state's voters led to proposals, introduced in both houses of Congress, to amend Article V to enable states to require that amendments adopted by the legislatures be confirmed by a popular vote in that state. *See* George Stewart Brown, *The 'New Bill of Rights' Amendment*, 9 VA. L. REV. 14, 14–15 (1922).

"phraseology" with the Fifteenth Amendment, the provenance of which had been unquestioned for fifty years.[71]

These two cases are of limited precedential force because neither discussed the idea of implicit substantive constraints, although both appeared to take the possibility seriously. Moreover, because both decisions upheld the amendments in question, there is no Supreme Court precedent for *invalidating* an amendment due to its incompatibility with existing constitutional provisions or principles. Nevertheless, the Court has at times endorsed the view that certain parts of the Constitution are "essential... to [the federal government's] very existence as a Government."[72] For example, it asserted its own authority to review decisions of state supreme courts whenever the Constitution or federal law was at issue. The Court reasoned that without this authority, disputes would likely be decided by violence.[73] Since the Founders clearly intended the peaceful resolution of such controversies, the Court concluded that it would retain its power "so long . . . as this Constitution shall endure."[74] This statement implies that the Court views its power to resolve such cases as inherent in the nature of the American system of government. Thus, even if the requisite supermajorities adopted an amendment to eliminate the Court's original or appellate power, an essential aspect of the regime established by the Constitution could preclude its enforcement.[75]

The thrust of these historical antecedents is that certain aspects of the Constitution's design are inseparable from its existence. As such, these antecedents lay the ground work for the thesis that, short of revolution, there are implicit substantive constraints on the content of constitutional change. The exact manner in which this conclusion will affect the permanence of the religion clauses, however, remains to be determined.

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71. *Leser*, 258 U.S. at 136.

72. Ableman v. Booth, 62 U.S. 506, 518 (1859).

73. *Id.* at 517.

74. *Id.* at 521. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (stating that "[t]he essence of our free Government is . . . to be governed by those impersonal forces which we call law"); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251–52 (1904) (relying upon fundamental principles that "grow[] out of the essential nature of all free governments.").

75. For other judicial examples, *see supra* notes 21, 28–36.

C. Identifying Implicit Substantive Limits on Constitutional Change

The premise that core foundational elements of the American Constitution can be inconsistent with certain constitutional amendments will lack practical import unless there exists a reasonably reliable way to identify them. Thus, in order to evaluate the plausibility of such constraints, it is necessary to examine more closely the types of "core values" or "basic structure" that are sufficiently well-defined to serve as substantive constraints on constitutional change.

1. The Declaration of Independence as a Source of Fundamental Values

Courts and commentators often turn to the Declaration of Independence as a source of fundamental American values. The second paragraph states that "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."[76] The Supreme Court has turned to the quoted clauses or the Declaration more generally when seeking to uphold rights as varied as the right to marry,[77] the right to pursue a profession,[78] the right of parents to control the education of their children,[79] and the right of illegitimate children to social security benefits.[80] Similarly, commentators have argued that the Declaration is our real Constitution,[81] and that the

76. This is from the famous paragraph beginning "We hold these truths to be self-evident . . . ." *See* THE DECLARATION OF INDEPENDENCE ¶ 2 (1776). The expression was "sacred and undeniable" in one of Jefferson's early drafts, but was changed in subsequent drafts, possibly by Jefferson. *See* JOHN H. HAZELTON, THE DECLARATION OF INDEPENDENCE: ITS HISTORY 596–97 (1970).

77. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (connecting the right to marry with the "pursuit of happiness").

78. *See* Cummings v. Missouri, 71 U.S. 277 (1867) (invalidating state law requiring applicants for a license to preach to swear they had never taken up arms against the United States or come to the aid or comfort of those who had). The Court asserted that "the theory upon which our political institutions rest is that all men have certain inalienable rights." *Id.* at 321.

79. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925). *See also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (entitling parents to "make decisions concerning the care, custody, and control of their children.").

80. *See* Matthews v. Lucas, 427 U.S. 495 (1976) (Stevens, J., dissenting).

81. Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 168 (1999). *See also* Walter F. Murphy, *The Right to Privacy and Legitimate Constitutional Change*, *in* THE CONSTITUTIONAL BASES OF SOCIAL AND POLITICAL CHANGE IN THE UNITED STATES (Shlomo Slonin, ed., Praeger Publishers 1990); Paolo Torzilli, *Rectifying the Sanctity of Human Life*, 40 CATH. LAW. 197, 224 (2000).

Constitution was originally seen as "the national legal implementation of the legal philosophy proclaimed in the Declaration . . . ."[82] An extreme variant of this interpretation is that the Declaration, and not the Constitution, is the only unalterable aspect of American law because the Declaration states the ends of government, whereas the Constitution merely outlines the means to achieve those ends.[83] According to this understanding, the rights stated in the Declaration (including the right of revolution) should be the touchstone for determining what laws—whether statutes or constitutional amendments—are entitled to take effect. Everything else is negotiable and, thus, subject to amendment.

The rights enumerated in the Declaration have often been construed as "natural rights" in the sense of transcendent standards or "higher law."[84] If they are understood in this manner, the regime established by the Constitution would point outside itself to external standards of indeterminate scope. Even if those standards were not derived from revealed religion, i.e., if they could be fashioned from a secular understanding of human nature or civilized society,[85] it would be virtually impossible to define the universe of fundamental principles with enough precision to make an implicit substantive constraint approach to constitutional change workable.

Yet the rights announced in the Declaration need not be understood as transcendent. These rights, and indeed any fundamental principles considered an integral part of the constitutional scheme, could be viewed as the product of positive law, i.e., the organizing documents of the American regime. In support of this view is a letter written in 1800 by Thomas Jefferson referring to the "obvious principles" of the Constitution, which Jefferson identifies as states' rights, freedom of religion, freedom of the press,

82. Edward J. Melvin, *The Constitution and the Declaration of Independence: Natural Law in American History*, 31 CATH. LAW. 35, 36 (1987). *See also* Lewis Lehrman, *On Jaffa, Lincoln, Marshall, and Original Intent*, 10 U. PUGET SOUND L. REV. 343, 345 (1987) (asserting, based upon statements of Abraham Lincoln, that the "principles" of the Declaration "are manifestly what the Framers meant to implement").

83. *See* Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 174 (1990).

84. *See* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 64 (1989).

85. *See* Wilson v. Garcia, 471 U.S. 261, 278–79 (1985) (identifying "these guarantees of liberty" with "the rights possessed by every individual in a civilized society . . .").

trial by jury, and economical government.[86] Two decades later, he also mentioned the writ of habeas corpus and the exclusive right of the people's representatives to determine legislation and taxation as among the "principles in which all our constitutions agree."[87] Both of these enumerations indicate that Jefferson viewed the inalienable rights as inalienable in America, but not necessarily inalienable simply. In other words, the inalienable rights would be established by positive rather than natural law.

What, then, to make of the "self-evidence" attributed to the rights enumerated in the Declaration of Independence? One commentator has noted that the sentence begins "We hold these truths to be self-evident," rather than a declaration that they *are* self-evident simply.[88] The "We" is the American people or those of them who endorsed the revolution against Great Britain. "Hold" refers to the fact that we take these to be true in the sense of axioms for our political community.[89] This interpretation, which portrays the rights as reflecting positive law, gains support from the statement of the Supreme Court that "the theory upon which our political institutions rest is, that all men have certain inalienable rights."[90] They rest, in other words, on a "theory" rather than on eternal verities, and it is "our institutions" rather than democracies or governments that are thus dependent. Treating the Declaration's inalienable rights as an expression of positive law is also consistent with other decisions linking fundamental principles to American political institutions[91] or "the traditions and conscience" of the American people.[92]

Even if the rights in the Declaration are statements of positive law, using them as the measuring rod against which to evaluate the constitutionality of Article V amendments is troublesome for several reasons. First, it is questionable whether, or to what extent, it is correct to assume that the Constitution embodies the principles

86. Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), *in* 10 JEFFERSON, WRITINGS, *supra* note 54, at 166–67.

87. Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), *in* 15 JEFFERSON, WRITINGS, *supra* note 54, at 489. "All of our constitutions" appears to mean all of the constitutions of the individual states of the United States.

88. Michael P. Zuckert, *Self-Evident Truths and the Declaration of Independence*, 49 REV. POL. 319, 323–24 (1987).

89. *See id.* The reference to the Creator as the source of the rights is also preceded by the phrase "We hold."

90. Cummings v. Missouri, 71 U.S. 277, 321 (1866).

91. *See* Herbert v. Louisiana, 272 U.S. 312, 316–17 (1926).

92. Brown v. Mississippi, 297 U.S. 278, 285 (1935) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1935)).

enunciated in the Declaration. The Constitution does not explicitly refer to either the Declaration or its statement of rights. The language of the Preamble to the Constitution, where one might expect reference to the Declaration or its values, does not track the language of the earlier document and lacks any reference to rights.[93] The Preamble is almost exclusively concerned with the collective aspects of the community.[94] Although liberty is mentioned as the last of the purposes for forming the union in the Preamble, the reference is to the "blessings" of liberty, rather than the Declaration's "right" to liberty. Moreover, the debates during the drafting of the Constitution contain only one direct mention of the Declaration, and the issue under discussion on that occasion was the character of the relation of the states to one another after the break from Great Britain was announced.[95] Similarly, the Declaration is referred to by name only once in the Federalist Papers.[96]

One interpretation of these omissions is that it was "taken for granted" that the Declaration was the foundation of the Constitution, to the point where its importance did not need to be asserted.[97] Pointing in the opposite direction is the fact that Supreme Court decisions before the Civil War referred to the Declaration exclusively as a document marking the beginning of a republic independent of Great Britain, at which time the law of each state was the governing law in that jurisdiction.[98] When the statement of rights in the

93. The Preamble is not inconsistent with the Declaration. Rather, the relationship between the two is simply not made explicit.

94. *See* U.S. CONST. pmbl.

95. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 153 (James Wilson asserting that the states became independent from Great Britain but were "confederated" with each other, as contrasted with being "in a state of nature toward one another," as was the view of Luther Martin, a delegate from Maryland). *See also* Edward J. Erler, *The Political Philosophy of the Constitution, in* TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 134, 152–53 (Herman Belz, Ronald Hoffman, & Peter J. Albert, eds. 1992) (describing the background of the interchange between Wilson and Martin).

96. *See* THE FEDERALIST, *supra* note 41, NO. 40, at 253 (James Madison) (citing the people's right to alter or abolish their government to "secure their safety and happiness"). The Declaration is clearly referenced, however, without being named, in at least one other place. *See* Erler, *supra* note 95, at 162 (quoting THE FEDERALIST No. 43 (James Madison)).

97. *See* Erler, *supra* note 95, at 153.

98. *See, e.g.*, Inglis v. Sailor's Snug Harbor, 28 U.S. 99, 121–22 (1830); M'Ilvaine v. Coxe's Lessee, 6 U.S. 280, 294 (1804); Ware v. Hylton, 3 U.S. 199, 224–25 (1796). *See also* Camp v. Lockwood, 1 U.S. (3 Dall.) 393, 402–03 (Ct. Com. Pl. Philadelphia Co. 1788).

Declaration was quoted during the nineteenth century, it was almost always in the briefs of counsel or relied upon in dissenting opinions.[99]

The historian Philip Detweiler has noted several other obstacles to assuming that the Constitution embodies, or was understood as embodying, the principles enunciated in the Declaration of Independence. He observes that the discussions at the state conventions ratifying the Constitution "rarely invoked Jefferson's language of 1776."[100] He also found that speeches during Fourth of July celebrations in the 1780s failed to mention the political theory of rights and that the state constitutions patterned themselves after the Virginia Declaration of Rights rather than the statement of rights in the Declaration. From these observations, Detweiler concludes that the significance of the Declaration evolved slowly between the 1790s and the 1820s from its justification for the break with Great Britain to the statement of principles for which it is famous today.

Another barrier to relying upon the Declaration for a statement of constitutional principles is that the rights enumerated in the Declaration are pronounced in a general and abstract fashion. The history of constitutional law is in significant part an attempt to identify what those and similar open-ended norms entail when legislation is challenged as violating such constitutional provisions. As a consequence, it would be predictably difficult and arguably dangerous for the Supreme Court to invalidate a properly ratified amendment based upon a contested interpretation of a vague standard. Although it is true that resolving interpretative ambiguities is quintessentially the work of the Court,[101] overturning amendments would not be comparable to overturning statutes. Among other things, when the Court invalidates a statute on constitutional grounds, it is still possible to "overturn" the Court's ruling with a constitutional amendment.[102] Thus, in criticizing the idea of implicit substantive

99. *See, e.g.*, Gulf, Colo. & Santa Fé Ry. Co. v. Ellis, 165 U.S. 150, 159–60 (1896); *Ex parte* Virginia, 100 U.S. 339, 365–66 (1879) (Field, J., dissenting).

100. *See* Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 559–63 (1962).

101. *See* Tribe, *supra* note 30, at 440–41.

102. *See supra* note 6 and accompanying text. Other examples include the Fourteenth Amendment, which overturned *Dred Scott v. Sanford*, 60 U.S. 393 (1857) and the Twenty-Sixth Amendment overturning *Oregon v. Mitchell*, 400 U.S. 112 (1970). According to one author, the Twenty-Third and Twenty-Fourth Amendments (poll taxes) were enacted, at least in part, in response to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, 349–57 (1996). The Twenty-Fourth Amendment, proposed in 1962, and ratified in 1964, prohibited poll taxes and thus overruled *Breedlove v. Suttles*, 302 U.S. 277 (1937).

limits on constitutional amendments, some commentators have expressed doubts about the Court having the power to invalidate amendments based upon their content because numerous amendments after the first ten have been proposed specifically to overturn controversial Supreme Court decisions.[103]

2. Other Sources of Fundamental Values

Proponents of the idea of implicit substantive constraints who do not emphasize the Declaration of Independence have characterized the core principles or values of the American regime in a variety of ways. The overarching principle uniting all of these characterizations is the idea of coherence or fit.[104] As expressed by Laurence Tribe:

> The Constitution does provide guidance of a sort—not decisive, but suggestive—for assessing the appropriateness of proposed amendments. Far from being a mere assortment of unconnected rules and standards, the Constitution can surely be understood as unified, although not rendered wholly coherent, by certain underlying political ideals: representative republicanism, federalism, separation of powers, equality before the law, individual autonomy, and procedural fairness. We may choose to reject some or all of these ideals, to override them, or to recast them, but as long as we retain some commitment to the Constitution—as long as we are amending it instead of discarding it—we cannot simply ignore its fundamental norms.[105]

In short, Tribe's position is that the Constitution embodies certain fundamental values such that amendments contradicting those values would amount to regime change or revolution, rather than amendment. If Article V creates a procedure for amendment, but not revolution, then "amendments" that do more than amend would not be legitimate under Article V. This distinction, which amounts to the difference between improving or refining the existing form of government on the one hand and "regime change" on the other, has

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103. *See* Tribe, *supra* note 30, at 442; Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 589 (1966). *See also* David E. Kyvig, *Appealing Supreme Court Decisions: Constitutional Amendments As Checks on Judicial Review*, 2 J. SUP. CT. HIST. 106 (1996).

104. *See supra* notes 61–64 and accompanying text.

105. Tribe, *supra* note 30, at 439–40 (footnotes omitted).

also been espoused by other theorists as a limitation on the content of valid amendments.[106]

Numerous other candidates for specific values that are fundamental for the American constitutional project have been proposed. Human dignity has been suggested as a core value,[107] as have political participation,[108] privacy,[109] tolerance,[110] autonomy,[111] freedom,[112] equality,[113] and the entire First Amendment.[114] It is not difficult to find authoritative sources supporting the centrality of religious freedom for the American Constitution. In proposing to include freedom of conscience in the country's bill of rights, Madison

106. *See* Mazzone, *supra* note 34, at 1752 (asserting that "[m]odifications that are more than amendments . . . require higher lawmaking"); *id.* at 1828–31 (attributing this view to George Washington), *Id.* at 1831–32; Murphy, *Ordering of Constitutional Values*, *supra* note 31, at 755–57; SOTIRIOS A. BARBER, WHAT THE CONSTITUTION MEANS 43 (1984); HARRIS, *supra* note 45, at 190.

107. *See* HARRIS, *supra* note 45, at 97–98 (describing dignity and democracy as "meta" constitutional values); Murphy, *Ordering of Constitutional Values*, *supra* note 31, at 708 (asserting that the fundamental value in the Constitution today is human dignity and suggesting that the judiciary take this "fixed star" into account in reaching its determinations); Murphy, *Art of Constitutional Interpretation*, *supra* note 49, at 156 (arguing the fundamental value has become human dignity, which he believes suggests this was not the fundamental principle at the founding). *See also* Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 39 (2002) (arguing that respecting human dignity is fundamental to all democratic governments).

108. *See* Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 13 (Greenberg, Katz, Olivero, & Wheatley eds., 1993); Murphy, *Merlin's Memory*, *supra* note 31, at 179; ELY, *supra* note 34, at ch. 4.

109. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (arguing that the right to privacy can be found in the penumbras and emanations of other rights, the Ninth Amendment's reservation of rights to the people, and the Fourteenth Amendment's Due Process Clause). *See also* Murphy, *Right to Privacy*, *supra* note 81.

110. Barak, *supra* note 107, at 39 (referring to constitutional democracies in general).

111. Murphy, *Merlin's Memory*, *supra* note 31, at 190.

112. *Id.* at 179.

113. *See* Clarence Thomas, *Toward a Plain Reading of the Constitution–The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987) (arguing that equality is the primary constitutional value). Perhaps property should be added. According to John Murrin, Jefferson probably viewed "property as a very basic civil right, defined by government, but not anterior to it." John M. Murrin, *Fundamental Values, the Founding Fathers, and the Constitution*, *in* TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 1, 21–22 (Herman Belz, Ronald Hoffman, & Peter J. Albert eds., 1992). Jefferson's reservations about property as a natural right, *see id.* at 21, may be the reason he omitted it in the enumeration of rights contained in the Declaration of Independence, despite the document's obvious Lockean provenance.

114. Murphy, *Art of Constitutional Interpretation*, *supra* note 49, at 151.

called religious freedom one of "the great rights" and "choicest privileges of the people," "a fundamental and undeniable truth,"[115] and "[a]mong the features peculiar to the Political system" of the United States.[116] As was noted earlier, Jefferson also singled out religious freedom as one of the "obvious principles" of the American Constitution.[117]

3. The Regime's Basic Structure as a Source of Implicit Constraints

Fundamental values can also be derived from the basic structure of the country's institutional arrangement.[118] A basic structure analysis might well include core or fundamental values such as those mentioned in the previous section on the ground that they are essential to a constitutional democracy such as ours. A basic structure approach could, however, extend further. For example, suppose a properly ratified amendment sought to eliminate the Article V amendment procedure entirely in the hopes of entrenching the Constitution in its present form permanently. Although nothing in the text of the Constitution prohibits this, this hypothetical amendment could interfere with an essential aspect of the basic structure of the document and the regime it established—namely, creating a mechanism for altering certain aspects of the regime without resort to violence or revolutionary measures.[119] The

115. The first two phrases are from a speech Madison gave in the House of Representatives in 1789. *See* 5 MADISON, WRITINGS, THE WRITINGS OF JAMES MADISON 380 (Gaillard Hunt ed., 1910) [hereinafter MADISON, WRITINGS]. Madison listed freedom of the press and trial by jury in criminal cases as the two other great rights. The third phrase is from the Memorial and Remonstrance Against Religious Assessments. *Id.* at 184.

116. Letter from James Madison to Jacob de la Motta (August 1820), in 9 MADISON, WRITINGS, *supra* note 115, at 29–30. This letter focuses on the "perfect equality of rights" available to all religious sects because it was written in reply to a letter describing the situation of a Jewish synagogue in Savannah, Georgia. It also references the equal religious rights of individuals, regardless of sect, because of the policy's contribution to "social harmony" and "the advancement of truth." *Id.* at 30. What we consider fundamental today in the area of religion may be different from what was considered fundamental at the time of the Founding, since the First Amendment initially applied only to the national government. When the Constitution was ratified, several states had an established church. *See* MARK DOUGLAS MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLE TO SEPARATE CHURCH AND STATE 16–20 (2005).

117. *See supra* note 87.

118. *See supra* notes 40–43 and accompanying text.

119. *See* THE FEDERALIST, *supra* note 42, NO. 78, at 469 (Alexander Hamilton); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983) (arguing that "article V represents a domestication of the right to revolution"); *See also supra* note 72 and accompanying text.

amendment seeking to eliminate Article V might also be invalidated as inconsistent with even a weak notion of republicanism or popular sovereignty, since the elimination of Article V would enable generations prior to the amendment to deny subsequent generations the ability to govern themselves in all matters made unamendable by virtue of having been part of the Constitution at the time Article V was removed.[120]

Alternatively, an amendment to Article V authorizing Congress to amend the Constitution, with or without supermajority votes in both houses, without submitting its proposal to state legislatures or conventions for ratification might not withstand a basic structure analysis. This hypothetical amendment would, in effect, place an overwhelming share of power in the hands of the legislative branch, by enabling it to amend the Constitution without recourse to the people in the several states. Additionally, this truncated mechanism could overturn judicial decisions and could also interfere with the balance of powers held by individuals, the states, and the national government.[121] Thus, the hypothetical amendment could be construed as antithetical to the regime's basic structure by precluding *any* route to achieving a balance of powers.[122] Although one wonders how

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Akhil Amar considers the Article V mechanism so fundamental that he argues that it would be unconstitutional to adopt an amendment eliminating the First Amendment since the consequence would be to destroy the conditions necessary for further constitutional revision. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1045 n.1 (1988). *See also* Murphy, *Art of Constitutional Interpretation*, *supra* note 49. For the opposite view, see Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 722–27 (1981).

120. Later generations could, of course, undertake revolutionary change by replacing the existing constitution with a new constitution. For a view contrary to the one expressed in the text, see RICHARD B. BERNSTEIN, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 255 (1993) (arguing that, not only could the Article V process be eliminated by an amendment, but the entrenched equal representation provision could be eliminated as well).

121. Although the principle of the separation of powers appears to be derivative of the more general principle of checks and balances between and among possessors of power in the U.S. government, it is difficult to imagine a balance of power structure without some variant of this feature. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 174 (1801) (criticizing the tendency of the Virginia constitution to repose the legislative, judicial, and executive power in the legislative on the grounds that the result would be an "elective despotism").

122. However, such an amendment would *not* be inconsistent with the Tenth Amendment since the Tenth Amendment defines the rights of the people and the states as residual to the powers granted to the national government. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. CONST. amend. X.

enough people in three-fourths of the states could be persuaded to adopt such an amendment in the first place,[123] the Prohibition Amendment teaches that the good sense of a very large part of the population can be suspended at one time.

Finally, considerations of the basic structure might also call into question amendments that constitutionalize "highly specific" and "controversial" public policy choices, like balancing the budget, flag burning, or banning handguns, because the nature of the constitution adopted in the United States is to "serve both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values."[124] Measures that look more like public policy rather than fundamental values should, on this theory, be precluded by the meaning of what a "constitution" constitutes.[125]

In short, either a fundamental values approach or a basic structure approach can, in principle, afford a conceptual basis from which to develop an account of the bedrock features of the American regime that could restrict the content of validly adopted amendments. The two frameworks might not, however, generate an identical list of core values. For example, principles derived from a basic structure analysis would surely include "rights of communication," but would not necessarily include "religious freedom."[126] Taking both sources of implicit substantive constraints together would probably best capture the spirit of the American Constitution. By the same token, it would make the analysis identifying the content of such constraints more difficult, not the least because the two sources would at times make competing, even inconsistent, claims as to which principles are core and which derivative or instrumental.[127]

In the United States, the laws of several states provide a partial model for distinguishing amendments that alter a fundamental aspect of a constitution from those that alter the document without disrupting its core or foundational elements. The constitutions of these states distinguish between constitutional revision and

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123. For an alternative that would bypass the need for approval by states, see Amar, *supra* note 25.

124. *See* Tribe, *supra* note 30, at 441–42.

125. *See* Murphy, *Constitutions, Constitutionalism, and Democracy*, *supra* note 108, at 7–10.

126. *See* Murphy, *Ordering of Constitutional Values*, *supra* note 31, at 713.

127. It is beyond the scope of this article to articulate, much less resolve this issue. For attempts to do just that, see Murphy, *Ordering of Constitutional Values*, *supra* note 31; Murphy, *Art of Constitutional Interpretation*, *supra* note 49, at 147–55.

constitutional amendment, with "revision" referring to fundamental change and "amendment" to changes that do not affect the constitution's core.[128] The purpose of marking this difference in these state constitutions is procedural. "Revisions" to state constitutions require a more complicated process to become effective than do "amendments" because revisions by definition trigger fundamental change.[129] The threshold question of deciding whether a proposed change is so fundamental as to constitute a revision rather than an amendment (in the state law sense) is itself fraught with difficulty at the state level.[130] Thus, the threshold classification question has repeatedly been litigated in state courts.[131] As a consequence, the controversies provoked by the revision-amendment distinction could provide useful insights into the problems likely to arise if the distinction were to be incorporated at the federal level.

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128. *See* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473 (1987). In some states, a constitution is revised if multiple subjects are amended, even if the consequence falls short of changing the basic character of the constitution. The Supreme Court of Delaware has rejected this kind of quantitative determination. *See Opinion of the Justices of the Supreme Court in Response to a Question Propounded by the Governor of Delaware*, 264 A.2d 342 (Del. 1970) [hereinafter *Opinion of the Justices*].

Some countries have constitutions that distinguish between ordinary amendments and constitutional revision, or between amendment, partial revision, and total revision. *See, e.g.*, CONSTITUCION [C.E.] art. 168 (Spain); Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 284 (1996).

129. *See* Colantuono, *supra* note 128, at 1479; *Opinion of the Justices*, *supra* note 128.

130. For a discussion of the difficulty in distinguishing more and less fundamental changes, see Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 31, at 13, 18–20.

131. *See* Bess v. Ulmer, 985 P.2d 979, 987–89 (Alaska 2000); Raven v. Deukmejian, 52 Cal.3d 336, 349–55 (Cal. 1990); Strauss v. Horten, 207 P.3d 48, 60–63 (Cal. 2009); Cambria v. Soaries, 776 A.2d 754 (N.J. 2000).

D. From Theory to Practice

Thus, although contested by some,[132] there are both historical and theoretical arguments for the proposition that implicit substantive constraints exist limiting the validity of properly adopted amendments to the Constitution.[133] By itself, however, this conclusion leaves unanswered the practical question of who, or what body, should decide which existing constitutional provisions are so fundamental that they should act as substantive constraints on further amendments and when the constraints apply. The courts and Congress are the two obvious alternatives, and both pose challenging institutional difficulties.

Some who endorse the possibility of implicit substantive constraints on amendments would trust the determination to Congress on the grounds that a determination of this kind would be a political question of the type historically reserved for the legislative branch. Writing in the 1940s, constitutional historian Lester Orfield argued that the Supreme Court generally viewed questions relating to the amendment process as political.[134] More recently, Laurence Tribe addressed the specific question of implicit substantive constraints on

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132. *See, e.g.*, Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 6–7 (2000) (declaring that the Supreme Court has dismissed the idea); Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 448 n.14 (1983) (arguing that "it would seem impossible to infer an intention that any other restrictions were intended to be placed on the character of amendments that might be adopted"); Linder, *supra* note 119, at 731–33; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 693 (1993) ("The provisions of a legal text may be taken as standing for a more general principle only to the extent that the text so provides. It is the rule provided for in the text, not the 'principle' for which the rule is thought to stand, that is law."); Vile, *The Case Against Implicit Limits*, *supra* note 31, at 191. Although they do not discuss the question directly, many interpretivists and originalists would reject the notion of implicit substantive constraints as a corollary to their rejection of applying underlying principles directly to cases and controversies. *See, e.g.*, Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007).

133. For authorities that support the possibility of implicit substantive constraints, see Amar, *supra* note 119; Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?*, 42 WAYNE L. REV. 1685 (1996); William L. Marbury, *The Limitations Upon the Amending Power*, 33 HARV. L. REV. 223 (1919); Murphy, *An Ordering of Constitutional Values*, *supra* note 31, at 755–57; Jeffrey Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073 (1990); Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 55 AM. U.L. REV. 1487, 1494–96 (2005); Tribe, *supra* note 30, at 438–42. *See also* Mazzone, *supra* note 34.

134. *See* LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 22–27 (1942) (summarizing judicial decisions in the early part of the twentieth century).

amendments and concluded that a substantive evaluation of an amendment's fit with core constitutional norms would constitute a "true political question."[135] By "political" these authors appear to mean that the determination must be made by the institution making the most credible claim to represent the will of the people; they do not suggest that the judiciary would be unable to make a determination based upon the text of the Constitution and its underlying principles.[136]

The political nature of such determinations is, however, a double-edged sword. Granting this authority to Congress is questionable in the first instance because it is likely that the two houses of Congress will have initiated the amendment process and subsequently ratified the proposed amendment by supermajority votes.[137] Thus, allowing Congress to determine whether implicit substantive constraints apply would fail any test for disinterestedness or impartial, considered judgment. Walter Dellinger rejects allowing Congress to decide. In his view, when controversies have arisen concerning the *procedural* requirements of Article V, "congressional authority is . . . dysfunctional and responsible for much of the uncertainty surrounding the amendment process."[138] Since assessing the counterpart question of implicit *substantive* limitations would be considerably more complex than assessing compliance with procedural standards, residing this power in Congress would, for Dellinger, be correspondingly more questionable.

Alternatively, granting this power to the judiciary could lead to equally undesirable consequences. Numerous amendments have been proposed to overturn Supreme Court decisions.[139] This fact should caution against ceding to the judiciary the exclusive power to determine if an amendment is compatible with the existing Constitution. Further, as the preceding discussion has made clear, relying on the Court to apply implicit substantive constraints to

135. *See* Tribe, *supra* note 30, at 433.

136. *See* John Ferejohn, *The Politics of Imperfection: The Amendments of Constitutions*, 22 LAW & SOC. INQUIRY 501 (1997) (arguing that a decision is political when it is not derived from transcendent premises and must instead be a product of choice).

137. *See* U.S. CONST. art. V.

138. Dellinger, *supra* note 119, at 405. Dellinger also notes that there is no textual authority for and considerable judicial precedent against Congress assuming this responsibility. *Id.* Dellinger denies the legitimacy of implicit substantive constraints in any event. Walker Dellinger, *Constitutional Politics: A Rejoinder*, 97 Harv. L. Rev. 446, 447–48 (1983).

139. *See supra* notes 6, 103, and accompanying text.

protect core constitutional values would risk undermining the credibility of the judiciary. Not only is the existence of such constraints contested; identifying which values are core and discerning when these values are threatened would be among the most elusive tasks a court could confront. It is difficult to imagine any court ruling that would enrage the nation to a greater degree since, by hypothesis, satisfaction of the two supermajority requirements of Article V would already have revealed the existence of a wide-ranging national consensus in support of the amendment.

The "life begins at conception" amendment illustrates these points well. Imagine that a large enough portion of Americans desired such an amendment to succeed and adopted it in accordance with Article V. The predictable ferocity of the public's reaction, were the Supreme Court to invalidate the amendment based upon implicit substantive standards, would likely severely compromise the Court's authority.[140]

In addition to these difficulties, to repose the power to invalidate an Article V amendment in either the judiciary or the legislature could well "upset the delicate balance" between these two institutions,[141] threatening the effectiveness of the American regime's structure of checks and balances. Thus, although these institutional barriers do not rule out adopting the implicit substantive constraint doctrine, they do suggest both the need for caution in pursuing it and the desirability of considering alternative strategies for protecting the religious clauses of the First Amendment. An alternative strategy is the subject of the next Part.

II. Constitutional Entrenchment

A possible alternative to the strategy discussed in Part I would be to persuade a sufficient number of concerned citizens to sponsor an amendment (or multiple amendments) that would make the constitutional values at risk permanent by explicitly identifying them

140. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007). Faced with these two unappealing alternatives, some commentators have suggested that amendments that would alter fundamental values of the existing Constitution should be adopted through the convention method at both stages. *See* Katz, *supra* note 128, at 287–88; Mazzone, *supra* note 34; Schaffner, *supra* note 133, at 1497–1501. However, Article V offers no support for routing any subset of amendments through a specific track among the four possibilities offered. *See* Schaffner, *supra* note 133, at 1505.

141. *See* Ferejohn, *supra* note 136.

and designating them unamendable. This type of amendment can be called an "entrenching amendment."

A. The Idea of Constitutional Entrenchment

The phrase "constitutional entrenchment" has been employed to refer to the act of placing legislative or common law precepts in a constitution or in special legislation classified as "basic law" so that the precepts are more difficult to repeal.[142] This phrase can also be used to describe the act of placing features of a country's constitutional or basic law beyond amendment. The latter meaning of "constitutional entrenchment" is explored in this Part.[143]

Initially, three provisions were entrenched in the U.S. Constitution: a prohibition against interfering with a state's ability to authorize the importation or migration of slaves, a prohibition against imposing direct taxes other than taxes proportionate to the population, and a prohibition against denying a state equal representation in the Senate without its consent.[144] By the express terms of Article V, the first two provisions expired in 1808.[145] At the present time, only the provision protecting states from losing their

142. *See* Ron Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. LAW 427, 451 (1998) (referring to the enactment of a Basic Law in 1992 as a constitutional entrenchment of the civil rights guaranteed by the Basic Law); Michael Kirby, *International Law–The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 336 (2006) (referring to constitutional provisions protecting rights as entrenching the rights); Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP L. REV. 617 (1999) (arguing that there should be an open debate on the subject of the relation between religion and state in Israel and that the results should be afforded constitutional status so that they clearly outrank ordinary legislation). *See also* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002) (using "entrenchment" to describe laws or rules one legislature enacts that preclude repeal or amendment by a subsequent legislature using the same procedure used to enact the precepts in the first place).

143. A third possible meaning equates entrenchment with the strategy described in Part I, i.e., finding limits on the types of possible amendments through implicit substantive constraints. *See* Ferejohn, *supra* note 136 (equating implicit substantive constraints with entrenchment).

144. U.S. CONST. art. V (which references art. I, § 9, cls. 1, 4). Roger Sherman had proposed an additional entrenched provision, i.e., that the states' police power should be exclusive over matters affecting the internal affairs of the state. *See* Carlos E. Gonzalez, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U.L.Q. 127, 189 (2002). *See also* Vile, *supra* note 31, at 192 (describing the discussion of Article V at the Philadelphia Convention, including Madison's fear that further additions to the list of entrenched provisions would open the "floodgates" to "special provisos").

145. U.S. CONST. art. V.

equal representation in the Senate without their consent is expressly entrenched.

Constitutions of numerous countries contain such entrenched provisions. The most frequently cited example is Germany, which adopted a constitution after World War II providing that certain human rights may not be removed by amending the constitution, even if such an amendment is adopted with the supermajorities required in the case of ordinary amendments.[146] The constitutions of Turkey and Namibia similarly place certain rights beyond amendment.[147] The constitution of Nepal prohibits amendments that are contrary to "the spirit of the Preamble."[148] The constitutions of Afghanistan, France, and Turkey entrench the "republican form of government."[149] The constitutions of Mozambique and the Islamic Republic of Mauritania both provide that presidential term limits cannot be amended.[150] In Bahrain, the constitution entrenches several provisions, including Shari'a as a main source for legislation, the principle of inherited rule, a bicameral system, and the principles of freedom and equality.[151]

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146. *See* BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, art. 79(3), *in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 35 (Albert P. Blaustein & Gisbert H. Flanz eds., 2007) (hereinafter CONSTITUTIONS). For a discussion of German, French, and Indian constitutional entrenchment, see Katz, *supra* note 128, at 265–73. *See also* Mazzone, *supra* note 34, at 1827 n.400 (describing entrenchment provisions in the constitutions of France, Italy, Norway, Romania, and the Ukraine).

147. *See* CONSTITUTION OF NAMIBIA, ch. 19, art. 131, *in* 12 CONSTITUTIONS, *supra* note 146 at 58; THE CONSTITUTION OF THE REPUBLIC OF TURKEY, art. 4 of Part One, *in* 18 CONSTITUTIONS, *supra* note 146, at 2.

148. Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 47, 48 (1996).

149. *See* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 162, *in* 6 CONSTITUTIONS, *supra* note 146, at 32; CONSTITUTION OF FRANCE, art 89, in 7 CONSTITUTIONS, *supra* note 146, at 89; CONSTITUTION OF THE REPUBLIC OF TURKEY, *supra* note 147. *See also* the discussion of the Romanian Constitution in Stephen Holmes and Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION, *supra* note 31, at 275, 290–91.

150. *See* CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA, Title XI, art. 99, *in* 12 CONSTITUTIONS, *supra* note 146, at 22–23; CONSTITUTION OF MOZAMBIQUE, Part V, art. 198–99, *in* 12 CONSTITUTIONS, *supra* note 146, at 82.

151. *See* CONSTITUTION OF BAHRAIN, ch. VI art. 120(c), *in* 2 CONSTITUTIONS, *supra* note 146, at 30. The constitutions of several states in the United States contain language that appears to make certain provisions unamendable, e.g., by expressly removing them from "the powers of government" and declaring that they will remain "inviolate" "forever." *See* A.L. CONST. art. I, § 36; A.R. CONST. art. II, § 29; K.Y. CONST., BILL OF RIGHTS, § 26; P.A. CONST. art. I, § 25. *See* O.K. Cushing, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 187 (1920). *See also* A.R. CONST. art. II, § 3 (stating that the "equality of all persons before the law is recognized, and shall ever remain inviolate"); A.Z. CONST. art. II, § 5 (stating that the rights of petition and assembly for the common good shall never be abridged). However, one state court held that

B. The Founding Period: The Permanent Constitution

As noted above, the text of the American Constitution currently entrenches a single provision—namely, the equal representation of states in the Senate.[152] The fact that nothing else is expressly entrenched may suggest that the drafters of the Constitution and those who ratified it believed that the rest of the Constitution, including the Bill of Rights,[153] could be altered without limits of any kind. This inference gains support from the fact that some of the colonies had adopted constitutions that entrenched certain fundamental rights.[154] Thus, the possibility of entrenching constitutional provisions of this kind was known to those who drafted the Constitution. Finally, the notes of the Philadelphia Convention reveal that the drafters considered and rejected entrenching additional provisions.[155]

The historical evidence concerning the framers' beliefs, however, is quite mixed on this point. Some scholars argue that the founders and those who ratified the Constitution did not, in general, believe that the Constitution should be altered.[156] According to legal

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amendments to such a provision can be adopted by the people, although not by any of the three branches of government. *See Opinion of the Justices*, 263 Ala. 158 (1955); Eason v. State, 11 Ark. 481 (1851) (invalidating a constitutional amendment properly adopted by the Arkansas legislature because it conflicted with the state's Bill of Rights, but noting that the people could adopt such an amendment in a convention).

152. *See supra* note 145–46 and accompanying text.

153. Including the Bill of Rights acknowledges the fact that many of the state ratifying conventions made a Bill of Rights a condition for ratifying the Constitution.

154. *See, e.g.*, PA. CHARTER OF PRIVILEGES OF 1701, art. I (entrenching freedom of conscience for those who believe in God), *cited in* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1567 n.37 (1989). William Penn's "Frame of Government of Pennsylvania," April 25, 1682 (end of first paragraph after the Preface) had a more expansive provision securing to the "freemen, planters and adventurers of, in and to the said province, these liberties, franchises, and properties, to be held, enjoyed and kept . . . forever." http://www.lonang.com/exlibris/organic/1682-fgp.htm. (last visited Sept. 20, 2009).

155. The rejected provision related to federalism concerns, not fundamental rights. *See supra* note 145.

156. *See* Cecelia Kenyon, *Constitutionalism in Revolutionary America*, *in* CONSTITUTIONALISM: NOMOS 84 (Pennock & Chapman, eds. 1979); PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS 219–20, 240–41 (1968) (arguing that the Constitution's generic character or essence should not be subject to change); Thomas E. Baker, *Toward a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. LAW 1, 5 (2000); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 537–38 (1995) (citing Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176

historian Philip Hamburger, "[a]lmost all the framers and ratifiers assumed that constitutions should, by their nature, be permanent."[157] Hamburger argues that the difference between Federalists and Anti-Federalists is the number of provisions that they sought to render permanent by placing them in the Constitution, with the Anti-Federalists seeking to place more protections for individual liberties and the republican form of government than did the Federalists.[158] Both groups, in other words, presupposed the permanence of some constitutional provisions.

To explain the inclusion of Article V, which authorizes amendments, Hamburger argues that advocates of constitutional permanence hoped to use Article V to "perfect" defects in the original design that could only be known through experience but not to accommodate social change.[159] So understood, including Article V would not contradict the goal of permanence. Rather, it would be the mechanism to promote the emergence of a "potentially permanent scheme."[160]

Given this logic, one can assume that those who believed in the desirability of a permanent constitution sought to design the document to withstand change to the greatest degree possible. One strategy to achieve this goal would be for the text of the Constitution to be spare, i.e., restricted to matters that would not, or should not be subject to change as the nation evolved economically, socially, and culturally.[161] By leaving these other matters to the discretion of legislatures, which were free to revise and adapt laws with changing times, the proponents of constitutional spareness may have hoped to safeguard the permanence of the provisions that had been afforded

(1803), for the view that ". . . the principles . . . are deemed fundamental . . . and they are designed to be permanent.").

157. Hamburger, *supra* note 156, at 241. Hamburger acknowledges that not all framers and ratifiers shared this view, *id.* at 242, but argues that "[i]n general . . . neither Federalists nor Anti-Federalists thought it appropriate for constitutional law to change in adaptation to social developments." *Id.* *See also id.* at 300 (asserting that the "vast majority of the framers and ratifiers, however, seem to have assumed that—notwithstanding the possibility of using amendments to adapt the Constitution—constitutions could and should be permanent.").

158. *See* Hamburger, *supra* note 156, at 240–42, 265, 298–300.

159. *Id.* at 300–01.

160. *Id.* at 300.

161. As an empirical matter, few countries have a constitution as short as the Constitution of the United States. *See* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION, *supra* note 31, at 237, 261.

constitutional status.[162] Whether this strategy was successful is a matter of dispute. Modern commentators note that the Constitution's "elegant parsimony"[163] has not prevented it from being virtually amended repeatedly through means, such as judicial interpretation, that bypass the procedures of Article V.[164]

Although the content of the entire Constitution was not expressly entrenched in the document, the difficulty of satisfying the procedures outlined in Article V can plausibly be seen as part of a deliberate attempt to forestall, if not totally block, change to the text as drafted and ratified.[165] Pointing in the opposite direction is the fact that at the time of the Founding, few nations made provision for peaceful changes to government to be initiated by the people. Article V may, therefore, be viewed as facilitating rather than obstructing amendments, given the practices at the time. In support of the latter view, historian David Kyvig argues that the understanding at the time the Constitution was drafted was that "a high level of community agreement could be eventually achieved," and thus the participants "did not conceive of supermajorities as thwarting democracy."[166]

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162. According to Hamburger, *supra* note 156, at 241–42, this was the understanding and strategy of the Federalists. He contrasts the Anti-Federalists, who feared that the Constitution would be the catalyst for social change—in particular, by creating conditions that would undermine civic virtue. *Id.* at 265–66. As a consequence, the Anti-Federalists insisted on including an enumeration of rights to prevent the erosion of "liberty and republican government." *See id.* at 267–70. *See also* Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 28 (1996).

163. This characterization is taken from PETER J. GALIE, ORDERED LIBERTY: THE CONSTITUTIONAL HISTORY OF NEW YORK 6 (1995).

164. For the view that there is a parallel process of informal amendments, as a result of which, many more amendments have gone into effect than have been formally ratified, see *supra* note 26 and *infra* notes 235–41 and accompanying text.

165. *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 121 (1996) (finding it impossible to view the purpose of Article V as anything other than "making it extremely difficult to engage in formal amendment"). *See also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GORES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 160 (2006) (stating that Article V practically entrenches the status quo and thus "works to make practically impossible needed changes in out polity"). *But see* Monaghan, *supra* note 58, at 125 (stating that the goal was to enable "a very small number" of the least populous states to veto proposed amendments). For a range of opinions on the practicality of the Article V process, see the excerpts from several state ratifying conventions in 4 THE FOUNDERS' CONSTITUTION 579–83 (Philip B. Kurland & Ralph Lerner eds., 1987). For a modern, empirical assessment of the difficulty of amending the U.S. Constitution, as compared with the constitutions of other nations, see Lutz, *supra* note 161, at 362–63.

166. KYVIG, *supra* note 102, at 61. *See also* Jos. R. Long, *Tinkering with the Constitution*, 24 YALE L. J. 573, 578–79 (1915) (arguing that, since most amendments

Certainly some of those who attended the Philadelphia Convention predicted that satisfying the amendment procedures would not be realistic.[167] Given that more than 11,000 amendments have been proposed in the nation's history,[168] but only seventeen ratified (not counting the Bill of Rights), preserving the original document has clearly been the overall effect—at least as far as formal amendments are concerned.[169]

C. The Founding Period: The Amendable Constitution

In contrast to the preceding, other understandings during the founding period emphasized the provisional nature of the Constitution.[170] Probably the most well-known illustration of this strand of thought is Thomas Jefferson's suggestion for periodic constitutional conventions to re-assess the fitness of the existing Constitution. Because Jefferson believed that a majority of adults living at any time would be dead in approximately nineteen years, Jefferson maintained that "[e]very constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."[171] Jefferson's reason for seeking a constitutional re-assessment at stated intervals was twofold: to enable the basic law to "keep pace with the advance of the age in science and experience"[172] as well as to enable each generation to determine its own government and not be bound by the will of former

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proposed are variations upon a small number of subject areas and are reproposed repeatedly, the actual number of distinct amendments proposed is not very great).

167. ORFIELD, *supra* note 134 (summarizing and discussing the debates).

168. *See Flag Protection Amendment: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. (2005) (statement of Prof. Richard D. Parker, Harvard Law School).

169. *See* Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Practice*, in RESPONDING TO IMPERFECTION, *supra* note 31, at 37, 50 (arguing that the Constitution was not amended frequently during the nineteenth century because "little was expected of the national government"). *But see* Long, *supra* note 166.

170. Hamburger notes such theories, but concludes they were not dominant. *See* Hamburger, *supra* note 156, at 242. Yet he recognizes that the founders also read and admired the writings of Montesquieu and other political theorists who stressed the ways in which the characteristics of a population influenced and were influenced by the character of the laws. *See id.* at 248-51.

171. *See* Letter from Thomas Jefferson to James Madison (1789), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, 29–30 (James Morton Smith ed., 1995) [hereinafter REPUBLIC OF LETTERS].

172. Letter from Thomas Jefferson to Robert J. Garnett (Feb. 14, 1824), *in* 16 JEFFERSON, WRITINGS, *supra* note 54, at 14–15.

generations.[173] In part, Jefferson believed that wisdom derived from experience would enable future generations to perfect deficiencies likely to inhere in the Constitution ratified in 1787.[174] He also believed that the law, including the basic law contained in the Constitution, would have to change to respond to changed times and circumstances,[175] although he opposed frequent constitutional changes, asserting that "moderate imperfections had better be borne with."[176]

Other Founders believed in the desirability of constitutional change without endorsing Jefferson's convention proposal. For example, although Alexander Hamilton described the Constitution as "the standard to which we are to cling," he affirmed the propriety of amendments ratified in accordance with the Article V process.[177] He criticized the Articles of Confederation for requiring unanimity among the states for an amendment to be approved, and he asserted the desirability of "an easy mode . . . for supplying defects which will

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173. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 7 JEFFERSON, WRITINGS, *supra* note 54, at 454, 457 (asserting that each generation derives its rights from nature rather than from its predecessors); Letter from Thomas Jefferson to John Wayles Eppes (June 24, 1813), *in* 13 JEFFERSON, WRITINGS, *supra* note 54, at 269–270 (viewing each generation "as a distinct nation, with a right, by the will of its majority, to bind themselves"). Somewhat later, Daniel Webster spoke out against binding future generations. *See* Raymond Ku, *supra* note 156, at 553–54.

174. *See* Letter from Thomas Jefferson to T. M. Randolph, Jr. (July 1787), *in* 6 JEFFERSON, WRITINGS, *supra* note 54, at 165, 167.

175. *See* Letter from Thomas Jefferson to A. Coray (Oct. 31, 1823), *in* 15 JEFFERSON, WRITINGS, *supra* note 54, at 480, 488. *See also* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 15 JEFFERSON, WRITINGS, *supra* note 54, at 32, 41 (criticizing European monarchs for failing to yield "wisely . . . to the gradual change of circumstances"). Jefferson's idea should be distinguished from the motion, made by Randolph at the Philadelphia convention, for a second convention held after the states had reviewed the Philadelphia draft. Randolph believed that only a new draft revised in light of amendments proposed by the states should be submitted to the states for ratification. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 631–32 (Max Farrand ed., rev. ed. 1996) [hereinafter FARRAND, RECORDS]. *See also* THE FEDERALIST, *supra* note 42, NO. 85 at 524–27 (Alexander Hamilton) (rejecting the idea of amendments before ratification); Paul J. Weber, *Madison's Opposition to a Second Convention*, 20 POLITY 498 (1988) (arguing that Madison opposed the second convention proposed by Randolph, but he was not opposed to a constitutional convention in the future to make improvements thought necessary in light of experience living with the original constitution).

176. Letter from Thomas Jefferson to Samuel Kercheval, *in* 6 JEFFERSON, WRITINGS, *supra* note 54, at 41. Jefferson also believed there were certain fundamentals that should not be subject to change. *See supra* notes 56–58 and accompanying text.

177. Letter from Alexander Hamilton to James Bayard (Apr. 1802), *in* 6 THE WORKS OF ALEXANDER HAMILTON 540, 542 (John C. Hamilton ed., 1850–1851) [hereinafter HAMILTON, WORKS].

probably appear in the new System."[178] Hamilton would have preferred the amendment process to be easier than the proposal agreed to by the participants at Philadelphia; hence, his own recommendation that the second stage of the process require the consent of only two-thirds of the states rather than three-quarters.[179]

James Madison was less optimistic about the benefits of constitutional amendments made without sufficient reflection because such changes were likely to "destroy the symmetry & the stability aimed at in our political system."[180] The implication of his comment about "symmetry" is that the basic structure established by the Constitution should be preserved because its design reflected a certain balance. Thus, Madison opposed "a reconsideration of the whole structure [of] Government" or "a reconsideration of the principles and the substance of the powers given."[181] Stability, in turn, would be furthered both by avoiding such a reconsideration and by "the prejudice in [the Constitution's] favor" resulting from the passage of time.[182] Although these views led him to oppose Jefferson's periodic constitutional convention proposal,[183] Madison also warned against making the amendment process too difficult,[184] since amendments would be proper when "the provisions of the

178. 2 FARRAND, RECORDS, *supra* note 175, at 558. George Mason and John Randolph were also seeking an "easy" path to amending the Constitution. *Id.* at 631–32.

179. *See* 3 FARRAND, RECORDS, *supra* note 175, at 630 (written communication from Hamilton to Madison at the conclusion of the Philadelphia Convention). Roughly a decade later, Hamilton urged caution in utilizing the amendment procedure. *See* Hamilton's abstract of points for Washington's Farewell Address, *in* 7 HAMILTON, WORKS, *supra* note 177, at 572–73.

180. Letter from James Madison to John M. Patton (Mar. 24, 1834), *in* 9 MADISON, WRITINGS, *supra* note 115, at 536.

181. *See* JAMES MADISON, *Madison's Speech to the House of Representatives on June 8, 1789*, in 5 MADISON, WRITINGS, *supra* note 115, at 370, 375.

182. *See* Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 5 MADISON, WRITINGS, *supra* note 115, at 434, 438. *See also* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443, 2450–53 (1990) (arguing that Madison emphasized the stability resulting from infrequent amendments over possible improvements from more frequent amendments). The difference between the views of Jefferson and Madison were due, in part, to their differing views of human nature. *See* James Morton Smith, *Introduction: An Intimate Friendship*, *in* REPUBLIC OF LETTERS, *supra* note 171, at 27–28.

183. *See* Letter from James Madison to Thomas Jefferson, *supra* note 115, at 438–39; THE FEDERALIST NO. 50 (James Madison). *See also id.* No. 49 (rejecting constitutional conventions called whenever two-thirds of two of the three branches propose them).

184. *See* THE FEDERALIST, *supra* note 41, NO. 43 at 278 (James Madison) (the importance of guarding against too many or too few amendments).

Constitution . . . be found not to secure the government and rights of the states against usurpations and abuses on the part of the United States."[185]

The danger of attempting to design a permanent constitution was not overlooked by the drafters in Philadelphia. The legal authority for their efforts, at least initially, was the directive to "amend" the Articles of Confederation. Throughout the Convention, the Articles' unanimity requirement for adopting amendments forced them to wonder about the legitimacy of their own efforts and the appropriate method for putting into effect the text finally agreed to by most, but not all, delegates.[186] In addition, since many believed that the government they had fashioned would be imperfect,[187] the prevailing view was to create a mechanism for change less onerous than that required by the Articles.[188] Arguments from stability, in other words, point in two directions—namely, to the desirability of permanence and veneration, on the one hand, and to the necessity of a psychological safety valve and a peaceful route to change, on the other.

Stability and measured, peaceful change were not the only purposes animating the design of Article V. Regional concerns may have prompted adopting a two-step process with supermajorities required at both stages. For example, there is evidence that Article V's provisions were "designed so that no particular geographic region could become hegemonic."[189] Related to this purpose, the process may

185. Letter from James Madison to Edward Everett (1830), *in* SELECTIONS FROM THE PRIVATE CORRESPONDENCE OF JAMES MADISON, FROM 1813 TO 1836 169 (J.C. McGuire ed., 1853). *See also* Letter from James Madison to John M. Patton, *supra* note 180, at 536 (noting that the Constitution "may doubtless disclose from time to time faults which call for the pruning or engrafting hand."); Wilson, 1 WILSON, WORKS, *supra* note 59, at 373, 377–78 (asserting both the people's right to change the constitution and the importance of following established procedures and avoiding impulsive and thoughtless acts).

186. *See*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 43–55 (1991). Bruce Ackerman and Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995). *See also* THE FEDERALIST NO. 40 (James Madison).

187. *See* THE FEDERALIST, *supra* note 41, NO. 14 at 104 (James Madison); *id.* NO. 40, at 252 (James Madison); *id.* NO. 49, at 315 (James Madison). *Cf. id.* NO. 85, at 523–24 (Alexander Hamilton) (arguing that the Constitution, although imperfect, was the best possible under the circumstances and superior to any alternatives offered to date).

188. *See* KYVIG, *supra* note 102, at 56–61 (describing the discussions and characterizing the role of Congress, as contrasted with conventions, as the main issue dividing the participants).

189. Bendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 U.C. DAVIS J. INT'L L. & POL'Y 267, 269 (1996). *See also* Laurence Sager, *The Incorrigible*

also have been established to "safeguard minority interests,"[190] especially in conjunction with creating a national government with limited powers. According to some commentators, Article V was more about the ongoing struggle between those who favored a stronger national government and those who sought to preserve the power of the states against the national government.[191] Thus, Article V is of a piece with other measures created to establish and maintain "the federal compromise."[192] This objective was achieved by providing alternative paths to proposing and ratifying amendments, one utilizing, the other bypassing state legislatures—a strategy that would have been unnecessary if the sole purpose was to create a mechanism to obstruct amendments to the Constitution while appearing to facilitate them. In short, if one assumes that the goal of the Framers was not to prevent change, but instead to encourage careful consideration of potential changes and appeal to a wide ranging consensus in the nation while incorporating some of the checks and balances characteristic of other parts of the Constitution, Article V is well designed to achieve these goals.

Whatever their private views regarding the desirability of a permanent Constitution, the Founders did not, in fact, make it unamendable, in whole or in part, with the arguable exception of the equal representation of states in the Senate.[193] This fact alone does not dispose of the question of the desirability of entrenching some part or parts of the document now, although the Founders' reasons for failing to insulate any other constitutional provision from change permanently should be taken into account in considering the wisdom of entrenchment. In particular, the Founders' views should encourage us to consider whether circumstances today have so changed that entrenching some provisions of the Constitution or the

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Constitution, 65 N.Y.U. L. REV. 893, 953 (1990) (arguing that Article V may have been designed to "protect the Constitution from the 'special perspectives' of certain states or regions").

190. Ku, *supra* note 156, at 539–40. *See also* Monaghan, *supra* note 59 at 175.

191. *See* Baker, *supra* note 132, at 4. *See* Monaghan, *supra* note 58, at 133, 148. *See also* Bruce Ackerman, *2006 Oliver Wendell Holmes Lecture: The Living Constitution*, 120 HARV. L. REV. 1737, 1746–47 (2006).

192. KYVIG, *supra* note 102, at 60 (concluding that with Article V, "[t]he federal compromise of the 1987 Constitution could be found in no more pure a form."); *See* Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 177–78 (1997) (emphasizing that reinforcing federalism was one of Article V's major goals). Denning notes, however, that the Anti-Federalists opposed Article V, both in Philadelphia and at the state ratifying conventions. *See id.* at 166–69.

193. U.S. CONSTITUTION art. V.

Bill of Rights would be desirable, or even necessary, so as to preserve the regime's original constitutional purposes under modern conditions.

D. The Constitutionality of Entrenching Core Constitutional Values

Before considering the desirability of adopting entrenching amendments, it is necessary to examine whether they would be constitutional. The text of the Constitution does not speak to this issue, and none of the three relevant parts of Article V is exactly on point. The Article V provision insulating state suffrage from elimination through an amendment does not provide an exact template because the affected state can consent to foregoing this right.[194] Article V also contains two substantive entrenched provisions. However, both were adopted with a limited duration[195] and, thus, do not directly speak to the possibility of making a constitutional provision permanent. The closest parallel is the amendment proposed shortly before the civil war that would have added a permanently entrenched provision securing states' rights to allow slavery.[196] However, the proposal was never adopted and, thus, does not provide an example of an entrenching provision withstanding constitutional challenge. In short, the terms of Article V cannot be used as definitive authority either in support of or in opposition to the constitutionality of adopting entrenching amendments today.

To go beyond the literal terms of the Constitution to decide this issue, it is useful to consider the principal ways in which the Constitution can be conceived. Constitutional theorist William Harris argues that there exist three basic ways of conceptualizing a constitution: as grounded in transcendent values or other external criteria; as a product of the historical traditions, acts, and commitments of a particular community; and as a principled and deliberative human construct.[197] Although understanding the American Constitution as derived from transcendent values is beyond the scope of this Article, it is worth noting that it would not do

194. *See* U.S. CONST. art. V, cl. 3.

195. *See* U.S. CONST. art. V, cl. 2.

196. The proposed amendment, known as the Corwin Amendment, prohibited any further amendment to the Constitution that would interfere with the rights of states to permit slavery. *See* Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 31, at 215, 216–19.

197. HARRIS, *supra* note 45, at 129–31.

violence to a constitution so conceived to adopt entrenched provisions as long as they replicated the underlying transcendent values.[198]

If the Constitution is conceived as conforming to Harris's second alternative, i.e., as the aggregation of a particular community's traditions, acts, and commitments, it is unlikely to display an inner logic. Rather, it will derive its authority from its origin in the actual and concrete experience of the community it ostensibly regulates. A theoretical account of this alternative is found in the work of Hans Kelsen, who elaborates a "dynamic" theory of law, in which law (constitutional, statutory, or administrative) derives its validity from the fact that it originates from a source with authority to make that type of law, whether a formal institution or a tradition.[199] If law's legitimacy is understood this way, according to Kelsen, "there is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right."[200] As jarring as this assertion may seem, it is a consequence of characterizing a regime exclusively in terms of its origin rather than its content or purposes. As applied to the United States, it may be hoped that structural mechanisms, such as the separation of powers and various types of checks and balances, will combine with procedural provisions to generate desirable outcomes over the long run. In principle, however, there is nothing inherent in the second alternative to preclude the existence of traditions that favor one part of the community at the expense of another or to prevent a group or coalition of groups from satisfying the requisite procedural conditions to utilize the law for ends harmful to the larger community or one or more parts of it.[201] By the same token, there is nothing to prevent the passage of inconsistent laws, laws based upon inconsistent assumptions, or laws promoting inconsistent results.

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198. Entrenched provisions in this case might, however, be unnecessary because they would be redundant. *See id.* at 130.

199. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 113–15 (Anders Wedberg trans., Russell & Russell 1961) (1945). For Kelsen, constitutional law is supported by, although not strictly deduced from, a basic norm that is not simply procedural.

200. *Id.* at 113.

201. For a spirited attack on the view expressed in the text, see Lon Fuller, *Positivism and Fidelity to Law–A Reply to Professor Hart*, 71 HARV. L. REV. 630, 642–43, 644–46 (1958). John Hart Ely, who elaborated a more complex procedural theory than Kelsen, sought to ensure substantively fair outcomes through procedural means. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST Ch. 4 (1980).

From the perspective of the second alternative, then, any amendment to the American Constitution that reflects the community's practices and is adopted following Article V procedures would be valid, whether it created entrenched provisions or not, since the amending process would conform to the requirements set forth in Article V, and Article V was itself adopted in accordance with the Article VII procedure accepted by the states ratifying the Constitution.[202] In short, incompatibility based upon the content of an addition to the Constitution would be irrelevant as a theoretical matter because traditions need not be consistent with each other and procedures can validate law without regard to substance.[203] Presumably there would be a practical need for an institution to be given the authority to address significant cases of inconsistency between an addition to the Constitution and what previously existed, for example, by canons of interpretation, by considerations of public policy, or by an exercise of discretion, so that people would know which of the conflicting standards governs their conduct. But such concerns would affect the implementation rather than the constitutionality of the entrenched constitutional provisions.

The third alternative articulated by Harris, i.e., a constitution deliberately designed to create a principled and coherent whole, is likely to lead to different results. Like the second alternative, this alternative rejects transcendent or universal truths and any other criteria external to a constitution as measures of its validity. However, unlike the second alternative, the third alternative conceptualizes a constitution as the product of a reasoned effort to design an entity based upon one or more principles and exhibiting substantive consistency.[204] As a consequence, additions to an existing constitution would cohere with it or not, or would fall somewhere on a continuum between cohering and not cohering with the existing constitution. This feature is what leads Harris to describe the third alternative as "a domain where conceptual analysis properly replaces a reliance on fact or opinion, argumentation displaces both truth and interest as the primary category of political validity, and

202. The Article VII procedure was accepted, over time, although not initially authorized by the member states under the Articles of Confederation.

203. *See* KELSEN, *supra* note 199, at 113 (asserting that, for this understanding of the nature of law, no law could be invalidated for being substantively inconsistent with another law or a moral norm).

204. *See* HARRIS, *supra* note 45, at 130–31.

interpretation poses itself against both subjectivism and objectivism as unalloyed forms of knowing."[205]

Which of the alternatives best explains the American Constitution is debatable. That at least one of the drafters thought it resembled the third alternative is suggested by Hamilton's query at the beginning of the Federalist Papers, asking whether the nation was capable of creating a regime from "reflection and choice," rather than "accident or force."[206] Legal theorist Paul Kahn agrees, arguing that the American Constitution was originally understood as embodying both popular sovereignty and reason as foundational principles, with the hope that a regime based upon reason could win the consent of the population to be governed.[207] For Kahn, this means that the Founders ranked reason higher than popular sovereignty as organizing principles of the regime created by the Constitution, although they viewed both as necessary for a successful political community. According to Kahn, however, by the time of the Civil War, the understanding of the Constitution had evolved to the point where popular sovereignty had become the dominant principle, although the consent that was emphasized at that time was the act of will involved in ratifying the Constitution during the founding period.[208] Thus, even in the mid-nineteenth century, the Constitution was understood as having a rational foundation and coherence.

From the perspective of the third alternative, amendments to the American Constitution could be evaluated to assess whether or not they are compatible with existing constitutional materials. For example, many opponents of a Bill of Rights argued that all of the rights enumerated in the proposal were already protected by the Constitution, given that the national government was afforded limited powers and that interfering with or denying the rights specified in the Bill of Rights was not among its powers to begin with.[209] If this correct, then the first ten amendments were merely what constitutional scholar Sanford Levinson calls "declaratory" amendments, i.e., additions that make explicit what is already in the existing Constitution rather than enacting changes.[210] Levinson

205. *Id.* at 132.

206. *See* THE FEDERALIST, *supra* note 41, NO. 1 at 27 (Alexander Hamilton).

207. *See* Paul Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 450–58 (1989).

208. *See id.* at 463–67.

209. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton).

210. *See* Levinson, *supra* note 130, at 27–30; Sanford V. Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment:*

contrasts these with "perfecting" amendments, i.e., changes introduced to respond to some deficiency perceived in the Constitution as it exists at the time of the change. Paradoxically, it would seem that "perfecting" amendments could either improve or worsen the existing Constitution, since they would give rise to a substantive change in its content. This could occur because the idea that constitutional materials have an inner logic speaks only to their internal coherence and whether additions are consistent with what already exists. The idea does not necessitate that the constitution in question desirable in the first instance. Whether proposed additions would cohere with the existing Constitution by virtue of making explicit what is implicit or by adding something new not inconsistent with what already exists would, of course, be a matter of discussion and, ultimately, judgment.[211]

Where would entrenching amendments fit in this schema? The relevant threshold determination is whether the *content* contained in an entrenching provision is consistent or inconsistent with the content of the Constitution. On this view, the entrenching feature would be unproblematic if the content is considered consistent. If the content seems inconsistent, an entrenching amendment would compel an inquiry to determine which of the competing provisions should be considered authoritative. Canons of interpretation are necessary to resolve such disputes. For example, it might be assumed that later provisions are authoritative unless in conflict with core or fundamental features of the existing constitution. Accordingly, if an entrenching amendment raised the minimum age for the office of President by five years, the two provisions would conflict, but the change would not constitute a change in the character of the regime established by the Constitution. If the entrenching amendment were to change the duration of the term for members of either chamber of Congress or the President, there would probably be a debate about the implications of such changes for the character of these institutions in their own right as well as for the separation of powers and checks and balances characteristic of the constitutional scheme as a whole. If the entrenching amendment were to limit all judges and justices to a single twelve-year term,[212] an even more wide-ranging debate would

Thoughts Generated by Some Current Proposals to Amend the Constitution, 1996 BYU L. REV. 611, 612 n.3 (1996).

211. *See infra* Part II.D.2.

212. In Germany, members of the Supreme Court are elected by the Parliament for one non-renewable twelve-year term. *See* Donald Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1991).

ensue focusing on the purpose for which the drafters adopted life terms for the federal judiciary, the consequences of judicial terms being limited or indefinite, and the effect of changed circumstances, such as the increase in longevity, on achieving or obstructing the original or contemporary understandings of the judicial function.

A determination of the constitutional status of entrenching amendments should also include examining the *entrenching aspect* of an entrenching amendment as a matter of substance to ascertain whether anything in the inner logic of the American Constitution precludes entrenching some or all of its provisions. According to Akhil Amar, the "substantive vision" underlying the Constitution is: "popular sovereignty, which in turn is rooted in the substantive values of equality (no citizen's vote should count for more than another's) and neutrality (no substantive outcome—including the status quo—should be specially privileged)."[213]

Amar's understanding of the values of equality and neutrality suggests that people possess an inalienable right to change the Constitution and that this is a right they cannot surrender.[214] Consequently, an entrenching amendment "would be generally pro tanto unconstitutional."[215] An entrenched provision would violate equality because it would deny future generations an equal say in their government, and it would deny neutrality because the consequence of entrenchment would be to "lock in" a specific theory of the good.

Amar's statements imply that the Constitution is a coherent arrangement with an inner logic because it embodies dominant values—popular sovereignty, equality, and neutrality—and these values are inconsistent with the very idea of entrenched constitutional provisions. Therefore, Article V should be considered unamendable in the sense that it cannot be removed or altered in a way that would deny citizens the ability to change the Constitution. In other words, the constitutional principle barring entrenchment should itself be entrenched. Somewhat surprisingly, then, Amar also argues that free speech, free press, and freedom of assembly are unamendable, explaining that these are necessary conditions for constitutional change, which popular sovereignty presupposes. He recognizes this

213. Amar, *supra* note 119, at 1045, n.1. Amar also argues that popular sovereignty dictates that Americans retain the right to amend the Constitution using means other than Article V. *See* Amar, *supra* note 25, at 489–92.

214. *See* Amar, *supra* note 119, at 1068. *See also* HARRIS, INTERPRETABLE CONSTITUTION, *supra* note 45, at 179, 188.

215. *See* Amar, *supra* note 119, at 1045, n.1.

position as "a seemingly paradoxical exception to the general rule that amendments must not be unamendable."[216] In short, for Amar, the inner logic of the Constitution is that certain First Amendment values *must* be entrenched and *only* those values can be entrenched.[217]

The preceding discussion illustrates that the constitutionality of having entrenched provisions in the Constitution cannot be decoupled from a more fundamental issue. If the Constitution is understood as a compilation reflecting the traditions and commitments of members of the founding generation, unamendable amendments might be conceptually at odds with some provisions of the Constitution.[218] They could not, however, be inconsistent with an identifiable core since this model does not presuppose such a core. Over time, inconsistent provisions might well increase due to their genesis in successive generations' values, traditions, and practices.[219] On this interpretation, all provisions would be presumptively equally authoritative, and a properly adopted amendment modifying or eliminating an existing constitutional provision would necessarily be more authoritative than the existing provision due to its later provenance.

On the other hand, if the Constitution is understood as embodying a reasoned and coherent basic structure of governance containing core features that define the Constitution's identity, there would exist conceptual standards for ascertaining whether amendments, including entrenching amendments, would fundamentally conflict with core aspects of existing constitutional materials. This feature of the Constitution's identity should be explored more fully than it has been to date, and the findings will likely affect the solution to the questions posed in this Article. The

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216. *Id.*

217. As Amar uses the term, entrenchment includes both explicit entrenching provisions and implicit substantive constraints, of the kind discussed in Part I, *supra*. Others have also argued that the structure or character of the American Constitution is inconsistent with having provisions that are unamendable. *See* HARRIS, *supra* note 45, at 188–91 (arguing that the simple fact of the Constitution having a "whole design" would prevent entrenched substantive provisions from being constitutionally valid).

218. *See supra* note 204 and accompanying text.

219. As Amar uses the term, entrenchment includes both explicit entrenching provisions and implicit substantive constraints, of the kind discussed in Part I, *supra*. Others have also argued that the structure or character of the American Constitution is inconsistent with having provisions that are unamendable. *See* HARRIS, *supra* note 46, at 188–91 (arguing that the simple fact of the Constitution having a "whole design" would prevent entrenched substantive provisions from being constitutionally valid).

need for such an inquiry in and of itself illustrates the daunting nature of the threshold question of entrenchment's constitutionality.

For now, the following discussion assumes that entrenchment is not per se unconstitutional and that specific individual entrenching amendments might be ill advised without necessarily being unconstitutional.

E. The Desirability of Entrenching Provisions

Assuming that entrenchment is not inherently incompatible with the American Constitution, would it be desirable to adopt an amendment that would make the religion clauses of the First Amendment unalterable? To protect the clauses from being diluted through modifications, an entrenching amendment would have to identify the reach of the clauses precisely by referencing Supreme Court opinions or otherwise articulating their meaning. The language of the entrenching amendment or the materials referenced in it would then provide a standard for determining whether a subsequent amendment has the effect of modifying the entrenched doctrine.

A proposal to entrench the religion clauses would likely be supported by Bruce Ackerman, the legal theorist who recommends entrenching the protections contained in the entire Bill of Rights in order to insulate them from alteration via Article V amendments.[220] Ackerman believes that entrenching the Bill of Rights will help restore the integrity of "certain rights of personal liberty" that have been undermined as a result of government policies justified by the war on terror.[221] Constitutional theorist Walter Murphy would likely agree that entrenchment is desirable because he believes that we are condemned to the possibility of anarchy or mob rule absent the ability to bind ourselves in the future.[222] Murphy points out that a constitutional democracy such as exists in the United States necessarily contains a tension between the need to reflect and the need to restrain the popular will.[223] On this view, entrenchment

220. *See* ACKERMAN, WE THE PEOPLE, *supra* note 186, at 16. *See also id.* at 319–21 (endorsing the idea of a more expansive "modern Bill of Rights" and arguing for the desirability of entrenching the modern version).

221. Personal correspondence from Ackerman to the author (Mar. 31, 2008) (on file with author).

222. Murphy, *Merlin's Memory*, *supra* note 31, at 188. For Murphy, there are a variety of ways to entrench constitutional values, including implicit substantive constraints and "the normative theory in the Constitution" as well as an express textual prohibition against amendment. *See id.* at 175–80.

223. *Id.* at 187. Murphy also argues that the First Amendment may already be entrenched by its terms, i.e., that "Congress shall enact no law . . . ." Since an amendment

actually reinforces popular sovereignty because it preserves the fundamental values that prevent the popular will from actions that could undermine popular government.[224]

Explicit formal entrenchment would serve several purposes. Symbolically, it would convey to the nation the gravity of the Constitution's commitment to the entrenched values. Practically, formal entrenchment would give pause to, if not fully dissuade, people seeking to pass an amendment to reduce the protection afforded entrenched values. This is because an entrenching amendment would explicitly or implicitly authorize a government institution to invalidate subsequent constitutional amendments deemed contrary to entrenched provisions. As a result, the latter would not go into effect even if they had been adopted using Article V procedures.[225] Relatedly, as a consequence of the possibility of invalidation of an amendment arguably at odds with an entrenched provision, proponents of the subsequent amendment might be deterred because of the uncertainty surrounding the new amendment's constitutionality.

Consider the proposed "life begins at conception" amendments discussed in this Article.[226] If the religion clauses were entrenched through an amendment prohibiting amendments constitutionalizing the religious beliefs of particular denominations, proponents of a conception amendment might conclude that their energies would be better spent reducing abortions through other means rather than undertaking an expensive and labor intensive nationwide effort to adopt a conception amendment that might ultimately be judged

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would create law, Congress could not participate in adopting an amendment. *Id.* Neither could the states since the First Amendment now applies to the states.

224. Jed Rubenfeld might be thought to support the potential utility of entrenching amendments because of his belief that "self-government consists of living under self-given commitments laid down in the past to govern the future," rather than gratifying one's present desires when these conflict with one's life's commitments. *See* Jed Rubenfeld, *Of Constitutional Self-Government*, 71 FORDHAM L. REV. 1749, 1759–60 (2003). Rubenfeld portrays constitutional commitments as constraints on the will of majorities and as representing the enduring normative principles underlying the Constitution. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 174 (2001). However, he also contends that constitutional commitments should be capable of revision through amendments when the need arises. *See id.* at 175–76 (asserting that a commitment cannot be established by a series of supermajority votes, even if the votes were to be unanimous, since a popular commitment does not exist "unless it succeeds over time: unless it takes and holds").

225. This assumes that the amendments would be challenged in court, which is certain to be the case.

226. *See supra* note 8.

unconstitutional. They might, for example, view supporting educational programs to prevent unwanted pregnancies, providing medical and nutritional assistance to women with unwanted pregnancies, and counseling about adoption as an alternative to abortion as more productive uses of their limited resources than pursuing a protracted and uncertain constitutional battle.

A related practical effect of incorporating explicitly entrenched values in the Constitution implicates their symbolic function. If a ratified amendment is subsequently declared unconstitutional, or the attempt to ratify such an amendment is abandoned out of concern about its constitutionality, proponents of a conception amendment would realize that the only way for the amendment to attain constitutional status would be to create a strong national consensus to contemplate adopting a new constitution. In countries with a history of regularly replacing their constitutions, the prospect of adopting a new constitution might deter, but not utterly defeat, those seeking to alter the regime in a fundamental way. In contrast, the United States Constitution is more than two centuries old and has attained the status of a sacred text. Although Americans disagree about the meaning of its abstract and foundational precepts, most agree that the Constitution is the reason for the country's prosperity and stability and, thus, that it should be preserved. Following this logic, proponents of a conception amendment would have to confront the radical nature of the policy they were seeking to constitutionalize and the fact that their goal is antithetical to the religious tolerance at the core of the American constitutional identity.[227]

Not all observers are likely to be sanguine about the benefits of explicit formal entrenchment. The central policy argument against entrenching parts of the Constitution is that doing so would subject the country to the risk of unamendable provisions in circumstances when they *should* be altered to accommodate social, economic, political, or cultural changes. While limiting entrenchment to core features of the Constitution could reduce this risk, such situations could still arise. Take, for example, the sole entrenched provision in the Constitution today—the protection of equal suffrage for states in the Senate. The Founders probably did not foresee the time when the population of some states would be seventy times the population of other states, as was the case in 2000, given that the most populous

227. A further potential consequence of entrenching features of the Constitution would be the evolution of the meaning of entrenched provisions through interpretation or other informal means. *See infra* notes 229–34 and accompanying text.

state in 1790 was roughly twelve times that of the least populous.[228] Had the Founders foreseen the modern disparities in population, they might have made the state suffrage provision of Article V easier to change. Now, because of the extreme disparities in the populations of states, small states have disproportionate influence on national decision-making and can bargain for hugely disproportionate amounts of federal funding.[229] Some critics claim that under the right conditions, less than one-fifth of the electorate could elect over half of the Senate.[230]

Whether these or other consequences of the disproportionate small state influence should be changed is debatable as a policy matter. However, the special constitutional status of the equal state suffrage provision is likely to consign such debates to virtual irrelevance.[231] At the very least, then, we can say that entrenching constitutional provisions would tend to relegate them to the back burner of discussion and analysis.[232] More ominously, it could lock in constitutional precepts with deleterious effects, such as the Prohibition Amendment, had it contained entrenching language, or

228. *See* http://www.infoplease.com/ipa/A0004986.html (based upon U.S. Census data, listing population by state from 1790 to 2006).

229. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 228–29 (1999).

230. *See* Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 859–60 (2006). *See also* Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213, 213–15 (1995).

231. The issue has, nonetheless, inspired a certain amount of predominantly academic debate. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 165, at 50–62. Some have argued that even the entrenched equality of state suffrage provision could be eliminated. *See* PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE 119 (1990); Scott J. Bowman, Note, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 FORDHAM L. REV. 1017–19 (2004). Douglas Linder argues that an amendment to remove the state suffrage provision of Article V should be upheld because the amendment would be "necessary to effectuate the broad design of the Constitution," i.e., that it be flexible and open to change. *See* Linder, *supra* note 119, at 726–27 (arguing that flexibility is "more basic" to the Constitution's design than the protection of state suffrage). Linder also argues that the proposed amendment to give the District of Columbia representation in the Senate should be upheld, if adopted in accordance with Article V, even though it would effectively "dilut[e] the voting strength" of the remaining states, as long as the goal was to redress the lack of representation of the District rather than to reduce the other states' voting strength. *Id.* at 727. *See also* Mazzone, *supra* note 34; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 68–70 (1997).

232. *See* MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 195–96 (2007) (arguing that if constitutional provisions were entrenched, the impossibility of changing them would likely dampen discussion about them).

the proposed Corwin Amendment to protect the institution of slavery, which did contain such language, had it been adopted.[233] The fact that three-quarters of the states ratified the Prohibition Amendment within thirteen months of the House and Senate voting to send the resolution to them is evidence that some types of movements can create a momentum contrary to detached and careful consideration. As constitutional historian John Vile has noted, "extensive resort to such amendments might indeed spark revolution or instill disrespect for the Constitution."[234]

A second reservation regarding entrenching amendments may be raised by those who claim that the current difficulty in obtaining Article V supermajorities has led to the development of a parallel universe of non-Article V "amendments" to the Constitution. Sanford Levinson is in the forefront of constitutional scholars noting that the difficulty in satisfying Article V procedures has played a critical role in prompting resort to other methods of amending constitutional doctrine.[235] For Levinson, Article V's "inflexibility" has been one of the main reasons that fundamental constitutional changes in the United States have repeatedly occurred through arguable overreaching by political actors, such as legislators or executives, that is then, in effect, ratified by judicial re-interpretations of existing constitutional law.[236]

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233. *See supra* note 195. *See also* SCHWARTZBERG, *supra* note 231, at 139 (arguing that constitutional change is necessary because of "human fallibility").

234. John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373, 387 (1985). *See* John Ferejohn, *supra* note 141, at 512–13 (asserting that "the authority of the courts themselves might be jeopardized by such efforts because it would fall to them to uphold entrenched provisions against unified and large majorities").

235. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 165, at 163–64. Levinson notes as well that not all types of constitutional change can be made through informal methods. For example, the electoral college, appointment of judges for life, and equal representation of states in the Senate could only be changed by a formal amendment. *See id.* at 164. *See also* Griffin, *supra* note 169, at 50–53. The non-Article V amendments, in turn, enhance reverence for the Constitution, which then makes it even less likely that the Constitution will be formally amended. *Id.* at 53.

236. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 165, at 163–64. According to Levinson, this occurred in *McCulloch v. Maryland*, 17 U.S. 316 (1819), *The Prize Cases*, 67 U.S. 635 (1862), *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1933), *West Coast Hotel v. Parish*, 300 U.S. 379 (1937), and *United States v. Darby*, 312 U.S. 100 (1940), among other decisions. *See* Levinson, *How Many Times?*, *supra* note 130, at 22–23 (suggesting that he shares the view of those who view *McCulloch* as an amendment to rather than an interpretation of the Constitution); *Id.* at 24, (suggesting that he views *West Coast Hotel* as an amendment to rather than an interpretation of the Constitution).

Judge-made constitutional law, sometimes referred to as "constitutional common law,"[237] is not the only type of amendment to the Constitution made through non-Article V means. Constitutional change has also occurred through the actions of independent administrative agencies and the expanding power of the presidency as well as through what some scholars call "super-statutes," i.e., statutes embodying fundamental norms that influence other laws and public understandings in much the same way as norms included in the text of the Constitution.[238] Similarly, Stephen Griffin argues that constitutional change resulted from the New Deal and Cold War restructuring of the relationship between the three branches of government, without the benefit of formal amendments—although he attributes the cause more to reverence for the Constitution than to the inflexibility of the Article V process.[239] Some commentators have dubbed these changes to the Constitution "informal amendments,"[240] whereas for others, they form part of "the Constitution-in-practice."[241]

Both Levinson and Griffin deplore this state of affairs. Levinson asserts that constitutional amendment through non-Article V methods lacks transparency and that the "degree of fundamental change is often covered up by being rationalized in incomprehensible legal jargon that requires inordinate faith in the lawyers and judges writing the opinion."[242] He also notes that the existence of constitutional amendment through judicial interpretation may be noticed and is "often met with outrage."[243] For Griffin, the primary undesirable result has been to place more and more constitutional doctrines "off-text," thereby rendering the constitutional text

237. *See* Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 229, 229 n.1 (Richard W. Bauman & Tsvi Kahana, eds., 2006); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

238. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 165, at 163–64; William N. Eskridge, Jr. & John Ferejohn, *Super-statutes*, 50 DUKE L.J. 1215, 1275 (2001) (characterizing super-statutes as "an intermediate category of *fundamental* or *quasi-constitutional* law"). *See also* Ernst A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411–14 (2007).

239. *See* Griffin, *supra* note 169, at 54–55. *See also* ACKERMAN, *supra* note 186, 43–55, (arguing that the New Deal period constituted a "constitutional moment" with the same effect on constitutional doctrine as a formal amendment).

240. *See* LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 165, at 164.

241. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 516–17 (2007).

242. Levinson, Our Undemocratic Constitution, *supra* note 165, at 164.

243. *Id.* at 163.

increasingly uninformative about the realities of the American form of governance.[244] Further, constitutional change effected through non-Article V means risks undermining the settlement function of law, i.e., the role the Constitution (and all settled law) plays in ensuring that people's behaviors are constrained by stable and coordinated standards and "reducing the range of viable disagreement" threatening law's legitimacy.[245] Were the country to adopt entrenching amendments, various types of non-Article V amendments would likely increase in response to the felt need to adapt constitutional doctrine to changing circumstances. To the extent that constitutional inflexibility is problematic, it would be advisable to avoid entrenching amendments or, at least, to limit them to a small number of largely uncontroversial core principles.

Other commentators, in contrast, view informal amendments in a more positive light. Heather Gerken challenged Levinson's assessment directly on the ground that informal amendment processes preserve "the ongoing contestability of constitutional law."[246] In Gerken's view, non-Article V constitutional processes create a certain degree of indeterminacy that contributes to *strengthening* the Constitution because no citizen can claim to have a definitive interpretation of the meaning of the most important constitutional provisions.[247] Moreover, because all groups can reasonably anticipate a time when they may be able to reverse the developments they oppose, they are likely to remain engaged and loyal despite electoral or legislative setbacks.[248] An illustration of Gerken's thesis might be the long-term strategy pursued by conservatives opposed to many of the Warren Court's liberal rulings—namely, gradually securing appointments of conservative judges on the federal bench to counter, and even overturn, the decisions of their predecessors. Although Gerken and others emphasize the advantages of constitutional change outside of Article V, it does not follow that they would endorse entrenching amendments because the purpose of their writings is to clarify the

244. *See* Griffin, *supra* note 169, at 56. He concludes that "most significant twentieth century constitutional change" has occurred "in the course of the interaction of the political branches." *Id.* at 57.

245. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376–77 (1997).

246. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to OUR UNDEMOCRATIC CONSTITUTION*, 55 DRAKE L. REV. 925, 937 (2007).

247. *See id.* at 939-40.

248. *See id.* at 938, 940–42 and sources cited.

nature and value of non-formal constitutional change rather than to recommend expanding its sphere.

A third objection to express constitutional entrenchment might also rest on the belief that there are, in fact, no core features of the Constitution that are essential to the American constitutional project. If the Constitution has no core defining America's constitutional identity, the justification for formal entrenchment is weakened, if not dissolved altogether, because there would exist no compelling theoretical reason to privilege permanently constitutional values that merely represent ideas agreed to at particular times in the nation's history. Rather, since such values derive their legitimacy exclusively from the consent of the governed, they should be permitted to evolve to reflect changing notions of constitutionalism and democracy. Thus, proponents of entrenching amendments must develop at least a probative argument that the American constitutional scheme contains a set of foundational principles that, taken together, define the nation's constitutional identity.

Finally, proponents of entrenching amendments must also confront the practical question raised earlier by the discussion of *implicit* substantive constraints regarding who or what institution should be entrusted with determining which principles are core and which proposals conflict with them. When raised in that connection, neither the legislature nor the judiciary seemed suited to this task.[249] The problem would, however, be less acute in the case of express substantive limitations for two reasons. First, in the case of entrenching amendments, the public would also play a meaningful role in the creation of the Constitution's unamendable provisions due to the political dynamics surrounding an attempt to amend the Constitution. Such public involvement could afford the claims of unamendable standards more institutional legitimacy than would be the case for implicit substantive constraints announced by the judiciary. There are usually wide-ranging and spirited debates across the country when an "ordinary" amendment is proposed, and public attention is likely to be greater if the stakes are higher, i.e., in the case of an amendment to be adopted and retained for as long as the Constitution endures.

To illustrate, imagine that an amendment was adopted to make the religion clauses unamendable and that the constitutional doctrines thereby fixed were stated clearly and in detail. Imagine also that, at a later time, an amendment was adopted to define human life as

249. Part I.D, *supra*.

beginning at the moment of conception. In that event, were the Court to hold the human life amendment unenforceable based upon the First Amendment, as supplemented by the entrenching amendment, the ensuing hostility to the Court's judgment would likely be moderated by the awareness on the part of the proponents of the human life amendment that the Court's ruling was grounded in the express statement of a binding national, albeit earlier, consensus.[250]

The question of institutional legitimacy would also be somewhat more manageable in connection with express substantive constraints than implicit ones, in part, because the current Constitution already contains an express substantive constraint (namely, the guaranty of equal state suffrage unless a state consents to modification). Consequently, the Supreme Court is already required to assess whether a conflict exists that would prevent a new amendment from being enforced if questions were to arise about the relation between the new amendment and the state suffrage provision.[251] Moreover, the Court has repeatedly been called upon since the Founding to determine whether conflicts exist between legislation and the Constitution. Although the practical consequences of invalidating legislation inconsistent with the Constitution are very different from those that would result from invalidating a constitutional amendment based upon the Constitution, the determination in both cases would appear to rely on the same faculty of judicial reasoning and judgment.

Although the express entrenchment strategy could provide greater legitimacy for invalidating a "life begins at conception" amendment than would the doctrine of implicit substantive constraints, it suffers from additional problems of a different kind. Two possible scenarios to implementing express formal entrenchment exist. Either the entrenching amendment would be proposed with the

250. Of course, proponents of the human life amendment might still find the Court's action an unacceptable misinterpretation of the religion clauses. The point in the text is only that the Court would be on more solid ground if its holding was grounded in an express amendment, hopefully accompanied by useful legislative history, as contrasted with invalidating the human life amendment based upon implicit substantive constraints.

251. For example, if an amendment were adopted to afford the District of Columbia representation in the Senate, but without the unanimous approval of all the states, it is easy to foresee a court challenge to the amendment based upon the claim that the dilution in voting power of the non-approving states would violate the state suffrage provision. Alternatively, if the residents of Texas were to vote to accept the option, granted when Texas joined the Union, to separate into five states with ten senators, the Supreme Court would also undoubtedly be called upon to determine whether the authorizing resolution was invalid because of Article V. *See* S.J. Res. for Annexing Tex. to the U.S., 28th Cong. (2d Sess. 1845).

clear understanding that its adoption would necessitate invaliding future attempts to constitutionalize religious beliefs, such as the belief that life begins at conception, or it would be approved without such understanding.

If the jurisprudential implications of the entrenching amendment were openly discussed, it would be extremely difficult, if not impossible, for the entrenching amendment to be adopted today or in the foreseeable future. For ratification under the procedures outlined in Article V, three-fourths of state legislatures or three-quarters of state conventions called specifically for this purpose must approve the entrenching amendment. In this scenario, minorities (of state legislators or convention delegates) in thirteen states could prevent the adoption of the entrenching amendment. This possibility is not far-fetched since it is precisely because of the persistence and extent of attitudes favoring such an amendment[252] that an entrenching amendment would be desirable in the first place. There must, then, be a considerable shift in popular opinion for the adoption of an entrenching amendment to be feasible in the first place. Paradoxically, the existence of such a shift in attitudes could make widespread popular support for a conception amendment less likely. If such a shift were to occur, it might still be desirable to pursue an entrenching amendment to protect the Constitution against subsequent shifts in public opinion back in favor of a conception or other religiously based amendment. In the last analysis, this first scenario for adopting the entrenching amendment is relatively improbable because the condition precedent to its adoption, i.e., a change of attitudes extensive enough to garner a supermajority of three-fourths of the states, would presumably be slow to arise.

The alternative scenario is that the jurisprudential implications of the entrenching amendment would not be thoroughly discussed or, at least, not definitively agreed to. If that occurred, the proposed amendment might be adopted more easily than under the first scenario. However, this alternative would result primarily from the circumstance that both proponents and opponents of a conception amendment would believe that the amendment entrenching the religion clauses would further their respective but conflicting agendas. By the same token, the consequences of the entrenching amendment

252. A survey done by the *Los Angeles Times* in June 2000 found that 53 percent of the people surveyed believe that human life begins at conception rather than at birth or some time in between. *See* Matthew C. Nisbet, *Public Opinion About Stem Cell Research and Human Cloning*, 68 PUB. OPINION Q. 131, app. at 144 (2004). The survey did not ask whether those surveyed favored a constitutional amendment to that effect.

adopted would be uncertain and might well depend on the composition of the Supreme Court at the time a conception amendment was adopted. As a result, the existence of an entrenching amendment would not perform the desired function of dissuading proponents of a conception amendment or of any other amendment constitutionalizing a particular denomination's religious beliefs from attempting to change the Constitution.

In sum, the threat posed by constitutionalizing specific religious beliefs of a particular denomination would likely be reduced if a formal entrenching amendment could be adopted that spelled out with sufficient clarity the doctrines to be entrenched. Possible positive ripple effects would include channeling citizen energy into alternative measures to solve the concerns that initially led to proposing such amendments. The process leading to the adoption of such an entrenching amendment might have the long-term effect of injecting greater clarity into public discourse concerning the centrality of religious freedom and religious tolerance for the First Amendment's religion clauses. Certainly, if the Supreme Court were ever to invalidate a ratified amendment because of a conflict between its content and the content of the pre-amendment Constitution, it would be preferable for the Court to rest its decision on an explicit constitutional provision rather than implicit substantive constraints.

At the same time, there are numerous disadvantages to entrenching amendments, once ratified. First and foremost is the difficulty in identifying subject areas in which permanent constitutional provisions would be desirable. The example of Article V's guaranty of states' equal representation in the Senate should give proponents of entrenchment pause about one generation's ability to see subsequent generations' needs accurately. In addition, contemporary disputes about methods of constitutional interpretation reveal the difficulty of stating with precision the exact contours of the constitutional standard being made permanent. Merely "entrenching" any one of the general provisions of the Constitution, without spelling out in considerable detail what is being protected, would merely lead to battles over the meaning of such provisions as frequent as those that occur today and probably even more contentious, since the stakes would be higher. Further, there is some risk that one or more successful entrenching amendments would have the unintended consequence of alienating significant groups that are now willing to work peacefully for gradual change precisely because of the Constitution's indeterminacy and openness to interpretation. Finally, as described above, profound attitudinal changes would be

necessary to make an entrenching amendment feasible in precisely those instances where the need for such an amendment appears the most urgent to the amendment's proponents.

Conclusion

The threat posed by proponents of constitutionalizing religious values is real, although not necessarily imminent. This Article has discussed two legal strategies for reducing the likelihood that such provisions could be adopted or, if adopted, become effective. Both strategies are attractive on the level of theory, yet both suffer from profound, if not insurmountable difficulties of implementation.

In light of the considerable barriers to pursuing either strategy successfully, it may be useful for opponents of constitutionalizing religious values to consider alternatives to relying upon the Supreme Court or some other institution to invalidate such amendments or discourage their adoption through the threat of invalidation. In particular, it may be useful to consider non-legal strategies for reducing the threat in question.

Ultimately, the motivation for constitutionalizing religious values originates in people holding certain religious beliefs passionately coupled with their assumption that the Constitution is the appropriate or the most effective vehicle for controlling the behavior of those who do not share these beliefs. It is unlikely that such people will alter their religious beliefs, nor would it be desirable to disparage their beliefs in a regime that prides itself on guarantying religious tolerance and personal freedom to the maximum extent possible, i.e., consistent with the personal freedom of others. What must change, then, is the belief that the Constitution should embody the religious or moral beliefs of individuals, especially beliefs that are not necessary ingredients of the political regime established by America's founding document.

How could such shift occur? A necessary, if not sufficient, condition is education about the essential nature of the Constitution and the meaning of its individual guaranties. Although great disagreement exists regarding the protections provided by various provisions of the Constitution, most Americans believe that the form of government it established has been responsible for the nation's success for more than two centuries. Most people, however, are relatively ignorant about the history of the Constitution, the distinctive characteristics of the American Constitution, and how its distinctiveness has contributed to its success. Most people are also

ignorant of the history of the religion clauses and the values they embody. One corrective to this situation entails a new emphasis in civic education on the nature of the Constitution, its distinctive approach to governance, and the consequences of its distinctiveness for both political and non-political aspects of American life.

For example, teaching citizens about the American Constitution might contain a discussion of the brevity of the document, as compared with the voluminous constitutions of other countries; what the founders hoped to achieve by not including social, moral, or religious values in it; and the effects resulting from the Constitution's brevity that have contributed to the nation's success over time. Teaching citizens about the Constitution might also incorporate a discussion of the difference between legal norms, on the one hand, and social, cultural, economic, and moral norms, on the other. Teaching the Constitution might also emphasize the history of religious wars in England and Europe and examine the judgment of those who drafted the Constitution that the most effective way to prevent such battles in America was to limit the ability of groups to use the machinery of government to impose their religious beliefs on others.

In order to realize these goals, a civic movement to expand understanding of the nature of the American Constitution would need to influence the curriculum taught in schools—a goal arguably as formidable as obtaining the two supermajorities necessary for a constitutional amendment. In the short term, however, it is possible to begin the process by emulating nonprofit groups that use "Constitution Day" (September 17) and "Law Day" (May 1) as occasions to teach about the Constitution in primary and secondary schools around the country. Groups such as the American Constitutional Society,[253] the Constitutional Rights Foundation,[254] the Bill of Rights Institute,[255] and others[256] have created diverse teaching modules to assist volunteers to bring greater understanding of the Constitution to students at various stages of their educational development.[257] Influencing the popular understanding of what

253. *See* http://www.acslaw.org. (last visited Sept. 12, 2009).

254. *See* http://www.crf-usa.org. (last visited Sept. 12, 2009).

255. *See* http://www.billofrightsinstitute.org. (last visited Sept. 12, 2009).

256. *See, e.g.*, http://www.discoverlaw.org/law-day-2009 (last visited Sept. 12, 2009).

257. *See* http://constitutioncenter.org/ConstitutionDay/Partner_Details.aspx?code=110L5H2I20; http://www.billofrightsinstitute.org/Teach/freeResources. (last visited Sept. 12, 2009).

function constitutions in general serve and the character of the American Constitution in particular is the opposite of a quick fix. But it might be the most effective long-term strategy for keeping contested social, moral, and religious values, and public policy more broadly, at the relatively safe level of ordinary legislative enactments.

Civic education has long been an overlooked strategy for law reform for the obvious and accurate reason that the concept is amorphous and the implementation would be dispersed across the country. Furthermore, its effects would be gradual and difficult to measure. Finally, and understandably, law reform focuses on *law*. Recent work by constitutional law scholars has begun to stress the importance of constitutional culture for the Constitution's legitimacy and interpretation as well as the importance of popular opinion, social movements, and non-institutional actors to explain the shifts in constitutional meaning that have gained acceptance by courts, lawmakers, and other public officials.[258] However, this growing literature largely takes the non-legal part of the equation as a given. This Article, the constitutional culture literature, and the insight that the non-legal can decisively determine the path of the legal all suggest that those who care about the future of the Constitution should work to influence public opinion and social attitudes about law so that the inevitable interaction between legal institutions and non-legal actors will be civil and constructive.

258. *See, e.g.*, Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 226–27 (2008); William Hoffer, *The Age of Impeachment: American Constitutional Culture Since 1960*, 27 LAW & HIST. REV. 238–39 (2009); Robert Post, *The Supreme Court, 2002 Term: Foreward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8–11 (2003); Post & Siegel, *supra* note 140, at 374; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1323–24 (2006); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302–07 (2001).

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