

WHY WRITE? THE DESUETUDE OF ARTICLE V AND THE DEMOCRATIC COSTS OF INFORMAL CONSTITUTIONAL AMENDMENT

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I. INTRODUCTION

In his classic *Introduction to the Study of the Law of the Constitution*, the great British constitutional scholar, Albert Venn Dicey likened the constitutional amendment power of the United States to a “a monarch who slumbers and sleeps.”¹ It was during periods of constitutional amendment, Dicey explained, writing in 1897, that the full sovereign power of the nation came together out of the disparate fifty states, but these moments were few and far between.

The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.²

During the late nineteenth century in which Dicey wrote, many people had grown perturbed by the supposed rigidity of Article V of the U.S. Constitution, which establishes the procedures for formal amendment of the text.³ Over the course of a century, only the Bill of Rights and the Civil War had roused the nation to action, leading some to the conclusion that the Constitution was practically impossible to change. A founding document that could not be changed, they feared, was one over which the “dead hand” of tradition hung heavily, one incapable of adapting to modern conditions, lacking a “safety valve” for

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1. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW AND THE CONSTITUTION* 140 (5th ed. 1897) (1885).

2. *Id.* at 140-41.

3. U.S. CONST. art. V (providing, in relevant part, “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. . .”).

democratic politics, and over which new generations had no say at all.⁴

Of course, whether we like it or not, constitutional meaning evolves over time, even without formal amendment. The President dislodges old governing arrangements and sets new quasi-constitutional norms.⁵ Congress fills in “gaps” in the text with statutes or regulations, “super-statutes” like the Administrative Procedure Act or the Voting Rights Act being important examples.⁶ Perhaps most impactfully, the Supreme Court shapes the meaning of constitutional text as it applies and expounds upon it.⁷

For years, there have been those who considered these subtle and gradual processes of change to be critical to the Constitution’s survival. “Nothing,” wrote the lawyer Hannis Taylor in 1906, “has been more remarkable in the history of our Federal Constitution than the ease with which it has adapted itself, by the aid of judicial interpretation, to the ever-increasing wants of a rapidly swelling population, continually organizing new systems of local government beyond our original limits.” Without such “subtle and silent” adaptation, Taylor proclaimed, “our otherwise rigid and inelastic” Constitution would have “[gone] to wreck.”⁸

But there is good reason to question whether informal processes of constitutional change are perfect substitutes for formal amendment. Many constitutional scholars believe that they are not. As a leading voice on this point, the University of Texas’s Sanford Levinson has argued for years that our Constitution is “hardwired” with such a deep anti-majoritarian bias (in institutions like the Senate and Electoral College) that nothing short of deep structural reform can salvage it.⁹ Levinson’s central point, in other words, is that informal adaptation is *insufficient* to make constitutional change fully democratic.

Others go further, asserting that informal amendment actually *precludes* Article V change. Why, ask a pair of well-known originalist scholars, would

4. On the “dead hand” problem in constitutionalism, see JOHN H. ELY, *DEMOCRACY AND DISTRUST* 11 (1980). As to the safety-valve image, it is believed that it was Justice Joseph Story who coined it. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, VOL. 3, 687 (1st ed. 1833). (“[The Framers] believed, that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.”).

5. On the President’s capacity to disrupt arrangements and create norms, see STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* (1991) and Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

6. See William Eskridge & Matthew R. Christiansen, *Congressional Overrides of Supreme Court Statutory Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014); William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215 (2001).

7. See JOHN R. VILE, *CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDMENT PROCESS* 75-88 (1993).

8. Hannis Taylor, *The Elasticity of Written Constitutions*, 182 N. AM. REV. 204, 205, 213 (1906).

9. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 21-22 (2006).

political and social movements opt for the onerous Article V route when they can focus instead on lobbying the courts to change the Constitution?¹⁰ Many who do not similarly lament the rise of an activist bench do agree, however, that Article V is something of a dead letter.¹¹

This article will assess this claim, both in descriptive and normative terms. Is Article V in a state of desuetude? And if so, is this a problem? I conclude yes on both counts, arguing that Article V usage has retreated from the mission originally conceived for it, reduced at present to a vehicle for single-issue lobbying proposals lacking in broader applicability and transformative scope. As to the second question, I conclude that the marginalization of transformative formal amendment has had three consequences with problematic implications: (1) the “sacralization” of the Constitution, (2) a mismatch between fixed constitutional standards and empowered institutions in a state of perpetual evolution; and (3) the eclipse of popular democratic constitutional politics. In concluding, I assess these and explore whether a return to a democratic politics of Article V amendment is possible, and desirable.

II. A VERY BRIEF HISTORY OF ARTICLE V AMENDMENT

Aspiring to formalize James Harrington’s maxim that government should be an “empire of laws and not of men,”¹² American democracy was established under a written constitution.¹³ Although many generations of Americans have asserted that the U.S. Constitution is a perfect document,¹⁴ Article V itself is the clearest sign that the Framers recognized theirs as an imperfect, contingent product. As the Virginian George Mason told the Convention in June 1787, “the plan now to be formed will certainly be defective, as the Confederation has been found on trial to be,” and “it will be better to provide for [amendment], in an easy, regular and Constitutional way than to trust to chance and violence.”¹⁵ Article V represented a giant leap beyond the constitutional amending mechanism under the Articles of Confederation, which demanded perfect unanimity from the thirteen states to ratify any amendments proposed by the Continental Congress.¹⁶ Not only were no amendments ever adopted through this mechanism, it was

10. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 202 (2013).

11. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641 (2014); BRUCE ACKERMAN, WE THE PEOPLE, VOL. 1: FOUNDATIONS 267-68 (1991).

12. THE POLITICAL WRITINGS OF JAMES HARRINGTON 41 (Charles Blazer ed.) (1955).

13. EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 84-88 (1965).

14. For a sweeping and masterful survey of such ideas in American history, see MICHAEL A. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 225 (1987).

15. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1, 203 (Max Farrand ed. 1911).

16. ARTICLES OF CONFEDERATION of 1781, art. XIII; see VILE, *supra* note 7, at 2.

ignored when delegates assembled to write a new constitution.¹⁷ Greater flexibility was necessary, the delegates knew, if their new charter was to avoid a similar fate.¹⁸ Similar provisions in a number of the revolutionary state constitutions provided them with a workable model.¹⁹

What emerged from that hot summer in Philadelphia was an amending process designed to be neither so easy as to destabilize the system, nor so difficult that the process would be ignored or lead to rebellion. The brand-new constitutional Article V specified two routes to amendment, each of which required the participation of both the federal government and the states. First, two-thirds of the legislators of both houses of Congress could propose amendments, to be ratified by three-fourths of the state legislatures or by conventions held in those states. Second, upon petitions by two-thirds of the state legislatures, Congress would have to convene an amending convention.²⁰ Writing in *The Federalist*, James Madison described the plan approvingly:

The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or the other.²¹

The new system ran into a huge hurdle before the Constitution was even ratified. The Anti-Federalists were bitterly opposed to the new document because it did not have a bill of rights specifically limiting the powers of the government over citizens' civil rights and liberties.²² Eventually, the Federalists were persuaded to support one in order to secure the Constitution's passage, and in 1789, as promised, a set of twelve amendments were introduced into the First Congress.²³

17. See Richard Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (Winter, 1987); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 UNIV. CHI. L. REV. 2 (Spring 1995).

18. VILE, *supra* note 7, at 2.

19. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 303-43 (1969).

20. U.S. CONST. art. V, *supra* note 3. The amending process contained two explicit limits: one, slave importation would continue for another twenty years; two, states would not be deprived of their equal suffrage in the U.S. Senate without their consent.

21. James Madison, *Federalist No. 43* in JAMES MADISON, ALEXANDER HAMILTON, AND JOHN JAY, *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 2003).

22. See RATIFYING THE CONSTITUTION (Michael A. Gillespie & Michael Lienesch ed., 1989); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEG. HIST. 197 (1994).

23. The desire to eliminate the need for a second convention was an important factor in persuading James Madison to accept a bill of rights. See Sanford Levinson, "Veneration" and *Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*,

Ten were ratified by the state legislatures in 1791 to become the now-celebrated Bill of Rights.²⁴

Two more amendments took shape within the Constitution's first two decades of existence as tweaks to glitches that appeared in the system. In 1793, the Supreme Court ruled that a lawsuit brought by a South Carolinian man against the State of Georgia could proceed.²⁵ A wave of protest ensued, and Congress acted swiftly to overturn the Court's decision. The Eleventh Amendment, ratified the very next year, provided that the judicial power would not extend to cases against a state by citizens of other states or nations.²⁶ The Twelfth Amendment, meanwhile, responded to an early defect in the Electoral College machinery. In the notorious presidential election of 1800, Thomas Jefferson and Aaron Burr split the anti-Federalist vote and ran to a tie, forcing a long and bitter struggle in the House of Representatives to resolve the election.²⁷ The Twelfth Amendment, ratified in 1804, provided that electors would cast separate votes for president and vice-president, thus paving the way for the modern party ticket.²⁸ The remaining half of the nineteenth century was a time of relative quietude on the amendment front, although one 1810 proposal by Maryland Senator Phillip Reed, barring any American citizen from accepting titles of nobility, attracted significant attention. Most likely the product of alarm at the marriage of a Baltimore socialite and the youngest brother of Napoleon Bonaparte, the "missing Thirteenth Amendment" was approved by Congress and ratified by twelve states (and even mistakenly included in a number of contemporary printings of the Constitution) before the ratification drive stalled out.²⁹

As national unity started to give way over the slavery question, faith in the

TEX. TECH L. REV. 21 (1990); CAROL BERKIN, *THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA'S LIBERTIES* (2016); and DONALD S. LUTZ, *A PREFACE TO AMERICAN POLITICAL THEORY* 49-88 (1992).

24. The two "failed" original amendments were proposed by Congress but not ratified by the states. The first mandated representation in the U.S. House of Representatives by at least one representative for every 30,000 residents until that body had 100 members or more. It would have quickly become obsolete as a result of population growth. The second stipulated that a congressional pay raise would not go into effect until the meeting of the next Congress. Proposed without time limits, this amendment was actually revived in the late twentieth century and ratified as the Twenty-Seventh Amendment.

25. *Chisholm v. Georgia*, 2 Dallas 419 (1793).

26. U.S. CONST. art. XI. On the history of the Eleventh Amendment, see JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

27. On the history and significance of the Twelfth Amendment, see Richard B. Bernstein, *Fixing the Electoral College*, 5 CONSTITUTION 42 (Winter 1993); Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501 (2013-14).

28. U.S. CONST. art. XII.

29. Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L. J. (1999); Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 98 LAW. LIBR. J. 303 (2001).

Constitution began to fray, and ever more radical reform proposals bubbled up. The constitutional scholar Sidney George Fisher claimed that the roots of the unrest lay in the difficulty of Article V amendment, and proposed, following the lines of the British system, that Congress should be able to make changes to the Constitution on its own.³⁰ Around the same time, John C. Calhoun, the great theorist of Southern secession, argued that crisis could be avoided by rewriting the Constitution to make the United States a “federated” republic. His proposals included stripping Congress of its commerce power, granting a “concurrent majority” veto power over federal legislation, and dividing the Presidency into two branches to represent Northern and Southern constituencies.³¹ In 1861, the Corwin Amendment, put forward by New York Senator William Seward (and supported by President Lincoln), offered the South eternal perpetuation of slavery without federal government interference in a desperate bid to avoid war. The Corwin Amendment managed to pass both houses of Congress, but it is impossible to say whether it would have been ratified by the states, since the outbreak of war in April 1861 interrupted the process.³²

The postwar Reconstruction amendments abolished the legal remnants of the Southern apartheid regime, but they only temporarily succeeded in restoring Americans’ faith in the amending process. For one thing, however broad the aspirations of their authors, the amendments were soon narrowed by the Supreme Court in ways that rendered them practically useless to improving the lives of liberated slaves, soon subjected instead to the rollout of Jim Crow.³³ A not-uncommon argument of the period, in fact, was that the amendments had gone too far for American public opinion.³⁴ Another reason for Article V-related

30. SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* (London, J.B. Lippincott & Co., 1862); see JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 97-105 (1992).

31. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION OF THE UNITED STATES* (Richard K. Cralle ed., South Carolina, Press of Walker and James, 1851). Other constitutional scholars of the period grew concerned about the constitutional convention mechanism in light of Southern secession, see JOHN A. JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING* (Chicago, Callaghan and Company, 1887); see VILE, *CONSTITUTIONAL AMENDING*, *supra* note 30, at 102-03.

32. Stephen Keogh, *Formal & Informal Constitutional Lawmaking in the United States in the Winter of 1860-1861*, 8 J. LEG. HIST. 275, 284-85 (1987).

33. For the mixed motives behind this amendment, see generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988). These court cases included *The Slaughterhouse Cases*, which narrowed the Privileges and Immunities Clause. See generally *Slaughter-House Cases*, 83 U.S. 36 (1872); the Civil Rights Cases of 1883, which overturned a federal statute prohibiting discrimination in places of public accommodation. See generally *Civil Rights Cases*, 109 U.S. 3 (1883); and *Plessy v. Ferguson*, which permitted “separate but equal” segregated facilities. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

34. In 1898, the history professor Goldwin Smith advocated for repealing the Fifteenth Amendment because it was not being enforced. See Goldwin Smith, *Is the Constitution Outworn?* 166 N. AM. REV. 267 (Mar. 1898).

skepticism was the dubious legality of the amendments' passage, Southern states only agreeing to ratify in order to be readmitted to the Union.³⁵ Furthermore, once the fog of war subsided, from 1870 to 1913 no amendments passed despite widespread support for proposals including the direct election of senators, women's suffrage, and the so-called Blaine Amendment, which provided that no state could make any law respecting an establishment of religion or direct public funds to be used by religious sects.³⁶ Instead, as the Industrial Revolution swept over the American economy and society, the Constitution—especially the provisions of the Fourteenth Amendment—was most often invoked to thwart political change, especially when it came to striking down efforts at easing economic dislocation for the most affected sectors—farmers, laborers, women, children, and the urban poor.³⁷

As the nineteenth century came to a close and the Progressive Era dawned, “constitution tinkering” hit a historical peak in America as rising political discontent started to spill over into calls for institutional change.³⁸ Writing in 1897, the constitutional historian Herman Ames judged that the last two decades of the nineteenth century had seen “attempts to alter the Constitution in almost every particular.”³⁹ Indeed, the next few decades witnessed, not just the passage of the Sixteenth Amendment (the federal income tax), the Seventeenth (direct election of senators), the Eighteenth (prohibition), and the Nineteenth (suffrage for women), but also a flurry of proposals aimed at changing the Constitution's most purportedly undemocratic structures: indirect senatorial elections, lifetime judicial appointments, the Electoral College, Senate malapportionment, the lack of representation for the District of Columbia, and even the legislative-executive separation of powers, which some clogged up the legislative and regulatory process.⁴⁰ Between 1791 and 1897, some 1,736 amendment proposals surfaced in Congress; between 1897 and 1929 alone, that total reached 1,370. Several states signed petitions calling for a constitutional convention; although this mechanism was not used, the threat of such a convention forced the Senate to approve of the Seventeenth Amendment in 1912.⁴¹ Finally, three of the four main parties contesting the 1912 presidential election—the Democrats, the

35. BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 2: TRANSFORMATIONS* 207-53 (1998). If these states were counted, 28 ratifications would be needed; otherwise, 22 states would do.

36. See Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38, 38 (Jan. 1992).

37. On this history, see generally Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (June 2009).

38. See KAMMEN, *supra* note 14, at 204-08, 226-31.

39. HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES* 23 (New York, Lenox Hill Pub. & Dist. co., 1897).

40. The history of the four Progressive amendments is covered in DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, 188-267 (1996).

41. See RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 180-82 (2001).

Progressives, and the Socialists—called for a national constitutional amendment in their party platforms.⁴²

The amendment fervor soon crested as the nation entered a period of conservatism. The federal government's massive expansion over industry and civil liberties during the First World War turned Americans against big government generally, while the passage of four amendments over a decade fanned critics' fears of radicalism and convinced reformers that the amending mechanism was working as intended.⁴³ Meanwhile, Prohibition, once a cause célèbre for evangelists, women, and other social reformers, grew increasingly unpopular, leading to rising dislike for formal amendment. An amendment to ban child labor passed Congress in 1924, but a combination of anti-feminist and anti-Communist propaganda helped halt the state ratification drive.⁴⁴ Eventually, the question of child labor was dealt with statutorily as part of FDR's New Deal, itself a watershed moment in American political reform that entirely bypassed the constitutional route.⁴⁵

The rest of the twentieth century saw a change in, if not the *frequency* of amendments, then in their scope and content, which grew narrower, more technical and, frankly, less interesting to American voters than that of their predecessors. These amendments fell into two categories. The first were amendments that made neat correctives to technical problems. The Twentieth Amendment, ratified in 1933, shortened the terms of lame duck officeholders by moving presidential and congressional inauguration dates forward.⁴⁶ That same year, the Twenty-First Amendment repealed Prohibition, the first amendment to repeal another and the only one ever ratified, not by state legislatures but by state conventions.⁴⁷ The Twenty-Second Amendment formalized the informal rule dating back to George Washington that limited a president to two full terms in

42. 1912 Progressive Party Platform (June 25, 1912), *The American Presidency Project*; 1912 Democratic Party Platform (June 25, 1912), *The American Presidency Project*; 1912 Socialist Party Platform (May 12, 1912), *Sage American History*.

43. Aziz Rana, *Progressivism and the Disenchanted Constitution in THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN STATE* 25, 50 (Stephen Skowronek et al. eds., 2016).

44. See Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 AM. J. LEG. HIST. 369, 374, 395-96 (Oct. 2000). When opponents of the child labor amendment asked the Court to declare it expired, even without a specified time limit, the Court declared that the timeliness of state ratifications was a "political question" for congressional determination. See *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

45. See *U.S. v. Darby*, 312 U.S. 100 (1941). For Franklin D. Roosevelt's decision to stack the Court rather than pursue the demanding amending option, see David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court and Constitutional Amendment*, 104 POL. SCI. Q. 463, 466 (Fall 1989).

46. U.S. CONST. art. XX.

47. U.S. CONST. art. XXI. Vile points out that the convention mechanism was used to circumvent state legislatures, dominated by rural interests, among whom "dry" pro-Prohibition forces remained strong. VILE, *CONTEMPORARY QUESTIONS*, *supra* note 7, at 8.

office.⁴⁸ Finally, the Twenty-Fifth Amendment, ratified soon after the assassination of John F. Kennedy, was designed to deal with the issue of presidential succession.⁴⁹ The second class of amendments, which arguably made good upon the protections of the Fifteenth Amendment, carried forward the progressive march to extend the democratic franchise.⁵⁰ In 1961, the Twenty-Third Amendment gave citizens of the District of Columbia the right to vote in presidential elections.⁵¹ The poll tax, long used to exclude poor minorities from the ballot, was abolished by in 1964 by the Twenty-Fourth Amendment.⁵² And in 1971, the Twenty-Sixth Amendment granted all citizens eighteen years and older the right to vote, a response to Vietnam Era-critics who pointed out that these young adults could die for their country, but not vote.⁵³

Far more transformative than the amendments that passed in these decades, however, were those that failed. One popular movement of the late 1930s through the early '50s called for a constitutional amendment to cap Congress's power to tax incomes at 25 percent.⁵⁴ Another, the Bricker Amendment, widely debated in the 1950s, reflected a deep suspicion of runaway presidential power over foreign policy; it bid to reassert the Senate's constitutional role in treaty-making by limiting the President's power to enter into executive agreements with other nations.⁵⁵ The Supreme Court's 1964 *Reynolds v. Sims* decision, which helped to cement the principle of "one person, one vote" in state elections, became the target of a popular proposal in the 1960s spearheaded by Illinois Republican Senator Everett Dirksen, calling for the states to call a constitutional convention to reauthorize gerrymandering.⁵⁶ Dirksen's bid fell a single state petition short of the two-thirds necessary to trigger a convention.⁵⁷ In 1969, a proposal to abolish the Electoral College passed the House by a wide margin, but died in the Senate, having failed to build a filibuster-proof majority against the objections of

48. U.S. CONST. art. XXII.

49. U.S. CONST. art. XXV. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* (2d ed., 1992).

50. On voting rights in the "Second Reconstruction," see J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (2000).

51. U.S. CONST. art. XXIII.

52. U.S. CONST. art. XXIV. The poll tax ban was later extended by the courts to the states via the equal protection clause of the Fourteenth Amendment. See *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

53. U.S. CONST. art. XXV.

54. See RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP* 68-69 (1988).

55. See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

56. See Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (Mar. 1968). See generally *Baker v. Carr*, 369 U.S. 186 (1962) (holding that apportionment was a justiciable matter, rather than a political question); *Reynolds v. Sims*, 377 U.S. 513 (1964) (applying the "one person, one vote" formula to both houses of the state legislatures).

57. CAPLAN, *supra* note 54, at 71-78.

Southern senators and small-state conservatives.⁵⁸ Two other popular amendments passed both houses of Congress but failed at the state ratification stage. The first and most famous was the Equal Rights Amendment to ban gender discrimination, approved in Congress in 1972 but which stalled after being ratified by thirty-five states, three short of the threshold.⁵⁹ The other amendment that failed would have given Washington, D.C. full representation in Congress; it passed both houses of Congress in 1978 but garnered only sixteen state ratifications.⁶⁰

The last thirty years may give further reason to question Article V's continued viability. To be sure, a raft of amending proposals continue to surface, with one amendment ratified during this time, but these have occurred under somewhat "bizarre" circumstances.⁶¹ The Twenty-Seventh Amendment, first proposed in 1789 as part of "Madison's original twelve," forbade a sitting Congress from raising its own salary. After lying dormant for two hundred years, it was rediscovered in the early 1980s by a political science student and later Texas legislative aide named Greg Watson, who made its ratification his calling.⁶² Despite the elapsed centuries, the text contained no explicit time limit on ratification by the states, and supporters managed to push it over the finish line on May 7, 1992, to the surprise of even some constitutional experts.⁶³ Given that the amendment formalized what had already been made into law in 1989 by the Ethics Reform Act, many consider it "a constitutional oddity," a trivial, quixotic, even damaging addition to the text.⁶⁴ The amendment's unusual mode of passage also exposed dozens of unanswered questions about the Article V process. Can a state rescind its vote? Does there exist some contemporaneity requirement on the process, even where an amendment has no specified time limits? Could the States, for instance, ratify Senator Seward's 1861 amendment, which forbade Congress from eliminating slavery? Even Greg Watson, the Twenty-Seventh's author, confessed, "It's a terrible process. It's sloppy, extremely unprofessional,

58. See JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 126-62 (2020).

59. See JANE MANSBRIDGE, WHY WE LOST THE ERA (1986); MARY BERRY, WHY THE ERA FAILED (1986). Discussing the legal status of recent attempts to revive the Equal Rights Amendment, see Gerard Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS L. REV. 633 (2019).

60. See JULES B. GERARD, THE PROPOSED WASHINGTON D.C. AMENDMENT (1979); Clement Vose, *When District of Columbia Representation Collides with the Constitutional Amendment Institution*, 9 PUBLIUS: J. OF FEDERALISM 105, 106 (1978); Dottie Horn, *Another Star for the Stripes?* 8 ENDEAVORS 4-6 (Fall 1990).

61. VILE, CONTEMPORARY QUESTIONS, *supra* note 7, at 10.

62. RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?, 243-48 (1995).

63. *Id.* at 46.

64. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM, L. REV. 497, 542 (1993).

and terribly haphazard.”⁶⁵

There is a further question about what, symbolically, formal amendment has become to the American public. Recent years have witnessed social movements for amendments to permit prayer in public schools,⁶⁶ criminalize flag-burning,⁶⁷ mandate a balanced federal budget,⁶⁸ make English the nation’s official language,⁶⁹ eliminate the federal income tax⁷⁰, eliminate private funding from electoral campaigns,⁷¹ and abolish the Electoral College,⁷² among others.⁷³ The fact that these proposals, refracted through the lens of ideological polarization, have little possibility of passage might ordinarily be seen as further proof that the Article V threshold winnows out unmeritorious proposals from good ones—except for the widespread public perception that the system is in crisis. Distrust in our governing institutions has been on a steady rise for decades now, and the most widely-discussed and promising solutions—severing the link between money and politics, correcting gerrymandered districts, setting a personal wealth ceiling on congresspeople—run into the obvious hurdle of “belling the cats,” or Congress’s lack of incentive to alter a system that favors it.⁷⁴ From widening wealth inequality to criticism of the government’s response to financial panics and the COVID-19 crisis, to the military quagmire in the Middle East and dismay about electoral democracy, the number of voices arguing that the Constitution is inadequate to meet current political needs has grown exponentially.⁷⁵ It seems enough to justify the skepticism of a young Woodrow

65. *Id.* at 549.

66. See BRUCE DIERENFELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* (2007).

67. See Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19 (1990).

68. See JAMES SATURNO & MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41907, *A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: BACKGROUND AND CONGRESSIONAL OPTIONS* (2018).

69. See DENNIS BARON, *THE ENGLISH-ONLY QUESTION* (1990).

70. H.R. 25, 116th Cong., (2019) (A bill to promote freedom, fairness, and economic opportunity by repealing the income tax and other taxes, abolishing the Internal Revenue Service, and enacting a national sales tax to be administered primarily by the States).

71. H.R. Res. 343, 115th Cong., (2017) (Restore Democracy Resolution).

72. S.J. Res.16, 116th Cong., (2019) (A joint resolution proposing an amendment to the Constitution of the United States to abolish the electoral college and to provide for the direct election of the President and Vice President of the United States).

73. The most complete compilation of amendments proposed during the course of American history is JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2015* (5th ed., 2015).

74. *Confidence in Institutions* (1973-2019), GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited May 7, 2020) [<https://perma.cc/8K88-6W5L>]. Exploring this idea, see Mark Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 BOSTON U. L. REV. 611 (2014).

75. See generally e.g., DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS*

Wilson, who, writing in 1884, declared, “It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery in Article V.”⁷⁶

III. THE ABILITY TO WRITE

Bruce Ackerman argues that “America has lost the ability to write”—that is, to encode important changes in our constitutional tradition in the language of the Constitution itself.⁷⁷ Even as “crisis” becomes a mainstay of our political vocabulary, and even as the political mainstream is riven by two warring visions of the Constitution, most constitutionalists continue to shy away from formal amendment as a remedy.⁷⁸ On the left, constitutional progressives sympathize with the concern that an unchanging Constitution is presumptively undemocratic, but consider informal adaptation—through strategies like litigation and influencing public opinion—a necessary, proper, and even sufficient accommodation to an inflexible text.⁷⁹ On the right, conservatives warn of judicial

PARALYZING DEMOCRACY (1996); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012); ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001); Jeffrey Toobin, *Our Broken Constitution*, *THE NEW YORKER* (Dec. 9, 2013), <https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [<https://perma.cc/MB7J-9KZY>]; Matthew Yglesias, *American democracy is doomed*, *VOX* (Oct. 8, 2015), <https://www.vox.com/2015/3/2/8120063/american-democracy-doomed> [<https://perma.cc/UV7Y-E6EU>].

76. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS*, 242-43 (Boston & New York, Cambridge Riverside Press, 1884).

77. Bruce Ackerman, 2006 Oliver Wendell Holmes Lecture: *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1752 (2007).

78. On the two warring visions, H. W. Perry & L.A. Scot Powe, *The Political Battle for the Constitution*, 21 *CONST. COMMENTARY* 641, 695 (2004) (identifying a “two-way split between the parties on a number of major constitutional issues,” which, the authors believe, has happened only twice before in American history: over the slavery question prior to the Civil War and over economic regulation in the New Deal era. “Both times the result was a complete victory for one of the parties.”). On the superfluity of amendment, see, for instance, Gerard Magliocca, *Constitutional Change* in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 909, 919 (Mark Tushnet et al eds., 2015); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457 (2001). Sanford Levinson offers a divergent view, considering the Constitution tainted by “hardwired” undemocratic features like bicameralism and the “indefensibly apportioned Senate,” and therefore only salvageable by a new drafting convention. LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 21-22 (2006). Other notable constitution-skeptics include Richard S. Kay, *Formal and Informal Amendment of the U.S. Constitution*, 66 *AM. J. COMP. LAW* 243 (2018); ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

79. Magliocca, *supra* note 78, at 919 (arguing that “constitutional amendments are typically

activism and the “living constitution,” insisting that constitutional change must go through the Article V route.⁸⁰ Yet they deny that Article V’s demanding threshold is a problem, leaving little alternative but either to tolerate informal adaptation or try to choke off constitutional change altogether.

Why is judicial interpretation an imperfect substitute for formal amendment? Here, I sketch out several answers.

First, although a healthy constitutional system requires “reverence for the laws,”⁸¹ in the words of Federalist Paper No. 49, there can still be such a thing as *too* much distance from the text. Jefferson famously warned that if the People viewed their Constitution “like the arc of the covenant, too sacred to be touched,” they were effectively giving away their popular sovereignty entirely.⁸² Some scholars now believe that just such a “sacralization of the text” is taking place.⁸³ For all the sharp tenor of their disagreements, liberals and conservatives alike tend to agree on a vision that sees the Constitution as the root of American national identity.⁸⁴ Veneration of the Constitution may not only “discourage recognition of its all-too-present imperfections,” but can also lead to a constitutional politics that views even friendly textual critique as tantamount to treason, and which can result in a rejection of compromise, or even the refusal to concede the legitimacy of other actors in the political system.⁸⁵

unnecessary to change constitutional law or culture” and that, for this reason, political activists “focus on litigation and influencing public opinion rather than hammering out proposed changes to the Constitution itself.”). *See also* Bruce Ackerman’s *We The People* trilogy, *WE THE PEOPLE: FOUNDATIONS, TRANSFORMATION, AND THE CIVIL RIGHTS REVOLUTION*, (vols. 1-3, 1991, 1996 and 2014); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, 25-36 (Jack Balkin ed., 2009). Indeed, such work shares a presumption that constitutional meaning is supplied by popular democratic forces, and therefore, to ignore these in interpreting the text is undemocratic.

80. *See e.g.*, MCGINNIS & RAPPAPORT, *supra* note 10.

81. THE FEDERALIST NO. 49 (ALEXANDER HAMILTON OR JAMES MADISON).

82. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816).

83. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2011). Aziz Rana echoes the diagnosis of what he calls “creedal constitutionalism.” AZIZ RANA, *THE RISE OF THE CONSTITUTION* 1-4 (forthcoming, draft on file with author).

84. Rana, *supra* note 43, at 58; GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944). *See* BARACK OBAMA, *THE AUDACITY OF HOPE* 231-32 (2005) (extolling a “vision of America finally freed from the past of Jim Crow and slavery, Japanese internment camps and Mexican braceros, workplace tensions and cultural conflict,” and insisting that in attaining this vision, “we’ve been aided by a Constitution that—despite being marred by the original sin of slavery—has at its very core the idea of equal citizenship under the law; and an economic system that, more than any other, has offered opportunity to all comers, regardless of status or title or rank.”).

85. Stephen Teles describes the conservative House Freedom Caucus as organized such “fundamentalist” constitutional principles. Stephen M. Teles, *How the Progressives Became the Tea Party’s Mortal Enemy: Networks, Movements, and the Political Currency of Ideas in THE PROGRESSIVES’ CENTURY* 453, 455 (Stephen Skowronek et al. eds., 2016).

Second is the problem of “interpreting an unamendable text.”⁸⁶ Today, constitutionalists of all stripes tend to ground their jurisprudence in a so-called “fidelity” to the text; as Justice Elena Kagan insisted at her confirmation hearing, “Today, we are all originalists.”⁸⁷ The problem is that, because said text has failed to internally adapt to modern conditions, it is increasingly unhelpful as a guide for—or, in fact, a limit upon—modern interpreters. In some instances, modern political customs and practices explicitly defy the text: the President’s first-mover role in deploying the armed forces overseas is one example.⁸⁸ In such cases, political practice tends to win out over strict obedience to the text. At other times, open-ended constitutional language supplies little guidance over problems it never anticipated, such as a Senate of a different party systematically blocking the President’s appointees (recall, of course, that the Constitution’s framers did not live in a world of political parties, or even anticipate their formation).⁸⁹ As the Founding recedes ever farther into the distance, literal or “plain meaning” readings of the text require increasingly large interpretive leaps, meaning that the text of the Constitution can be invoked, as one originalist scholar puts it, “at such a high level of generality that it ceases to function as an effective constraint on the interpreter.”⁹⁰

Third and final is the eclipse of popular constitutionalism that Jefferson famously feared. With constitutional amendment off the table, deep changes in governing authority take place through informal, incremental change in the behavior of political actors, particularly judges.⁹¹ We do not change our Constitution by large-scale popular debates over political values and

86. Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VANDERBILT L. REV. 547, 552 (2018).

87. Discussing originalism, see MCGINNIS & RAPPAPORT, *supra* note 10; for critical takes, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204. (1980); JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (2015); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004).

88. For contrasting views, see Bruce Ackerman and Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (Feb. 2011); and Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1370-1388 (1994).

89. Nat’l. Labor Relations Bd. v. *Canning*, 573 U.S. 513 (2014); Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883 (2018). On failing to anticipate political parties as a “failure” of the Framers, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

90. CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 395 (1994).

91. *But see* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 555 (1992) (describing and sounding a note of warning a “growing tendency to use [amendment politics] either as an alibi for not solving major political problems through the ordinary political process or as a means to distract the electorate from more pressing issues.”).

constitutional structures; we do so, in large part, through a much narrower, top-down process: boutique law firms litigating before the bench, legal academics and policy experts producing arguments they hope will be picked up by judges, landmark judicial opinions like *Roe v. Wade* or *Citizens' United* that change the constitutional state-of-play. With the great constitutional debates of the age—abortion, religion, federalism, and the powers of the presidency—taking place before the bench, the vibrancy of social movements is stunted by their dependence on elite actors, especially the lawyers who translate political claims into legal ones, and the judges who, in assessing these claims, make them into law.⁹² Today, it is “judicial revolution, not formal amendment,” through which fundamental change under our Constitution is made.⁹³

IV. CONCLUSION: RECOVERING A FORMAL CONSTITUTIONAL POLITICS

If Article V is not exactly out of sight and out of mind, it has grown less important over the last several decades. The varied causes at work in this transformation include the fact, as mentioned, that extreme partisanship has left America currently divided between two distinct and warring visions of the Constitution, as well as the fact that judicial interpretation has largely taken the place of formal amendment.⁹⁴ As I have argued here, the latter is not a substitute for the former, as the Founders well knew.⁹⁵

What might resuscitating a democratic constitutional politics look like in practice? Today, a broad literature speaks of popular constitutionalism, but too often, sweeping liberationist language translates into little more than advising citizens to lobby courts for their favor.⁹⁶ Within this literature, we might trace out

92. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); William Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Self-Rule*, 81 CHI-KENT L. REV. 967, 968 (2006).

93. Ackerman, *supra* note 77, at 1742.

94. On the rise of “living constitutionalism” as a substitute for formal amendment in the post-Progressive Era, see Andrea S. Katz, *The Lost Promise of Progressive Formalism*, 99 TX. L. REV. (forthcoming Nov. 2020).

95. Stated George Washington in his farewell address of 1796, “If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this . . . is the ordinary weapon by which free governments are destroyed.” George Washington, *Washington’s Farewell Address* (1796) (transcript available at The New York Public Library).

96. A few examples from a broad literature include Larry D. Kramer, *Popular Constitutionalism circa 2004*, 92 CAL. L. REV. 959 (2004) (“in a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law”); KRAMER, *supra* note 92; William Forbath, *Popular Constitutionalism in the Twentieth Century* 967 (2006); Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644 (2014); Reva B. Siegel, *Constitutional*

four groups:

1. *Judicial Strategies*—instructing the bench to give greater deference to laws or regulation that maximize popular participation in democracy and/or improve the conditions of participation (John H. Ely, Richard Parker); or instructing judges to allow values from other sectors besides elite legal ones to infuse judicial decision-making (Jack Balkin).⁹⁷
2. *The Political Process*—reviving departmentalism by shifting interpretive authority over constitutional questions to the legislature or other political actors as there is no a priori reason to support judicial supremacy or finality over constitutional questions (William Eskridge, Larry Kramer, Mark Tushnet).⁹⁸
3. *Social Tinkering*—changing the material or societal conditions for political participation in constitutional debates, including by ensuring individuals a certain minimum level of wealth (John Rawls’ “property-owning democracy,” Anne Alstott and Bruce Ackerman’s “stakeholder society”), or restructuring local democracy to encourage civic participation, whether by revitalizing unions as vehicles to making ordinary Americans’ voices felt (William Forbath et al.), or by having the government convene local debating circles around elections (James Fishkin and Bruce Ackerman).⁹⁹
4. *Constitution Tinkering*—convening a new drafting convention to amend Article V and end malapportionment (Sanford Levinson); amending the Constitution to add a “popular branch” that could be called into session by the Court, Congress, or a voter initiative, which would deliberate like a jury over controversial legislation and judgements, or consider new reform proposals (Ethan Leib).¹⁰⁰

Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAL. L. REV. 1323-1419 (2006); and Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

97. JOHN ELY, *DEMOCRACY AND DISTRUST* (1980); Richard D. Parker, *A Constitutional Populist Manifesto*, 27 VAL. U. L. REV. 531 (1993).

98. William Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215 (2001); Matthew Christiansen & William Eskridge, *Congressional Overrides*, 92 TEX. L. REV. 1317 (2014); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

99. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 135-79 (2001); ANNE ALSTOTT & BRUCE ACKERMAN, *THE STAKEHOLDER SOCIETY* (2000); JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming); William E. Forbath & Brishen Rogers, *A New Type of Labor Law for a New Type of Worker*, N.Y. TIMES (Sept. 4, 2017); JAMES S. FISHKIN & BRUCE ACKERMAN, *DELIBERATION DAY* (2004).

100. LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *passim*; ETHAN J. LEIB, *DELIBERATIVE*

Assessing the likelihood and desirability of these proposals is beyond the scope of this article, but a few points are worth bearing in mind. Ultimately, the first two categories appear to be more of the same, and would not, without more, free us from the impasse. The third has encouraging equalizing aspects, but it too, would seem to require actual *institutional* reform—such as reducing the effects of gerrymandering or corporate campaign financing on elections—in order to guarantee that citizens’ preferences are actually translated into higher law. A “resuscitation” of Article V politics, as the final group proposes, is an extreme long shot in the current political climate. However, our history shows that at many times, impassioned reformers proposed serious reforms to the Constitution precisely in order “to save it.”¹⁰¹ Perhaps, the current mood of crisis represents, less an obstacle to change so much as an opportunity to test the idea that constitutional amendment is not only desirable, but possible.¹⁰²

DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2005).

101. In a similar spirit, Richard Bernstein and Jerome Agel write of previous attempts to revise the Constitution, “Because we venerate it so much, we want the Constitution to fit ever more closely with our hopes and expectations for American life.” RICHARD BERNSTEIN & JEROME AGEL, *AMENDING AMERICA*, xiii (1995).

102. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 21-22 (2006) (on the Constitution’s hardwired features, suggesting the same separation of formal structural content and symbolic meaning).