WIND OF (CONSTITUTIONAL) CHANGE:

Amendment Clauses in the Federal and State Constitutions

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I. INTRODUCTION

"We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."[1] On May 2, 2022, an anonymous Supreme Court insider leaked an explosive draft opinion penned by Justice Alito that sent the legal world and large swaths of civil society into a frenzy.[2] Law professors[3] and cable news

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[1] Thomas E. Dobbs v. Jackson Women's Health Organization et al. 5 (draft, 2022), *at* https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504.

[2] Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico (May 2, 2022), *at* https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[3] Mary Wood, *Unpacking the Supreme Court Leak: Professor Douglas Laycock Discusses Dobbs Breach*, University of Virginia School of Law (May 3, 2022), at https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak.

commentators[4] publicly debated what *Dobbs* would mean for women's rights and landmark cases of civil liberties. Citizens around the country took to the streets to protest against the judgment.[5] But it seems that, privately, some wondered why exactly it is that the right to abortion is not "protected by any constitutional provision," be it implicit or explicit. After all, a majority of Americans are in favor of such a right.[6] Within 24 hours of the leak, Google reported a 500 percent uptick in searches for the search term "amendment."[7] This is a familiar phenomenon. Whenever a breaking story highlights a mismatch between popular opinion and constitutional jurisprudence, Americans start to wonder how they could amend their constitution. Searches for "amendment" peaked, for example, in January 2021. With searches up 370 percent from December 2020, citizens asked Google what the Constitution had to say about ousting a president and rioters storming the Capitol. And all too often, when they found out the Constitution didn't say what they wanted it to, they started to wonder how that could be changed.

Inevitably, this lands them on one of the many articles that deal with either the necessity of new amendments,[8] impossibility thereof,[9] or both.[10] Such coverage is not just sensationalism. The last amendment

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4 Kevin Breuninger, *How the Supreme Court went from Cementing Abortion Rights in Roe v. Wade to Drafting their Demise*, CNBC (May 6, 2022), *at* https://www.cnbc.com/2022/05/06/how-supreme-court-went-from-roe-v-wade-to-drafting-opinion-to-overturn-it.html.

5 Joseph Guzman, *Nationwide Protests Planned in Response to Leaked SCOTUS Abortion Ruling*, The Hill (May 5, 2022), *at* https://thehill.com/changing-america/respect/accessibility/3478491-nationwide-protests-planned-in-response-to-leaked-scotus-abortion-ruling.

6 *America's Abortion Quandary,* Pew Research Center (May 6, 2022), *at* https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary.

7 *Amendment, April 29–May 6, 2022,* Google Trends, *at* https://trends.google.com/trends/explore?date=now%207-d&geo=US&q=amendment.

8 Ana Becker, *We the People*, N.Y. Times (Aug 4, 2021), https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html.

9 Eric Posner, *The U.S. Constitution is Impossible to Amend,* Slate (May 5, 2014), *at* https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html#:~:text=It%20provides%20that%20an%20amendment,two%2Dthirds%20of%20the%20states.

10 Dave Levinthal, *Why a Constitutional Amendment Enshrining Abortion Rights is Next to Impossible*, Insider (May 2, 2022), *at* https://www.businessinsider.com/roe-v-wade-abortion-rights-constitution-2022-5.

passed in 1992. Roughly 10 percent of voters are under the age of 25,[11] meaning that during their lifetimes, the Constitution has remained completely static. This is because the American constitution is notoriously resistant to change. It is so resistant, in fact, that when Donald Lutz[12] and later Zachary Elkins, Tom Ginsburg, and Tom Melton[13] turned the ease (or difficulty) of amendment into a numerical score, Article V of the U.S. Constitution ranked most difficult in a field of some 900 historic and contemporary amendment provisions.

This is no accident. Andrew Johnson was of the opinion that "[a]mendments to the Constitution ought to not be too frequently made; . . . [if] continually tinkered with it would lose all its prestige and dignity, and the old instrument would be lost sight of altogether in a short time."[14] This paper discusses two historic developments that played a crucial role in lending the amendment process its rigidity: the debates on Article V at the Constitutional Convention in Philadelphia and the rise of political parties in the early republic. It will then contrast the amendment procedure of the federal constitution with that in California and other states, which are plagued by excessive length rather than underinclusive brevity. Lastly, it will discuss legislative amendment clauses that are part of the constitutions of Delaware and Germany as possible solutions for both issues.

II. AMENDING THE FEDERAL CONSTITUTION

History of the Amendment Clause

"Depending on one's normative perspective, [the difficulty of amending the U.S. Constitution] is seen either as a reflection of the Constitution's genius

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[11] *Number of Voters as a Share of the Voter Population, by Age,* Kaiser Family Foundation (Nov. 2020), *at* https://www.kff.org/other/state-indicator/number-of-individuals-who-voted-in-thousands-and-individuals-who-voted-as-a-share-of-the-voter-population-by-age/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[12] Donald Lutz, *Towards a Theory of Constitutional Amendment,* 88 Am. Pol. Sc. Rev. 355 (1994).

[13] Zachary Elkins, Tom Ginsberg & James Melton, The Endurance of National Constitutions 101 (2009).

[14] Andrew Johnson, Speech at the Capitol in Washington, D.C. (Feb. 22, 1866).

and a key to its endurance, or as a barrier to modernization."[15] When the Constitutional Convention was in session in Philadelphia, most attendees did not see the impossibility of amending it as a reflection of constitutional genius. Just a few years after the Articles of Confederation were ratified, the constitutional order in the young republic was about to collapse. The Articles had proven to be too confederal and too restrictive of the new government. Besides featuring paralyzing oversights like the federal government's inability to regulate commerce or to raise taxes, it provided for no means of amending the document upon ratification unless all states agreed on a proposed change, which essentially fossilized the status quo of 1777.[16] Hence, a handful of state representatives were summoned to Annapolis in 1786 to revise how the Articles dealt with trade and commerce. Quickly, they came to the conclusion that this narrow objective was not sufficient to fix the Articles of Confederation and instead came to agree that "the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention."[17] A year later, this convention then assembled in Philadelphia. Its "sole and express purpose" was to revise the Articles of Confederation.[18] In other words, amendment procedures are at the core of U.S. constitutional history.

Unsurprisingly, the debate around Article V was kicked off by deciding that the Constitution was to be amendable at all. The delegates "[r]esolved that the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the People to consider and decide thereon."[19]

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15 Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at all*? 13 Int'l J. Con. L. 686 (2015).

16 Richard R. Beeman, Plain, Honest Men: The Making of the American Constitution 245 (2009).

17 *Address of the Annapolis Convention,* National Archives, Founders Online (Sept. 14, 1786), https://founders.archives.gov/documents/Hamilton/01-03-02-0556.

18 Journals of the Continental Congress, 1774–1789: Volume XXXII. 1787 January 17–July 20 (Roscoe R. Hill ed., 1936).

19 2 Record of the Federal Convention of 1787 85 (Max Farrand ed., 1911).

What exactly this meant, they were not sure. The debate quickly focused on one question: Should the power of amendment be given to the people or to the states? The faction wanting to empower the people could count on important advocates. After Oliver Ellsworth and William Patterson had moved to entrust the state legislatures with the power of amendment, George Mason of Virginia was the first to speak on their proposal. "A reference of the plan to the authority of the people," he exclaimed, was "one of the most important and essential of the Resolutions."[20] Mason argued that because the state legislatures were products of the states' constitutions, the power to amend should thus be granted to special conventions, elected directly by the people.[21] Nathaniel Gorham of Massachusetts and fellow Virginians Edmund J. Randolph and James Madison concurred with Mason. Madison pointed out that a constitution was no treaty. To him, changes to the constitution would make "essential inroads on the State Constitutions." Allowing state legislatures to amend a constitution would mean "that a Legislature could change the constitution under which it held its existence."[22] But if the existence of a constitution rested on the shoulders of the people, then they, too, should have the authority to amend it.

Outside the Convention, the Antifederalists also had strong opinions about proposed Article V. They, prophetically, pointed out the risks of bad faith politics and obstructionism by a minority of states. Patrick Henry, who had refused a call to serve on Virginia's delegation to the Convention, expressed fear "that the most unworthy characters may get into power, and prevent the introduction of amendments." To him, "[t]o suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous."[23] He went on to point out the undemocratic nature of the draft amendment clause: "[F]our of the smallest states, that do not collectively contain one tenth part of the population of the United States, may obstruct the most salutary and necessary amendments. Nay, in these four

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[20] *Id*. at 88.

[21] *Id*. at 89, 90; *see also* Beeman, *supra* note 16, at 245.

[22] *Id*. at 93.

[23] 3 The Debates in the Several State Conventions 49 (Jonathan Elliot ed., 1845), https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=003/lled003.db&recNum=60&itemLink=D?hlaw:1:./temp/~ammem_LAQ1::%230030061&linkText=1.

states, six-tenths of the people may reject these amendments." These lines have aged well; they are still an apt summary of the ills plaguing Article V.

Yet, the proponents of popular empowerment and their arguments did not prevail. To those in favor of having state legislatures amend the federal constitution, there was no need to directly empower the people in the first place. Elbridge Gerry, like Nathaniel Gorham a member of the delegation of Massachusetts, "could not see any ground to suppose, that the people will do what their rulers will not. The rulers will either conform to or influence the sense of the people." On the contrary, he thought that the people "would never agree on any thing."[24] Oliver Ellsworth was more cynical: "If there be any Legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as wd be competent." He believed that "more was to be expected from the Legislatures than from the people." But he also had historical fact on his side: "To whom have Congs. applied on subsequent occasions for further powers? To the Legislatures; not to the people. The fact is, that we exist at present . . . as a federal society . . . ."[25] This seemed to convince the delegations at Philadelphia. All but one voted in favor of submitting amendments to the legislatures in the states.[26] The "populists" had to accept defeat by the "statists." One year after the debates in Philadelphia, former "populist" James Madison, writing as Publius, published *Federalist 43* and came to praise Article V:

> The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments

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24 *Id*., vol. 5, at 353, https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=374&itemLink=D?hlaw:1:./temp/~ammem_Stzt::%230050375&linkText=1.

25 *Id*., vol. 5, at 354, https://memory.loc.gov/cgi-bin/ampage?collId=lled&fileName=005/lled005.db&recNum=375&itemLink=D?hlaw:1:./temp/~ammem_2574::%230050376&linkText=1.

26 Beeman, *supra* note 16, at 246.

> to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.[27]

Once this was settled, the framers still had to decide about the precise modalities of the amendment procedure. On August 6, 1787, the delegates decided that an application by two-thirds of the states would suffice to call a constitutional convention.[28] But one month later, on September 10, Elbridge Gerry voiced concern that this rule would allow a majority of states to "bind the Union to innovations that may subvert the State-Constitutions altogether."[29] Hamilton added that states would "not apply for alterations but with a view to increase their own powers."[30] Finally, they agreed on the procedure as we know it today: a two-thirds majority in Congress may submit amendments to the states, three-quarters of which then have to vote in favor of the proposal.[31]

It was clear that this design of Article V was not meant to serve the people or to make sure that the Constitution kept up with the political and social zeitgeist of a majority of Americans. Instead, it was meant to protect the states against tyranny by other states or by the federal government. During the Convention, Hamilton stated, "There was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State."[32] And a year after the Convention had ended, he wrote to the people of New York:

> [H]owever difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests [there can be no] room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.[33]

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27 The Federalist No. 43, at 278–79 (James Madison) (Clinton Rossiter ed., 1961).

28 2 Record of the Federal Convention, *supra* note 19, at 188.

29 *Id*. at 557, 558.

30 *Id*. at 558.

31 *Id*. at 559; of course, Article V now also features two alternative modes of amendment.

32 *Id*. at 558.

33 The Federalist, *supra* note 27, No. 85, at 526 (Alexander Hamilton).

In essence, the difficulty of getting three-quarters of the states to accept an amendment was a conscious design choice and not an unexpected flaw. But as the past 230 years have shown, the delegates' fears of activism and even active bullying by some states were unfounded. On the contrary, it is the states that have had a foot on the brake when it comes to codifying social progress. If not for their hesitancy to amend the Constitution, we would have a constitutional ban on child labor, an amendment protecting equal rights, and D.C. would be the fifty-first state of the Union.[34] And those are just the proposed amendments that made it through Congress. All too many proposals died there, as members of Congress know all too well that if not Congress, the state legislatures would kill the proposals. Truly, "it is an unfortunate reality . . . that Article V, practically speaking, brings us all too close to the Lockean dream (or nightmare) of changeless stasis."[35]

Amendments and Partisanship

Of course, neither the Framers nor the states deserve all the blame. Raging partisanship in Congress has made it virtually impossible to get consensus on political matters ranging from ambassadorial confirmations to combating climate change. To change the Constitution, two-thirds of both the House and the Senate need to vote in favor of the proposed amendment. Such clauses disproportionately empower small, vocal minorities, especially if they stand to gain from the status quo. In light of this, achieving the constitutionally mandated supermajorities in both chambers of Congress seems to be a thing of the past. This poses the question: How did we get here?

When Article V was drafted, the Framers did not expect the rise of unfettered partisanship and bad-faith politics. Oliver Ellsworth's advice to lawmakers suggesting they ask for help if they do not feel competent to form an opinion is of course cynical, but it also contained an ounce of truth. There was still a widespread belief that legislatures would follow the better argument, vote in favor of the greater good, have the intellectual honesty to seek out advice, and not deal favors to interest groups.

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[34] Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 L. Libr. J. 303 (2001).

[35] Sanford Levinson, Our Undemocratic Constitution 21 (2006).

Holding this ideal high, the Framers were terrified of the formation of parties, fearing that they would erode the political culture of the young republic. John Adams, then residing in Amsterdam, stated in a 1780 letter to Jonathan Jackson, who had just served as a delegate to the Constitutional Convention of Massachusetts, "There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other."[36]

But it did not take long until partisanship started to creep up on the founders. The rift between Federalists and Antifederalists gave them an early taste of what was to come. In May of 1789, Thomas Jefferson, then minister to France, wrote a letter to John Adams. The summer before, civil unrest had shaken major French cities and in January, the Estates General was summoned to assemble in Paris later that spring.[37] Jefferson witnessed the growing divisions and tensions between factions in France firsthand. Indeed, just weeks after sending his letter to Adams, revolution broke out in Paris. Now, he felt pressed to declare whether he was affiliated with the Federalists or the Antifederalists, when the newly formed federal government was just a week old.

> I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in any thing else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.[38]

Certainly, Jefferson's experience in France shaped his fear of the impact parties might have on American political culture. He was concerned about the free flow of ideas and independent thinking, without which parties would come to poison the practicability of the amendment process.

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[36] *From John Adams to Jonathan Jackson* (Oct. 2, 1780), https://founders.archives.gov/documents/Adams/06-10-02-0113.

[37] The Editors of Encyclopaedia Britannica, *French Revolution,* Encyclopedia Britannica (Sept. 10, 2020), *at* https://www.britannica.com/event/French-Revolution.

[38] *From Thomas Jefferson to Francis Hopkinson* (March 13, 1789), https://founders.archives.gov/documents/Jefferson/01-14-02-0402.

The American people got a last warning by George Washington as he left office. In his Farewell Address, he cautioned about the ruthlessness of parties and their officials. In his view, they served

> to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

He went on to predict that

> they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.[39]

Unfortunately, by that time, the Constitution had already been ratified and Article V embodied the final decision on its amendment procedure. It was too late to account for rising partisanship and the dangers associated with it.

Amendments as a Reflection of Constitutional Moments

So far, we have seen how the states were empowered in the amendment procedure at the expense of the people, and how the framers failed to make Article V party-proof until it was too late. Together, this has led to an increasing inability to amend the Constitution. In the eyes of some, this is a good thing. John O. McGinnis and Michael B. Rappaport, for example, argue that supermajority rules — like those of Article V — are "a sound method of producing legitimate and desirable entrenchments."[40] This may

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[39] George Washington, *Farewell Address* (1796), https://avalon.law.yale.edu/18th_century/washing.asp.

[40] John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 11 (2013).

be true in theory. But has it worked out in practice? Are the entrenchments caused by Article V legitimate and desirable?

In 1993, Bruce Ackerman published the first volume of his *We the People* trilogy.[41] There, he develops a theory of "constitutional moments." These are distinct points in history that "involve the overthrow of preceding ruling arrangements, including the important role in these arrangements played by established judicial doctrine" and are "extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system."[42] Originally, Ackerman felt that the United States had only had three of those moments: the Founding, Reconstruction, and the New Deal. Eventually, he accepted that there were more than three, including the Senate's accession to congressional–executive agreements in 1945[43] and the Civil Rights Era of the 1950s and 1960s.[44]

In the late eighteenth century, constitutional moments and constitutional amendments went hand in hand. This started with the Bill of Rights. During the drafting of the Constitution, it was subject to heavy debate between Federalists and Antifederalists. Initially, it seemed like the Federalists and their opposition to the Bill would emerge from this debate triumphant. Hamilton slammed the idea of a codified Bill of Rights and instead pointed to the people's *pouvoir constituent*: "Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." And further: "[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous."[45]

The Antifederalists, meanwhile, strongly believed that the Bill of Rights was necessary. For example, to "Brutus," the much-quoted opponent of the Constitution, there was nothing distinct about a republic that would safeguard the people's rights better than monarchies did. To him, elected

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41 Bruce Ackerman, We the People: Foundations (1993).

42 Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's "We the People*," 108 Yale L.J. 2237, 2239 (1999).

43 Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799, 835 (1995); David Golove, *Against Free-Form Formalism,* 73 N.Y.U. L. Rev. 1791 (1998).

44 Bruce Ackerman, *The Living Constitution,* 120 Harv. L. Rev. 1737, 1765 (2007).

45 The Federalist, *supra* note 27, No. 84, at 513 (Alexander Hamilton).

politicians were as capable oppressors as monarchs: "But rulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes, and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another."[46]

Eventually, James Madison stepped up and lobbied for the Bill, convincing eleven of the fourteen states to ratify it.[47] A constitutional moment happened, and ten constitutional amendments were at its center.

The next of Ackerman's moments happened just three-quarters of a century later. The young republic broke apart over the South's fervent embrace of slavery. After its defeat in the Civil War, the Union demanded that the former Confederate states ban slavery, accept a significant reduction in state power, and give Black men the right to vote. It was not a legislative bill or a treaty between the North and the South that codified this, but three constitutional amendments.[48] The Waite Court initially gutted them, but their continued existence as the Thirteenth, Fourteenth, and Fifteenth Amendments ensures that the constitutional moment of Reconstruction remains part of this nation's constitution.

The reflection of the next three constitutional moments in amendments is much murkier. The New Deal upended much of American economic policy and legislation. Yet its only reflection in the Constitution is the Twenty-first Amendment, which ended Prohibition. At least part of the rationale behind this amendment was that banning alcohol turned out to be exorbitantly costly for the taxpayer. Its enforcement alone cost $300 million, and it caused a loss of $11 billion in tax revenue.[49] During the Great Depression, this was a luxury the federal government could no

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46 *Brutus II,* New York Journal (November 1, 1787) *at* https://archive.csac.history.wisc.edu/Brutus_II.pdf.

47 Richard E. Labunski, James Madison and the Struggle for the Bill of Rights 178–255 (2006).

48 *The End of Slavery and the Reconstruction Amendments*, Bill of Rights Institute, *at* https://billofrightsinstitute.org/essays/the-end-of-slavery-and-the-reconstruction-amendments.

49 Michael Lerner, *Unintended Consequences of Prohibition*, PBS, *at* https://www.pbs.org/kenburns/prohibition/unintended-consequences/; Jesse Greenspan, *How the Misery of the Great Depression Helped Vanquish Prohibition,* History (January 2, 2019), *at* https://www.history.com/news/great-depression-economy-prohibition.

longer afford. But this is only a faint reflection of the New Deal. None of the core programs and institutions we now associate with the New Deal have found their way into the Constitution, nor has the extent to which it has transformed the role of the government in America's society and economy. The Twenty-first Amendment hardly does justice to the New Deal's importance as a fundamental constitutional moment.

The civil rights era suffered a similar fate. Its only reflection in the text of the constitution is the Twenty-fourth Amendment of 1964, which prohibits states from limiting suffrage to those who paid a poll tax. This amendment helped fight disenfranchisement of voters in the South and is an important achievement of the civil rights movement.[50] But it is not reflective of the movement's ambitious goals and far-reaching accomplishments. And the accession to congressional–executive agreements changed congressional dynamics and the way America interacts with the world so fundamentally that Ackerman deems it a constitutional moment, but it has left no trace in the text of the Constitution at all. Hence, in the almost six decades since 1964, no constitutional moment has been lifted to actual constitutional status.

This list is of course subjective and not exhaustive. One might disagree with the inclusion or exclusion of one event or another. But the general point stands: over time, moments of supreme historic importance are seeing decreasing reflection in the Constitution. Where, at the founding, social and political history had a strong influence on the text of the Constitution, this is not the case today. That is not for want of trying. The current Congress alone has made 117 proposals to change the Constitution.[51] All of them failed. And the proposed Equal Rights Amendment remains unratified. The last time a state legislature picked it up was in 2021, when the North Dakota Legislative Assembly actually rescinded its 1975 ratification.[52] Put simply, amendments and constitutional moments used to

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[50] Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax,* 103 Nw. U. L. Rev. 63 (2009).

[51] Congress.gov (saved search), *at* https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22117%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22%5C%22Proposing+an+amendment+to+the+Constitution+of+the+United+States%5C%22%22%7D.

[52] Nicholas Quallich, *North Dakota Legislature Rescinds 1975 Ratification of The Equal Rights Amendment,* KX News (Mar. 19, 2021), *at* https://www.kxnet.com/news/local-news/north-dakota-legislature-rescinds-1975-ratification-of-the-equal-rights-amendment.

be intimately related. Just consider the Bill of Rights. Today, they seem to be strangers. Amending the federal constitution no longer plays a role in entrenching broad societal consensus.

III. AMENDING STATE CONSTITUTIONS

If states truly are to be laboratories of democracy, as Justice Brandeis suggested in his *New State Ice v. Liebmann* dissent,[53] then their amendment provisions are exhibits A and B for it. On the one hand, their drafting histories show disagreement on what the best provisions were, followed by a gradual convergence over time resulting in remarkable homogeneity today. On the other hand, they have come to create environments in the state that are hyper-conducive to experimenting with different constitutional clauses. The excessively long constitutions of California and also of states like Texas and Alabama, enabled by lax amendment provisions, are testament to this.

Revolutionary Constitutions

In 1816, Thomas Jefferson commented on proposals to revise the 1776 constitution of Virginia. In a letter to Samuel Kercheval, he lamented, "Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched."[54] Since the first revolutionary constitutions were drafted, states had wrestled with this issue, unable to find a uniform answer to the questions: "Who should touch a constitution?" and "When should it be touched?"

In essence, there were three competing models of amendment clauses. Seven states, among them Virginia and New York, followed the lead of the Articles of Confederation and did not include any provision that allowed for subsequent amendments or delineated the process.[55] A second group of states, comprising South Carolina, Delaware and Maryland, allowed their

[53] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[54] *From Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval), Proposals to Revise the Virginia Constitution* (July 12, 1816), https://founders.archives.gov/?q=Ancestor%3ATSJN-03-10-02-0128&s=1511311111&r=2.

[55] Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 118 (1910); the states were New Jersey, Connecticut, North Carolina, New Hampshire, and Rhode Island.

legislatures to vote on amendments. And lastly, four states had provisions that allowed for special constitutional conventions to make amendments.

These four states — Pennsylvania, Vermont, Georgia, and Massachusetts — were the first to let the people participate directly in a constitutional amendment procedure. Section 47 of the 1776 constitution of Pennsylvania, for example, holds that amendments "shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[56] In these systems, popular input played a vital role in the amendment process. About four months later, the constitution of Georgia adopted a similar mechanism that took this idea one step further. Article LXVII of the state's 1777 constitution states: "No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State."[57] For the first time, citizens of a state were directly called upon not only to voice their opinions on an amendment or to publicly discuss it, but to decide its fate by casting a vote.

Other states were quick to adopt this model. In 1784 New Hampshire did away with its 1776 constitution and drafted a new one. While the previous constitution had no codified amendment clause, part of the new constitution was a provision that allowed for amendments if they were proposed by delegates to a constitutional convention and "approved by two-thirds of the qualified voters present, and voting upon the question"[58] Such supermajoritarian amendment rules can still be found today.

While other states followed suit, there were no new developments in amendment provisions until 1818. It was then that Connecticut decided it could no longer rely on its so-called "charter" of 1662 but that it needed a proper constitution.[59] Article XI contained this new constitution's amendment provision:

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[56] Pa. Const. (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

[57] Ga. Const., art. LXVII (1777).

[58] N.H. Const. (1784), https://en.wikisource.org/wiki/Constitution_of_New_Hampshire_(1784).

[59] Wesley W. Horton, The Connecticut State Constitution: A Reference Guide (1993).

> [I]f two thirds of each house . . . shall approve the amendments proposed . . . , said amendments shall . . . be transmitted to the town clerk in each town in this State; whose duty it shall be to present the same to the inhabitants thereof, . . . and if it shall appear . . . that a majority of the electors present at such meetings, shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution.[60]

With this provision, Connecticut established the now-familiar practice of amending the constitution by a proposal in the legislature (and not a convention or delegation as was the case in previous constitutions) which is subsequently adopted by popular vote.

Some believe that Alabama's constitution was the first to let citizens vote directly on proposed amendments during regular elections.[61] This is correct but does not show the full picture. Alabama was merely the first state to combine regular elections and votes on proposed amendments. As seen, it was in fact in Connecticut that the legislature and the people started working on the constitution hand in hand. From there on, the idea caught on. Today, all but one of the states require constitutional amendments to be accepted by the citizens after they are placed on the ballot either by the legislature or by a ballot proposition.[62] In nine states, amendment by way of a constitutional convention has even been struck from the constitution altogether.[63]

Excessive Change in the States

Since then, state constitutions have exploded in length. Early constitutions were just a few thousand words long, which hardly changed for about a century. But once the responsibility over constitutional amendments was placed in the hands of two different entities — legislature and voters — as opposed to giving any one party (near) complete control over the process, the rate of amendment quickly picked up.

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60 Conn. Const. (1818), https://collections.ctdigitalarchive.org/islandora/object/30002:22194671.

61 Dodd, *supra* note 55, at 123; Ala Const. (1819), https://avalon.law.yale.edu/19th_century/ala1819.asp.

62 53 The Council of State Governments, Book of the States 8 (2021).

63 *Id*. at 11.

When the constitution of California was ratified in 1879, for example, it was about 8,900 words long. By the 1960s, amendments had caused it to grow to 75,000 words. This was deemed too long and convoluted, so a Constitutional Revision Commission was tasked with shortening it. It found that "too many amendments have been submitted and adopted"[64] and recommended cutting the document by an impressive total of 40,000 words, spread over several smaller proposals.[65] Californians got to vote on these proposals, but unfortunately, far from all recommendations were approved and, today, the constitution has surpassed its 1960s length, standing at 77,000 words. Other constitutions are doing even worse. The constitution of Alabama, for example, has been amended more than 900 times since its adoption in 1901 and has grown to an astonishing 403,000 words in length, making it the longest by far. For comparison, this is about 4.4 times more than the constitution of the runner-up, Texas.[66] Most of this length is due to a controversial provision that allows voters of just one county to single-handedly amend the constitution as long as the amendment only concerns this one county.[67]

Of course, constitutions that are this easy to amend and that are this flush with change are not reflective of constitutional moments either. In such systems, amendments do not come with "extremely high-temperature, high-pressure bursts of energy that sweep across the whole political system"[68] anymore, since change has become so commonplace. This is not just an academic problem. Early on, Californians felt that their constitution was getting out of hand and was awash with amendments that had nothing "constitutional" about them. In 1931, Charles Aikin observed in a short piece written for the *American Political Science Review* that "[t]he electorate has become so accustomed to approving or rejecting

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64 Constitution Revision Commission, *Minutes of the Article XVIII Committee* 2 (July 14, 1966).

65 Joseph R. Grodin, Calvin R. Massey & Richard B. Cunningham, The California State Constitution 19 (1993).

66 The Council of State Governments, *supra* note 62, at 7.

67 *Id.*; Ala. Const., § 284.01; William Histaspas Stewart, The Alabama State Constitution 242–43 (2016).

68 Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's "We the People,"* 108 Yale L.J. 2237, 2239 (1999).

constitutional amendments that the man in the street refers to all proposals placed on the ballot as amendments."[69] Little has changed. Today, clauses in the Californian Constitution stipulate that textbooks are to be used until the eighth grade[70] or that certain tax exemptions are applicable to buildings under construction.[71] This has nothing to do with the revered document a constitution should be and that citizens have come to expect. When the Golden State's constitution was ratified, it was described as "a sort of mixture of constitution, code, stump-speech, and mandamus."[72] California's amendment practices have all but made sure that it has become much heavier on the code aspect and even lighter on the constitution aspect.

IV. A WAY OUT?

Neither the situation on a federal level nor that in the states is ideal. But is change likely? Certainly not with the federal constitution. While Article V could itself be changed, making amendments easier and more reflective of popular opinion,[73] is all but impossible to get supermajorities in Congress and the states that would vote to cut their own powers.

In California, the situation is somewhat different, but not much more hopeful. In the 1960s, California's Constitutional Revision Commission remarkably managed streamlining the state's constitution significantly. But many of those recommendations were defeated at the polls, and, more importantly, they failed to adequately address the roots of the problem. While a modest proposal was made to reform Article XVIII, which lays out the amendment procedure, by requiring votes on amendment proposals on two separate days,[74] some members of the Article XVIII Subcommittee

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[69] Charles Aikin, *The Movement for Revision of the California Constitution: The State Constitutional Commission,* 25 Am. Pol. Sc. Rev. 337 (1931).

[70] Cal. Const., art. IX § 7.5.

[71] Cal. Const., art. XIII § 5.

[72] Henry George, *The Kearny Agitation in California,* 17 Popular Sci. Monthly 43, 445 (Aug. 1880).

[73] George Mader, *Unamendability in the Constitution,* 99 Marquette L. Rev. 841, 848 (2016).

[74] Constitution Revision Commission, *supra* note 64, at 2.

felt that even this was too much.[75] As a result, the provision ended up surviving the reform period of the 1960s and 1970s unscathed. As long as it is exceedingly easy to propose amendments, either through a ballot proposition or by a disinterested legislature, amendments will keep playing a subordinate role in constitutional moments.

But there is an alternative. Not all states suffer from the ills that plague the constitutions of California, Alabama, or Texas. Until now, Delaware has been the state of choice for corporate lawyers. Its 1,000,000 corporations — one for every Delawarean — are a testament to that.[76] For the most part, constitutional lawyers have overlooked the Diamond State. But it might be time to change that. Delaware is the only state in the Union that does not require its people to vote on constitutional amendments. Instead, it places the amendment process completely in the hands of the legislature. While it is counterintuitive that this would serve the people better, it actually means that state legislators have to take complete responsibility for the fate of the constitution. Unlike in California, they know that they would be punished at the ballot if the constitution deteriorated. This makes them trustees of the constitution of sorts. As a result, the state's constitution was not changed at all in 2020 and only 1.2 times per year on average since its inception, as opposed to Alabama's 8.1 times, California's 3.8 times, and Texas' 3.5 times.[77] This amendment system has also succeeded in preventing excessive length. Today, the Delaware Constitution is just 25,445 words in length, up from 7,495 in the original version of 1897. This is a rather modest increase that stayed well below the national average of 42,000.[78] In light of this unique attitude toward the amendment process, it seems like a fitting coincidence that Delaware was the only state in 1787 that objected to handing the power of amendment in Article V to the states.[79]

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[75] Constitution Revision Commission, *Article XVIII Minority Committee Report* (Oct. 1966).

[76] *About,* Delaware Division of Corporations, *at* https://corp.delaware.gov/aboutagency/#:~:text=The%20State%20of%20Delaware%20is,made%20Delaware%20their%20legal%20home; *Quickfacts: Delaware,* U.S. Census (July 1, 2021), https://www.census.gov/quickfacts/DE.

[77] The Council of State Governments, *supra* note 62, at 5.

[78] *Id.* at 8.

[79] 2 Record of the Federal Convention, *supra* note 19, at 188.

States might be served well if they adopted this model for their own constitutions. But it might also be the better option for the federal constitution. Take Germany, for example. The European country is also organized as a federal state with separate constitutions for the federal and state levels. There, the amendment process requires two-thirds majorities in both chambers of parliament (Bundestag and Bundesrat), but it involves the states only indirectly (through the Bundesrat) and no popular votes at all. As a result, the Basic Law of the Federal Republic of Germany (the German constitution) has been amended about fifty-four times in the first sixty years of its existence, a rate quite comparable to that of Delaware. The German people, in the meantime, could trust that societal changes and constitutional moments would be reflected in the federal constitution. In the same time period, they hardly touched the sixteen state constitutions. There, the total number of amendments is between zero and thirty-six.[80] This shows two things: First, entrusting constitutional amendment to one sufficiently democratically legitimated branch of government calms amendment rates.[81] Second, if the people feel that the federal government is responsive to popular discourse and a gradually changing consensus, they feel less need to make changes in the state. For the U.S. Constitution, this would mean that changing Article V and making amendments more frequent as a consequence, would likely cause amendment rates in the states to slow down.

The examples of Delaware and Germany are quite different indeed. But this is a good thing. They show that certain design choices — legislative amendments, limiting the actors involved in amendment processes — work in a variety of contexts and on both a federal and a state level.

V. CONCLUSION

Of course, neither changing Article V nor changing any of the states' amendment procedures is probable. The fact that a Constitutional Reform

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[80] Deutscher Bundestag Wissenschaftliche Dienste, *60 Jahre Grundgesetz – Zahlen und Fakten,* Deutscher Bundestag (2009), https://www.bundestag.de/resource/blob/414590/7c0ab6898529d2e6d7b123a894dbeb8f/wd-3-181-09-pdf-data.pdf.

[81] This would not be the case if, for example, the *states* had complete control over the amendment process of the *federal* constitution: *see e.g.*, Charles L. Black, T*he Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957 (1963).

Commission in California could not even agree to recommend two readings instead of one should suffice as proof thereof. However, this paper is not intended as a policy brief. Instead, it aims to highlight the shortcomings of amendment clauses in the state and federal constitutions, investigate their historical origins, and finally show that better solutions are readily available. Importantly, it showed that both a lack of public participation and an excess thereof can be counterproductive to constitutional culture. Solid amendment provisions neither make it too easy to change the constitution, nor do they ensure that the constitution is all but fossilized. Instead, they give citizens an incentive to reach out and work together so that whatever is deemed a social consensus would be reflected in the constitution.

Luckily, we do not have to resort to our imagination or to foreign mechanisms to come up with a better solution. At least for states like California, Texas, or Alabama, this better solution has been tried and tested by one of their peers. Delaware has a model of amendment that has served the state well in preserving the constitution's "constitutionality," i.e., its limitation to essential social and political questions and its openness to change, while ensuring that the rate of amendment does not get out of hand. Today, Delaware is the only state with this model. But it needn't be. California, Texas, and Alabama all have multiple constitutions in their past. If they decide to add one more to that list, its drafters should take a look at the Diamond State. They might strike constitutional gold.

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