

NOTES ON A BICENTENNIAL CONSTITUTION: PART I, PROCESSES OF CHANGE†

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I. INTRODUCTION: SIGNIFICANCE, LONGEVITY, AND CHANGE

There are nearly 160 nations today with written constitutions, yet fewer than half of these written constitutions predate 1970. Moreover, if one retraces three decades prior to 1970, say, prior to World War II, the number of written constitutions retaining substantially the same basic features to the present time dwindles to a mere fifteen. Of these fifteen constitutions, only five were also extant in 1900. Written constitutions seem to be a relatively recent phenomenon. Long-lasting written constitutions, moreover, may be rare.¹

Four of the five extant written constitutions that predate 1900 belong to Colombia, Luxemburg, Argentina, and Norway. The earliest of these four is Norway's, dating from 1815. The fifth, the oldest by far, dates from 1789. It belongs to the United States. Indeed, ours is the oldest, continuously functioning, and basically unaltered written constitution in the world. Even allowing for some obvious natural advantages we have had, the unique longevity of this fundamentally unaltered constitution is surely noteworthy.

Shortly we are to commemorate the bicentennial of our constitution and, given its superannuated distinction, no doubt much will be written in praise of its great virtues. Still, it is easier to assume what these virtues are than it is to specify their critical value. We tend to forget, for instance, that even the fact that the constitution is written is not necessarily critical. After all, the English have maintained quite a stable government since 1688, with an excellent tradition of freedom, and to this day the English still manage without benefit of a *written* constitution.

If it is not the bare fact of a long-lived written constitution that war-rants praise, perhaps it is the critical value of our famous Bill of Rights that we should stress. To be sure, its own bicentennial is not due until

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1. These and other interesting comparisons are briefly noted in Grier, *It's Tough to Write a Constitution that will Endure*, CHRISTIAN SCI. MONITOR, Sept. 19, 1983, at 2, cols. 2-4.

1991, and, strictly speaking, the English have also managed without a formal Bill of Rights. But at least our Bill of Rights may sharply distinguish us from the more totalitarian communist countries in which such basic matters have presumably been ignored. Perhaps, then, it is this feature of our written constitution that we should most celebrate.

Perhaps that is so, but perhaps we should be somewhat careful in the claims we make and the comparisons we mean to draw as well. Otherwise we may merely embarrass ourselves by our claims. Our assumptions about the nature of written constitutions in communist countries may turn out to be false. Indeed, so far as the most prominent of those countries is concerned, the suggestion that our constitution is superior to theirs because ours provides an elaborate Bill of Rights and their constitution provides no equivalent Bill of Rights, is quite absurd.

Actually, the 1977 Constitution of the Union of Soviet Socialist Republics (USSR) has a list of rights that makes our own list seem pale and incomplete.² The Soviet Constitution does not merely guarantee such things as privacy,³ freedom of speech, of the press, and of assembly,⁴ religion,⁵ petition,⁶ and freedom from arbitrary arrest.⁷ It also provides an explicit equal rights article,⁸ of the very sort that failed in the United States as recently as 1982, with the demise of the proposed twenty-seventh amendment, the Equal Rights Amendment (ERA). The Constitution of the USSR also contains, as ours does not, a long list of *affirmative* rights: to health protection,⁹ to housing,¹⁰ to education,¹¹ and to work.¹² This new Constitution of 1977 is the USSR's fourth constitution, incidentally, since 1918.

Our problematic bicentennial claims of constitutional distinction may also bear watching in other respects as well. For instance, our constitutional plan of government, with its trichotomy of separated powers and alleged checks and balances among the executive, judicial, and legislative departments, is far from unique to the United States. Moreover, given the Supreme Court's nearly complete acquiescence in the congressional habit of divesting itself of large blocks of legislative responsibility¹³

2. The following references are taken from the English translation of the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation, Oct. 7, 1977, as published by Novosti Press Agency Publishing House, Moscow, 1982.

3. *Id.* arts. 55, 56.

4. *Id.* art. 50.

5. *Id.* art. 52.

6. *Id.* arts. 49, 58.

7. *Id.* art. 54.

8. *Id.* arts. 34, 35.

9. *Id.* art. 42.

10. *Id.* art. 44.

11. *Id.* art. 45.

12. *Id.* art. 40.

13. See, e.g., *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting) ("[t]hese omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of [the doctrine of separated powers]"); E. CORWIN, *THE PRESIDENT* 9 (4th ed. 1957)

by shifting its obligations and its powers to the President and to independent administrative agencies (whose laws Congress now cannot even disapprove¹⁴), and given the Court's tendency to sustain executive law-making to the extent Congress is unwilling or unable to legislate against such executive practices,¹⁵ one can in fact question whether the actual extent of separated legislative and executive powers is as substantial as the conventional wisdom supposes.

Similarly, the federalism of our constitution scarcely distinguishes it, although we are likely to celebrate this as well. A significant number of countries are organized in the same fashion, several, such as Canada, Australia, and Switzerland, more credibly than the United States. Moreover, as with the separation of powers, the extent to which our Supreme Court has permissively yielded to Congress virtual authority to determine the extent of Congress's own several powers, has effectively rendered the de facto extent of federalism essentially a matter of congressional grace.¹⁶

Still, blush as one ought in anticipation of the overzealous patriotism the bicentennial is certain to occasion, *some* features of our constitution may yet be rightly regarded as noteworthy. And, in fact, I think that our constitution does contain three such genuinely noteworthy features. Primarily, however, they are not the conventional trinity of federalism, the Bill of Rights, and the separation of powers. Rather, they are these three: (1) the judicial power of substantive constitutional review, invokeable by ordinary litigants in the course of ordinary litigation; (2) the special insulation of article III federal judges in whom much of that judicial power is vested, including most importantly the Justices of the

("that none of the departments may abdicate its powers to either of the others . . . has today almost completely disappeared as a viable principle of American constitutional law"); Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 600 (1973) ("The problem about Congress is simply this: Not only does it not govern, *it does not want to govern.*") (emphasis in original). See also *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

14. See *Immigration & Naturalization Serv. v. Chadha*, 459 U.S. 1097 (1983); *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 103 S. Ct. 3556 (1983).

15. See *Haig v. Agee*, 453 U.S. 280 (1981). *Haig* was critically reviewed in Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263. See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 1; Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46.

16. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307-08 (1981) (Rehnquist, J., concurring). The concurring opinion said:

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. . . . [O]ne could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.

See also *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *Perez v. United States*, 402 U.S. 146 (1971).

Supreme Court; and (3) the deliberately clogged arteries of formal constitutional change, i.e., the limited mechanisms of amendment provided for in article V of the Constitution. Together these three measures, each quite as valuable as the other two (a "medically-proven combination of ingredients," as it were), have given the United States Constitution some unusual and even international significance. To the extent that these features have fulfilled their original expectations, moreover, they have tended to make the Constitution substantially more useful as well. In brief, the addition of these three features is what tends to make the other features count.

By far the majority of the world's written constitutions are mere precatory or mere political instruments. They reserve their proper interpretation and application to the people, or rather to the people's representatives. The people's representatives purport to resolve the issue of the consistency of their own actions with the constitution by determining that consistency by theoretically not enacting laws inconsistent with the constitution and, rather, enacting only such laws as their own correct and conclusive understanding of the constitution shows to be consistent with that constitution. In this ostensibly satisfactory fashion, their written constitution retains a direct connection with a continuing popular sovereignty: In all doubtful cases, indeed in *all* cases, the constitution is what the people, meaning their representatives, say it is. Accordingly, courts may not permit ordinary litigants to make a subsequent appeal in court against such a law (similarly disallowed in the Soviet Union).¹⁷ The appeal is disallowed on the wholly logical foundation that any constitution established by the people, as that of the USSR or that of the United States purports to be, must necessarily commit its own authoritative interpretation to the people's own popularly elected representative-proxies, rather than to less accountable, or practically unaccountable judges. Thus the explanation, for example, of why citizens may not question the consistency of the Supreme Soviet's actions with their constitution. The legislature has already determined that the act is consistent with the constitution, and that determination is virtually *res judicata*, so to speak, as far as the courts are concerned.

Written constitutions so used are not thereby necessarily useless, but it is fair to suggest that they are not likely to figure as significantly as constitutions that ordinary litigants may also invoke before judges charged with an obligation to make a separate determination as requested by the litigant, despite the government's or "the people's" view. Moreover, that such written but not justiciable constitutions might endure, even over a substantial time, would not be remarkable. Being but precatory instruments, to be interpreted quite plastically according to

17. The Soviet Union does not allow such appeals. For a recent and poignant review, see D. KAMINSKAYA, *FINAL JUDGMENT* (1982). See also Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1350 (1979).

whatever appears best to today's vagrant majority in the national legislature, these constitutions are kept up-to-date in the same measure that they are also interpretatively unreliable. Exactly to the extent that a contemporary generation regards the words of a given constitution as but empty shells into which it will deposit its own preferences (i.e., its own interpretations), the significance of that constitution as so flexibly and amiably (mis)construed is diminished. Correspondingly, exactly to the extent that our constitution is *not* similarly malleable, that is, exactly to the extent that judges are *not* bound to any legislature's interpretations but rather will apply the Constitution with some earnest degree of steadfast consistency, the longevity of our Constitution *is* remarkable.

This point is so important that it deserves to be elaborated more carefully, to take account of other views as well. A constitution whose provisions were determined by people, all of whom are now dead, but whose constitutional provisions courts apply to limit the living, seems suspect and not right. Unless it can be altered very readily or reinterpreted, such a constitution seems utterly anomalous. Thomas Jefferson regarded a permanent constitution as so irreconcilable with the equal right of each generation to resolve its own constitutional preferences, for instance, that he seriously proposed to Madison that our Constitution should have a maximum date of expiration not in excess of thirty-four years from its date of ratification.¹⁸ Had Jefferson's thought been adopted, the Constitution of 1789 would literally have expired in 1823. Jefferson selected the period of thirty-four years, moreover, quite scientifically; it was the average remaining life expectancy of persons already twenty-one years old, the age Jefferson thought marked one's entitlement to act for oneself, as an adult. In any event, according to this view every constitution should terminate and honorably expressly provide for that expiration within thirty-four years, if the members of each subsequent generation were to be treated with the same respect for their collective sovereignty as Jefferson's generation, the original constitution-making generation, had claimed for itself.

Only by its own positive *re*-enactment, by fully equivalent majorities affirming its provisions each thirty-four years, could the Constitution, or any constitution, claim the same legitimacy for that generation as it derived from the consent of the original generation. Indeed, Jefferson maintained that only by such positive reenactment could the Constitution claim *any* legitimacy beyond thirty-four years: procedures allowing for its amendment, even supposing they might be extremely permissive procedures, could not suffice as a substitute. "[T]he power of repeal is not an equivalent,"¹⁹ Jefferson observed, and a moment's thought about the matter makes it obvious that he was correct. Inertia carries too artifi-

18. THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488-93 (A. Koch & W. Peden eds. 1972) (letter from Thomas Jefferson to James Madison, Paris, Sept. 6, 1789) [hereinafter cited as JEFFERSON].

19. *Id.* at 492.

cial an advantage on its side. Automatic expiration must be provided for to insure that the renewed constitution would reflect the same positive affirmation as the original.

The alternative to Jefferson's automatic thirty-four year sunset clause cannot be found in any such different and lesser mechanism such as some clause or article providing the means of amendment. Certainly, one cannot say that the limited means of amendment in article V are sufficient. What, then, might be sufficient in lieu of an express termination clause, or sufficient as a complement to some article providing for amendment?

The obvious candidate is the prerogative of each generation to substitute its own interpretation of each and every article, clause, and word in the Constitution, and utterly without apology for any apparent, or for that matter, real incongruity, either with the words or clauses thus freshly interpreted or with the interpretations of prior generations. To the contrary, any such inconsistencies would mean merely that this generation has elected interpretatively to enact a different constitution than that which the preceding generation found satisfactory, but which, as is their *equal* right, this new generation does not find equally satisfactory.

One need not dilate this view much more to see the necessary implication.²⁰ Effectively, this approach eventually comes to the same point we have already examined. This result explains why most countries with written constitutions have historically had no sense of anomaly in reserving the question of the correct constitutional interpretation to their most popularly representative department, in addition to including a provision in the same constitution for rather easy outright amendment. Such interpretations, and not merely such amendments, are then fully binding on all other departments. The fact that the Congress of 1985 might read *commerce* in the commerce clause differently than Congress read it in 1890, or in 1794, or indeed the fact that today's Congress might interpret the word *commerce* as though it said "everything," is all right. This difference merely means in this way we are taking Jefferson's suggestion seriously; each generation is indeed enacting its own constitution.

The usual academic variation on the arrangement just described is to complicate the arrangement by one additional move. This variation adopts the notion of the legislature's right to say what the Constitution shall be, by reporting each generation's alleged preferences via alleged interpretation, subject to a *weak* form of judicial review.²¹ This weak

20. *But see* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

21. An early, moderate, version of weak review appears even in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The more systematic rationale was developed in Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For additional elaborations, see W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 7-11 (1984), originally appearing as Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983). This article is meant to be

form of judicial review does not allow the judge to determine if the legislative interpretation of a given clause, word, or article is correct in any usual sense, however, but only to determine if it is correct in the particular sense of whether the legislature has accurately reported the current generation's preferred interpretation. On this theory, a court should intervene if, but only if, the court concludes that the legislature has misunderstood a given generation's preference about something in the Constitution. When the court intervenes, of course, its task is *not* to apply the Constitution according to its mere words, their plain meaning, or prior understandings based on the Constitution of the dead; the court's task is rather to apply the Constitution of the present, that is, the Constitution of the current majority will as if this generation were making the Constitution anew. On the other hand, if, but only if, the courts think that the legislature is out of touch with "the people," in that the legislature's view of the preferred new constitutional interpretation does not reflect "the people's view" (who presumptively prefer some preexisting interpretation), then only on those occasions shall the courts presume to apply the preexisting Constitution to invalidate a legislative act.²²

Beyond the weak populist view of independent substantive constitutional review, occasionally commentators add a single qualification. And although too many contemporary authors claim credit for it, actually this qualification was another point which Jefferson had suggested, even as a qualification upon his own proposal for an automatically self-expiring thirty-four year constitution. In 1824, thirty-five years after detailing his reasons for a self-expiring constitution, Jefferson wrote still again about his idea. But, he added a qualification:

A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves. *Nothing then is unchangeable but the inherent unalienable rights of man.*²³

Jefferson's last sentence is the basis for still another variation of judicial review. According to this view, courts would stringently apply the particular provisions, if any, of the original constitution that record and protect "inherent unalienable rights." These are rights that in theory governments or whole majorities may not properly presume to deny, whether or not denying such rights would conform to their constitutional preferences. The reason for this exception is the obvious one. Whatever constitutes "the inherent" and "unalienable rights of man," by definition no government, no constitution, and no majority may abridge. Thus, to the extent that the Constitution and the Bill of Rights may have captured

substantially complementary to that piece. Cf. Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 Nw. U.L. REV. 1435 (1984).

22. See also Ackerman, *supra* note 20, discussed *infra* note 51.

23. JEFFERSON, *supra* note 18, at 714 (letter to John Cartwright, from Monticello, June 5, 1824) (emphasis added).

some of *these* sorts of rights, naturally they are not subject to subsequent majoritarian tampering at all. In theory, moreover, these rights cannot be denied even by the process of amendment provided for in article V of the Constitution. Only these rights, however, would be protected enduringly by the strong version of judicial review. As to all the rest of the Constitution, naturally just the weak form of review would apply. This whole scheme assumes, of course, that the judges can determine which rights are the "inherent unalienable" ones.

Even so, whatever the degree of variation, the point remains the same: the real or concrete adjudicative significance of the Constitution is almost wholly a function of the extent to which it is *not* democratized and rationalized away. If, as Jefferson suggested, the Constitution would literally terminate according to its own terms each thirty-four years, by definition it would have had a brief term of possible significance, but no longevity. Similarly, constitutions regarded as conveying *no* power of independent judicial substantive review may last for a long time, but have no particular, nonprecatory significance. This is quite obviously true even of the most modern constitution in the Soviet Union. In the middle of the continuum between these points, in nations with written constitutions and judicial review, but in nations whose judges genuflect to popular interpretations, whether of "commerce," of "equal protection," or whatever, the constitution's significance is correspondingly an intermediately weaker or stronger one, depending upon the extent of this judicial practice.

The theoretically available variations are, of course, quite as numerous as the number of available academic sponsors. Their ingenious theories for various kinds of weaker or stronger judicial review are put forward as extremely well-written efforts to reconcile a large number of problems merely touched upon here.²⁴ One may nonetheless reserve a certain doubt whether their work has really advanced much beyond providing an excuse for a variety of Supreme Court decisions and interpretations that highly political judges have simply strongly preferred, and which they were quite delighted to be able to deliver in better-looking jurisprudential packages. We need not reexamine that question here, however, still again.²⁵

Although the strong form of substantive judicial constitutional review of which the United States Constitution is normally thought to be an example, is invokeable by ordinary litigants, even it may not be of great moment if either the decisions or the judges may be readily changed. Thus the obviousness of why the *combination* of the three noteworthy features of our Constitution, each as indispensable as the other two, deserves emphasis. Very few countries imitate the American plan in all three respects. Indeed, as already implied, American judges only oc-

24. For discussions and references, see *supra* note 21.

25. These matters are discussed more fully *infra* sections III and IV.

asionally fulfill it. Most of those countries that do adhere to a similar arrangement only have done so since World War II. Interestingly, West Germany is one of these, although not in all respects: the judges of the West German constitutional court serve only for a fixed term, for instance, and there are also some differences about the manner in which constitutional questions can be raised. Even so, it is interesting that the West Germans have followed the United States example, their resolve to do so having arisen from the ashes of the Third Reich.

Quite apart from the extent of our Constitution's recent influence on constitutional developments in other countries, however, it is obvious that something must be approximately sound about the existing American arrangement. For nearly two centuries the Constitution has neither been overthrown by revolution, nor peacefully displaced as were the Articles of Confederation, nor yet so frequently amended as to have made its provisions little more than mutable super statutes. That the Constitution has not been widely imitated may be appropriately sobering. But that it evidently still reports approximately the right degree of tension for the needs of the United States seems true. Indeed, it seems to be so self-evident as virtually to imply its own conclusion: Whatever the difficulties of American processes of constitutional change, the evidence is impressive that no radical revisions may be warranted.

It ought not come as a surprise, therefore, if the most one may propose in assessing the processes of constitutional change turns out to be quite mild. Indeed, the proposals may amount to little more than some passing suggestions on the uses of article V. Thus I mean to review briefly how article V has appeared to work, and how its workings might be helped in some respects without any radical change. Thereafter, I compare our other processes of constitutional change with those provided by article V. And in the end, I venture an observation or two on how these several processes may operate during the next century as well—assuming we are fortunate enough to have one. The choice as I think it may be is between a living constitution and a dead sea scroll.

II. PROCESSES OF AMENDMENT

The amendment process has been invoked continuously, but its successful use divides into three identifiable parts. Although somewhat in excess of five thousand amendments have been proposed in Congress,²⁶ only thirty-three have emerged from Congress, and of these the States have ratified only twenty-six. Even as to this last modest number, moreover, the number is somewhat misleading in its implications. On its face, it might imply that a significant constitutional change has occurred by amendment approximately once each decade—twenty-six divided into two hundred years. As is generally well-known, however, the actual uses

26. See S. REP. NO. 724, 95th Cong., 2d Sess. (1977).

of the amendment process have been more messy. One may more accurately speak of three clumps of amendment, only two of which, moreover, genuinely postdate the Constitution.²⁷

The first clump was the group of anti-federalist amendments, the first through the eleventh, that responded to much of the original resistance to ratification. All of these except the eleventh were both proposed and ratified within a very brief, two-year interval between 1789 and 1791, at virtually the same time as the Constitution. The second clump is that resulting from the Civil War, and consists of the thirteenth through the fifteenth amendments, which were laid in place within a single five-year period from 1865 to 1870. Most of the rest of the more recent amendments, other than those which are primarily housekeeping, are not quite as neatly grouped sociologically, but can reasonably be seen as populist amendments: that which authorizes the graduated income tax (the sixteenth amendment), the several amendments further spreading the vote (the seventeenth on election of senators, the nineteenth on sex, the twenty-third on District of Columbia presidential electors, the twenty-fourth on poll taxes in federal elections, and the twenty-sixth on voting for eighteen year olds), and the two amendments constituting our failed experiment with populist morality (the eighteenth's enactment of prohibition and its repeal fourteen years later by the twenty-first).

Actually, if one excludes the Bill of Rights, on the ground that it followed so quickly after ratification of the Constitution that it is an integral part of the original ratification struggle, fundamental constitutional change by amendment may have occurred at but one time in American history: from 1865 to 1870. These alterations expunged the original slave clauses and dislocated from the states, via the thirteenth, fourteenth, and fifteenth amendments, their former police power to do much as they liked with only the provisions in article I, section 10 lightly hemming them in. It may be instructive that the change was the by-product of civil war. It was also facilitated by the absence of a substantial part of the nation from the Congress which proposed the amendments. Furthermore, ratification was achieved partly under political duress to the extent that Congress presumed to determine the "republican" character of certain states partly by their ratification receptivity to the thirteenth and fourteenth amendments.²⁸ Significant constitutional change by amendment apparently has been confined to two occasions of enormous domestic upheaval: the immediate post-Revolutionary War epoch, and the post-Civil War epoch.

In addition, with respect to change by formal amendment, it is noteworthy that all of the amendments have originated in but one of the two

27. For an excellent review, see Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427-30 (1983).

28. See C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-1868, at 509-10 (1971).

ways provided for by the Constitution and that none has originated via the alternative mode. Specifically, article V provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

No amendment has ever been proposed by a convention, pursuant to a call by Congress, triggered by the applications of two-thirds of the state legislatures. Rather, every amendment has originated in Congress. One may thus suppose that this alternative method of constitutional change has been useless, more quaint than significant—roughly of the same desuetude, for instance, as the third amendment in the Bill of Rights, which forbids the quartering of troops in private homes during peacetime without the owner's consent.

This observation is almost but not quite true. The observation may need qualification in two respects. First, while the use of the state-called convention mechanism has not been successful as such in that no convention has ever been called, on at least one occasion the mechanism *was* used to prompt Congress to produce a proposed amendment, which the states then swiftly ratified, and which Congress may have proposed principally in response to state applications for a convention, rather than from any interest or desire on its own part for the proposed amendment. Such was the particular history of the seventeenth amendment, providing for the election of senators. The Senate showed little interest in proposing such an amendment, which would necessarily subject incumbent senators to new risks because prior to the seventeenth amendment senators were chosen by state legislatures rather than by popular vote. Only after many states filed applications, making it likely that Congress would be obliged to call a convention to propose such an amendment, did Congress moot the question by introducing the amendment itself.²⁹

In a more distant but still relevant sense, the same was true of the original Bill of Rights. Seven of the states had strongly indicated, in the course of ratifying the Constitution, that they firmly expected Congress to propose immediately some sort of bill of rights. James Madison's introduction in the first Congress of a proposed Bill of Rights pretermitted further efforts by several states to call a convention. Apparently, the quickness and ease of getting Congress to agree upon the original Bill of

29. See R. WAGNER, R. TOLLISON, A. RABRUSHKA & J. NOONAN, *BALANCED BUDGETS, FISCAL RESPONSIBILITY, AND THE CONSTITUTION* 94 (1982). See also 47 CONG. REC. 211 (1911) [hereinafter cited *Senate Subcommittee Hearing*].

Rights may have been influenced by the perceived likelihood that in the absence of such congressional initiative a convention would have been demanded by the requisite number of state legislative applications.

Second, that no amendment has yet been proposed by a limited called convention may not necessarily reflect any consensus that congressionally proposed changes are the only appropriate means. Rather, apparently such conventions might have been called, on at least a few occasions, were it not for certain problems that Congress has not wanted to resolve. Its own passiveness in this respect has helped Congress maintain its virtual monopoly over the amendment process. The principal practical constraint on the use of the state-called convention as a mechanism to propose amendments is the profound fear and uncertainty associated with its untested use. The uncertainty is probably greater than it need be. It is made worse insofar as Congress has never adopted any useful guideline legislation to settle a large number of questions.³⁰

Within the past decade, for instance, a considerable number of state legislatures, by one count thirty-two, did apply to Congress to call a constitutional convention to consider various proposals to restrict the deficit spending practices of Congress.³¹ Informally, these various applications sought some sort of budget-balancing amendment modeled roughly on several states' constitutional provisions forbidding biennial appropriations in excess of anticipated revenues. The proposals differed from such state provisions, however, in permitting a degree of flexibility essential to the greater responsibilities of the national government. Not all of the state legislative applications were identically framed. Indeed, some applications were so entirely inconsistent with some other applications that Congress most probably could *not* count them together.

Be that as it may, in several other state legislatures, such as California, it became obvious that the state's effort to resolve its application would fail less from misgivings about some sort of proposed amendment than from misgivings about the uncertainties of article V. The uncertainties were emphasized by several constitutional scholars invited to testify in opposition to the proposal before the California Assembly.³² They made quite a convincing case. Absent congressional guideline legislation which may not be able to resolve every question but which surely can

30. A summary of failed bills on the subject is provided in the Senate Judiciary Committee's most recent Report and proposal, in SENATE COMM. ON THE JUDICIARY, CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1984, S. REP. NO. 594, 98th Cong., 2d Sess. 13-15 (1984). For additional references to the full range of prior hearings and professional reviews on state-called conventions, see *Constitutional Convention Procedures, Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, S. REP. NO. 77, 96th Cong., 1st Sess. (1979).

31. See SENATE COMM. ON THE JUDICIARY, BALANCED BUDGET—TAX LIMITATION CONSTITUTIONAL AMENDMENT, S. REP. NO. 628, 98th Cong., 2d Sess. 13 (1984).

32. See, e.g., Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979) (reprint of a prepared statement delivered to the Committee on Ways and Means of the California State Assembly). *But see* Noonan, *The Convention Method of Constitutional Amendment, Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641 (1979) (revised testimony before the Committee on Ways and Means of the California Assembly). See also references cited *supra* note 30.

answer some questions, too many uncertainties seem to exist. Among the uncertainties emphasized in the California hearings were these:

1. whether a limited agenda convention may be called or whether any convention, once called, is at once empowered to propose any amendments to which it might agree;

2. whether Congress may decline to submit for ratification amendments proposed in excess of a convention's originally limited agenda, or whether it must submit whatever the convention proposes;

3. whether states would vote in a convention as states ("one state, one vote"), or by individual delegate votes, and if the latter, how many delegates would each state have;

4. how state delegates would be selected, where the convention would meet, and pursuant to what set of rules shall it conduct its business.

This list of questions is by no means exhaustive. It is quite sufficient, however, to make the point that the uncertainty of the state-called convention method to secure even limited changes in the Constitution has been a substantial factor in the failure of the process. Congress's reluctance to enact suitable guideline legislation has contributed to the problem. It is obvious to anyone who has participated in the congressional hearings that some of the resistance does not come merely from a belief that such guideline legislation could at best be of limited use.³³ Rather it proceeds from a fear of the amendment process itself and from a preference to reserve that process solely to Congress and to the courts.

One additional set of observations may be helpful regarding the accomplishment of constitutional change by amendment rather than by adjudication. In reexamining article V, we should note that regardless of how an amendment is proposed, whether by two-thirds of both houses in Congress or by a state-called convention, Congress has the complete discretion to select either of two methods of submitting proposed amendments for ratification. Congress may either submit a proposed amendment to the state legislatures or to the "Conventions in" the states. In all but one instance, amendments have undergone the ordeal of the state legislature route—most recently, of course, with the proposed twenty-seventh amendment, the Equal Rights Amendment (ERA). That amendment fell three states short of the thirty-eight needed for ratification,³⁴ even after ten years, the longest congressionally authorized period

33. See *Senate Subcommittee Hearing*, *supra* note 29, at 292, 298, 301. See also Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985; Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295. But see, e.g., Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979).

34. Memorandum for the Administrator of General Services Suggesting Mootness, at 3-4, *National Org. for Women, Inc. v. Idaho*, 459 U.S. 1032 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313).

of ratification ever provided. It is not well-known, however, that on one occasion Congress did provide for ratification by state conventions—and the procedure met with instant success. Such was the particular history of the twenty-first amendment.

The twenty-first amendment, which repealed prohibition, went at once from Congress to statewide ballots, in which state convention delegate-candidates sought election. The successful states convened promptly thereafter to ratify the proposed amendment. Professor Dellinger has reviewed extensively the history of that ratification.³⁵ His research tends to confirm the suggestion that certain kinds of amendments may fare better in this process than in that which uses state legislatures.

If a proposed amendment has very substantial support nationwide, congressional submission of the amendment to the convention ratification procedure may avoid some of the pitfalls the same amendment might encounter in state legislatures and stand an improved chance of timely ratification. State legislatures still often meet but once each two years. Some states, moreover, such as Illinois, require more than a majority vote of the whole legislature to accomplish ratification.³⁶ Opposition to a proposed amendment by a small minority even of the least populous states can suffice to defeat the amendment. If their views are shared by even a few securely entrenched committee leaders in but one house of a few state legislatures, the amendment may necessarily fail. The same handicaps may not apply to an amendment submitted to state ratifying conventions. Professor Dellinger has suggested, for instance, that given the strong and well distributed support that favored the ERA, and the fairly brief time in which state ratifying conventions are elected once an amendment has been proposed, had Congress submitted the ERA to ratification by convention, rather than to the slower ordeal of state legislative sessions, it is entirely likely that the ERA would have been ratified.³⁷ Given also that the ERA was originally received quite favorably, with ratification going forward very rapidly during the first two years and foundering only as the amendment tended to stay around, I see no reason to question his interesting conjecture. In any event, this much may be reasonably clear: in some instances, the process of constitutional change by amendment might be expeditiously employed insofar as Congress, in submitting proposed amendments, might be more canny in its discretion to select the convention mode of ratification than the more customary, state legislature mode.

In summary, one can make these few observations about the processes of amendment: First, that the Constitution has endured as

35. Dellinger's summary regarding the ratification of the twenty-first amendment appears in Dellinger, *Another Route to the ERA*, NEWSWEEK, Aug. 2, 1982, at 8. He retains the supporting research on file at Duke University.

36. For an interesting review of the Illinois arrangement, see *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975).

37. See Dellinger, *supra* note 35.

long as it has, and that it continues to figure very prominently in our national life, may strongly suggest that no radical revision of article V is either necessary or appropriate to accommodate the changing circumstances of the United States. Second, at the same time, one should not expect such changes as may be made by amendment to work any *fundamental* revision of the Constitution, except in the most extraordinary or virtually calamitous conditions. Third, it is nevertheless feasible to ease the course of making changes by amendment even now, insofar as anyone is interested in doing so. One way to do so is through congressional enactment of guideline legislation to reduce the uncertainties of state-called conventions. Another is by means of more attention within Congress to the alternatives available to it in the choice of ratification procedures. Whether these observations and suggestions are sufficient, however, may depend at least partly upon how one feels about our other processes of constitutional change—the processes not authorized by article V. So, we now turn briefly to these.

III. THE JUDICIAL PROCESS AND CONSTITUTIONAL CHANGE

“We are under a Constitution,” Charles Evans Hughes declared to his Chamber of Commerce audience in Elmira, New York, “but the Constitution is what the judges say it is.”³⁸ Hughes’s remark is memorable, of course, because his choice of words is much more insinuating than other ways of describing the judicial task. In *Federalist Number 78*, for instance, Alexander Hamilton also acknowledged and defended the propriety of judicial review. Clearly, however, his careful choice of words did not imply the same tone or suggestion that one at once detects in Hughes’s reiteration. Thus, *Federalist Number 78* noted:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute.³⁹

The Federalist stresses a good faith obligation “to ascertain its meaning,” emphasizing that the Constitution is to control rather than the judges. Hughes stresses “what the judges say,” i.e., the thing that in fact controls is whatever the judges say the Constitution means, whether what they say proceeds from a good-faith effort to ascertain its meaning or whether what they say comes from an additional view of their role or of their opportunities as judges.

38. C. HUGHES, *Speech Before the Elmira Chamber of Commerce*, ADDRESSES AND PAPERS 133, 139 (1908).

39. THE FEDERALIST NO. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961).

The Federalist's rather disarming, even dry description assuredly disengages the judiciary from any active role in constitutional change; the judges are to give the Constitution *no less than its due*, despite whatever misgivings they might have about the wisdom of certain clauses, such as the slave clauses, and *no more than its due*, despite whatever misgivings they might have about the limited reach of certain other clauses, such as the due process clause. *The Federalist* assumes that the Supreme Court may be involved in the processes of constitutional change, but only as a catalyst. Insofar as its decisions faithfully applying the Constitution might bring to public attention consequences of the unamended Constitution that a large enough public would no longer approve, its decisions may trigger one or another of the article V amendment processes. Fundamental law would thereby be altered, as indeed it was thus altered by the eleventh, the fourteenth, and the sixteenth amendments.⁴⁰ Emphatically, however, the judges are to leave to the processes of article V such alterations as might be thought necessary to provide a better Constitution. The judges' decisions may thus signal appropriate occasions for constitutional change, but they do not presume to make it.

Much different from this signalling function of the Supreme Court in the processes of constitutional change are the many varieties of substantive judicial activism that have been persistently advanced. Indeed, even within the last three years, six new books have renewed the argument for a more participatory role for the Supreme Court in effecting substantive constitutional change.⁴¹ And even these recent additions understate the matter, as they leave out of account a burgeoning law journal enthusiasm supportive of that role.⁴² Significantly, the positions that the writers advance in these works are not confined to the suggestion that the Supreme Court should take care to apply the Constitution with equal firmness to new circumstances as to older, more familiar ones, as for example to apply the fourth amendment to warrantless intrusions by wiretap the same as to warrantless intrusions by the physical breaking down of doors.⁴³ This kind of application of unamended clauses may amount to no more than the firm application of the Constitution, and quite compatibly with the expectations of *Federalist Number 78*.

Neither are these writers' positions confined to the defensible propo-

40. These amendments respectively alter the Constitution as otherwise interpreted in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); and *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

41. See S. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984); C. BLACK, *DECISION ACCORDING TO LAW* (1981); P. BOBBITT, *CONSTITUTIONAL FATE* (1982); R. LADENSON, *A PHILOSOPHY OF FREE EXPRESSION* (1983); A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM* (1982); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

42. See, e.g., Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983).

43. See *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)). The *Katz* majority adopted the approach of the dissents by Holmes and Brandeis in *Olmstead*. See 277 U.S. at 469 (Holmes, J., dissenting); 277 U.S. at 471 (Brandeis, J., dissenting).

sition that the clauses of the Constitution should be interpreted under a rule of generous construction, appropriately acknowledging that it is indeed a constitution being expounded, within which the enumerations, allocations, and limitations of power ought not to be grudgingly regarded or narrowly construed.⁴⁴ Rather, the stronger thesis holds that the Supreme Court also has a necessary and proper obligation complementary to the formal amendment processes of article V. Accordingly, and yet allegedly consistent with article V, the Court must act to preserve the living Constitution from the hazards of obsolescence by its own innovation of interstitial or incremental quasi-amendments under article III. In brief, the national judiciary allegedly has the additional responsibility of repairing the gaps of constitutional inadequacy that become quite evident, but which the nation cannot sensibly expect the more cumbersome and less tentative machinery of the formal amendment process to handle.

To be sure, a large number of conventional arguments concerning this subject are not framed in these terms. Rather, they are framed more esoterically, in the manner of the arguments examined in the Introduction,⁴⁵ to construe the Constitution according to the perceived will of "the people." Here, however, the point is a different one than the suggestions considered in the Introduction. It is not that the courts should adjust their interpretations of the Constitution to conform to some alleged contemporary popular preference. Rather, it is that the courts are institutionally best situated to measure the need for constitutional revisions, and thus, within reasonable limits, to make such revisions directly.

Thus, by pressing the full advantage of Chief Justice Hughes's observation, the judicial power arising under article III of the Constitution may also include a power incidental to the processes of constitutional change provided for in article V. This incidental power is, moreover, allegedly not adverse to article V, but rather it allegedly complements article V. The difficult combination of prerequisite extraordinary majorities demanded for formal article V amendments is, in this view, not objectionable. To the contrary, it is entirely defensible as a proper protection of the Constitution from the risks of captious alteration which, if not restrained, might well trivialize the Constitution as a source of "fundamental" law. For example, the ease of amending the California Constitution by simple majority referenda may have tended to trivialize large portions of that state's constitution.

The heavy machinery of article V, one may thus believe, has worked reasonably well, and accordingly that machinery ought not be tampered with now. But the desirable rigor of article V necessarily tends to threaten a *rigor mortis* for the entire Constitution, if the Supreme Court

44. The reference, of course, is to Marshall's familiar phrase from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819). See also Holmes's able reiteration in *Missouri v. Holland*, 252 U.S. 416, 432-35 (1920).

45. See *supra* text immediately preceding and accompanying notes 17-22.

ignores its *own* supposed institutional obligation of tentative and retractable quasi-amendment.

Accomplished with care and with studied restraint, the Supreme Court's implied judicial power of interstitial and retractable quasi-amendment helps safeguard the contemporaneity of the Constitution. The Court presumably does not take large leaps as a formal amendment might, but rather makes only fairly small, incremental adjustments, principally at the margins of ambiguous clauses. This Court process is far superior to the formal amendment process in this regard, moreover, because insofar as later events may be persuasive that a particular constitutional innovation by the Court was not as well-advised as circumstances originally suggested, the quasi-amendment may be retracted by the same process that called it into being; neither the innovation nor its elimination is subjected to the heavy machinery of article V. Thus, just as the decision in *Lochner v. New York*⁴⁶ may illustrate the downside risks of a power of interstitial judicial innovation, unlike the prohibition amendment it did not require any later amendment to cancel the experiment; in fact, the Court effectively overruled *Lochner* a mere twelve years later.⁴⁷ And similarly, neither are such judicial quasi-amendments as those enunciated in *Mapp v. Ohio*,⁴⁸ importing the exclusionary rule into the fourteenth amendment, nor in *Roe v. Wade*,⁴⁹ declaring a limited abortion right, beyond retraction. To whatever extent each may be regarded as more amendment than interpretation, we recognize even now that each is extremely vulnerable to repeal by the same agency which introduced them. Indeed, it is exactly our shared recognition of that possibility which accounts for the political struggle to command who shall next be appointed to the Supreme Court.

In sum, there is in this view allegedly a desirable duality of two, neatly-fitted mechanisms for constitutional change. Both are provided for within the Constitution: the molar machinery of article V, heavy, formal, and required for any outright modifications in the written text of the Constitution; and the molecular machinery of article III, lighter, more insulated, and appropriate for incremental and retractable judicial innovation. Allied with the latter, moreover, may also be an additional and companionate role associated with Congress, a participating legislative implication arising from article I. The thought shaped in certain cases⁵⁰ is that an extension of some existing clause that may seem doubtful for the Supreme Court to provide as a quasi-amendment may nonetheless be adopted by the Court if first commended in some congressional

46. 198 U.S. 45 (1905). *Lochner* more or less "amended" the fourteenth amendment to enact Herbert Spencer's *Social Statics*. But see 198 U.S. at 75 (Holmes, J., dissenting).

47. *Bunting v. Oregon*, 243 U.S. 426 (1917).

48. 367 U.S. 643 (1961).

49. 410 U.S. 113 (1973).

50. E.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Price*, 383 U.S. 787 (1966) (dicta); *United States v. Guest*, 383 U.S. 745 (1966) (dicta).

action. The Introduction,⁵¹ however, adequately developed the rationalized foundation for this species of collaborative quasi-amendment, and it need not be reviewed here still again. Essentially, the quasi-amendment reintroduces “the people’s” will, operating supposedly through Congress, to enlarge the Constitution as Congress likes.

IV. CAMBRIAN RINGS AND THE LIVING CONSTITUTION

The preceding sketch of the principal processes of constitutional change now seems reasonably complete and, quite possibly, reassuring as well. Running it through from back to front, this is what we appear to have: First, there are interstitial quasi-amendments, occasionally introduced, and occasionally also withdrawn through the Supreme Court, al-

51. See *supra* notes 16, 20, 21, 24 and accompanying text. This earlier discussion developed the rationalized foundation for this species of collaborative quasi-amendment.

A recent hybrid species of *amendment* has been proposed in Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). Its labored ingenuity is a tribute to its author’s resolve to invent a connection between article V and substantive changes that are not proposed and ratified as express amendments, but which Professor Ackerman nonetheless regards as sufficient for the Supreme Court to treat as though they were.

Professor Ackerman’s proposal is to have the courts treat the word *convention*, as it appears in article V, as not limited to that which article V expressly describes. Rather, he proposes that courts should regard the mass of American citizens at large as a continuing *convention* whose manifest preference for some major alteration in the Constitution may become effective as an amendment. Such an amendment occurs “during rare periods of heightened political consciousness,” *id.* at 1022, in which “the mass of American citizens mobilizes itself in a collective effort to renew and redefine the public good.” *Id.* at 1029. See also *id.* at 1026-30, 1046, 1057.

Crisply restated, Professor Ackerman proposes that courts interpret article V as though it were accompanied by an additional (phantom) section. As thus (re)written, article V would then provide in full:

Section 1. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the senate.

Section 2. A “convention for proposing amendments” shall also be deemed to have been called, and ratifications of its resolves shall be deemed to have occurred, whenever the mass of American citizens, acting during rare periods of heightened political consciousness, has mobilized itself in a collective effort to renew and redefine the public good.

See *id.* at 1022, 1026-30, 1046, 1057.

Professor Ackerman suggests that the Supreme Court’s acquiescence in New Deal legislation is a concrete example of his discovery of a proper understanding of article V. He declares that the Supreme Court acted *improperly* in purporting to sustain that legislation pursuant to the existing commerce, and necessary and proper clauses in article I. In his view, the contested acts of Congress were not within the scope of those clauses. He suggests, however, that the Court would have acted properly had it declared, instead, that the acts were valid pursuant to the structural nonamendment obviously desired and effectively enacted by the mass nonconvention under article V. The Court would then have explained that convention includes the extended definition suggested by Ackerman and that the amendment thus both proposed and ratified had modified the Constitution by adding a new and general welfare power as an unenumerated power vested in Congress and in the President. See *id.* at 1056-57, 1064-65.

Professor Ackerman maintains his discovery of the (unprovided for) extended *convention* in article V is the genuine article; he derides those inclined to find it remarkable as but “formalists,” a dismissive term intentionally synonymous, no doubt, for the picayune and small-minded. *Id.* at 1059-1070.

beit somewhat thinly disguised as but activist *interpretations* of existing clauses, and not usually acknowledged as actual amendments.

Second, Congress or the President has initiated significant de facto alterations. One example is the development of a virtual national police power in partial derogation of the tenth amendment. Another is the development of considerable government regulation through agency rulemaking, in partial derogation of the article I assumption that when laws are made they shall be made by Congress. One further example is the development of exceptional executive prerogative in partial derogation of the more modest assumptions of article II. The Supreme Court has acquiesced in these changes, albeit also thinly disguised as *interpretations* of existing clauses, and not acknowledged as actual amendments either.

Third, occasionally we have approved outright amendments pursuant to article V, most of which may have constituted reasonable improvements reflecting a modified national consensus on certain matters. In the aggregate such amendments have been neither so numerous as to clutter or degrade the Constitution, nor so few as to suggest that we have been ruled by a Constitution desired solely by persons long since dead, and virtually unalterable by the living.

Finally, we have a Constitution which, while still not widely imitated elsewhere, nonetheless is surprisingly resilient in respect to its domestic significance two hundred years after its original novelty.

One might sensibly conclude, therefore, that the three processes of constitutional change are appropriate, felicitous, and sound for the future as well. To be sure, two of them apparently grew up outside the rules of the Constitution, because they are not provided for in article V, which seems to provide expressly and thus exclusively how constitutional change shall be accomplished. But such events are not unfamiliar in the life of the law. They may amount to no more than a confirmation of Holmes's observation—that the life of the law, in this particular instance of the Constitution, has been experience and not merely logic.⁵²

Similarly, the review of the tripartite processes of change may reflect a more mature description of our Constitution. This description, far from being embarrassing, is arguably quite creditable. It may furnish in its own limited fashion an external set of insights of the same sort Alexis de Tocqueville provided so admirably more than a century ago, on a vastly more magnificent scale. In *Democracy in America*,⁵³ Tocqueville, as a visitor, appraised American institutions unconstrained by the American conventional wisdom. What he said did not conform to nativist descriptions that did not account for things as he saw them. But by providing his own descriptions, Tocqueville did America no disservice, and indeed he returned to France with a flattering enthusiasm for this country.

52. O. HOLMES, *THE COMMON LAW* 1 (1881).

53. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1835, 1840 (A. Knopf ed. 1945).

One need not, therefore, be defensive about our several processes of constitutional change, even if two of them seem somewhat lawless and in some respects ironic. One might have anticipated that the formal, recorded amendments would have marked major alterations in our Constitution, for instance, even assuming that minor, interpretative alterations would proceed by other means. With the exception of the Civil War amendments, however, quite the reverse appears to be true. The majority of amendments since 1791 have been less significant, in all likelihood, than the combination of quasi-amendments simply forced by the Supreme Court and the alterations presumed by congressional and executive fiat, and then approved by judicial winking after the fact. But what of that? What does it matter, assuming one feels gratified with the overall results? Is it not quite sufficient that the system has given us a Constitution which in fact seems well worth its own bicentennial celebration? A small marginal lawlessness seems to be a very fair price.

I suppose this view we have been examining may well be entirely correct. To conclude on any different note, moreover, may seem disfiguring. Still, even assuming that we should have more pride and more confidence in the way things have worked, there are some regrets and reservations that one can hardly fail to acknowledge. My own principal reservation can best be explained in the following way.

It has seemed to me for a long time that the one fairest way of testing the enthusiasm exhibited by many commentators on the Constitution is to imagine the figurative constitutionalizing of their own suggestions. The proposal is to take each author's good idea and to reexamine it as though it were already a clear and an established feature of the Constitution. One may feature it within article V, or add it onto article III if it is meant as a directive to judges. Or one may place it among the enumerated powers of Congress, insofar as the proposal means to commit to Congress an enumerated authority to extend its own powers. Whatever the argument, try it not merely as a piece of advocacy urged upon one's colleagues, the judges, or on Congress. Try it at least as a figurative draft one may need to provide for one's own ideas, to see more clearly how each then appears.⁵⁴

The point of this figurative exercise is not meant as a trick. It is not to imply that the idea under review should not be credited unless or until it is recast as a proposed actual text within the Constitution. The purpose is simply to ask that one carry the enthusiasm of one's advocacy to that figurative exercise, even as if one had sole sufficient authority to do so. The point is to see how the idea looks when it must be confronted as though it were, indeed, an express, authorized mode of constitutional alteration, enlargement, diminution, or change. How, then, would others frankly regard the proposal? How well would the proponent regard it? With what degree of confidence does one imagine that a majority of the

54. See, e.g., *supra* note 51.

living would welcome it as a necessary and proper feature of *their* constitution?

My own impression is that nearly all of the offered "insights" about the conscious changing of the Constitution without the formalities of article V will at once fail this figurative test. They will do so, moreover, because their own authors may not quite trust in them generally, but only selectively, only when applied sometimes, by some judges, by some Congresses, by some people with sympathies similar to their own. One may desire a more democratically driven Constitution, but perhaps only if what it would yield would be better from the particular set of preferences such as an author's strong preference for more generous welfare laws, but not for more stringent anti-abortion laws or death penalty laws. One may also desire a more *judicially* driven Constitution, but perhaps only if it would deliver a more powerful version of the equal protection clause, rather than, say, a more powerful version of the impairment of obligations of contracts clause.

If one were to take the supposedly proper power of judicial quasi-amendment out from the mere shadows of article III and give it equal textual dignity and respect as the Constitution provides in article V, how likely is it even a simple majority of citizens would feel benefited? How many would regard it favorably? Or, if we pretended for a moment that we lived under Jefferson's automatically self-expiring constitution, which of the several means of providing for constitutional change now would we want to provide? Jefferson's own provision that the Constitution terminate thirty-four years from now? The Bruce Ackerman version of article V? Some intermediate proposal such as "all parts of the Constitution save those concerned with inherent and unalienable rights are subject to such altered application as Congress shall provide?" All of these? None of these?

But if one would not welcome the appearance of these formulations as *expressly* additional to (or as substitutes for) article V, what does that suggest? One may wriggle about the question in many ways, no doubt, but what it most obviously suggests is a serious ambivalence at best. Each suggestion carries its own troubles and its own baggage, even as article V already possesses its own troubles and carries its own baggage. Enthusiasm is quickly tempered when thus tested. Better not to recognize these other proposals in the formal Constitution. Best simply to urge them as strategies, from time to time, and otherwise reserve the usual right to condemn the judges when they are obviously tampering with *the* Constitution, that is, of course, the Constitution of one's own preference. If, moreover, no contemporary majority would vote their approval of any of these proposals in their constitution (the constitution of the living and not merely of the dead), none of these proposals may find support on the errant notion that each generation is entitled to settle its own rules; clearly the living may not, in fact, welcome these kinds of

rule changes in their constitution. They may strongly prefer that the judges respect the rules already laid down.

Nearly everyone is familiar with the adage that "hypocrisy is the tribute that vice pays to virtue." Few, however, appreciate its full subtlety. At the point when one shifts from a de Tocqueville position of merely offering detached observation as to how the several processes of constitutional change actually operate, to the different position of applause leader or sponsoring theorist, that homily should be recalled.

There are places in our law which are deliberately hypocritical, and perhaps it is for the best.⁵⁵ Our deviant processes of constitutional change are, at best, very probably of this sort. Americans may each personally benefit from their occasional de facto exercise, yet we are understandably reluctant to regularize them or to grant them a conventional legitimacy. Rather, there is a sense in which it is desirable that these processes be used only hypocritically, if at all. Honesty would not necessarily be the best policy, for its own hubris might so thoroughly discredit the amenities of article V as to alter the very nature and stability of constitutional law.

In brief, one can make a strong case at least to preserve the forms and require the minimum price of self-conscious courtesy. When Congress or the Supreme Court Justices knowingly presume effectively to rewrite a clause, an article, or an amendment to the Constitution, the least they must do is to have the civility to deny it. Their insistence that they are in no respect presuming to amend the Constitution is the minimum tribute they owe the written Constitution at precisely those times when they are quite consciously doing exactly what they disclaim.

Nevertheless, given this complicated and highly ambivalent compromise, there are at least two additional difficulties. The first, by far the minor of the two, is the usual first casualty of truth. It is the marginal cost of professional disaffection. It is one thing to take the Supreme Court seriously, for instance, even when the substance of one's analysis of a case or of an opinion is extremely critical. Indeed, to treat a Supreme Court opinion critically, as to spend many hours on any task, is implicitly a high form of respect. It is quite a different thing, however, to review what the Court does, to quarrel with one feature, amplify another, commend still another, and so forth, insofar as the entire enterprise is accompanied by a profound sense of irrelevance. When one's own sense of professional commitment seems betrayed, as it may when the Court apparently does not take doctrine seriously, but resolves instead to torture it, to misconstrue it, and to manipulate it as the mere form of genuflection the Court thinks smiling vice owes to virtue, to treat the Court's explanations of its cases seriously becomes a professional act of complicity. The result tends to be that the more caring critics, the more serious

55. For an exceptionally thoughtful discussion and illustration, see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* (1973).

people, are driven out. Gresham's law operates in scholarly disciplines as predictably as in monetary systems.⁵⁶

In addition and with this observation I mean to close, one must consider another cost, namely, the prospect of a gradual petrification of the written Constitution. As we celebrate the bicentennial, we should also take care to anticipate the future and not merely commemorate the past. As the present becomes the past, unless we take article V more seriously, using it as well as respecting it, the tricentennial is quite likely to possess a certain quaintness that even the pending bicentennial does not have: the celebration of a great relic, the petrified Constitution of the United States.

Amendments to the Constitution are in some sense like cambrian rings. They are its best evidence of life and of continuing growth. They mark and record visible passages. Here the eleventh amendment marks the reaction to *Chisholm v. Georgia*;⁵⁷ over there, the nineteenth amendment declares the equal right of women to vote; "look here," at the sixteenth and seventeenth amendments, in which first the resolve to authorize unapportioned income taxes appears, and then the direct, popular election of senators. See where a cambrian ring dates the oddity of forbidding virtually all uses of "intoxicating liquors," in 1919, in the eighteenth amendment. Note where it evidently was reconsidered, in 1933. See where the Americans quite recently decided to enfranchise even their teenagers, in 1971. These are the cambrian rings of a living constitution.

Famous case names are *not* cambrian rings. They are at best rabbinical annotations on a dead sea scroll. *Reed v. Reed*,⁵⁸ for instance, has no equivalent status as the ill-fated Equal Rights Amendment would have possessed. At best, *Reed* marks an enlightened innovation gently forced by a particular hierarchy, and since then tentatively confirmed by a rush of guilt-laden legislative reinforcement. But evidently no sufficient enthusiasm exists in the United States to fix as an express part of its Constitution that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁵⁹

Not the least reason for that reluctance—the reluctance to add to the written Constitution—is an acquired ambivalence toward our own

56. For a recent and striking example of such disaffection, see Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U.L. REV. 549 (1983). See also Kurland, *Is the Constitution Dead, Too?*, U. CHI. MAG., Winter 1984, at 28.

57. 2 U.S. (2 Dall.) 419 (1793), as discussed *supra* note 29.

58. 404 U.S. 71 (1971) (holding invalid a state statute using a male-preference "tie breaker" for court appointment as executor). The case is noteworthy, of course, as the first to shift the equal protection standard away from the century-old conventional standard regarding gender. Cf. Hoyt v. Florida, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948). The reasoning in *Reed* was saved from disrepute through the creative grace of Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

59. Congress proposed the Equal Rights Amendment as the twenty-seventh amendment on March 22, 1972, and the extended ratification deadline expired on June 30, 1982. The amendment would have provided:

rabbis. Having noticed how very artfully existing clauses have been interpreted, one has a peculiar resistance to proposals that may provide highly uncertain careers of their own. The addition of any new cambrian ring is thus made more problematic.

Similarly, not the least reason for the failure of the proposed twenty-seventh amendment resulted from equivalent mistrust of its enabling clause, the provision vesting in Congress a power to enforce it by "appropriate" legislation.⁶⁰ The fear of congressional capture, and the conjecture that the Supreme Court would too readily acquiesce in such uses as Congress might presume to make of its new authority, were substantial. In effect it was not that the amendment was necessarily unacceptable. It was, rather, that the foundation for trust in its merely fair and moderate administration was missing. At the end this consideration, more than any other, meant there would be no "cambrian ring" taking governmental gender discrimination from the shadows of the fourteenth amendment.⁶¹

The amendment process has been made much more difficult than the barriers of its own formalities, partly because of the self-fulfilling imperatives of the other processes of constitutional change. Their own virtual normalization tends to displace the usefulness of article V. Ironically, however, the written Constitution thus begins to recede from the living. It is less democratic on its face as it becomes layered in abstruse constructions.

One may be appropriately philosophical about these matters and, even so, feel a sense of loss. No one in this generation may have the vision to foresee the alterations appropriately called for in the living Con-

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 power to enforce by appropriate legislation, the provision of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

60. *Id.* § 2.

61. There were, of course, many contributing factors. Among them, I would include all of the following: (1) The Civil War syndrome, as evidenced by the fact that the majority of nonratifying states were in the South, where resistance to the ratification of amendments enlarging national powers has traditionally been strong; (2) the unexpected strength of the sex role tradition; (3) the undue complacency of the original proponents, whose explanations of the amendment offered at the time of its proposal in Congress were quite cavalier and came around to embarrass the sponsors; (4) tactical oversights in Congress, such as using "sex" rather than "gender," and failing to consider ratification by state conventions; (5) the 1980 shift in the control of the Republican Party, with the conservatives prevailing and the party platform omitting approval of the ERA; (6) the alienating novelty of the ratification deadline extension that provided three additional years after the earlier provision for seven years; (7) the relatively late start in organized efforts by proponents and the well organized efforts by opponents; (8) the alienating effect of additional groups hoping to benefit from ratification, such as homophile groups; (9) the displacement effects of supervening *post-Reed* Supreme Court decisions, enlarging the interpretation of the fourteenth amendment to reach nearly all gender-based laws, undercutting the perceived importance of the ERA; (10) mistrust of the Supreme Court and of Congress about possible uses and (mis)applications of the proposed amendment.

At the end, in at least three very close states—Illinois, North Carolina, and Florida—the combination of items 3, 9, and 10 proved impossible to overcome. Cf. Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQUALITY 1 (1983).

stitution during the next century, but it is surely unlikely that the right answer is "none at all." The revivification of the amendment process, like the revival of the Equal Rights Amendment, may require more confidence in the people and less paternalism in the courts. The processes of change need not be so strained.