"Hey, the Constitution isn't engraved in stone."
On Saturday, September 15, 1787, as the Constitutional Convention in Philadelphia was bringing its labors to a close after four grueling months, several disgruntled delegates called for abandoning the project and beginning anew with a second convention. Young Charles Pinckney of South Carolina objected: “Conventions,” he said, “are serious things, and ought not to be repeated.” Pickney prevailed, a majority of the Convention approved the Constitution two days later, and we have not had another convention since. Our Constitution is the second oldest surviving written constitution in the world (the oldest is the 1780 Massachusetts Constitution, which has been amended and “rearranged” but not replaced). During the same period of time, the states have gone through well over a hundred constitutions—eleven of them in Louisiana alone. Other countries have similarly written and rewritten countless constitutions. What accounts for the extraordinary longevity of the United States Constitution?

One answer is that we are merely deceiving ourselves when we applaud the Constitution’s longevity. After all, as one scholar flippantly remarked during the bicentennial celebrations of 1987, our Constitution may be two hundred years old, but it was in the shop for four of those years. It is possible to argue that we do not have the same Constitution that we had in 1787: the original Constitution was an elitist, anti-democratic document that gave little power to the federal government and virtually none to most of the population. Both the text of the Constitution and its interpretation have undergone so much change that those who wrote it might very well find it unrecognizable today.

However, that very elasticity has contributed significantly to the Constitution’s survival. As the framers themselves recognized, any constitution will necessarily be imperfect. Article V, which provides two different routes for amendment (only one of which has ever been used), offers one way of responding to that imperfection. Amending the Constitution, however, is designed to be strong medicine: the framers were wary of too-frequent change, and thus provided for supermajorities in the House, the Senate, and among the states as a necessity for any ratification. The process has only been used twenty-seven times (and two of the amendments cancel each other out). While it is a necessary safety valve, it should therefore be used carefully. This essay is a brief historical survey of how the amendment mechanism has worked in practice, and of the major controversies surrounding the process.

The process of amending the Constitution has now become so regularized that it is almost routine, but it was not always so. When James Madison first proposed the group of amendments that would become the Bill of Rights, he had great difficulty even persuading his colleagues in the House to consider them. They wasted the better part of a day debating whether it was appropriate to discuss amendments at that time, prompting one Representative to note that “[i]f no objection had been made to [Madison’s] motion, the whole business might have been finished before this.” Ultimately, the House allowed Madison to present his amendments, largely in the hope that hearing the amendments and turning them over to a committee “would tend to tranquilize the public mind.” Some Representatives objected to this transparent public relations move. Elbridge Gerry of Massachusetts suggested that “referring the business to a special committee will be attempting to amuse [constituents] with trifles.” Nevertheless, procedural maneuvers managed to delay consideration of Madison’s proposals for over three months.

Even once the House turned to the matter, they could not immediately debate the substance of the proposed amendments. First they had to decide an issue we take for granted: whether the amendments should be appended to the end of the existing Constitution or inserted into the body of the text. The House first voted to interleave the changes,
Since 1789, approximately ten thousand resolutions have been introduced in Congress proposing amendments.

Moreover, despite numerous calls for amendments to reverse Supreme Court rulings—Roe v. Wade and Engel v. Vitale (the school prayer case)—two are of the two most popular targets: the Eleventh Amendment reversed Chisholm v. Georgia and protected the states from suit in federal court; the Fourteenth Amendment reversed Dred Scott v. Sanford and declared newly freed blacks to be citizens; the Sixteenth Amendment reversed Pollock v. Farmers’ Loan and Trust Company and permitted Congress to establish the income tax; and the Twenty-Sixth Amendment reversed Oregon v. Mitchell and gave eighteen-year-olds the vote. Most of the amendments proposed by Congress have dealt with more enduring issues than a single Supreme Court decision. Proposals to give women the vote, for example, surfaced as early as 1866, although no amendment was actually proposed to the states until 1919. Discussions of the appropriateness of term limits on the President, ultimately codified in the Twenty-Second Amendment proposed in 1947, go back to the 1787 Convention. Congress has indeed shown commendable wisdom in rejecting some of the amendments introduced. Some have been dangerously divisive and needlessly exclusionary, such as the perennial suggestions that the Constitution explicitly recognize the authority of Jesus Christ or make English the official language. Others have merely been trivial or absurd, such as the nineteenth century proposal to change the name of the country to “The United States of the Earth” and to require the House and Senate to “vote by electricity.” A few have been truly evil, such as the proposals in the early part of this century to make miscegenation unconstitutional, or to deny citizenship to Asian children born in the United States.

Even Congress is not infallible, of course. While the Congress has filtered out many amendments, six have made it through that hurdle only to fail to obtain the ratification of three-quarters of the states. Several are quaint legacies of past eras that have been mooted or otherwise lost their urgency: The Bill of Rights originally contained a provision specifying the size of the House of Representatives at various population levels; in 1810, Congress proposed strengthening the ban on titles of nobility; and in 1924, it proposed giving Congress the power to prohibit child labor. None of these issues survived long beyond their initial impe-
The most recent amendments proposed by Congress simply failed to garner the requisite number of state ratifications. In 1972, Congress proposed the Equal Rights Amendment and in 1978 it proposed the D.C. Statehood Amendment. Neither succeeded in the time allotted.

There is the almost-Thirteenth Amendment, which proves the worth of the state ratification requirement in the face of Congressional moral cowardice. In March of 1861, in a last-ditch effort to avoid a Civil War, Congress sent to the states the Corwin Amendment, which provided: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." For those unfamiliar with standard Constitutional double-speak on this issue, the proposed amendment prohibited any future amendment from outlawing slavery. Abraham Lincoln endorsed the Corwin Amendment in his first inaugural address, but only three states ratified it before events intervened. It was ultimately one of the least lamented casualties of the Civil War.

There is, finally, the Amendment which confounds the counting process. In 1789, Congress originally proposed twelve amendments to the states. The states ratified the last ten, which became the Bill of Rights. The first was the proposal regarding the size of the House, which failed to garner sufficient ratifications. The second was a provision prohibiting any salary change for members of Congress from taking effect until after an intervening election. The obvious purpose was to prevent members of Congress from raising their own pay, although the language applies to pay cuts as well. Only six states ratified the proposal during the eighteenth century. In 1873, almost a century after the amendment was proposed, Ohio ratified it. Late ratifications, incidentally, are not confined to obscure amendments: Massachusetts, Georgia, and Connecticut ratified the Bill of Rights in 1939 (no, that's not a typographical error).

In 1982, A University of Texas college student wrote a term paper arguing that the payRaise amendment—still languishing with only seven ratifications—could, and should, still be ratified (he got a C on the paper). Political factors combined with his personal letter-writing campaign on behalf of the amendment, and in 1992 Michigan became the thirty-eighth state to ratify the two-hundred-and-two-year-old proposed amendment. Is it now the Twenty-Seventh Amendment to the Constitution?

Scholars are still debating whether the late ratifications were effective. Some contend that there are inherent time limits to proposed amendments, or that the ratifications must be sufficiently close in time to demonstrate a "contemporary consensus" on the wisdom of the amendment. They point to the horrific possibility that other amendments without time limits might be similarly resurrected, including the Corwin Amendment. Others suggest that as long as Congress does not specify any time within which the amendment must be ratified, the only requirement is that three-quarters of the states ratify it. For these scholars, the Corwin Amendment is a red herring, long since superseded by the Thirteenth Amendment. Neither the Child Labor Amendment nor the House Size Amendment would have any effect today, and no one appears to care whether the Titles of Nobility Amendment might suddenly come into vogue. That indifference may be misplaced: at least one reading of the amendment would strip Nobel Prize winners of American citizenship.

Several authors of constitutional law casebooks, attempting to remain agnostic on the subject of the Twenty-Seventh Amendment, include it in the Appendix along with the rest of the Constitution, but mark it with an asterisk to denote its suspicious provenance. (Shades of Roger Maris!)* The final practical resolution of this debate came from an unlikely source: By Congressional statute, the National Archivist is responsible for certifying that a proposed amendment has been ratified, and he did so almost immediately. Congress, which had been murmuring about holding hearings on the matter, quickly acquiesced. Only in the law reviews is it still a live issue.

A related question is whether a state can rescind its ratification before three-quarters of the states have ratified. As a matter of consistency, one might think that "contemporary consensus" advocates would permit rescission (since all the states have to agree to the amendment at roughly the same time), and formalists would count any ratification whether or not it had been rescinded (since the Constitution merely specifies the number of required ratifications, and not whether they need be surviving or contemporaneous). Most scholars on both sides apparently have large minds, however, since the leading "contemporary consensus" advocates deny the effectiveness of rescissions and the leading formalist would permit them. This issue, unlike the question of how long a proposal remains active in the absence of Congressional time limits, may actually come up again in the context of the flurry of amendments Congress is now threatening to propose. But neither issue arises unless a proposed amendment is unusually subject to the winds of change, and thus these questions serve as a further reminder that Congress would do well to avoid hasty amendments catering to what Madison disparagingly called the people's "transient impressions."

There are two other interesting unresolved questions about the amending process. The first is whether it would be possible for a proposed amendment to be unconstitutional. Are there any limits to what could count as a valid amendment?

*Ed. note. For the uninitiated: In 1961, when Roger Maris beat Babe Ruth's record of home runs within a single season, statisticians placed an asterisk beside Maris' name in the record books. In effect, acknowledging the effort yet declaring Maris' claim to the top honor was dubious since he enjoyed a longer season than Ruth.]
Two different theories support an affirmative answer. Some argue the Constitution itself entrenches certain provisions and renders them temporarily or permanently immune from amendment. Article V itself explicitly prohibits amendments that deprive any state of its equal representation in the Senate, and temporarily (until 1808) prohibited any amendments regulating the slave trade. The Corwin Amendment, had it been ratified, would have precluded further amendments on slavery. One reading of the combination of the First Amendment and the Fourteenth Amendment prohibits Congress or the states, acting separately or in combination, from abridging freedom of speech, and thus effectively entrenches the First Amendment, making unconstitutional such things as an amendment permitting states to ban flag burning. Some scholars, however, question whether any constitutional entrenchment provision can be legally binding on subsequent generations. The easy way out of this dilemma, of course, is first to amend the entrenching provision, stripping the target provision of its protection. (Only a self-referential entrenchment or an infinite number of sequential entrenchments could eliminate this possibility.) Nevertheless, the notion of unconstitutional amendments remains an intriguing possibility.

Thus, some other constitutional thinkers through the years have proposed a different theory of unconstitutional amendments: that certain changes would be so fundamentally inconsistent with either the document itself or the natural rights of mankind that they would be unconstitutional. This argument has been made against such diverse proposals—real and hypothetical—as the ablation of slavery, the extension of the right to vote to women, Prohibition, and endorsement of race discrimination, and limits of freedom of speech. One recent article expands on this notion by suggesting that two apparently contradictory premises underlie our constitutional scheme: popular sovereignty and fidelity to a higher law. In order to accommodate both principles, any constitutional amendment would have to leave the constitutional order before and afterward with sufficient resemblance to each other that “We the People” know that it is indeed we who have imposed this higher law on ourselves. Radically transformative amendments, in other words, would be inconsistent with the American scheme of government and thus unconstitutional.

Finally, there is the question of whether Article V provides the exclusive method of amending the Constitution. Like the question of unconstitutional amendments, this raises an issue of whether Article V (or any provision of the Constitution) can preclude a united and determined people from changing their governing document. The Constitution itself, after all, was extralegal, born in contravention to the then-governing constitution: The Articles of Confederation required consent of all thirteen states for any amendments. Can constitutional change occur outside of the procedures specified by Article V? Some scholars question the validity of the question, since constitutional change, they argue, does occur in the absence of formal amendments—and formal amendments don’t necessarily work a constitutional change. Thus one writer has subtitled his recent article on the amendment process: “How Many Times Has the United States Constitution Been Amended? (a) < 26; (b) 26; (c) > 26; (d) all of the above.” (This was before the controversy over the Twenty-Seventh Amendment.) Other scholars have argued for the validity of various extraconstitutional mechanisms, from a national referendum to a systematic and thoughtful exercise of sovereign power reflected in the actions of the various branches of government.

What lessons can we draw from this admittedly incomplete romp through the history of the amendment process? One thing that most participants—both political and scholarly—seem to agree on is that the process itself should not be taken lightly. Mistakes at this level have serious and sometimes unforeseeable consequences. Luckily, the various filters tend to screen out most of the mistakes. Nevertheless, as I’m sure Charles Pinckney would have agreed, amendments are serious things, and ought not to be [too often] repeated.

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3 In his view, the only clearly wrong answer is (b).