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2009

# Can a Constitutional Amendment Be Unconstitutional?

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# OKLAHOMA CITY UNIVERSITY LAW REVIEW

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VOLUME 33

FALL 2008

NUMBER 3

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## ARTICLES

### CAN A CONSTITUTIONAL AMENDMENT BE UNCONSTITUTIONAL?

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I. INTRODUCTION.....	668
II. CONSTRAINTS.....	669
A. Logical Constraints .....	674
B. Substantive Limitations.....	678
C. Procedural Limitations .....	685
D. Human Rights .....	687
III. LEGITIMACY AND JUSTIFICATION .....	694
A. Legitimacy .....	696
B. Justification .....	701
1. Utilitarianism .....	702
2. Rights Theory .....	712
3. Pluralistic Communitarianism .....	719
4. Overlapping Normative Systems .....	723
IV. COMPARATIVE LAW AND THE ROLE OF THE COURTS.....	727

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A. Comparative Law .....	727
B. Role of the Courts .....	735
V. CONCLUSION .....	746

## I. INTRODUCTION

Is there an independent legal method separate from the political process for handling a constitutional amendment that may be inconsistent with, or contrary to, the basic structure and rights the Federal Constitution currently inaugurates, or are courts stuck with having to accept the amendment on its face? This problem is not unique to the United States. Nor is it the same problem as whether a state constitutional amendment may violate the Federal Constitution.<sup>1</sup> While I initially focus on the U.S. Constitution, I plan, before the end of this piece, to broaden out to other national constitutions as well, and certainly some of the arguments might also apply to state constitutional amendments, as we see with the controversy over the constitutionality of California's Proposition 8. In this vein, it will make sense to consider cases from other nations, like *Kesavananda Bharati v State of Kerala*,<sup>2</sup> in which the Supreme Court of India held that the judiciary could strike down amendments to the constitution passed by Parliament that conflict with the constitution's "basic structure."<sup>3</sup> The U.S. Supreme Court has never addressed what constitutes the basic structure of the U.S. Constitution. This is the question addressed in this article.

Part II of this article considers the reasonableness of various types of constraints on constitutional amendments, including logical, substantive, procedural, and human-rights constraints. Part III considers how our own constitutional order operates and what logical and normative assumptions courts make to decide the legitimacy of certain kinds of transformative constitutional cases. Part III shows how, under a fairly

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1. I am assuming, for purposes of overriding state constitutional amendments, that the federal constitutional principle written in Article VI of the U.S. Constitution applies:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

2. A.I.R. 1973 S.C. 1461.

3. *Id.*

reasonable set of assumptions regarding justification, amendments made to our Constitution could undermine popular acceptance and the promotion of individual rights and could be found unconstitutional. Part IV considers how other countries have attempted to deal with this issue, and how their assumptions may not be all that different from the ones made in the United States. Part IV also shows why, in the American legal system, the Supreme Court is the proper body to ultimately decide this question, but subject to a somewhat restrictive use of the word “ultimately.” Finally, I conclude with the view that although circumstances might arise where courts are justified in holding an amendment unconstitutional, this need not raise too much concern for existing democratic institutions.

## II. CONSTRAINTS

A number of constraints operate on constitutional texts. Some of these constraints derive from the rules of logic alone; others derive from the explicit language of the text. Still, others derive from the specific goals the text was meant to serve while also providing a foundation for the language used. Additionally, limitations implied by “universal” agreements or *jus cogens* principles under international law and our evolving understanding of human rights, may exist as well. All of these conditions apply whether we are discussing a written constitution, like that of the U.S. Constitution, or one that derives its existence from an oral tradition in which certain separate documents are afforded constitutional status, as in the case of the Constitution of Great Britain.<sup>4</sup> Presentation notwithstanding, in both instances, language serves as the medium of communication, and thus, the constraints that apply to language are the constraints that apply to constitutions as well.

Still, because it is language we are talking about, and specifically language in a constitutional text, as a prelude to this discussion, it helps to set out a couple of definitions. First, what is meant by the noun “constitution” in context to governments? Second, what is meant by the verb “to amend” in context to constitutions? Here, it is important to note that words are symbols, and only symbols have meanings; things do not have meanings unless they become symbols through their use to represent something else, as in an artist’s use of piled-up broken cars to

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4. Here, I have in mind that although the British Constitution is unwritten, it certainly includes principles derived from, among other places, Magna Carta.

represent modern society.<sup>5</sup> Hence, the quoted phrase, the “Sears Tower,” merely mentions two words in the English language. However, when used in the sentence, “The Sears Tower is the tallest building in Chicago,” they reference not words, but a particular building located in the Chicago Loop. Similarly, “the tallest building in Chicago,” when used to identify a Chicago landmark, is just a set of words and represents the same building that the *name* “Sears Tower” represents.

The use of the word “constitution,” according to Wikipedia, references

a system for government—often codified as a written document—that establishes the rules and principles of an autonomous political entity. In the case of countries, this term refers specifically to a national constitution defining the fundamental political principles, and establishing the structure, procedures, powers and duties, of a government.<sup>6</sup>

The Wikipedia definition belies two particularly important facts about how the symbol “constitution” is used in political discussions. The first is that constitutions define the formal rules of governance, including the institutional structures that define the kind of government one is going to have. The second is that constitutions create autonomous, in the sense of self-governing, political entities. It need not mean, as will be seen below, that constitutions be completely separate from outside constraint.

The second definition, that of amend, according to Merriam-Webster, comes from the Latin word *emendare*, and when used as a transitive verb, means:

**1:** to put right; *esp:* to make emendations in (as a text) **2a:** to change or modify for the better: IMPROVE <~ the situation>  
**b:** to alter *esp.* in phraseology; *esp:* to alter formally by

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5. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 88 (Sarah Touborg ed., 13th ed. 2009).

6. Wikipedia, Constitution, <http://en.wikipedia.org/wiki/Constitution> (last visited Jan. 9, 2009). *Ballentine's Law Dictionary* defines “constitution” as “[a] system of fundamental laws or principles for the government of a nation, state, society, corporation, or other aggregation of individuals.” *BALLENTINE'S LAW DICTIONARY* 253 (3d ed. 1969). I prefer the Wikipedia definition here because it raises the issue of autonomy, which is central to whether *outside* factors might affect the constitutionality of an amendment.

modification, deletion, or addition <~ a constitution> . . . .<sup>7</sup>

This definition signals that the amendment serves the normative purpose of making the text better in some relevant way from how it is currently understood. It may be better in terms of the political goals by which the text came about and is supposed to serve, or simply may be better by clarifying some language so as to avoid ambiguity. How the sense of improvement relates to its object is important, because the verb in this context is transitive. Consequently, it would not properly be considered an amendment, for example, to change the U.S. Constitution to establish an absolute monarchy, because that would be completely out-of-step with the goal of the original text, which was, and has continued to be, to establish a republic.<sup>8</sup> But then what would such a change toward monarchy be?

Taken together, the two definitions set out the basic rules and structures that are thought to be constitutive of a certain kind of government. They define the kind of government sought, and they define how it might be modified to be made more perfect. The definitions are not restricted to any particular kind of government, and thus they fit democratic republics, constitutional monarchies, and absolute monarchies with very simple phrases like “what the queen says

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7. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 39 (11th ed. 2004).

8. In *The Federalist No. 39*, James Madison wrote:

The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

THE FEDERALIST NO. 39, at 236 (James Madison) (Clinton Rossiter ed., 1961). Here, it might be noted that another writer of the *Federalist Papers*, Alexander Hamilton,

who had inherited almost nothing, was wont to define a republic as any government in which no one had a hereditary status; whereas his friend Madison, who had inherited the status of freeman amidst slavery . . . , preferred a definition that would avoid the sticky question of status and merely considered as republican any system in which governmental power derived from the consent of the “public.”

FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 5 (1985).

is law.”<sup>9</sup> Definitions serve this function by setting out common meanings of words to be used within language games<sup>10</sup> that are designed to perform certain tasks.<sup>11</sup> Constitutions, in particular, make use of language sometimes with very narrow, concrete meanings. Other times, they make use of language with more open-textured, abstract meanings to define areas of institutional responsibility and authority, along with various procedural requirements for how a government is to operate.<sup>12</sup>

9. H.L.A. Hart states that “[i]n a very simple system like the world of Rex I . . . , where only what he enacts is law and no legal limitations upon his legislative power are imposed by customary rule or constitutional document, the sole criterion for identifying the law will be a simple reference to the fact of enactment by Rex I.” H.L.A. HART, *THE CONCEPT OF LAW* 100-01 (2d ed. 1994).

10. Ludwig Wittgenstein has noted:

In the practice of the use of language . . . one party calls out the words, the other acts on them. In instruction in the language the following process will occur: the learner *names* the objects; that is, he utters the word when the teacher points to the stone.—And there will be this still simpler exercise: the pupil repeats the words after the teacher—both of these being processes resembling language.

We can also think of the whole process of using words . . . as one of those games by means of which children learn their native language. I will call these games “language-games” . . . .

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 5e (G.E.M. Anscombe trans., 1953). Here, Wittgenstein is talking about learning a native language. But the idea expands to include all sorts of specialized languages—like the language of physics, mathematics, and law—as involving particular symbols that one comes to assign specific meanings to.

11. Here I note a certain performative use of language, where the language itself, once it is given expression, actually changes the world in some important way. COPI & COHEN, *supra* note 5, at 72. *See also* J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 235-36 (J.O. Urmson & G.J. Warnock eds., Oxford Univ. Press 2d ed. 1970) (1961) (discussing the original take on the term “performative” that was thought near to the lawyers’ word “operative” language). Take, for example, the exchange of the words “I do” by two persons who are legally qualified to marry, or the statement “I promise” by one who commits to some action. COPI & COHEN, *supra* note 5, at 72. In both instances, the world is changed in some important way. *See id.* In the first case, the two single speakers are now a married couple. In the second case, an obligation is created that previously had not existed.

12. John Hart Ely has argued:

Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured. At one extreme—for example the requirement that the President “have attained to the Age of thirty five years”—the language is so clear that a conscious reference to purpose seems unnecessary. Other provisions, such as the one requiring that the President be a “natural born Citizen,” may need a reference to historical usage so as to exclude certain alternative constructions—conceivably if improbably here, a requirement of legitimacy (or illegitimacy!) or non-Caesarian birth—but once

Constitutions also will often provide limitations by defining certain types of actions as *ultra vires*, or “beyond the powers.” Such examples include the limitation against cruel and unusual punishment in the Eighth Amendment to the U.S. Constitution<sup>13</sup> and the restriction on *ex post facto* criminal legislation in Article I.<sup>14</sup> For our purposes, the question is how a constitution’s language restricts the kinds of amendments that can be made when the language itself implicates various purposes and goals, and there are certain logical and human-rights constraints?

Article V of the U.S. Constitution provides only a *formal* procedure for amending the Constitution, and it has only two substantive limitations:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>15</sup>

The first substantive limitation, “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth

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that “dictionary function” is served, the provision becomes relatively easy to apply. Others, such as the First Amendment’s prohibition of congressional laws “abridging the freedom of speech,” seem to need more. . . .

Still other provisions, such as the Eighth Amendment’s prohibition of “cruel and unusual punishments,” seem even more insistently to call for a reference to sources beyond the document itself and a “framers’ dictionary.”

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13 (1980) (footnote omitted).

13. U.S. CONST. amend. VIII.

14. *Id.* art. I, § 9, cl. 3.

15. *Id.* art. V.



Section of the first Article,” prevented the abolition of the slave trade until 1808, which is obviously no longer relevant.<sup>16</sup> The second substantive limitation states “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>17</sup> These two substantive limitations are the only ones the founders drafted into Article V. So, it is at least conceivable that much, if not all, of the Constitution could be amended, provided that the Senate restriction remained unchanged or that any change was consented to by the affected states. But then there is another question: could Article V itself be amended to remove the restriction? Or, could the Supreme Court hold unconstitutional some kinds of amendments even though they were ratified in accordance with the procedure set out in Article V?

#### A. Logical Constraints

Here, I begin by noting that all language that is meaningful must presuppose certain basic laws of logic. These are the three laws of thought, which were probably first explicitly recognized by Aristotle. They are the principle of identity, the law of contradiction, and law of excluded middle.<sup>18</sup> Accordingly, every sentence that is meaningful assumes these three laws.<sup>19</sup> Thus, if I say, “It is raining here now,” I mean to imply just that it is, in fact, raining here now. I also mean to imply that the statement, “It is not raining here now,” is a false statement, and, further, that it is not possible to both be and not be raining here now.<sup>20</sup> These principles are obviously true and operate on all uses of language, whether made explicit in written form or not.<sup>21</sup> Thus, a constitution with contradictory principles, like one that both affirmed and disaffirmed, in the same way, freedom of speech, would in fact be saying nothing meaningful. If the two seemingly contradictory principles entered the constitution at different points in time, courts could address this problem by adopting a canon of interpretation where the latter provision rescinded the former, thereby allowing for the constitution to

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16. *Id.*

17. *Id.*

18. COPI & COHEN, *supra* note 5, at 367-68.

19. Provided that the “statements [are] unambiguous, nonelliptical, and [contain] precise terms,” these three “‘laws of thought’ are unobjectionable.” *Id.* at 369.

20. *See id.*

21. *Id.*

remain consistent.<sup>22</sup> A more difficult example arises when the contradiction goes to the source of the authority, rather than what it is claiming. But this situation is only *apparently* more difficult, because the source may be implying the opposite principle, thereby giving rise to the same type of contradictory problem.

Consider, for example, a problem posed by David Luban concerning the effect on the Catholic Church if the Pope were to claim *ex cathedra*, i.e., as an infallible statement, “that God does not exist.”<sup>23</sup> Here, we begin by noting that the Pope’s constitutional authority, especially his authority *ex cathedra*, arises from more than just his election by the College of Cardinals; it arises also from the dogmatic Catholic belief that the spirit of God operates when the Pope addresses questions of faith and morals in an infallible encyclical.<sup>24</sup> Thus, were the Pope to claim infallibly that God does not exist, a dilemma of authority would arise for the church. If the Pope’s claim is taken as true, its foundation is automatically undercut. If it is taken as false, it cannot be infallible notwithstanding that it arises from satisfying some procedure alone, namely, that he made it part of an infallible encyclical and delivered it from the chair of Peter.<sup>25</sup> In other words, there are substantive and, in this case, dogmatic limitations to what the Pope can say infallibly that transcend both his title and the procedure he follows.

By analogy, if a constitution, like the U.S. Constitution, is what H.L.A. Hart terms, “the rule of recognition,”<sup>26</sup> then any amendment taken to be valid under it should satisfy the procedure set out in Article V.<sup>27</sup> But if this were all that was necessary, amendments could be validly adopted even though their acceptance by the broader legal

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22. See *Whitney v. Robertson*, 124 U.S. 190 (1888) (construing an act of Congress passed after a treaty was made).

23. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 252 (1988).

24. DOGMATIC CONSTITUTION ON THE CHURCH LUMEN GENTIUM SOLEMNLY PROMULGATED BY HIS HOLINESS POPE PAUL VI ON NOVEMBER 21, 1964 (1964), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html).

25. Here, it might be argued, “[c]ouldn’t God have existed, given the Pope’s infallibility in certain areas, and then ceased to exist.” However, this criticism could be resolved by altering the Pope’s infallible statement to be that “God *never* existed.” In short, we get very close to the idea of a logical contradiction when the foundation for some authority is denied in the name of the authority whose foundation it is. I owe this criticism, which allows me to make clearer my position, to Mark Strasser of Capital University Law School.

26. See HART, *supra* note 9, at 100-01.

27. See U.S. CONST. art. V.

community would prove very hollow. For example, were the Constitution amended to no longer guarantee the basic civil liberties of freedom of speech, press, or assembly,<sup>28</sup> would that be acceptable to most jurists, let alone the vast majority of Americans? Certainly the amendment could meet the procedural requirement for validity if passed by two-thirds of both Houses of Congress and three-quarters of the legislatures of the several states. But would it be acceptable to most Americans? Here, it might be thought that because three-fourths of the states had accepted it, its acceptability had been shown. But then one could easily imagine situations in which the circumstances of the amendment's adoption did not truly reflect the views of most Americans. For example, this could occur when most Americans had not been adequately informed of the amendment's implications or what it meant. Perhaps there had been an intentional effort to mislead the public about the meaning of the amendment by claiming that it would afford greater personal security; perhaps the country is in a state of war or in fear of terrorist attacks, and feelings of insecurity are running so high that they are actually overcoming the ability of the people to foresee the implications of various choices.

In these instances, one can imagine limiting freedoms such as speech, press, and assembly, especially concerning groups thought to be connected with terrorists' organizations. Similarly, suspected terrorists might be denied such basic rights as the right to a fair trial, the right to have knowledge of the evidence against them, and the right to adequate representation of counsel.<sup>29</sup> In a related vein, imagine initiatives to deny constitutional rights, such as those given by the Fourth Amendment (which currently protects "persons"),<sup>30</sup> to illegal aliens or persons without identity cards as a way to affirm immigration laws; or, imagine initiatives that would avoid the guarantee of one citizen-one vote to prevent the representation of minorities. All of these amendments could

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28. See *id.* amend. I.

29. In *Boumediene v. Bush*, the Supreme Court noted, regarding the detaining of prisoners captured in Afghanistan and elsewhere, that U.S.

[s]ecurity depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.

*Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

30. See U.S. CONST. amend IV.

conceivably satisfy the procedures for adopting amendments set forth in Article V; yet, would they be acceptable to most Americans?

Herein lies the dilemma for a society in which the principle of consent has no substantive limitations, or at least none beyond those mentioned in Article V. Either the public must accept the “good intentions” of public officials and have full awareness of what they are agreeing to, or goodwill acceptance by the public must entail some limitations beyond mere procedure. In the instant examples, one could view the problem as “how to ensure an enlightened society,” because the contradictory forces are not of the formal Aristotelian sort illustrated by the Pope example, but rather they comprise a contradiction in interests as described by Hegel.<sup>31</sup> One obvious requirement to gain public legitimacy in these contexts would be to guarantee opportunities to obtain knowledge of the relevant circumstances for any substantial constitutional change. Another would be to ensure that all parties’ interests are openly considered and discussed. These basic limitations on acceptance comport with acknowledging members of the citizenry as full and equal citizens, not to mention as moral agents. The limitations also are likely to be discovered from the substantive provisions of the Constitution itself if the social order created center-stages the importance of citizenry.<sup>32</sup> If so, then these substantive provisions will likely prevent

31. In *Excerpt from Hegel for Beginners*, it is noted that

[Geoffrey] Hegel calls this dynamic aspect of his thinking the power of “negation.” It is by means of this “negativity” of thought that the static (or habitual) becomes discarded or dissolved, made fluid and adaptable, and recovers its eagerness to push on towards “the whole.”

Dialectical thinking derives its dynamic of negation from its ability to reveal “contradictions” within almost any category or identity.

Hegel’s “contradiction” does not simply mean a mechanical denial or opposition. Indeed, he challenges the classical notion of static self-identity,  $A=A$ , or  $A \text{ not} = \text{non-}A$ .

By negation or contradiction, Hegel means a wide variety of relations difference, opposition, reflection or relation. It can indicate the mere insufficiency of a category or its incoherence. Most dramatically, categories are sometimes shown to be self-contradictory.

Excerpt from *Hegel for Beginners*, <http://www.marx.org/reference/archive/hegel/help/easy.htm> (last visited Jan. 9, 2009).

32. In the U.S. Constitution, Article I, Section 2 provides that “[n]o Person shall be a Representative [in the House of Representatives] who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . .” U.S. CONST. art. I, § 2, cl. 2. Section 3 follows by stating that “[n]o Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States . . . .” *Id.* art. I, § 3, cl. 3. Article II provides that “[n]o Person except a

those kinds of amendments that, though they meet all procedural requirements, have the effect of undermining the very process by which the public gives them credence. But then the question arises—what are these substantive provisions of the Constitution that impose constraints on what amendments are acceptable within the constitutional order?

### B. Substantive Limitations

Constitutions come about to serve certain purposes. The U.S. Constitution was adopted in 1789 to respond to inadequacies in the Articles of Confederation.<sup>33</sup> Those inadequacies had made the central government ineffective in handling various problems confronting the new nation.<sup>34</sup> But the Constitution of 1789 was not adopted as an amendment to the Articles of Confederation, which would have required unanimous consent of all the states.<sup>35</sup> To the contrary, the delegates to

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natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." *Id.* art. II, § 1, cl. 5. The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Id.* amend. XIV, § 1. The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." *Id.* amend. XIX. The Twenty-sixth Amendment states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." *Id.* amend. XXVI, § 1.

33. JACK BROOKS, U.S. HOUSE OF REPRESENTATIVES, FORWARD (1992), [www.house.gov/house/Foreword.shtml](http://www.house.gov/house/Foreword.shtml).

34. The weaknesses of the Articles of Confederation include a lack of executive authority to conduct foreign policy without the approval of the states, *see* THE FEDERALIST NO. 16 (Alexander Hamilton), little central-government coordination over trade and commerce, *see* THE FEDERALIST NO. 22 (Alexander Hamilton), a lack of direct taxing authority, *see* THE FEDERALIST NO. 21 (Alexander Hamilton), the providing of only minimal resources to deal with a crisis, *id.*, a lack of coordination of executive or judicial authority over sparse authority held by Congress, *see* THE FEDERALIST NO. 22 (Alexander Hamilton), *supra*, the ability of states to coin and value their own money even though such value varied from state to state, *see* THE FEDERALIST NO. 42 (James Madison), and the ability of states to free-ride one another's actions, *see* THE FEDERALIST NO. 15 (Alexander Hamilton). Additionally, the Articles required a two-thirds supermajority for Congress to pass laws, and they required unanimous state consent to amend. Documents from the Continental Congress and the Constitutional Convention, 1774-1789, <http://memory.loc.gov/ammem/collections/continental/defects.html> (last visited Jan. 9, 2009).

35. The Articles of Confederation state the following:

Every State shall abide by the determinations of the United States in

the Philadelphia Convention adopted a different procedure: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”<sup>36</sup> There were important political reasons for this revolutionary change—mostly fear that it would be hard to obtain unanimous consent, even though all thirteen original states did eventually join in ratifying the Constitution. However, that was, in part, because the ratifying states had already formed the union under the new Constitution and the remaining states did not want to be left out.<sup>37</sup>

This rationale in itself suggests that the Constitution of 1789 was not a mere amendment to the Articles of Confederation. To the contrary, the Constitution of 1789 was a revolutionary departure from the Articles. This is most clearly established by the delegates’ chosen departure from the Articles’ amendment process and their agreement to keep their actions secret until their task was finished.<sup>38</sup> Also, significantly, the new concept of federalism that was established between the central

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Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

ARTICLES OF CONFEDERATION, art. XIII (1781).

36. U.S. CONST. art. VII.

37. See THE FEDERALIST NO. 85 (Alexander Hamilton) (arguing that unanimous consent for a constitution that could thereafter be ratified by three-quarters of the states would be too difficult the first time around). Cf. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 13 (1981) (arguing that even if the Articles of Confederation collapsed, there was no reason “for abandoning the principles of state equality and unanimous consent for fundamental constitutional change”).

38. James Madison notes in *The Federalist No. 40*:

It may be collected from [the delegates] proceedings, that they were deeply and unanimously impressed with the crisis [of weak government under the Articles of Confederation] which had led their country almost with one voice to make so singular and solemn an experiment, for correcting the errors of a system by which this crisis had been produced; and they were no less deeply and [solemnly] convinced, that such a reform as they have proposed, was absolutely necessary to effect the purposes of their appointment.

THE FEDERALIST NO. 40, at 264 (James Madison) (Jacob E. Cooke ed., 1961). For this reason, one of delegates, James Madison, recommended sitting “with closed doors, because opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed.” CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 22 (1993) (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 479 (Max Farrand ed., 1937)).

government and the states under the new Constitution would have been unthinkable under the Articles.<sup>39</sup>

This new relationship was sufficiently different from the original confederation of states established by the Articles that it, by itself, would be hard to legitimize under the Articles had the original amendment process been followed.<sup>40</sup> The Articles and the Constitution simply involved two different concepts of government, regardless of their name, which, of course, was also different. This suggests that we need to distinguish an amendment process from a more radical departure, such as the departure the adoption of the 1789 Constitution represented. I will refer to the latter as "revolutionary change." The difference between the two has more to do with how the government is conceptualized, rather than with whether a certain procedure is followed to achieve a change. In the case of the 1789 Constitution, the United States was seriously re-conceptualized from what it had been; it was altered from a confederation of quasi-sovereign states to a dual system in which the federal government had primary authority over certain matters, and the states held residual authority over others.<sup>41</sup>

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39. Article II of the Articles of Confederation specifically states that "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION, art. II (1781).

40. In contrast to Article II of the Articles of Confederation, the Constitution has no provision specifically recognizing the sovereignty and independence of the states. To the contrary, the only provision that comes close is Article IV, Section 4, which states that

[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4.

41. When the Bill of Rights was passed in 1791, the Tenth Amendment provided the following: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X. Though somewhat open-ended, the provision was obviously included to recognize a level of independence and minimal sovereignty of the states.

The Constitution amended each of the state constitutions in a number of ways, and if it were adopted by a majority vote of the whole people, the people in some states would be altering both the political societies and the constitutions of other states. This, in the nature of things, they could not have the authority to do. The Constitution must, then, be submitted for ratification by each of the thirteen political societies, which is to say by the people of the several states in their capacities as people of the several states. This unmistakably implied that the source of sovereignty was the people of the states and that the residue of

An amendment, as stated above, is a modification, alteration, or addition to some text to make it right. But that definition presumes that the original text is not right in some particular and important way. It does not usually presume the system of government to be wrong writ large. So, the amendment comes in to rectify the error. In contrast, “[a] revolution (from the Latin *revolutio*, “a turn around”) is a [significant] change . . . that [usually] takes place in a relatively short period of time. Aristotle described two types of political revolution: 1. [c]omplete change from one constitution to another [and] 2. [m]odification of an existing constitution.”<sup>42</sup>

The defining part of the term’s application is that it represents a “significant change,” instead of just a modification for the purpose of making an existing charter better.<sup>43</sup> So, a revolution can involve a modification of an existing constitution if the change that takes place represents a re-conceptualization of the entire political system. That change need not necessarily occur simultaneously with the modification, as long as the long-term effect represents a re-understanding of the

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sovereignty that was committed neither to the national/federal nor to the state governments remained in them—an implication that was subsequently made explicit by the Tenth Amendment.

MCDONALD, *supra* note 8, at 280. This, more than specific guarantees of individual rights, explains the Tenth Amendment following the Ninth, which provided that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Here, one might note that the Anti-Federalists saw the ultimate check on an overarching central government to be “revolutionary . . . , made more significant, however, by the support and coherence that the state governments . . . lend the populace in case of such an ultimate resort.” STORING, *supra* note 37, at 69.

42. Wikipedia, Revolution, <http://en.wikipedia.org/wiki/Revolution> (last visited Jan. 9, 2009).

43. In essence, this is the issue that is at the heart of the current dispute before the California Supreme Court over whether a referendum to make marriage only between opposite-sex couples—after the court had held California’s constitution’s equal-protection provision required the state to allow same-sex couples to marry—was a *revision* of the constitution requiring that the change be initiated in the legislature, or simply an *amendment* to the constitution, which could be initiated by popular referendum. Maura Dolan & Jessica Garrison, *Battle Over Prop. 8 Goes to High Court*, L.A. TIMES, Nov. 20, 2008, <http://articles.latimes.com/2008/nov/20/local/me-prop8-supreme-court20>. “California Atty. Gen. Jerry Brown also asked the court to overturn the proposition, but on other grounds. He argued that ‘inalienable rights’ cannot be eliminated without compelling reasons, an argument that, if accepted by the court, would make major new law in California.” Maura Dolan & Jessica Garrison, *California Supreme Court to Hear Prop. 8 Arguments*, L.A. TIMES, Feb. 4, 2009, <http://www.latimes.com/news/local/la-me-prop-8-spending4-2009feb04,0,3808081.story>.



political process. Thus, as Bruce Ackerman points out, the changes brought about by the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments were “transformative,” not just because they ended slavery in the United States, but also because they precipitated a re-conceptualization of the nation’s values from an emphasis on federalism to an emphasis first on economic freedom, then eventually, on equality.<sup>44</sup> Indeed, it is for this reason I believe that Ackerman would no doubt distinguish between the Constitution post-1870, when the last of the so-called Reconstruction Amendments were adopted, and the Constitution of 1789. In effect, though perhaps not immediately perceived, the two were very different documents in terms of the values they emphasized, although those were not necessarily incongruent values.

As Ackerman also points out, the Reconstruction Amendments initiated—though slowly—a libertarian period in our constitutional

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44. Ackerman disputes the so-called “easy answers” of what occurred during this “middle period” in American constitutional history. On the one side is Hugo Black, who saw the Republican—referring to the party of Lincoln-Johnson—amendments as “the People self-consciously . . . [endorsing] something . . . [Ackerman calls] a synthetic rule . . . According to Black, . . . the Fourteenth Amendment ‘incorporated’ all of the terms of the Federalist Bill of Rights and made them applicable to the states.” 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 90 (1991) (citing *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting)). In contrast, Ackerman notes that other interpreters, most notably Raoul Berger, saw these amendments as “superstatutes” with far narrower aims. *Id.* at 91 (citing *RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* ch. 2 (1977)). “[T]he Fourteenth Amendment . . . had a very narrow aim: to constitutionalize the rules contained in a single statute, the Civil Rights Act of 1866, that the Reconstruction Congress had enacted into law a few months earlier.” *Id.* To Ackerman, both of these views were too simplistic to explain what had occurred during and after this middle period. He states that

[t]he Republican amendments were popularly understood as much more than a series of superstatutes; but they represented a good deal less than a comprehensive synthesis of the Founding and Reconstruction. What is required, transparently, is a richer set of interpretative categories that allow us to express the kind of constitutional transformation envisioned by the nineteenth-century Americans who supported the Reconstruction proposals.

This is my aim in characterizing them as transformative amendments. In contrast to superstatutes, such amendments do not merely contemplate a change in a few higher law rules. They are the culminating expression of a generation’s critique of the status quo—a critique that finally gains the considered support of a mobilized majority of the American people.

*Id.* at 92. Thus, Ackerman’s view would allow for a developmental process in which reactions against the spirit and language of the amendments, over time, give way to a broader construction.

understanding of individual rights.<sup>45</sup> That transformation ended when a second transformation began with the Court upholding the constitutionality of New Deal legislation that allowed for government intervention—first, in the private sector, to protect economic well-being, and later, against the states, to ensure such basic liberties as speech, privacy, and the right of parents to choose where to send their children to school.<sup>46</sup>

So, in effect, two transformative changes occurred with only one set of amendments leading the way. The first was the birth of a libertarian jurisprudence with the Court's rather infamous decision in *Lochner v. New York*.<sup>47</sup> In *Lochner*, the Court struck down legislation designed to limit the number of hours that bakers could be made to work, and it based its decision on a principle of freedom of contract under the Due Process Clause of the Fourteenth Amendment.<sup>48</sup> Parenthetically, it was questionable whether the baker's freedom to enter into these contracts could balance out the employer's power to set unhealthful working conditions, because they were clearly not at equal bargaining positions.<sup>49</sup> The *Lochner* era ended with the Court's decision in *West Coast Hotel v. Parrish*,<sup>50</sup> in which the Court upheld the constitutionality of minimum-wage legislation enacted by the state of Washington.<sup>51</sup> Thereafter, the Court began to redirect its due-process protections to guard against personal, as opposed to purely property, rights.

The importance of making the distinction between amendment and revolution suggests that a different criterion of legitimacy is at stake. In the case of amendments, their legitimacy is founded on an already accepted process of how governmental structures can be altered or changed. In the case of revolution, no preexisting legitimating process exists. Instead, change arises by way of a new consensus taking shape, where existing institutions can no longer skirt the growing popular desire for a new social understanding of the role of government. The popular

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45. *Id.* at 115 (“[T]he Civil War amendments only transformed the status of *blacks*; when, as in the *Slaughterhouse Cases*, [83 U.S. (16 Wall.) 36 (1872)], white men wished to avail themselves of the amendments, a majority of the Justices refused to generalize the Civil War amendments’ new nationalism, libertarianism, and egalitarianism beyond the context of race relations.”).

46. See 1 ACKERMAN, *supra* note 44, at 153-56.

47. *Lochner v. New York*, 198 U.S. 45 (1905).

48. See generally *id.*

49. See 1 ACKERMAN, *supra* note 44, at 64.

50. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

51. *Id.* at 399-400.

desire has to be strong and enduring for such institutional change to arise. Moreover, there will not necessarily be any formal benchmarks for how the desire is manifested, provided it is sufficiently strong to provoke unrest in the society's institutions.

The *Lochner* era, which had its inauguration at the end of the Civil War with the abolition of slavery and the recognition of each person's right to sell their labor power on the open market, came to an end when the economic effects of the depression forced society's institutions to consider adjustments to a "pure" right to contract.<sup>52</sup> That transformation did not follow the formal amendment process, but it instead reflected a different psychology wherein the country developed the resolve in the 1930's to try to deal with devastating economic situation caused by the depression.<sup>53</sup>

What I take from this analysis, then, is that certain kinds of constitutional amendments, i.e., those that go beyond trying to improve some established understanding of the role of government, will be very unstable unless *truly* supported by a supermajority of the population. Because these amendments go beyond mere modifications to existing governmental institutions or processes, they will fail the test of legitimacy unless accompanied by an equivalent psychological change in the attitudes of the populace to support them. One instance of the failure to meet this requirement is illustrated by the passage of the Eighteenth

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52. Indeed, it was the Supreme Court's slow, but eventual, recognition of this change in popular opinion that is expressed by the old adage, "The switch in time that saved nine." Wikipedia, The Switch in Time that Saved Nine, [http://en.wikipedia.org/wiki/The\\_switch\\_in\\_time\\_that\\_saved\\_nine](http://en.wikipedia.org/wiki/The_switch_in_time_that_saved_nine) (last visited Jan. 9, 2009). The adage represents the politics of the period when a popular President's New Deal legislation was being struck down as unconstitutional by the Court, and a serious mood was felt in the country to increase the number of justices on the Supreme Court to allow President Roosevelt the opportunity to appoint justices who would be more aligned with his own philosophy about the role of government. See 1 ACKERMAN, *supra* note 44, at 106 (discussing the "'court-packing' bill in 1937").

53. See 1 ACKERMAN, *supra* note 44, at 107-08 (noting that President "Roosevelt and Congress[, rather than make use of the amendment process,] left it to the Supreme Court to codify the constitutional meaning of New Deal democracy in a series of transformative judicial opinions"). These opinions supported newly enacted "'framework statutes' like the Administrative Procedure Act," ch. 324, 60 Stat. 237 (1947), *repealed by* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, "the National Security Act" of 1947, ch. 343, 61 Stat. 495, as well as "the Executive Reorganization Act[, ch. 314, tit. V, 47 Stat. 413 (1932)], the Hatch Act[, ch. 410, 53 Stat. 1147 (1939)], the Legislative Reorganization Act[ of 1946, ch. 753, 60 Stat. 812], and the Full Employment Act" of 1946, ch. 33, 60 Stat. 23, all in support "of activist national government at home and abroad." 1 ACKERMAN, *supra* note 44, at 107, 107 n.\*.

Amendment, which nationally prohibited the sale, manufacture, and transportation of alcohol for consumption.<sup>54</sup> The cultural and historical background that accompanied the use of alcohol in everything from religious services to the presentation of food at meals resulted in unstable support for the amendment,<sup>55</sup> such that in less than thirteen years, the amendment was repealed.<sup>56</sup>

### C. Procedural Limitations

Important procedural limitations also place certain constitutional amendments out-of-bounds. The one obvious limitation is found in Article V of the U.S. Constitution. It provides “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>57</sup> This means that even a supermajority of three-quarters of the states could not alter a state’s equal suffrage in the Senate of the United States without the state’s consent. But could Article V itself be repealed in the way the Eighteenth Amendment was repealed, and a new amendment adopted that provided less protection for each state’s equal suffrage in the Senate? Does the equal-suffrage provision, except upon consent of the affected state(s), have to be maintained? If so, then any amendment repealing Article V without such a limitation would also have to be found unconstitutional, because on its face, it would not guarantee each state’s equal suffrage in the Senate. This suggests that even the procedure for amending the Constitution may be constrained by certain embedded substantive provisions, such as the provision for equal state suffrage in the Senate. But if that is the case, are there other constraints that might affect procedure that also would place certain kinds of

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54. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

55. The failure of Prohibition has been admitted by many of its own supporters. In a 1932 letter, the wealthy industrialist John D. Rockefeller, Jr., stated that

[w]hen Prohibition was introduced, I hoped that it would be widely supported by public opinion and the day would soon come when the evil effects of alcohol would be recognized. I have slowly and reluctantly come to believe that this has not been the result. Instead, drinking has generally increased; the speakeasy has replaced the saloon; a vast army of lawbreakers has appeared; many of our best citizens have openly ignored Prohibition; respect for the law has been greatly lessened; and crime has increased to a level never seen before.

Wikipedia, Prohibition in the United States, [http://en.wikipedia.org/wiki/Prohibition\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Prohibition_in_the_United_States) (last visited Jan. 9, 2009).

56. U.S. CONST. amend. XXI.

57. *Id.* art. V.

amendments out-of-bounds? For example, if the provision in Article V that allows for amendments were totally dropped from the Constitution, would that signal such a departure from democratic society that such an amendment could not be rendered consistent with Article V?<sup>58</sup> A related example would be an amendment that created a permanent monarch who would have the power to decide what constitutional amendments were allowed. At a more subtle level would be an amendment dismantling the Supreme Court and thereby ending judicial review.<sup>59</sup> Such an amendment might be viewed as so destructive to the republican form of government the Constitution envisions that it would be outside the Article V amendment process. In a sense, the issue is analogous to an old question: can a person use his freedom to permanently enslave himself, or would such an action taken in the name of freedom involve a contradiction in terms?<sup>60</sup> I use the word "contradiction" here in the

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58. In other words, it seems antithetical to the very concept of freedom to think we can choose now to forgo all future freedoms not only for ourselves, but also for future generations. Obviously, one who turns himself in after committing a serious crime may be forgoing his future freedoms. However, it would be a misuse if one's choices gave up another's freedoms without moral condemnation. This is one reason why abortion is a sticky issue; the freedom of the unborn (if it is a person) is being given up. This also provides a reason why some international documents contain certain protections, such as Article 2, Paragraph 4 of the U.N. Charter, which states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4. For living under the threat of a "gunman" destroys freedom and returns us to a greater power/imperial domination, contrary to the whole Westphalian project that began in 1648. Westphalia ended the thirty-year war with the recognition of states as independent sovereignties, no longer subservient to the empire.

59. Below, we will take up the question of whether the courts are justified in engaging in judicial review, at least under the American constitutional system. For now, it suffices to note that if judicial review is the only way to obtain a real check on constitutional excesses, then it may indeed be necessary to maintain the system of government the Constitution sets up. See *infra* Part IV.B.

60. Gerald Dworkin has noted the following:

Now leaving aside the fudging on the meaning of freedom in the last line [(whether it is freedom for a man "to be allowed to alienate his freedom")], it is clear that part of this argument is incorrect. While it is true that *future* choices of the slave are not reasons for thinking that what he chooses then is desirable for him, what is at issue is limiting his immediate choice; and since this choice is made freely, the individual may be correct in thinking that his interests are best provided for by entering such a contract. But the main consideration for not allowing such a contract is the need to preserve the liberty of the person to make future choices. This gives us a principle—a very narrow one—by which to justify some paternalistic interferences. Paternalism is justified only to

Hegelian sense of a contradiction in power.<sup>61</sup> Certainly, if the freedom we have is permanent, then the freedom to relinquish our freedom in a permanent way seems antithetical. But this raises a deeper question: are there certain universal values that even a constitution must uphold?

#### D. Human Rights

Here, we take up a more theoretical problem: are there some rights that are truly inalienable? The Declaration of Independence states the following:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.<sup>62</sup>

Under the aforesaid principles, which Thomas Jefferson wrote in the

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preserve a wider range of freedom for the individual in question.

Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107 (Richard A. Wasserstrom ed., 1971), reprinted in *PHILOSOPHY OF LAW*, at 293, 299 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).

61. See Excerpt from *Hegel for Beginners*, *supra* note 31.

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

Declaration of Independence, government is made dependent, not independent, on the will of the people. Accordingly, government exists to protect certain inalienable natural rights already possessed by the people. These rights are not the products of the sovereign's favor and available only at the sovereign's discretion, as Thomas Hobbes thought.<sup>63</sup> Rather, following John Locke, these rights are prior to government, and indeed they justify the existence of government to the extent government supports and preserves these basic rights.<sup>64</sup> Indeed,

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63. Hobbes writes that

[b]ecause the Right of bearing the Person of them all, is given to him they make Sovereigne, by Covenant onely of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Sovereigne; and consequently none of his Subjects, by any pretence of forfeiture, can be freed from his Subjection. . . .

. . . . [It] is annexed to the Sovereigntie, the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy and what Actions he may doe, without being molested by any of his fellow Subjects: And this is it men call *Propriety*.

THOMAS HOBBS, *LEVIATHAN* 230, 234 (C.B. Macpherson ed., Penguin Books 1985) (1651).

64. Locke states the following:

IF man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? [W]hy will he give up this empire, and subject himself to the dominion and controul of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. . . .

The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, is *the preservation of their property*. To which in the state of nature there are many things wanting.

....  
THOUGH in a constituted common-wealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but *one supreme power*, which is *the legislative*, to which all the rest are and must be subordinate, yet the legislative [power] being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them: for all *power given with trust* for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the power devolve into the hands of those [who] gave it, who may place it anew where they shall think best for their safety and security.

the influence of Locke on Jefferson can be seen most clearly when one reads Locke's description of the way the social contract comes into existence.

According to Locke, each person enters this world with a natural (property) right in his own life, as an animation, that God gives to him and over which he has absolute control, subject only to the moral law.<sup>65</sup> A person extends that property right in his own life beyond his body when he mixes his labor power with that which is unowned, so that the labor power and the unowned material merge, thereby making the external object now his property.<sup>66</sup> The only limitation, according to Locke, is that one must always leave "enough, and as good left" in kind for others.<sup>67</sup> Thus, it would be unjustified for a person to horde all of the apples in an unowned orchard when many will spoil and other people are in need of food.<sup>68</sup> However, by agreement, people can freeze the products of their labor power in the form of coinage, which does not deteriorate, but instead, preserves those products for future use.<sup>69</sup> The function of government in this situation is to preserve property as a common good. Accordingly, Locke begins by noting that

[p]olitical power, then, I take to be a *right* of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the common-wealth from foreign injury; and all this only for the public good.<sup>70</sup>

Locke was not the only seventeenth-century philosopher to believe that certain rights existed prior to government.

[Hugo Grotius] introduced the modern idea of *natural rights* of individuals. Grotius says that we each have natural rights which we have in order to preserve ourselves. He uses this idea to try

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JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 65-66, 77 (C.B. Macpherson ed., Hackett Publ'g Co., Inc. 1980) (1690).

65. *Id.* at 19.

66. *Id.*

67. *Id.* at 21.

68. *Id.* at 20-21.

69. *Id.* at 29.

70. *Id.* at 8.



and establish a basis for moral consensus in the face of religious diversity and the rise of natural science and to find a minimal basis for a moral beginning for society, a kind of natural law that everyone could potentially accept. He goes so far as to say *even if we were to concede what we cannot concede without the utmost wickedness, that there is no God, these laws would still hold.*<sup>71</sup>

Of course, the difficulty lies in determining what specific rights human beings have *qua* human, and why these rights should be thought of as universal. Here, contractarianism (both practical<sup>72</sup> and theoretical), as well as ethical rationalism, may provide some indication.

By practical contractarianism, I am referring to specific human-rights agreements many nations of the world have adopted as a basis for saying what rights humans ought to be thought to possess regardless of where they live. The specific documents include the Universal Declaration of Human Rights,<sup>73</sup> the International Covenant on Civil and Political Rights,<sup>74</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>75</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>76</sup> the Convention on the Rights of the Child,<sup>77</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>78</sup> and the Declaration on the

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71. Wikipedia, Social Contract, [http://en.wikipedia.org/wiki/Social\\_contract](http://en.wikipedia.org/wiki/Social_contract) (last visited Jan. 10, 2009).

72. Here, one might ask, if the rights come about by social contracts, in what sense are they human rights? My answer to that is that social contracts merely afford recognition to rights that the parties have come to believe, on other grounds—religion, nature, or reason—that humans already possess. So, there is no contradiction in acknowledging the *recognition* of these rights via the social contract.

73. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Declaration of Human Rights].

74. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter Covenant on Civil and Political Rights].

75. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter Covenant on Economic, Social and Cultural Rights].

76. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 113.

77. Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (Nov. 20 1989).

78. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., 107th plen. mtg., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter Convention on Discrimination Against

Elimination of Violence Against Women.<sup>79</sup> Together these documents represent a growing trend, among the nation-states, of universal recognition of a set of specific human rights.<sup>80</sup>

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Women]. “[U]nlike the Convention on the Elimination of All Forms of Racial Discrimination, the Women’s Convention has attracted numerous reservations, reflecting deeply ingrained historical, cultural and religious attitudes.” LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, HUMAN RIGHTS 359 (1999).

One of the most distinctive features of the Women’s Convention is its requirement that States Parties undertake affirmative steps to modify cultural patterns that impair the enjoyment of rights on [the] basis of equality of men and women. Article 5(a) requires States Parties “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Similarly, Article 10(c) requires States Parties to eliminate discrimination against women in the field of education by, *inter alia*, eliminating “any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.”

*Id.* at 360 (quoting Convention on Discrimination Against Women, *supra*, at 195, art. 5(a); *id.* art. 10(c)). These authors suggest that “some abridgements of women’s [nonfundamental] human rights are justified in terms of religious doctrine mandating separate roles for men and women.” *Id.* at 396. Of course, a key would be to decide which rights are fundamental and in what contexts. For example, a state should not enforce a fundamental human right to require the Catholic church to ordain women priests, but should it not enforce a fundamental human right of women in Ethiopia, Nigeria, and possibly northern India to be spared from forced female circumcision? See Genesis of Eden, <http://www.dhushara.com/book/orsin/rites/rite.htm> (last visited Jan. 10, 2009); Chicken Bones: A Journal, <http://www.nathanielturner.com/fearingforcedfemalegenitalmutilation.htm> (last visited Jan. 10, 2009).

79. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 217, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993).

80. I say “among nation-states” rather than “signatory states” because, although these rights apply in the first instance to the latter, under customary principles of international law, they take on universal application.

[T]reaty rules may be accepted as customary law and therefore be binding on states not parties to the treaty in question. The International Court of Justice has noted that this would occur when one of the following conditions existed:

1. Where the treaty rule is declaratory of pre-existing custom
2. Where the treaty rule is found to have crystallized customary law in process of formation
3. Where the treaty rule is found to have generated new customary law subsequent to its adoption

LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 115 (4th ed. 2001) (citing *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969

On the theoretical side is John Rawls' *A Theory of Justice*; in that, Rawls asks what rights would be acknowledged from behind a veil of ignorance, in which persons only know general social, political, and economic facts and the psychology of motivation.<sup>81</sup> The idea is that from behind such a veil, persons, out of self interest, would be inclined to choose equal rights to the basic liberties—the right to life; the rights of speech, press, and assembly; the right to vote; the right to own property; and the right to be free from arbitrary arrest and discrimination.<sup>82</sup> Beyond these rights, there would be some allowance for social and economic inequalities, provided that they worked to everyone's advantage and were attached to positions and offices open to all.<sup>83</sup>

A different approach, through ethical rationalism, would begin by asking what every normative system necessarily presupposes, namely, if the persons it addresses are voluntary purposive actors.<sup>84</sup> From that starting point, Alan Gewirth argues that in order to perform any action, a person would logically be bound to claim rights to freedom and well-being as necessary conditions for the very possibility of human action.<sup>85</sup> Moreover, since all human actors would stand in the same shoes *qua* purposive actors, the rights to freedom and well-being would be equal rights.<sup>86</sup> For governments, this would translate into, on the freedom side, rights to freedom of speech, press and religion, and the freedom of personal autonomy and privacy; on the well-being side, it would translate into rights to life, physical integrity, and mental equilibrium, as well as rights to both maintain one's level of purpose fulfillment and to increase one's level of purpose fulfillment, through education, health care, and reasonable standards of living, at least where economically feasible.<sup>87</sup>

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I.C.J. 3 (Feb. 20)).

81. JOHN RAWLS, *A THEORY OF JUSTICE* 136-37 (1971).

82. *Id.* at 61.

83. *Id.*

84. ALAN GEWIRTH, *The Basis and Content of Human Rights*, in *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* 41, 46 (1982) [hereinafter *GEWIRTH, Human Rights*]. For a fuller treatment of this issue, see generally ALAN GEWIRTH, *REASON AND MORALITY* 26-42, 48-63 (1978) [hereinafter *GEWIRTH, REASON AND MORALITY*].

85. GEWIRTH, *Human Rights*, *supra* note 84, at 47.

86. *Id.* at 53; ALAN GEWIRTH, *The Golden Rule Rationalized*, in *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS*, *supra* note 84, at 128, 138 [hereinafter *GEWIRTH, Golden Rule*]; ALAN GEWIRTH, *Individual Rights and Political-Military Obligations*, in *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS*, *supra* note 84, at 234, 239, 240, 251 [hereinafter *GEWIRTH, Individual Rights*].

87. GEWIRTH, *Human Rights*, *supra* note 84, at 61-63.

Obviously, any of these more theoretical approaches would require a more detailed examination of their contents. My point here is not to suggest one approach over another as governing the legitimacy of constitutional amendments, but rather it is to show that the amendment process is not as wide open as it may at first appear. For here, we see that there are more constraints on amendments than just the logical or internal to the American constitutional system—the Senate-suffrage constraint—already written into the document; further restraints also include how any particular amendment might relate both to the purposes and goals of the existing constitutional order, which must include universal human rights generally.

Since constitutional amendments require that legitimacy not be based on procedure alone, core human-rights constraints are included within the range of criteria that such amendments must meet. These provide the moral ground for any amendment's universal acceptability.<sup>88</sup> Without necessarily denying any of the earlier constraints regarding logic and substance, adding in the normative constraints provides a level of moral legitimacy.<sup>89</sup> This is so because they place the amendment within the broader social contract of mutually implied duties that a constitution creating a workable social order represents.<sup>90</sup> This more-than-historical

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88. See generally VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 26 (1998) (arguing that the duty to obey the law is distinguishable from what law is; specifically, the former is an area of normative political philosophy, while the latter fits more closely within debates in traditional legal philosophy).

89. See *id.* at 126-29. When referencing pages 126 to 129, pay special attention to the argument from DERYCK BEYLEVELD & ROGER BROWNSWORD, LAW AS A MORAL JUDGMENT 149-50 (1986) (applying Gewirth's Human Rights principle—the "PGC"—the derivation and meaning of which I discuss in Part IV.B.).

90. Here, I follow Locke's suggestion regarding

how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his *tacit consent*, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect, it reaches as far as the very being of any one within the territories of that government.

LOCKE, *supra* note 64, at 63-64. *Contra* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law*, 82 YALE L.J. 950 (1973), reprinted in PHILOSOPHY OF LAW, *supra* note 60, at 221, 226 (arguing that "residence and use of the protection of the law do not constitute any usual kind of consent to a government nor any usual kind of promise to obey its laws"). Smith admits to the difficulty in responding to arguments that his

contingency is a far stronger and more persuasive grounding for the constitutional order. It adds to history the way justification adds to legitimacy, not just by identifying trends or patterns commonly accepted, but by providing a rational foundation for why we ought to follow certain trends and not others.

### III. LEGITIMACY AND JUSTIFICATION

One way to make out substantive claims of constitutional legitimacy is to focus on “historical processes that allowed Americans to transform moments of passionate sacrifice and excited mobilization into lasting legal achievements—ones that might continue to inspire us today as we confront the challenges of the future.”<sup>91</sup> Here, it is important to understand that the Constitution is more than just a flowchart of the powers exercised by the various organs of government. It is also a normative document claiming legitimacy for certain exercises of power by the central government over those exercised by the states.<sup>92</sup> The dualist claim is that those powers and their limitations derive directly from the people, rather than indirectly from the legislature as the elective representatives of the people; hence, the dual source of power.<sup>93</sup> Thus, the Constitution requires a level of engagement of the people, which is only requested on those few occasions where a constitutional amendment, or its equivalent, is put forth.<sup>94</sup>

At the constitutional level, the dualist disclaims the question of justification in favor of discussing legitimacy.<sup>95</sup> Here, legitimacy is presupposed by the popular will, provided that there is adequate attention to what is ultimately at stake—namely, a constitutional amendment.<sup>96</sup>

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“criticism rests on an unduly narrow reading of the words *consent* and *promise*.” *Id.*

91. See 1 ACKERMAN, *supra* note 44, at 22.

92. *Id.* at 81 (noting that the First Amendment originally limited only the federal government’s establishment of religion).

93. Ackerman notes that “the dualist sees the discharge of the preservationist function by the courts as an essential part of a well-ordered democratic regime.” *Id.* at 10.

94. I say “or its equivalent” to continue following Ackerman’s claim that what occurred in the 1930’s, with the re-elections of Franklin Roosevelt and the pressure on the Court to uphold New Deal legislation, comprised nothing short of a change in the constitutional order.

95. H.L.A. Hart’s claim is that the Rule of Recognition exists only by agreement, not validity. See HART, *supra* note 9, at 108-10.

96. Article V provides for adequate attention by requiring either two-thirds of both Houses of Congress to propose amendments, or two-thirds of the state legislatures to call for a convention to propose amendments, and then three-fourths of the states to agree to

That the public feels justified in making this choice based on some ultimate right residing in them is a view that can be traced back to John Locke's idea that government's ultimate authority derives from the people.<sup>97</sup> From this foundation, it can reasonably be assumed that the public will view its choice of how government should operate as legitimate, provided that there is adequate attention, discussion, and reflection, and regardless of whether or not some deeper moral theory would actually justify the outcome. Still, even here, there is a sense in which legitimacy presupposes justification, even though the two are not the same, and the former need not be thought to depend on a complete understanding of the latter. The sense in which the presumption is made is that the public, when deciding on an amendment, is not merely expressing a preference, as it might regarding a regular statute under consideration by the legislature; to the contrary, it is stating *a fortiori* its belief that the change is right because it advances the common good, protects individual rights, or comports with good citizenship.<sup>98</sup> Putting aside, for the moment, any difficulty with vagueness, the position captures a kind of pro-attitude one would expect from higher decision-making.

That said, if an amendment is adopted and approved by three-fourths of the states, it might be believed that is enough to render the amendment constitutional, even though it may violate some of the substantive or human-rights constraints mentioned above.<sup>99</sup> But the move from *mere* acceptance to legitimacy cannot ignore all justifications or the role of justifying theories in the constitutional legitimating process. Since that

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any of the proposals put forth. U.S. CONST. art. V.

97. LOCKE, *supra* note 64, at 77-78.

98. Ackerman explains it this way:

Although gradual adaptation is an important part of the story, the Constitution cannot be understood without recognizing that Americans have, [from] time and again, successfully repudiated large chunks of their past and transformed their higher law to express deep changes in their political identities. . . . If a label will clarify matters, American history has been punctuated by successful exercises in *revolutionary reform*—in which protagonists struggled over basic questions of principle that had ramifying implications for the conduct of large areas of American life.

1 ACKERMAN, *supra* note 44, at 19 (footnote omitted).

99. The point is that justification concerns itself with grounds that are materially unassailable, whereas legitimacy concerns itself with beliefs regarding when an act is justified or not. Thus, an amendment adopted in accordance with Article V might be thought to be legitimate because it was approved by a majority of the people without ever questioning why majoritarian democracy is the morally right form of government.

process produces not just a formal change to the Constitution, but also a generally recognized normative obligation to abide by that change, there is more than a superficial need to believe the change is warranted in the name of higher law making.<sup>100</sup> This issue is treated in detail below.

### A. *Legitimacy*

In an important contribution to constitutional legitimacy in American political thought, Bruce Ackerman argues that

[t]he monist is right to insist that our government is, first and foremost, based on democratic principles; the foundationalist is right to emphasize its protection of fundamental rights against normal political change; the [Edmund] Burkean is right to point out the historically rooted character of our constitutional tradition; and the partisans of [Louis] Hartz and [John] Pocock are right to see that America is distinctive in its embrace of a special sort of liberalism and republicanism.

But it is only dualism that incorporates all these insights into a larger whole—a whole that invites deepening reflection upon the distinctive strengths and weaknesses of the American Constitution, as it has come down to us over two centuries of debate and decision. . . . Although our evolving constitutional practice has been enriched by all of the influences surveyed in this chapter (and many more), the trick is to see how Americans have managed to combine them into a whole that is more than the sum of its parts.<sup>101</sup>

Ackerman then identifies a distinctive American constitutional pattern. Under the pattern, people decide, rather complacently, most political questions through their elective representatives.<sup>102</sup> But a few questions, at selective times, are taken out of the standard political process and decided directly by the people. These are the constitutional amendments—with one important exception Ackerman identifies—that are decided directly by the people. And these are the times when the people are most directly engaged in the political process. According to

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100. See *infra* Part III.B.

101. 1 ACKERMAN, *supra* note 44, at 32-33.

102. See U.S. CONST. art. I, § 8.

Ackerman, two periods following the founding engaged a transformation in the constitutional order. These were the period when the Reconstruction Amendments were adopted (1857-1870), and the period of the New Deal's response to the depression of the 1930's—especially the election of 1936—when “Roosevelt's long tenure had fundamental, if [not] unsurprising, implications for the Presidency's role in . . . higher lawmaking.”<sup>103</sup>

That role included gaining “[c]ongressional support for an activist program,” and obtaining a massive popular rebuke of “the [o]ld Court's eloquent constitutional critique of the New Deal's interventionist premises.”<sup>104</sup> “[T]he New Deal Justices never collaborated with judicial holdovers from the Republican regime . . . . By the early 1940's, the Court led by Harlan Fiske Stone was treating the preceding [libertarian—property rights] jurisprudential era as if it had been decisively repudiated by the American people.”<sup>105</sup>

“In 1938, the question for the Justices was not [what was] the ‘original intention’ of the Founding generation. The [issue] was [how] to synthesize the Founding into the New Deal revolution.”<sup>106</sup>

Roosevelt and the New Deal Congress had not chosen to codify their new constitutional principles by enacting a few formal amendments, of the sort contemplated by Article Five. Instead, the President and Congress left it to the Justices themselves to codify the New Deal revolution in a series of transformative judicial opinions, threatening to pack the Court unless it accepted this novel constitutional responsibility. When the Justices executed their famous “switch in time” in the spring of 1937, they began to execute the task Congress and the President had assigned to it.<sup>107</sup>

Nowhere is this made clearer than in the famous footnote four to the *Carolene Products* case.<sup>108</sup> Here, we see the Court engaged in a reinterpretation of the Reconstruction Amendments—and most specifically the Fourteenth Amendment—in light of the New Deal

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103. 1 ACKERMAN, *supra* note 44, at 47.

104. *Id.* at 53.

105. *Id.* at 77.

106. *Id.* at 123.

107. *Id.* at 119.

108. *United States v. Caroline Products*, 304 U.S. 144, 152 n.4 (1938).



transformation by noting in the first paragraph of footnote four “the constitutionality of activist intervention [by the courts] when[] ‘legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .’”<sup>109</sup> In a sense, this is a recognition of the earlier founding liberty that still reigns central in American constitutional interpretation.<sup>110</sup> Thereafter, the Court went on to excise from the Fourteenth Amendment’s Privileges and Immunities, Due Process, and Equal Protection Clauses the prior view “of a property-centered ideal of liberty.”<sup>111</sup> The Court does this in the subsequent two paragraphs where it suggests, by acknowledging *what it need not now decide*, “a new area of [political] life as the centerpiece for egalitarian concern.”<sup>112</sup> In effect,

the Court in the modern era no longer feared that political power may be used to exploit the propertied classes. Instead, it redirected the Fourteenth Amendment’s central concern toward the protection of “discrete and insular minorities” against majoritarian “prejudice.” Once again, the Court was undertaking to preserve the egalitarian meaning of Reconstruction despite the profound transformation [of] . . . the New Deal: While it left the rich to take care of themselves, it suggested that the Fourteenth Amendment’s concern with equality must take on a deeper meaning in the redistributive politics of the modern regulatory state.<sup>113</sup>

Ackerman’s historical analysis is important, as it bespeaks, better than other approaches, the way transformative constitutional change occurred and was legitimated during two distinct periods of its history in the United States. His message, that American constitutional change does not follow the foundationalist approach, is correct if he means no unalienable principles are either written into the document or are

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109. 1 ACKERMAN, *supra* note 44, at 122 (quoting *Caroline Products*, 304 U.S. at 152 n.4).

110. Recall our earlier discussion of the Declaration of Independence proclaiming “[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

111. 1 ACKERMAN, *supra* note 44, at 127.

112. *Id.* at 128.

113. *Id.* at 129.

distinctive of the discourse that Courts engage in when rendering constitutional decisions.<sup>114</sup> That said, however, it is too strong a claim to say such principles are not in the background, or that they fail to orient major political change. Certainly, the ideal of equality in the Fourteenth Amendment, which was a centerpiece of the Reconstructionist period, could not be ignored even against the transformation of New Deal politics.<sup>115</sup> Although it took the Court some time, even prior to the New Deal, to see the Fourteenth Amendment's application outside questions of race, that too was a product of a developing concern for the role of equality that would, in the post-New Deal era, accommodate gender and

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114. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (involving a Texas church that sued under the Religious Freedom Restoration Act to be allowed to add a new facility after its building was declared an "historical landmark"). Justice Kennedy's majority opinion held the statute unconstitutional because Congress had overstepped, or in effect, changed the constitutional Free Exercise Clause in a way that the Court had not recognized. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." *Id.* at 519. Philip Bobbitt describes Court decisions like Kennedy's as fitting one of the six modalities of constitutional arguments. They are

historical (relying on the intentions of the framers and ratifiers of the Constitution)[, see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)]; textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street")[, see, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928)]; structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up)[, see, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819)]; doctrinal (applying rules generated by precedent)[, see, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)]; ethical (deriving rules from those moral commitments of the American ethos [during two distinct periods of its history] that are reflected in the Constitution)[, see, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2004)]; and prudential (seeking to balance the costs and benefits of a particular rule)[, see, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944)].

PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991).

115. The argument of the petitioners in *Strauss v. Horton*, No. S168047 (Cal. filed Nov. 5, 2008), that a revision of the California constitution's equal-protection clause to make marriage only between one man and one woman requires more than just a referendum, fits Ackerman's notion of a transformative amendment. The referendum was not a revolution from the past because it was not meant to replace the whole or even a significant portion of the constitutional structure nor wipe out the equal-protection clause in its entirety. But neither was Proposition 8 a mere adjustment to the set of values that clause had already enshrined, because it was particularly extracting from the reach of that provision which genders can marry. In that sense, the referendum was setting a precedent for future amendments to carve out select institutions for special protection. In this sense, the Proposition 8 referendum represents a significant departure from the philosophy of the California equal-protection clause, as bespeaks to it being a transformative amendment whose justification would then have to be evaluated on philosophical grounds.

some other forms of invidious discrimination. Equally certain from this period too is the idea of government having a role in providing baseline economic protections against laissez-faire economics. Those two views, properly construed, provide illustrations of the kinds of human-rights protections that so many in the world are concerned with today. They certainly play central roles in both the United Nations' International Covenant on Civil and Political Rights<sup>116</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>117</sup> And although these are comparatively new documents, they bespeak the deeper, long-term yearnings many in the world have held.

One thing that is clear from Ackerman's position is that no constitutional amendment that may pose a significant transformation of our politics will be legitimated merely because it was adopted according to some prescribed procedure. The Thirteenth Amendment's end of slavery followed the Civil War. The extension of the Fourteenth Amendment's protection of race equality to encompass ethnicity<sup>118</sup> and alienage,<sup>119</sup> gender,<sup>120</sup> illegitimacy,<sup>121</sup> and the disabled,<sup>122</sup> was a drawn-out process that is arguably still underway.<sup>123</sup> This suggests that the

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116. See Covenant on Civil and Political Rights, *supra* note 74.

117. See Covenant on Economic, Social and Cultural Rights, *supra* note 75.

118. *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (applying strict scrutiny in the university's denial of tenure to a professor because of his Arab ancestry).

119. See *Graham v. Richardson*, 403 U.S. 365 (1971) (inaugurating strict-scrutiny review in the denial of welfare benefits based on alienage).

120. See *Craig v. Boren*, 429 U.S. 190 (1976) (applying, for the first time, "heightened scrutiny" to a state classification based on sex).

121. See *Clark v. Jeter*, 486 U.S. 456 (1988). A unanimous Court agreed that the equal-protection test for illegitimacy should be "heightened scrutiny."

122. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding, under the rational-basis test, that the city's requirement of a permit for a group home for mentally disabled persons in an R-3 zone, but not for hotels, hospitals, sanitariums, nursing homes, or dormitories, suggested an illegitimate governmental purpose to discriminate).

123. Some of the areas still open for Fourteenth Amendment protection concern so-called "gay rights." To date, the Supreme Court has only once said, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (alterations in original) (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The Court has never considered whether gays and lesbians might constitute a suspect class warranting strict scrutiny (based on whether they were historically discriminated against, the discrimination is based on an immutable (or hard to remove) trait, or they are largely politically powerless). In *Lawrence v. Texas*, Justice O'Connor's concurring opinion would have held unconstitutional Texas criminalizing same-sex

words of even a transformative amendment, like the Fourteenth, will be accepted only if there already is present a mood to change the constitutional order. The words themselves may be part of that mood for change, but they will lack legitimacy if the acceptance of the existing constitutional order is not also called into question.

Still, even with that said, the changes that Ackerman suggests occurred over two important periods of American history seem inadequate to the broad future tasks that would await them if all we focus on is legitimacy, rather than justification. Changes to the constitutional order concern not only discovery, within the existing value tradition, of new interpretations that arguably fit the immediate needs of that period, but also concern how the new principles reached should fit an ever-evolving social world. To go beyond the immediate needs of the moment to the creation of a constitutional order ready to engage an unknown future requires that we consider more than just acceptance. We must also think through the grounding principles from which that order is derived. In doing so, we will inevitably engage in what Rawls calls "reflective equilibrium," which is the process by which moral principles and new decisions are balanced back and forth to discover deeper meanings of the principles involved and a more complete justification for the decisions made.<sup>124</sup>

### B. Justification

Here, the question of justification is discussed. In fact, some alternative approaches toward justification will be offered, not because I believe one may be better than the others, but because I want to consider any overlap that may create a source of common agreement among the many approaches. With this goal in mind, consider possible justifications for constitutional change based on utilitarianism, rights theory, and pluralistic communitarianism, and then consider what those

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sodomy on the equal-protection ground that "a State [cannot set up] . . . 'a classification [without something more, of moral disapproval] of persons . . . for its own sake.'" *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 635). In fact, the majority opinion declined to follow the equal-protection route, and instead favored a due-process, liberty-protection approach because "some might question whether a prohibition would be valid[, which the Court obviously thought it would not be,] if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Lawrence*, 539 U.S. at 575 (majority opinion).

124. See RAWLS, *supra* note 81, at 48.

theories imply where an amendment may not be justified because it fails to meet all of these criteria. In a sense, I am reversing the process of reasoning used in the prior historical section from one of discovery to one of proof, where history fades to the background. My purpose in doing so is not to say history, and specifically the American constitutional experience, is irrelevant or unimportant, but, on the contrary, to show that what the experience reveals is often constitutional propositions with independent moral validity. The more difficult question is how to determine the moral validity of constitutional propositions, which cannot be a strictly legal question.<sup>125</sup>

### 1. Utilitarianism

Beginning with utilitarianism, the question for adopting any constitutional amendment is whether it will produce the greater good for the greater number.<sup>126</sup> I am assuming an individual utilitarian stance rather than a corporatist utilitarian stance.<sup>127</sup> The latter, like in Plato's

125. In effect, what I am suggesting here is consistent with the way courts decide very difficult cases—i.e., cases where the political morality of the society is itself in doubt—by first engaging higher orders of abstraction and then applying what is found to concrete cases. See SAMAR, *supra* note 88, at 108-09, 125-26, 138. The only difference here is that because it is the constitutional order itself that is at stake, the move to abstraction will entail a far greater concern with philosophical theories than would be typical for most constitutional-law decisions. This is because there lies a moral question behind the order, viz., why adopt this order rather than some other? That question cannot be answered with the existing order without avoiding circularity. *Id.* at 221-22. But this is no failure of the system, because any legal system confronted by the same question would reach the same impasse. *Id.*

Let  $L$  be a legal system composed of rules and principles and  $A$  be an amendment to  $L$ . If  $A$  is justified by a rule  $R$ , then either  $R$  must be outside  $L$  and substantive or, if not, one can easily pose the follow-up question: how is  $R$  justified? Hart tries to solve this problem by saying that the Rule of Recognition is just accepted. However, that only works if there is no reason to doubt  $R$ . See HART, *supra* note 9, at 108-10. Everything we have suggested above would seem to indicate that this is not the case, at least when  $A$  has a substantial bearing on  $R$ . So, we are back to the question: what justifies  $R$ ?

126. As John Stuart Mill states, utilitarianism, "or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure." JOHN STUART MILL, *Utilitarianism*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 183, 194 (Max Lerner ed., 9th prtg. 1971).

127. Alan Gewirth notes the following:

As we run through the list of utilitarian "goods" supplied by human society, we can also see the basis of an important distinction between two different types of utilitarianism. One type is *individualistic*: it views society as

*Republic*, speaks to the good of the society as a whole treated as an organic entity.<sup>128</sup> I defer now any further discussion of a corporatist utilitarian model in favor of an individualist utilitarian view, because I will later deal with communitarianism where such a discussion would be better placed.

My approach here will not be to take a strictly quantitative evaluation of different, unspecified views of the good. This is because we are dealing with a constitution, and constitutions have particular contents; they are not merely formulas for aggregating preferences, although they may include an element of that by creating a legislative process governed by majority rule.<sup>129</sup> In my view, taking a utilitarian view of the Constitution requires a combined qualitative and quantitative approach, analogous to the approach the English philosopher John Stuart Mill suggests for understanding why all those who are familiar with both approaches evaluate certain goods above others, even though in the moment they suffer some displeasure.<sup>130</sup>

composed of elements, individual persons, who are basically complete even apart from society. . . .

Another type of utilitarianism is *organic*, or *corporatist*: it views the individual as constituted by, rather than constituting, society in that the individual is basically incomplete, and indeed “unreal,” apart from society. It is this point that Aristotle expresses in his famous assertions that “man is by nature a political animal” and that “the state is by nature prior to the individual.”

Alan Gewirth, *Introduction, in* POLITICAL PHILOSOPHY 1, 10 (Alan Gewirth ed., 1965).

128. Plato shows this corporate-organist attitude as discussed in *The Blackwell Guide to Plato's Republic*: “For what we laid down . . . as a universal requirement when we were founding our city, this, I think, or some [version] of this, is justice . . . that each man must perform the one social service in the state for which his nature was best adapted.” Gerasimos Santas, *Methods of Reasoning About Justice in Plato's Republic, in* THE BLACKWELL GUIDE TO PLATO'S REPUBLIC 125, 134 (Gerasimos Santas ed., 2006).

129. This is most specifically illustrated by the U.S. Constitution, which provides certain institutional structures and distinct basic rights—as specified in the Bill of Rights and Fourteenth Amendment—as being beyond mere legislative alteration.

130. Mill says that

[i]f I am asked what I mean by difference [in] quality [of] pleasures, or what makes one pleasure more valuable than another, . . . there is but one possible answer. Of two pleasures, if there be one to which all or almost all who have experience of both give a decided preference, irrespective of any feeling of moral obligation to prefer it, that is the more desirable pleasure. If one of the two is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure of which their nature is capable of, we are justified in ascribing

Though Mill wrote more than seventy-five years after the founding (*On Liberty* was published in 1859), the idea of having more than a utilitarian solution seems reflected in the earlier debates at the Constitutional Convention and thereafter between the federalists and the anti-federalists over whether the Constitution needed to provide a bill of rights to protect against majoritarian tyranny.<sup>131</sup> Since utilitarians abjure “natural rights” talk, anti-federalists could fear that government by majority would provide inadequate protection of civil liberties.<sup>132</sup> On the other hand, the founding formula of the Bill of Rights, if viewed from a federalist standpoint, can be seen to fit the pattern of modern-day *rule utilitarianism* in the sense that certain goods, like freedom of speech, press, and assembly, are accompanied by a very strong presumption in their favor that is not easily overcome.<sup>133</sup> Mill himself seems to have foreshadowed this notion—though he was not a rule utilitarian—when in *On Liberty* he argues for a very strong presumption in favor of freedom of speech, not based on abstract right, but *based on the long-term*

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to the preferred enjoyment a superiority in quality so far outweighing quantity as to render it, in comparison, of small account.

MILL, *supra* note 126, at 196.

131. Contrary to the Federalists, who claimed the Constitution would, due to its structure, protect individual rights, the Anti-Federalists had a different view. See THE FEDERALIST NO. 81 (Alexander Hamilton); THE FEDERALIST NO. 84 (Alexander Hamilton).

Three kinds of rights were stressed [by the Anti-Federalists]: the usual common law procedural rights in criminal prosecutions, liberty of conscience, and liberty of the press. The Anti-Federalists insisted that the Constitution should explicitly recognize the traditional procedural rights: to be safe from general search and seizure, to be indicted by grand jury, to trial by jury, to confront witnesses, and to be protected against cruel and unusual punishments.

STORING, *supra* note 37, at 64.

132. Mill states that

[i]t is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

JOHN STUART MILL, *On Liberty*, in ESSENTIAL WORKS OF JOHN STUART MILL, *supra* note 126, at 249, 264.

133. J.J.C. Smart offers the definition: “Rule-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances.” J.J.C. Smart, *Act-Utilitarianism and Rule-Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 9, 9 (1973).

*progressive interests of human beings*.<sup>134</sup> For Mill, that presumption did not mean that freedom of expression could never be overridden, but that it would take more than mere preference-based reasons to do so.<sup>135</sup> A similar argument is made in favor of tastes and pursuits and freedom of association with other adults of like mind, although here the claim is with actions unlikely to implicate others outside the group.<sup>136</sup>

134. Joel Feinberg has noted:

No part of Mill's argument in *On Liberty* is more impressive than his case for totally free expression of opinion. It is especially ingenious in that it rests entirely on social advantages and forgoes all help that might come from appeals to "the inalienable right to say what one pleases whether it's good for society or not." But that very utilitarian ingenuity may be its Achilles heel; for if liberty of expression is justified only because it is socially useful, then some might think that it is justified only *when* it is socially useful. The possibility of special circumstances in which repression is still *more* useful is real enough to disturb allies of Mill who love liberty fully as much as he and would seek therefore a still more solid foundation for it.

Joel Feinberg, *Limits to the Free Expression of Opinion*, in *PHILOSOPHY OF LAW*, *supra* note 60, at 379, 381.

135. Mill claims that

there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others *through* himself . . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.

MILL, *supra* note 132, at 265.

136. Mill further states, as part of the same discussion, that

[s]econdly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.



Mill's emphasis on a very strong presumption is worth noting, because it is consistent with earlier majoritarian-federalist explanations of why constitutions, like the United States', limit any change in their substantive content to a supermajority vote—his emphasis recognizes “the decided preference” of those at the founding who experienced tyranny.<sup>137</sup> By the same token, it opens the door to the concern that a tyrannical supermajority could undermine individual rights.<sup>138</sup> Indeed, it

*Id.*

137. As McDonald reports it, the Anti-Federalist case included the claim that

[t]he constitutional grant of power to Congress—so laconic and broad—is an argument in favor of a bill of rights, not against it. In fact, said the satirical Aristocrotis, “this constitution is much better and gives more scope to the rulers than they durst safely take if there was no constitution at all; for then the people might contend that the power was inherent in them; and that they had made some implied reserves in the original grant; but now they cannot, for every thing is expressly given away to government in this plan.” Who can overrule the pretensions of Congress that any particular law is “necessary and proper”? “No one; unless we had a bill of rights to which we might appeal; and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgments.”

MCDONALD, *supra* note 8, at 66 (footnote omitted). McDonald also notes the concern from Great Britain: “Freedom of speech, for the most part, referred not to a civil right but to a parliamentary privilege.” *Id.* at 46. Moreover, “neither Parliament nor the colonial assemblies extended the privilege to nonmembers: criticism of the legislative bodies or of royal officials, along with dissenting religious opinions, was rigorously suppressed.” *Id.* at 46-47.

138. Bernard Williams has argued against utilitarianism on the ground that it

attaches value ultimately to states of affairs, and its concern is with what states of affairs the world contains, that it essentially involves the notion of *negative responsibility*: that if I am ever responsible for anything, then I must be just as much responsible for things that I allow or fail to prevent, as I am for things that I myself, in the more everyday restricted sense, bring about.

Bernard Williams, *Negative Responsibility: And Two Examples*, in UTILITARIANISM: FOR AND AGAINST, *supra* note 133, at 93, 95. Williams goes on to show that the logic of utilitarianism permits scenarios like that of George, the unemployed chemist, who has to take a job in a chemical-weapons factory in order to support his family, even though it violates his own moral values. Another example is that of Jim, an American botanist surveying the foliage of some remote area of South America, who comes upon a village under seize by a government patrol, and is given the choice by the captain to select one native to be killed, or the patrol will kill all twenty natives for allegedly dissenting against the government. *Id.* at 97-98. Here, the problem is not that the scenarios appear farfetched, but that the theory provides no justifiable alternative except to compromise one's moral integrity. Brian Barry suggests that “when we are dealing with interests there are two conflicting principles at work: aggregative and distributive. They are both, it seems to me, independently operative in most men's minds; and where they give conflicting answers there is no higher principle to which the conflict can be referred.”

is for this reason that rights theorists, in the form of anti-federalists, at least wanted the assurance that a bill of rights would be added to the Constitution right after ratification before they would support ratification.<sup>139</sup> Although I believe Mill's concern also fits a fundamental human rights concern, for purposes here, I only note it, as ultimately, a strong enough majority, as will be explained below, will have their day.<sup>140</sup>

Now, the question for us is whether, from a utilitarian standpoint, the support of a supermajority alone provides adequate basis for constitutional change. Certainly, in some cases, it seems adequate. For example, under the Constitution, it takes a majority of the electoral college to elect a president, and this is usually—though not always—tied to the popular vote in the states.<sup>141</sup> Also, the Constitution separately provides that presidential elections shall only take place every four years, and that, absent death, incapacity, or impeachment, the office will only become vacant at noon on January 20th of the subsequent year.<sup>142</sup> In each of these instances, the limitation can be changed, and, in fact, it has been changed in the course of American constitutional history by a supermajoritarian vote.<sup>143</sup>

What I am suggesting is that, notwithstanding where supermajorities alone might operate quite satisfactorily, in the same way there are limitations on the public preference in the legislative realm—since policies are not subject to instant popular approval, but will usually await the result of the next election—there may be a need for limits on

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Brian Barry, *Justice and the Common Good*, 21 ANALYSIS 86 (1961), reprinted in POLITICAL PHILOSOPHY, at 190 (Anthony Quinton ed., 1967).

139. Rights theory, in contrast to utilitarianism, does not seek to justify actions based on a principle of aggregation, but instead determines obligations based on some special status of the holder; the special status may arise from a natural entitlement or special circumstance, as when based on a contract or agreement. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955), reprinted in POLITICAL PHILOSOPHY, *supra* note 138, at 53-66. Thus, from the standpoint of rights theory, even a supermajority would be unjustified to infringe a fundamental right. This doesn't mean rights can never be overridden, but what overrides a right must be connected to how the right is justified in the first place. See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 797 (2d ed. 1999) (under "rights").

140. See *supra* Part III.A.

141. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (noting that although there is "no federal constitutional right to vote for electors for the President of the United States," the several states now vest that right in the people; still, they can take it back).

142. See U.S. CONST. amend. XX.

143. Compare *id.*, with *id.* art. II, § 1, cl. 3, and *id.* amend. XII.

constitutional change, especially if the change were to bind future generations to a form of government or limitation of freedom in ways in which they would thereafter have little or nothing to say. So, for example, it would not provide the greatest good for the greatest number, understood *qualitatively*, for even a current supermajority to bind future generations to rules they could not alter (or could only alter under the most severe circumstances), if such limitations provided less individual freedom rather than more. Indeed, one of the arguments made in favor of providing for the free exercise of religion was to prevent those people escaping religious tyranny in Europe from recreating the same tyranny to outsiders or new generations in this country.<sup>144</sup>

Following this line of thought, from a utilitarian perspective, a constitutional amendment that limits future constitutional change would itself be unconstitutional, at least with regard to those matters over which the public has an interest. But herein lies the catch: are there some interests that are properly deemed private, that is, that the public has no interest in? If the answer is yes, then perhaps protections for individual freedom to fulfill those interests ought not to be amendable from a utilitarian point of view.<sup>145</sup> This then gets us to the basic civil-liberties

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144. McDonald has noted:

As for the colonies, all except Rhode Island—which provided complete religious freedom for all Christians and toleration for others—imposed limitations upon various sects; no colony gave full rights to Catholics or Jews; and most colonies had tax-supported denominational establishments. Penalties for dissenters, apostates, blasphemers, and idolators were numerous and severe.

. . . Most revealing of habits of mind was the Virginia Declaration of Rights. After declaring that “all men are equally entitled to the free exercise of religion, according to the dictates of conscience,” article 16 of the document went on to say “that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.” And five states (New Hampshire, Massachusetts, Connecticut, South Carolina, and, partially, Maryland) continued to have tax-supported established churches.

MCDONALD, *supra* note 8, at 42-43 (footnotes omitted).

145. McDonald makes the point:

To understand the concepts of liberty and property in [colonial] America, it is therefore necessary to understand, at least in general terms, how American law differed from but was similar to English law. This, for a beginning, entails a recognition of certain fundamental principles of both bodies of jurisprudence. One was that personal liberty and private rights to property were normally beyond the reach of the king and could be taken from the individual only as provided by the law of the land. This principle was deeply rooted in the English common law, had been confirmed by Magna Carta in the thirteenth century and by . . . Parliament as recently as 1773. It had been incorporated

protections over which many would argue, along with Mill, that if the public has any interest, it is only indirectly and not in the first instance.<sup>146</sup> For there is always a sense in which someone can have an interest in a thing indirectly, perhaps because they believe God has commanded their interest, or for some other equally distant reason. If constitutional protections are to be well-founded, then it must be because there is some inherent dimension to them that separates private interests from public interests.

In this regard, it seems eminently plausible to argue that if the mere description of an action, “without the inclusion of any additional facts or causal theories,” suggests a conflict with another’s interest, then no *prima facie* privacy claim is made, and the only further question is whose interest is stronger, which may be decided by a majority or supermajority legislative requirement, depending on how important an interest is at stake.<sup>147</sup> On the other hand, if the mere description of the action, without the inclusion of any additional facts or causal theories, suggests no infringement on anyone else’s interest, then the matter should be treated as *prima facie* private. That does not mean the state could never intrude upon it, but it does mean that the reason for the intrusion would first require a *factual* showing that there was an intrusion on another’s interest. In other words, the causal theory would have to be shown to utilize the normal standards of empirical evidence. And then there would be further questions regarding the weight of the interest to show that the

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into the laws of the Maryland General Assembly in 1639, the Massachusetts Body of Liberties in 1641, the West New Jersey Charter or Fundamental Laws in 1676, the New York “Charter of Libertyes and priviledges” [sic] in 1683, several Revolutionary state constitutions after 1776, and the Northwest Ordinance of 1787.

The other principles were interrelated. The concepts of liberty and private property carried with them a large body of assumptions, customs, attitudes, regulations both tacit and explicit, and rules of behavior. Thus neither liberty nor property was a right, singular; each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state. Together, these constituted the historical “rights of Englishmen” of which eighteenth-century Americans were so proud—at least until 1776, when they abandoned their right to call themselves Englishmen.

*Id.* at 12-13 (footnote omitted) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*43-44; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 84-85 (1833); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 499-507 (1902)).

146. MILL, *supra* note 132, at 265.

147. VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 67 (1991).

importance of the interest affected warranted not leaving the privacy interest alone.<sup>148</sup> Short of that, the matter ought to be left to individual discretion. The latter does not mean that the state could not promote a discussion about it, even with a bias towards one point of view; however, it does mean that the state could not directly intervene on behalf of one side or in any other way effect its bias by direct action.

Now, if what I have said is true, then from a Millian utilitarian point of view, certain constitutional protections—most notably those that in the first instance protect the private, such as habeas corpus, which the original founders wrote into the Constitution even before the Bill of Rights,<sup>149</sup> and those later found in the First,<sup>150</sup> Fourth,<sup>151</sup> Fifth,<sup>152</sup> Sixth,<sup>153</sup> Eighth,<sup>154</sup> and Fourteenth Amendments<sup>155</sup>—should not be

148. *Id.* at 112-16 (showing how there may at times be interests that the state seeks to protect that are more compelling than its interest to protect privacy).

149. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. In *Boumediene v. Bush*, the Supreme Court held

that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

*Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

150. The First Amendment protects the rights of the people concerning speech, press, assembly, the right “to petition the Government for a redress of grievances,” the right to free exercise of religion, and it prohibits establishment of a state religion. U.S. CONST. amend. I.

151. The Fourth Amendment assures the people of their right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” *Id.* amend. IV.

152. The Fifth Amendment protects the person from, among other things, being put in double “jeopardy of life or limb,” being “compelled in any criminal case to be a witness against himself,” being denied “life, liberty, or property, without due process of law,” or having private property “taken for public use, without just compensation.” *Id.* amend. V.

153. The Sixth Amendment guarantees trial by jury in all criminal cases, and guarantees the accused the right “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” *Id.* amend. VI.

154. The Eighth Amendment prohibits excessive bail or fines and “cruel and unusual punishments.” *Id.* amend. VIII.

155. The Fourteenth Amendment guarantees federal and state resident citizenship to “[a]ll persons born or naturalized in the United States,” and it prohibits any state from abridging “the privileges or immunities of citizens of the United States,” depriving “any

subject to any restrictive constitutional amendment absent a showing of very substantial harm to others. I leave open the question of whether these amendments could be broadened by additional amendments, because that would add more liberty, rather than less, especially for future generations.

From this perspective, passing a constitutional amendment restricting a woman's right to choose to have an abortion, absent proof of the personhood status of the fetus, ought not to be allowed.<sup>156</sup> A similar but related argument might be made for not limiting the Fourteenth Amendment's equal protection of the laws by passing a constitutional amendment defining legal marriage as a union of one man and one woman, because that seems to bring government on one side in a religious debate, rather than confine it to a secular understanding of reality. In the first set of cases, the proposed amendment intrudes on specifically private, reproductive decisions by women; in the second, it limits the standing of same-sex adult citizens by imposing a belief-based disqualification on them. Because these people are not already married and are not too closely associated by blood, the limitation would have the further effect of imposing a status distinction that is not related to any legitimate governmental purpose; thus, the limitation would impliedly impose a class distinction contrary to the very ideal of equal protection and without utilitarian justification.<sup>157</sup>

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person of life, liberty, or property, without due process of law," or denying to those "within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1.

156. The reason for the disclaimer of the personhood status of the fetus is that if the fetus were a person, then the issue of privacy would fall by the wayside. But this leads to a separate inquiry, given the gravity of the potential harm to personhood should the fetus turn out to be a person. The question might be put, "Should the burden of proof fall on the person seeking the abortion to show that the fetus is not a person rather than the reverse?" The answer is no; the potential for a rights violation between mother and fetus are not even similar in kind. It is clear that if the fetus is not a person, a personal right of the woman is being violated because she clearly is a person. There is no doubt about that matter. By contrast, whether the fetus is a person is the very issue in question. So we would be requiring a person who is clearly a rights holder to forgo a personal liberty for the sake of an entity that has not been shown to possess any level of personhood status. Perhaps the person the fetus would become may have a dispositional claim to rights not to be harmed if it is brought to term, but that presupposes the fetus is brought to the status of a person. I talk about this issue more fully elsewhere. See Vincent J. Samar, *Abortion: The Persistent Debate and Its Implications for Stem Cell Research*, 11 J.L. & FAM. STUD. 133 (2008).

157. Such a rationale seems hard to maintain except on the basis of a prejudice against a particular group of people, in this case, most likely gay people, which is contrary to the very purpose of equal protection. In *Romer v. Evans*, the Supreme Court held that "[a]

## 2. Rights Theory

Much of last section's commentary carries over to rights theory, but with a different set of assumptions. From the point of view of rights theory, all humans have certain basic rights, whether they are founded on a divine or natural grant,<sup>158</sup> or on some aspect of what it means to be human.<sup>159</sup> At a minimum, these rights include the right to life and the basic civil liberties of freedom of speech, press and assembly, freedom of religion, the right to vote, and the right to be free from arbitrary arrest and discrimination; both libertarians and egalitarian liberals agree all

law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Court asserted the proposition: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634 (alteration in original) (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Previously, in *Palmore v. Sidoti*, a unanimous Supreme Court, in holding unconstitutional a state law denying a mother custody of her child for marrying outside her race, stated that "[t]he Constitution cannot control such prejudices but neither can it tolerate them." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

My reason for excepting blood and present marriage is that the former may implicate the physical health of future generations, and the latter might, if practiced in the traditional way of polygamy, impose burdens on women not equally imposed on men. But all that is to suggest that the factual situation might be interposed to show that equality in those limited circumstances might be better served by not allowing the marriage than by allowing it. Of course, since this would be fact dependent, if the couple were infertile or if polymorphous marriage were allowed, the restriction may no longer hold.

158. For John Locke,

every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joynted to it something that is his own, and thereby makes it his *Property*.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

159. Alan Gewirth claims that

[t]his necessary content of morality is to be found in action and its generic features. For all moral precepts, regardless of their further contents, deal directly or indirectly with how persons ought to act. The specific modes of action required by different moral precepts are, of course, highly variable. But amid these variations, the precepts require actions; and there are certain invariant features that pertain generically to all actions.

GEWIRTH, REASON AND MORALITY, *supra* note 84, at 25.

humans have these rights.<sup>160</sup> However, they disagree over the extension of the right to life via one's labor power—the ability to encompass and make one's property that which was previously unowned, or to unlimitedly obtain property from others by sale or gift. Libertarians believe that government should not be able to tax or take away private property except for the good of all.<sup>161</sup> Thus, government should treat all persons the same way; however, individuals can interact as they please provided they do not harm others in the process.<sup>162</sup> Libertarians also would not support civil-rights legislation *aimed at the private sector* to protect persons from discrimination based on race, class, gender, or sexual orientation.<sup>163</sup> Examples of the reasons that libertarians would allow taxation include support for a police department, fire department, or national defense—essentially all matters affecting individuals alike and over which persons could not operate effectively if left to their own devices.<sup>164</sup> Egalitarian liberals, in contrast, would allow more

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160. John Hospers, *What Libertarianism Is*, in *THE LIBERTARIAN ALTERNATIVE* 3 (Tibor Machan ed., 1974), reprinted in *ETHICS: THE BIG QUESTIONS*, at 218 (James P. Sterba ed., 1998); see also RAWLS, *supra* note 81, at 61.

161. Hospers explains it this way:

It has become fashionable to claim virtually everything that one needs or desires as one's *right*. Thus, many people claim that they have a right to a job, the right to free medical care, to free food and clothing, to a decent home, and so on. Now if one asks, apart from any specific context, whether it would be desirable if everyone had these things, one might well say yes. But there is a gimmick attached to each of them: *At whose expense?* Jobs, medical care, education, and so on, don't grow on trees. These are goods and services *produced only by men*. Who then is to provide them, and under what conditions?

Hospers, *supra* note 160, at 221.

162. *Id.* at 212 (“[E]very human being has the right to act in accordance with his own choices, unless those actions infringe on the equal liberty of other human beings to act in accordance with their choices.”).

163. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 172-73 (1974) (arguing that patterned principles of justice that protect, e.g., the neediest, clash with moral constraints on how individuals ought to be treated). Elsewhere, I make the argument that discrimination based on irrelevant or irrational criteria serves no one, and, once justified on the basis that it is a private act, can easily be flipped against any group; for this reason, such discrimination, when it occurs in the market place where essential goods and services are at stake, is more properly seen on par with the kinds of criminal behavior libertarians agree government can limit. See Vincent J. Samar, *A Moral Justification for Gay and Lesbian Civil Rights Legislation*, 27 *J. HOMOSEXUALITY* 147 (1994), reprinted in *GAY ETHICS: CONTROVERSIES IN OUTING, CIVIL RIGHTS, AND SEXUAL SCIENCE*, at 156-58 (Timothy Murphy ed., 1994).

164. As John Hospers describes it,



government involvement and taxation to serve a much broader set of common purposes, including purposes that do not benefit all to the same degree.<sup>165</sup> Thus, egalitarian liberals would agree that government can prohibit private-sector discrimination in employment, housing, credit, and public accommodations, if the discrimination is based on irrelevant grounds.<sup>166</sup> Government can also set low-wage protections and safety standards in the workplace, although how low-wage protections might operate is controversial.<sup>167</sup> Government can also tax to support an educational system, a system of national health care, and to provide financial support to those who, through no fault of their own, may become unemployed.<sup>168</sup>

Obviously, from the rights-theory point of view, libertarians and egalitarian liberals describe limitations on the rights of individuals differently. For our purposes, in considering limitations on constitutional amendments, this issue is not central. That is because constitutions, like our own, define limits on governmental action. Thus, debates within rights theory between libertarians and egalitarian liberals over governmental involvement in the private sector would probably be resolved, in the absence of an overarching theory, by leaving such matters to the elected representatives of the people.<sup>169</sup> And, indeed,

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[i]f each individual had constantly to defend himself against possible aggressors, he would have to spend a considerable portion of his life in target practice, karate exercises, and other means of self-defense, and even so he would probably be helpless against groups of individuals who might try to kill, maim, or rob him. . . . The function of government is to take this responsibility off his shoulders: the government undertakes to defend him against aggressors and to punish them if they attack him.

Hospers, *supra* note 160, at 217.

165. RAWLS, *supra* note 81, at 277-78 (arguing that redistribution of wealth through taxation may be necessary to avoid concentrations of power and to provide "equality of opportunity" to "the least advantaged," as in obtaining access to institutions of education and culture).

166. See Samar, *supra* note 163, at 162-68.

167. See Edmund S. Phelps, *Raising the Employment and Pay of the Working Poor: Low-Wage Employment Subsidies Versus the Welfare State*, 84 AM. ECON. REV. 54 (1994), available at <http://www.columbia.edu/~esp2/lowwage.pdf>.

168. See JOHN RAWLS, POLITICAL LIBERALISM 183-84 (1993) ("[T]he variations that put some citizens below the line[*i.e.*, with 'less than the minimum essential capacities required to be a normal cooperating member of society,'] as a result of illness and accident . . . can be dealt with, I believe, at the legislative stage when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure.").

169. This is made evident by the fact that Article I provides that "[t]he Congress shall

legislative legitimacy seems at its apogee when it operates with a clear constitutional specification.<sup>170</sup>

What is less controversial among rights theorists is the role of government in regard to civil liberties as opposed to civil rights. Here, both libertarians and egalitarian liberals agree that government has no role to play, absent a clear and undeniable harm to others.<sup>171</sup> In these matters, government intervention must be at its nadir, leaving the individual the maximum freedom to act as long as their acts do not cause harm to others.<sup>172</sup> Additionally, government must show absolutely no favoritism between persons or their comprehensive “religious, philosophical, and moral doctrines.”<sup>173</sup> Contrary to the application of the

have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .” U.S. CONST. art. I, § 8, cl. 1. Furthermore, “[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . .” *Id.* amend. XVI.

170. It is hard to deny the legitimacy of congressional action that is supported by a clear constitutional mandate. In the case of Congress’ power to prescribe private-sector, civil-rights legislation, the Supreme Court has said that this follows from Congress’ power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.* art. I, § 8, cl. 3. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that Congress could regulate a business that served mostly interstate travelers); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress’ power to regulate commerce extended to businesses serving mostly local clientele if the products they served had moved across state lines); *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress could regulate a non-economic good that had been produced and sold strictly intrastate if it were part of a national legislative scheme).

171. See *Hospers*, *supra* note 160, at 220 (noting the libertarian belief that “[b]ehavior which harms no one else is strictly the individual’s own affair”); see also RAWLS, *supra* note 81, at 60 (presenting, as his first principle of justice, that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”). But note, the parties to Rawls’ hypothetical “original position” (where the principles of justice are first adopted and then the constitution and laws) would consent in order “to protect themselves against their own irrational inclinations . . . to a scheme of penalties that may give them a sufficient motive to avoid foolish actions and [accept] certain impositions designed to undo the unfortunate consequences of their imprudent behavior.” *Id.* at 249.

172. John Stuart Mill expressed the idea in his now famous harm principle:

[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

MILL, *supra* note 132, at 263. Although Mill is not a rights theorist, his work fits within the rights framework.

173. RAWLS, *supra* note 168, at 3-4. “According to libertarianism, the role of

principle of equality that libertarians and egalitarian liberals disagree over with regard to the private sector, the principle is at its apex in regard to the public sector. No fundamental disagreement exists between these two groups over the basic civil liberties generally or civil rights as when applied to the private sector. Consequently, absent a fundamental change of position, rights theorists would disfavor limitations, even by constitutional amendment, on the basic First, Fourth, Fifth, Sixth, Eighth, and Reconstruction Amendments rights. Rights theorists would also disfavor any limitation on habeas corpus—except when necessary to achieve an imminent and compelling interest—to avoid opening an overarching, if not tyrannical, governmental power.<sup>174</sup>

That said, it should not be thought that rights theory would never allow any limitations in these areas. Since there may be situations that would make the protection of these rights detrimental to the common good of all, rights theorists would allow for some limited restrictions provided they were both necessary in the sense that they were essential to protect the foundation for the right (e.g., autonomy) and were narrowly drawn.<sup>175</sup> Here, the word “compelling” implies that there is no other way by which the government could secure the good of all.<sup>176</sup> It also

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government should be limited to the retaliatory use of force against those who have initiated its use. It should not enter into any other areas, such as religion, social organization, and economics.” Hospers, *supra* note 160, at 217. “[S]o long as the basic structure [of society] is regulated [by principles of justice as fairness.] . . . its institutions are not intended to favor any comprehensive doctrine.” RAWLS, *supra* note 168, at 193. Moreover, “[i]n justice as fairness, then, the equal basic liberties [(life, speech, press, worship, right to vote, right to own property, and run for office)] are the same for each citizen and the question of how to compensate for a lesser liberty does not arise.” *Id.* at 326.

174. In *Boumediene v. Bush*, the Supreme Court held that prisoners from the war on terror held at the U.S. Naval Base at Guantanamo Bay, Cuba had a constitutionally protected right under the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, to petition the federal courts for habeas corpus relief; some of the prisoners had been held for six years without trial or even being told of the charges against them. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Supreme Court’s majority position does not raise any issue that can be specifically attributed to a difference between libertarian and egalitarian liberals.

175. The idea of “narrowly drawn” is to protect against overarching government. As Hospers, who is particularly sensitive to this issue, puts it, “[g]overnment, then, undertakes to be the individual’s protector; but historically governments have gone far beyond this function. Since they already have the physical power, they have not hesitated to use it for purposes far beyond that which was entrusted to them in the first place.” Hospers, *supra* note 160, at 217.

176. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court held that the University of Michigan Law School admission process, which considers race as one of many factors, did not violate the Equal Protection Clause of the Fourteenth Amendment

identifies those rights that lawyers often call “fundamental” because of their importance to human liberty. The reference is important because, otherwise, limitations might arise simply to support a favored group that may have majority, or even supermajority, support. Although they require a compelling state interest, rights theorists would likely agree to lesser limitations that serve the common good where harm is likely, but not always, present.<sup>177</sup> Thus, certain restrictions based on gender, for example, where neither sex is stereotyped or harmed, would be tolerated by rights theorists for lesser but important governmental reasons.<sup>178</sup> But the harm claimed must be non-belief mediated.<sup>179</sup> Thus, affording pregnancy leave to women but not men might be a reasonable governmental job benefit, provided leaves for taking care of new-born infants are not based on gender.<sup>180</sup> The latter would presuppose a stereotype regarding male and female roles that is potentially harmful to women, notwithstanding that some might believe such is the proper role of the genders. So, we find from rights-theory analysis that certain constitutional changes should be disallowed, absent a major reformulation in society’s thinking.

But here a question might be asked: if a belief-mediated constitutional change was able to secure a supermajority vote, wouldn’t that signal the exact kind of change in thinking I have been discussing?

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because diversity is a compelling state interest in a law-school setting. *Id.* In other words, the autonomy that would justify the liberty right to achieve the best education one qualifies for would not be successful absent having present a diverse student body. *Contra Gratz v. Bollinger*, 539 U.S. 244 (2003) (determining that the University of Michigan undergraduate admissions process, which assigned the largest number of points to an applicant’s race, did violate equal protection because it was not narrowly drawn).

177. As John Hart Ely has noted, “the general idea is this: Classifications by sex, like classifications by race, differ from the usual classification—to which the traditional ‘reasonable generalization’ standard is properly applied—in that they rest on ‘we-they’ generalizations as opposed to a ‘they-they’ generalization.” John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 n.85 (1973).

178. I have in mind stereotypes that are weak on evidence and may not in all cases deny women and others equal opportunity. Again, there may be some debate between libertarians and egalitarian liberals with regard to laws preventing discrimination in the private sector, but insofar as unjustified reliance on stereotypes is likely to be the result of irrational and irrelevant prejudices, there is good reason to believe they ought to be restricted, *at least* in regard to the public sector. See Samar, *supra* note 163, at 151.

179. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 257-59 (1990) (arguing against “moral indignation” as a basis for making an act criminal, because as a belief-mediated distress, it infringes no claim at all; in short, one does not have a rights claim to be free of moral indignation).

180. See Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381-6387; 29 U.S.C. §§ 2601-2654 (2006)).

Surely it may, but the problem is that the view would no longer be justifiable from within a rights theory point of view. In other words, let's say, for example, that the people of the United States choose, through a constitutional amendment, to adopt a certain Christian theological view in regard to the laws that it would or would not allow. Let's say further that the change would apply to the amendment process itself. Under such a circumstance, the rights theory would no longer be relevant, as decisions would now be made based on some religious dogma. But that means that the constitution itself could no longer be changed except on the basis of that dogma. So, the right of the people to alter their form of government would have effectively been permanently forgone. Could such an event happen? Sure, if a revolution in Americans' thinking occurred about the constitutional doctrine of separation of church and state.<sup>181</sup> However, it is very doubtful that the change would ever garner the support of enough Americans—given their diversity of religious backgrounds—to ever come about, regardless of the hopes of those believers who might prefer it. Still, one might worry about smaller, but still sizable changes perhaps sought by various interest groups that move in that direction.<sup>182</sup>

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181. The First Amendment states that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I. The courts have interpreted this provision to prohibit government establishment of religion. In *Everson v. Board of Education of Ewing Township*, the Supreme Court stated the following:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

*Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15-16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

182. See, e.g., *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) (finding visible displays of the Ten Commandments in the courthouses of two Kentucky counties to be an establishment of religion). *But see* *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553 (2007) (holding that a group of taxpayers lacked legal standing to challenge

### 3. Pluralistic Communitarianism

Communitarianism began as a group of related, yet distinct philosophies in the late twentieth century that opposed theories of rights and opposed exalted forms of individualism, while at the same time advocating for a civil society: “[n]ot necessarily hostile to social liberalism or even social democracy, communitarianism emphasizes the . . . interest[] . . . [of] communit[ies]” and societies over those of the individual.<sup>183</sup>

Communitarians claim values and beliefs exist in public space, in which debate takes place. They argue that becoming an individual means taking a stance on the issues that circulate in the public space. For example, within the United States debate on gun politics, there are a number of stances to be taken, but all of these stances presuppose the existence of a gun politics debate in the first place; this is one sense in which the community predates individualism.<sup>184</sup>

An important difference between communitarians and rights theorists, like John Rawls, is that communitarians presuppose some preexisting view of the good of the community that unites the community.<sup>185</sup> In contrast, right theorists tend to treat individuals as atomistic bearers of rights who may share any variety of views about the good of the community.<sup>186</sup> So, while a rights theorist may argue that

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the Bush Administration’s effort to fund faith-based groups dealing with a variety of social problems).

183. Wikipedia, Communitarianism, <http://en.wikipedia.org/wiki/Communitarianism> (last visited Jan. 10, 2009).

184. *Id.* Note the Supreme Court’s recent decision in *District of Columbia v. Heller*, which held that the Second Amendment provides a right to individuals to possess handguns, unrelated to service in the military, for lawful purposes, including self-defense. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). That the Second Amendment’s meaning had been unclear prior to the decision suggests that handgun politics preceded debate over different state stances toward handgun possession.

185. As Michael Sandel notes, the stories of families, communities, and groups “make a moral difference, not only a psychological one. They situate us in the world, and give our lives their moral particularity.” Michael J. Sandel, *The Political Theory of the Procedural Republic*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 85, 91 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

186. Sandel says that

[t]he precise content of the list of primary goods is given by what Rawls calls

freedoms of speech, press, or assembly are necessary to create autonomous thinking beings, a communitarian may argue for these same freedoms as necessary to perform the functions of good citizenship.

If a person argues, for example, for freedom of speech in the name of good citizenship, and, if it can be shown that certain expressions, like those expressed by pornography or violent movies, do not contribute to good citizenship, the government would be justified in restricting such expressions. The same would not be true under a rights theory, absent a showing of actual harm to others, because the expressions would be considered mere artifacts of individual autonomy. This does not necessarily mean that communitarianism is more ideal because it presupposes a social good to be achieved via expressions of human freedom or equality. A society of ascetic monks is a communitarian society. But such a society's values, especially the members' disdain of private property, would not function very well in a modern capitalistic state. Similarly, a communitarian focus on values uniquely ascribed to the Torah, the Gospels of Jesus, or the Koran, would provide only a very poor fit to a society in which members were drawn from different religious traditions, different sects within a tradition, or in which members subscribe to no such tradition at all.

This suggests that if communitarianism is to be applied to a nation-state with a population that represents a wide range of different religious and cultural traditions, it must—as I have argued elsewhere—treat as a possible good the notion of “a more pluralistic society, especially one [that] values tolerance of differing personal moral and religious points of view.”<sup>187</sup> Such a pluralistic type of communitarianism would subscribe to no religious dogma or metaphysical criterion, but would affirm goods that support social cooperation in matters in which individuals are likely to disagree.<sup>188</sup> Thus, a pluralistic communitarian would support the

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the thin theory of the good. It is thin in the sense that it incorporates minimal and widely shared assumptions about the kinds of things likely to be useful to all particular conceptions of the good, and therefore likely to be shared by persons whatever their more specific desires. The thin theory of the good is distinguished from the full theory of the good in that the thin theory can provide no basis for judging or choosing between various particular values or ends.

MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 25 (1982).

187. Samar, *supra* note 163, at 158.

188. In this sense, such a pluralistic communitarianism would differ from its classical forerunners (Plato, Rousseau, and Marx) “in that the ‘good’ to be obtained is not something eternal or outside the society but is, rather, a constitutive element of the

aforementioned freedoms of speech, press, and assembly, not because they contribute to individual autonomy, but because they create conditions for social stability and cooperation.

Of course, this presumes that the individual members of these cooperative efforts are willing to forgo ultimate religious or metaphysical claims in favor of achieving some more moderate end. John Rawls describes this process as a process of public reason, where members of a pluralistic society come to realize that they will not succeed in securing their ultimate ends, but may be able to approximate some aspects of those ends if they engage in social cooperation.<sup>189</sup> Needless to say, the

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society in question." *Id.*

189. According to John Rawls,

[t]he idea of public reason arises from a conception of democratic citizenship in a constitutional democracy. This fundamental political relation of citizenship has two special features: first, it is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death; and second, it is a relation of free and equal citizens who exercise ultimate political power as a collective body. These two features immediately give rise to the question of how, when constitutional essentials and matters of basic justice are at stake, citizens so related can be bound to honor the structure of their constitutional democratic regime and abide by the statutes and laws enacted under it. The fact of reasonable pluralism raises this question all the more sharply, since it means that the differences between citizens arising from their comprehensive doctrines, religious and nonreligious, may be irreconcilable. By what ideals and principles, then, are citizens who share equally in ultimate political power to exercise that power so that each can reasonably justify his or her political decisions to everyone?

To answer this question we say: Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, . . . in particular situations, provided that other citizens also accept those terms. The [requirement] of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position. Citizens will of course differ as to which conceptions of political justice they think the most reasonable, but they will agree that all are reasonable, even if barely so.

Thus when, on a constitutional essential or matter of basic justice, all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law. It may not be thought the most reasonable, or the most appropriate, by each, but it is politically (morally) binding on him or her



value of this process is that it substitutes moderate forms of success for conflicts over ultimate ends. Of course, the process will not succeed in conditions where individuals are unwilling to make such compromises.

When applying pluralistic communitarianism as a restriction to certain kinds of constitutional amendments, the following seems to be the case. Amendments designed to limit everyone's freedom, but satisfy the views of only one group of believers, are not likely to be sustained. These amendments fail to allow for the development of social cooperation, and effectively exclude those on the outside from any hope of ever succeeding in having their values accepted by the society at large. Some arguable cases of this would be a constitutional amendment defining the United States as a Christian country,<sup>190</sup> or an amendment—as opposed to a statute—defining marriage as a union of one man and one woman.<sup>191</sup> Though both amendments might, depending on how they are written, be repealed at a later date, both would effectively shut down, by definition, the yearnings of whole classes of people whose views might be quite different from those whom the amendment is serving.<sup>192</sup>

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as a citizen and is to be accepted as such. Each thinks that all have spoken and voted at least reasonably, and therefore all have followed public reason and honored their duty of civility.

Hence the idea of political legitimacy based on the criterion of reciprocity says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.

JOHN RAWLS, *The Idea of Public Reason Revisited*, in *COLLECTED PAPERS* 573, 577-78 (Samuel Freeman ed., 1999) (citations omitted).

190. See Huckabee God Amendment, <http://www.youtube.com/watch?v=imnsTO0ztSo> (last visited Jan. 10, 2009).

191. See H.R.J. Res. 56, 108th Cong. (2003).

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

“Article—

“Section 1. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”

*Id.*

192. Charles Kelbley has argued that Rawls'

#### 4. Overlapping Normative Systems

From what was said above, one might be inclined to think that only amendments that are justified under all three philosophical systems should be allowed. But that would be both theoretically unworkable and prudentially unreasonable. It would be prudentially unreasonable because those who hold each point of view believe it to be sufficient to justify any particular amendment. It would be theoretically unworkable because each view operates by a set of criteria that leaves no conceptual space for the other views to operate.

Utilitarianism does not leave a conceptual space for abstract rights; rights theory does not leave space for a prior conception of the good; and pluralistic communitarianism does not lend itself to an individual quantitative, as opposed to a corporatist-qualitative, interpretation of what the society's end should be. Moreover, any attempt to bring in some additional constraint would impliedly be saying that the view to which it was attached was fundamentally inadequate. More importantly, this inadequacy would be difficult to locate within each view since each claims to be self-sufficient. Consequently, there would be no way of finding compromise short of forgoing each view entirely in favor of some more general theory of ethics, which is not likely to be successful

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conclusion that the Supreme Court must declare amendments that repeal core freedoms invalid is open to considerable doubt. Rawls's position becomes even more doubtful, however, when we put aside his ideal and normative theory and recall that his theory of justice is partially founded on the assumption of circumstances of justice that are favorable to the exercise of equal liberties. A severe change or interruption in those otherwise prevailing circumstances may well justify a suspension of the equal liberties, something Rawls provided for, as we have seen. . . . [E]ven the fullest commitment to reason "allows only a provisional commitment to constitutional democracy because we must be open to rational persuasion about the moral necessity, or at least desirability, of systemic transformation of the polity." It is tempting to think that "constitutional democracy would [thus] allow a transformation to another system that would *enlarge* reason's empire or *strengthen* its reign." But we cannot even be sure of that, lacking the ability to identify, and the wisdom to know, the endless ways reason may be enlarged or strengthened.

Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487, 1535-36 (2004) (alterations in original) (footnotes omitted) (quoting Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 189 (Sanford Levinson ed., 1995)).

anytime soon.<sup>193</sup>

There is no room within utilitarianism for, as Mill said, the idea of abstract right as a thing independent of utility. A similar limitation would apply to the other views as well. That said, we might reverse the above suggestion of mutual justification, and see if overlap to the negative, i.e., what would violate all three positions, might be a better approach. Under this construction, the only time a constitutional amendment would not be recognized is if it could not be justified under either utilitarianism, rights theory, or pluralistic communitarianism. Perhaps this idea may at first seem like just another variation on the justificatory-positive approach. The difference lies, however, in that its legitimacy will not vary depending on the particular justificatory stance adopted by the reviewer; instead, it will depend on the view that all justificatory stances, which make a reasonable claim for universalizability, do not support it. Obviously, I am not including more narrow views, such as those that might arise within a particular religious tradition, as these are not likely contenders for universal acceptance.<sup>194</sup>

The view I suggest is particularly helpful given that different reviewers, representing different population groups, are likely to have different justificatory stances. It allows the greatest reach for legitimacy within a pluralistic democratic society that affirms the common good, and where no singular view is likely to dominate. In short, everyone gains by this approach, as it is less objectionable than more particularistic approaches, and it has a greater likelihood for success than the positive view.

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193. The idea here is like the new definition for “planet,” which was voted for by the International Astronomical Union after it was found that Pluto was smaller than some other objects—other than comets—orbiting the Sun. The new definition, which excludes Pluto from the class of full-fledged planets (making it a “dwarf planet”), requires an object to have a clear path in its orbit around the Sun. Since the orbit of Pluto crosses the orbit of Neptune, it cannot satisfy this condition.

In my statement, I leave open the possibility of a higher-ordered moral theory that would address the limitations that rational formulations of each of the above views fail to answer. But as no such theory has, as yet, received overwhelming popular consensus, it is enough to simply leave this as an open question. For those who might want an example of such a higher-ordered moral theory, see generally GEWIRTH, REASON AND MORALITY, *supra* note 84.

194. Here, it is fair to say that I am following an intuition expressed so well by Kant’s categorical imperative: “Act only according to that maxim by which you can at the same time will that it should become a universal law.” IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 38 (Lewis White Beck trans., Macmillan Publ’g Co. 2d ed. 1990) (1785).

But this raises still another question: does the negative approach allow for too much exclusion from the amendment process? Alternatively, since it only prohibits amendments that have no reasonable hope of universal justification, does it leave the constitutional order too open to revolutionary change? I am not suggesting that the constitutional order is not already open to revolutionary change as a matter of fact, I am only asking whether the conceptual framework of this approach leaves the current order with little or no defense against such change. Remember, even the Constitution of 1789 was transformed by the Reconstruction Amendments of 1865 to 1870, and that constitutional era was again transformed by the New Deal and the success of President Roosevelt in marshalling an ongoing consensus of American popular opinion.<sup>195</sup>

Here, I think the proper response must be more nuanced to the nature of the change inaugurated by any particular amendment. If the amendment would affront all three views (utilitarianism, rights theory, and pluralistic communitarianism), then it should have no effect.<sup>196</sup> But if the amendment might align with one or two of these views (and I am

195. I do not speak of transformation in the adoption of the Constitution of 1789, because that was more a revolutionary change from even the procedures established for change by the Articles of Confederation than it was a transformative change.

196. Michael Perry comments on the way the Court has interpreted the Fourteenth Amendment, by stating that

[i]n American constitutional culture, few if any persons disagree that the norms the Constitution consists of include at least some directives issued by—that is, some norms “ordained and established” by—“We the people” and, moreover, that the Constitution consists of some such norms partly because the norms were “ordained and established” by “We the people[.]”[] What directives have “We the people” issued, what norms have they established? . . . [W]hen “We the people[.]”[] through their elected representatives, put words into the text of the Constitution, they do so for the purpose of issuing—and, in that sense, establishing—one or more constitutional directives. The text of the Constitution, in each and all of its various parts, is the yield of political acts of a certain sort: acts intended to establish, not merely particular configurations of words, but, ultimately, particular norms, namely, the norms that “We the people” understood—or would have understood, if they had been engaged, if they had been paying attention—the particular configurations of words to communicate. Therefore, the norm (or norms) that “We the people” established, in putting a particular configuration of words into the text of the Constitution, is the norm they understood (or would have understood) their words to communicate. They did not establish a norm they would not have understood their words to communicate.

MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 49 (1999).

recognizing that there will be some variations within the views—like between egalitarian liberalism and libertarianism), then the amendment would have an effect, but must be narrowly interpreted by the courts, at least until such time as it would win wider popular acceptance.<sup>197</sup> How narrow the courts might interpret it would depend upon whether it failed to align with just one of these views or two of them, and how significant a departure from social norms the amendment might represent to society as a whole. In the case where the amendment was out of conformity with two of the three positions, it would receive the most narrow interpretation. An example is the Supreme Court's enlarging, over time, the scope of the Fourteenth Amendment as it became clear that society's values had transformed enough to adapt to the extension of equality into areas not involving race. Notice, I am nowhere saying that the language of the amendment would not allow for such an expansion on its face, only that the question of scope would be a matter of interpretation for the courts, which can never be too far ahead of society.

So, under the proposed view, legitimacy and justification come together as two opposite sides of a coin where each supports the other, but in opposite directions. Justification provides us reasons for the

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197. Perry goes on to note that

there is an enduring and (because enduring) unnerving dissensus among students of the history of the Fourteenth Amendment about precisely what norms "We the people" (through their representatives) established in adding section one to the constitutional text.

"The extremes of opinion are represented on the right by Raoul Berger's insistence that section 1 of the amendment had only the 'clearly understood and narrow' purpose of putting the Civil Rights Act of 1866 beyond the reach of presidential veto; and on the left by those of us who assert that 'the amendment both applies the Bill of Rights to the states and guarantees equality together with other unspecified rights.'"

*Id.* at 82 (quoting Judith A. Baer, *Making Moderation an End in Itself: William Nelson's Fourteenth Amendment*, 15 LAW & SOC. INQUIRY 321, 324 (1990)).

The broad antidiscrimination norm [the amendment has taken on] . . . became a part of our constitutional bedrock in the period after World War II, because, in [the] post-Holocaustal period, the true and full humanity of *every* person (including, therefore, *every* citizen) emerged as a fundamental axiom of American political morality. No law (or other governmental action) that violated this axiom—no law based on the view that a black person, for example, or a Jew, or a woman, is not truly, fully human—could any longer be adjudged consistent with "the supreme Law of the Land[.]" (Of course, there could be, and was, disagreement about whether one or another law was based on such a view.)

*Id.* at 83.

amendment's adoption. Legitimacy pushes us to question why it was adopted and exactly what it means. Both, together, afford a route for normative evaluation of a new constitutional amendment where even the most open-ended ideas are subject to the constraints of language, reasons, policies, principles, and purposes.

#### IV. COMPARATIVE LAW AND THE ROLE OF THE COURTS

##### A. Comparative Law

In this section, I observe how a few other countries have handled the question: can a constitutional amendment be unconstitutional? My purpose is not to suggest that these extraterritorial sources should be seen as precedents for American constitutional understandings, but rather it is to illustrate examples of how courts in other countries have reasoned their way through these issues. My point is that if different countries, notwithstanding their different traditions and concerns, share common values—especially common human-rights values—then there is reason to draw analogies between some of the best reasoning of their courts and how U.S. courts make decisions, especially when the issues appear quite similar.<sup>198</sup>

After the defeat of Nazism, the new West German Constitution explicitly provided for a number of specific human-rights protections that could not be repealed; also, the requirement of a “republican form of government” could not be repealed, even with the support of a supermajority of the German people.<sup>199</sup> In support of this limitation, the

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198. For a more complete discussion and theoretical development of this issue, see Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1, 40-63 (2005) (arguing for, at least, minimalist application of international human-rights principles to American constitutional law, provided that they can be rationally ascertained within a common language game, and especially if they already share wide-ranging global acceptance). Later in that piece, I apply my theory of using international human-rights principles to three specific American cases, two involving constitutional interpretation, and one involving federal statutory interpretation. *Id.* at 63-87.

199. Article 79(3) provides the following: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the [basic] principles laid down in Articles 1 [affecting Human Dignity] and 20 [guaranteeing democracy and federalism] shall be inadmissible.” Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 79(3), available at <http://www.iuscomp.org/gla/statutes/GG.htm#20>. See also I ACKERMAN, *supra* note 44, at 15.

Constitution also provides, in Article 20(4), a grant of “immunity to Germans who resist those attempting to destroy the constitutional order if there is no other remedy.”<sup>200</sup> This move towards entrenchment of certain basic human rights in the West German Constitution was a response to the holocaust and the social, political, and economic conditions that preceded it.<sup>201</sup> Still, it leads one to question whether the United States or any other nation might not fall victim to the same horrors if the political, economic, and social conditions were to line up in a similar way.<sup>202</sup>

Ackerman emphasizes the provisional character of the present West German Constitution, noting that this particular provision might nevertheless be altered “within the framework of the present Basic Law (Grundgesetz), which allows for its replacement by a completely new Constitution (Verfassung) . . . .”<sup>203</sup> Here, a change to the Basic Law would be somewhat analogous to the change in the United States when the Constitution of 1789 replaced the earlier Articles of Confederation. Notwithstanding that possibility, post-unification German courts have been steadfast to preserve human-rights protections. For example, to vouchsafe the convictions of former East German leaders who authorized border killings of East Germans trying to escape to the West during the Cold War, these courts, along with the European Court of Human Rights, invoked both the principle of intentional homicide under the West German criminal code and the rights to life and freedom of movement under the United Nations Covenant on Civil and Political Rights, which East Germany had ratified in 1974.<sup>204</sup>

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200. Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 267 (1996) (citing Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 20(4)).

201. See 1 ACKERMAN, *supra* note 44, at 321. In *Privacy of Communications (Klass) Case*, the West German Federal Constitutional Court upheld an amendment that expanded the state’s power of surveillance. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1970, 30 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.). See Katz, *supra* note 200, at 268. But in doing so, the Court did note that “‘Art. 79, par. 3 does exempt from possible amendment the protection afforded by Art. 1 to the dignity of man.’” *Id.* (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1970, 30 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.)).

202. See 1 ACKERMAN, *supra* note 44, at 321.

203. *Id.* at 326 n.20.

204. *Victors’ Justice: Court of Human Rights and the Conviction of East German Leaders*, 2 GERMAN L.J. No. 6 (2001), available at <http://www.germanlawjournal.com/article.php?id=62>.

These decisions suggest a clear change in direction from the previous constitutional order of East Germany. Under the unification agreement, the courts were supposed to apply East German criminal law to matters arising within the former territory of the German Democratic Republic.<sup>205</sup> However, East German criminal law did not allow for the use of lethal force except for serious crimes—which involved border crossings that endangered life or health, made use of firearms, or were “committed with a particular intensity.”<sup>206</sup> Because many of these cases did not fit this scenario, as most “victims acted alone, were unarmed and employed primitive methods in their efforts to flee East Germany,” the courts could, and did, legitimately apply the more lenient Federal Republic (West German) intentional homicide standard and the United Nations Convention without violating the unification agreement.<sup>207</sup> Whether a more radical change occurs in the future now that the two Germanys are together remains to be seen. What these cases represent is a reconceptualization of the constitutional order set up by the unification agreement that is probably somewhat at variance with what the parties originally expected, in support of human rights.<sup>208</sup>

In *Kesavananda Bharati v. State of Kerala*,<sup>209</sup> the Supreme Court of India held that the judiciary could strike down amendments to the Constitution passed by Parliament which conflict with the Constitution’s “basic structure.”<sup>210</sup> That decision was subsequently reaffirmed in *Minerva Mills Ltd. v. Union of India*,<sup>211</sup> when the Indira Ghandi government, in response to *Kesavananda Bharati*, attempted to amend the Constitution by introducing Clause S to Article 368 to prevent courts from questioning the power of Parliament to amend the Constitution.<sup>212</sup>

205. *Id.*

206. *Id.*

207. *Id.*

208. See Germany: Political Developments Since Unification, [http://www.photius.com/countries/germany/government/germany\\_government\\_political\\_developmen~1425.html](http://www.photius.com/countries/germany/government/germany_government_political_developmen~1425.html) (last visited Jan. 10, 2009) (“Many Germans see the prosecution of former East German officials as a necessary part of coming to terms with divided Germany’s past.”). See also Declaration of Human Rights, *supra* note 73, pmb1. (providing that “all members of the human family” share certain “inalienable rights”).

209. A.I.R. 1973 S.C. 1461.

210. *Id.*

211. (1981) 1 S.C.R. 206.

212. *Id.* Katz notes that

the Supreme Court of India did not rule that fundamental constitutional principles can never be altered. Instead, the court placed the limitation only upon the legislature’s amending power while suggesting that the constitution



In the words of Chief Judge Chandrachud's opinion,

[t]he Preamble [of the Indian Constitution] assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship, and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of 'Fraternity assuring the dignity of the individual and the unity of the Nation[.]'[] The newly introduced clause S of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever[.]"[] No constituent power can conceivably go higher than the skyhigh power conferred by clause (S), for it even empowers the Parliament to "repeal the provisions of this Constitution[.]"[] that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend.<sup>213</sup>

The basic structure in India is itself a judge-made doctrine, as it is not specifically provided as such by the text. It probably includes the supremacy of the Constitution, the creation of a republican and

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could be amended in another manner: A separate Constituent Assembly, which would have constitution-making power equal in authority to that of the framers of the constitution, has unlimited amending power since it could conceivably write a new constitution.

Katz, *supra* note 200, at 273 (citing A.I.R. 1975 S.C. 2299).

213. (1981) 1 S.C.R. 206, 240.

democratic form of government, the maintenance of separation of powers, the federal character of the national government, the building of a welfare state, the providing for individual liberties, and the ensuring of equality.<sup>214</sup>

The Indian Constitution is much longer than the American Constitution, containing 395 articles with ninety-four amendments. Part 20 of the Indian Constitution allows Parliament to ratify amendments with presidential approval, with the following exceptions: it cannot ratify amendments that modify the federal or state high courts and those of the territories, amendments that alter the election and extent of the executive power of the president and power of state governors, or amendments that effect the distribution of legislative powers between the union and state governments.<sup>215</sup> Amendments to any of these provisions *also* require that half of the states approve.<sup>216</sup> Still, the Indian Constitution is similar to the U.S. Constitution in that it does not, on its face, provide for judicial authority to declare amendments unconstitutional. Nevertheless, as a former English colony sharing a similar concern for democratic self-government, it raises questions like, “Is there a similar basic structure to the U.S. Constitution that also arguably cannot be amended?”

In *Fayt*,<sup>217</sup> a district court in Argentina declared, in April 1998, for the first time in that nation’s history, “a constitutional amendment enacted by a constituent convention” to be unconstitutional, in part because the convention had exceeded its authority.<sup>218</sup> Although the appellate court affirmed the decision without addressing the constitutional issue, the case is nevertheless significant to show “the judiciary’s power over the acts of a popularly elected constituent

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214. Elai Katz has noted that “[i]n India, the text of the constitution does not prohibit any kind of constitutional amendment. Instead, the Supreme Court of India developed a doctrine of limited amending power from the penumbra of the multi-tiered amending mechanisms and the lengthy bill of rights.” Katz, *supra* note 200, at 268-69 (footnote omitted).

215. See INDIA CONST. art. 368.

216. See *id.*

217. See “Fayt,” *Suplemento de Derecho Constitucional*, L.L., 18 de Agosto de 1998, at 8-9.

218. Comment, *Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead*, 31 U. MIAMI INTER-AM. L. REV. 93, 94 (2000) [hereinafter *Argentine Judiciary*] (citing “Fayt,” *Suplemento de Derecho Constitucional*, L.L., 18 de Agosto de 1998, at 8-9).

convention."<sup>219</sup>

Article 30 of the Argentine Constitution provides that "[t]he Constitution may be totally or partially amended. The need for reform must be declared by Congress by a vote of at least two-thirds of its members; but it shall not be carried out except by an Assembly summoned to that effect."<sup>220</sup> The Constitution is silent on how Congress is to declare the need for reform: is it by joint resolution or law?<sup>221</sup> Once Congress has declared the need for reform, however, it must specify what articles or provisions need to be revised.<sup>222</sup> It is assumed that the convention may not introduce amendments "outside of those specified by Congress" as needing reform.<sup>223</sup>

*Fayt* involved a justice of the Argentine Supreme Court who sought a declaratory judgment "to invalidate a measure limiting the term of office of Supreme Court Justices enacted by the Constituent Convention."<sup>224</sup> *Fayt* argued that the 1994 congressional authorization for the Convention was only "to modify the removal process for inferior federal judges."<sup>225</sup> By limiting the term of a Supreme Court justice, the Convention had exceeded its delegated authority.<sup>226</sup> The district court agreed, and it held that the Assembly had acted "outside its delegated authority";<sup>227</sup> as a result, it declared null the reform introduced by the Convention to Article 99 requiring all federal judges to retire at age seventy-five unless re-nominated.<sup>228</sup>

The appellate court affirmed the district court's decision, but it did so on a different theory of the case. The appellate court held that the new law did not apply retroactively to judges appointed prior to the 1994 reform.<sup>229</sup> As a consequence, the appellate court was able to sidestep the

219. *Id.* (citing "Fayt," L.L., 28 de Mayo de 1999, at 3).

220. *Id.* at 101 (translating and quoting CONST. ARG. art. 30, ch. I, pt. I).

221. *Id.* at 102 (citing NÉSTORE PEDRO SAGUÉS, ELEMENTOS DE DERECHO CONSTITUCIONAL TOMO I 330-31 (1997)).

222. *Id.* at 103 (citing GERMAN J. BIDART CAMPOS, MANUAL DE LA CONSTITUCION REFORMADA TOMO I 380 (1996)).

223. *Id.*

224. *Id.* at 111 (citing "Fayt," Suplemento de Derecho Constitucional, L.L., 18 de Agosto de 1998, at 8).

225. *Id.*

226. *See id.*

227. *Id.* (citing "Fayt," Suplemento de Derecho Constitucional, L.L., 18 de Agosto de 1998, at 8).

228. *Id.* (citing "Fayt," Suplemento de Derecho Constitucional, L.L., 18 de Agosto de 1998, at 8).

229. *Id.* at 112 (citing "Fayt," L.L., 28 de Mayo de 1999, at 2).

constitutional question of whether a court can declare an amendment to the Constitution unconstitutional.

The 1990 Constitution of Nepal provides that “[a] Bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament: Provided that this Article shall not be subject to amendment.”<sup>230</sup> Included among the various claims of the Preamble are the following:

WHEREAS, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate the Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality; and also to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality; NOW, THEREFORE, keeping in view the desire of the people that the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution, I, KING BIRENDRA BIR BIKRAM SHAH DEVA, by virtue of the State authority as exercised by Us, do hereby promulgate and enforce this CONSTITUTION OF THE KINGDOM OF NEPAL on the recommendation and advice, and with the consent of the Council of Ministers.<sup>231</sup>

Although vague as to specifics, it is clear the Nepalese Constitution contemplates that certain basic protections for human rights, democracy, and separation of powers are considered to be beyond the amendment process.<sup>232</sup> Moreover, the Nepalese Constitution establishes a Supreme

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230. NEPAL CONST. art. 116(1).

231. *Id.* pmb1.

232. Stith describes it this way:

The basic structure doctrine was built upon the premise that there is an unchangeable nature of the Constitution. At the same time, that structure was denatured by the incorporation of contingent instrumental policies. The resulting antinomy, however, became widely accepted by modernizing opinion

Court as “the sole and final interpreter both of statutes and of their constitutionality in all significant contexts.”<sup>233</sup> That said, there are some clear limitations, even on what is beyond constitutional amendment. Under the Nepalese Constitution, actions of the non-democratic institutions of the monarchy and of the military are not subject to judicial review.<sup>234</sup>

It further appears that the Nepalese Supreme Court has the power to declare constitutional amendments unconstitutional that it interprets to violate the Preamble.<sup>235</sup> Article 88(2) specifically provides that

[t]he Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *hebeas corpus*, *mandamus*, *certiorari*, Prohibition and *quo warranto* . . . .<sup>236</sup>

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leaders in part because both of its contradictory elements were useful.

Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U. J. INT'L L. & PUB. POL'Y 47, 66 (1996).

233. *Id.* at 49.

234. NEPAL CONST. arts. 31, 35(6), 86(1), 88(2)(a). Article 31, entitled “Question not to be Raised in Courts,” states that “[n]o question shall be raised in any court about any act performed by His Majesty: Provided that nothing in this Article shall be deemed to restrict any right under law to initiate proceedings against His Majesty’s Government or any employee of His Majesty.” *Id.* art. 31. Article 88(2)(a) provides that

the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army.

*Id.* art. 88(2)(a). Article 35(6) protects advice to the king, *see id.* art. 35(6), and Article 86(1) places the military courts outside the control of the judiciary. *See id.* art. 86(1).

235. Stith, *supra* note 232, at 53.

236. NEPAL CONST. art. 88(2). This is subject to certain *provisos*. *See supra* note 234.

One interpreter of India's and Nepal's constitutional systems believes that

[a]cceptance of the idea that there [exists] a basic structure of the Constitution that may not be changed, and that this basic structure includes both individual rights and state welfare goals, need not in itself have led to the centralized supreme judicial power now found in India and Nepal. For the question still remains open: What institution or institutions shall decide whether the basic structure has been violated?<sup>237</sup>

In other words, if the text of the Constitution does not explicitly grant this power to the Supreme Court, couldn't it be exercised in some other way?

One alternative would be to have the power exercised among all the branches of government, while *checking and balancing* each other, much as is done in Great Britain and Israel.<sup>238</sup> A second alternative, following more a *separation-of-powers* view, would follow the Italian model and have separate courts "decide the meaning of statutes and of the Constitution." A third alternative could be to follow the French model, and have a Constitutional Council scrutinize new parliamentary legislation and a Council of State monitor actions of the executive. A fourth alternative could be to follow the Chilean model, and allow the Supreme Court to "refuse to apply laws it considers unconstitutional in particular cases" with no *stare decisis* effect.<sup>239</sup> Still another alternative, analogous to a similar clause in the Norwegian Constitution, makes a provision regarding how a constitutional amendment may operate "only a directive for the legislature, and is not to be used by any court as an excuse for refusing to recognize the legal validity of an amendment."<sup>240</sup>

### B. Role of the Courts

Finally, I now put center stage the question the previous sections

237. Stith, *supra* note 232, at 68.

238. Here, I would note that the checks-and-balance system of Great Britain differs from the United States' system in that the former is set by tradition in the sense that the Constitution is unwritten. *See id.* at 71.

239. *Id.* at 72.

240. *Id.* at 75 (citing D. Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN Y.B. INT'L AFFS. 347, 380 n.10e (1970)).

have hinted at: who should decide whether a constitutional amendment is unconstitutional? To answer this question, I focus particularly on the American legal system, noting that the traditions and histories of other countries may lead to different arrangements, as was suggested at the end of the previous section. That said, it is certainly reasonable to expect that under the American legal system, the final power to declare a constitutional amendment unconstitutional lies with the courts. I say this for two reasons. The first concerns how we get to the question; the second distinguishes popular legitimacy from legal legitimacy and their somewhat different implications for political power.

Beginning with the second question, it is important to differentiate the belief that a proposed constitutional amendment is unconstitutional from the view that the amendment is unconstitutional. The former is certainly sustainable by every member of Congress who resists voting to submit the proposal to the states. It is also sustainable by every state legislator who either votes against the proposal or votes against an effort to call forth a national convention to propose certain constitutional amendments.<sup>241</sup> Finally, under the latter method, the belief that a particular amendment is unconstitutional is also sustainable by every delegate to the convention who may in good conscience resist its adoption. This view could be held by the public itself, and it may be a reason why they might encourage their legislators to vote against it.<sup>242</sup>

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241. Here, I am just following the procedure set forth in Article V. See U.S. CONST. art. V. However, one commentator has proposed that the unstated reason for the alternative amendment processes is to provide a method by way of convention for more radical change. See Katz, *supra* note 200, at 280-81 (arguing that the traditional congressional amending process is adequate for amendments that do not change the character of the Constitution; for those that do, the conventional method that provides greater opportunity for the people to express their will seems preferable). I am not convinced, however, that there is a textual basis, see W.F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321 (1921), or an historical basis for this idea beyond the original convention that got us to the Constitution of 1789. An interesting thing occurred in 1861 when "Congress voted to propose a constitutional amendment that would have eternally forbidden Congress from abolishing or interfering with slavery. This amendment—the Corwin Amendment—was intended to save the Union from civil war, but the Civil War broke out after only three states could ratify it." Katz, *supra* note 200, at 276 (footnotes omitted). The amendment stated that "[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." CONG. GLOBE, 36th Cong., 2d Sess. 1263 (1861).

242. Ackerman points out that one difference between the normal legislative process and the constitutional-amendment process is that the public becomes more seriously

Still, this is not the same thing as saying that the amendment is unconstitutional post ratification. At that point, the relevant branches of government, and some of the public, will no doubt feel that they have had their say, at least as much as the democratic process allows, notwithstanding the outcome. So, absent a complete denial of that process, the issue would seem settled within the common American understanding of how these institutions work. The open question, however, concerns the role of the courts, specifically, the U.S. Supreme Court—for that role is predicated not in the first instance on popular appeal, but instead in the way the new amendment would operate within the broader legal understanding of the constitutional order, including other relevant provisions of the Constitution.<sup>243</sup> And this is what separates legal discussions from political discussions, at least with respect to the judicial function of interpreting statutes or executive orders.

Interpreting a federal constitutional amendment as being constitutional or not would be at least a broader extension of their current

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engaged in the latter—like the difference between what will I have for dinner and who will I marry involves two different levels of engagement. See 1 ACKERMAN, *supra* note 44, at 6-7.

243. Although I will discuss below, in greater detail, the Supreme Court's decision in *Marbury v. Madison*, it suffices for now to note the Supreme Court's own recent understanding of that decision. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *United States v. Morrison*, the Court, in a footnote, after refusing to recognize Congress' power to enact a civil remedy as part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. V, § 40302, 108 Stat. 1902, 1941 (codified as amended at 42 U.S.C. § 13981 (1994)), *invalidated* by *United States v. Morrison*, 529 U.S. 598 (2000), where the regulation did not have a substantial effect on interstate commerce, stated the following:

Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint. See, e.g., *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). It is thus a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution."

*Morrison*, 529 U.S. at 616 n.7 (quoting *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995)). Without venturing into the merits of the decision, which would be beyond the scope of this article, it is nevertheless worth noting that a majority of the Court paid heed not only to the Constitution's limitation on the power of the political branches, but also to its conferral of power onto the judiciary to define such a limitation.



role, if not a new role, for the courts. Part of the question concerns what theory of interpretation a court would use. I have already suggested that one persuasive theory would only strike down amendments that could not be sustained by overlapping views of utilitarianism, rights theory, and pluralistic communitarianism.<sup>244</sup> If the amendment fails to satisfy only two of these positions, or even only one, that would be, at most, a reason for courts to narrow the meaning, at least until society underwent some transformative value change.<sup>245</sup> In the limited case of a logically contradictory amendment, a canon of interpretation, such as last in time replaces what came earlier because it reflects a new consensus over what was the constitutional order, could be used.<sup>246</sup> Otherwise, the amendment could be handled in the same way a transformative substantive amendment is handled, by asking how it squares with existing rights from the viewpoint of rights theory and pluralistic communitarianism or the constitutional order (especially the relations of institutional structures) as viewed under utilitarianism and pluralistic communitarianism. Still, it is helpful to ask why the Supreme Court should be central to this process versus some other institution—perhaps a new institution. Or, as stated by our first question, how did we get to this point of making the Court central?

Here, I believe it helps to note some unique features about how American courts operate generally, both positive and negative. On the positive side, the federal courts, including the Supreme Court, are relatively weak institutions. As Alexander Hamilton noted in *The Federalist No. 78*,

[w]hoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword

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244. See *supra* Part III.B.4.

245. See *supra* Part IV.A.

246. See *supra* Part IV.A.

or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>247</sup>

The lack of danger from even an overly aggressive Supreme Court is made further manifest by specifically limiting the Court's power in the Constitution. Namely, the Constitution provides that the President nominates Justices to the Supreme Court, and they must then be confirmed by the Senate;<sup>248</sup> Congress decides upon the number of justices that serve on the Court;<sup>249</sup> Congress sets their salary;<sup>250</sup> the

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247. THE FEDERALIST NO. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

248. U.S. CONST. art. II, § 2, cl. 2.

249. The various statutes Congress has adopted to adjust the size of the Supreme Court to meet changing docket conditions is nicely summarized in Wikipedia, "The Supreme Court":

The United States Constitution does not specify the size of the Supreme Court; instead, . . . Congress [has] the power to fix the number of Justices. Originally, the total number of Justices was set at six by the Judiciary Act of 1789. As the country grew geographically, the number of Justices steadily increased to correspond with the growing number of judicial circuits. The court was expanded to seven members in 1807, nine in 1837 and ten in 1863. In 1866, [however, Congress wished to deny President Andrew Johnson any Supreme Court appointments, and therefore] passed the Judicial Circuits Act which provided that the next three Justices to retire would not be replaced; thus, the size of the Court would eventually reach seven by attrition. Consequently, one seat was removed in 1866 and a second in 1867. In the Circuit Judges Act of 1869, the number of Justices was again set at nine (the Chief Justice and eight Associate Justices), where it has remained ever since. President Franklin D. Roosevelt attempted to expand the Court (see Judiciary Reorganization Bill of 1937); his plan would have allowed the President to appoint one new, additional justice for every justice who reached the age of seventy but did not retire from the bench, until the Court reached a maximum size of fifteen justices. Ostensibly, this was to ease the burdens of the docket on the elderly judges, but it was widely believed that the President's actual purpose was to add Justices who would favor his New Deal policies, which had been regularly ruled unconstitutional by the Court. This plan, referred to often as the Court Packing Plan, failed in Congress. The Court, however, moved from its opposition to Roosevelt's New Deal programs, rendering the President's effort moot. In any case, Roosevelt's long tenure in the White House allowed him to appoint eight Justices to the Supreme Court (second only to George Washington) and promote one Associate Justice to Chief Justice.

Wikipedia, Supreme Court of the United States, [http://en.wikipedia.org/wiki/Supreme\\_Court\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) (last visited Jan. 10, 2009) (citing Peter G. Fish, *Justices*,

House holds the sole power of impeachment,<sup>251</sup> which when exercised, transfers the matter to the Senate for trial.<sup>252</sup> Moreover, it would not be a reasonable interpretation of the amendment power, as I have described it, to believe that the Supreme Court could limit these provisions, thereby broadening its own power. One reason is that the theory of rights would certainly not support a Supreme Court operating without any constraint on what rights it would or would not protect. A rule-utilitarian theory would not allow a Supreme Court to operate contrary to the greater good that would be possible were all constraints removed.<sup>253</sup> Finally, a pluralistic communitarian who operates with a corporatist point of view would question whether one could achieve overlapping consensus if the political branches could be too easily stifled in respect to any decision they might make.<sup>254</sup>

On the negative side, Jeremy Waldron has argued that there is no reason to suppose courts are any better than legislatures in protecting rights, and further that the judiciary fulfilling this function “is democratically illegitimate.”<sup>255</sup> Waldron acknowledges, however, that the idea that the political branches are better at protecting rights presupposes both that the “democratic and legislative institutions [are] in good shape so far as political equality is concerned,” and “that the members of the society we are considering are by and large committed to the idea of individual and minority rights.”<sup>256</sup> Were this not true, Waldron admits that “the core argument against judicial review that [he

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*Number of*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 477, 477-78 (Kermit L. Hall et al. eds., 1992)).

250. U.S. CONST. art. I, § 8, cl. 1.

251. *Id.* art. I, § 2, cl. 5.

252. *Id.* art. I, § 3, cl. 6.

253. I do not consider act utilitarianism here because the whole idea of a constitutional system like that in the United States, which affords the presumptions for certain “rights,” is to place restrictions on the power of the Congress to act based solely on popular preferences. Certainly, Congress should be able to act if it considers the rule itself contrary to the common good.

254. Alexander Bickel has pointed out that “[f]ull and free play must be allowed to ‘that wide margin of considerations which address themselves only to the practical judgment of a legislative body.’” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 35 (Yale Univ. Press 2d ed. 1986) (1962) (quoting James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893)).

255. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1346 (2006).

256. *Id.* at 1401.

has] outlined cannot be sustained.”<sup>257</sup>

Although Waldron believes that the political branches’ responsiveness to minority rights could be improved, he admits to certain cases in which judicial review may be appropriate, by noting “Justice Stone’s suggestion in the famous *Carolene Products* footnote four: ‘[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .’”<sup>258</sup> “Minorities in this situation may need special care that only non-elective institutions can provide—special care to protect their rights and special care (as John Hart Ely points out) to repair the political system and facilitate their representation.”<sup>259</sup> At this point, Richard Fallon raises an important challenge to Waldron’s view that judicial review may be unjustified. Fallon argues that “judicial review may provide a distinctively valuable hedge against errors of underenforcement,”<sup>260</sup> “because it is morally more troublesome for fundamental rights to be underenforced than overenforced.”<sup>261</sup> This, of course, does not fully settle the question of why the courts, versus some other presumably non-elected body with life tenure, are the best place to handle such matters.

Ever since the Supreme Court’s decision in *Marbury v. Madison*,<sup>262</sup> the Court has asserted that it has the right to decide what the Constitution means.<sup>263</sup> The case involved one William Marbury who, pursuant to the Judiciary Act of 1789,<sup>264</sup> had been appointed by the outgoing federalist President John Adams to be a justice of the peace in the District of Columbia.<sup>265</sup> Up to this time, the federalist party had control of both houses of Congress and the presidency; however, an incoming Democratic-Republican Congress and administration led by Thomas Jefferson would soon replace that party. Nonetheless, the Senate had approved the Marbury appointment, along with many others, and Marbury’s appointment would have gone into effect had the commission

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257. *Id.* at 1404.

258. *Id.* at 1403 (alteration in original) (quoting *United States v. Caroline Products Co.*, 304 U.S. 144, 153 n.4 (1938)).

259. *Id.* (citing ELY, *supra* note 12, at 135-79).

260. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1709 (2008).

261. *Id.* at 1735.

262. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

263. *Id.* at 177.

264. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

265. *Marbury*, 5 U.S. (1 Cranch) at 137-38.

been delivered to him.<sup>266</sup> That did not happen, however.<sup>267</sup> The outgoing Secretary of State, John Marshall, had little time to see to it that all the commissions that had been approved were delivered prior to Thomas Jefferson taking office. When Jefferson entered the presidency, he ordered his new Secretary of State not to deliver any commissions that remained. As a result, Marbury's commission was never delivered.<sup>268</sup> Marbury then brought suit in federal court for a writ of mandamus to order the government to deliver his commission.<sup>269</sup> The suit reached the Supreme Court, which then determined that there were three separate questions: Did Marbury have a right to the commission? If he did, do the laws provide him a remedy? Finally, is asking the Supreme Court for a writ of mandamus the appropriate remedy?<sup>270</sup>

Chief Justice John Marshall—the same John Marshall who had been Adam's Secretary of State—delivered the opinion for a unanimous Supreme Court. Marshall quickly noted that the appointment is made when the President signs the commission and is complete when it bears the Seal of the United States.<sup>271</sup> This effectively resolved the first issue, and allowed the Court to proceed to the question of whether a remedy was available. Here Marshall stated that

where heads of departments are the political or confidential agents of the . . . President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of [this] country for a remedy.<sup>272</sup>

Having determined that Marbury had a right and that the laws of the United States afforded him a remedy—presumably a writ of mandamus—the only consideration left was whether a writ of mandamus

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266. *Id.* at 138.

267. *See id.*

268. *See id.*

269. *See id.*

270. *Id.* at 154.

271. *Id.* at 162.

272. *Id.* at 166.

by the Supreme Court was the right remedy.

Here, Marshall retreated. Article III of the U.S. Constitution provides that “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all other cases . . . , the supreme Court shall have *appellate* Jurisdiction . . . .”<sup>273</sup> Yet, the Judiciary Act of 1789 authorized the Supreme Court to issue “writs of *mandamus*, . . . in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”<sup>274</sup> The problem, as the Court saw it, was that a writ of mandamus looks a lot like the action of a court of original jurisdiction, at least when directed “to an officer for the delivery of a paper.”<sup>275</sup> Consequently, the Act’s authorization of such actions by the Supreme Court could not be sustained under Article III, because the statute implicitly expands the original jurisdiction of the Court without constitutional warrant.<sup>276</sup> Here, Marshall succinctly noted the power of the Court: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>277</sup> Herein lies the principle of judicial review:

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.<sup>278</sup>

In effect, what Marshall did here was not as unexpected as Jefferson

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273. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

274. Judiciary Act of 1789, ch. 20, §13, 1 Stat. 73, 81.

275. *Marbury*, 5 U.S. (1 Cranch) at 175.

276. *Id.* at 176.

277. *Id.* at 177.

278. *Id.* at 178.

and some others might have thought at the time. Indeed, it has been suggested that the power of judicial review goes back to the English courts of 1610,<sup>279</sup> and it is also found in some state-court decisions.<sup>280</sup> More significantly, Alexander Hamilton wrote in *The Federalist No. 78*:

If it be said that the legislative body are themselves the constitutional judges of their own powers... it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of

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279. Wikipedia, "Marbury v. Madison," notes the following: "The idea that courts could nullify statutes" may have had

its roots in Chief Justice Edward Coke's 1610 opinion in *Dr. Bonham's Case*, 8 Co. Rep. 107a. That decision arose under a statute of Parliament enabling the London College of Physicians to levy fines against anyone who violated their rules. The College accused a doctor of practicing without a license and fined him accordingly. Coke found that their statutory powers violated "common right or reason" because "no person should be a judge in his own case."

Wikipedia, *Marbury v. Madison*, [http://en.wikipedia.org/wiki/Marbury\\_v.\\_Madison](http://en.wikipedia.org/wiki/Marbury_v._Madison) (last visited Jan. 10, 2009) (quoting *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (K.B.)). Although the *Dr. Bonham* case was about the supremacy of common law over statutory law, it should be noted that the U.S. Supreme Court has rejected this precedent in *Hurtado v. California*, 110 U.S. 516 (1884).

280. "The doctrine was specifically enshrined in some state constitutions, and by 1803 it had been employed in both State and Federal courts in actions dealing with state statutes, but only insofar as the statutes conflicted with the language of state constitutions." *Id.* (citing GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN GLOBAL PERSPECTIVE: THE BASICS* 132-34 (2004)).

the people to the intention of their agents.<sup>281</sup>

How this translates to the Supreme Court being the final arbitrator of an allegedly unconstitutional amendment is seen if we merely extend the scope of the word “constitution” to “constitutional order” in the Hamilton quote: “A constitution is in fact, and must be, regarded by the judges as a fundamental law.”<sup>282</sup> This is not some radical sleight of hand. It simply reflects a necessary truth that the words of a document are not understood independent of the language or their history, or even of the reasons, policies, principles, and purposes that they were meant to serve.<sup>283</sup> It is indeed this background understanding that provides the foundation of judicial interpretation. Consequently, from the foregoing analysis, at least for the constitutional order of the United States, if there is to be a question about the constitutionality of a constitutional amendment, that question will be best answered, both for its legal merits and for its ability to separate it from popular fads, if it is settled by the judiciary subject to all the constraints mentioned above, rather than by the political branches of government, which are most subject to

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281. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 247, at 524-25.

282. *Id.* at 525.

283. Here, I recall Lon Fuller’s criticism of H.L.A. Hart’s idea of interpreting a legal rule by first finding an extension of “core” cases to which the rule applies, and then locating a penumbra around which the rule applies. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Fuller writes:

If I have properly interpreted Professor Hart’s theory as it affects the “hard core,” then I think it is quite untenable. The most obvious defect of his theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words. Surely no judge applying a rule of the common law ever followed any such procedure as that described (and, I take it, prescribed) by Professor Hart; indeed, we do not normally even think of his problem as being one of “interpretation.” Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text. Surely a paragraph does not have a “standard instance” that remains constant whatever the context in which it appears. . . .

. . . If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, “without thinking,” that a noisy automobile must be excluded.

Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-63 (1958).



unreflective political upheavals.<sup>284</sup>

## V. CONCLUSION

In this article, I sought to deal with a perplexing question: can a constitutional amendment be unconstitutional? I sought to address the issue with a primary, though nonexclusive, focus on the American constitutional order. With that in mind, I have suggested that, notwithstanding the two specific limitations written into Article V, one of which is now moot, that a broader, but not unlimited, set of limitations is also present, at least implicitly. Those limitations include logical limitations, substantive limitations, procedural limitations, and human-rights limitations. I offered a means for how these limitations are discovered in terms of legitimacy, and then, how they are justified by overlapping theories of utilitarianism, rights theory, and pluralistic communitarianism. That said, the article showed how some of these same issues have arisen in connection with the constitutions of other countries, and also showed the various means those countries have adopted to resolve them. Finally, the article sets forth a rationale for why, at least in the American context, this role ought to be primarily the responsibility of the U.S. Supreme Court.

If I have been correct with most of my arguments, then the position should be quite sustaining as a future direction for the federal courts to follow. It should also set free fears that whenever one wants to change the country (liberal or conservative), all they have to do is amend the Constitution. Also, one does not have to give up on the idea of "government of the people, by the people, [and] for the people."<sup>285</sup>

Unlike other non-democratic attempts to impose restrictions, all of my arguments take, as a central feature, the idea of a social contract in

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284. Cass Sunstein has argued that

[j]udicial review was intended to create a further check [to the system of checks and balances among the governmental branches]. Its basic purpose was to protect the considered judgments of the people, as represented in the extraordinary law of the Constitution, against the ill-considered or short-term considerations introduced by the people's mere agents in the course of enacting ordinary law.

SUNSTEIN, *supra* note 38, at 23 (citing THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 247).

285. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 183, 184 (William E. Gienapp ed., 2002).

which the people decide what is to happen to them, although I do not treat the people's decision *simpliciter*, as based only on momentary or fleeting preferences. In an interesting historical reversal, it seems like those who today would have been classified as federalists because they believe in strong central government based on majority rule, like present-day social conservatives, are the ones arguing for amendments like the anti-federalists of old—though in this instance to protect the flag, bring God into the Constitution, stop abortion, and limit marriage to a heterosexual institution. Whereas those who today would be more classified like anti-federalists because they believe in individual human rights like liberals, moderate progressives, and to some extent (not related to private property) libertarians, are the ones arguing for institutions marking a strong central government like old-time Federalists.

Where I differ from some modern-day federalists is in their simplistic contractarianism. I recognize that what was set up originally in 1789 was a contract not only for the present, but also for future generations. And where I differ from some modern-day anti-federalists, is that I do not expect courts to do all the work of securing a progressive society, but only to guarantee minimal limits for the possibility of progressiveness, if that be the peoples choice.<sup>286</sup> Moreover, because the future cannot be completely foretold, the model that emerges from this discussion allows for some degree of play to meet changing social and economic conditions and understandings. In most cases those changes will be met by common legislation or mild adjustments to the basic framework, as one might expect in a democracy. But in a few cases, broader transformative amendments will be necessary, as was true with the Reconstruction Amendments, to allow full participation of the individual in making the democracy work. And, in very far fewer cases, even revolutionary change must be acknowledged, as it was when the

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286. Sunstein has noted that

some justices attempt to decide cases in the hope and with the knowledge that several different conceptions of the point can allow convergence on a particular outcome. Their attempt stems from their knowledge that some of their own convictions may not be right, and from their effort to accommodate reasonable disagreement. This point returns us to a central point: judicial minimalism is rooted in a conception of liberty amid pluralism, a conception that is central to the democratic idea.

CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 41 (1999).

Articles of Confederation gave way to the Constitution of 1789, when all else led to a non-just-belief in an intolerable social or economic situation.

Still, none of this need draw us to the kind of moral and legal relativism that would exist if the Constitution were merely an open document capable of supporting any change that met the more formal standard for adoption outlined in Article V. What saves the Constitution from that plight is that behind it lies a developing philosophical understanding of those values proclaiming liberty, equality, and basic human dignity that have been part of it from the very beginning. That set of values, combined with logical and substantive limitations provided by the original document and its historical interpretation by the Court, along with human-rights concerns, gives us comfort to believe that the constitutional order will advance in a direction that most will be able to recognize as collectively beneficial, overridingly democratic, and individually self-fulfilling.