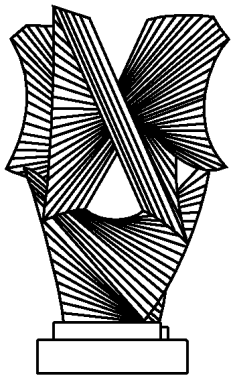
1999

Do Constitutional Amendments Matter?

David A. Strauss



Do Constitutional Amendments Matter?

David A. Strauss

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

Do Constitutional Amendments Matter?

David A. Strauss[*]

I. Constitutional Change and Constitutional Amendments

A. What Amendments Do

At the time our Constitution was drafted, written constitutions were in many ways a new idea. The idea of a formal amendment process was, therefore, also new.[1] Article V specified various ways in which the Constitution could be changed without unanimous consent, and in the ratification debates the supporters of the Constitution frequently mentioned the relative ease of

---

[*] Harry N. Wyatt Professor of Law, the University of Chicago. This is a much revised version of the 1997 Wilber Katz Memorial Lecture at the University of Chicago Law School. Many members of the audience on that occasion gave me helpful comments on the lecture. I am also grateful to Jack Goldsmith, Michael Klarman, Adrian Vermeule, and participants in workshops at the University of Virginia, New York University, and Benjamin N. Cardozo Law Schools for comments on earlier drafts, and Wesley Brown and Laura Grisolano for comments and research assistance. The Lee and Brena Freeman Faculty Fund and the Sonnenschein Fund at the University of Chicago Law School provided financial support.

[1] See generally, on the complex question of the way in which the idea of a written constitution was an American innovation, Bernard Bailyn, The Ideological Origins of the American Revolution 67-68, 175-84, 189-93 (enlarged ed.) (Harvard Univ. Press 1992); Gordon Wood, The Creation of the American Republic 259-68 (Norton 1972).

At the time of the Constitutional Convention in 1787, five states' constitutions had no provision for formal amendment. The others specified various means: legislative action of some form, conventions, or, in two states, a "council of censors" elected by cities and counties that would periodically determine if the Constitution should be revised. See Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 139-44 (Rita and Robert Kimber trans.) (Univ. of North Carolina Press, 1980).

amendment in urging the superiority of the new Constitution to the unamendable Articles of Confederation.[2]

Latter-day successors to the Founders have been equally enthusiastic about Article V. In the 105th Congress, 110 constitutional amendments, covering at least 26 separate subjects, were proposed. In the first year of the current Congress, the 106th, 46 proposed amendments, addressing 19 subjects, were introduced.[3] In the last Presidential election, the Republican candidate, Senator Dole, endorsed no fewer than four constitutional amendments—on school prayer, a balanced budget, term limits, and flag burning—in his two-minute closing remarks in the last debate.

It is certainly natural to think, as all these efforts suggest, that Article V describes the principal way of changing the Constitution. The Supreme Court undoubtedly thought it was uttering a truism when it said: "Nothing new can be put into the Constitution except

---

[2] See, e.g., Federalist No. 85 (Hamilton), Nos. 43, 49 (Madison). See also ratification debates in Massachusetts (King) and North Carolina (Iredell). The Articles of Confederation could be amended only by the unanimous consent of the states. Art. XIII of the Articles of Confederation provided: "[N]or shall any alteration at any time hereafter be made in any of the[Articles] unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."

Article V of the Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendment 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; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[3] Search of THOMAS, Bill Summary & Status (July 23, 1999) (search for records containing "constitutional amendment" in SUBJECT TERM field) <http://thomas.loc.gov>.

through the amendatory process. Nothing old can be taken out without the same process."[4] But in fact, through most of our history, the amendment process has been a sidelight. The Constitution, in practice, changes in many ways—but not because a supermajority makes a discrete, self-conscious decision to amend the text of the Constitution. On the contrary, the forces that bring about constitutional change work their will almost irrespective of whether and how the text of the Constitution is changed.

Many people have observed that our system has other ways of changing besides formal amendments: court decisions, important legislation, or the gradual accretion of power, as in the Presidency during this century. But these are not just *other* ways in which the Constitution changes. It is only a slight exaggeration to say that these are the only means of change we have. To be precise: subject to only a few qualifications, our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment. Of course this claim involves a degree of counterfactual speculation and cannot be proved with certainty; if the Constitution really contained no provision for formal amendment, much else about the way constitutional law has developed might be different. And there are, in any event, some qualifications and arguable exceptions to this proposition. But even taking into account all the qualifications and exceptions, the pattern is clear: constitutional amendments have not been an important means of changing the constitutional order.

I will try to show this by establishing four propositions. First—a relatively familiar point—sometimes matters addressed by the Constitution change even though the text of the Constitution is unchanged. Second, and more dramatically, some constitutional changes occur even though an amendment that would have brought about that very change is explicitly *rejected*. Third, when amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment. The changes produce the amendment, rather than the other way around. Fourth, when amendments are adopted even

---

[4] Ullmann v. United States, 350 U.S. 422, 428 (1956).

though the society hasn't changed, the amendments are systematically evaded. They end up having little effect until the society catches up with the ambitions of the amendment.

In other words—to put the point crudely—when the constitutional order changes, it does so without a formal amendment, and sometimes in the face of the rejection of a formal amendment; when formal amendments are adopted, they are either unnecessary (because the change has already occurred without the amendment) or ineffective (because the change does not occur, despite the amendment). This is too stark and unqualified an account, but it is not that far off. The net contribution of constitutional amendments to constitutional change is very limited.

Of course this argument requires that one differentiate between the what might be called the small-c constitution—fundamental institutions of the society, or the constitution in practice—and the document itself. This distinction (about which I will say more below) is imprecise but surely coherent. When people try to amend the Constitution—that is, the document—they are not ultimately concerned about the document; they are concerned about the institutional arrangements that the document is supposed to control. If those institutions do not change, then the constitution in practice—what I will sometimes call the constitutional order, or the constitutional regime—has not changed, even if the text of the Constitution has changed. Similarly, as I will discuss below, it is coherent to say—and people often do say—that certain changes are of a kind and magnitude that amount to changes in the constitutional order even though the text has not changed. The proposition I am considering is that amendments to the text of the Constitution have been at most a sidelight to the process of change in the constitutional order—to the point that the small-c constitution would look the same even if there were no provision for formal amendment of the text.

I consider this claim only in connection with a mature democratic society, not for a fledgling constitutional order. It is a claim about how a constitutional system changes, not about how one gets established in the first place. For that reason I will not try to argue that the first twelve amendments to our Constitution made no difference, although such an argument may be stronger than it appears to be at first. The Constitution of 1787 built on a system

that was already well established in many ways, and it might be possible to argue that the text of the original Constitution and the early amendments were relatively insignificant, compared to forces already operating in the society, just as (I will argue) the later textual amendments were relatively insignificant.

Be that as it may, when a constitutional system is getting underway, and on its shakedown voyage so to speak, amendments are more properly seen as part of the initial establishment of the regime, rather than as means of changing it. When a regime is being established, formal texts are more important. The traditions, institutions, and understandings that bind people together in a mature society, and that make orderly change possible without formal amendments, are less well developed. But in a society in which a constitutional system has survived for, say, a generation or two, formal constitutional amendments, of the kind envisioned by Article V, are a sidelight to the main processes of constitutional change.

Constitutional amendments do serve certain ancillary functions. For example, several constitutional amendments have served the familiar role of establishing "rules of the road"—settling matters that are not themselves controversial but that have to be settled clearly, one way or another. The date of the President's inauguration is one example; the Twenty-Fifth Amendment, which spells out what to do if a President is disabled, is another. This is not a trivial function for amendments to serve, but it is far removed from providing the central means of constitutional change. And a formal amendment process is probably not needed to serve this function. If a formal amendment process were unavailable, it seems likely that our system would develop some other way of settling these issues, at least in most cases.

Constitutional amendments in our system also serve the distinct function of suppressing outliers. When the nation has reached a nearly unanimous consensus on a subject, the formal amendment process is a way of bringing the stragglers into line. It turns all-but-unanimity into unanimity. The Twenty-Fourth Amendment, banning the poll tax in federal elections, is an example: by the time it was adopted, only four states had a poll tax. In this way, constitutional amendments do cause changes, although they are changes around the edges, as it were, rather than at the core.

This relatively minor function, too, may be even less significant than it appears. In these situations, in all likelihood, the outliers would not have held out much longer against the nearly unanimous opposing consensus. And again it seems reasonable to conjecture that, if there were no formal amendment process, the courts would allow Congress greater power to act in areas where the national consensus was strong. On at least two occasions—during the New Deal, then again during the civil rights era—a strong national consensus has led to expansions in congressional power, even when there was no formal amendment, indeed even when a formal amendment authorizing the change had been rejected. Probably the most accurate description of amendments that suppress outliers, then, is that they turn near-unanimity into unanimity a little sooner than that would otherwise have happened. Again this is a far cry from seeing constitutional amendments as the principal engine of constitutional change.

B. The Significance of Insignificance

This claim about the insignificance of the formal amendment process, if it is true, matters for several reasons. The first is that it undermines a popular way of thinking about the Constitution—that the written Constitution is in some meaningful sense the work of a deliberate act, or a series of discrete acts, by We the People.[5] The Constitution claims to speak in the name of "the People," and a central aspect of the constitutional thought of the founding era was that written constitutions gain their authority from the People, not

---

[5] See, e.g., Stephen Holmes and Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in Sanford Levinson, ed., Responding to Imperfection: The Theory and Practice of Constitutional Amendment 275, 276 (Princeton Univ. Press, 1995) (The "traditional democratic answer" to the question of the source of "the constitutionally regulated power to revise constitutional regulations of power" is "'the people.'"). The most prominent current example of such an approach does not limit itself to the text and greatly deemphasizes the role of formal amendments (Bruce Ackerman, We the People: Foundations (Harvard Univ. Press 1991); Bruce Ackerman, We the People: Transformations (Harvard Univ. Press 1998)), but the practice of viewing amendments as the work of the People is common.

from elected representatives or any other source.[6] It is natural to think of the formal amendments to the Constitution in the same way. The People, one might say, do not speak often; they spoke comprehensively in 1789, and, in the amendments, on specific subjects since then. But on those occasions when they speak, their voice carries special authority. Constitutional amendments, on this view, are such an occasion. Unlike an ordinary statute, a constitutional amendment, because it is supported by a supermajority, reflects a decisive act by the People. George Washington spoke of constitutional amendments this way.[7]

But however appropriate that might have been as an account of the Constitution at the founding, it no longer matches the reality of our constitutional order, and it may not match the reality of any mature liberal constitutional system. The constitutional principles that actually govern a mature society accumulate and evolve over time though a variety of complex means. Discrete, decisive, formal amendatory acts, supposedly by the sovereign People, are at most a minor part of the process of constitutional change.[8]

---

[6] See, e.g., Wood, Creation of the American Republic (cited in note x), esp. ch. VI.

[7] See [Farewell Address]; 29 The Writings of George Washington 311 (John C. Fitzpatrick ed.) (U.S. Government Printing Office) (letter to Bushrod Washington, dated Nov. 10, 1787):

> The warmest friends and the best supporters the Constitution has, do not contend that it is free from imperfections, but they found them unavoidable and are sensible, if evil is likely to arise there from, the remedy must come hereafter; . . . and, as there is a Constitutional door open for it, I think the People (for it is with them to Judge) can as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendments which are necessary . . .

[8] Even if formal amendatory acts are not the principal means of constitutional change, constitutional change might still be the product of discrete, self-consciously political acts by the population, not an evolutionary process. Indeed this is the central argument of Ackerman, We the People (cited in note xx). To the extent this is a normative argument—a justification for certain changes in the constitutional order—it is not necessarily inconsistent with the proposition that in fact our system changes through evolutionary means: Even if the changes were brought about, in fact, by a more evolutionary process, a self-

There are also more concrete implications that follow from the relative insignificance of the formal amendment process. It is sometimes said that the Constitution should be interpreted "as a whole." The amendments and the original provisions should, according to this view, all be read together, roughly as if the document were all written at one time by one author.[9] For example, many of the amendments concern the franchise and elections; few of the post-Bill of Rights Amendments establish new substantive rights. Therefore (it is argued), constitutional law should be primarily concerned with maintaining a well-functioning representative government rather than with establishing substantive rights.[10] Others have invoked the Nineteenth Amendment, which guarantees women's suffrage, as a reason for interpreting the Fourteenth Amendment to forbid gender discrimination across the board (an interpretation of the Fourteenth Amendment that appears inconsistent with the original understanding of that provision).[11]

---

conscious political act by the People might be needed to make those changes legitimate. As a descriptive matter, however, the same factors that prevent supermajoritarian textual amendments from being a significant means of change will probably also make it unlikely that other similar acts that do not take the form of textual amendments will be an important means of change.

[9] See Akhil Reed Amar, *Intratextualism* , 112 Harv. L. Rev. 747 (1999). There are also suggestions of this approach in Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (Harvard Univ. Press, 1996) and Law's Empire (Harvard Univ. Press 19xx); and perhaps in Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987). For a criticism of this approach to interpretation, see Adrian Vermeule and Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, forthcoming 113 Harv. L. Rev.

[10] See John Hart Ely, Democracy and Distrust 77-88 (Harvard 1980).

[11] For this use of the Nineteenth Amendment, see, e.g., Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1778-79 (1997). See also Akhil Reed Amar, The Bill of Rights 274 (Yale Univ. Press 1998).

An argument of this kind was made by Justice Sutherland, in his opinion for the Court in the Lochner-era case of Adkins v. Children's Hospital, 261 U.S. 525, 553 (1923): "[T]he ancient inequality of the sexes, otherwise than physical, as suggested in [Muller v. Oregon, 208 U. S. 412 (1908)] has continued 'with diminishing intensity.' In view of the great—not to say

And it has been suggested that the Sixteenth, Seventeenth, and Nineteenth Amendments (respectively, authorizing an income tax, providing for the direct election of Senators, and enfranchising women), implicitly authorized the federal welfare and regulatory state.[12]

These arguments presuppose that amending the Constitution—and, by implication, failing to amend the Constitution—are significant events. A formal, textual amendment can legitimately be read back into other provisions of the Constitution, to produce a result that might not be warranted in the absence of the formal amendment.[13] But if the amendments carry no special significance—if they are not the principal means (or even an important means) by which the People change our constitutional order—then these interpretive approaches lose their foundation. It may be right to interpret the Fourteenth Amendment to forbid gender discrimination, and the movement toward greater equality for women, including women's suffrage, may be a legitimate reason to interpret the Fourteenth Amendment this way. But the fact that women's suffrage was formally recognized by the Nineteenth Amendment—instead of coming about through, for example, state legislation or judicial interpretation—should not carry great weight.

One final implication is the most practical of all. If amendments are in fact a sidelight, then it will usually be a mistake for people concerned about an issue to try to amend the Constitution as a way of addressing it. Their energy and other resources are usually better spent on legislation, litigation, or private sector activities that will make political action unnecessary or that will indirectly cause political actors to respond. It is true that the

---

revolutionary—changes which have taken place since [Muller], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.". Adkins was overruled by West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[12] See Akhil Reed Amar, The Bill of Rights 300 (Yale Univ. Press 1998).

[13] See ibid. (suggesting that "ordinary citizens and lawyers alike" may find such an inference from a textual amendment more acceptable than a claim that the Constitution had changed without a textual amendment).

effort to obtain a constitutional amendment might serve very effectively as a rallying point for political activity. But in this respect constitutional amendments are comparable to congressional resolutions, presidential proclamations, or declarations of national holidays; their primary significance is symbolic. A constitutional amendments may be an especially powerful symbol, and it may be worth it for groups to seek a constitutional amendment for just that reason. But while the symbolic effect of a constitutional amendment might contribute to a climate in which lasting change can come about, that is different from saying that the amendment is the principal factor in bringing about the change.

The claim that constitutional amendments are not a principal means of constitutional change should not be confused with the different claim that judicial decisions cannot make significant changes without help from Congress or the President;[14] and it certainly should not be confused with a global skepticism about the efficacy of political activity generally. The point is that changes *of constitutional magnitude*—changes in the small-c constitution—are not brought about by constitutional amendments. It may also be the case that that kind of fundamental change is always the product of an evolutionary process and cannot be brought about by a discrete political act of any other kind—by a single statute, judicial decision, or executive action, or (at the state level) by a constitutional amendment adopted by majoritarian referendum or some other means. The things that are true of Article V amendments may be equally true of these other acts—either they will ratify (while possibly contributing to) changes that have already taken place, or they will be ineffective until the society changes to catch up with the aspirations of the statute or decision. Or, on the other hand, it may be, paradoxically, that majoritarian acts, precisely because they do not require that the ground be prepared so thoroughly, can force the pace of change in a way that supermajoritarian acts cannot.[15]

---

[14] See, e.g., Gerald Rosenberg, The Hollow Hope (Chicago, 199x); comments in U. Va. L. Rev.

[15] For example, there is an interesting question about how much change was brought about by the Voting Rights Act, often considered the single most important piece of civil rights legislation.

Whatever one thinks of these broader speculations, however, they certainly do not entail a general skepticism about whether political activity matters at all. Legislation, judicial decisions—and activity in the private realm that is not explicitly political—are the kinds of things that can accumulate to bring about fundamental and lasting changes that are then, sometimes, ratified in a textual amendment. Sustained political and non-political activity of that kind are precisely what do bring about changes of constitutional magnitude. But such changes seldom come about, in a mature democracy, as the result of a formal amendment adopted by a supermajority.

C. Why Don't Amendments Matter?

On reflection perhaps it should not be so surprising that a formal, supermajoritarian amendment process matters so little in a mature constitutional regime. One characteristic of a mature liberal society is that there are other ways, besides formal textual amendments adopted by a supermajority, to change the Constitution in fact if not in name. Those other mechanisms exist because over time people have established institutions that they trust. This is the principal reason for thinking that a fledgling society will be different from a mature society—in a society that does not have well-established understandings, traditions, and patterns of mutual trust and accommodation, the formal, written text may be the only usable institution. But a mature liberal society will have such understandings, traditions, and institutions.

Because such institutions exist, by the time an Article V supermajority is galvanized into action, chances are good that much of the society has already changed by one of those other means. If a formal amendment process were unavailable, the society would find another way to enforce the change it has determined to make—by legislation and judicial interpretation, by changes in social understandings and private sector behavior, or in some other way. The change might not be accomplished as neatly or as decisively—it might take longer to bring outliers into line—but relatively speaking that is a detail. Those other institutions—not supermajoritarian constitutional amendments—will be the truly important means of constitutional change. That explains why, when society has changed

enough to produce a supermajority in favor of a formal amendment, the amendment was probably unnecessary.

The opposite situation could still arise, however: a supermajority might act, and adopt an amendment, even if society has not fundamentally changed. One cannot simply say that any set of political forces strong enough to bring about a constitutional amendment is strong enough to change society in some other way, because that is not always true. An amendment might represent a momentary high water mark of popular sentiment on a question. On second thought, many people, even an ordinary majority, might decide that the amendment was a mistake—but there it is, entrenched in the Constitution.

On these occasions the formal amendment will be relatively insignficant for a different reason. Where there is no lasting social consensus behind a textual amendment, the change in the text of the Constitution is unlikely to make a lasting difference—at least if it seeks to affect society in an important way—unless and until society changes in the way that the amendment envisioned. Until that happens, the amendment is likely to be evaded, or interpreted in a way that blunts its effectiveness. This is, in a sense, the other side of the fact that mature societies have a variety of institutions, in addition to the text of the Constitution, that can affect how the society operates. Those institutions can change society without changing the Constitution; but they can also keep society basically the same—perhaps with some struggle, but still basically the same—even if the text of the Constitution changes. This was, most notoriously, the story of the Fourteenth and, especially, the Fifteenth Amendment. The Fifteenth Amendment may have affected things in the short run, but within a generation it had been reduced to a nullity in the South.

It does not follow that, owing to some kind of historical necessity, formal amendments cannot ever possibly cause important changes. Rather the point is that the formal amendment process will be the means of significant change only in certain limited circumstances that hardly ever occur in a mature society. In particular, three conditions would have to be present to a substantial degree in order for the amendment process to make a difference.

First, a formal supermajoritarian amendment process is unlikely to be an important means of change unless the other usual means of

change—such as legislation and judicial interpretation—are, for some reason, unavailable. If other means of change are available, they will probably have been used, and they will have effected the change to a significant degree, before a supermajority can be assembled to amend the Constitution.

Second, the existence of a formal amendment process is likely to make a difference only when the supermajority that adopted the amendment is a temporary one that was assembled even though the society had not basically changed. That is because, as I have suggested, deep, long-lasting changes in society will find some way to reflect themselves with or without a formal amendment—if not through legislation or changes in the composition of the courts, then through changes in private behavior. The formal amendment process will have its most significant effect when the supermajority sentiment does not persist.

Finally, in order for an amendment to matter, it would have to be unusually difficult to evade, perhaps because it specified a precise rule rather than a relatively vague norm. An amendment that is adopted at the high-water mark of public sentiment will be prone to being narrowed or evaded once public sentiment has receded, as the Fourteenth and Fifteenth Amendments were. It will only have a substantial effect if it is, for whatever reason, especially difficult to evade.

If these circumstances all occur, a temporary supermajority's ability to adopt a formal amendment might permanently change things in a way that they would not have been changed without a formal amendment. But this confluence of circumstances is unlikely to happen very often. I suggest below one instance in which it might have happened—the Twenty-Second Amendment, limiting President's terms. Even that example is not entirely clear. But that may be the only occasion, since the early days of the Republic, on which the formal amendment process seems to have made a substantial difference.

In the rest of this paper I will try to establish the propositions I set out before: that in our system, constitutional changes occur without amendments, and the amendments that have been added are, speaking roughly, either unnecessary or ineffective. Part II describes amendments that occurred in fact, even though the text of the Constitution had not changed, including times when an

amendment was proposed and rejected but the constitutional order changed anyway. Then I will turn to the amendments that have been adopted. In Part III, I will discuss the Civil War Amendments, ordinarily thought to be among the most significant Amendments to the Constitution. In Part IV, I will discuss amendments that are significant not because they work important changes but only because they operate as "rules of the road." In Part V, I will turn to the Progressive Era Amendments—the income tax, the direct election of Senators, and women's suffrage—and I will try to show that these amendments, too, despite their apparent importance, were not the engines of significant change. Along the way I will compare the Civil War and Progressive Era amendments to other existing or proposed amendments.

II. Non-Amendment Amendments

The first indication that the role of formal amendments may be less than meets the eye is how often important changes—what have to be called, realistically, changes of constitutional magnitude—occur without any formal amendment. Even more dramatic, there have been occasions on which formal amendments were proposed and rejected by the nation, but the constitutional order then changed in the way that the failed amendment sought to bring about.

A. Change Without Amendment

Our constitutional history has seen many developments that must be regarded as changes in the constitutional order, or changes of constitutional magnitude, but that were unaccompanied by any formal amendment. Of course, this requires a definition of "constitutional" change, or change of constitutional magnitude, as opposed to other kinds of changes, and it is difficult to define these notions precisely.[16] But it seems reasonable to say that there is a class of developments that would strike an untutored reader of the

---

[16] See, for discussion of this issue, Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?*, in Levinson, ed., Responding to Imperfection: The Theory and Practice of Constitutional Amendment 13 (Princeton Univ. Press, 1995).

Constitution as the kinds of changes that would be accompanied by a change in the text. These are changes that affect matters at the core of what the written Constitution addresses: for example, the allocation of power between the federal government and the states, or among the three branches of the federal government; the scope of individual rights against government action; and the basic rules of representative democracy, such as who will have the vote and who will elect which officials. Unless one is going to say, rigidly and unhelpfully, that by definition the constitutional order cannot change unless the text of the Constitution changes, at least some changes in these aspects of our system have to be considered fundamental enough to be changes of constitutional magnitude.

One example of such a change is the enormous growth in the permissible range of federal legislation. Congress may now regulate subjects that a century ago would have been regarded as the exclusive province of the states—the workplace and the employment relationship, land use and the environment, agriculture and the sale of consumer products, important areas of criminal law.[17] This expansion in Congress's power came about principally through judicial interpretation, especially interpretation of the Commerce Clause. Indirectly, of course, it came about because of insistent political and social forces that demanded legislation and ultimately would not tolerate judicial invalidation.

This change in the scope of federal power has to be regarded as a constitutional change. The text of the Constitution defines Congress's powers in detail, and the scope of federal power was a

---

[17] The view that certain subjects were the exclusive province of the states, and off-limits to the federal government, was articulated and applied in some (infamous) Supreme Court opinions—notably *Hammer v. Dagenhart*, 247 U.S. 251, 272-76 (1918), and *United States v. E.C. Knight & Co.*, 156 U.S. 1 (1895). See also *Keller v. United States*, 213 U.S. 138, 144 (1909); *United States v. Dewitt*, 76 U.S. 41, 44-45 (1869). Principally, however, this was a more general understanding about the proper scope of Congress's role, rather than a clearly-articulated doctrine of constitutional law that the Supreme Court consistently enforced. See, for a prominent expression of the attitude, Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950). For an account of this subject, see Larry D. Kramer, *Putting Politics Back Into the Political Safeguards of Federalism*, forthcoming 100 Colum. L. Rev.

principal issue at the Constitutional Convention. But no formal amendment to the Constitution authorized this great expansion of Congress's power. In fact, President Franklin Roosevelt, who was responsible for one great wave of this legislation, consciously rejected the use of Article V; he believed that he could accomplish his objectives by other means.[18] And, as I will discuss below, the Child Labor Amendment to the Constitution, which would have authorized a particular expansion of federal regulatory power in this direction, was proposed and rejected.

This is not to suggest that the cases expanding Congress's power under the Commerce Clause and other provisions were usurpations or otherwise inappropriate. The Commerce Clause cases of the New Deal era—which are usually thought to have authorized the ultimate expansion of congressional power[19]—had strong precedential roots, and they responded to the perception that no principled line can be drawn that would substantially limit Congress's power. But however sound those decisions are, and however much the current Supreme Court might be inclined to nibble at the edges of the Commerce Clause power, today it is settled that Congress may legislate about a far broader range of subjects than would have been considered within its power a century ago.

The growth in the power of the President, especially in foreign affairs, is another constitutional change, again from this century, that occurred without a formal amendment.[20] Today the President is conceded broad power to use military force overseas without a declaration of war. The President enters into executive agreements that in many respects have the force of treaties, but without the Senate consent required for a treaty. The courts have consistently

---

[18] See, e.g., William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 347, 383-86.

[19] See Corwin, The Passing; Wechsler, Political Safeguards.

[20] These developments are described in G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 U. Va. L. Rev. 1 (1999); Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995); and Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759, 791 & n. 197 (1992).

suggested that the President can be delegated broader powers in the field of foreign relations than in domestic affairs, and that delegations of power to the President in the area of foreign affairs are to be more liberally construed.[21] None of these powers has a clear basis in the text of the Constitution; none of them existed, in anything like its current form, a century ago; all are well-established now, without the aid of any textual amendment.

Similarly, the growth of a federal bureaucracy with the power to make rules and adjudicate cases is not anticipated in any significant way by the text of the Constitution. The Constitution does refer to "executive Departments," but the enormous expansion in the size of the federal bureaucracy in this century has to be considered a change of constitutional magnitude.[22] Beyond that, the regulatory agency, a central feature of the federal government, also came into being at the federal level a hundred years or so ago; beginning with the Interstate Commerce Commission, created in 1887, Congress established a number of agencies that combined, in some form, executive, legislative, and judicial functions. The New Deal is famous for having greatly increased the number of these agencies, but by 1933 the administrative state was already well-established: the Federal Trade Commission, the Federal Power Commission, the Federal Radio Commission (the predecessor of the Federal Communications Commission), the Commodities Exchange

---

[21] United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936), established this principle and famously referred, in a passage on which the Executive Branch has relied many times since, to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." 299 U.S. at 320. See also Dames & Moore v. Regan, 453 U.S. 654, 678 (1981); Haig v. Agee, 453 U.S. 280, 291 (1981) ("[I]n the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.").

[22] In 1816, the federal government had fewer than 4,000 civilian employees. By the end of the nineteenth century, the number was almost 240,000. By 1930—before the New Deal—there were already over 600,000 federal civilian employees. The number grew to over 1,000,000 by 1940 and around 2.000,000 by 1950. U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957 at 710. See Kramer, 100 Colum. L. Rev.

Authority, and other agencies were already in existence. These and other similar agencies raised serious constitutional issues. They combined the functions of the different branches, in apparent contravention of the separation of powers; they engaged in adjudication, although their members were not judges appointed pursuant to Article III of the Constitution; and they assessed forms of civil liability without providing for a jury trial, arguably in violation of the Seventh Amendment.[23]

No constitutional amendment authorized either the expansion of the federal bureaucracy or the creation of the administrative state. But the expanded federal government is now a permanent part of our system, beyond any serious constitutional challenge. The constitutionality of administrative agencies has been beyond question at least since the Supreme Court's decision in *Crowell v. Benson*, in 1932.[24] In fact, since so many agencies were already well-established by then, it seems fair to say that *Crowell v. Benson* essentially ratified a fait accompli. This was a change of constitutional magnitude—one that is hard to reconcile with several provisions of the text—that took place without any formal amendment.

This pattern of extra-textual amendments is not just a twentieth century development. *McCulloch v. Maryland*[25] upheld the second Bank of the United States and gave a very broad construction to the Necessary and Proper Clause of the Constitution, essentially permitting Congress to enact any law so long as it was not irrational to conclude that there was a connection between the law and an objective Congress was permitted to pursue.[26] Many people viewed *McCulloch* as an example of a Supreme Court decision that amended the Constitution without

---

[23] On the growth of the administrative state before the New Deal, see Stephen Skowronek, Building a New American State, chs. 5, 8 (Cambridge Univ. Press. 1982). See also Larry Kramer, *What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 Case Western Reserve L. Rev. 885, 921-25 (1996).

[24] *Crowell v. Benson*, 285 U.S. 22.

[25] 4 Wheat. (17 U.S.) 316 (1819).

[26] Id. at 415.

authorization.[27] James Madison, the most prominent member of the Constitutional Convention, wrote that, in his estimation, the Constitution would not have been ratified if it had included an authorization of congressional power as sweeping as that announced by Chief Justice Marshall in *McCulloch*.[28] But this aspect of *McCulloch* has endured as a foundational constitutional principle; indeed it has been extended beyond the Necessary and Proper Clause to other grants of power to Congress.[29]

In fact, the evolution of Madison's views about the Bank of the United States shows that Madison—a principal author of the text of the Constitution—was also a principal author of the idea that the Constitution can be amended without changing to the text. When Alexander Hamilton first proposed the Bank of the United States, Madison vehemently objected, saying that the Constitution did not authorize such an expansion of federal power.[30] Like Washington and other Framers, Madison said that any alteration in the Constitution would be a usurpation if not accomplished through Article V.[31]

After an extensive debate on its constitutionality, Congress enacted legislation establishing the Bank.[32] When the term of the first bank expired, Congress rechartered it. Madison, then President,

---

[27] See White, Suber, cited in Levinson at 22 & n.31.

[28] See his letter to Judge Roane, September 2, 1819, reprinted in III The Records of the Federal Convention 435 (Max Farrand, ed.) (Yale Univ. Press. 1966): "[T]hose who recollect, and, still more, those who shared in what passed in the State conventions, through which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification."

[29] See, e.g., South Carolina v. Katzenbach; Jones v. Mayer?; 18th A case.

[30] See 2 Gales & Seaton's Debates and Proceedings of the Congress of the United States 1944-52 (1834), reprinted in Paul Brest & Sanford Levinson, eds., Processes of Constitutional Decisionmaking (3d ed. Little, Brown & Co. 1992).

[31] Id; Washington's farewell address.

[32] See David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 at 78-80 (Univ. of Chicago Press, 1997).

vetoed the bill rechartering the Bank—but explicitly on nonconstitutional grounds. By now it was 1815, 24 years after Hamilton first proposed by Bank, and Madison explained that he considered the issue of constitutionality to be "precluded . . . by various recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of Government, accompanied by indications, in different modes, of a concurrence in the general will of the nation."[33] A year later, he signed the bill creating the second Bank of the United States.

After Madison left office, the constitutionality of the bank again became an issue; a rechartering was ultimately vetoed by Andew Jackson on constitutional grounds. In 1831, Madison stated even more emphatically his view that a well-established practice could alter the constitutional regime. Declaring the bank unconstitutional at that point would be, he said, "a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention." He asked:

> "[W]hich, on the whole, is most to be relied on for the true and safe construction of a constitution; that which has the uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties; or that which depends upon the opinions of every new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes[?]"[34]

Madison is credited with extraordinary foresight for his contributions to the Founding. But the later Madison—who

---

[33] Veto message of Jan. 30, 1815, in Hunt ed., VIII Writings of Madison 327; Currie, The Constitution in Congress: The Jeffersonians xxx-xx (forthcoming Univ. of Chicago Press)

[34] Quoted in Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 81-82 (1989).

envisioned that "the uniform sanction of successive legislative bodies" could change the Constitution, even without a formal amendment—was equally visionary about the system he had helped create.

B. Rejected Amendments that Became the Law

Even more revealing than extra-textual amendments are the proposed formal amendments that were rejected but that nevertheless became, for all practical purposes, part of the Constitution. That is to say, even though the proposed amendment was rejected, constitutional law changed in almost exactly the way it would have changed if the amendment had been adopted.

The Child Labor Amendment, which would have authorized Congress to enact laws regulating or forbidding labor by people under 18, was approved by Congress and sent to the states in 1924.[35] Congress proposed the amendment after making repeated efforts, thwarted by the Supreme Court, to regulate child labor by statute. In 1916, Congress passed the Child Labor Act, which restricted the shipment in interstate commerce of goods made by child labor. Two years later, in *Hammer v. Dagenhart*,[36] the Supreme Court invalidated the Act on the ground that it exceeded Congress's power under the Commerce Clause. The Court reasoned, as it had in some earlier cases concerning the Commerce Clause, that Congress lacked the power to regulate "purely local" matters, such as manufacturing; and the Court suggested that legislation under the Commerce Clause would be invalid when Congress's intention was not to regulate commerce but rather to reach matters (such as the age of employees) that would ordinarily not be within Congress's power.[37]

---

[35] Section 1 of the proposed amendment provided: "The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age." Section 2 provided that "the power of the several States is unimpaired by this article" except to the extent needed to give effect to congressional legislation. Encyc. 48.

[36] 247 U.S. 251 (1918).

[37] Id. at xxx, xxx.

Congress tried again to regulate child labor, enacting the Child Labor Tax Act in 1919; three years later, the Supreme Court struck down that law, too.[38] Congress then proposed the Child Labor Amendment.[39] The proposed amendment got little support. Within a year, it had been ratified by only four states and explicitly rejected by 19,[40] and by 1930, it had been ratified by only six states and seemed as good as dead.[41]

By 1941, it might as well have been added to the Constitution. In *United States v. Darby*,[42] the Supreme Court upheld the Fair Labor Standards Act, which specified minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The Court in *Darby* specifically rejected the rationales of *Hammer v. Dagenhart* and other decisions limiting Congress's power under the Commerce Clause and explicitly overruled *Hammer v. Dagenhart*. It was as if the Child Labor Amendment not only had been adopted but had been given an especially expansive reading—not just as authorizing laws forbidding child labor, but as repudiating the entire approach to the Commerce Clause that underlay *Hammer v. Dagenhart* and the cases on which that decision relied.

More recently the leading example of this kind of amendment—rejected, yet ultimately triumphant—is the Equal Rights Amendment, which would have forbidden unequal

---

[38] *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

[39] For accounts of the Child Labor Amendment, see Clarke A. Chambers, Seedtime of Reform: American Social Service and Social Action, 1918-1933 at 29-46 (University of Minnesota Press, 1963), and Walter L. Trattner, Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America 163-86 (Chicago, Quadrangle Press 1970). See also Stephen B. Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law (University of Chicago, 1968).

[40] Alan P. Grimes, Democracy and the Amendments to the Constitution 103 (Lexington Books, 1978).

[41] Subsequently, several states sought to rescind their rejections of the amendment. Their actions led to the Supreme Court's decision in Coleman v. Miller (1939). Eventually 28 states ratified the amendment. Ency 48.

[42] 312 U.S. 100.

treatment on the basis of sex. A version of the ERA was first proposed in 1923. It was sent to the states in 1972 but not enough states ratified it; it died in 1982. Today, it is difficult to identify any respect in which the law is different from what it would have been if the ERA had been adopted. The Supreme Court requires an "exceedingly persuasive" justification for gender classifications, and it invalidates gender classifications that rest on what it considers to be "archaic and overbroad generalizations"—such as the view that women are less likely to work outside the home than men. Even when the Court has upheld gender classifications, it has not questioned that the Constitution (specifically the Equal Protection Clause) contains a principle generally forbidding gender discrimination.

It is true that the official standard that the Court applies to racial classifications—so-called "strict scrutiny"—is not formally applied to gender classifications. But the official formulations of levels of scrutiny are not very revealing about what the courts are doing. For example, although "strict scrutiny" nominally applies to both racial affirmative action and to discrimination against minorities—and to certain restrictions on other constitutional rights—the Supreme Court actually uses a different approach in each of these areas.[43] Although the Court has, of course, rejected some claims of gender discrimination, it has never done so on the ground that the rejection of the ERA shows that gender discrimination is a less serious concern, under the Constitution, than racial discrimination. In fact, it appears that neither the Court nor even a single Justice has ever suggested that the rejection of the Equal Rights Amendment has any significance at all.[44]

---

[43] For details, see David A. Strauss, *Affirmative Action and the Public Interest*, 1995 Sup. Ct. Rev. 1, 6-11.

[44] An exchange between Justices Brennan in Powell in *Frontiero v. Richardson*, 411 U.S. 677 (1972), decided while the ERA was before the states, in a sense presaged that it was irrelevant whether the amendment was adopted. Justice Brennan, in urging the Court to apply strict scrutiny to gender classifications, relied in part on Congress's "increasing sensitivity to sex-based classifications," revealed in anti-discrimination legislation and also the proposed ERA. Id. at 687 (plurality opinion of Brennan, J.). Justice Powell's response was that the Court wait until the fate of the ERA was determined before taking such a step.

Again, it would be a mistake to say simply that an overly activist Court "ratified" the ERA in the face of a contrary verdict from the country. What "ratified" the ERA, in effect, was not just the Court but the same kind of thing that "ratified" the Child Labor Amendment: insistent pressure from society as a whole. In the case of the ERA, this took the form of the increasing presence of women in the workplace, in politics, and generally in new roles.[45] Instead of the courts' imposing an agenda on society, it is probably more accurate to say that the opposite occurred: because of developments in society, the Court would have found it very difficult to go on sustaining gender classifications based on certain kinds of stereotypes.

The recent decision in *United States v. Virginia*,[46] which invalidated all-male education at the Virginia Military Institute, is an example. Several years before that case was decided, women were admitted to the United States Armed Forces, and to the services academies, not because of fear of court decisions but because that was a natural outgrowth of the changing status of women in society. Then when *United States v. Virginia* reached the Court, the Court was surely influenced by the experience of the service academies and the armed forces; that experience made it easier to view VMI as an anachronism, as the Court did. A variety of forces, then—changes in society, legislation and executive action, judicial decisions—combined to bring about what the ERA sought to establish.

Id. at 692 (Powell, J., concurring). Justice Powell's argument was that the plurality was seeking to "pre-empt" a decision by "the will of the people" (ibid.). That objection is superficially plausible, but it leads to the conclusion that the Supreme Court can never adopt any doctrinal innovation: how can it be more consistent with "the will of the people" for the Supreme Court to modify constitutional doctrine when the modification it is contemplating is so lacking in popular support that no constitutional amendment has even been proposed by Congress?

[45] Cf. Casey (Souter part of plurality op.)

[46] 116 S. Ct. 2264 (1996).

III. The Civil War Amendments (and Non-Amendments)

Even if the Constitution can change without a constitutional amendment, and rejected constitutional amendments can end up, in effect, being the law, it does not follow that those amendments that do get adopted are unimportant. Offhand one might say that it is impossible to deny the significance of the Civil War Amendments: the Thirteenth Amendment, which abolished slavery; the Fourteenth Amendment, which provides for national citizenship and contains the Due Process, Equal Protection, and Privileges or Immunities Clauses; and the Fifteenth Amendment, which forbids discrimination in voting on the basis of race or previous condition of servitude.

In fact these amendments changed things much less than might be thought. The Civil War, needless to say, worked enormous changes. Ultimately the nation changed in many of the ways envisioned by the Civil War Amendments; today racial minorities are not excluded from voting, for example. But it was not the amendments that changed things. The amendments made relatively little difference when they were adopted; the changes they prescribed only came about when society itself changed. This shows again that the true mechanism of constitutional change in our political order is not the distinct acts of a sovereign people expressing its will through the Constitution, but an evolutionary process (or, in the case of the Civil War, a traumatic event) in which changes to the text of the Constitution are sidelights.

To begin with, it is not at all clear that the Civil War Amendments should be regarded as formal amendments to the Constitution, of the kind authorized by Article V. The process by which they were ratified was highly irregular. The amendments received crucial ratification votes from state legislatures in secessionist states that were controlled by governments installed by the North. In many instances, the states of the Confederacy were required to ratify the Amendments in order to be readmitted to the Union. In these circumstances, the Civil War Amendments are probably better seen not as formal amendments but in the nature of a treaty, reflecting the outcome of the war. The states of the Confederacy did not so much ratify the amendments as submit to them because they

were the defeated parties and had little choice. The victors also bound themselves, in order to make the terms of the peace more palatable and "to avoid charges of rank hypocrisy,"[47] and probably thinking that the cost to themselves was minimal.

However one characterizes the Civil War Amendments, however, the most conspicuous thing about them is that they meant little for 100 years. That is not to say that they meant nothing. The Civil War Amendments did serve a limited role, comparable to the role that other amendments serve. But they were not the principal means of constitutional change.

A. The Thirteenth Amendment (With an Aside on the Poll Tax)

The practical effect of the Thirteenth Amendment was to abolish slavery only in four border states (Delaware, Maryland, Kentucky, and Missouri) that had not joined the Confederacy and therefore were not subject to the Emancipation Proclamation (and, more to the point, where emancipation had not already been accomplished by the Union Army). In that sense, the Thirteenth Amendment is an example of an amendment that suppressed outliers before they otherwise would have been suppressed. Slavery in those states could not possibly have persisted for long after the end of the Civil War and the effective abolition of slavery in the Deep South. Even if the border states had persisted, it is a reasonable conjecture that Congress would have outlawed slavery and the Supreme Court would have upheld its action.[48] But in any event, the best estimate of the effect of the Thirteenth Amendment is probably that it brought about the end of slavery in a few border states a few years before it otherwise would have ended. That is not trivial, but it is a far cry from viewing the amendment as the principal means of constitutional change.

---

[47] Michael J. Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 349.

[48] Before the Civil War, there were a variety of arguments, seriously advanced, that the Constitution either forbade slavery [Frederick Douglass] or was hostile to it. See, e.g., Lincoln/Douglas debates; Eric Foner, Free Soil, Free Labor, Free Men (Oxford Univ. Press. 1970). The Commerce Clause and the Guaranty Clause could have been the basis for Congressional action outlawing slavery if the Thirteenth Amendment had not been adopted.

Among the more recent amendments, the Twenty-Fourth Amendment, which outlaws the use of a poll tax in federal elections, most closely resembles the Thirteenth. When the Twenty-Fourth Amendment was proposed, only five states had poll taxes at all.[49] The Twenty-Fourth Amendment forbade those states from using the poll tax in federal elections—a clear example of an amendment that has the effect only of suppressing outliers.

Later events reveal even more about the Twenty-Fourth Amendment. The few states that had a poll tax continued to use it in state elections, which were not reached by the Twenty-Fourth Amendment. But two years after the Twenty-Fourth Amendment was adopted, the Supreme Court, in *Harper v. Virginia State Board of Elections*,[50] invalidated the use of poll taxes in state elections, too. The Court in *Harper* did not invoke the Twenty-Fourth Amendment as a basis for its decision; nor did it explain why it was effectively expanding the Twenty-Fourth Amendment beyond the text that was ratified. Rather, the Court followed a series of decisions, beginning with *Reynolds v. Sims*, that established the principle of "one person, one vote" and used that principle to strike down a variety of state restrictions on the franchise

In view of *Harper*, the net effect of the Amendment was, at most, to abolish the poll tax in federal elections, in a few states, two years before it would otherwise have been abolished across the board anyway. Even that limited purpose could have been accomplished by federal legislation, instead of by amending the Constitution.[51] For that matter, federal legislation almost certainly could have abolished the poll tax in state elections as well.[52] The Voting Rights Act of 1965 outlawed literacy tests even in state elections in jurisdictions where there was reason to fear that literacy tests and other devices

---

[49] See *Harman v. Forssenius*, 380 U.S. 528, 539 (1965). Virginia changed its law in anticipation of the ratification of the amendment, although the revised law was also declared unconstitutional. Ibid.

[50] *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

[51] This appears to follow from *Oregon v. Mitchell*, 400 U.S. 112 (1970).

[52] Justice Black, who dissented vigorously in *Harper*, said he had "no doubt at all" that Congress had this power. *Harper*, 383 U.S. at 679 (Black, J., dissenting).

were being used to discriminate; the poll tax, like the literacy test, had a close historical association with the de facto disfranchisement of African-Americans.[53] So the Twenth-Fourth Amendment, too, bears out the thesis that the things would look the same even if a formal amendment process were not part of the Constitution.

In fact, the history of the Twenty-Fourth Amendment suggests another example—like the Equal Rights Amendment and the Child Labor Amendment—of a rejected amendment that nonetheless became the law. Originally, proponents of the Twenty-Fourth Amendment wanted it to ban the poll tax in state elections, too. But they dropped that part of the proposed amendment because they thought it would make it too difficult to get the amendment ratified. That deliberately omitted part of the the Twenty-Fourth Amendment was what the Supreme Court "adopted" in *Harper*; and even if the Supreme Court had not done so, it probably could have been adopted by Congress in ordinary legislation, as I have said.

It is true that ordinary legislation would not have formally entrenched the abolition of the poll tax in the way that an amendment did. But no state has tried to reenact poll taxes for state elections and get *Harper* overruled; and no state has tried to reinstitute literacy tests and have the Voting Rights Act repealed. In any event, the power of an amendment to entrench change should not be overstated. Even an amendment cannot guarantee that a change will be permanent, as the history of the other Civil War Amendments shows.

B. The Fourteenth and Fifteenth Amendments, and the Civil War's Greatest Non-Amendment

The Fourteenth and Fifteenth Amendments present a somewhat different story from the Thirteenth. The Fourteenth and Fifteenth Amendments did not address something like slavery, which was not an important institution by the time the Civil War

---

[53] See *South Carolina v Katzenbach*, 383 U.S. 301 (1966) (upholding provisions of Voting Rights Act that outlawed literacy tests in certain jurisdictions). On the use of the poll tax to discriminate against African-Americans, see, e.g., J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910 (1974).

ended. The Fourteenth and Fifteenth Amendments addressed matters of great importance to the post-Civil War South. But they were ahead of their time, and consequently ended up having little effect until their time came around, in the mid-Twentieth Century.

The Fifteenth Amendment, barring discrimination in voting against blacks or former slaves, presents the more dramatic case. The Fifteenth Amendment was not nullified at once. Its effects of the Fifteenth Amendment lingered in the South for a decade or so after Reconstruction, and the Fifteenth Amendment may have helped blacks gain the franchise in the North.[54] But for the most part the Fifteenth Amendment is the inverse of the Equal Rights Amendment: an Amendment that was added to the Constitution's text but did not become part of the Constitution in operation.

The Fifteenth Amendment was ratified in 1870. By the late 1880s it was being blatantly subverted in much of the South. The subversion usually did not take the form of outright defiance. Rather, Southern states adopted a variety of devices, such as literacy tests and poll taxes, that did not explicitly deny blacks the vote but in effect disenfranchised them. Where such ostensibly legal means did not work well enough, Southern whites used intimidation, subtle or otherwise, and violence. By the turn of the century African-Americans were effectively disfranchised throughout almost the entire region.[55] The Amendment continued to be nullified on a large scale until the middle of the 20th century.

If one read the Constitution, and took the amendments at face value, one would conclude that the Fifteenth Amendment enfranchised African Americans. It did not. To a limited degree, the Union Army, and the aftermath of its occupation, did; then 100 years later, the Voting Rights Act—itself the product of long-term social and economic forces—enfranchised blacks. The Constitution—in the sense of the actual rights of people—did not

---

[54] See, on this point, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 789-93 (1991) and sources cited there.

[55] See J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910 (1974); Michael J. Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 350-61, 359-60.

change with the Amendment. It changed only when deeper changes occurred in society.

The Fourteenth Amendment is a less dramatic case because its requirements are not as clear as those of the Fifteenth; it is easier to demonstrate that blacks were denied the vote on the basis of their race than to demonstrate that they were denied "equal protection" or "privileges or immunities," just because the latter terms are more vague. But in many ways the Fourteenth Amendment presents the same pattern as the Fifteenth. And what it accomplished is swamped by what it did not accomplish.

The Fourteenth Amendment had one immediate legal effect: it outlawed the Black Codes, systems of civil disability imposed on African Americans by many former slave states. But even here, it is not clear that the Amendment was crucial. Congress believed it had the power to abolish the Black Codes without the Fourteenth Amendment. The Reconstruction Congress enacted the Civil Rights Act of 1866, which was directed at the Black Codes, before the Fourteenth Amendment was adopted. (President Andrew Johnson vetoed the bill that became the 1866 Act on constitutional grounds, and his veto was overridden.) The Fourteenth Amendment was designed to ensure the constitutionality of the Civil Rights Act of 1866. But had the Supreme Court agreed with Congress about the constitutionality of the Act, the Fourteenth Amendment would not have been necessary even to abolish the Black Codes. Many Republicans at the time believed that "the amendment was simply declaratory of existing constitutional law, properly understood."[56]

Some of the members of Congress who thought that the Fourteenth Amendment was unnecessary invoked the Thirteenth instead. But they also relied extensively on the Guaranty Clause: "the jewel of the Constitution," in the words of one Radical Republican.[57] Some supporters of the Civil Rights Act also revived antebellum theories of the unconstitutionality of slavery, or took the

---

[56] Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 91 (Duke Univ. Press, 1986). See Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954).

[57] Eric Foner, Reconstruction: America's Unfinished Revolution 232 (1988) (quoting Sen. Richard Yates).

position that secession and civil war created their "own logic and imperatives."[58] In any event, even if the Fourteenth Amendment (or the Thirteenth and Fourteenth in combination) were instrumental in getting rid of the Black Codes, that is a limited accomplishment that falls far short of working a substantial change. Massive denials of equality to African Americans, of a kind that the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment were intended to prohibit, persisted until the 1950s and the Civil Rights Revolution.

Still, it might be said, when the Civil Rights Revolution of the 1950s did occur, it was important that the Fourteenth Amendment supplied a textual provision that the Supreme Court, and others, could point to as guaranteeing equality. But even this limited effect cannot be attributed to the Fourteenth Amendment without qualification. When the Supreme Court declared state-sponsored racial segregation unconstitutional, in *Brown v. Board of Education* and its sequelae, the Court also ruled, in *Bolling v. Sharpe*, that the Constitution barred the federal government from segregating the schools of the District of Columbia. Of course the Equal Protection Clause applies only to the states, not to the federal government. The Court in *Bolling* relied on the Due Process Clause of the Fifth Amendment, but this is a notoriously questionable use of the Fifth Amendment: among other things, the Fifth Amendment was adopted at a time when slavery was legal and protection of the slave trade was entrenched in the Constitution.[59]

The Supreme Court's willingness to decide *Bolling* without a plausible textual basis suggests that events in the 1950s and 1960s would not have taken a dramatically different course if the victors of the Civil War had not added the language of the Fourteenth Amendment to the Constitution. It is difficult to believe that the Supreme Court would have ruled in favor of the school board in *Brown v. Board of Eductation* if the Fourteeth Amendment had not been adopted—if, for example, there was a consensus after the Civil

---

[58] Ibid. (quoting Rep. Thaddeus Stevens).

[59] The strongest text-based argument in favor of Bolling is put forward in Akhil Reed Amar, Intratextuality, Harv. L. Rev.

War that the Civil Rights Act of 1866 was constitutional even without the Amendment, and the Reconstruction Congress had turned its attention elsewhere instead of proposing an amendment. It seems more likely that the Court (with help, of course, from the litigators who brought the series of cases leading up to *Brown*) would have identified some other text in the Constitution as the formal basis for their claims of equality.[60]

The most conspicuous Civil War non-Amendment supports this conjecture. Before the Civil War, the question whether the Constitution permits a state to secede from the Union was a subject of lively debate. The progenitor of the argument that states had a right to secede was Jefferson's Kentucky Resolution. In the decades leading up to the Civil War, respected political and legal figures advanced serious legal arguments in support of the right to secede.[61] No Amendment adopted after the Civil War settled this question, expressly or by any reasonably direct implication.

Yet the question has, without doubt, been settled. The person on the street would say it was settled by the Civil War, and that

---

[60] The possibilities include those suggested by the antebellum opponents of slavery and the Reconstruction Congress—such as the Guaranty Clause—and those suggested by some current accounts. See, e.g., the discussion in Amar, Intratextuality, HLR (bill of attainder, titles of nobility (cf. Scalia in Adarand), 5th A DPC).

In fact, it is possible that the Court in *Brown* and similar cases was already relying on the "wrong" provision—that the the Privileges or Immunities Clause, not the Equal Protection Clause, was intended to be the true equality-protecting provision of the Fourteenth Amendment, see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888 at 342-51 (Chicago 1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). The Court's decision in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), foreclosed reliance on the Privileges or Immunities Clause. The Court's ability to invoke a provision for a purpose that was, apparently not originally intended, is additional evidence that even without a Fourteenth Amendment, the Court would have found some textual basis for *Brown* .

[61] See generally David M. Potter, The Impending Crisis 1848-1861, at 479-84 (1976); Jesse T. Carpenter, The South as a Conscious Minority, 1779-1861, at 200-13 (1930).

person would be right.[62] It was settled by the Civil War, even though no formal Amendment was added to the Constitution.[63] The Civil War settled the question of the constitutionality of slavery in the same way, and it settled, or more accurately began the process of settling, the question of racial equality. The Secession Amendment, by its absence, makes it difficult to argue that the Thirteenth, Fourteenth, or Fifteenth Amendments made as much difference as one might unreflectively think. The role of the formal Civil War amendments—which, because of the irregularities in the ratification process, might not even be correctly described as formal amendments—appears to have been limited and incidental.

IV. Rules of the Road

Some other constitutional amendments are remarkable for their relative lack of importance. The flukish Twenty-Seventh Amendment, adopted 200 years after it was proposed, prohibits members of Congress from raising their own salaries until an election has occurred; it seems safe to say that this Amendment has no significant effect at all. But many constitutional amendments, while not important because of the changes they brought about, are not insignificant in this way. They serve a nontrivial purpose; they are just not important in the way that amendments are usually thought to matter. These are amendments that address matters that must be settled one way or the other—but how they are settled is not so important. The analogy is to the rule that traffic must keep to the right.

The Twenty-Fifth Amendment, which governs Presidential succession and disability, is a prime example. Its details were debated, but it hardly changed society. The Twentieth Amendment, the so-called Lame Duck Amendment, which moved Inauguration Day from March 4 to January 20 (and changed the date on which Congress was to convene), is another. Of course, these amendments

---

[62] See Testa v. Katt, 330 U.S. 386, 390 (1947) (suggesting that "the fundamental issues over the extent of federal supremacy ha[ve] been resolved by war").

[63] See Charles Black, xxx.

could, under certain circumstances, make an enormous difference. If a foreign power threatens nuclear war on February 1 of the year after an election, the adoption of the Lame Duck Amendment might prove to have made literally all the difference in the world. But any rule of the road can be important in that way.[64]

This is one function that the amendment process has served in our system. It settles such matters of relative detail that need to be decisively settled. But this function of amendments—a far cry, of course, from the notion that amendments are the means by which the People speak when the wish to bring about fundamental changes—is not necessarily inconsistent with the thesis that our constitutional order would be no different if there were no formal amendment process. If there were no formal amendment process, it seems reasonable to suppose that the courts would interpret the Constitution to allow Congress to settle such matters by ordinary legislation. Why wouldn't they? It is important that the matter be settled, and the stakes are low; there is no reason why a supermajority, as opposed to a simple legislative majority, should be required.

In fact, something comparable to this has happened in the interpretation of Article V itself. In *Coleman v. Miller*, the Supreme Court ruled that certain questions about whether a state's ratification is valid are political questions; the Court will not overturn the judgment of Congress on those issues. Why should Congress have this power, when ordinarily the power to interpret the terms of the Constitution (such as "ratified" in Article V) rests with the Court? The answer seems clear: there must be a definitive determination on the question how many states have ratified, and the because Amendments are a way of overturning a Supreme Court decision, the Supreme Court itself is not a suitable body to have that final say. If practical considerations like these led the Court to grant Congress the power to interpret Article V, it seems reasonable to suppose that the Court would similarly allow Congress to establish rules

---

64 Ackerman on lame duck amendment and traditions.

respecting, for example, Presidential disability, if the Amendment process were unavailable.[65]

The Twenty-Sixth Amendment, which grants eighteen-year-olds the right to vote in all elections, combines features of the amendments setting rules of the road and the amendments suppressing outliers. Someone who did not know the background of the Amendment might think of it as something much more significant—perhaps a determination by the People, during the Vietnam War and in response to the baby boom generation, that 18-year-olds should have the franchise. Perhaps there was such a determination by the People, but it would be a mistake to give the formal amendment process credit for the change.

The Twenty-Sixth Amendment was added to the Constitution because Congress and the Supreme Court combined to create an untenable situation that had to be resolved one way or the other. In 1970, Congress amended the Voting Rights Act to prohibit any state from denying the vote to eighteen-year-olds. The Supreme Court upheld that legislation as it applied to federal elections but invalidated it as applied to state elections.[66] The states were thus confronted with the administrative nightmare of conducting elections with two different electorates. Some different rule was needed, and the states put up no resistance to lowering the voting age across the board. Congress approved the Twenty-Sixth Amendment three months after the Court's decision; the states ratified it three months after that.

What would have happened if there were no formal amendment process specified in the Constitution? The lack of resistance to the Twenty-Sixth Amendment suggests that inevitably most of the states, and probably all of them, would have changed their laws individually within a relatively short time. The formal amendment process provided a means by which the change could be effected quickly and across the board, without further administrative messiness. But by the time the Twenty-Sixth Amendment was

---

[65] [In fact Art. II, combined with the necessary and proper clause, arguably can be read to allow this]

[66] *Oregon v. Mitchell*, 400 U.S. 112 (1970).

proposed to the states, it was already a foregone conclusion that before long, eighteen-year-olds would be voting in all elections.

V. The Progressive Era Amendments

Everyone knows that the Constitution has not been amended often. Perhaps even more striking, though, is how the amendments that have been adopted are concentrated in just a few periods in our history. The first ten amendments were adopted in 1791; two more were added in 1798 and 1804 respectively, as the new constitutional order settled in. After that, however—except for the three Civil War Amendments, which obviously arose from extraordinary circumstances—no amendments at all were adopted for almost 110 years.

Then, beginning in 1913, the Constitution was amended four times in seven years. All four of those amendments concerned important subjects. The Sixteenth Amendment authorized an income tax. The Seventeenth Amendment provided that Senators would be elected directly by the people of each state, not by state legislatures. The Eighteenth Amendment inaugurated Prohibition (subsequently repealed, of course, by the Twenty-First Amendment). The Nineteenth Amendment provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex."

Surely, it might be thought, *these* amendments are important. No one can deny the importance of the income tax or of women's suffrage. Many people trace the decline of state prerogatives, and the expansion of federal regulatory power, to the Seventeenth Amendment, on the theory that it weakened the connection between Senators and the government of the states they represented.[67]

Here again, though, the story is more complicated than it appears to be at first, and the role of formal amendments is much less than meets the eye. The fact that such a high proportion of the

---

[67] See, e.g., Alan P. Grimes, Democracy and the Amendments to the Constitution 76 (Lexington (MA) Books, 1978) ("No amendment has so fundamentally altered the design of the original structure of government.")

substantive, controversial amendments to the Constitution were concentrated in this period is itself revealing. While the Progressive Era was an important time of change in the United States, there have been other important eras of change when no substantive amendments were adopted—the Jefferson and Jackson eras, the New Deal, the end of Reconstruction, the civil rights revolution. This suggests that the formal amendment process is not a central mechanism of change, a suggestion borne out by the history of the Progressive Era amendments.

A. The Income Tax (With An Aside On Presidential Term Limits)

The Sixteenth Amendment was a direct response to the Supreme Court's decision in *Pollock v. Farmers Loan and Trust*.[68] *Pollock* struck down a federal income tax on the ground that it was a "direct" tax, which under Article I, section 2 must be apportioned among the states. But *Pollock* was a surprising decision that did not reflect the way the law was understood at the time and did not much change the direction in which the law evolved.[69] In 1881, the Supreme Court upheld an income tax that was imposed during the Civil War but not repealed until 1872.[70] When the movement for a federal income tax gathered speed in the late nineteenth century, no one raised serious questions about its constitutionality. The decision in *Pollock*, in 1895, was widely and immediately condemned; one commentator, writing at the time, compared the hostility to *Pollock* to the reaction to the Dred Scott decision.[71]

After *Pollock* was decided, there was considerable sentiment in Congress for simply enacting an income tax statute—not so much as an act of defiance but because many were convinced that the Court would not adhere to *Pollock*. The Court did little to dispel this conviction. A few years after *Pollock*, the Court upheld an inheritance tax, reasoning that it was an excise tax and therefore

---

[68] 158 U.S. 601 (1895).

[69] See Ackerman, Columbia L. Rev.

[70] *Springer v. United States*, 102 U.S (12 Otto) 586 (1881).

[71] Joseph R. Long, *Tinkering With the Constitution*, 24 Yale L.J. 574, 576 (1915).

indirect.[72] In 1908, William Howard Taft, in accepting the Republican nomination for President, endorsed an income tax and suggested that a constitutional amendment might be unnecessary because the Court might have changed its mind.

When Taft became President he changed his view about the need for an amendment, and in 1909—as part of a package of complex political maneuvers by both supporters and opponents of the income tax—Congress proposed the Sixteenth Amendment to the states. The Senate vote in favor of the amendment was unanimous. At nearly the same time, Congress enacted a tax on corporations that was measured by their income. While the proposed amendment was before the state legislatures, the Court upheld the corporate income tax, again narrowing *Pollock* by reasoning that the tax was not an income tax but an excise tax, in this case a tax on the privilege of doing business in corporate form.[73] After the Sixteenth Amendment was adopted, the Court, in upholding the income tax, said that the amendment restored power that Congress had assumed to exist before *Pollock* was decided.[74]

In this instance, too, the primary mechanism of change was not the amendment process; it was the long-term development of popular opinion. The Supreme Court essentially accepted the income tax both before and after the Sixteenth Amendment. *Pollock* was a momentary aberration, as the Court itself all but admitted. It is true that the amendment dispatched *Pollock* cleanly and decisively; without an amendment, *Pollock* would have continued to cast a cloud over the income tax. But it seems likely that *Pollock* would have been swept away, one way or another, irrespective of whether there was a formal amendment process. *Pollock* had all the earmarks of a

---

[72] *See Knowlton v. Moore*, 178 U.S. 41. See also *Spreckles Sugar Refining Co. v. McClain*, 192 U.S. 397. [?]

[73] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

[74] On these events, see generally Sidney Ratner, American Taxation (New York, W.W. Norton, 1942); John D. Buenker, The Income Tax and the Progressive Era (New York, Garland, 1895); Robert Stanley, Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913 (New York, Oxford Univ. Press 1993); Edwin R.A. Seligman, The Income Tax (2d ed.) (New York, Macmillan, 1914); Ackerman, Colum. L. Rev.

precedent that was destined to be overruled—it was inconsistent with earlier cases, it was immediately given a narrow construction by subsequent cases, and it faced strong popular opposition. The Sixteenth Amendment put an end to the sideshow that *Pollock* began, but a sideshow was what it was.

The Twenty-Second Amendment, which limits a President to two terms in office, is of course not a Progressive Era Amendment—it was adopted in 1951—but in certain respects it can be compared to the Sixteenth Amendment. Before President Franklin Roosevelt ran for a third term, there was an unbroken tradition that Presidents would not do so. The Twenty-Second Amendment restored that tradition. One might say that Roosevelt's decision was comparable to *Pollock*, an aberration that was inconsistent with the broad evolutionary course of constitutional history; the amendment merely restored a preexisting tradition and (it might be said) may even have been unnecessary, because the tradition might have reasserted itself even without an amendment.

This account of the Twenty-Second Amendment is plausible, but it is not the only plausible one, and in many ways the Twenty-Second Amendment is the best candidate for a constitutional amendment that really mattered—mattered in the sense that it is difficult (although not impossible) to show that things would be no different if the formal amendment process had been unavailable. To begin with, it cannot be said that the Twenty-Second Amendment simply established a rule of the road: the length of a term is a rule of the road, but the decision to have term limits is an important substantive one. In particular, a Presidential term limit can have significant effect on politics even if no President ever actually seeks a third term, because it makes a reelected President a lame duck throughout his second term.

The three conditions that can potentially make amendments significant all coalesced in the case of the Twenty-Second Amendment, making it the best candidate for an instance where the formal amendment process mattered. First, unlike, for example, slavery or the poll tax, Presidential term limits may not have been a subject on which the nation had reached closure, subject only to mopping up pockets of resistance. The amendment did pass with substantial support and relatively little public controversy, but it is arguable that it was adopted at a high-water mark of anti-Roosevelt

and anti-Truman sentiment.[75] The adoption of the Twenty-Second Amendment was in some ways a highly partisan act, supported by Republicans (virtually unanimously) and by Southern Democrats (many of whom were opposed to the New Deal and to the early civil rights initiatives of President Roosevelt's successor), but bitterly opposed by many supporters of the New Deal.[76]

Presidential term limits, therefore, was a subject on which sentiment was one-sided—making a constitutional amendment possible—but only temporarily so. Presidents Eisenhower, Nixon, and Reagan all, at one point, made statements criticizing the Twenty-Second Amendment, and it seems likely that President Clinton would at least have entertained the thought of running for a third term had it not been for the impeachment controversy. That is every President who has been elected to a second term since the Amendment was adopted. (Presidents Eisenhower and Reagan did subsequently disavow any interest in running for a third term, and of course President Nixon never finished his second.) This is further evidence that the Amendment was adopted as public opinion crested, but public opinion since receded—leaving the Amendment in place.

This condition alone, however, is not enough to establish that the Amendment really mattered. The Fifteenth Amendment, for example, was also adopted at a high water mark of public sentiment, which subsequently receded. When an amendment is adopted in such circumstances, one would expect it to be evaded, as the Fourteenth and Fifteenth Amendments were. The second condition that makes the Twenty-Second Amendment an arguable exception to the rule that amendments don't matter is the apparent

---

[75] See generally, on the circumstances of its adoption, Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 Constitutional Commentary 62 (1990).

[76] Only ten House Democrats from states outside the old Confederacy voted for the proposed Amendment, and only two urban liberals. One of those two was the newly-elected John F. Kennedy of Massachusetts, whose father had become a virulent opponent of Roosevelt. See David Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution 1776-1995 at 331 (University Press of Kansas 1996).

difficulty of evading it. So as long as a term-limits amendment is carefully drafted, with precise numerical specifications, it should, one would think, be evasion-proof. It is not manipulable, like the Privileges or Immunities Clause, the Equal Protection Clause, or the provision forbidding the franchise from being denied "on account of" race or previous condition of servitude.

The third condition that makes the Twenty-Second Amendment an arguable exception to the rule of unimportance is that Presidential term limits is not a subject on which the other branches are at all likely to speak authoritatively. Often the reason the formal amendment process does not matter is that some combination of legislative action and judicial interpretation of the Constitution can produce the same outcome, even without an amendment—just as legislative and judicial action produced so many constitutional changes that were not supported by a formal amendment. This was true, for example, of the Thirteenth, Fourteenth, Sixteenth, Twenty-fourth, Twenty-fifth, Twenty-sixth, and—I will argue—Seventeenth and Nineteenth Amendments.

But it is essentially inconceivable that the Supreme Court would have announced a two-term Presidential limit without a constitutional amendment. The problem is not that the two-term tradition was insufficiently well-established. In other contexts the courts would have little hesitation in enforcing a tradition with such deep roots, even if it had no specific textual basis. But the separation of powers issues involved in term limits are so sensitive that the courts could not possibly have enforced a limit based on tradition alone. In fact, it is hard to imagine the Supreme Court's invalidating the election of a candidate to a third term even now, with the Amendment on the books; the Court seems much more likely to regard the validity of the election as a kind of political question, to be determined through the electoral process. And Presidential term limits are also not a matter on which the courts are likely to allow Congress to act, again because the threat to separation of powers is too great. Thus the three conditions needed to make the formal amendment process significant—the adoption of the Amendment at a high-water mark from which popular sentiment subsequently receded; the difficulty of evasion; and the fact that the other branches are out of the picture—were all present to here to a

substantial degree. Combined, they make the Twenty-Second Amendment a strong candidate for to be an exception to the generalization that the formal amendment process does not matter.

In a sense, the peculiarity of this confluence of circumstances proves the point: it takes an unusual set of conditions to make the formal amendment process truly an important means of constitutional change. All three of these conditions have to come together. Otherwise an amendment will either ratify an understanding that would have held anyway; be evaded; or do work that the courts and Congress would have done in the absence of an amendment. And it is rare that all of these circumstances will occur together.

Beyond that, though, it is possible that in the end even the Twenty-Second Amendment made less of a difference than one might think. Despite appearances, it is not impossible to evade a term limits provision. The incumbent's spouse, or a crony, can seek election, with the understanding that the incumbent will continue to exercise power behind the scenes. Term-limited state governors have done this.[77] The fact that there has been no serious effort to evade the Twenty-Second Amendment in this way suggests that the barriers to allowing (what amounts to) a third Presidential term are stronger than just the constitutional provision itself. "Time for a change" is a powerful electoral appeal, and in fact it is not clear that any post-Roosevelt President could have won a third term. The lame-duck effect is mitigated by the fact that a Vice-President or other close political ally will ordinarily be a leading candidate to succeed the incumbent. The Twenty-Second Amendment makes it more difficult to evade the two-term tradition, and impossible to defy that limit outright. But all in all the lesson of the Twenty-Second Amendment is that the circumstances in which an amendment is likely to make a difference come about infrequently, and even then the effects of the amendment might be less than first appears.

---

[77] E.g. George Wallace and Lurleen.

B. The Direct Election of Senators

The Seventeenth Amendment requires the direct popular election of Senators—the original Constitution specified that they were to be elected by state legislatures—and the direct election of Senators may have been a significant change in the nation's constitutional order. But once again, it would be a mistake to say that the Seventeenth Amendment is responsible for this change. The change occurred, for all practical purposes, before the Amendment was adopted. The effect of the Amendment was to ratify something that was already accomplished. At most, the Amendment once again served to mop up outliers that were few in number and would have fallen into line before long.

The direct election of Senators developed in stages, beginning as early as the 1830s. Until that time, candidates for Senate typically did not campaign in any significant way until the state legislature was elected. Then they campaigned among members of the legislature. Beginning in the 1830s, however, people who wanted to be elected to the United States Senate began appealing directly to the voters of the state to vote, in state legislative elections, for candidates who were pledged to support them for the Senate.[78] The famous debates about slavery between Abraham Lincoln and Stephen Douglas in 1858 dramatized this development; those debates, of course, took place before the general public, not before the state legislature, even though Lincoln and Douglas were campaigning for the Senate. Not only did Lincoln and Douglas appeal to the electorate as a whole, but in that election the state parties endorsed their respective candidates for Senate before the state legislative elections took place. This had the effect of binding each party's state legislative candidates to the party's Senate candidate.[79] In effect the state legislative election resembled the election of a prime minister in a parliamentary system.

---

[78] See William H. Riker, *The Senate and American Federalism*, 49 Am. Pol. Sci. Rev. 452, 463-44 (1955).

[79] Id. at 464; George H. Haynes, The Election of Senators 133 (Henry Holt & Co. 1906)

The Lincoln-Douglas election was atypical, but support for direct election increased greatly in the latter half of the Nineteenth Century. Several constitutional amendments providing for direct election were proposed. Meanwhile, state governments, responding to the sentiment in favor of direct election, also instituted measures designed to bring about direct election in fact even if not in name. Beginning in 1875, Nebraska held a primary election to choose parties' candidates for Senate. Other states followed suit, and in one-party states (notably in the South), victory in the primary election was tantamount to election to the Senate. In one-party primary states, then, direct election was effectively instituted well before the Seventeenth Amendment was even proposed.

Then in 1904, Oregon took the next step by requiring candidates for the state legislature to say officially whether they would pledge to support the Senatorial candidate who received the highest vote in a single primary election; not surprisingly, nearly all the state legislative candidates took the pledge. In 1909, an Oregon state legislature with a Republican majority elected a Democratic Senator who had won the popular election, establishing that direct election existed in all but name.

By 1911, a year before the Seventeenth Amendment was proposed, over half the states had adopted the Oregon system or something like it; in many states, the ballot for state legislative elections stated whether the candidate had pledged to support the winner of the popular election for United States Senate. In at least three states, the state constitution required state legislators to elect the Senate candidate who received the most votes in the primary.[80] Things had reached the point where the following exchange occurred on the floor of the Senate between Senators Cummins of Iowa, who favored the Seventeenth Amendment, and Senator Heyburn of Idaho, a rock-ribbed opponent:

---

[80] On these various devices, see, e.g., Haynes, The Election of Senators ch. VI; Ronald D. Rotunda, *The Aftermath of* Thornton, 13 Const. Commentaries 201 (1996); (vol.) I George H. Haynes, The Senate of the United States: Its History and Practice 100-03 (Boston, Houghton Mifflin, 1938).; Alan P. Grimes, Democracy and the Amendments to the Constitution 76 (Lexington (MA) Books, 1978); Kyvig 210.

> Mr. CUMMINS. . . . [T]he Senator from Idaho is insisting . . . that if the voters of the United States be permitted to say who shall be their Senators, then this body will be overrun by a crowd of incompetent and unfit and rash and socialistic and radical men who have no proper views of government. I am simply recalling to his attention the fact that the people of this country, in despair of amending the Constitution, have accomplished this reform for themselves.
>
> Mr. HEYBURN. Like a burglar.
>
> Mr. CUMMINS. In an irregular way, I agree, but they have accomplished it.
>
> Mr. HEYBURN. Like a burglar.
>
> Mr. CUMMINS. And they have accomplished it so effectively that, whether the Constitution is amended or not, the people in many or most of the States will choose their own Senators.[81]

The Seventeenth Amendment, therefore, did not bring about the direct election of Senators; it ratified a practice of de facto direct election that had been instituted by other means.

It is true that the Seventeenth Amendment made this practice uniform before it otherwise would have become uniform. It prevented states from reversing themselves and returning to a more indirect form of election, although there appear to be no instances in which a state tried to do so before the adoption of the Seventeenth Amendment. The Seventeenth Amendment also eliminated any missteps that might occur in the states' makeshift forms of direct elections. These are functions that the formal amendment process does serve. But again the principal forces bringing about the direct election of Senators lay elsewhere, and they were on their way to prevailing, one way or another, whether or not the text of the

---

[81] 47 Cong. Rec. 1743 (June 7, 1911), quoted in Riker, 49 Am. Pol. Sci. Rev. at 467.

Constitution was changed.[82] This is really another example of a change in the Constitution that occurred without a formal amendment; the formal amendment followed the change, rather than precipitating it.

In a way it should not be surprising that, notwithstanding what the original Constitution says, the direct election of Senators was effectively implemented without a formal amendment. The Constitution also envisions that Presidents will be elected indirectly, by the electoral college. Nominally, they still are; but in substance they are elected directly, on a state-by-state basis. A direct election amendment—specifying that each state's electoral vote total will be cast automatically for the popular vote winner, with no intercession by the electors' judgment—would have no effect on Presidential elections.[83] The basic change from indirect to direct election of the President was, like the change to direct election of Senators, brought about by state law, and in the case of the President by Supreme Court decisions that permitted the arguable subversion of the original constitutional design. There is every reason to think that the indirect election of Senators would have suffered the same fate as

---

[82] This conclusion—that the Seventeenth Amendment served primarily to ratify a change that had for the most part already occurred—has been reached by many other. See, e.g., Riker, 49 Am. Pol. Sci. Rev. at 468 ("[T]he Seventeenth Amendment thus simply acknowledged an already existing situation."); Kramer, Vanderbilt; Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1354-55 (1996) (footnotes and paragraph break omitted): "I think it fair to say that even without ratification of the Seventeenth Amendment, direct election would be with us today in most if not all States. In reality then, the Seventeenth Amendment was a formalizing final step in an evolutionary process." See also Haynes, The Election of Senators 133.

[83] Direct election should be distinguished from the other prominent feature of the electoral college, its winner-take-all character within each state. An amendment providing for election by a nationwide popular plurality might very well have a significant effect, on campaign tactics even if not on outcomes. But that is a change in how votes are aggregated, which is a different matter from direct election. Simply providing for direct election—in the sense that each state's electoral votes would be counted automatically, so no one except the voters at large would exercise any discretion over who is to be elected—would not change the current system significantly.

the indirect election of the President, even without the Seventeenth Amendment.

C. Women's Suffrage (With an Aside on Flag Desecration)

The enfranchisement of women was not the first major change in the composition of the American electorate, even leaving aside the Fifteenth Amendment. Before the Revolution, all of the colonies limited the franchise to property holders.[84] Many of those property qualifications were reduced or eliminated at the time of the Revolution, but many persisted.[85] Then, in several waves of reform in the first decades of the Nineteenth Century, the states began eliminating property qualifications and adopting what was called "universal" suffrage (although it was limited to white adult males).[86] Many of these changes occurred in state constitutional conventions; others by legislation.[87] By 1840, property qualifications were no longer significant, and by 1860, property qualifications had been abolished everywhere.[88]

The abolition of property qualifications is another candidate for a change of constitutional magnitude that occurred without a formal amendment. Today, across-the-board property qualifications in

---

[84] See Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, in Donald W. Rogers, ed., Voting and the Spirit of American Democracy 19, 22 (1992). See generally Edmund Morgan, Inventing the People: The Rise of Poular Sovereignty in England and America (1988).

[85] See Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 293-307 (Rita and Robert Kimber trans.) (Univ. of North Carolina Press, 1980) (detailing various states' property qualifications before and after the Revolution). Massachuestts made its property qualifications more stringent. See Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787-1860*, in Rogers, ed (cited in note x) 31, 33.

[86] See Chilton Williamson, American Suffrage: From Property to Democracy, 1760-1860 (Princeton Univ. Press, 1960); Wilentz at 33.

[87] See Merrill D. Peterson, ed., Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s (1966); Eric Foner, The Story of American Freedom 52 (W.W. Norton & Co., 1998).

[88] Ibid. (Foner at 52)

general elections are essentially unthinkable, as they have been for more than a century. The Supreme Court did eventually ratify this change: beginning in the 1960s, the Court, following the "one person, one vote" principle, held that property qualifications are unconstitutional except in elections for bodies that deal exclusively with matters of special importance to the property owners who are authorized to vote.[89] But by the time of those decisions, the basic principle was deeply entrenched. So far as the text of the Constitution is concerned, the Supreme Court's decisions in this area (like all of its "one person, one vote" decisions) relied on the Equal Protection Clause of Section 1 the Fourteenth Amendment—even though there are strong arguments that Section 1 was never intended to limit the states' power over the franchise.[90] The Supreme Court's decisions can be seen, therefore, an interpretation of the nontextual "amendment" that brought about so-called universal suffrage.

Just as the advent of the direct election of the President without a formal amendment should suggest that the significance of the Seventeenth Amendment is easy to overstate, so the rejection of property qualifications without a formal amendment might suggest that there is less to the Nineteenth Amendment than meets the eye. The Nineteenth Amendment was of course, the product of a decades-long struggle for women's suffrage, in which the supporters of women's suffrage sought to achieve their objective both at the state level and by means of a constitutional amendment. At first, the principal emphasis was on the states.[91] A women's suffrage

---

[89] See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973); Phoenix v. Koloziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District, 395 U.S. 621 (1969).

[90] See the discussions in Akhil Reed Amar, The Bill of Rights 216-17 & n. * (Yale Univ. Press 1998), citing many sources, and Reynolds v. Sims, 377 U.S. 533, 590-608 (1964) (Harlan, J., dissenting). For a contrary view, see William W. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33.

[91] See Eleanor Flexner, Century of Struggle 173 (Belknap, 1959). Between 1854 and 1917, suffragists initiated, by one count, 854 campaigns directed at state legislatures. See Aileen Kraditor, The Ideas of the Woman Suffrage

amendment to the federal Constitution was introduced in Congress in 1868, and then repeatedly in subsequent Congresses, but it never came close to passage. It received some attention from Congress until 1896, at which point it "virtually disappeared from the Congressional agenda and from public notice until 1913."[92]

During this time, suffragists had some, but limited, success at the state level. By 1913 women had full suffrage in only nine states. At that point there was a major division among suffrage supporters over whether to continue to seek changes at the state level or to concentrate on a federal constitutional amendment instead.[93] But beginning in the mid-1910s, the current began to run more strongly in favor of suffrage. In 1916, both major parties' platforms endorsed women's suffrage "'state by state.'"[94] Charles Evans Hughes, the Republican candidate for President, went beyond his party's platform to endorse a federal constitutional amendment.[95] President Wilson at one time opposed women's suffrage entirely and then said he thought it should be implemented by states but not by constitutional amendment; but during the 1916 Presidential campaign, he indicated for the first time that he would support a constitutional amendment.[96] In 1918 the House, for the first time,

---

Movement 1890-1920 at 5-6 (Columbia Univ. Press, 1965). See also David Morgan, Suffragists and Democrats (Michigan State University Press, 1972); Anne F. Scott and Andrew M. Scott, One Half of the People: The Fight for Woman Suffrage (Lippincott, 1975).

92 Flexner at 175.

93 Id. at 265-67.

94 Id. at 277-78 & n. 5, 6, quoting The New York Times, June 17, 1916. The quotation is from the Democratic Party platform.

95 Christine A. Lunardini and Thomas J. Knock, Woodrow Wilson and Woman Suffrage: A New Look, 95 Pol. Sci. Q. 655, 661 (1980).

96 In 1915, Wilson announced that he would vote in favor of women's suffrage in a referendum in his home state of New Jersey, although he added: "I believe it should be settled by the State and not by the National Government."Id. at 660. Then, during the 1916 campaign, in a speech before a suffragist group, Wilson endorsed suffrage and added: "[W]e shall not quarrel in the long run as to the method of it," a remark that was taken to show that Wilson would not insist on proceeding state by state but would support the federal constitutional amendment. Id.at 662.

voted in favor of the amendment by a two-thirds majority, although the Senate—after a debate in which states' rights was a recurrent theme—narrowly rejected it.[97] In 1919, the House again voted for the amendment—by a substantially larger margin—and the Senate this time concurred. The amendment was ratified in 1920, after several dramatic moments in state legislatures.[98]

This history suggests that the availability of a formal amendment process was much more significant for women's suffrage than for the direct election of Senators or even the income tax. The Nineteenth Amendment did not simply ratify a fait accompli in the way the Seventeenth Amendment did. The suffragists had relatively little success at the state level; the federal amendment process provided them a more hospitable arena. The national political parties were competing for current and future women voters nationwide. They could not afford to ignore the suffrage issue. By contrast, in states where women did not have the vote, the parties had much less incentive to favor suffrage; this was particularly true in one-party states, such as the solidly Democratic South, which was the strongest bastion of opposition to suffrage. While the national parties could influence the states, they were presumably more effective at the federal level. Wilson lobbied vigorously for the amedment in 1917 and 1918,[99] and he, too, would presumably have been less of a factor if the campaign for the amendment had been conducted entirely at the state level, although he was apparently influential in securing some state ratifications of the Amendment.[100].

On the other hand, three-quarters of the states did ratify the Nineteenth Amendment. A state ratification cannot necessarily be equated to a state's decision to adopt women's suffrage on its own—a supermajority or referendum might have been required for the latter, and enormous resources were concentrated on the marginal states in the ratification process. Still, the forces that led to the shift in

---

[97] Flexner at 291-92, 309-10.

[98] Id. at 314, 315-24.

[99] Lunardini & Knock, 95 Pol. Sci. Q. 664-68.

[100] See id. at 669-70.

opinion in favor of a constitutional amendment also changed the climate of opinion at the state level. In the period from 1916-1919, several more states enfranchised women for some or all elections.[101] This happened even though, by then, much of the suffragistgs' efforts were directed toward Washington. With both political parties strongly supporting women's suffrage and the President playing an active role even at the state level, it seems unlikely that many states would have held out for long. The Nineteenth Amendment certainly suppressed outliers; it made women's suffrage uniform before it otherwise would have been. Beyond that, probably the best estimate is that if the suffragists had been forced to concentrate solely on the state level, they would have achieved substantial, although not complete, success, at least within a few years after 1920.

The Nineteenth Amendment is revealing in other ways about the limited role of the formal amendment process in bringing about constitutional change. A naive reader of the text of the Constitution would think that racial minorities voted in elections from 1870 on, women from 1920 on. That is true of women—there is no evidence of systematic subversion of the Nineteenth Amendment, once it was adopted—but emphatically untrue of African Americans. But you will not learn that from the text of the amended Constitution. By 1920, the society really had changed to the point where it was willing to accept, and, in substantial measure, insist on women's suffrage. In 1870, the society had not reached that point for African Americans, and the Fifteenth Amendment could not bring about the change. It is, therefore, not always or trivially true that any constellation of political forces powerful enough to bring about a constitutional amendment is powerful enough to change society. Sometimes amendments ratify a permanent shift in the political culture; sometimes they do not. The lack of resistance to the enforcement of the Nineteenth Amendment reveals that it was an instance of the former. But in either event, what controls the pace of change is the culture, not the amendment.

---

[101] Id. at 290, 306, 311-12, 313.

This contrast between the Fifteenth and Nineteenth Amendments also sheds some light on the recent proposed amendment to ban flag desecration. Opponents of the amendment sometimes paint a dramatic picture, suggesting that any such amendment would represent a serious incursion on the First Amendment and could significantly undermine our system of freedom of expression. The amendment might have that effect—or it might not. It is possible that a flag desecration amendment would be interpreted narrowly, as allowing the government to ban flag desecration but not otherwise affecting the law governing freedom of expression. In that case, the effect of the amendment would be minor. (Its principal effect would surely be to *increase* the amount of public flag desecration, since flag desecration becomes a much more attractive means of protest when it is illegal.)

On the other hand, a flag desecration amendment might be interpreted to give the government a general authority to develop a conception of secular blasphemy—that is, to make it a crime to treat various national symbols disrespectfully. In that case the effects of a flag desecration amendment would indeed be substantial. We cannot say for sure at this point which of these two scenarios would occur, if the amendment were adopted; that would be determined by a complex array of forces that influence legislative and judicial action and public opinion. The amendment might be interpreted one way at first and another way after a few decades. Or a rejected flag desecration amendment might have the same fate as the rejected ERA: Courts might allow the government to develop a secular equivalent of blasphemy laws even without an amendment. In any event, if our experience with constitutional amendments is a guide, the adoption of the amendment itself is unlikely to be the crucial event in resolving these larger questions.

Finally, the events leading up to the Nineteenth Amendment reveal the fallacy of the argument that the text of the Constitution should be read as an integrated whole, so that, for example, the Nineteenth Amendment might be read back into the Fourteenth Amendment to justify a principle forbidding gender discrimination that would otherwise be harder to justify. It is just a fortuity that there is a women's suffrage amendment: seeking a Constitutional amendment just happened to be, in the specific political context of the time, the suffragists' best strategy. If political conditions had

been more favorable in the states and women's suffrage had achieved an encouraging series of victories at the state level, as "universal suffrage" did in the early nineteenth century, the suffagists would presumably not have invested effort in trying to obtain a constitutional amendment.

It seems odd to say that if women's suffrage had fared better at the state level, and the Nineteenth Amendment had never been needed, we would have less reason today for interpreting the Constitution to require gender equality. The nation's commitment to women's suffrage would have been just as profound, and just as appropriate an influence on the interpretation of the Equal Protection Clause, if the states had adopted suffrage without the compulsion of the federal Constitution. The idea that that commitment should influence the interpretation of the Fourteenth Amendment is certainly plausible. But to say that that commitment should influence the interpretation of the Fourteenth Amendment only because it too happened to be enshrined in a constitutional amendment, instead of being arrived at through state and local politics, is to misunderstand the way our system changes and to attach too much importance to a contingency.

VI. Conclusion

The idea of the Constitution that comes down to us from the Framers is an alluring one: the Constitution as the authentic voice of the People on matters of fundamental principle, and therefore the ultimate touchstone of our legal system. But however true this idea was for the original Constitution and its early amendments, it is a misleading picture of the constitutional development of the mature Republic. The fundamental changes in the constitutional order have occurred in ways other than the amendment process. They have occurred without amendments, despite the rejection of amendments, or in ways that made amendments only incidentally important.

Formal amendments do help to settle matters that have to be settled one way or another. In addition, formal amendments serve the function of mopping up pockets of resistance to a national consensus, making what would be merely the dominant rule into a universal rule. It is unlikely that the pockets of resistance would

ultimately have survived a consensus powerful enough to produce a formal amendment, but the formal amendment process can bring about national uniformity more quickly. But except for these two limited functions—which the system might have found other ways to accomplish even in the absence of a formal amendment process—a case can be made that our constitutional order would look little different if a formal amendment process did not exist.

This does not mean, however, that the Constitution does not reflect the will of the people. It just means that the Constitution embraces more than the text—it includes settled understandings that have developed alongside the text—and it means that the people do not rule through discrete, climactic, political acts like constitutional amendments. They rule in a different way—often simply in the way they run their non-political lives, sometimes combined with sustained political activity spread over a generation or more. The ERA was rejected in the formal amendment process but ratified in effect by women entering the workforce, seeking political office, and seeking jobs once closed to them, along with political and legal campaigns that paralleled those developments. The Fifteenth Amendment, formally adopted a century earlier, finally became a real part of the Constitution in the mid-1960s, as a result of more than a generation's worth of both political activity and economic and demographic change that supported that activity. These are forms of popular rule that are less romantic than the idea of the People speaking in one voice to amend the Constitution. And these forms of popular rule may be less congenial to lawyers, because they do not provide a canonical text to be scrutinized and interpreted. But they represent a deep and true form of popular rule in a mature republic.

This working paper is a draft of August 16th, 1999.
Please do not cite without permission.

Readers with comments should address them to:

David A. Strauss
Harry N. Wyatt Professor of Law
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637

david_strauss@law.uchicago.edu