

# Brigham Young University Journal of Public Law

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Volume 25 | Issue 1

Article 4

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7-1-2011

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### Recommended Citation

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# Constitutional Aesthetics: Appending Amendments to the United States Constitution

*Mehrdad Payandeh\**

## ABSTRACT

*Ever since the First Federal Congress in 1789 adopted the Bill of Rights, amendments to the United States Constitution have not been interwoven with the original text but appended to it. An examination of the historical background reveals that this decision of Congress was based on a misconception of the nature of a constitution and of constitutional rights in particular. It was furthermore motivated by the opponents of the Bill of Rights who tried to diminish the meaning and significance of the amendments. This somewhat arbitrary and misinformed decision about constitutional design had a subtle but significant influence on further constitutional developments: on the practice of making amendments, on the symbolic nature of the Constitution and the character of the Bill of Rights, and on constitutional interpretation.*

*“Form, sir, is always of less importance than the substance; but on this occasion, I admit that form is of some consequence.”*

James Madison<sup>1</sup>

## I. INTRODUCTION

Constitutional amendments play a significant role in the narrative of the history, law, and politics of the United States Constitution. The Founding was characterized by the repudiation of the amendment procedure under the Articles of Confederation in favor of the

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1. 1 ANNALS OF CONG. 708 (1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 118 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

revolutionary approach of 1787.<sup>2</sup> Immediately after the Founding, the formulation of the Bill of Rights as amendments to the Constitution preoccupied the First Federal Congress. The Civil War resulted in the Reconstruction Amendments, arguably the most important transformation of U.S. constitutional law in the nineteenth century. This importance of amendments for constitutional reality justifies the enormous attention constitutional scholars pay to issues surrounding the amendment procedure: did the Fourteenth Amendment enter into force in a constitutional way, even though the Republican government excluded the all-white southern governments from the process?<sup>3</sup> Is the procedure of constitutional amendment under Article V of the U.S. Constitution exclusive?<sup>4</sup> Or is it just one form of higher lawmaking alongside a more informal process of constitutional moments?<sup>5</sup> Scholars have comprehensively scrutinized the amendment procedure as well as the content and scope of the single amendments.

Yet, one particular aspect of the amendment mechanism has hardly attracted any attention among constitutional scholars: the fact that amendments do not alter the original Constitution but are added to the text in a supplementary form. Students of the U.S. Constitution may be inclined to take this form of constitutional amending for granted. All twenty-seven amendments to the Constitution have been added to the original Constitution in this manner. The text of the original Constitution has never been changed. It is the same text that was adopted at the Philadelphia Convention on September 17, 1787, and subsequently ratified by the state conventions; however, a casual gaze at the practice of constitutional design around the world and within the U.S. reveals that the Constitution's mode of amendment is rather exotic. Modern constitutions are regularly amended by changing the text. New provisions are not adhered in chronological order but interwoven with the text. A look at the constitutional history of the

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2. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 29–33, 285–86 (2005); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 480 (1995).

3. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–252 (1998) (arguing that the Fourteenth Amendment did not come about in the process constitutionally envisioned by Article V); AMAR, *supra* note 2, at 379 (arguing that the exclusion was justified under the guarantee of a republican form of government according to Article IV, § 4 of the U.S. Constitution); see also the counterplea by Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1747 n.25 (2007).

4. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing for the exclusivity of the Article V amendment procedure); see also Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 3 (2000); AMAR, *supra* note 2, at 295–99 (accepting the theoretical possibility of constitutional amendments outside of Article V).

5. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991).

United States confirms that the federal model did not come as a necessary consequence. In fact, when James Madison proposed the Bill of Rights to the First Federal Congress in June of 1789, he propounded that the amendments be integrated into the original text of the Constitution.<sup>6</sup>

The historical background of the First Federal Congress's decision in favor of adding amendments in a supplementary form, and against incorporating or interweaving them with the original text, is documented only fragmentarily and only with regard to the deliberations in the House of Representatives.<sup>7</sup> Scholars have analyzed this history and offered some tentative conclusions about the prevailing conception of constitutionalism at the time of the First Congress.<sup>8</sup> In addition, they have offered a draft of how the U.S. Constitution could look today, had Madison prevailed.<sup>9</sup>

Yet, an analysis of how the peculiar design of the amendment technique has influenced subsequent constitutional developments and our perception of the Constitution and of constitutional law in general is missing until today. This article will attempt to fill in this gap in constitutional scholarship and to examine in more detail the impact of the First Congress's decision in favor of the supplementary form of amendments. Part II of this article is devoted to the historical question of why Congress chose to append amendments to the Constitution and not to interweave them with the text. Part III examines the influence this decision had on the development of the Constitution.

## II. THE 1789 DECISION OF THE FIRST CONGRESS

An inquiry into the significance of the supplementary style of constitutional amendments has to begin with the debate between James Madison and Connecticut Congressman Roger Sherman who, during the First Congress in 1789, objected to Madison's approach and introduced the idea of adding amendments as an annex to the text of the original Constitution.<sup>10</sup> The refusal of the Philadelphia Convention

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6. CREATING THE BILL OF RIGHTS, *supra* note 1, at 11–14.

7. CREATING THE BILL OF RIGHTS, *supra* note 1, at 55–213; *see also* GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 33 (1995).

8. *See* Price Marshall, Essay, "A Careless Written Letter" – *Situating Amendments to the Federal Constitution*, 51 ARK. L. REV. 95, 96–112 (1998); Edward Hartnett, A "Uniform and Entire" Constitution; Or, *What if Madison had Won?*, 15 CONST. COMMENT. 251, 252–58 (1998); Carlos E. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1489–96 (2005); Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1778–93 (2005).

9. *See* Hartnett, *supra* note 8, at 284–99.

10. 1 ANNALS OF CONG. 707 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra*

to include a bill of rights in the Constitution served as one of the major obstacles in the ratification of the new Constitution and fueled the Anti-Federalist opposition to the Constitution.<sup>11</sup> The formulation of fundamental individual rights against encroachment by the newly formed federal government, therefore, was of pivotal importance at the First Congress in the spring and summer of 1789. Debates about the substance of the proposed amendments—proposals that eventually came into being as the Bill of Rights—were accompanied by a debate about the form of the amendments. While Madison initially proposed the amendments to be integrated and interwoven into the text of the original Constitution, Congress eventually decided to leave the text untouched and append the amendments after Article VII. After the first ten amendments came into existence in this supplementary form, this technique has been applied to each of the seventeen subsequent amendments. Congress's decision in 1789, therefore, has set a precedent in favor of the supplementary form of amendments, a precedent that has not been challenged in constitutional practice or academic writing.

On what basis, then, did the First Congress decide in favor of the supplementary method of constitutional amendment? Scholars who have explicitly dealt with this question have focused on the debate between Madison and Sherman within the First Congress.<sup>12</sup> They have emphasized that the decision in favor of Sherman's approach of adding the amendments constitutes a concession by Madison, who preferred to interweave the amendments into the text of the Constitution, but surrendered his preference in form for the sake of achieving a consensus with regard to the substance of the amendments.<sup>13</sup> According to this reading, the decision in favor of the Sherman approach is conceived of as a political compromise. This is undoubtedly true; however, if seen only in this way, a significant characteristic of the 1789 decision is neglected almost completely—its arbitrary nature. The arbitrariness of the decision in favor of the supplementary form becomes clear if one adds to the picture four hitherto neglected aspects. First, the lack of guidance and examples that Congress could build its decision upon allowed for an open-ended debate about the form of the amendments. Second, the somewhat arbitrary nature of the decision is mirrored in the debate between Sherman and Madison. A closer examination of the debate leads to the

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note 1, at 117.

11. See John P. Kaminski, *Restoring the Grand Security: The Debate over a Federal Bill of Rights 1787-1792*, 33 SANTA CLARA L. REV. 887, 889-912 (1993).

12. See Hartnett, *supra* note 8, at 252-58; Marshall, *supra* note 8, at 96-112.

13. See *id.*

result that Madison had the better arguments and that the approach of Sherman and his supporters was based on a number of misconceptions about the nature of the Constitution. Third, the substance of the amendments that were debated as the first amendments to the Constitution also played a decisive role in determining the form of the amendments. Had the amendments proposed to the First Congress not dealt with the rather autonomous matter of fundamental rights but with a topic that had more explicitly required a change in the text of the Constitution, the debate could have taken a different course. Fourth, concerns regarding the practicability of incorporating amendments into the text might also have played a role. These four aspects will be examined in this section in order to highlight that the supplementary form of the amendment process is not only based on an arbitrary decision but also on a decision that was motivated by unpersuasive arguments. The third part of this article will examine how this arbitrary and unpersuasive decision has influenced the subsequent development of constitutional law and our contemporary understanding of the Constitution.

*A. Congress on its Own: The Lack of Guidance and of Examples*

At the beginning of the twenty-first century, if a state decides to craft a new constitution, it can look for guidance not only to the approximately 200 constitutions that are currently in force, but also to a long history of failed and effective constitution-making. In 1787, by contrast, the Philadelphia Convention could not resort to any such compilation of experience. When the Founders looked for guidance in constitutional design, their horizon probably encompassed the constitutions of the thirteen newly independent states, the Articles of Confederation, and the constitution of the Kingdom of Great Britain. But while these documents and sets of written and unwritten principles—along with the Declaration of Independence—gave some guidance with regard to substance, they were of only limited value with regard to the technique of amending. The Constitution of the United Kingdom does not consist of a single written document but is a set of documents and unwritten sources.<sup>14</sup> No formal mechanism of amending the Constitution as a whole exists. The Articles of Confederation arranged for the possibility of amendments but no amendment ever came into force.<sup>15</sup> It is therefore pure speculation

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14. See, e.g., HILAIRE BARNETT, CONSTITUTIONAL & ADMINISTRATIVE LAW 3 (5th ed. 2004).

15. See, e.g., AMAR, *supra* note 2, at 285-86.

whether amendments to the Articles would have been integrated in the text or appended.<sup>16</sup>

Just as state constitutions were of little help to the Philadelphia Convention in 1787, they were again of little help to the Founders as examples with regard to the amendment procedure as such,<sup>17</sup> nor to the First Congress in 1789 with regard to the amendment technique. The Constitution of Connecticut of 1776<sup>18</sup> continued the 1662 Charter from the King of England,<sup>19</sup> just as Rhode Island continued to be governed by the 1663 Charter from the King.<sup>20</sup> Neither Charter encompassed an amendment mechanism. Similarly, the constitutions of New York,<sup>21</sup> Virginia,<sup>22</sup> and North Carolina<sup>23</sup> did not explicitly provide for the possibility of amendment. And while the constitutions of New York and North Carolina were subsequently amended, these amendments occurred only after the meeting of the First Congress.<sup>24</sup> The New Jersey Constitution of 1776 could be amended by the legislature, though it also determined that some of its provisions could not be amended.<sup>25</sup> In 1777, the New Jersey legislature amended the Constitution substituting the words “State” and “States” for “colony” and “colonies.”<sup>26</sup> The constitutions of South Carolina,<sup>27</sup> Delaware,<sup>28</sup>

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16. It is, however, worth noting that when Congress, in 1785, considered an amendment to the Articles of Confederation, the Committee of the Whole submitted a proposition to alter the text of Article 9, ¶ 1 of the Articles. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 1836).

17. See AMAR, *supra* note 2, at 287–89.

18. CONN. CONST. (1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 257 (Benjamin Perley Poore ed., 2d ed. 1878) [hereinafter 1 THE FEDERAL AND STATE CONSTITUTIONS].

19. CHARTER OF CONNECTICUT, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 252.

20. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, 1595 (Benjamin Perley Poore ed., 2d ed. 1878) [hereinafter 2 THE FEDERAL AND STATE CONSTITUTIONS].

21. N.Y. CONST. (1777), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1328.

22. VA. CONST. (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1910.

23. N.C. CONST. (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS *supra* note 20, at 1409.

24. See N.Y. Amendments to the Constitution of 1777 (1801), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1339; N.C. Amendments to the Constitution of 1776 (1835 & 1854), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1415.

25. N.J. CONST. art. XXIII (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1313.

26. See 2 THE FEDERAL AND STATE CONSTITUTIONS, Colonial Charters, *supra* note 20, at 1310.

27. S.C. CONST. art. XLIV (1778), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1627.

Maryland,<sup>29</sup> and Pennsylvania<sup>30</sup> provided for their amendment, as did the 1784 Constitution of New Hampshire,<sup>31</sup> but none were ever amended. Similarly, while Georgia's Constitution of 1777 could be amended,<sup>32</sup> as could its 1789 Constitution,<sup>33</sup> amendments were not made before 1795.<sup>34</sup> The Massachusetts Constitution of 1780<sup>35</sup> was not amended before 1822.<sup>36</sup> With the exception of New Jersey, which amended its 1776 Constitution by substituting one expression, the history of the state constitutions lacks any comprehensive or instructive illustration of constitutional amendment design.

In light of the above, when the First Congress convened in 1789 to discuss amendments to the Constitution, it had only limited points of reference with regard to the question of how to amend a constitution. It was left with the text of Article V, which stipulates that amendments that are proposed and ratified in the procedure laid down in Article V "shall be valid to all Intents and Purposes, as part of this Constitution."<sup>37</sup> Article V neither specifies how the amendments shall become part of the Constitution, nor does the term "amendment" determine whether amendments should be annexed to or integrated in the text.<sup>38</sup>

### *B. Debating the Form of Amendments at the First Congress*

In the absence of clear normative predeterminations, the delegates to the First Congress were in the position to freely decide whether they wanted to integrate amendments into the Constitution or add them to the text. Madison assumed that amendments should be integrated

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28. DEL. CONST. art. IX (1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 300.

29. MD. CONST. art. LIX (1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 828.

30. PA. CONST. § 47 (1776), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1548.

31. N.H. CONST. pt. II, unenumerated paragraph (1784), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1293.

32. GA. CONST. art. LXIII (1777), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 383.

33. GA. CONST. art. IV, § 7 (1789), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 387.

34. Ga. Amendments to the Constitution of 1789 (1795), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 387.

35. MASS. CONST. pt. II, ch. VI, art. X (1780), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 972.

36. Mass. Amendments to the Constitution of 1780 (1822), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 18, at 973.

37. U.S. CONST. art. V.

38. *Id.*



into the text of the Constitution; thus, he proposed that a declaration recognizing popular sovereignty should be prefixed to the Constitution and that other substantive changes—which in part would later become the Bill of Rights—should be made through adding text into specific articles and sections of the original Constitution.<sup>39</sup> Madison’s proposal was, however, not the only proposal that was on the table. Amendment proposals made by the state conventions were rather undecided as to the question of the amendment technique. The proposals made by Massachusetts,<sup>40</sup> New Hampshire,<sup>41</sup> and Virginia<sup>42</sup> encompassed only substantive changes without further specifying how these proposals should become part of the Constitution. The proposals of South Carolina and New York basically followed this same approach, yet they show that the legislatures of these states thought it legitimate to make changes to the original text of the Constitution.<sup>43</sup> South Carolina proposed to insert a word in Article VI, Section 3,<sup>44</sup> and New York proposed that the phrase “without the Consent of the Congress” be deleted from Article I, Section 9.<sup>45</sup> Similarly, the House Committee Report suggested making changes directly to the text of the Constitution.<sup>46</sup>

### 1. Sherman v. Madison

The form of the amendments was debated first in the Committee of the Whole on August 13, 1789, and again in the House on August 19, 1789.<sup>47</sup> These debates followed sessions of the House in which the representatives intensely discussed whether it was too early to adopt

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39. See 1 ANNALS OF CONG. 433–36 (1789) (Joseph Gales, Sr. ed., 1834) (recounting Madison’s introduction of proposed Amendments to the Constitution), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 11; see also Madison’s statements in the committee of the whole described in GAZETTE OF THE UNITED STATES (June 10, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 66; 1 ANNALS OF CONG. 424–42 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 84–85.

40. Amendments proposed by the Massachusetts Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 14.

41. Amendments proposed by the New Hampshire Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 16.

42. Amendments proposed by the Virginia Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 17.

43. See AMAR, *supra* note 2, at 458–59.

44. Amendments proposed by the South Carolina Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 16.

45. Amendments proposed by the New York Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 28.

46. HOUSE COMMITTEE REPORT (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 29.

47. CREATING THE BILL OF RIGHTS, *supra* note 1, at 104, 197.

amendments to the Constitution and whether the House, the Committee of the Whole, or a select committee was the appropriate forum to discuss amendments.<sup>48</sup> When the representatives eventually decided to move into the Committee of the Whole,<sup>49</sup> Madison proposed an introductory paragraph that should precede the text of the Constitution.<sup>50</sup> Sherman, who was generally opposed to discussing amendments and a Bill of Rights,<sup>51</sup> immediately objected to the proposal and opted for appending the amendments to the text of the original Constitution:

I believe, [M]r. Chairman, this is not the proper mode of amending the [C]onstitution. We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles; the one contradictory to the other. Its absurdity will be discovered by comparing it with a law: would any legislature endeavor to introduce into a former act a subsequent amendment, and let them stand so connected. When an alteration is made in an act, it is done by way of supplement; the latter act always repealing the former in every specified case of difference.<sup>52</sup>

This started a fierce debate about the right mode of amending the Constitution.<sup>53</sup> Sherman and his supporters argued that Congress had no authority to alter the original document itself, which was made under the authority of the people.<sup>54</sup> Amendments, by contrast, would not derive their authority from the people but from state governments.<sup>55</sup> Under this view, any alteration of the original

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48. See the debate taking place in May and June 1789 described in *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 57–103.

49. 1 *ANNALS OF CONG.* 660–64 (1789) (Joseph Gales, Sr. ed., 1834), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 102–03.

50. *THE DAILY ADVERTISER* (Aug. 14, 1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 104–05.

51. See, e.g., *ANASTAPLO*, *supra* note 7, at 15.

52. 1 *ANNALS OF CONG.* 707 (1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 117.

53. This debate is described by three different commentators: see *THE DAILY ADVERTISER* (Aug. 14, 1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 105–07; *Gazette of the United States* (Aug. 15, 1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, at 107–12; 1 *ANNALS OF CONG.* 703–17 (1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, at 117–28. Since the debate is described most comprehensively in *The Congressional Register*, I will, in the following, primarily refer to this report.

54. 1 *ANNALS OF CONG.* 707 (1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 117.

55. 1 *ANNALS OF CONG.* 707–17 (1789), *reprinted in* *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 117, 125–26.

document would constitute a repeal to which Congress was not authorized.<sup>56</sup> On the contrary, according to Sherman's point of view, Congress could only pass "legislative acts," which therefore should be detached from the Constitution and annexed.<sup>57</sup> The amendments, therefore, should be kept clearly distinguishable from the original text so that "by a comparison, the world would discover the perfection of the original and the superfluity of the amendments."<sup>58</sup> Furthermore, alterations of the document would render the signatures of those who signed the document false and would obscure the fact that the Founders had only signed the original Constitution.<sup>59</sup> Inserting amendments in the body of a law was unprecedented, and universal usage was to alter legal documents by supplementary acts.<sup>60</sup> The Magna Carta, for example, had never been altered but only supplemented by other documents.<sup>61</sup>

Madison and his supporters, on the other hand, highlighted that the simplicity of the Constitution would be destroyed through supplementary amendments; incorporating the amendments would guarantee that the Constitution would remain "uniform and entire."<sup>62</sup> Through supplementary amendments, the Constitution could, in time, become too complex and obscure and thereby inaccessible to the people.<sup>63</sup> Or, as Congressman John Vining described, the Constitution could, "like a careless written letter, have more matter attached to it in a postscript than was contained in the original composition."<sup>64</sup> Additionally, the supplementary method could lead to incoherencies in situations when a clause in the original Constitution would be inconsistent with an amendment.<sup>65</sup> Incorporating amendments would also avoid distorting the question of authority: the people themselves, through the state conventions, had expressed their wish for amendments.<sup>66</sup> Sherman's proposal was problematic for supporters of incorporated amendments because it assumed that amendments were inferior to the original Constitution; such a proposition would defeat

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56. *Id.* at 124.

57. THE DAILY ADVERTISER (Aug. 14, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 105.

58. 1 ANNALS OF CONG. 707-17 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 120.

59. *Id.* at 120.

60. *Id.* at 119, 125.

61. *Id.* at 125.

62. *Id.* at 118.

63. *Id.* at 122, 123-24.

64. *Id.* at 120.

65. THE DAILY ADVERTISER (Aug. 14, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 106.

66. *Id.*

the purpose of the amendments.<sup>67</sup> In addition, some supporters referred to the text of Article V of the Constitution, which states that the amendments should become *part* of the Constitution.<sup>68</sup> Therein, they saw a decision of the Constitution in favor of incorporating amendments.<sup>69</sup>

At the end of the debate, the Committee of the Whole voted in favor of Madison's approach and decided that amendments should be integrated in the text of the Constitution.<sup>70</sup> In the following days, the substance of the proposed amendments was debated in detail. On August 19, 1789, however, Sherman repeated his motion for adding the amendments rather than integrating them in the text of the original Constitution.<sup>71</sup> This time his motion—which was proposed to the House and not to the Committee of the Whole—passed.<sup>72</sup> The Congressional Register only reports that a debate similar to the one on August 13, 1789, took place but does not further describe its content or offer any insights into why the House at this time decided against Madison and in favor of Sherman.<sup>73</sup> The Senate, whose deliberations were secret and are not reported, did not change this decision.

The most convincing explanation for the change of mind in the House of Representatives lies in the increasingly tense atmosphere that characterized the debates in the House and that even lead to congressmen challenging each other to duels.<sup>74</sup> Against this background, and against the background of some of the congressmen generally opposing the adoption of amendments, the decision in favor of Sherman has to be seen as a concession of Madison toward his opponents.<sup>75</sup> Although Madison was strongly in favor of the interweaving method as more than a mere preference of form, he had already signaled to Sherman that he was willing to compromise on this point.<sup>76</sup> This reading is supported by a letter from James Madison to Alexander White:

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67. 1 ANNALS OF CONG. 707–17 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 122, 127.

68. U.S. CONST. art. V.

69. 1 ANNALS OF CONG. 707–17 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 118, 121–22.

70. *Id.* at 128.

71. 1 ANNALS OF CONG. 766 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 197.

72. *Id.* at 197–98.

73. *Id.* at 198.

74. *See* Hartnett, *supra* note 8, at 256–58; CREATING THE BILL OF RIGHTS, *supra* note 1, at xv.

75. *See* Marshall, *supra* note 8, at 110–12.

76. 1 ANNALS OF CONG. 707–17 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 118.

The substance of the report of the Committee of eleven has not been much varied. It became an unavoidable sacrifice to a few who knew their concurrence to be necessary, to the despatch [sic] if not the success of the business, to give up the form by which the amendts. [sic] when ratified would have fallen into the body of the Constitution, in favor of the project of adding them by way of appendix to it.<sup>77</sup>

Thus, it appears clear that Madison gave up his preferred form of amending in order to save the substance of the Bill of Rights, to facilitate its adoption by Congress, and to improve its prospects for success.

## 2. *Assessment of the debate*

It would be easy to treat the debate between Madison and Sherman as any other political debate and to simply declare that Sherman won—be it due to having the better arguments or due to the political circumstances that led Madison to give in. However, a closer examination of the arguments that Sherman and his supporters brought forward reveals that they were informed by misconceptions about the nature of the Constitution and of constitutional law. Moreover, from the perspective of the twenty-first century, their goals in pursuing appended amendments rather than incorporated ones have not been achieved.

*a. Heterogeneity.* The first argument against interweaving the amendments was the heterogeneity of the articles that would be destructive “of the whole fabric” of the Constitution. This argument is difficult to evaluate from the outset. The original Constitution encompasses a variety of very heterogeneous provisions dealing with a broad variety of issues. The main theme is of course the structure of the new national government as well as the relationship to the states. However, even within this homogeneous matter, the original Constitution contains procedural as well as substantive regulations, text of different degrees of generality, and dissimilar provisions standing side-by-side, such as: the entrenchment of slave trade,<sup>78</sup> the state of the Union address,<sup>79</sup> and the right to trial by jury.<sup>80</sup> Against

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77. Letter from James Madison to Alexander White (Aug. 24, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 287.

78. U.S. CONST. art. I, § 9, cl. 1.

79. *Id.* art. II, § 3.

80. *Id.* art. III, § 2, cl. 3.

this background, it is hard to see how the proposed amendments would qualitatively change the homogeneity of the Constitution. As individual rights and limits on the powers of the national government, they fit in neatly with the original document, a document that as Madison and Hamilton emphasized, was designed by the very structure of the government it establishes as a guarantee of individual rights.<sup>81</sup> Even if one agrees with Sherman's perception of the heterogeneity of the amendments, it would seem even more convincing to integrate them into the text of the original Constitution in order to clarify their relationship with the original text.

*b. Unprecedented nature.* Another argument brought against interweaving the amendments into the text was that such a technique would be unprecedented. Sherman referred to the general process of lawmaking, in which a subsequent act would not alter the text of the original act but be added as a supplement, specifying which parts of the original act it repeals.<sup>82</sup> James Jackson from Georgia added the example of the British Constitution in which the Magna Carta would not be altered by an amendment.<sup>83</sup> The reference to the precedential value of British constitutionalism is, however, not very convincing. The creation of the American Constitution undoubtedly relied heavily on the British tradition and incorporated numerous constitutional elements, such as the habeas corpus provisions<sup>84</sup> and the right to trial.<sup>85</sup> At the same time, the Constitution incorporates numerous elements that decisively depart from the British model and in fact constitute an explicit repudiation of the governmental regime of the former colonial power. The form of the Constitution in particular constitutes a significant break with the tradition of British constitutionalism. Unlike the unwritten British Constitution, Americans chose to codify the basic rules and principles of their government in a comprehensive and holistic, single, written document.<sup>86</sup> Since the British Constitution does not have an explicit mechanism for amendment, it is hardly convincing to derive conclusions about the technique of constitutional amendment from the British example.

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81. See THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 84, at 581 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

82. 1 ANNALS OF CONG. 707 (1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 1, at 117.

83. *Id.* at 125.

84. U.S. CONST. art. I, § 9, cl. 2.

85. *Id.* art. III, § 2, cl. 3.

86. On the nature of the British Constitution as a mainly unwritten document and on the processes in which the British Constitution may be changed, see, e.g., BARNETT, *supra* note 14, at 8-10.

The reference to the general tradition of lawmaking is more convincing. It would seem natural for the constitution makers to imitate this example and to make “alterations” to the original document by way of supplementary amendments. However, there are some important differences between the Constitution and acts of ordinary lawmaking that cast doubts on this analogy. Unlike legislative statutes, the Constitution provides for the possibility of its own amendment.<sup>87</sup> While statutes can be repealed and replaced at the will of the legislature, the Constitution contains a special amendment procedure, the task of which is to ensure that the people do not have to replace the whole Constitution every time they want to change parts of it. There are two ways in which the people can express their will: through giving themselves a new constitution or through changing the existing Constitution through amendments.<sup>88</sup> Unlike a statute which can be repealed and replaced by the legislature at will, the Constitution is designated to be the foundational document of the Union government. This difference limits the immediate transferability of the model of changing statutes to the constitutional amendment process.

An inquiry into constitutional history further casts into doubt the presumption of Sherman and his supporters as to the impossibility and inappropriateness of interweaving amendments into the text of the original Constitution. Already under the Articles of Confederation, amendments had been proposed in a way that would have altered the text of the Articles.<sup>89</sup> With regard to the adoption of a Bill of Rights as a supplement to the Constitution, the amendment proposals brought forward by the state conventions show that altering the text of the Constitution was not as unthinkable as Sherman portrayed it. The proposals of South Carolina and New York encompassed explicit changes to the text of the original Constitution.<sup>90</sup> There are no indications that either of the two state conventions regarded this technique as problematic. The same is true for Madison’s proposal. While the congressmen at the First Congress could not foresee the subsequent development, an examination of the practice of the state constitutions<sup>91</sup> shows that the interweaving model is not as far-fetched

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87. See U.S. CONST. art. V.

88. As to the exclusiveness of the Article V amendment procedure, see references, *supra* notes 4 and 5.

89. See 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 1836).

90. Amendments proposed by the South Carolina Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 16; Amendments proposed by the New York Convention (1788), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 28.

91. Observations about the state constitutions in the following and throughout this paper

as Sherman believed. Of the fifty state constitutions which are currently in force, only the 1901 constitution of Alabama,<sup>92</sup> the 1872 constitution of West Virginia,<sup>93</sup> and the Massachusetts Constitution of 1780,<sup>94</sup> follow the example of the federal Constitution and add amendments to the text in supplementary form.<sup>95</sup> All other state constitutions—many of which date back to the eighteenth or nineteenth century—allow for alterations of and additions to the original text.<sup>96</sup> This background seriously challenges Sherman’s assumption with regard to the extraordinary character of Madison’s interweaving proposal.

*c. Sources of authority.* Turning to more substantive opposition against interweaving amendments into the text, Sherman argued that the Constitution and the amendments derived their authority from two different sources and should therefore not be intermingled. This argument touches upon the allegedly different nature of constitution making and constitutional amendment. According to Sherman, the former is an act of the people “at large,” whereas the latter, is only an act of the state governments.<sup>97</sup> According to Sherman, the people had authorized Congress only to make amendments, not to repeal the Constitution.<sup>98</sup> Thus, Sherman would have perhaps referred to the pivotal distinction in constitutional theory between the power that creates the constitution (*pouvoir constituant*) and the power that is created by and exercises powers derived from the constitution (*pouvoir constitué*). Sherman’s assumption that the Constitution and the amendments stem from two different sources of authority, however, has to be criticized on the basis of constitutional practice and theory as well as with regard to its internal coherence.

First, the Constitution came into force as the result of a proposal

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are based on an examination of the fifty constitutions as they are presented on the official websites of the state legislatures.

92. ALA. CONST. (1901).

93. W. VA. CONST. (1872).

94. MASS. CONST. (1780).

95. Furthermore, the constitutions of Alabama and Massachusetts differ from the federal model. They add amendments to the original text in a manner resembling the federal Constitution. Unlike the amendments of the federal Constitution, however, amendments under the Alabama and Massachusetts constitutions can add text to or annul parts of the original constitutions. The only instance in which the federal Constitution resembles this process is the Twenty-First Amendment which explicitly repeals the Eighteenth Amendment.

96. *See, e.g.*, N.Y. CONST. (1938). The New York Constitution has been modified numerous times since it entered into force, and it indicates after each article and section when a certain provision had been altered by a constitutional amendment.

97. 1 ANNALS OF CONG. 704 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 117, 125–26.

98. *Id.*



by the Philadelphia Convention and the subsequent ratification by conventions of at least nine states.<sup>99</sup> It has been pointed out that, although the ratification did not occur through statewide referenda, the participation of the people through the ratifying state conventions was significantly more democratic than any process of constitution making known before.<sup>100</sup> In contrast, amendments are regularly proposed by Congress and ratified by state legislatures. Apart from the fact that Article V also encompasses at least the theoretical possibility of ratification by state conventions,<sup>101</sup> the confrontation of “the people” ratifying the Constitution as opposed to state legislatures ratifying the amendments is too simplistic. The relationship between the people as the bearer of popular sovereignty and state institutions as representatives of the people is one of the most complex subjects of democratic theory. Popular sovereignty is the main theme of American constitutionalism, and it is among the pivotal achievements of the American Founding. It is fair to say that the Constitution is regarded as a foundational document establishing the government, and not as the result of a bargaining process between the governed and the governing. If one conceives of the American Constitution as a contract,<sup>102</sup> it is a contract between the individuals and not between the people and the governing entities;<sup>103</sup> however, “the people” as an entity are in need of modes of representation. Just as conventions are a form of representation of the people,<sup>104</sup> Congress and the state legislatures are a different form of representation. One might argue that state conventions are more democratic than Congress and state legislatures, and that the former therefore represents the people more accurately than the latter. This does not make the former an embodiment of the people and the latter only a representative. Borrowing the terminology employed by Bruce Ackerman: representation of the people is never *mimetic* representation in which the representative entity is to be equated with the people, but is only *symbolic* representation, embracing the awareness that the

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99. U.S. CONST. art. VII.

100. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5 (1980); AMAR, *supra* note 2, at 7.

101. According to Article V, Congress can choose whether ratification shall occur through the state legislatures or through state conventions. *See* U.S. CONST. art V.

102. Madison himself refers to the concept of a “social compact.” THE FEDERALIST NO. 44, at 301 (James Madison) (Jacob E. Cooke ed., 1961).

103. *See* CHRISTIAN WINTERHOFF, *VERFASSUNG – VERFASSUNGGEBUG – VERFASSUNGSÄNDERUNG* 17–19 (2007).

104. *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 306–343 (1969) (discussing the concept of conventions as representative assemblies outside of the institutionalized framework of regularly constituted authorities); *see also* ACKERMAN, *supra* note 5, at 174–75 (arguing that the convention could speak for the people with “*greater* political legitimacy” than any existing political institution).

representative body is not the same as the entity it is supposed to represent but only a representative in a symbolic way.<sup>105</sup> The original Constitution, as well as the amendments to the Constitution, are therefore creations of representatives of the people, and both derive their ultimate legitimacy from the people as the bearer of popular sovereignty.

Furthermore, while it might be true that at the end of the eighteenth century the state conventions were more democratic than the state legislatures, this argument loses its force with regard to subsequent amendments. The Reconstruction Amendments as well as most of the amendments of the twentieth century have led to an extension of voting rights to groups that were previously excluded from the political process: blacks, women, and eighteen-year-olds.<sup>106</sup> Similar developments took place on the state level. An amendment that entered into force in the twentieth century or that will be decided upon in the twenty-first century thereby derives its legitimacy from a Congress and from state legislatures, which more accurately and comprehensively represent the people than any other political institution at any point in time before.

Second, and turning to the realm of constitutional theory, Sherman implies that the amendments possess an inferior degree of authority than the original Constitution.<sup>107</sup> As a matter of constitutional theory, the authority to make the constitution lies with the *pouvoir constituant*, and the authority to change the constitution is vested in the *pouvoir constitué*.<sup>108</sup> Whereas the act of constitution making constitutes a genuine act of popular sovereignty, amendments to the constitution derive their authority from the constitution itself and are therefore, a legal act by an already constituted political power. While this differentiation is essential in terms of constitutional theory, it does not entail a lower degree of legal or political authority of the amendments. At first sight, one might be tempted to argue in favor of a lower authority of constitutional amendments in light of the farther reaching powers of the *pouvoir constituant* in comparison to the *pouvoir constitué*. While the former is legally unrestricted in exercising its powers of constitution making,<sup>109</sup> the latter may exercise its

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105. See ACKERMAN, *supra* note 5, at 179–86.

106. See ELY, *supra* note 100, at 98–99.

107. 1 ANNALS OF CONG. 707–17 (1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 1, at 117, 125–26.

108. This distinction was famously pronounced by EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? (1964).

109. With regard to contemporary processes of constitution making, it may, however, not be neglected that international law increasingly posits external legal influences on the constitution making process. See, e.g., Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir*

amendment powers only within the procedures laid out by the Constitution. The amendment powers can also be substantially restricted by entrenched constitutional provisions that are kept from the disposal of the amendment power. Under the U.S. Constitution, the equal representation of the states within the Senate is not amendable without the consent of every state, and, until 1808, the slave trade clauses<sup>110</sup> were exempted from the amendment process.<sup>111</sup> In the process of constitution making, the people as the *pouvoir constituant* arguably are not subject to restrictions of this kind. However, this difference in authority of the *pouvoir constituant* and the *pouvoir constitué* does not entail a different authority of the original Constitution and subsequent amendments. It does not endow the original Constitution with a higher degree of normative force than the amendments. The different degree of authority of the *pouvoir constituant* and the *pouvoir constitué* applies to the original Constitution and to the amendments in the same way: both are at the disposition of the *pouvoir constituant*. As a matter of constitutional theory, the people, at any point in time, have the power and capacity to repeal the Constitution—the original Constitution and the amendments alike—and to engage in an act of genuine constitution making. Constitutional theory thereby does not imply a different degree of authority between the original text of the Constitution and the amendments.

This conclusion is furthermore supported by the text of the Constitution. According to Article V, amendments “shall be valid to all Intents and Purposes, as part of this Constitution.”<sup>112</sup> As a matter of legal authority, the Constitution explicitly stipulates the equal status of original Constitution and subsequent amendments. Original Constitution and constitutional amendments are evenly part of the “supreme Law of the Land.”<sup>113</sup> If the people express their will through the act of constitution making, the U.S. Constitution exposes the explicit will of the people that the amendments shall have the same force and authority as the original Constitution.

Third, and finally, Sherman’s assumption that Congress has the authority to amend but not to repeal the Constitution is not maintainable in its generality. While Congress could not repeal the Constitution as a whole, the amendment procedure allows Congress to

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*Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B. U.N. L. 423 (2006).

110. U.S. CONST. art. I, § 9, cl. 1 and cl. 4.

111. *Id.* art. V.

112. *Id.*

113. *Id.* art. VI, § 2, cl. 2.

substantively repeal almost all parts of the Constitution. Under the current Constitution, only the equal suffrage of each state in the Senate is immune from amendment, unless every state consents.<sup>114</sup> The amendments, even though they are added to the original Constitution and do not alter the text, substantively repeal parts of the original Constitution. The Bill of Rights limits Congress's power to legislate, thereby altering its powers under Article I.<sup>115</sup> Section 2 of the Fourteenth Amendment does not alter the text of the original Constitution, but it substantively repeals parts of Article I, Section 2, Clause 3.<sup>116</sup> The first section of the Seventeenth Amendment, which stipulates that the Senators shall be elected by the people of the state, repeals Article I, Section 3, Clause 1. The Twelfth, Twentieth and Twenty-Fifth Amendments repeal and modify the procedure of Presidential election and the President's term of office in Article II, Section 1. Congress's power to amend the Constitution is not limited to adding provisions but encompasses altering and repealing provisions of the original Constitution.<sup>117</sup>

*d. The need to distinguish.* Finally, the proponents of the supplementary approach highlighted the need to maintain a clear distinction between the text of the original Constitution and the amendments. They wanted future generations to be able to compare the original text with the amendments and thereby discover the "superfluity" of the amendments.<sup>118</sup> They deemed it improper to interweave subsequent amendments into a text that was signed by the Founding Fathers.<sup>119</sup> The latter objection is without merit. As New York Congressman Egbert Benson rightly pointed out, Madison's approach would not have led to an actual change of the original Constitution, which would remain untouched in the archives of the United States.<sup>120</sup> It would at any time be visible—or at least traceable

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114. *Id.* art. V. On the question of natural rights limitations of the amendment process, see Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L. J. 1073, 1084–89 (1991).

115. U.S. CONST. art. I.

116. *Id.*

117. The same thought is expressed by Massachusetts Congressman Elbridge Gerry. See 1 ANNALS OF CONG. 712 (1789) (Joseph Gales, Sr. ed., 1834), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 122 ("It is said, if the amendments are incorporated it will be a virtual repeal of the Constitution. I say the effect will be the same in a supplementary way, consequently the objection goes for nothing, or it goes against making any amendments whatever.").

118. 1 ANNALS OF CONG. 707–17 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 120.

119. *Id.* at 120.

120. 1 ANNALS OF CONG. 713 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 123.

through a view into the records of Congress—which formulations were part of the original text and which alterations were made at which point in time. Contemporary copies of the Constitution in effect could highlight, for example through footnotes or an accompanying explanatory commentary, how and when the text had been changed. The Founding Fathers signed the Constitution with the text of Article V in it. They were undoubtedly aware of the possibility of subsequent alterations to the text and reasonably expected such alterations to occur.

The assumption that amendments should be clearly distinguishable from the original Constitution in order to prove the “superfluity” of the amendments indicates that Sherman and his supporters did not only care about the “right” way to make amendments in terms of juridical handcraft. Their proposal was primarily motivated by their opposition against including a Bill of Rights in the Constitution, as Philadelphia Congressman George Clymer’s remark with regard to the superfluity of the amendments clearly shows.<sup>121</sup> More than 200 years of constitutional developments have proven Sherman and his supporters wrong and placed the Bill of Rights—especially in correlation with the subsequent Reconstruction Amendments—at the top of the contemporary constitutional canon. The role the supplementary form of the amendments might have played in the track record of the Bill of Rights will be examined in Part III.

### *C. The Connection Between Substance and Form of the First Amendments*

Another aspect that might have influenced the outcome of the debate between Madison and Sherman is the content of the actual amendments that were debated at the First Congress. Among the main purposes of the Congress was the formulation of fundamental rights against encroachment by the federal government. To be sure, other provisions were also discussed at the First Congress, and the twelve amendments to the Constitution that were eventually adopted by Congress on September 28, 1789, included not only the Bill of Rights but also two provisions on the ratio of representation in the House of Representatives and on the compensation of the members of Congress respectively.<sup>122</sup> However, at the center of the debates were the

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121. 1 ANNALS OF CONG. 710 (1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 120.

122. Amendments to the Constitution art. I and II (Sep. 28, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 3. Both Amendments initially failed to achieve the required number of ratifications by the state legislatures, therefore turning Articles III to XII of

individual rights now guaranteed in the Bill of Rights.

This substance matter of the proposed amendments might have played into the hands of Sherman and his supporters. Even though the Bill of Rights has been characterized as “more episodic and thus less obviously coherent in character” than the text of the 1789 Constitution,<sup>123</sup> the ten amendments—with the exception of the Tenth Amendment— were understood as embracing the same idea and thereby building a unity.<sup>124</sup> It was therefore easily conceivable that the amendments could be annexed to the Constitution, with the Constitution and the Bill of Rights as two separate but connected texts. Although the reports of the First Congress do not encompass any hints in this direction, the Congressmen could even resort to a precedent for such a technique: in 1776 the state of Virginia adopted a Bill of Rights<sup>125</sup> and, in a separate document, a constitution.<sup>126</sup> Going back in time even further, Congress could draw upon the constitutional history of Britain in which the Magna Carta of 1215, the Petition of Right of 1628, the 1679 Habeas Corpus Act, and the Bill of Rights of 1689 provided numerous examples of individual rights guarantees united in a single document.<sup>127</sup>

The Bill of Rights was therefore a thankful candidate to be added to the Constitution in the form of an annex. It contained a certain degree of coherence and unity. Congress could rely on precedents of similarly designed rights declarations. Although the Bill of Rights affects the original Constitution, it does not explicitly change any provision of the original text.<sup>128</sup> While the first ten amendments could have been interwoven into the text—as Madison’s proposal shows<sup>129</sup>— it did not seem as necessary and natural as it would have seemed, had

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Congress’s Amendments into the Bill of Rights that became the first ten amendments to the U.S. Constitution. The second of the two initially proposed articles has been ratified in 1992 and is now in force as the Twenty-Seventh Amendment. See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497 (1992).

123. ANASTAPLO, *supra* note 7, at 34.

124. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132 (1991).

125. VA. BILL OF RIGHTS (1776), reprinted in 2 *THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1908.

126. VA. CONST. (1776), reprinted in 2 *THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1910.

127. See ANASTAPLO, *supra* note 7, at 22–28.

128. See Robert A. Goldwin, *Congressman Madison Proposes Amendments to the Constitution*, reprinted in *THE FRAMERS AND FUNDAMENTAL RIGHTS* 57, 62 (Robert A. Licht ed., 1991) (“All of the ratified articles were additions, not amendments.”).

129. See 1 *ANNALS OF CONG.* 433–36 (1789) (Joseph Gales, Sr., ed. 1834) (recounting Madison’s introduction of proposed Amendments to the Constitution), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 11; see also Hartnett, *supra* note 8, at 258–64.

the First Congress discussed amendments which would have required an explicit repeal or alteration of the original Constitution. Had the First Congress, for example, discussed a change to the election process of the Senate, which—as the Seventeenth Amendment does now—demanded a change of Article I, Section 3, Clause 1, it would have been more obvious to alter the provision in the article of the original Constitution than to formulate such a change in a supplementary amendment. When the New Jersey legislature in 1777 decided to amend the New Jersey Constitution of 1776 by substituting the word “State” for “colony,”<sup>130</sup> it probably seemed natural to the representatives to alter the term throughout the document instead of formulating a single amendment stating that henceforth the term “colony” should be read as “state.” Had the First Congress been faced with a similar change to the Constitution, it might have intuitively followed the New Jersey example.

#### *D. Practical Problems*

From the perspective of the twenty-first century, the amendment of a legal document does not pose significant challenges with regard to the practical and technological implementation. Legal texts are officially published and reliably distributed. It is seldom problematic to identify the law currently in force. Online publications furthermore facilitate this process. By contrast, at the end of the eighteenth century, practical obstacles in the amendment of a legal text might have played a more dominant role. If amendments were integrated into the text of the Constitution, every amendment would have required the publication of a completely new text. Not only the higher costs of this manner of production might have played a role, but also the fear of numerous different versions of the Constitution circulating with the difficulty of identifying the currently valid version. If the text of the original Constitution was not changed, the already circulating versions of the Constitution would remain valid. Only the newly established amendments would have needed to be published and circulated.

#### *E. Conclusion*

The decision of the First Congress to add amendments to the original text of the Constitution instead of integrating them into the text has been influenced by a variety of factors. A lack of precedents

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130. 2 THE FEDERAL AND STATE CONSTITUTIONS, Colonial Charters, *supra* note 20, at 1310.

allowed Congress to freely debate the amendment technique. The debate between Madison and Sherman reveals that the proponents of the supplementary form did not only have the less persuasive arguments but were also misinformed as to the nature of the Constitution and the significance of the Bill of Rights. Turning more to the realm of speculation, the substance of the amendments discussed by the First Congress, as well as practical concerns about the implementation of Madison's approach, might have also facilitated support for Sherman's proposal. In conclusion, the decision of the First Congress to add amendments to the Constitution in a supplementary form seems, to a certain degree, arbitrary. It was not only misinformed, but its decision was the result of a political bargain between proponents and opponents of the Bill of Rights, with the latter trying to diminish the meaning of the amendments. The opponents were motivated by their opposition against the Bill of Rights and also by their concern with and respect for the original Constitution.<sup>131</sup> With these peculiarities of the amendment technique in mind, we can now turn to the question of whether and how the decision in favor of Sherman's approach has influenced subsequent constitutional developments.

### III. CONSTITUTIONAL DESIGN AND CONSTITUTIONAL DEVELOPMENT

The somewhat arbitrary nature of the decision in favor of appending amendments to the Constitution rather than integrating them could be disregarded as a neat peculiarity of constitutional history if it was simply a question of form. Yet, as Madison rightly pointed out in 1789, "on this occasion . . . form is of some consequence."<sup>132</sup> Similarly, his opponent Sherman insisted that they were not only debating a question of form.<sup>133</sup> But what exactly are the consequences of the form that was chosen by the First Congress? In the following, I will examine the impact of the supplementary mode of constitutional amendment (A) on the practice of constitutional amendment, (B) on the symbolic nature of the Constitution, and (C) on the character of the Bill of Rights. Eventually, I will analyze (D) whether the amendment technique has any significance for the interpretation of the amendments and (E) for our understanding of the significant turning points of constitutional history.

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131. See Marshall, *supra* note 8, at 101.

132. 1 ANNALS OF CONG. 708 (1789) (Joseph Gales, Sr. ed., 1834), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 118.

133. *Id.* at 715.



*A. Probability and Significance of Constitutional Amendments*

As pointed out in the Introduction, constitutional amendments play an important role in American constitutional law. However, this is only half the truth considering the remarkably small number of successful amendments. While the Bill of Rights and the Reconstruction Amendments constitute major constitutional achievements of the eighteenth and nineteenth century, other major events and developments of constitutional dimension have not been formally translated into constitutional amendments. During the radical changes encompassed by the New Deal Revolution, proposals for amendments did not play a significant role.<sup>134</sup> The Civil Rights Revolution of the 1960s did not culminate into a formal change of the Constitution.<sup>135</sup> The Equal Rights Amendment was proposed by Congress but did not achieve the required ratification by three-fourths of the states.<sup>136</sup> In the current debate about same-sex marriage, constitutional amendments mainly play a role as constitutional bans on same-sex marriage, as they exist in numerous state constitutions and were proposed on the national level through the Federal Marriage Amendment.<sup>137</sup>

The shrinking significance of formal amendments to the Constitution has led constitutional scholars and practitioners to search for alternative ways of transforming social change into constitutional law. Bruce Ackerman, most famously argues for the recognition of the New Deal and the Civil Rights Revolution as constitutional moments on equal footing with the Founding and Reconstruction.<sup>138</sup> As a consequence, Ackerman argues that the constitutional canon should be expanded to encompass not only the written text of the Constitution but also landmark cases, such as *Brown v. Board of Education*,<sup>139</sup> and superstatutes, such as the Civil Rights Act of 1968.<sup>140</sup> Reva Siegel highlights how even the failed Equal Rights Amendment has influenced the Supreme Court's jurisprudence under the Fourteenth

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134. See ACKERMAN, *supra* note 3, at 312-44.

135. However, the Twenty-Third to Twenty-Sixth Amendments, enacted between 1961 and 1971, expanded the scope of voting rights and aimed at precluding restrictions on the right to vote. U.S. CONST. amends. XXIII-XXVI.

136. The proposed Equal Rights Amendment reads as follows: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section. 3. This amendment shall take effect two years after the date of ratification." 86 Stat. 1523 (1972).

137. H.R.J. Res. 56, 108th Cong. (2003).

138. ACKERMAN, *supra* note 5, at 58-80; Ackerman counterplea, *supra* note 3, at 1737.

139. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

140. Pub. L. No. 90-284, 82 Stat. 73 (1968).

Amendment, taking into account the role of social movements in influencing constitutional interpretation.<sup>141</sup> At the beginning of the twenty-first century, social and political movements try to bring about constitutional change through strategic court appointees and changes in the interpretation of the Constitution. The formal amendment process plays only a subordinate role.

The connection between the formal requirements for an amendment and the low number of amendments is obvious. The high watermark of achieving a two-thirds majority in both houses of Congress and ratification by three-fourths of the states<sup>142</sup> has only seldom been achieved. But the supplementary design of the amendments might also have had an influence on the practice and politics of constitutional amendments. Akhil Amar has pointed out that the supplementary form of the amendments demonstrates the “incompleteness” of the Constitution and shows the American Constitution as a “work in progress.”<sup>143</sup> The “vast creative white space at the bottom” of the document thereby signals room for further amendments.<sup>144</sup> This theoretically compelling understanding of the amendment design is, however, rather harshly contrasted by the reality of the very low number of successful amendments. While the amendment design is certainly not among the most significant factors explaining the low-key use of the amendment mechanism, it might nevertheless have contributed to it. Constitutions that do not follow the American model, but allow for alterations of the text itself, experience amendments of different importance. While some amendments entail significant substantial changes in constitutional law, other changes are of a more cosmetic nature or have a clarifying meaning.<sup>145</sup> In federal systems, constitutions regularly encompass catalogues of competences that are vested in either the federal or the state level.<sup>146</sup> Constitutional orders that allow for alterations of the text enable the political actors to more easily shift competences between the different federal levels.<sup>147</sup> Under the U.S. Constitution, by contrast, such clarifying

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141. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

142. U.S. CONST. art. V.

143. AMAR, *supra* note 2, at 460.

144. *Id.*

145. Under the German Constitution of 1949 (“German Basic Law”), for example, Article I § 3 stipulates that the basic rights guaranteed by the Constitution shall bind the legislature, the executive and the judiciary as directly applicable law. In its original version the article limited the executive to the administration (*Verwaltung*). In 1956 a constitutional amendment changed the text to the broader term “executive power” (*vollziehende Gewalt*).

146. See, e.g., Articles 73, 74, and 75 of the German Basic Law, granting legislative powers to the federal level (*Bund*) and to the states (*Länder*).

147. In 2006, for example, the German Basic Law was reorganized with regard to the

changes and alterations in specific powers are more difficult. While the Sixteenth Amendment<sup>148</sup> arguably had a clarifying function with regard to Article I, Section 9, Paragraph 4,<sup>149</sup> no amendment has touched upon the competences of Congress under Article I, Section 8. This is even more remarkable considering that the distribution of powers between the federal and the state level is among the most controversial topics of American constitutional law. But no amendment aims at clarifying the term “Commerce” in Article I, Section 8, Clause 3 of the Constitution or the contentious scope of the enforcement power under Section 5 of the Fourteenth Amendment. This is, of course, mainly due to the fact that it is difficult to achieve the necessary political consensus required by Article V of the Constitution. But as a complementary factor, it seems more difficult to incorporate such changes in an isolated amendment than it would be to propose an alteration of the text. It would have been relatively easy to add the words “and to print paper money” to the power of Congress to coin money under Article I, Section 8, Clause 5; but as a separate amendment clarifying that Congress’s power to coin money includes the issuance of paper money seems more difficult to achieve politically. Opponents might argue that it would be inappropriate to “waste” a whole amendment on such an issue.

Whether the supplementary form of the amendments actually had such a decelerating effect on the practice of constitutional amendments is hard to examine empirically. Numerous factors contribute to the limited practical importance of the Article V procedure; among them, are the high requirements for constitutional amendments and the political landscape that is dominated by two ideologically dichotomic political parties. In this light, a comparison with the constitutions of other countries would not be conclusive. The comparably limited number of successful amendments is primarily due to the fact that the U.S. Constitution is among the constitutions with the most difficult amendment procedure.<sup>150</sup> And even an examination of the state constitutions is not very insightful and does not reveal a connection between the mode of amendment and the number of successful amendments. Currently, only the state constitutions of Alabama, West

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allocation of legislative competences between the *Bund* and the *Länder*, see Gesetz zur Änderung des Grundgesetzes (Act Amending the Basic Law), Aug. 28, 2006, BGBl. I at 2034 (F.R.G.).

148. U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

149. *Id.* art. I, § 9, cl. 4. (“No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

150. See, e.g., Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AMERICAN POL. SCI. REV. 355, 362 (1994).

Virginia, and Massachusetts follow the model of the federal Constitution.<sup>151</sup> Taking into account the duration of the constitutions, West Virginia and Massachusetts are among the state constitutions that have been amended the least.<sup>152</sup> Alabama, on the other hand, is the state constitution with the highest rate of amendments. As of today, 827 amendments have been added to the original 1901 Constitution of Alabama—18 of which deal with the operation of the game “Bingo” in the different counties of Alabama.<sup>153</sup> The mere fact that a constitution follows the supplementary model therefore does not entail a low number of amendments. However, Alabama might be a bad example for a comparison with the federal Constitution. The Alabama Constitution, even in its original form of 1901, is the longest state constitution. It consists of 287 sections and regulates in great detail matters that, at least from the perspective of the federal Constitution, do not seem to belong to constitutional law substantively. The examples of the state constitutions may in general be of no guidance for understanding the amendment process of the federal Constitution: unlike the federal Constitution, state constitutions are relatively “easy to amend” and they are more often amended.<sup>154</sup>

Nevertheless, the example of Alabama may show why federal legislators may be reluctant to add too many amendments to the federal Constitution. A federal Constitution with several hundred amendments would no longer be a concise document accessible to the people as the Founding Fathers wanted it to be. It would become the “careless written letter” Congressman Vining feared.<sup>155</sup>

### *B. The Symbolic Dimension of the Constitution*

This leads over to the question of the influence of the amendment technique on the symbolic dimension and nature of the Constitution.<sup>156</sup> A constitution is the legal foundation of a national polity. It establishes, legitimates, and limits public power. But beyond its legal significance, a constitution ideally also has a symbolic function and is a document with which the people can identify. In this regard, the supplementary mode of constitutional amendment may be a virtue. It

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151. See *supra* notes 92 to 95 and accompanying text.

152. See the data provided by Lutz, *supra* note 150, at 367.

153. ALA. CONST. (1901).

154. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 676 (2002).

155. 1 ANNALS OF CONG. 710 (1789) (Joseph Gales, Sr. ed., 1834), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 1, at 120.

156. See Marshall, *supra* note 8, at 97 (“The debate over the form of amendments was first a debate over the nature of a constitution.”)

unfolds the historical context of the original Constitution and of the single amendments. Furthermore, it openly acknowledges the imperfectness of the original Constitution and past mistakes of American history.<sup>157</sup> The reader can become aware of the achievements of the Founding moment, of the shortcomings of past generations, as well as of the democratic accomplishments of subsequent decades.

While it is true that the supplementary amendment technique may have this effect, a similar result is regularly achieved by modern constitutions through the preamble. The preamble of a constitution establishes and highlights the historical context and background in which the constitution came into being. Against the background of World War II, the preamble of the 1949 Basic Law for the Federal Republic of Germany, for example, highlights the German people's responsibility before God and man, their determination to promote world peace, and their position as an equal partner in a united Europe.<sup>158</sup> It also encompassed a reference to the separation of Germany into West and East, a reference that was replaced after reunification by a reference to the unity and free self-determination of the German people in 1990.<sup>159</sup> The preamble of the 1996 Constitution of the Republic of South Africa begins with a reference to the injustices of the past, and emphasizes that the Constitution is deemed to "heal the divisions of the past" and "build a united and democratic South Africa."<sup>160</sup> South Africa's history of apartheid is thereby clearly visible in the preamble of its Constitution.

Embedding references to historical background—whether they are positive, as the American Founding or German reunification, or negative, as slavery, the abhorrence of the Second World War, or apartheid—in the preamble, rather than in the operative part of a constitution, may have further advantages. First, it may make the context clearer. While the original U.S. Constitution encompasses substantial references to slavery, it avoids the term slavery. Rather, it contrasts slaves with free Persons and speaks of "all other Persons,"<sup>161</sup> of the "migration or importation of Persons,"<sup>162</sup> or of

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157. AMAR, *supra* note 2, at 460–61; *see also* Hartnett, *supra* note 8, at 264 (highlighting that the virtue of Madison's approach would be to permit the elimination of "noxious provisions").

158. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, pmbL. (23 May 1949).

159. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, pmbL. (as amended on 23 September 1990).

160. S. AFR. CONST., pmbL. (1996).

161. U.S. CONST. art. I, § 2, cl. 3 (amended 1868).

162. *Id.* art. I, § 9, cl. 1. (amended 1913).

“Person[s] held to Service or Labour.”<sup>163</sup> As a result, constitutional scholarship regularly does not focus much on the relationship between slavery and the Constitution. Similarly, the inattentive reader may simply skip these passages without seeing its implications for slavery. The Reconstruction Amendments, of course, employ a much clearer language. However, applying Madison’s approach, a clearer reference to the abolishment of slavery could have been placed at a more pivotal place in the preamble.

Madison’s approach would have had another advantage over the supplementary mode of amending. Substantive parts of today’s Constitution—especially the provisions concerning the Electoral College and suffrage—are scattered all over the Constitution and the amendments, making it difficult to identify the valid constitutional rules. A reader who is not familiar with constitutional law might be deeply confused when, after having read Article II, Section 1, Clause 3, he reaches the Twelfth Amendment. Similarly, if he wants to find out who is eligible to vote, he will have to complement his reading of the first Articles with the Fifteenth, Nineteenth, and Twenty-Sixth, and arguably the Twenty-Fourth Amendments. Having all these provisions bundled together would more immediately give the reader an actual impression of the people’s participation in the political process. In order for the people to identify with their Constitution, it is not only necessary that the document reminds them of their place in history and the achievements of the past, but it is of at least equal importance that the document is accessible and intelligible and can be understood even by readers not familiar with constitutional law.

### *C. The Character of the Bill of Rights*

Constitutional provisions for the protection of individual rights were already proposed during the Philadelphia Convention of 1787, but no comprehensive bill of rights was agreed upon.<sup>164</sup> Opponents argued that the constitutional protection of individual rights was not necessary because the federal government did not have the power to infringe rights in the first place, and substantive differences between the state constitutions prevented consensus with regard to the formulation of rights, for example the right to trial by jury in civil cases.<sup>165</sup> The original Constitution encompasses only some specific individual rights, such as the right to trial by jury in criminal cases,<sup>166</sup>

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163. *Id.* art. IV, § 2, cl. 3. (amended 1865).

164. Kaminski, *supra* note 11, at 889–90.

165. ANASTAPLO, *supra* note 7, at 11–18.

166. U.S. CONST. art. III, § 2, cl. 3.

or the privilege of the writ of habeas corpus.<sup>167</sup> Following the Philadelphia Convention, the lack of a constitutional catalogue of rights proved to be a potential obstacle to the ratification process.<sup>168</sup> As a reaction, Alexander Hamilton argued in *The Federalist No. 84* that many state constitutions also did not contain catalogues of individual rights, and that the Constitution already encompassed numerous rights protections.<sup>169</sup> Rights would only be necessary as safeguards of subjects towards their king. Because the Constitution established a government of the people by the people, such a safeguard was not necessary.<sup>170</sup> The Founders were also skeptical as to the effectiveness of individual rights protections because the declarations of rights encompassed by some state constitutions had not prevented the state legislatures from violating private rights.<sup>171</sup> Finally, adding individual rights might not only be superfluous but also dangerous because it might be understood as stipulating exceptions to powers which are not granted to the national government.<sup>172</sup>

Regardless of Hamilton's remarks, many state conventions ratified the Constitution only with the understanding that a bill of rights would soon be established.<sup>173</sup> Many state conventions even submitted their own proposals. Madison himself had promised his constituency in Virginia to introduce a proposal.<sup>174</sup> Nevertheless, the debate about the desirability of a bill of rights continued in the First Congress.<sup>175</sup> Against this background, Sherman's proposal to add the amendments to the original Constitution in the way of an annex has to be seen as an attempt of the Bill of Rights' opponents to downplay the importance of the amendments. The amendments were not supposed to share the high authority of the original Constitution and should be clearly distinguishable from the latter in order to make their alleged superfluity visible.

Sherman and his supporters succeeded in having the amendments annexed to the Constitution, but their project to undermine the significance of the Bill of Rights failed. Although it was not until the twentieth century that the full potential of the Bill of Rights started to

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167. *Id.* art. I, § 9, cl. 2.

168. See Kaminski, *supra* note 11, at 893–912.

169. THE FEDERALIST NO. 84, *supra* note 81, at 575–78 (Alexander Hamilton).

170. *Id.* at 578–79.

171. See Marshall, *supra* note 8, at 106.

172. THE FEDERALIST NO. 84, *supra* note 81, at 579 (Alexander Hamilton).

173. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 12 (3d ed. 2006).

174. See ANASTAPLO, *supra* note 7, at 36.

175. See Kaminski, *supra* note 11, at 913–20.

unfold, particularly in its application against the states through incorporation by the Fourteenth Amendment,<sup>176</sup> there is no doubt that the amendments enjoy the same normative status as the original Constitution. Moreover, their alleged superfluity in comparison with the original Constitution has yet to be realized.

How has the decision in favor of the supplementary mode of constitutional amendment influenced the development and perception of the Bill of Rights? If Madison had prevailed, most parts of today's Bill of Rights would have been inserted in Article I, Section 9 as limits on Congress and in Article III as safeguards in judicial proceedings.<sup>177</sup> The substance of the first ten amendments would have been kept but they would not have come along in the form of a neat Decalogue. The symbolic dimension that is encompassed by the Bill of Rights in their collectivity would be diminished. The people could not as easily identify with single rights provisions spread across the seven articles of the Constitution as they can with reference to the Bill of Rights, as a more or less comprehensive collection of fundamental rights guarantees.<sup>178</sup>

Having constitutional rights bundled together in the "interconnected package"<sup>179</sup> of ten amendments rather than spread throughout the Constitution should also have eased the development of a coherent general doctrine of fundamental rights. Modern constitutions usually consist of two components: a catalogue of fundamental rights and structural provisions establishing government and distributing competences.<sup>180</sup> While both components are interrelated, the distinction between individual rights and structural provisions is of some significance. The constitutional law of modern states usually encompasses general rules—whether explicit in the Constitution or developed in constitutional doctrine—that apply to all individual rights. These general rules regulate, for example, who is the bearer of the rights, who is bound by those rights, what constitutes

176. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 215–30 (1998).

177. See 1 ANNALS OF CONG. 433–436 (Joseph Gales, Sr., ed., 1834) *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 12–13.

178. See Goldwin, *supra* note 128, at 62 ("If the House of Representatives had gone along with Madison's proposal to insert the new articles in the body of the Constitution, it would have been difficult to think of them collectively as a body to be called the Bill of Rights, or any other collective name."); see also Kenneth R. Bowling, "A Tub to the Whale": *The Adoption of the Bill of Rights*, *reprinted in* THE BILL OF RIGHTS AND THE STATES 46, 53 (Patrick T. Conley & John P. Kaminski eds., 1992); Marshall, *supra* note 8, at 113; AMAR, *supra* note 176, at 291–92.

179. Amar, *supra* note 154, at 694.

180. See, e.g., Alec Stone Sweet, *Constitutions and Judicial Power*, *reprinted in* COMPARATIVE POLITICS 217, 219 (Daniele Caramania ed., 2008).



an infringement, and whether and how such an infringement can be justified.

In American constitutional law, such general terms that would apply to all fundamental rights similarly have only partially developed. Fundamental rights doctrine has evolved independently for each right. For instance, First Amendment doctrine bears only little resemblance to the doctrine of the Fourth Amendment, or of the Fourteenth Amendment's Due Process Clause. However, there are some general rules that apply in a similar way to all fundamental rights guarantees. The state action doctrine generally applies to all fundamental rights, and within the discussion of the appropriate level of judicial scrutiny, constitutional rights are put into relation to each other. The bundling of the rights made these developments easier, thus, laying open the shared nature of the rights embodied in the Bill of Rights.

This coherence of individual rights doctrine is best exhibited in the discussion of whether the Bill of Rights applies to the states. In 1833, when the Supreme Court held in *Barron v. Mayor of Baltimore* that the rights embodied in the amendments apply only to the federal government and not to the states, Chief Justice Marshall did not regard the different wording of the amendments as significant.<sup>181</sup> The First Amendment explicitly applies only to Congress while the Fifth Amendment, which was discussed in *Barron*, does not encompass any such restriction. Nevertheless, Marshall did not have difficulties applying the same standards to all parts of the Bill of Rights alike, limiting their scope of application to actions taken by the federal government.<sup>182</sup> Subsequently, the Supreme Court explicitly and generally held that the Bill of Rights was intended to protect against the federal government and not against the states.<sup>183</sup>

Similarly, when the discussion started of whether the Fourteenth Amendment incorporated fundamental rights guarantees, it was primarily focused on the Bill of Rights as a whole. Congressmen John Bingham and Jacob Howard both expressed the opinion that the Fourteenth Amendment incorporated all the guarantees encompassed by the Bill of Rights,<sup>184</sup> and so did Justice Hugo Black.<sup>185</sup>

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181. *Barron v. Mayor of Balt.* 32 U.S. (7 Pet.) 243, 250 (1833) (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

182. *See id.*

183. *Adamson v. California*, 332 U.S. 46, 51 (1947) *overruled by* *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

184. *See* AMAR, *supra* note 2, at 387–88 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866)).

185. *Adamson*, 332 U.S. at 90 (Black, J., dissenting); *Duncan v. Louisiana* 391 U.S. 145, 162–63 (1968) (Black, J., concurring).

Subsequently, the Supreme Court did not incorporate the Bill of Rights as a whole; rather, it incorporated specific rights encompassed by the first eight amendments.<sup>186</sup> This selective approach is understandable against the background of the case or controversy clause.<sup>187</sup> The broader debate, however, focused on the question of whether the Fourteenth Amendment incorporated the whole Bill of Rights or only some parts of it.<sup>188</sup> The bundling of fundamental rights in the first eight amendments intuitively raises the question why only some and not all parts of the Bill of Rights should be incorporated. It is furthermore remarkable that the incorporation discussion concentrated solely on the Bill of Rights and did not encompass other individual rights guarantees that are spread throughout the seven articles of the original Constitution.<sup>189</sup>

It seems possible, and indeed very likely, that the bundling of rights in the Bill of Rights contributed to forming the debate and directing the focus on the first eight amendments. Had these amendments been interwoven with the original Constitution in the way Madison envisioned, the debate could have gone a different way. The provisions encompassed now by the Bill of Rights would not as easily be regarded as building a normative unity. It would not be as intuitively logical to apply the same standards generally to all of the rights. It would not have been as easy and convincing for proponents of total incorporation to argue that the Fourteenth Amendment incorporated all the guarantees that were adopted at the First Congress. In fact, it would have been more difficult to argue in favor of incorporation at all, had the Fourteenth Amendment been interwoven in the original Constitution.<sup>190</sup>

While the unification of the first ten amendments in the Bill of

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186. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment's guarantee of freedom of speech); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment's right against unreasonable search and seizure); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating the Sixth Amendment's right to a speedy trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating the Fifth Amendment's protection against double jeopardy). For a more comprehensive list, see CHEMERINSKY, *supra* note 173, at 503-504.

187. U.S. CONST. art. III, § 2, cl. 1.

188. See, e.g., CHEMERINSKY, *supra* note 173, at 500-03.

189. In *Torcaso v. Watkins* the Supreme Court held that Maryland's requirement of a declaration of a belief in God for taking public office violated the First and Fourteenth Amendments. Only in a footnote did Justice Black address the question of whether Article VI, § 3 of the U.S. Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," was violated. However, since the Court reversed the judgment on other grounds he found it unnecessary to examine whether this provision also applied to the states. *Torcaso v. Watkins*, 367 U.S. 488, 489 n.1 (1961).

190. See Marshall, *supra* note 8, at 112-13.

Rights might therefore have facilitated at least a certain degree of coherence among the enumerated rights, it might at the same time have contributed to a distortion of the relationship between the original Constitution and the Bill of Rights. As has already been pointed out, the focus on the Bill of Rights has led to a certain neglect of the individual rights enshrined in the original Constitution.<sup>191</sup> The supplementary model of constitutional amendment might also have contributed to an excessively dichotomic understanding of the original Constitution and the Bill of Rights. While the former is deemed to be concerned mainly with structural issues of the establishment and organization of government, the latter is regarded as endowing individuals with rights against encroachment by the majority.<sup>192</sup> This view is not incorrect but it is too simplistic. It tends to overlook that the Bill of Rights is deeply intertwined with structural questions of government and does not only employ minority rights but also, more generally, rights that are supposed to guard society against a government that does not act in the general interest.<sup>193</sup> Sherman's approach to constitutional amendment allowed for the development of an understanding of the Bill of Rights as an inclusive normative system—a constitution besides the Constitution. While this might have strengthened the internal coherence of the application and interpretation of the specific rights, it also contributed to a one-sided and biased approach to the Bill of Rights as being concerned only with—allegedly countermajoritarian—individual rights guarantees.

#### *D. Constitutional Interpretation*

Until now this article has tried to show what impact the decision of the First Congress to attach amendments to the original Constitution supposedly had on subsequent constitutional developments in a broad, conceptual perspective. Turning to more doctrinal issues, the question arises whether the model of amendment had and has an impact on constitutional interpretation. In other words: would the prevailing interpretation of the twenty-seven amendments to the Constitution have been different had they not been appended but integrated into the text of the original Constitution?

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191. *Id.*

192. *See, e.g.,* CHEMERINSKY, *supra* note 173, at 1-5.

193. Amar, *supra* note 124, at 1131.

1. *The relevance of location*

The perennial debate about the right or appropriate way to interpret the Constitution—most prominently carried out between “originalists” and “living constitutionalists”—is well-known. Notwithstanding this debate and its jurisprudential underpinnings<sup>194</sup>, constitutional practice exhibits the constant usage of certain types of argumentation. Philip Bobbitt has identified the prevailing interpretive modalities as historical, textual, doctrinal, prudential, structural, and ethical.<sup>195</sup> At the first view, it does not seem to make a difference whether the amendments are adhered to or integrated in the original Constitution: the historical background will be the same, the text will be identical—or at least it can be identical—doctrinal, prudential, and ethical considerations will not be different, and even the structure of the Constitution will hardly be affected. However, a constitutional provision cannot only be read in clause-bound isolation, as in classical textual analysis, and also not only from the broad perspective of constitutional structure. Situated somewhat in-between the micro and the macro perspective applied by those two interpretive modalities are systematic modes of interpretation that focus on the text of a certain clause or phrase, but derive constitutional meaning from an analysis of its relationship with other clauses of the Constitution; this mode of interpretation has been called “locational textualism,” or “architextur[alism]”<sup>196</sup> or “architectural.”<sup>197</sup>

The use of this interpretive method is best displayed in the two landmark decisions of *Marbury v. Madison*<sup>198</sup> and *McCulloch v. Maryland*.<sup>199</sup> In *Marbury v. Madison*, Chief Justice Marshall ruled that, although the Court could not issue a mandamus due to jurisdictional reasons, Marbury had a right to his commission as justice of the peace.<sup>200</sup> Marshall argued that Marbury was already appointed, and that the delivery of the commission was not a constitutive part of the appointment process.<sup>201</sup> In order to arrive at this conclusion, Marshall referred to the location of the appointing

194. See, e.g., SCOTT J. SHAPIRO, LEGALITY (forthcoming 2010) (manuscript at 24–28, on file with the author).

195. PHILIP BOBBITT, CONSTITUTIONAL FATE 3–119 (1982). For a more recent comprehensive study, see LACKHAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION (2009).

196. Amar, *supra* note 154, at 672, 696.

197. BLOOM, JR., *supra* note 195, at 44.

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

199. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

200. *Marbury*, 5 U.S. at 162.

201. *Id.* at 159–162.

power and the power to grant commissions, reasoning that “[t]he acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution.”<sup>202</sup>

In *McCulloch*, Marshall was faced with the question of whether Congress had the power to establish a national bank.<sup>203</sup> Marshall concluded that the Necessary and Proper Clause<sup>204</sup> empowered Congress and did not limit its competences.<sup>205</sup> He derived this reading from the location of the Necessary and Proper Clause, which is based in Section 8 of Article I and deals with the powers of Congress rather than the limitations of Congress laid down in Section 9.<sup>206</sup>

In light of this mode of argumentation—which, of course, is not alone decisive and can be trumped by other argumentative modalities<sup>207</sup>—the decision to adhere the amendments and to not integrate them into the original text can have an influence on constitutional interpretation. In the following, I will demonstrate this influence with the help of a few examples.

## 2. *Clarifying the scope of application of the Bill of Rights*

If Madison had prevailed, today’s First Amendment would have been integrated in Article I, Section 9 of the U.S. Constitution among the other limitations of Congress’s powers.<sup>208</sup> This would have made the contemporary and rather extensive interpretation of the First Amendment more difficult. Although the First Amendment textually applies only to Congress<sup>209</sup>—and through incorporation via the Fourteenth Amendment to the state legislatures—the Supreme Court has not applied the First Amendment solely to the legislative branch. The Court has declared unconstitutional not only federal and state laws, but also the posting of the Ten Commandments to a courthouse in two Kentucky counties,<sup>210</sup> state university policies excluding religious student groups from the use of university facilities that were

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202. *Id.* at 156.

203. *McCulloch*, 17 U.S. at 401.

204. U.S. CONST. art. I, § 8, cl.18.

205. *McCulloch*, 17 U.S. at 418–419.

206. *Id.* at 419.

207. See Amar, *supra* note 154, at 698; BLOOM, JR., *supra* note 195, at 44–45.

208. See 1 ANNALS OF CONG. 433–436 (Joseph Gales, Sr., ed., 1834), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 12; Hartnett, *supra* note 8, at 289.

209. “Congress shall make no law . . . .” U.S. CONST. amend. I.

210. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

generally available for activities of student groups,<sup>211</sup> and a state agency's refusal to allow the Ku Klux Klan to build a large Latin cross in a park next to the state capitol.<sup>212</sup> This extensive interpretation of the First Amendment conflicts with the text of the provision. In order to apply the guarantees enshrined in the First Amendment not only to the legislature but also to other branches of government, and not only to laws but also to simple acts and administrative decisions, the Court had to overcome the textual command. Had Madison prevailed and had the provision we know today as the First Amendment been integrated in Article I, Section 9, the argumentative burden for the Court would have been even heavier. The Court would not only have to ignore the explicit textual content but also the location of the provision that would have clearly indicated that religious and communicative freedoms were deemed to apply against legislative acts. And the Supreme Court's decisions in *Marbury* and *McCulloch* show that the Court takes this locational argument seriously. This is not to say that the Court would not have extended the scope of the First Amendment in a similar way, as it actually did, had the text of the amendment been integrated in Article I, Section 9. However, the Court would have faced an additional argument against such a broad reading, and critics of the Court would have had an additional point of attack against the Court's jurisprudence.

Similar observations apply to other parts of the Bill of Rights. The Fourth Amendment, for example, undoubtedly provides a constitutional protection directly against unreasonable searches and seizures by the police.<sup>213</sup> Unlike the First Amendment, it does not encompass a textual limitation to actions by Congress. However, had the text of the Fourth Amendment been integrated into Article I, Section 9 of the U.S. Constitution as Madison proposed,<sup>214</sup> the understanding of the Fourth Amendment as a protection directed against police action would be at least more complicated. Constitutional interpretation would be faced with the problem of applying a provision in Article I, Section 9 that deals with limits on the powers of Congress to executive action.

From the perspective of eighteenth century constitutionalism, the focus on Congress is understandable. It seems that the Founders' main concern in limiting the powers of the national government and thereby preventing abuse of power was directed at Congress. Hamilton

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211. *Widmar v. Vincent*, 454 U.S. 263 (1981).

212. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

213. U.S. CONST. amend. IV.

214. See 1 ANNALS OF CONG. 433-436 (Joseph Gales, Sr., ed., 1834), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 1, at 12-13.

characterized the judiciary as the least dangerous branch,<sup>215</sup> and in the Founding vision the office of the Presidency was expected to be carried out with “Republican virtue.”<sup>216</sup> Moreover, while the idea of the separation of powers was at the core of the Founders’ constitutional conception, it appears they regarded most governmental activities to be dependent on Congress. For example, Congress was supposed to make the laws that the executive carried out and the courts interpreted and applied. From that perspective, constitutional restraints on Congress could be understood as constitutional restraints on all branches of government in general.<sup>217</sup>

In contemporary constitutional thought, by contrast, all three branches of government are directly subject to the constitutional limitations of fundamental rights guarantees. The peacetime quartering of soldiers without the consent of the house owner violates the Third Amendment<sup>218</sup> whether it is ordered by a congressional statute, directly by the President, or based upon a court decision. Had the first amendments been integrated in Article I, Section 9 and Article III, Section 2, respectively, the prohibition of non-consensual peacetime quartering could, of course, also have been extended to all three branches of government. But this extensive reading would have had to overcome the argumentative obstacle of applying fundamental rights guarantees to all branches of government although their location in the text of the Constitution would indicate that their scope of application should be limited to one.

### *3. Avoiding ambiguities between the amendments and the original Constitution*

When Madison wrote to White in August 1789 and reported that Sherman had prevailed in changing the form of the amendments, he voiced the concern that:

[I]t is already apparent I think that some ambiguities will be produced by this change, as the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superseded, by the supplemental act.<sup>219</sup>

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215. THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

216. See ACKERMAN, *supra* note 5, at 67–68.

217. ANASTAPLO, *supra* note 7, at 49.

218. U.S. CONST. amend. III.

219. Letter from James Madison to Alexander White (Aug. 24, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 287–88.

This problem foreseen by Madison arose, for example, with regard to the question of whether and how far the Fifth and the Sixth Amendments affect the content of Article III of the Constitution. In *Patton v. United States*, the Supreme Court held that the guarantee of jury trial in criminal cases in Article III, Section 2, Paragraph 3 of the Constitution and in the Sixth Amendment constitutes primarily a right of the defendant and can therefore be waived.<sup>220</sup> The Court drew upon the history of Article III and the framers' intent, but also referred to the text of the Sixth Amendment that clearly depicts jury trial as a right of the accused.<sup>221</sup> However, if regarded in isolation, the jury clause in Article III is more convincingly understood as putting an objective obligation on the government.<sup>222</sup> Due to the coexistence of the Amendment and Article III, the Court could refer to the Sixth Amendment as an additional factor in favor of its reading of Article III. Regardless of whether one agrees with the holding of the Court in *Patton*, the opinion shows how the supplementary form of the amendments can lead to more ambiguity and thereby increase the argumentative options for constitutional interpretation. Had the Court wanted to reach the opposite result, it could have put more emphasis on the text of Article III and argued that the First Congress did not intend to alter the meaning of Article III through the Sixth Amendment. Under the Madisonian model, this ambiguity would cease to exist: the Sixth Amendment would have been split up, with the more detailed regulation about the criminal trial jury in Article III, and with other rights of the accused in criminal proceedings inserted in Article I, Section 9.<sup>223</sup> Madison's approach would have forced the framers to decide on less ambiguous language. There would have been no potentially waiveable "right" to trial by jury in the text of the Constitution but only the more objectively formulated obligation that the trial of all crimes "shall be by an impartial jury."<sup>224</sup>

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220. *Patton v. United States*, 281 U.S. 276, 297–98 (1930).

221. *Id.* at 298; U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

222. Amar, *supra* note 124, at 1196–97.

223. Hartnett, *supra* note 8, at 260–61; 1 ANNALS OF CONG. 433–436 (Joseph Gales, Sr., ed., 1834), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 12–13.

224. 1 ANNALS OF CONG. 433–436 (Joseph Gales, Sr., ed., 1834), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 1, at 12–13.



4. *Clarifying the scope of enforcement powers under the Reconstruction Amendments*

The Reconstruction Amendments do not only extend the concept of citizenship and encompass prohibitions on the federal government and the state with regard to race discrimination. They also empower Congress to enforce the provisions of the three Amendments through appropriate legislation.<sup>225</sup> However, in 1883 the Supreme Court held in the *Civil Rights Cases* that Congress had no authority to enact laws against private discrimination under the Thirteenth or Fourteenth Amendment.<sup>226</sup> While the Court has overruled this restrictive approach with regard to the enforcement power under the Thirteenth Amendment,<sup>227</sup> it reaffirmed its position with regard to the Fourteenth Amendment as recently as in the 2000 decision of *United States v. Morrison*.<sup>228</sup> The reasoning underlying the *Civil Rights Cases* and *Morrison* reflects a holistic view of the Fourteenth Amendment. Just like Section 1 of the Fourteenth Amendment is only addressed to state action, Section 5 authorizes Congress only to regulate discrimination by the states and not private behavior. This view is expressed by Chief Justice Rehnquist in *Morrison*:

Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. “[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”<sup>229</sup>

Therefore, the Fourteenth Amendment as a whole does not apply to private action.<sup>230</sup> The Court employs a similarly holistic approach with regard to the scope of Section 5 of the Fourteenth Amendment. While the Court held in *Katzenbach v. Morgan* that the Fourteenth Amendment vested broad powers in Congress comparable to the Necessary and Proper Clause,<sup>231</sup> it retreated from this approach in

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225. U.S. CONST. amend. XIII, § 2, amend. XIV, § 5, amend. XV, § 2.

226. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

227. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

228. *United States v. Morrison*, 529 U.S. 598 (2000).

229. *Id.* at 621 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

230. For a different reading of the Fourteenth Amendment, see AMAR, *supra* note 2, at 382–83.

231. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

*City of Boerne v. Flores*, and emphasized that Section 5 authorized Congress only to enact “remedial” legislation.<sup>232</sup> It explicitly rejected the view that Section 5 allowed Congress to expand the scope of the rights contained in Section 1 of the Fourteenth Amendment.<sup>233</sup> The scope of Congress’s powers under Section 5 therefore only extends as far as the prohibition under Section 1 reaches. The Supreme Court has confirmed this approach in subsequent decisions.<sup>234</sup>

The approach of the Supreme Court under Section 5 of the Fourteenth Amendment has been subject to harsh criticism, and compelling arguments can be relied on in favor of a more extensive approach.<sup>235</sup> The location of Section 5, however, supports the Court’s restrictive reading. The placement of Section 5 next to Section 1 within the same Amendment suggests a common understanding of the scope of the two provisions, with Congress’s power under Section 5 reaching only as far as the prohibition under Section 1. The same holds true for the Court’s holding that Section 5 does not encompass the regulation of private conduct. If private conduct is not prohibited under Section 1, it seems intelligible and coherent that Congress cannot regulate it under Section 5.

This locational argument would fall away under Madison’s approach to the amendment technique. Although we can only assume how the Reconstruction Congress would have integrated the substance of the Amendments into the text of the Constitution, it presumably would have split up the Amendments, placed the prohibitory elements at different places in the Constitution, and integrated the enforcement powers into Article I, Section 8. Edward Hartnett has suggested that the substance of Section 2 of the Thirteenth Amendment would probably have been added to the Necessary and Proper Clause, clarifying that Congress had the authority to “enforce the limitations and obligations imposed by this Constitution,” thereby also encompassing the enforcement power under Section 5 of the Fourteenth Amendment.<sup>236</sup> Regardless of whether Congress would have chosen exactly this approach, the clearer separation of limits on Congress and government in general on the one side, and powers of Congress on the other, would have allowed for a broader understanding of Congressional powers after Reconstruction. It would

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232. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

233. *Id.* at 527–28.

234. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

235. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1 (2003).

236. Hartnett, *supra* note 8, at 269, 275–76.

have been easier to maintain and elaborate the broad approach taken by the Court in *Katzenbach*. The enforcement powers would be read rather in their context with other broad powers of Congress under the Necessary and Proper Clause or the Commerce Clause, and not so much within their relationship with the prohibitory elements of today's Thirteenth and Fourteenth Amendments.

*E. Constitutional Moments and Intergenerational Synthesis*

The foregoing examples have shown how individual amendments have to be brought into accordance with individual provisions of the original Constitution. This touches upon a more general phenomenon of constitutional development. Significant constitutional developments can raise the question of whether they not only influence single provisions of the original Constitution, but demand a more fundamental, conceptual change in the understanding and interpretation of the Constitution. This question has most prominently been attacked by Bruce Ackerman.<sup>237</sup> According to Ackerman, the history of the American Republic is characterized by distinctive constitutional moments of higher lawmaking.<sup>238</sup> He identifies the Founding, Reconstruction, and the New Deal as the “three great turning points of constitutional history.”<sup>239</sup> These three moments of higher lawmaking are characterized by significant normative transformations brought along by the people who in a five-step process—consisting of signaling, proposal, deliberation, ratification, and consolidation—engage in higher lawmaking.<sup>240</sup> These normative transformations can come along as formal amendments, such as the Reconstruction Amendments,<sup>241</sup> or they can take shape in form of important judicial decisions (“landmark cases”) and statutes (“superstatutes”).<sup>242</sup> This division of constitutional history into constitutional moments entails the necessity of intergenerational synthesis.<sup>243</sup> According to Ackerman, transformative amendments—regardless of whether they

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237. See ACKERMAN, *supra* note 5; ACKERMAN, *supra* note 3. For a summary of Ackerman's theory, see Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 116–22 (1994).

238. ACKERMAN, *supra* note 5.

239. ACKERMAN, *supra* note 5, at 58.

240. ACKERMAN, *supra* note 5, at 266–94.

241. Note, however, that according to Ackerman the Reconstruction Amendments did not come into force in the way envisioned by Article V but nevertheless were a legitimate exercise in higher lawmaking by the people. See ACKERMAN, *supra* note 3, at 99–119, 207–34; for a critical appraisal, see AMAR, *supra* note 2, at 364–80.

242. Ackerman counterplea, *supra* note 3, at 1741–42.

243. ACKERMAN, *supra* note 5, at 86–99, 131–62.

come along in the formal way of Article V amendments or not—have to be integrated into the original Constitution not only with regard to the specific provisions they might affect, but also on a higher level of generality; this task of synthesizing the different constitutional regimes is carried out by the judiciary in particular.<sup>244</sup> It is for the courts to reconcile the diverse paradigms dominating the three constitutional moments: the Founding’s concern with individual rights and limited national government, the implications of Reconstruction for equal protection of the races and arguably other minorities and social groups, and the New Deal’s affirmation and legitimization of activist government and of regulatory interference in economic and social life.<sup>245</sup>

Ackerman thereby invites us to understand constitutional development not as a steady flow of events, but rather as a process of normal politics that is at times disrupted by constitutional revolutions of a transformative nature in which the people engage in higher lawmaking.<sup>246</sup> It has been pointed out that the technique of adhering amendments to the Constitution highlights and facilitates the issue of intergenerational synthesis.<sup>247</sup> And indeed, as Ackerman himself stipulates, had the Reconstruction Republicans not limited themselves to the three amendments, but proposed a completely new Constitution, the issue of synthesis would not have arisen.<sup>248</sup>

The supplementary form of the amendments certainly makes it easier to see the synthesis problem. However, substantively the same problem would arise had the amendments been integrated into the text. Furthermore, not all amendments take part in the intergenerational synthesis of Ackerman’s theory. The Twenty-Sixth Amendment, for example, is characterized as a mere “superstatute” and not as a transformative amendment.<sup>249</sup> It changes only the voting age and not any deeper principles underlying the Constitution.<sup>250</sup> On the other hand, Ackerman does not only include formal amendments in the process of synthesis, but also—as in the New Deal—constitutional principles that are expressed in other ways, such as landmark decisions or superstatutes.<sup>251</sup> Under the theory of constitutional moments and intergenerational synthesis, the transformative content

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244. ACKERMAN, *supra* note 5, at 86–99.

245. ACKERMAN, *supra* note 5, at 58–80.

246. ACKERMAN, *supra* note 5, at 230–94.

247. AMAR, *supra* note 176, at 292.

248. ACKERMAN, *supra* note 5, at 93.

249. ACKERMAN, *supra* note 5, at 91.

250. U.S. CONST. amend. XXVI.

251. Ackerman, *supra* note 3, at 1741–42.

that has to be synthesized with the traditional principles of the preceding constitutional regimes has to be identified, regardless of whether it comes along in the form of an amendment or an unwritten transformation.

#### IV. CONCLUDING REMARKS

The supplementary form of the amendments to the U.S. Constitution is a peculiarity that is hardly recognized as such by scholars and students. An inquiry into the background of the First Congress's choice in favor of this mode of amendment reveals the somewhat arbitrary and misguided character of the decision. Constitutional scholars seldom pay attention to this historical fact although it arguably had some impact on subsequent constitutional developments. It influenced the practice of constitutional amendments as well as our understanding of the Constitution and the Bill of Rights. It also has some subtle but relevant implications for the interpretation of the amendments and their relationship with the original Constitution.

Constitutional scholars who deal with the amendment form regularly also evaluate the First Congress's decision in favor of Sherman's approach. While some have argued that Madison's proposal would have resulted in a better Bill of Rights and avoided some interpretive ambiguities,<sup>252</sup> others highlight the merits of Sherman's approach.<sup>253</sup> Regardless of these different assessments, the somewhat idiosyncratic style of constitutional amendment is part and parcel of American constitutionalism. The purpose of this article is to contribute to the understanding of this design choice and of its implications for past and future constitutional developments.

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252. Hartnett, *supra* note 8, at 262; Marshall, *supra* note 8, at 114–15.

253. AMAR, *supra* note 2, at 458–62.