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# ARTICLE V AFTER 230 YEARS: TIME FOR A TUNE-UP

*Sanford Levinson\**

## ABSTRACT

*No one, including the Framers, believes the Constitution as drafted in 1787 is perfect. That is why we have an amendment clause, after all. But, in contrast to U.S. state constitutions, amendment of the national Constitution has been remarkably infrequent, not least because of the formidable obstacles Article V places in the way of those who seek amendment. Those defending against constitutional change have great advantages against those playing offense, and this, perhaps understandably, leads most rational people, when thinking of how to invest their scarce time, money, and energy, to avoid going down the road of constitutional amendment (or, even more so, calling for a new constitutional convention).*

*Given my own belief that the Constitution of 1787, with its infrequent amendment, is significantly defective and, indeed, even dangerous with regard to our future as a functional polity, I believe we need to think far more seriously than we currently do about potential amendment or even a new constitutional convention, which I in fact support. It may be the case that Article V worked tolerably well in the early years of the U.S. republic, but it is clear that, at present, it is a severe impediment to even thinking—and engaging in a national discussion—about the kinds of constitutional reform that may be necessary. To look to the Supreme Court to effectively supply necessary *de facto* amendments, even if we regard that as a legitimate function of the Court, is chimeric with regard to the features of the Constitution that are truly hard-wired and nearly impossible to amend instead of being open to judicial interpretation.*

*One should not drive a car and be indifferent to the possibility that the brakes might give way at any moment; this is why we take our cars for inspections or tune-ups. One might even analogize this to going to the doctor at regular intervals, even if we do not feel ill, in order to get a checkup. A constitutional convention would be an occasion for just such a checkup, even if the happy conclusion was that the Constitution really did not need any significant change at all.*

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\* W. St. John Garwood and W. St. John Garwood Jr., Centennial Chair in Law, University of Texas at Austin School of Law, and Professor of Government, University of Texas at Austin.

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#### I. INTRODUCTION: CHANGING THE U.S. CONSTITUTIONAL ORDER

The general topic of our symposium is problems posed by efforts to significantly change the U.S. constitutional order. Quite obviously, one's response to this topic centrally depends on the extent to which one believes that the constitutional order *does* need significant change. After all, as the common saying goes, "If it ain't broke, don't fix it." But I strongly believe that the Constitution *is* truly broken and very much needs a variety of fixes. To believe otherwise, I am increasingly tempted to assert, is simply an example of psychological denial: We want to avoid coming to terms with afflictions that might seriously threaten us. This is especially true, incidentally, if we rationally believe that potential cures are either unavailable or, for whatever reason, unlikely to be realized. At that point, the operative saying may well become, "If it can't be fixed, then we should all pretend it's not really broken."

I will not rehash the arguments I have made in two previous books—one of them, I am happy to say, was the subject of a prior Drake Constitutional Law Center Symposium<sup>1</sup>—as to why I believe that this denial is a danger to the maintenance of our constitutional order, just as a denial of certain medical conditions may ultimately be life-threatening.<sup>2</sup> Suffice it to say nothing in the past decade has lessened my belief that the Constitution makes its own contribution to our pervasive sense of malaise and mistrust—across the political spectrum—of the national government. As of the end of May 2019, for example, when these remarks were written, polls appear to agree that less than 40 percent of the U.S. public believe the country is going

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1. See generally SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) [hereinafter LEVINSON, *FRAMED*]; SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*]; see also Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 *DRAKE L. REV.* 859 (2007).

2. See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 1, at 9.

in the right direction,<sup>3</sup> and fewer than 20 percent express approval of Congress.<sup>4</sup>

When most people believe—correctly, in my opinion—that the country is going in the wrong direction and they express extraordinarily little confidence in Congress especially, then I would argue that in itself constitutes evidence of a certain kind of political “crisis” to which we should be attentive.<sup>5</sup> Perhaps the great paradox is why a widespread contempt of government and political leaders is relatively unaccompanied by a critique of the Constitution that, in substantial ways, enables their elections and the powers they enjoy. Instead, the Constitution continues to enjoy widespread—and I believe wholly undeserved—veneration even as our political system is accurately described as more polarized than at any time since the run up to secession and the Civil War in 1860.<sup>6</sup> Indeed, there is

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3. See, e.g., *Direction of Country*, REAL CLEAR POL. (Aug. 6, 2019), [https://www.realclearpolitics.com/epolls/other/direction\\_of\\_country-902.html](https://www.realclearpolitics.com/epolls/other/direction_of_country-902.html) [<https://perma.cc/MQ42-ZSFS>].

4. See, e.g., *Congressional Job Approval*, REAL CLEAR POL. (Aug. 28, 2019), [https://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) [<https://perma.cc/W95L-W78V>]. President Donald Trump has yet to come close to cracking the 50 percent approval mark. *President Trump Job Approval*, REAL CLEAR POL. (Aug. 28, 2019), [https://www.realclearpolitics.com/epolls/other/president\\_trump\\_job\\_approval-6179.html](https://www.realclearpolitics.com/epolls/other/president_trump_job_approval-6179.html) [<https://perma.cc/X35K-9CXT>]; see also Nate Silver, *Is Rasmussen Reports Biased?*, FIVETHIRTYEIGHT (Jan. 3, 2010), <https://fivethirtyeight.com/features/is-rasmussen-reports-biased/> [<https://perma.cc/P3Q5-8GWQ>]. Only the Rasmussen Poll, which many observers believe is overly weighted toward Republican respondents, gives him even 46 percent approval, while the others are significantly closer to only 40 percent. On the Republican tilt of Rasmussen, see Matthew Sheffield, *Pollster: Rasmussen Research Has a Pro-GOP Bias*, THE HILL (Sept. 10, 2019), <https://thehill.com/hilltv/what-americas-thinking/405965-pollster-rasmussen-research-has-a-pro-gop-bias> [<https://perma.cc/8M99-VZAA>]. As of September 26, 2019, when final revisions of this Article were entered, for example, a Harvard-Harris Poll gives President Trump a 46 percent approval rate and a 54 percent disapproval rate, while Reuters finds that only 42 percent of Americans approve and 53 percent disapprove. Rasmussen, however, finds a tie vote of 49 percent approval and disapproval. See *Latest Polls*, REAL CLEAR POL., [https://www.realclearpolitics.com/epolls/latest\\_polls/](https://www.realclearpolitics.com/epolls/latest_polls/) [<https://perma.cc/3VL8-W2SW>].

5. See *Direction of Country*, *supra* note 3; see also *Congressional Job Approval*, *supra* note 4.

6. Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 1, 2013), <https://newyorker.com/magazine/2013/12/09/our-broken-constitution> [<https://perma.cc/5GD6-D83Q>] (discussing the public’s trust in the Constitution despite internal paralysis); see also Laura Paisley, *Political Polarization at Its Worst Since the Civil War*,

currently widespread debate about the degree to which the United States is embroiled in a “constitutional crisis,” and much of the debate concerns the specific criteria necessary to establish the existence of such a crisis.<sup>7</sup> My friend and frequent coauthor Jack Balkin, who resists labeling our current discontent as a constitutional crisis, nonetheless eloquently writes about a pervasive “constitutional rot” that afflicts our constitutional order.<sup>8</sup> This rot is most vividly typified—I am tempted to add *of course*—by the presence of President Donald J. Trump in the Oval Office,<sup>9</sup> who himself instantiates a threat to the maintenance of what we would like to affirm as our liberal democratic constitutional order, which I must emphasize does not mean that a constitutional order must be dominated by liberal Democrats.<sup>10</sup>

I should note one implication of my use of the term *constitutional order* instead of simply *the Constitution*. The first is a significantly broader term, referring to a mixture of the commands or limits of our written Constitution and what many have come to call the unwritten components of the constitutional ocean within which we swim.<sup>11</sup> There is much discussion these days about the importance of unwritten norms or conventions that complement whatever might be written down in the text of the Constitution visible at the National Archives in Washington (or in any casebook on constitutional law).<sup>12</sup> Consider in this context the question of the size of the

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USC NEWS (Nov. 8, 2016), news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/ [https://perma.cc/7WFL-RFDT] (discussing the current political polarization in the United States).

7. See, e.g., Jack M. Balkin & Sanford Levinson, *Constitutional Crises*, 157 U. PA. L. REV. 707, 709–10 (2009).

8. See, e.g., JACK M. BALKIN & SANFORD LEVINSON, DEMOCRACY AND DYSFUNCTION 107 (2019).

9. See, e.g., Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order* 21 CHAP. L. REV. 133, 134–35 (2018).

10. See *id.* I emphasize that *liberal democratic* in this context is not a reference to rule by the Democratic Party any more than maintenance of a republican form of government (guaranteed by the Constitution itself) is a reference to rule by the Republican Party. U.S. CONST. art. IV, § 4. For an accessible overview of what constitutes the specific form of liberal constitutionalism, much distinguished these days from its rival illiberal constitutionalism, see Dieter Grimm, *Types of Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 98, 116, 119–20 (Michel Rosenfeld & Andras Sajó eds., 2012). See generally the essays collected in CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

11. AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION (2012).

12. See, e.g., *id.*

Supreme Court. Unlike many other constitutions—including, importantly, many U.S. state constitutions—the 1787 text, though requiring that there in fact be a Supreme Court,<sup>13</sup> says nothing at all about the size of the Court.<sup>14</sup> The initial Court was set at six members.<sup>15</sup> The size since then has varied from five to a theoretical ten during the Civil War when Congress authorized a tenth justice, who was in fact never appointed.<sup>16</sup> So it seems clear, from one perspective at least, that whether the Court remains at its present nine—the official congressionally mandated number since 1871 (when the number was raised from seven to nine)—is simply a matter for the unimpeded judgment of Congress.<sup>17</sup>

Yet no doubt many, perhaps most, Americans believe nine is the constitutionally required number.<sup>18</sup> If so, suggestions that, for example, Democrats will “pack the Court” should they recapture the Presidency and Senate in 2020, therefore gaining repayment for the “stolen seat” now inhabited by Justice Neil Gorsuch after the refusal of Republican Majority Leader Mitch McConnell even to hold hearings on President Barack Obama’s nomination of Judge Merrick Garland to succeed the late Antonin Scalia, would violate what has now become the constitutional norm of nine justices.<sup>19</sup> The alternative would simply describe it, for better or worse, as another example of what has come to be called constitutional hardball, which by definition involves the willingness to take advantage of what are, after all, constitutionally permissible powers.<sup>20</sup> But the point perhaps is that

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13. See U.S. CONST. art. III. This is unlike lower courts, whose establishment is left entirely to Congress’s own discretion. *Id.* art. I, § 8.

14. Compare *id.* art. III, § 1, with IOWA CONST. art. 5, § 2.

15. *The Supreme Court of the United States and the Federal Judiciary*, FED. JUD. CTR., [fjc.gov/history/courts/supreme-court-united-states-and-federal-judiciary](http://fjc.gov/history/courts/supreme-court-united-states-and-federal-judiciary) [<https://perma.cc/44HL-HV99>].

16. See *id.*; see also Timothy Huebner, *The First Court-Packing Plan*, SCOTUSBLOG (July 3, 2013, 1:37 P.M.), <https://scotusblog.com/2013/07/the-first-court-packing-plan/> [<https://perma.cc/99CJ-UGHU>].

17. See Huebner, *supra* note 16.

18. See Elizabeth Nix, *7 Things You May Not Know About the U.S. Supreme Court*, HIST. (Oct. 28, 2018), [history.com/news/7-things-you-might-not-know-about-the-u-s-supreme-court](http://history.com/news/7-things-you-might-not-know-about-the-u-s-supreme-court) [<https://perma.cc/5BFV-9W86>].

19. See, e.g., Joan Biskupic, *Democrats Look at Packing the Supreme Court to Pack the Vote*, CNN (May 31, 2019), [cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html](http://cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html) [<https://perma.cc/6DPP-M9LR>].

20. Mark Tushnet coined the term *constitutional hardball*. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); see also Eric A. Posner

what well-trained lawyers might regard as permissible actions could easily strike most laypeople as threats to what they rightly or wrongly assume constitutes the underlying presuppositions of our constitutional order, which is a rigid and never-changing number of justices.<sup>21</sup>

## II. PATH DEPENDENCE AS SUPERGLUE

Our actual order is constituted not only by what one might regard as the hard-and-fast requirements set out in the 1787 text, including, say, bicameralism and equal voting power in the Senate, but also by a set of decisions made quite early on that become embedded in our imaginations as defining our order.<sup>22</sup> Political scientists speak of path dependence, which is nothing more than the ability of any given decision to become highly “sticky” (perhaps even demonstrating the strength we associate with superglue), even though at the time the decision was initially made, one could well imagine it having gone the other way.<sup>23</sup> To overcome these decisions would *not*, it should be clear, require constitutional amendment in the way that would be true of, say, getting rid of the equality of voting power of Wyoming and California in the Senate or even moving up Inauguration Day from its present January 20th to a more sensible December 1st, for example. But that might in fact be irrelevant when we discuss how imaginable it is to change our institutions in necessary ways.

Let me offer one example that I find particularly powerful: our exclusive reliance on single-member districts as the means of electing representatives to the House of Representatives.<sup>24</sup> That is in fact not required by the Constitution, which gives states great leeway in designing how they wish to select their national representatives.<sup>25</sup> However, Congress, with good reason, passed a perfectly constitutional statute in 1842 under the Elections Clause of the Constitution, requiring states with more than one

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& Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 991–92 (2008). Both of these terms convey the same willingness to push one’s ostensibly constitutional powers to the utmost, disregarding the frayed feelings that may be generated by the losers in these contests. Posner, *supra*; Tushnet, *supra*.

21. See, e.g., Biskupic, *supra* note 19.

22. See generally U.S. CONST. art. I.

23. Julie Novkov, *Understanding Law as a Democratic Institution Through US Constitutional Development*, 40 LAW & SOC. INQUIRY 811, 819 (2015) (discussing path dependence).

24. See 2 U.S.C. § 2(c) (2018).

25. U.S. CONST. art. I, § 2.

representative to elect them in single-member geographical districts.<sup>26</sup> I say *with good reason* because it was patently unfair to do what some states were doing, which was electing their entire slate of representatives in a statewide, winner-take-all election.<sup>27</sup> For example, the Pennsylvania delegation might have been entirely selected by only the 55 percent of the population that voted for the Whig (or Democratic) slate; the remaining voters would have been frozen out completely from having any representation in the House.<sup>28</sup> That is fundamentally unfair, and the 1842 legislation was a sensible response to the attempts of state political elites to overreach—in a game of constitutional hardball—and freeze out their political opponents from electing any of their champions.<sup>29</sup> One might note, incidentally, this is the consequence of adopting winner-take-all procedures for the Electoral College, which many analysts find equally egregious and is also not at all required by the Constitution.<sup>30</sup> I should note that the 1842 statute was complemented by a second statute, passed by Congress in 1967, when it became obvious Hawaii and New Mexico (neither a state in 1842) were not in compliance with the earlier statute.<sup>31</sup>

But decisions that made sense in 1842 (or 1787) might not be optimal for us in 2019. I am fond of quoting the beginning of *The Federalist*, where Publius (in this case, Alexander Hamilton) says that what is truly exceptional about the moment of ratifying the Constitution is the opportunity for Americans to engage in genuine “reflection and choice” as to how they wish to be governed.<sup>32</sup> There is no hint that the reflection and choice would be a one-time-only process, with the 1788 decisions written in stone and

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26. See 2 U.S.C. § 2(c).

27. James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of “Representation”?*, 7 MICH. J. RACE & L. 357, 373 (2002).

28. See *id.*

29. See 2 U.S.C. § 2(c).

30. Compare *id.*, with U.S. CONST. art. I, § 2. In the interest of full disclosure, I note I am a plaintiff in a lawsuit challenging Texas’s ability to assign all of its electoral votes to the single party that comes in first. See *League of United Latin Am. Citizens v. Abbott*, 369 F. Supp. 3d. 768 (W.D. Tex. 2019), *appeal docketed*, No. 19-50214 (5th Cir. Apr. 2, 2019).

31. See Tucker, *supra* note 27, at 376.

32. See SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY 10 (2015) [hereinafter LEVINSON, AN ARGUMENT OPEN TO ALL]; see also THE FEDERALIST NO. 1 (Alexander Hamilton).

impervious to any future reconsideration.<sup>33</sup> We could (and should) be arguing about the desirability, for example, of adopting an actually proposed statute that would require all states with more than, say, five or six representatives to adopt multimember districts whose winner would be selected via a form of proportional representation. This would at once minimize (if not entirely eliminate) gerrymandering or other consequences of what has come to be called the sorting effect,<sup>34</sup> while at the same time guaranteeing that political minorities, as a practical matter, would be assured of getting some representation of their own instead of being frozen out, as is now the case.

Texas, for example, with 36 representatives,<sup>35</sup> could easily be organized into six districts electing six representatives each. The most commonly used system of proportional representation, which allows voters to allocate their six votes however they wish (i.e., one vote to each of the six candidates or, more rationally, more than one vote to those candidates they strongly support, including the possibility of casting all six for a person's particular favorite), would assure the election of at least one or two Republicans in the predominantly Democratic cities and the Rio Grande Valley, just as some Democrats would be elected from what are now Republican bastions.<sup>36</sup> And, just as importantly, third or even fourth parties could organize and be successful in the Texas example; if a given candidate gets the support of at least one-seventh plus one of the total votes cast by the electorate, that candidate would be elected in a six-representative district.<sup>37</sup> For some, of course, this last possibility (or reality) is a bug and not a feature, inasmuch as it would break what is sometimes called the two-party duopoly that works to freeze out potentially innovative minority parties.<sup>38</sup> Part of "American exceptionalism" is the extent to which we are so completely dominated in

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33. THE FEDERALIST NO. 1 (Alexander Hamilton).

34. See generally Lilliana Mason, "I Disrespectfully Agree": *The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. POL. SCI. 128 (2015).

35. Texas, GOVTRACK, <https://www.govtrack.us/congress/members/TX#representatives> [<https://perma.cc/3LNC-FRAH>].

36. See Michael A. McCann, *A Vote Cast; a Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL'Y 191 (2002) (discussing the potential impact of proportional representation on congressional elections).

37. See *id.*

38. Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 (2000) (discussing the benefits of moving the United States away from a two-party duopoly on elections).



our political lives by only two parties, which is in part a function of the electoral system, including the use of single-member geographical districts that by definition have only one winner.<sup>39</sup>

So, as a purely descriptive matter, one could repair this problem—and I think improve the U.S. political order—by repealing the 1842 and 1967 legislation and replacing it with a perfectly constitutional statute requiring multimember districts as described above. This is simply a discussion about wise policy and not at all about what the Constitution does or does not permit. However, as a matter of brute fact, there is basically a zero probability that a House of Representatives filled with people who have benefited from the existing political system would support such an obviously disruptive change to the status quo.<sup>40</sup> This is path dependence with a vengeance. Nor does the national political system, unlike many U.S. states, allow any kind of direct legislation generated by popular initiative and referendum.<sup>41</sup> Only Congress can initiate or pass legislation at the national level.<sup>42</sup> That is a fundamental reality of our formal Constitution.

Paradoxically or not, one way to cure this defect would be a new constitutional convention that simply sidesteps the fatal hurdles generated by having to go through the present House. Such a convention must be called, according to Article V, should two-thirds of all states petition Congress to call it.<sup>43</sup> We have essentially no idea how this would actually work, though, since there has not been such a convention since the one that occurred in Philadelphia in 1787.<sup>44</sup> Ironically or not, one reason many people oppose such a new convention is precisely that the first one typifies a “runaway convention,” in that it went well beyond its congressionally authorized mandate to consider only revisions to the existing Articles of Confederation.<sup>45</sup> Instead, it scrapped the existing system, which several

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39. See McCann, *supra* note 36.

40. See *id.* at 209.

41. See *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES (Aug. 7, 2019), <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiatives-states.aspx> [<https://perma.cc/HH2W-HCE8?type=image>].

42. See, e.g., 2 U.S.C. § 2(c) (2018).

43. U.S. CONST. art. V.

44. See *Constitutional Convention and Ratification, 1787–1789*, U.S. DEP'T ST., OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> [<https://perma.cc/SP39-Y9S2>].

45. See *id.*; see also BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS:*

delegates freely described as imbecilic, in favor of what opponents of the new Constitution accurately labeled a radically transformed and consolidated government.<sup>46</sup>

I myself believe there are good answers to those who fear such a convention. The most obvious answer is that no proposed (or even imagined) convention would have the right to *impose* a new constitution; it could only propose one.<sup>47</sup> Whatever one thinks of the 1787 convention in Philadelphia, whose delegates clearly went beyond their mandate from Congress (and totally ignored the existing provision of Article XIII of the Articles of Confederation that required unanimous consent of the legislatures for all 13 states for any amendment),<sup>48</sup> even they submitted themselves to a process of ratification that in fact could have proved fatal to their enterprise.<sup>49</sup> After all, the final vote in New York was only 30–27; a swing of two votes would have doomed ratification and, because of the location of New York within the United States, quite possibly the overall constitutional project itself.<sup>50</sup> Nothing was foreordained about the acceptance of the audacious changes suggested by the delegates.<sup>51</sup>

In theory, the particular problems generated by single-member districts could be solved without overt constitutional change, if only Congress would be willing to pass congruent legislation. Unfortunately, that is certainly not true of other problems.<sup>52</sup> Take as an example one of my own hobbyhorses: the potential dangers presented by the hiatus between election and inauguration of new presidents, especially if the new president defeats an incumbent or otherwise represents a genuine break from the incumbent's policies.<sup>53</sup> Although we usually (though not invariably) know who the winner is by the Wednesday after Election Day, inauguration does not take place

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CHARISMATIC LEADERSHIP AND THE RULE OF LAW 367 (2019) [hereinafter ACKERMAN, REVOLUTIONARY CONSTITUTIONS].

46. See LEVINSON, AN ARGUMENT OPEN TO ALL, *supra* note 32, at 57–60.

47. U.S. CONST. art. V.

48. See ARTICLES OF CONFEDERATION of 1781, art. XIII.

49. See U.S. CONST. art. V.

50. LEVINSON, AN ARGUMENT OPEN TO ALL, *supra* note 32, at 9–10.

51. See *id.*

52. See U.S. CONST. art. II (granting Congress the power to do so); see, e.g., 2 U.S.C. § 2(c) (2018).

53. R.K. Landers, *Dangers in Presidential Transitions*, C.Q. RESEARCHER (1988), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1988102100> (subscription required) (discussing the dangers presented by presidential transitions through the lens of the 1988 presidential election).

until January 20th thanks to the Twentieth Amendment,<sup>54</sup> which could leave the United States without a genuinely effective (or even politically legitimate) government for roughly 10 weeks.<sup>55</sup> The Twentieth Amendment is one of the glories of the Constitution inasmuch as it moved up the inauguration from March 4th to the new date of early January.<sup>56</sup> This move replaced the bizarre decision of the Framers to mandate a new congressional session a full 13 months after elections (though presidents could, if they wished, call Congress into special session in the meantime).<sup>57</sup> One could cite many other features of the Constitution that would require amendment and not merely corrective legislation or imaginative (and unlikely) workarounds. Thus, one proposed solution to the Inauguration Day problem requires the willingness of a defeated incumbent to exit almost immediately in order to pave the way for a far quicker succession by the new President. This would require the willingness of the Vice President to resign first, followed by the immediate nomination of the electorate's choice for President as Vice President under the procedures of the Twenty-Fifth Amendment, which would require almost instantaneous congressional confirmation and then resignation by the defeated incumbent.<sup>58</sup> This is surely possible but, I think, quite literally fantastic. This is just another example of our propensity to deny the reality of fundamental illnesses in the constitutional order. For example, no workaround—even in fantasy—seems available if one believes the veto system established in 1787 gives the President far too much power to negate the express will of both houses of Congress, given that these vetoes can be undone only in the rare instances when both the House and Senate can summon two-thirds majorities to override the veto.<sup>59</sup> And so on.

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54. U.S. CONST. amend. XX.

55. *See id.*

56. Edward J. Larson & Jeff Shesol, *The Twentieth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xx/interps/153> [<https://perma.cc/S89E-7NJC>].

57. *Id.*

58. *See generally* U.S. CONST. amend. XXV.

59. *See id.* art. I, § 7. It is worth noting that even in the current hyperpolarized congressional split between Democratic control of the House and Republican control of the Senate, both houses have passed legislation on two occasions that would have overridden President Trump's declaration of an "emergency," ostensibly allowing him to shift funds allocated elsewhere to build his border wall with Mexico. *See* Emily Cochrane, *House Again Rejects Trump's Border Emergency*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/politics/house-rejects-border-emergency.html> (detailing votes in February and September of 2019). Congress also voted to end

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### III. ARTICLE V AND THE PROCESS OF CONSTITUTIONAL AMENDMENT

This requires a direct confrontation with Article V, which I believe is, from both theoretical and empirical perspectives, the worst single feature of the Constitution that is itself full of defective features. These features taken together may well constitute a clear and present danger to our survival as a nation. Before turning to my reasons for that belief, let me emphasize—perhaps surprisingly—that this does not require engaging in what I sometimes label “founder bashing.” That is, it is not necessarily the case that Article V did not make a great deal of sense in 1787 when proposed and adopted. Indeed, I am willing to concede this is the case for almost every decision made at that time, whether I agree with it or instead manufacture a story that I might have voted against myself had I been a delegate in Philadelphia or at one of the state’s ratifying conventions.

The delegates were potentially making certain assumptions that have invalidated what they themselves would have called the lessons of experience. This would be the case, for example, with regard to the belief that the Electoral College, as presented in *The Federalist No. 68* (authored by Hamilton), would serve to protect us against the election of someone unsuited to be President.<sup>60</sup> This assurance has turned out to be false, even if there is some debate as to when it proved so. Some, for example, might pick President Andrew Jackson’s election in 1828.<sup>61</sup> In any event, it seems virtually impossible for people today to view President Trump’s presence in the Oval Office as vindicating Hamilton’s optimistic argument.<sup>62</sup>

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U.S. military assistance for Saudi Arabia in its intervention in Yemen. See Lauren Gambino & Julian Borger, *Yemen War: Congress Votes to End U.S. Military Assistance in Saudi Arabia*, *GUARDIAN* (Apr. 4, 2019), <https://www.theguardian.com/world/2019/apr/04/yemen-saudi-arabia-war-us-military-assistance-vote-congress-trump-veto-latest> [https://perma.cc/SZ4Z-YPJV]. Needless to say, the President simply vetoed these attempts to limit his unilateral power, and his policy continues uninterrupted, albeit without the support of the majority of either one of the Houses of Congress. See, e.g., *Donald Trump: Vetoed Legislation*, *BALLOTPEDIA* [https://ballotpedia.org/Donald\\_Trump:\\_Vetoed\\_legislation](https://ballotpedia.org/Donald_Trump:_Vetoed_legislation) [https://perma.cc/5EAN-WG67]. As of the time of writing this footnote, September 28, 2019, he has not yet vetoed legislation passed only the day before by Congress, but his veto is expected, and there are not sufficient votes in either the House or the Senate to override it. See Cochrane, *supra*.

60. See *THE FEDERALIST NO. 68* (Alexander Hamilton).

61. See, e.g., Dani Holtz, *Why a Second Look at Andrew Jackson Could Rescue American Politics*, *WASH. POST* (Dec. 21, 2018), <https://www.washingtonpost.com/outlook/2018/12/21/why-second-look-andrew-jackson-could-rescue-american-politics/?noredirect=on> [https://perma.cc/3GHF-F8C5?type=image].

62. See, e.g., Glenn Thrush, *Is Donald Trump Qualified to Be President?*, *POLITICO*

Other decisions, such as the accommodation of slavery, may have rested less on dubious assumptions about the degree to which slavery would naturally fade away than on a calculation of what sorts of compromises—with what was even then recognized as an evil—were necessary in order to get agreement to a constitution.<sup>63</sup> We needed a constitution that would create a single country instead of two or three separate countries along the Atlantic Coast, countries that would almost undoubtedly end up with wars being fought among them or with European countries attempting to take advantage of the relative weakness of separate countries along the Atlantic coast.<sup>64</sup> One can hardly ignore the powerful arguments offered in the early essays of *The Federalist* about the dire consequences of a country divided into two or even three separate national states.<sup>65</sup> The states would almost inevitably become militarized in order to fight or stave off inexorable military conflict.<sup>66</sup> Perhaps the Constitution was worth the price paid for it. But, even in the absence of the Thirteenth Amendment, no one would dare suggest adherence to the 1787 compromise simply because slavery was tolerated by those we venerate as our national founders. As background realities change, the justifications for compromises may well disappear, since as compromises, they never actually represented an agreement on fundamental political norms (other than achieving agreement in the first place). My own view is that this skepticism about past decisions should apply to much more than slavery.

Article V itself is evidence of the fact that the founders themselves recognized the certainty of imperfection and the concomitant desirability of change.<sup>67</sup> No less a presence than George Washington wrote his nephew Bushrod Washington (who would eventually become a justice on the Supreme Court) that not even “[t]he warmest friends and the best supporters” of the Constitution agree “it is free from imperfections; but they found them unavoidable and are sensible if evil is likely to arise there from,

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(Sept. 26, 2016), <https://politico.com/story/2016/09/is-donald-trump-qualified-to-be-president-228657> [<https://perma.cc/7M74-9QFA>].

63. See THE FEDERALIST NO. 68 (Alexander Hamilton); An “*Unspeakable Compromise*,” *Slavery and the Constitution*, DUKE L. (Sept. 19, 2007), <https://law.duke.edu/news/749/> [<https://perma.cc/RLX4-ATG4>].

64. See THE FEDERALIST NOS. 8, 68 (Alexander Hamilton).

65. See THE FEDERALIST NO. 8 (Alexander Hamilton).

66. See *id.*

67. See U.S. CONST. art. V (providing for the Constitution’s amendment).

the remedy must come hereafter.”<sup>68</sup> But fortunately, “there is a Constitutional door open,” which is precisely the possibility of amendment through Article V.<sup>69</sup>

Turning to Article V in its 1787 context, the first thing one should note is that it was a deliberate effort to subvert a far more onerous system of amendment than what was established in the United States’ first constitution,<sup>70</sup> the Articles of Confederation. Article XIII of the Articles of Confederation specified an amendment could take place if—and only if—the state legislatures of *all* of the constituent members agreed.<sup>71</sup> This meant, practically speaking, that Rhode Island—with roughly one-sixtieth of the national population—was able to veto a proposed amendment that had the support of the other 12 states.<sup>72</sup> The population disparity was not so great, but New York was equally able to veto a proposed amendment that might have gone far in resolving some of the daunting financial problems facing the young nation following the conclusion of the Revolutionary War.<sup>73</sup> In any event, the procedure established by Article XIII was intolerable.<sup>74</sup>

In *The Federalist No. 40*, one of the most important of the entire set of 85 papers we know as *The Federalist*, James Madison, writing as Publius, defended the clear defiance of the Constitutional Convention’s arguably limited congressional mandate and, even more certainly, the limits imposed by Article XIII.<sup>75</sup> “[I]n all great changes of established governments,” he writes, “forms ought to give way to substance . . . .”<sup>76</sup> To engage in “rigid adherence” to mere forms, he argues, “would render nominal and nugatory the transcendent and precious right of the people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and

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68. Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 3* (Sanford Levinson ed., 1995).

69. *Id.*

70. See generally ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 45, at 366–70.

71. ARTICLES OF CONFEDERATION of 1781, art. XIII.

72. See ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 45, at 368.

73. See *id.* at 368–69.

74. See *id.*

75. THE FEDERALIST NO. 40 (James Madison).

76. *Id.*; see generally LEVINSON, *AN ARGUMENT OPEN TO ALL*, *supra* note 32, at 149–51.

happiness.”<sup>77</sup> This internal quotation comes from the Declaration of Independence, which audaciously sets out the right for those individuals now viewed as U.S. patriots to secede from the British Empire and establish their own government based on “the consent of the governed.”<sup>78</sup>

A necessary complement to *The Federalist No. 40* in this context is Madison’s chilling statement in the immediately following *The Federalist No. 41*, where he cautions against placing overly stringent limits on the powers of the national government.<sup>79</sup> One of the catch phrases associated with Madison is “parchment barriers”: the placement of limits in the Constitution that will prove to be mere words on parchment when what trained lawyers today might call “compelling state interests” demand the state act in certain ways.<sup>80</sup> Thus, Madison writes, “It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.”<sup>81</sup> To be sure, he is writing, in this case, about the measures the United States might take if attacked by a foreign nation.<sup>82</sup> But, of course, the meta issue is how exactly we identify threats to the overriding impulse of self-preservation.<sup>83</sup>

*The Federalist No. 40* identified Article XIII of the Articles of Confederation as, in effect, one such threat because of its indefensible requirement of unanimous approval by state legislatures, and Madison argues the proper response was to ignore it and run the risk of being accused of usurpation.<sup>84</sup> Indeed, Madison argues any of those accusations, which, after all, rested on a reasonable foundation if one took the text of Article XIII seriously, would effectively be answered by the “approbation of [the

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77. THE FEDERALIST NO. 40 (James Madison).

78. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

79. THE FEDERALIST NO. 41 (James Madison).

80. See *id.*; see also Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 TEX. A&M L. REV. 323, 325 (2019) (discussing how James Madison’s fear of mere parchment barriers may help to explain the relative loss of actual governance by Congress and the rise of the modern administrative state).

81. THE FEDERALIST NO. 41 (James Madison).

82. *Id.*

83. See *id.*

84. See THE FEDERALIST NO. 40 (James Madison).

people]” in the ratification process itself.<sup>85</sup> Popular approval would wash clean any sins committed by Madison and his allies in Philadelphia, even if the requisite approval, as set out in Article VII of the new Constitution, was now only required to come from nine states and from conventions thereof, not the state legislatures.<sup>86</sup> There is ample reason to view the 11 states that had ratified the Constitution by the time of President George Washington’s inauguration on April 30, 1789, as having, in effect, seceded from the perpetual union ostensibly established by the Articles of Confederation, leaving North Carolina and Rhode Island in some juridical limbo inasmuch as they had not yet ratified the Constitution.<sup>87</sup> The Philadelphia Convention ran away, as it were, not only in terms of the radical changes it proposed to the structure of the U.S. government but also (and most vividly) with regard to the method by which its juridical legitimacy would be established.<sup>88</sup> For me, this speaks well for them; for others, it is a matter of embarrassment or, at least, fevered efforts to prove they behaved properly in terms of their fidelity to the law.<sup>89</sup>

As already noted, there is no reason to believe the Framers themselves believed they had achieved perfection in Philadelphia.<sup>90</sup> It is also important to realize that Article V itself established procedures for amendment significantly different from (and perceived as far easier than) those of the Article of Confederation’s Article XIII.<sup>91</sup> Amendments can be proposed if two-thirds of each House of Congress agrees, and the proposed changes would then be sent on to the states, three-fourths of which would have to assent in order to change the Constitution accordingly.<sup>92</sup> Given the reasonable fear that Congress might be captured by interests averse to certain proposals, an alternative track allows states to trigger a new

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85. *Id.*

86. *See* U.S. CONST. art. VII.

87. *See* THE FEDERALIST NO. 40 (James Madison); *see also* D. Jason Berggren, *Presidential Election of 1789*, MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/presidential-election-of-1789/> [<https://perma.cc/7YJE-6KBA>] (discussing the inability of Rhode Island and North Carolina to participate in President Washington’s election because they had yet to ratify the Constitution).

88. *See* ACKERMAN, *REVOLUTIONARY CONSTITUTIONS*, *supra* note 45, at 367 (discussing the “sweeping nature” of the proposed new Constitution).

89. *See id.*

90. *See generally* U.S. CONST. art. V.

91. *Compare id.*, with ARTICLES OF CONFEDERATION of 1781, art. XIII.

92. *See* U.S. CONST. art. V.



convention if two-thirds of them petition Congress to call one.<sup>93</sup> Some of the Anti-Federalists who reluctantly voted to ratify the new Constitution at New York's ratifying convention (recall the final vote was 30–27) were undoubtedly influenced by the promises of Federalists to support a call for a new convention that could address some of the complaints registered by the dissidents.<sup>94</sup> Any promises were quickly forgotten, in part because Federalists who dominated the first Congress quickly agreed to add a number of amendments we now identify as the Bill of Rights in order to placate a crucial part of the opposition.<sup>95</sup> One might view the Bill of Rights similar to how it was dismissed at the time as a “tub thrown to the whale,” designed to distract Congress from the truly important calls for a new convention that could address certain structural features of the new political system.<sup>96</sup> However, there can be little doubt that those amendments were popular and accepted as signs of a good-faith attempt to meet many of the objections of those who had doubts about the new order.

What should be emphasized, though, is that one might view Article V as working very well in its first outing. That is, Congress actually proposed 12 amendments.<sup>97</sup> The original first and second amendments—dealing with congressional districting and legislative salaries, respectively—did not receive the necessary support of three-fourths of the states.<sup>98</sup> The original second amendment was, however, declared ratified in 1992 when Michigan became the 38th state to ratify what some might consider a zombie amendment that remained alive inasmuch as Congress had not placed a time limit on ratification.<sup>99</sup> We know it today as the Twenty-Seventh

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93. *See id.*

94. *See* PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 385–98 (2010).

95. *Id.* at 446–54.

96. *See id.*; Gordon S. Wood, *The Origins of the Bill of Rights*, in 101 *THE PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY, 1800–2008*, at 255, 272–73 (1991) (citing South Carolina Representative Aedamur Burke for his use of the phrase in criticizing James Madison's insistence on including the Bill of Rights).

97. *See* Robert Longley, *The Original Bill of Rights Had Twelve Amendments*, THOUGHTCO, <https://www.thoughtco.com/original-bill-of-rights-and-amendments-3322334> [https://perma.cc/DKW9-2BGF].

98. *See id.*

99. Evan Andrews, *The Strange Saga of the 27th Amendment*, HISTORY (May 5, 2017), <https://www.history.com/news/the-strange-case-of-the-27th-amendment> [https://perma.cc/BD96-QYGW?type=image].

Amendment.<sup>100</sup> No one would suggest reviving the original first amendment, not least because its provisions would require a present House of Representatives consisting of approximately 6,000 members.<sup>101</sup> One might congratulate the state legislatures at the time for manifesting good judgment in distinguishing proposed amendments 3 through 12 from the first two and ratifying the former.<sup>102</sup> Moreover, Article V proved altogether adequate twice more in the first 15 years of the new nation.<sup>103</sup> The Eleventh Amendment was added in 1794 to overturn the Supreme Court's (correct, in my opinion) decision in *Chisholm v. Georgia*,<sup>104</sup> in which Justice James Wilson emphatically held Georgia was "NOT [sic] a sovereign State" and therefore could not refuse to appear in a federal court to defend itself against a claim that the state was in arrears on a contract.<sup>105</sup> As one might imagine, states were upset by this decision; Congress agreed—it no doubt helped that senators were selected by state legislatures—and ratification was quickly procured.<sup>106</sup>

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100. *Id.*

101. Longley, *supra* note 97.

102. *See generally* MAIER, *supra* note 94.

103. U.S. CONST. art. XII (proposed by Congress in 1803 and ratified by three-fourths of the states in 1804); U.S. CONST. art. XI (proposed by Congress in 1794 and ratified by three-fourths of the states in 1798).

104. *Chisholm v. Georgia*, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI; Timothy S. McFadden, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of Kimel v. Florida Board of Regents*, 27 J.C. & U.L. 519, 524–25 (2000).

105. *Chisholm*, 2 U.S. at 457.

106. *See State Sovereign Immunity*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-11/state-sovereign-immunity> [<https://perma.cc/GQP6-YF2J>]. It remains a subject of quite bitter debate whether the Court's decision was in fact mistaken or, as I believe, a correct decision that was overruled by those states unhappy with this aspect of what was correctly described by many opponents of the Constitution as a consolidated government. The Court's recent decision overturning *Nevada v. Hall*, *Franchise Tax Board of California v. Hyatt*, rests, among other things, on the declaration by the majority, without a scintilla of genuine argument, that *Chisholm v. Georgia* was "mistaken." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1495–96 (2019); *see also Nevada v. Hall*, 440 U.S. 410 (1979), *overruled by Hyatt*, 139 S. Ct. 1485. Among other things, one has to explain why the vote of the five justices was 4–1, with Chief Justice John Jay and Justice Wilson writing especially powerful opinions on the implications of popular sovereignty for any theories of state sovereignty and concomitant sovereign immunity. *See Chisholm*, 2 U.S. at 453–66, 469–79.

The Twelfth Amendment followed in 1803, in time for the 1804 election, following the fiasco and near civil war generated by the mechanisms of the original Electoral College.<sup>107</sup> The tie vote between Thomas Jefferson and Aaron Burr meant a lame-duck, Federalist-controlled House of Representatives had to choose between them on a one-state-one-vote basis.<sup>108</sup> Federalists despised Jefferson and were tempted to choose either Burr or, even more audaciously, no one and arrange for John Marshall, as Secretary of State (along with being Chief Justice), to become President.<sup>109</sup> The imbroglio was resolved only on the 36th ballot, against the background of threatened military intervention by the state militias of Pennsylvania and Virginia.<sup>110</sup> The “solution” was not, alas, the elimination of the Electoral College itself; instead, electors now would vote separately for presidential and vice presidential candidates.<sup>111</sup> This was, in effect, a recognition that the Framers’ hope for a country without political parties and partisanship was in fact delusionary.<sup>112</sup> In this sense, the Twelfth Amendment is extraordinarily important because it is the one and only recognition of the de facto importance of political parties in the entire Constitution (unlike the constitutions of many countries abroad drafted in the twentieth century with full knowledge of the importance of political parties, including the ways they can both contribute to or attack the maintenance of a liberal constitutional order).<sup>113</sup>

But the essential point is that analysts of the U.S. Constitution could, in say 1814, the 25th anniversary of Washington’s installation as our first president, reasonably pronounce Article V to be thoroughly successful.

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107. See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 3, 247 (2005).

108. See *id.* at 43.

109. See *id.* at 3.

110. See *id.* at 3–4; see also Andrew Prokop, *The Real-Life Election of 1800 Was Even Wilder than Hamilton the Musical Lets on*, VOX (Nov. 28, 2015), <https://www.vox.com/2015/11/28/9801376/hamilton-election-of-1800-burr-jefferson> [<https://perma.cc/3PLL-T4L5>] (citing GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* (2009)).

111. See Sanford Levinson, *A Common Interpretation: The 12th Amendment and the Electoral College*, NAT’L CONST. CTR. (Dec. 14, 2016), <https://constitutioncenter.org/blog/a-common-interpretation-the-12th-amendment-and-the-electoral-college> [<https://perma.cc/8FA2-RKJZ>].

112. See U.S. CONST. amend. XII.

113. See generally Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501 (2014).

Perhaps Washington was correct with regard to his message to his nephew, Bushrod. Madison might agree. As he wrote in his conclusion to *The Federalist No. 14*, the drafters in Philadelphia “formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.”<sup>114</sup> Perpetuation would presumably require, at least on occasion, the kinds of improvement that would require amendment. One might point to the first 12 amendments as vindicating those hopes, and, importantly, no truly significant amendment had been proposed and failed to ratify only because of failure to cross the magic barrier of gaining the support of three-fourths of the states. Neither of the two amendments that failed to ratify were deemed truly important at the time, even if we now know that the ratification of the original first amendment would have rendered the operation of the House of Representatives as a truly deliberative body impossible. To be sure, Madison wrote in *The Federalist No. 49* a ringing attack on his friend Thomas Jefferson’s call for relatively frequent conventions to bring the Constitution up to date.<sup>115</sup> Instead, Madison emphasized the importance of “veneration” and the practical impossibility of reconvening a new convention that would be as productive as the virtually unique 1787 gathering. There is, one might say, a genuine tension between the appeal to reflection and choice set out in *The Federalist Nos. 1 and 14* and the emphasis on veneration in *The Federalist No. 49*.<sup>116</sup>

IV. SHOULD ARTICLE V BE VIEWED AS A “TIMELESS” REQUIREMENT?  
DOES WHAT WAS (ARGUABLY) DESIRABLE IN 1787 CONTINUE TO BE  
DESIRABLE DECADES (AND EVEN CENTURIES) LATER?

As University of Chicago Professor of Law Aziz Huq has interestingly argued, there is something to be said for making constitutions difficult to amend, inculcating a mood of veneration upon the nation, particularly in the early years of a new regime.<sup>117</sup> Only the mutual assurances that come with a difficult amendment process will guarantee a commitment to making the new enterprise really work.<sup>118</sup> There is nothing easy about establishing a new political order, especially if (as in the United States) it is a federal one that

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114. THE FEDERALIST NO. 14 (James Madison).

115. THE FEDERALIST NO. 49 (James Madison).

116. Compare THE FEDERALIST NO. 1 (Alexander Hamilton), and THE FEDERALIST NO. 14 (James Madison), with THE FEDERALIST NO. 49 (James Madison).

117. See generally Aziz Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165 (2014).

118. See generally *id.*

is, almost by definition, composed of states with populations that are mistrustful of other states and their significantly different populations.<sup>119</sup> One of the opponents of the new Constitution, James Winthrop, writing as Agrippa, expressed his doubts over whether the people of Massachusetts and Georgia could really be governed by a common political body, given their significant differences.<sup>120</sup> Madison himself took note of the most obvious of those differences, toleration or opposition to chattel slavery, but others could easily have been noted.<sup>121</sup> It was difficult to get them to agree to unity in the first place; hard deals and compromises had to be made, and one might well believe that the public should be discouraged from believing that those deals could easily be abrogated. People would have to learn to live with one another (and the deals entered into).

A too-easy system of amendment would provoke dissidents to initiate changes that might well lead to ultimate dissolution when it became apparent the deals struck in Philadelphia and at the ratifying conventions were themselves evanescent, good only until sufficient votes could be found to renege and change the Constitution accordingly. If one accepts Huq's intriguing argument, then this suggests the real problem with Article V is not that it adopted a quite severe system of constitutional amendment, even if better than that of Article XIII of the Articles of Confederation, but rather it did not put a time limit on its rigidity.<sup>122</sup> It might, for example, have stated that after 50 years (1837), it would be sufficient to amend the Constitution if only two-thirds or even a majority of the states (perhaps along with a majority of the population as well) assented to proposals initiated by three-fifths of each House of Congress.

One of the remarkable features of the Article V system is that no formal attention is given to the actual percentages of the population that can veto any proposed changes.<sup>123</sup> It is a notorious truth that, for example, as the

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119. See MALCOLM FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 110–15 (2008); see generally LEVINSON, *FRAMED*, *supra* note 1, at ch. 14.

120. See Letter from Agrippa No. IV (Dec. 3, 1787) (on file with the University of Chicago Library).

121. THE FEDERALIST NOS. 37, 38 (James Madison).

122. See generally Huq, *supra* note 117.

123. Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014), <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html> [<https://perma.cc/859H-JV6U>].

United States changed from a country of roughly 4 million people in 1790 to roughly 330 million at present, the population did not disperse itself evenly across the U.S. territory.<sup>124</sup> Instead, we have ended up in a country where the total 2019 population of the 13 smallest states that could block any proposed constitutional amendment is slightly less than 3 percent of the entire population, i.e., less than 10 million.<sup>125</sup> Even if it is unlikely an amendment will be blocked by only these 13 states, one should not be reassured if the blocking minority were even two or three times as large. Consider in this context the fact that the Equal Rights Amendment was ratified by 35 states with approximately 70 percent of the national population.<sup>126</sup> There is simply no justification in the twenty-first century for giving geographically well-located minorities the ability to stifle what is widely recognized as necessary constitutional reform, even if one might agree that assignment of such a veto power made sense in 1787 in order to elicit support for the initial deal.<sup>127</sup>

Or the U.S. Constitution might have emulated the 1784 New Hampshire constitution by either allowing the national electorate to vote at stated intervals, beginning well after ratification in 1788, on whether to call a new national convention or even by mandating a new convention every 50 years in order to determine what the lessons of experience might teach with regard to improving or tuning up a Constitution that would undoubtedly reveal new imperfections with the passage of time.<sup>128</sup> As John Dinan has demonstrated in his invaluable study *The American State Constitutional Tradition*, there have been more than 230 state constitutional conventions

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124. See Christopher Ingraham, *Look at the Jaw-Dropping Emptiness of America*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/20/americas-emptiest-places-42-of-the-land-1-of-the-people/?noredirect=on> [<https://perma.cc/7AV3-APB3>] (showing the geographic disparity in the United States among some of the most and least densely populated locations); *Population Density of the United States from 1790 to 2018 in Residents Per Square Mile of Land Area*, STATISTA, <https://www.statista.com/statistics/183475/united-states-population-density> [<https://perma.cc/6ALH-5AGH>] (showing the change in overall population density over time).

125. See *US States by Density 2019*, WORLD POPULATION REV., <http://www.worldpopulationreview.com/states/state-densities> [<https://perma.cc/BN23-YUQM>].

126. See Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. MICH. J.L. REFORM 409, 480–81 (1987). Even if one subtracts the populations of the five states that attempted to rescind their earlier ratifications, the total percentage of population of the remaining 30 states was still 69 percent under either the 1970 or 1980 census. See *id.* at 460–62.

127. See generally *id.*

128. N.H. CONST. art. 99 (repealed 1980).

over our 243-year history.<sup>129</sup> Many of them were triggered by provisions such as those present in New Hampshire's constitution, which accounts for the fact that the state has had 17 conventions because of the votes of its electorates to do so.<sup>130</sup>

#### V. ARE REFLECTION AND CHOICE POSSIBLE IN THE TWENTY-FIRST CENTURY?

An alternative to a convention, as already suggested, is the ability of the electorate to initiate, and then to endorse, proposed constitutional amendments.<sup>131</sup> It is this, for example, that explains Nebraska's 1934 decision to eliminate its state senate in favor of the unicameral.<sup>132</sup> Jesse Ventura, when he was the "maverick" governor of Minnesota (elected only because there were three candidates in the race, and he came in first), proposed that the Minnesota Senate be likewise abolished.<sup>133</sup> Needless to say, because Minnesota does not have procedures for direct democracy, the Minnesota Senate continues to flourish.<sup>134</sup> Its members are simply not likely to vote themselves out of a job, whatever might be said in favor of doing so. The same may well be true of Iowa, which to an outsider does not immediately seem so large or heterogeneous to need a second legislative house.

As we move well into the twenty-first century, however, what is most striking about Article V is the strength of its barriers for generating what Hamilton, in *The Federalist No. 1*, called the reflection and choice attached to a genuinely republican form of government.<sup>135</sup> It has become a vise, what I have elsewhere referred to as an "iron cage," that not only stifles necessary changes but also (and in some ways just as importantly) infantilizes our political discourse by leading practically minded people to view altogether accurately the prospect of constitutional amendment as basically

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129. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7–9 (2006).

130. *Id.*

131. *See supra* Part II.

132. *See* DINAN, *supra* note 129, at 172.

133. B. Drummond Ayres Jr., *Political Briefing; Ventura's Mission: Turning Two into One*, N.Y. TIMES (Aug. 22, 1999), <https://www.nytimes.com/1999/08/22/us/political-briefing-ventura-s-mission-turning-two-into-one.html> [<https://perma.cc/KFZ5-W6TK>].

134. *See generally* MINN. CONST. art. 4, § 1.

135. THE FEDERALIST NO. 1 (Alexander Hamilton).

impossible.<sup>136</sup> Perhaps a better analogy for Iowans would be one of its numerous corn mazes, but one featuring no exit once one makes the mistake of entering.

That is, alas, not an irrational view of the present operation of Article V, whose preamble might simply read “Abandon all hope ye who enter here,” which Dante suggested was the message found at the entrance to hell.<sup>137</sup> Few, if any, of the present students at Drake (or any other law school) have an active memory of the last genuine effort at constitutional amendment, the effort to add the Equal Rights Amendment to the Constitution in the 1970s.<sup>138</sup> There have been attempts since then to propose balanced-budget and flag-burning amendments, but none got out of Congress.<sup>139</sup> There is currently an active attempt led by political conservatives to procure the petitions of the 34 states necessary to constitute two-thirds of the total 50 required to mandate that Congress call an Article V convention, but the November 2018 elections suggest this effort will be unsuccessful inasmuch given the victories of Democrats in several of the states considering these petitions.<sup>140</sup> Moreover—and crucially—this attempt to generate an Article V convention is the result of what might be called a stealth process, known only to some political insiders and others interested in these issues; there has been no effort to mobilize a genuine national movement that might, for example, attempt to initiate the kind of national conversation necessary to instantiate a process of reflection and choice.<sup>141</sup>

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136. LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 1, at 165.

137. See DANTE ALIGHIERI, *INFERNO*, CANTO III 19 (Allan Gilbert trans., 1969) (1320).

138. See Maya Salam, *What Is the Equal Rights Amendment, and Why Are We Talking About It Now?*, N.Y. TIMES (Feb. 22, 2019) <https://www.nytimes.com/2019/02/22/us/equal-rights-amendment-what-is-it.html> [<https://perma.cc/39E6-F9JW>].

139. See Massimo Calabresi, *Why the Flag-Burning Ban Failed*, TIME (June 27, 2006), <http://www.content.time.com/time/nation/article/0,8599,1208509,00.html> [<https://perma.cc/W3HT-NRCY?type=image>]; Eliza Collins, *House Fails to Advance a Balanced Budget Amendment to Counter High Spending Levels*, USA TODAY (Apr. 12, 2018), <https://www.usatoday.com/story/news/politics/2018/04/12/house-fails-to-advance-balanced-budget-amendment-counter-high-spending-levels/508665002> [<https://perma.cc/U9TS-6AKF>].

140. See Jamiles Lartey, *Conservatives Call for Constitutional Intervention Last Seen 230 Years Ago*, THE GUARDIAN (Aug. 11, 2018), <https://www.theguardian.com/us-news/2018/aug/11/conservatives-call-for-constitutional-convention-alec> [<https://perma.cc/5PL7-5ZT3>].

141. Michael Wines, *Inside the Conservative Push for States to Amend the*



Nor, frankly, is this effort being led by national figures even close to the stature of those who assembled in Philadelphia and could use the strength of their established reputations to reassure those who had doubts about the new Constitution (and, recall, it still was ratified quite narrowly in the absolutely necessary states of New York and Virginia).<sup>142</sup>

The last truly significant change to the Constitution, it might well be argued, was the Twenty-Second Amendment (added in 1951) to make a repeat of President Franklin Delano Roosevelt's extended presidency impossible.<sup>143</sup> People argued, at the time, that he had violated a provision of the United States' "unwritten Constitution" by running for a third term in 1940 (and, of course, a fourth term in 1944).<sup>144</sup> The Twenty-Second Amendment formalized the tradition of presidents serving a maximum of two terms, reaching back to George Washington's voluntary renunciation of what could easily have become a lifetime term in office.<sup>145</sup> There have been five additional amendments since then, including the Twenty-Seventh Amendment ratifying the original second amendment that was rejected at the time.<sup>146</sup> But none have proved to be of truly great significance, save, perhaps, for the Twenty-Fifth Amendment, which provided a mechanism by which President Richard Nixon could replace the disgraced Vice President Spiro Agnew with Gerald Ford (who succeeded him upon Nixon's own disgrace), and then Ford in turn could nominate Nelson Rockefeller to be his vice president.<sup>147</sup>

Many Americans view the paucity of amendments to the U.S. Constitution as a feature, something to be proud of. Americans do have,

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*Constitution*, N.Y. TIMES (Aug. 22, 2016), <https://nytimes.com/2016/08/23/us/inside-the-conservative-push-for-states-to-amend-the-constitution.html> [https://perma.cc/L7R9-Q96T].

142. *Id.*

143. See *FDR's Third-Term Election and the 22nd Amendment*, NAT'L CONST. CTR. (Nov. 5, 2018), <https://www.constitutioncenter.org/blog/fdrs-third-term-decision-and-the-22nd-amendment> [https://perma.cc/M2LB-X4XB].

144. See Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), <https://today.law.harvard.edu/feature/presidential-power-surges/> [https://perma.cc/WQX9-5PVL].

145. See *FDR's Third-Term Election and the 22nd Amendment*, *supra* note 143.

146. U.S. CONST. amends. XXIII–XXVII.

147. See Brian C. Kalt & David Pozen, *Common Interpretation: The Twenty-Fifth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv/interps/159> [https://perma.cc/MG2N-5H5M].

after all, the most difficult to amend national constitution in the world.<sup>148</sup> Perhaps more to the point, though, given a certain U.S. parochialism about learning anything from any of the other countries with formal constitutions (and many amendments), is the fact that the 50 U.S. states have rejected the message that amendments should be basically unthinkable.<sup>149</sup> For some, this is evidence that U.S. state constitutions are not “genuine” constitutions, for genuine constitutions require a high degree of rigidity rarely found at the state level.<sup>150</sup> This is a foolish view. At the very least, though, persons who endorse it should be pushed to make affirmative arguments and to explain exactly why it is irrelevant that each and every one of the 50 states have adopted easier procedures for amendment than is true of the U.S. Constitution.

One possible explanation for the common misconception about genuine constitutions is the indefensible way U.S. constitutionalism is taught, especially within the legal academy. Too often we pretend there is only *one* constitution within the United States, which is patently false. This means we rarely take advantage of the opportunity presented by U.S. federalism to engage in truly rich and illuminating forms of comparative constitutional analysis. States have often made quite stunningly different decisions about some very basic constitutional realities. Consider, for example, that the overwhelming majority of the 50 states rejects the so-called unitary executive,<sup>151</sup> assigns quite different veto powers to their governors,<sup>152</sup> and elects most of their judges.<sup>153</sup> No state elects its governor through anything resembling the Electoral College.<sup>154</sup> And the Supreme Court read

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148. Eric Black, *Constitution Nearly Impossible to Amend: Is the Bar Too High?*, MINNPOST (Dec. 10, 2012), <https://www.minnpost.com/eric-black-ink/2012/12/constitution-nearly-impossible-amend-bar-too-high> [<https://perma.cc/4HL3-W2LC>].

149. See, e.g., Regan McCarthy, *Scholars: Florida's Constitution "Easiest" to Amend*, WFSU, <https://news.wfsu.org/post/scholars-floridas-constitution-easiest-amend> [<https://perma.cc/J6GP-A6AG>] (highlighting the relative ease of amending state constitutions).

150. See *id.*

151. See Ilya Somin, *Rethinking the Unitary Executive*, REASON (May 3, 2018), <https://reason.com/2018/05/03/rethinking-the-unitary-executive/> [<https://perma.cc/AQC9-C7J2>].

152. THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES 2017*, at 177–78 (2017).

153. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), [brennancenter.org/rethinking-judicial-selection/significant-figures](http://brennancenter.org/rethinking-judicial-selection/significant-figures) [<https://perma.cc/V3YH-PN9B>].

154. *Governors' Powers & Authority*, NAT'L GOVERNORS ASS'N, [nga.org/consulting/powers-and-authority/](http://nga.org/consulting/powers-and-authority/) [<https://perma.cc/E7KX-S2ZQ>] (“Governors, all of whom are

the Fourteenth Amendment over a half-century ago to invalidate the so-called little federalism within the states that had allowed state senates to mimic the disproportionality of voting power manifested by the U.S. Senate.<sup>155</sup> Students should be expected not only to know about some of these differences but also, and far more importantly, to engage in vigorous debates as to whether the United States' or Iowa's (or any other state's) constitution presents a better model for twenty-first century governance.

What constitutes U.S. constitutionalism is definitely not something to be decided only by judges wearing impressive robes. It is, as Publius affirmed in *The Federalist No. 1*, a topic that should be addressed by anyone proclaiming membership in the U.S. political community.<sup>156</sup> And it should be a central concern for those of us who are devoting our lives to teaching the young within the legal academy or undergraduate courses. No question is more important than this: Will those of us now in our sunset years pass down an adequate constitutional heritage to our children, grandchildren, and those who will follow them in what we hope will be a flourishing U.S. constitutional order? If—as I believe is the case—that requires significant reforms, then so be it. The most unequivocally attractive legacy of the Framers was their willingness to ask audacious questions and to do what was necessary when they viewed proper answers as being stymied by imbecilic forms. To behave differently ourselves is not only to dishonor what is most admirable about the generation of the Framers but also to condemn us and our own descendants to an ever-more-bleak future.

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popularly elected, serve as the chief executive officers . . .”). However, notice should be taken of Mississippi's unique system, whereby a governor must not only get a majority of the popular vote but also win at least 62 of the 122 state House of Representatives districts, failing which the governor is elected by the Mississippi House of Representatives. MISS. CONST. art. V, § 140–41. A lawsuit is currently underway challenging the constitutionality of this system on the grounds that it is designed to preserve white supremacy. See Tal Axelrod, *Federal Lawsuit Claims Mississippi's Method of Electing Governors Is Racist*, THE HILL (May 30, 2019), <https://thehill.com/regulation/court-battles/446143-federal-lawsuit-claims-mississippi-method-of-electing-governors-is> [<https://perma.cc/X7KE-KC9P>].

155. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (requiring “one-person, one vote” as the basis of representation in both legislative chambers of bicameral states).

156. THE FEDERALIST NO. 1 (Alexander Hamilton).