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Amending the Constitution: Just Not Every November

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AMENDING THE CONSTITUTION: JUST NOT EVERY NOVEMBER

BRENDON TROY ISHIKAWA¹

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I. INTRODUCTION

In an age of accelerating microprocessors and diminished attention spans, simple boredom with Washington politics-as-usual has made the selling pitch of "new & improved" as effective for political agendas as for laundry soap. Political unrest increasingly replaces the Republican and Democratic parties as the controlling influence in determining the composition of the federal government.² The half-life of political support seems to be halving from Reagan's two terms, to Bush's single term, to Clinton's two year approval rating slide, to Gingrich's plummet in the polls after only one year as speaker.³ What seems to work best—at least for a while—are catchy phrases and patriotic symbols: "Three strikes and you're out," "Contract with America," and "Balanced Budget." Perhaps it is inevitable that tinkering with the Constitution will fire the public's imagination; especially with images of burning the American flag or promises of a balanced budget. Recent congressional votes show that we have come very close to proposed amendments constraining federal power over the budget and citizens' expressive freedom.⁴ Catchy

²See Akhil Reed Amar & Vikram David Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992).

³Cf. Richard L. Berke, *Clinton's Ratings Over 50% in Poll As G.O.P Declines*, N.Y. TIMES, Dec. 14, 1995, at A1, A17 (discussing President Clinton's approval ratings slide over two years and recent polls showing Speaker Gingrich's approval rating decline).

⁴Since 1989, the number of senators voting in favor of a flag-burning amendment has been steadily rising to require only three more "yes" votes to meet the constitutional requirement of two-thirds of both houses of Congress. Robin Toner, *Flag-Burning Amendment Fails In Senate, but Margin Narrows: Proposed Constitutional Change is 3 Votes Short*, N.Y. TIMES, Dec. 13, 1995, at A1, A14. Similarly, the balanced-budget amendment was only four votes short in the Senate of the constitutional requirement. Richardson Powelson, *Matthews: White House not Behind My Budget Vote*, KNOXVILLE NEWS-SENTINEL, Mar. 4, 1994, at A15.

gimmicks seem to bolster chances of reelection more than sound policy reasoning.⁵

Momentary inclinations of the electorate and sound bites are ill suited for determining whether the Bill of Rights should be abridged for the first time or whether Article I's allocation of legislative power needs to be reigned in.⁶ Exactly this would result if amending the Constitution were subject to national elections, instead of the congressional and state super majorities required by Article V. Nonetheless, Professor Akhil Amar has defended the idea that Americans may amend the Constitution regardless of Article V's dictates.⁷ Professor Amar does not stand alone on this claim. Professor Bruce Ackerman not only agrees, but would actually prefer direct popular amendment over the express Article V procedures.⁸ Their arguments, however, ignore the Framers' careful balancing of federal and popular principles in Article V by embracing only the democratic populist aspect of the Constitution.

The Framers did recognize that democracy offers an essential means of ensuring that its citizens enjoy political freedom. Thus, the constitutional scheme preserves democratic institutions during its operation, and during its amendment. Each of Article V's two amendment procedures includes a democratic element by involving state legislatures or conventions either to ratify a proposed amendment or to call for a constitutional convention for purposes of proposing an amendment.⁹ To the Framers, state legislatures and

⁵The ephemeral nature of amendment politics showed in the vote on the balanced-budget amendment when all five of the senators who switched from an earlier "no" to "yes" votes faced reelection the next year. Mark Z. Barabak, *Balanced-budget About-face Leaves Feinstein Credibility Insecure*, SAN DIEGO UNION-TRIBUNE, Mar. 4, 1995, at A3. Note, however, that "[o]f the six senators who switched from "yes" to "no," thus sealing the amendment's defeat, none face re-election sooner than 1998, by which time [the March 1995] vote may well be politically irrelevant." *Id.* Even if voters remember, a vote either way can be justified because "voter support for a balanced budget—80 percent in the abstract—plummets to the 30 percent range when Social Security is threatened." *Id.*

⁶Note that concerted efforts are also being made to revise the Fourteenth Amendment's guarantee of citizenship to those born in the United States and the First Amendment's Establishment Clause. See Neil A. Lewis, *Bill Seeks to End Citizenship As Birthright for Everyone*, N.Y. TIMES, Dec. 14, 1995, at A20 (noting "substantial initial support" of congressional representatives for eliminating automatic citizenship for those born in United States); J. Michael Parker, *Conservative Christians Back 2 Amendment Ideas*, SAN ANTONIO EXPRESS-NEWS, Dec. 2, 1995, at A1 (noting congressional and grass-roots support for "Religious Equality Amendment" and "Religious Liberties Amendment").

⁷See generally Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter Amar, *Consent*].

⁸BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 54 (1991); Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63 (Sanford Levinson ed., 1995).

⁹See *infra* Part III.B.

conventions represented self-governance at the most local level possible.¹⁰ The Framers, however, also understood that the democratic principle must be balanced against another principle—the principle of federalism. Otherwise, the majority might constitute a tyranny by denying individuals or even a sizable minority of their rights.¹¹ Not surprisingly, Article V's amendment procedures contain a blend of federal and democratic components that the Framers anticipated would further Preamble aims.

Article V's federal aspect inheres in Congress's role in proposing amendments or convening a convention to propose an amendment. In originating amendments, Congress serves as the single, deliberate body best able to suggest improvements to the constitutional system.¹² Or, Congress

¹⁰See James Wilson's Summation and Final Rebuttal in the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 846, 850 (Bernard Bailyn ed., 1993) (arguing that most direct election procedures possible at time were incorporated into the Constitution, and that these included action by states, the electoral college, and conventions) [hereinafter DEBATE]. But see *infra* text accompanying notes 187-88 (noting recent arguments that this filter of representation no longer is necessary due to improved transportation and communicative technologies).

¹¹For example, the Fifth Amendment's Takings Clause allows governmental takings of private property for the public good, but requires the public to make the owner whole again through "just compensation." U.S. CONST. amend. V (emphasis added). This clause demonstrates the understanding that the minority may be denied political or economic victory but not justice. Professor Amar emphasizes the majoritarian and states rights aspects of the Bill of Rights, but perhaps with too much zeal. He dismisses the Takings Clause as nothing more than a provision that Madison had the foresight to "sneak in." See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1181-82 (1991) ("How, then, did [Madison] manage to slip the Takings Clause through? In part by clever bundling, tying the clause to a variety of other provisions that commanded more enthusiasm . . .") [hereinafter Amar, *Bill of Rights*]. Amar's account of the takings clause passage characterizes Madison's drafting as involving a "log-rolling" tactic only with respect to the Fifth Amendment.

Surely, we must give Madison and his colleagues more credit. Elsewhere, Professor Amar acknowledges the care given to the preparation of our governing document. See Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 287 (1987) (noting that first Congress in 1789 concerned itself with printing "correct" copy of Constitution to clean up "de minimus" textual discrepancies). Thus, it seems surprising that Professor Amar dismisses a focus on "just" treatment of an individual or minority suffering (economic) deprivation. While the Framers did focus on the majoritarian aspect of government, their goals as stated in the Preamble—to establish a more perfect union and justice—compelled them to safeguard the minority as well as well as affirm majoritarian rights.

Thus, the Fifth and Sixth Amendments do not address the collective people or states, but use the singular in requiring that "no person" shall be denied the benefit of counsel or the due process. Although these protections prevent the government from waging a divide and conquer battle against the majority, their language focuses on individual and minority protections that "no person" may be denied. U.S. CONST. amends. V & VI.

¹²See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (1987) (Max Farrand ed., Rev. Ed. 1966) (recounting Hamilton's argument that "[t]he National Legislature

should ensure that the convention be properly composed and convened in a proper setting.¹³ Underlying the Framers' involvement of Congress was the intent that it would ensure that only one version of a proposed amendment pending ratification while an impetus for change may find support in many quarters.¹⁴ Thus, democracy is tempered against excess by being balanced against federalism.

Federal principles may appear to disempower the political agency of the electorate in this juxtaposition. But federalism serves not to disempower, but to temper the tyranny of the majority.¹⁵ This is not a government in which the strong do what they can and the weak suffer what they must.¹⁶ Federalism guarantees "to our posterity"¹⁷ the longevity and vitality of our system. Thus, it complements the self-governance principle of republican government. Properly conceived, federalism does not trump democracy.¹⁸ Instead, the true role of federalism is to defend against innovations, inclinations, and confusion that

will be the first to perceive and will be most sensible to the necessity of amendments . . .") [hereinafter FARRAND, RECORDS].

¹³AMERICAN BAR ASSOCIATION, SPECIAL STUDY: THE CONVENTION METHOD FOR AMENDING THE CONSTITUTION 19 (1974) (concluding that Congress should provide for time, place, composition, and financing of constitutional convention) [hereinafter ABA STUDY]; PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION 145-52 (1989) (reprinting bill introduced to Senate to codify procedures for Congress to follow, which include convening convention, administering oath to delegates, financing, and provision of information and assistance).

¹⁴See THE FEDERALIST No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *infra* note 181 and accompanying text.

¹⁵See *infra* Part I.B.3 (examining what tempers tyranny of the majority under our Constitution).

¹⁶Cf. THUCYDIDES, THE PELOPONNESIAN WAR 331 (Crawley trans., Modern Lib. Ed. 1951) (recounting Athenian's rejection of Melian entreaties for justice because "right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must"). In contrast, ours is a government of All of Us the People of the United States, not just the half plus one.

¹⁷U.S. CONST. preamble.

¹⁸This is not to say that democracy has never been undermined; it has been on a number of occasions. Federalism, however, has not been the source of subordination of democracy. Those sources have found their roots elsewhere—in prejudice, economic forces, and efficiency rationales.

Most tragically, the aims of republican government, as declared by the Declaration of Independence and the Preamble to the Constitution, were denied to slaves and those suffering involuntary servitude. U.S. CONST. art. I, § 9, cl. 1. Article I, section 3 denied autochthonous Americans and slaves from even being counted as complete persons. U.S. CONST. art. I, § 2, cl. 3. Thus, it followed that they did not count enough to merit complete rights. Essentially, slaves' economic value—to a select few—precluded recognition of their value as political participants in the nation they helped support. Consider the following account of statement by George Mason, Virginia delegate to the Philadelphia convention:

would irreparably or perniciously undermine majoritarian action. Federalism is that principle—the lack of which doomed many of the ancient republics to tempestuous and short lives—that ensures the federal government’s role in safeguarding democracy.¹⁹ The irony of direct democracy is that a majority can hold inclinations that are anti-majoritarian and act on these in a majoritarian function.²⁰ Our federal institutions do not exist to thwart self-governance, but to preserve it.

Part I of this Article examines and critiques Professor Amar’s argument that the people may directly amend the Constitution without having to comply with Article V. An examination of the Framers’ deliberate inclusion of federal principles in Article V, and the Constitution as a whole, suggests Amar’s popular sovereignty theorem to be incomplete. Part II argues that constitutional legitimacy requires that amendments proceed on a clearly lawful path to ratification. This Part offers suggestions for making Akhil Amar’s constitutional amendment proposal more consonant with the spirit and text of our Constitution.

II. POPULAR CONSTITUTIONAL AMENDMENT OUTSIDE OF ARTICLE V?

A. Professor Amar’s Popular Sovereignty Theorem

In a series of articles culminating with *Consent of the Governed*,²¹ Professor Amar articulates a theory that Article V does not limit the right of the American

It was certain that the slaves were valuable, as they raised the value of land, increased the exports and imports, and of course the revenue, would supply the means of feeding & supporting an army, and might in cases of emergency become themselves soldiers. As in these important respects they were useful to the community at large, they ought not to be excluded from the estimate of Representation. He could not however regard them as equal freemen and could not vote for them as such.

1 FARRAND, RECORDS, at 581. Not all delegates agreed, of course. But necessity forced compromise. "Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. . . . These were difficulties however which he thought must be overruled by the necessity of compromise." 1 *id.* at 587. Professor Amar notes the economic value of slaves once the cotton gin was invented sealed their fate in the Southern states. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1215 (1992) [hereinafter Amar, *Fourteenth Amendment*]. The economic value of slaves precluded consideration of their value as citizens.

Our experiences in having other values—such as economy, efficiency, and prejudices—should warn us about subverting the fundamental principles of republican government. If, as Professor Amar suggests, a majority of United States citizens may amend the Constitution, the people should heed our national experiences and mistakes.

¹⁹ See *infra* note 67 and accompanying text (noting problems inhering in democracies lacking counterbalances to majoritarian rule).

²⁰ See *infra* Part II.B.3 (noting that Framers understood possibility and danger of ultra vires actions by majority).

²¹ See Amar, *Consent*, *supra* note 7; see also Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Akhil Reed

electorate to popularly amend the Constitution.²² What he posits to be his "First Theorem" rests on the proposition that the people who constitute the electorate may elect to reconstitute the Constitution to more closely reflect their constitution.²³ As a corollary, Professor Amar reasons that this right of the people to amend the Constitution cannot be denied even though the Constitution does not expressly recognize such an exercise of popular sovereignty. Instead, the Constitution represents a grant of political power by the citizenry to representatives who accept that power with all of the limitations expressed therein. These limitations exist only in the exercise of delegated powers flowing from the people, not on the origin of that power, the people themselves. Viewed in this light, Article V's express constraints on constitutional amendment procedures appear inapplicable to the people themselves. Those procedural constraints, however, are not meaningless because they apply to the use of powers delegated by the people.

1. The Corollary—Article V's Applicability to Federal Officials Only

Article V's specific instructions for the amending process can be read to preclude any other method of constitutional amendment under the principle of *expressio unius est exclusio alterius*.²⁴ According to this principle of construction, Article V provides the only lawful method for constitutional amendment. Professor Amar contends that this construction makes sense only in considering the amendatory power of Congress. Federal officials cannot properly overstep their limited grant of power to amend the Constitution as provided by Article V.²⁵ To do so would render their actions *ultra vires*, a usurpation of powers that the people have not chosen to delegate.

But, under Amar's theorem, to apply this *expressio unius* construction of Article V to the power of the people to amend the Constitution makes no sense. He argues that the Framers understood that the people were the origin and residuaries of the power to alter their system of government.²⁶ Any articulation

Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 8, at 89.

²²See generally Amar, *Consent*, *supra* note 7.

²³*Id.* at 504 ("Popular sovereignty does not prevent us from striking a balance in our own minds that strongly privileges the constitutional status quo. But popular sovereignty does prevent us from denying future generations of popular majorities—our posterity—the right to strike a different balance.").

²⁴"*Expressio unius*" refers to a maxim of construction that excludes options not included in a list because the list's specificity implies that it to be comprehensive. See *BLACK'S LAW DICTIONARY* 581 (6th ed. 1990) (defining "*expressio unius est exclusio alterius*").

²⁵Amar, *Consent*, *supra* note 7, at 460 ("Precisely because ordinary Government is distrusted, it may not amend the Constitution without amassing an extraordinary bloc of Government officials").

²⁶*Id.* at 473-87.

of their constitutional amendment power would be redundant, mere surplusage. For this reason, Professor Amar contends that Article V's silence on the matter of popular constitutional amendment supports, rather than precludes, the existence of that right.²⁷ Thus rejecting the *exclusio unius* construction of Article V, Professor Amar concludes that the people may directly amend the Constitution.²⁸ The generation that drafted, debated and ratified the Constitution, he asserts, understood that power as inalienable.²⁹ The specific instructions of Article V apply only to governmental officials as a grant of powers delegated by the people. As with most grants, however, it came with strings attached.

2. Framers' Concerns About a Distant, Unresponsive Federal Government

Professor Amar characterizes the high hurdles imposed by Article V—requiring either two-thirds of Congress in conjunction with three-quarters of the states or three-quarters of states and a constitutional convention—as designed to prevent self-dealing by federal officials. Article V thus represents the Framers' solution to the possibility of a renegade federal government by requiring both a supermajority of Congress and a supermajority of state legislatures.³⁰ The Framers intended these onerous requirements to keep a distant government—one that might become unresponsive to the wishes of the people—in check.

Because the Framers recognized the people as ultimate guardians of republican government,³¹ Amar reasons that these high hurdles laid out to prevent self-aggrandizement make no sense as a check on the people themselves.³² The constitutional red tape of Article V binds federal officials only—the people need not take a number and wait to be served.

3. Professor Amar's Concerns About a Distant, Unresponsive Federal Government

Article V's constraints not only check self-aggrandizement but may cause such friction in the constitutional amendment system that inertia results. Another contributing factor to governmental inertia may be that distant federal

²⁷ *Id.* at 459 ("Begin by noting what Article V does *not* say. It emphatically does not say that it is the *only* way to revise the Constitution.").

²⁸ *Id.* at 459-61.

²⁹ *Id.* at 473-87.

³⁰ Amar, *Consent*, *supra* note 7.

³¹ See U.S. CONST. amend. II (providing for strong states by guaranteeing "right to bear arms" to protect against the central government).

³² See Amar, *Consent*, *supra* note 7, at 460 ("Popular sovereignty cannot be satisfied by a Government monopoly on amendment, for the Government might simply block any constitutional change that limits Government's power, even if strongly desired by the People.").

officials refuse to respond to locally felt needs. Because inertia may so favor federal officials or so little affect them, Professor Amar supports the power of the people to take direct action on constitutional issues.³³

Professor Amar argues that the Framers drafted the Bill of Rights to affirm their understanding that the new federal government must yield to the collective people.³⁴ He points to the Bill of Rights' express declaration of the allocation of power between the federal government on the one side and the reserved powers of states and the people on the other.³⁵ The Bill of Rights, he argues, memorialized what the Federalists and Anti-Federalists understood: that power in our republic resides in the people themselves. Professor Amar concludes that the Bill of Rights was intended to guard against self-dealing of federal governmental officials by ensuring the strength of the states,³⁶ checking the power of Congress to enrich itself,³⁷ and precluding subtle intimidation tactics via use of federal troops.³⁸

B. A Critique of Professor Amar's Popular Sovereignty Theorem

Although Professor Amar presents an inviting argument, a number of problems inhere in his popular amendment proposal. First, history shows that the people's right to directly affect the federal government requires an enabling amendment, passed in strict conformity with Article V constraints. Second, the

³³*Id.* Professor Amar's worries about a distant, unresponsive government are not new. During the ratification debates, Anti-Federalists shared the same concerns. *See, e.g., "An Old Whig" [George Bryan et al.] I* (Oct. 12, 1787), in 1 DEBATE, at 123; Speech of Patrick Dollard in South Carolina Ratifying Convention, in 2 DEBATE, at 593; Patrick Henry Elaborates His Main Objections in the Virginia Ratifying Convention (June 12, 1788), in 2 DEBATE, at 677-79. *See generally* Herbert Storing, What the Anti-Federalists Were For, in 1 THE COMPLETE ANTI-FEDERALIST 48-52 (Herbert Storing ed., 1981) (noting that Anti-Federalists feared that "aristocratic character of organized civil society tends to become more severe and more selective over time, and the main efforts of constitution makers should be directed to at least putting obstacles in its way.").

³⁴*See generally* Amar, *Bill of Rights*, *supra* note 11.

³⁵*Id.* at 1199-1201.

³⁶*Id.* at 1162-64 (discussing Framers' understanding that Second Amendment ensured strong, free states); *see also* U.S. CONST. amend. II (declaring that "right of the people to keep and bear arms, shall not be infringed.").

³⁷*See* U.S. CONST. amend. XXVII (originally second of twelve amendments proposed as Bill of Rights); *see also* Amar, *Bill of Rights*, *supra* note 11, at 1145-46 (discussing proposed second amendment now certified as Twenty-Seventh Amendment); RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA, IF WE LOVE THE CONSTITUTION SO MUCH WHY DO WE KEEP TRYING TO CHANGE IT? 243-49 (1993) (discussing adoption of Twenty-Seventh Amendment).

³⁸*See* U.S. CONST. amend. III (precluding quartering of soldiers, in time of peace, without owner's consent). The Third Amendment served to preclude "insidious forms of military occupation, featuring federal soldiers cowering civilians by psychological guerrilla warfare, day by day and house by house . . ." *See* Amar, *Bill of Rights*, *supra* note 11, at 1174.

Framers did not acknowledge the popular constitutional amendment plan that Professor Amar advances. To the contrary, Federalists and Anti-Federalists alike acknowledged that Article V's procedures would be exclusive. Third, the people's remedy to an unresponsive federal government already exists—but has remained unused. Ultimately, Amar's concerns about tyranny by federal officials should be allayed—at least in part—by this dormant remedy.

1. The Lesson of the Seventeenth Amendment

If popular sovereignty allows the people to directly affect the federal government, even in instances in which the Constitution does not so recognize, then the Seventeenth Amendment would have been unnecessary. The people could simply have started directly voting for senators. Although the method for choosing senators was prescribed by the Constitution,³⁹ the people—according to Professor Amar's reasoning—could have simply chosen to govern themselves.

The existence of the Seventeenth Amendment, however, indicates the requirement of a constitutional amendment—in compliance with Article V—to vest a power in the people that the original Constitution reposed in the state legislatures.⁴⁰ The Constitution originally provided that state legislators choose federal senators.⁴¹ Not until the Seventeenth Amendment passed could the people directly choose senators. Article I, section 3—which provided for election of senators by state legislatures—used the same wording "shall" as does Article V. Consider the imperative language of Article I, section 3 in providing that "[t]he Senate of the United States *shall* be composed of two Senators from each state, chosen by the Legislature thereof . . ."⁴²

Similarly, Article V contains the same imperative in providing procedures for amendments "which, in *either* case, *shall* be valid to all Intents and Purposes, as part of this Constitution . . . as *one or the other* mode of Ratification may be proposed by the Congress . . ."⁴³ Professor Amar argues that this imperative language of Article V does not preclude the people from directly amending the Constitution. But he fails to distinguish between the nature of the imperatives in Article V and those used in other articles. Instead, he argues that the statements of leading Framers, including James Wilson and *The Federalist* authors, indicate that those who framed and ratified the Constitution

³⁹U.S. CONST. art. I, § 3, cl. 1 (providing that state legislatures elect senators), *amended* by U.S. CONST. amend. XVII, § 1.

⁴⁰*See* U.S. CONST. amend. XVII, § 1 ("The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."). The Seventeenth Amendment was enacted to supersede Article I, Section 3, of the Constitution. That section provided that the two Senators of each state be chosen by that state's legislature. U.S. CONST. art. I, § 3.

⁴¹U.S. CONST. art. I, § 3.

⁴²U.S. CONST. art. I, § 3, cl. 1 (emphasis added).

⁴³U.S. CONST. art. V (emphasis added).

understood the people to retain the power to choose their form of government directly.⁴⁴ Professor Amar, however, fails to explain why the evidence supporting the power of the people to vote on constitutional amendments should not also have had the power to vote for senators.

Just as the Framers did not accord the decision on the matter of senators to the people, they did not accord the decision on the matter of constitutional amendment directly to the people. What is important about the textual commitment of these important decisions to the Congress, the state legislatures, or a body of special electors is that it reveals the Framers' conception of the relation between the people and their representatives. That conception was one characterized, in part, by wariness of pure democracy.

This wariness shows not only in the mode of senatorial elections or constitutional amendments, but also in the process of choosing the executive. None of these are by majority vote of the electorate. In *Federalist* No. 68, Hamilton intimated that citizens generally will not "possess the information and discernment requisite to so complicated an investigation" as choosing "a magistrate who was to have so important an agency in the administration of the government of the United States."⁴⁵ Thus, the Framers adopted "precautions" against the "mischief" to which the people might fall prey. Such mischief was thought to include "[t]alents for low intrigue, and the little arts of popularity, [which] may alone suffice to elevate a man to the first honors in a single State . . ."⁴⁶ Ultimately, the Philadelphia convention delegates did not repose their confidence in the people for purposes of electing senators,⁴⁷ presidents⁴⁸ or judges.⁴⁹ The people only directly elected their federal

⁴⁴Clearly, however, this was not the intent of the Framers. 1 FARRAND, RECORDS, at 148-49 (recounting delegates' rejection of James Wilson's proposal to have the people themselves elect senators); EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 82 (1964) ("Wilson had consistently favored election of Senators by the people rather than by state legislatures. The latter mode, however, was accepted upon Dickinson's motion."); see also THE FEDERALIST No. 67, at 410-11 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁵THE FEDERALIST No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Amar, however, downplays the significance of the electoral requirement by noting that today presidential elections are de facto popular elections. The authors characterize the practices of several states in "purporting to legally bind their electoral collegians to vote for the candidates selected by the state voters in the general election" as "a basic feature of today's 'unwritten constitution'"—"an informal constitutional amendment of sorts. . . ." See Amar & Amar, *supra* note 2, at 919.

Yet, the significance of the electoral requirement remains central to our inquiry into the system that the Constitution of 1787 anticipates. The ignorance of Constitutional imperatives may informally amend constitutional practice. This is not the sort of constitutional amendment, however, that we concern ourselves with as a matter of principle.

⁴⁶THE FEDERALIST No. 68, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁷See U.S. CONST. art. I, § 3.

⁴⁸See U.S. CONST. art. II, § 1, cls. 1 & 2.

representatives to the House and state legislators. A popular sovereignty theory alone cannot explain the necessity of the Seventeenth Amendment to allow the people to directly elect senators.

2. What the Framers Did Not Say About Constitutional Amendment

Similarly, the principle of popular sovereignty alone cannot explain—or even anticipate—any hurdles in the way of the people to amend the Constitution. Yet, for the same reason that the principle of popular sovereignty cannot account for the necessity of the Seventeenth Amendment, so too Professor Amar's argument in favor of popular constitutional amendment avails itself of only one of the two premises upon which this republic is founded.

The first principle of republican government—which Professor Amar refers to as popular sovereignty—recognizes the people as the ultimate political agents in a republican form of government in their prerogative to directly determine issues by voting. This quality exists in our constitutional system to the extent that "the supreme and ultimate authority [resides] in the *majority* of the people of the Union . . ."⁵⁰ Although this is the animating theme of republican government, it tells only half the story. Thus, Madison explained that majoritarian action alone—which he characterized as the "national" principle, and which we might characterize as "pure democracy"—is insufficient, by itself, to alter or abolish the Constitution.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times like that of a majority of every national society to alter or abolish its established government.⁵¹

Instead, such a national movement of the American electorate toward amendment can only succeed in conjunction with the federal part of our system of government.⁵²

⁴⁹See U.S. CONST. art. II, § 2, cl. 2. The list of unelected federal officials also includes "Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States, whose appointments are not herein otherwise provided for . . ."

⁵⁰THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

⁵¹*Id.*

⁵²*Id.* In explaining that the "mode provided by the plan of the convention is not founded on either of these [national or federal] principles," Madison explained that Article V ultimately incorporates a blend of the two principles. "In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the national and advances towards the *federal* character . . ." *Id.* Note Madison's express dismissal of any possibility that the amendment process involves only federal or only popular principles. It is for this reason that Professor Amar's

The second principle upon which our republican government rests is what Madison called the "federal" nature of our republic. Congress, the President, and the Supreme Court, in addition to the state governments represent the federal heart of our government. The miracle of Philadelphia is not so much that it created a democratic society, but that it created it on a scale, and for a length of time that had never before existed. The remarkable and experimental nature of such a founding of a nation was not lost on the Framers who took great pains to avoid the tumultuous, short-lived nature of the small democracies that had preceded. Madison, in particular, perceived the problems inhering in pure democracies:

Hence it is that such [small, direct] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.⁵³

The federal character of the new republic distinguished it from these small, direct democracies that had been so violent and short lived. Federalism also distinguished the new governmental scheme from the failed one under the Articles of Confederation.⁵⁴ The federal character stood as a complement to *and* a check on the national character of the new republic. As a complement, federalism served as a vehicle to greatest happiness of the people.⁵⁵ As a check,

popular sovereignty theorem remains incomplete. It is not that "Madison left us a huge puzzle," so much as missing a vital piece in seeing the big picture. *But see* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 768 (1994) (arguing that this quoted language in *The Federalist* No. 39 makes little sense and was relatively unimportant during ratification debates).

⁵³THE FEDERALIST No. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961). As one commentator noted, the lessons of lost republics was not lost on Madison. "As Madison never tired of repeating, there is direct democracy, feasible only for small communities like ancient city-states, for example, where simple majority rule holds sway and where all who are citizens cast their vote, in congregations of the whole people (or as many as present themselves)." Adrienne Koch, *Introduction to NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON*, at xix (Bicentennial ed., Norton Paperback 1987) (1966) [hereinafter MADISON'S NOTES].

⁵⁴Compare ARTICLES OF CONFEDERATION art. II (U.S. 1778) ("Each 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.") with U.S. CONST. preamble ("in Order to form a more perfect Union . . .").

⁵⁵James Wilson's Opening Address in Pennsylvania Ratifying Convention (Nov. 24 1787), 1 DEBATE at 791, 793 ("A Federal Republic naturally presented itself to our observation, as a species of government which secured all the internal advantages of a republic, at the same time that it maintained the external dignity and force of a monarchy.").

federalism served to "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."⁵⁶

Nonetheless, federalism was not intended to undermine the national, democratic principle in the amendment process because no amendments may be ratified except with national approval. Madison's explanation of our republic as one "neither wholly national, nor wholly federal"⁵⁷ applies not only to the Constitution, but also to the process of amending that Constitution.

Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles.⁵⁸

Federalism and democracy exist as twin principles of constitutional amendment and the constitutional scheme itself.⁵⁹

As Professor Amar acknowledges, Madison's statements preclude popular constitutional amendment.⁶⁰ Because our government is not exclusively national in character, the majority of the people cannot directly amend the United States Constitution.⁶¹ Because Professor Amar's argument does not

⁵⁶THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

⁵⁷THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

⁵⁸*Id.* Even though federalism was part of the solution, unchecked federalism was equally problematic as unchecked (some commentators say "unfiltered") popular election. There was a need to balance national principles against federal principles. Thus, Madison noted that the amendment process "in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character." *Id.*

⁵⁹This understanding of the dual federalist and nationalist nature of the Constitution was a recurring theme in the Philadelphia convention. The eventual compromise that resolved the issue of representation in the Senate—"the most violent of the controversies which marked the deliberations of the convention"—incorporated both elements. DUMBAULD, *supra* note 44, at 81. Once the delegates agreed on proportional representation in the House of Representatives, Oliver Ellsworth of Connecticut proposed equal representation of states in the Senate; the plan which was eventually adopted. He reasoned:

We were partly national; partly federal. The proportional representation in the first branch [i.e., House of Representatives] was comfortable to the national principle & would secure the large States agst. the small. An equality of voices was comfortable to the federal principle and was necessary to secure the Small States agst. the large. He trusted that on this middle ground compromise would take place. He did not see that it could on any other.

¹FARRAND, RECORDS, at 468-69 (June 29).

⁶⁰Amar, *Consent*, note 7, at 507.

⁶¹Indeed, Madison clearly explained the reasons for the denial of such a role in the amendment process to the people. He stated:

The *passions*, therefore, not the *reason*, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. . . . It appears in this that occasional appeals to the people

encompass the federal nature of the Constitution system, it does not fully acknowledge the need for checking inclinations of the majority. But amendment can only succeed in conjunction with the federal part of our system of government. In order to formulate a theory of constitutional amendment that remains faithful to the nature of our republic, we must understand why the Framers thought that federalism principles must inhere in the process of amending the Constitution.

3. What Tempers the Tyranny of the Majority in the United States⁶²

Each of the Article V constitutional amendment procedures evidence the Framers' combination of national and federal principles in the Constitution.⁶³ The first procedure begins with the federal government, Congress specifically, proposing amendments. (The national complement is the ratification by three-quarters of the several states.) The second procedure involves Congress's function in calling a convention for purposes of proposing an amendment. (Here, the national component involves both the call of the several states for such a convention and the states' subsequent ratification of the proposed amendment of that convention.) Article V does not expressly dictate the type of convention or even the membership of the convention that Congress must call. Thus, the prospect of a convention seems to strike fear into the hearts of some scholars,⁶⁴ seemingly due to the uncertainty of a constitutional event that has not yet happened.

But this trepidation of modern thinkers was not shared by the Framers,⁶⁵ who saw the convention as an opportunity of Congress to ensure that the drafting of constitutional amendments lies with wise, deliberate drafters, rather than conniving agents of the factions that clamor for the amendment. In discussing the prospect of leaving the process of constitutional amendment entirely to the people, Madison feared intrigue:

[to amend the Constitution] would be neither a proper nor an effectual provision for that purpose.

THE FEDERALIST No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961). The failure of the Council of Censors, who under the Pennsylvania Constitution of 1776 were to recommend whether to call a convention for improvements, had proven extremely problematic due to political wrangling. This precedent was not lost on the Framers. See BERNSTEIN & AGEL, *supra* note 37, at 9; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 339 (1969).

⁶² See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 262-72 (J.P. Mayer ed., 1969) (Part II, Chapter 8: "What Tempers the Tyranny of the Majority in the United States").

⁶³ See *infra* Part III.B.

⁶⁴ See generally Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979).

⁶⁵ Madison, however, did acknowledge reservations about leaving the instructions to Congress about convening conventions for proposing amendments in such laconic form. 2 FARRAND, *RECORDS*, at 558.

[I]t could never be expected to turn on the true merits of the question. It would be inevitably connected with the spirit of pre-existing parties, or of parties springing out of the question itself. . . . It would be pronounced by the very men who had been agents in, or opponents of, the measure to which the decision would relate.⁶⁶

The lessons of the volatility of preceding direct democracies had not been lost on the Framers.⁶⁷ Thus, they erected federal checks on the possibility of ultra vires actions by factions and partisan interests that would disrupt the domestic tranquillity and injure the rights of other citizens to the point of defeating the basic aims of the republic.⁶⁸ When considering the injury to private rights especially,

⁶⁶THE FEDERALIST No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961).

⁶⁷Letter of James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 DEBATE, at 196-97 (arguing that ancient democracies failed because of "the prominence of the local over the federal authority"). Madison thought the lessons of history so important that he not only arrived at the convention having studied the ancient democratic republics, but devoted *Federalist* Nos. 18, 19, and 20 to a discussion of the histories of the ancient democracies. Adrienne Koch, *Introduction* to MADISON'S NOTES, at xiii-xiv (noting that Madison "came to the Convention after an intensive scholarly preparation"). Thus, Madison was aware of the dangers of volatility that many previous democracies had succumbed to: "Hence, it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths." THE FEDERALIST No. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961). In Madison's survey of the successes and failures of democratic governments, he found one character that he thought contributed to the stability and lawfulness of democracy. "[T]he popular government, which was so tempestuous elsewhere, caused no disorders in the members of the Achæan republic, because it was there tempered by the general authority and laws of the confederacy." THE FEDERALIST No. 18, at 126 (James Madison with Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, we see that Madison and Hamilton understood that federal principles temper tyranny of the popular will.

James Wilson also engaged in a historiography of federalism during the Pennsylvania ratifying convention that displayed his command of and concern for political precedents. See James Wilson's Opening Address (Nov. 24, 1787), in 1 DEBATE, at 796-97 (discussing examples of Achæan and Lycian leagues, Amphyctionic council, United Netherlands, Germanic Body, House of Austria).

We must not forget these ancient historical lessons that the Framers so carefully heeded. Neither can we ignore the mob violence, rebellions, and rioting that "at one time or another paralyzed all the major cities" in America during the eighteenth century. See WOOD, *supra* note 61 at 319-28 (1969) (noting that "more such groups sprang up in the dozen years after Independence than in the entire colonial period."). Rather, in the Philadelphia convention, the delegates brought a sense of history, ancient and recent, to the framing of republican government that was hoped to ensure "domestic tranquillity" for generations, even onto "our posterity." *Id.*

⁶⁸*But see* Amar, *Consent*, *supra* note 7, at 503. ("In the end, individual rights in our system are, and should be, the product of ultimately majoritarian processes. Once again, there is nothing paradoxical about this. Sloppy philosophical rhetoric notwithstanding, there is nothing in the ontological character of a "right" that requires that it be vested in an "individual" or "minority" against the 'majority'.") Professor Amar's contention

even action by a majority would be ultra vires.⁶⁹ Madison and a number of the other Framers understood the power and danger of majoritarian action. The

plays a nice game in casting rights as complementary with majoritarian action.

Ideally, rights and popular sovereignty coexist peacefully. But a right marks territory beyond which even a majority cannot act. Rights affirm that even the good of a many cannot justify treading upon the rights of even one. Utilitarianism strives to maximize popular agency for the public good, but cannot account for individual rights, even if Professor Amar would so like. Otherwise, why not let Congress pass bills of attainder? If more people want to see someone they are sure is guilty convicted than those who believe that person should at least receive a fair trial, why not let a clear majority, or even supermajority, so decide? Justice and popular action are not synonymous and cannot be conflated.

Although Professor Amar correctly asserts that rights can be majoritarian in nature, even this does not mean that the majority can act in any way that it wishes. Amar, *Bill of Rights*, *supra* note 11, at 120; Amar, *Consent*, *supra* note 7, at 504. Majoritarian rights mark the limit beyond which the majority cannot transgress. The Framers understood the lessons of history that taught that majorities can undermine their own authority and efficacy. Thus, the Federalists understood that the government must have the power to defend itself against monarchical or aristocratic inventions. Why, because these violate majoritarian rights even if a majority has such an inclination.

⁶⁹In making these points, I am aware of thoughtful scholarship to the contrary. Specifically, Bruce Ackerman's two-tiered theory of constitutional politics stands at odds with assertions that any procedures for handling "constitutional moments" must anticipate divisiveness, intrigue, and mania. Ackerman contends that during these constitutional moments Americans put away the apathy, pettiness, and unthinking allegiances that usually prevail.

Professor Ackerman's contention, however, has received criticism that draws on the empirical data of constitutional moments on the state level when the people of the states directly amend their state constitutions. See generally Philip J. Weiser, *Ackerman's Proposal for Popular Constitutional Lawmaking: Can it Realize His Aspirations for Dualist Democracy?*, 68 N.Y.U. L. Rev. 907, 920 (1993) ("[A]s envisioned by Ackerman, 'apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future.' (quoting Ackerman) In this transformation, the country would temporarily transcend the evils of faction which may be constrained, but never completely overcome, within America's pluralist political system."). Skepticism about validity of Professor Ackerman's transcendental constitutional moment appears to be well founded. As a fundamental matter—and the Constitution is our most fundamental matter—we cannot base our republican system on hopes of best case scenarios.

Even if Professor Ackerman is right for the most part, we must anticipate permanent injury to our cultural and political fabric that can arise on the truly divisive issues that require a constitutional amendment to be realized and have the zealous support of a good portion of the electorate. The Federalists hoped for the best, but planned for the worst. By contrast, Professor Ackerman's theory does not anticipate, and thus does not address the intrigues, manias, division, and factions that Madison anticipated.

Similarly, Professor Amar's first theorem does not account the possibility that a faction of the *majority* could act unlawfully. Nonetheless, majorities can deny minorities or individuals their rights to life, liberty, and property in such a way that makes a mockery of the principles expressed in the Constitution that Professor Amar contends allows them to take such action. Real examples of people directly amending their constitutions to entrench racist discrimination in that governing document exist, even though only at the state level. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (racially discriminatory effect on private land sales). Professor Amar neither acknowledges this,

fact that a majority acts *qua* majority does not legitimate the denial of lawfully granted rights.⁷⁰ Madison stated:

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of *such a faction*, and at the same time preserve the form of popular government, it then is the great object to which our inquiries are directed.⁷¹

Majoritarian action can be a rule of force rather than rule of law unless it has limits beyond which it cannot lawfully be exercised. The Framers recognized the dual nature of strength in numbers.

The Framers understood that majoritarian government is the best guard against the sort of unresponsive despotism that the colonies had revolted against. This, of course, affirms that our government derives its legitimacy from the consent of the governed. On this point, Professor Amar's theorem captures the importance of the democratic element of our government. Throughout the Philadelphia convention and subsequent ratification debates, the Framers consistently acknowledged this democratic element to be essential to the new governmental scheme.⁷²

Nonetheless, the Framers understood that majorities can also act to the detriment of individual and minority rights, can undermine its own authority, and can permanently injure the system of government within which it operates.⁷³ Thus, the Framers tempered the power of the majority even while enshrining that power as central to our system of government.⁷⁴ Madison

nor does he offer a solution to this denial of rights by the majority to work on the national level.

Even today, Madison's plan is visionary. Only it anticipates and addresses these problems of popular amendment of the Constitution.

⁷⁰Whether a minority or a majority acts does not change the nature of the actions lawfulness or legitimacy. Madison explained: "By faction I understand a number of citizens, whether amounting to a *majority or minority* of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, at 78 (James Madison) (emphasis added).

⁷¹*Id.* at 80 (emphasis added).

⁷²See generally Amar, *Central Meaning*, *supra* note 52.

⁷³See THE FEDERALIST No. 18 (James Madison with Alexander Hamilton) (discussing histories of and lessons to be drawn from ancient Athens, Sparta, Lacedæmonia, Thebes, and Achæan league).

⁷⁴But see Thomas Jefferson, Inauguration Address (March 4, 1801), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 324 (Adrienne Koch & William Peden eds., 1972) ("[I]t is proper that you should understand what I deem the essential principles of government [including] *absolute acquiescence in the decisions of the majority*—the vital principle of republics, from which there is no appeal but to force . . .") (emphasis added); Thomas Jefferson, The Will of the Majority Should Always

noted: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."⁷⁵

The solution for preserving a vital popular power in the people while guarding against its ultra vires exercise, was the same as their solution for instituting legislative, executive, and judicial powers in our government while preventing those powers from becoming oppressive. In short, that solution involved separation and balancing of powers—our "checks and balances" system. Although we tend to think of checks and balances as between coordinate branches of the federal government, the Framers also applied the principles to the federal relation between the central government, states, and electorate.

Just as it makes no sense to determine which coordinate branch is the ultimate branch⁷⁶ in a system of coordinate branches, so too it makes little sense to ask which, popular sovereignty or federalism, is *the* central principle of our republican government. Federalism and the national principle together represent the core of our republican system of government. They are separate, irreducible, equal loci of the power that inhere in our system of government under the Constitution.

Thus, it is significant that Madison did not call it a "democratic" government when arguing for the adoption of the Constitution in *The Federalist*. Rather, he characterized it as a "republican" form of government.⁷⁷ What distinguished the new republican form from the purely democratic governments that had preceded it was the fact that political power was not to be exercised only according to majoritarian principles, but also in accordance with federalism.⁷⁸

The majoritarian nature of the government was anticipated to be the driving force for change.⁷⁹ Thus, the Framers provided for a way that majoritarian action may lead to constitutional change. Nonetheless, in amending that government, the Framers recognized the need for checks and balances to operate there also against the rule by strength that so often had the effect of concentrating power too narrowly.

Prevail: Thomas Jefferson Replies to Madison, *in* 1 DEBATE, at 213.

⁷⁵THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* James Wilson's Opening Address, *in* DEBATE, at 795 (arguing that representation and federal nature of new republic would provide more desirable government than under Articles of Confederation).

⁷⁶*Cf.* Commodity Futures Trading Commission v. Schor, 475 U.S. 1007 (1986).

⁷⁷*See generally* THE FEDERALIST No. 39 (James Madison).

⁷⁸*See* THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

⁷⁹The Framers consistently recognized the people as the engine of the republican system, as Professor Amar proves. However, this begins rather than ends the inquiry into how they may exercise that role.

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.⁸⁰

The principles of federalism that check against the possible pernicious innovations of the majority are clearly set forth in Article V. Both methods for amending the Constitution according to Article V involve Congress. Congress proposes the amendment, or calls the constitutional convention for purposes of proposing the amendment. In short, Article V anticipates that a coordinate branch of the central government be involved with the process of amending the Constitution. This is the federal principle that is built into the lawful process for amending our system of government.

4. What Tempers the Tyranny of the Federal Government

Ultimately, the Framers rejected the original proposal under the Virginia plan that "provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."⁸¹ Article V was ultimately written to provide for the amendment of the Constitution.⁸² Even though the Framers involved a branch of the federal government in both methods of amendment, they did not forget the essential point of the Virginia proposal, which was intended to provide a constitutional remedy against an unresponsive federal government.

Because Congress would necessarily be involved under the Article V plan, some of the delegates worried that Congress could stymie all necessary improvements to the government. George Mason worried that "[a]s the proposing of amendments is in both the modes to depend, in the first immediately, in the second, ultimately, on Congress, not amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive."⁸³

In response, Gouverneur Morris and Elbridge Gerry proposed a solution to tempering such tyranny by the federal government. Their plan required that a convention for purposes of proposing an amendment must be convened by Congress when demanded by two-thirds of the states.⁸⁴ Ultimately, this

⁸⁰THE FEDERALIST No. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

⁸¹Journal Entry by James Madison (May 29, 1787), in 1 FARRAND, RECORDS, at 22.

⁸²See *infra* Part III.B.1 (discussing Article V's requirement that Congress either propose an amendment or call special convention for purpose of proposing amendment).

⁸³Journal Entry by James Madison (Sept. 15, 1787), in 2 FARRAND, RECORDS, at 629.

⁸⁴*id.*

measure passed.⁸⁵ In providing for amendment procedures that tempered both tyranny by the majority and tyranny by the federal government, the Framers struck a delicate balance. Thus, at the end of the day—literally—the Constitution was ordered engrossed.⁸⁶

Although history has ignored the second amendment procedure, its significance as a bulwark against tyranny by the federal government has not diminished.⁸⁷

The second of the two methods of proposing amendments to the Constitution provided in this article (namely a convention called at the request of the legislatures of two-thirds of the states) has never been used. Yet its existence continues to serve the purpose which Gouverneur Morris had in mind when he proposed it. It places an effective remedy at the disposition of the people of the states if abuses on the part of Congress itself should become an evil requiring amendment and Congress should fail or refuse to act.⁸⁸

This guarantee that Congress cannot overcome a national impetus for an amendment had great significance during the Constitution's ratification.⁸⁹ Just as the proper balancing of the federal and democratic principles of our

⁸⁵2 *id.* at 629-30.

⁸⁶2 *id.*

⁸⁷ *But see* Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth Amendment*, 103 YALE L.J. 1971 (1994). Without elaboration, Kobach asserts that calls for constitutional convention are "hopeless" even in instances in which three-fourths of states appear to favor particular constitutional change. *Id.* at 1973. Surprisingly, this commentator's skepticism of this Article V route is not founded on the difficulty in getting two-thirds of states to call for a constitutional convention, but the mere fact that this procedure has never been successfully implemented. Kobach acknowledges that in the case of the Seventeenth Amendment, two-thirds of states had taken some sort of action to formally support popular senate elections, whether by statute or by amending the state constitution. Nonetheless, Kobach declares that the calls for convention by some of the states "could never be as decisive as the electoral interests of the Senators from the 28 states that had already effectively adopted popular election." *Id.* at 1979 n.36. This reasoning inexplicably conflates dormancy and ineffectiveness. Moreover, it ignores Hamilton's assertion, in *Federalist* No. 85, that the call for a convention must result in congressional action to that end.

Interestingly, Kobach acknowledges that the option for a call of a constitutional convention may ultimately have spurred the Congress to propose its own version before having to call a convention and cede that prerogative.

[A]n alternative theory as to why the Senate ultimately capitulated and endorsed the Seventeenth Amendment [is] that numerous states had called for a national proposing convention to address the issue.

... [T]he possibility of the necessary two-thirds of the states eventually making such a call pushed the Senate into action.

Id. at 1979 n.36; *see also* William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 943.

⁸⁸ DUMBAULD, *supra* note 44, at 435; *see also* 2 FARRAND, RECORDS, at 629-30.

⁸⁹ *See* THE FEDERALIST No. 85 (Alexander Hamilton).

republican government drew the Philadelphia convention to a close, so too did *The Federalist* conclude with the promise of a better union as illustrated by the plan for amendments.

Hamilton's *Federalist* No. 85 drew the series to a close on a note of pragmatism and promise. Although Hamilton conceded that the Constitution was a work of compromises, less than ideal on a number of points, he argued that it was a sound plan which would only improve with time.⁹⁰ Amendments, of course, held the key to perfecting the new system of government.⁹¹ And the new government need not be feared to refuse improvements as had the British monarchy in light of the second method of amendment provided for in Article V.⁹² Hamilton declared: "The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body. . . . We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."⁹³ The second route of Article V represents the promise that the federal government may not remain immobile in the face of national demand.⁹⁴

In sum, the Framers' balancing of federal and democratic principles in Article V tempers both the possibility of tyranny by the federal government or by a majority. Any comprehensive understanding of the constitutional amendment process must incorporate both principles. Our republican system of government does not rest upon popular sovereignty alone, but instead has two legs to stand on. Professor Amar's assertion that popular action suffices to amend the Constitution has some basis in Gouverneur Morris's contribution to Article V. Yet, despite Professor Amar's argument to the contrary, the Framers intended Article V to provide exclusive means for lawful constitutional change.

III. CONSTITUTIONAL AMENDMENT PROCEDURAL CONSTRAINTS

Article V specifies exactly two procedures for amending the Constitution. An examination of Article V's origin in the Philadelphia convention and its controversy during the ratification debates reveals elements common to each amendment procedure. These elements incorporate the federal and democratic principles that pervade the Constitution as a whole. Specifically, each Article V procedure requires Congress to act, either state legislatures or conventions to ratify, and each step to be carried by a supermajority vote. The Framers intended these elements to provide both "safe" and "easy" procedures for

⁹⁰THE FEDERALIST No. 85, at 523-25 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁹¹And, indeed, the provision for amendments helped secure its initial adoption.

⁹²*Id.* at 525-26.

⁹³*Id.* at 526.

⁹⁴See *infra* note 87 (noting scholarship suggesting that Senate action in proposing Seventeenth Amendment was spurred when number of states calling for convention on that issue approached two-thirds of states requirement).

constitutional amendment so that governmental change need not proceed from violence or convulsions.⁹⁵

In contrast, Professor Amar's popular amendment proposal lacks all but one of these elements.⁹⁶ Because his proposed procedure departs so radically from the elements of amendment thought essential by the Framers, any amendment following his suggestions must be of suspect validity. Present doubt even about the validity of "existing" amendments suggests that a new procedure, if it is even to have a chance, must comply at least with the spirit of the Constitution.⁹⁷ As discussed above, the federal and democratic principles serving as the basis for the overall architecture of the Constitution must also be present in changing that document. To this end, this Article suggests that a slight recasting of Professor Amar's proposal may contribute to its viability.⁹⁸

A. The Article V Procedural Quatrefoil

Article V's first procedure involves amendments that originate in the Congress. To date, all amendments have traveled this path. The second

⁹⁵On the matter of amendments, Mason noted the necessity of an alterable Constitution so that bloody revolutions need not precede every improvement of government. "Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence." 1 FARRAND, RECORDS, at 202-03.

⁹⁶See *infra* Part II.C (analyzing Professor Amar's proposed procedure in terms of four elements inhering in Article V).

⁹⁷For example, consider the Thirteenth Amendment. Ratification of the Amendment was plied upon 11 states that were under military occupation. Moreover, the attempted rescissions of Delaware and Kentucky were ignored. See BERNSTEIN & AGEL, *supra* note 37, at 101-03.

The Fourteenth Amendment lacked sufficient ratifications if states are allowed to rescind their ratifications. JOHN VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 6 (1993) (noting that ratification of the Fourteenth Amendment was unclear because of uncertainty about inclusion of seceding states in requisite number and ability of states to rescind earlier ratifications).

The Twenty-Seventh Amendment took so long to ratify, that its sporadic ratifications over the course of 202 years may have given birth to a stillborn amendment. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION, *supra* note 8, at 25 n.39 ("[T]he so-called Twenty-seventh Amendment is a professorial godsend for the questions it raises about the operation of Article V as a vehicle for amendment.")

Moreover, additional problematic issues have arisen from amendments that did not receive the necessary ratifications. For example, consider the equal rights amendment, which raised the question of whether Congress may extend a ratification deadline. Compare Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment*, 57 TEX. L. REV. 919, 919-45 (1979) with Grover Rees III, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension", 58 TEX. L. REV. 875, 875-932 (1980).

⁹⁸Subject to the doubts expressed above in noting the necessity of the Seventeenth Amendment, see *infra* Part II.D.

procedure involves amendments that originate in a special convention, called upon demand of two-thirds of the state legislatures. Although this latter procedure has been attempted—several times verging on the two-thirds requisite⁹⁹—no amendments have ever been established this way.¹⁰⁰

1. Amendments Originating in Congress

The first Article V procedure requires that an amendment originate by a two-thirds vote of Congress. Then, the amendment must receive the ratification of three-quarters of the state legislatures or special conventions in the states.¹⁰¹ All twenty-seven ratified Amendments have proceeded along this path, with state legislatures being the preferred "Mode of Ratification"¹⁰² only once—for the Twenty-First Amendment repeal of prohibition—has Congress specified ratification by this second mode.¹⁰³

From the outset of the Philadelphia convention, the Framers were aware of the need for an effective method for amending the new form of government.¹⁰⁴ Ironically, the procedure of amendment by which all of the constitutional amendments have been ratified was not among early amendment provisions considered by the convention. Instead, it arose only later in the summer as a reaction to the prevailing plan that did not give Congress the power to propose amendments.¹⁰⁵ In response, Hamilton contended that states would amend the Constitution only to increase their own powers, and to the detriment of the

⁹⁹See ABA STUDY, *supra* note 13, at 59-77 (collecting main categories of calls made by states).

¹⁰⁰Proposal of an amendment by constitutional convention has not yet occurred. DUMBAULD, *supra* note 44, at 435.

¹⁰¹U.S. CONST. art. V.

¹⁰²*Id.* Note that Congress determines whether the state legislatures or special conventions in the states be the "Mode of Ratification." Thus, some states may not ratify by legislative assent, while others call special conventions. Instead, the states must comply with the Congressional determination. See *United States v. Sprague*, 282 U.S. 716, 730 (1931).

Ratification by state conventions has occurred only once; in the case of the repeal of prohibition. See Kobach, *supra* note 87, at 1974 n.9. Again, Congress has sole power to determine whether an amendment shall be ratified by state legislatures or conventions. U.S. CONST. art. V.

¹⁰³U.S. CONST. amend. XXI, § 3; See BERNSTEIN & AGEL, *supra* note 37, at 176 (noting unique circumstances attending prohibition repeal leading to congressional specification of state conventions as means for ratification); see also 1 DEBATE, at 981-93 (listing methods for ratification specified by Congress).

¹⁰⁴See 1 FARRAND, RECORDS, at 22 (May 29) (Virginia resolution XIII); 1 *id.* at 27 (Governor Randolph's propositions founded on "republican Principles" calling for amendment mechanism); 1 *id.* at 202-203 (Mason's exhortation to provide for "easy, regular" constitutional amendment).

¹⁰⁵See 2 FARRAND, RECORDS, at 148, 188, 461, 467-468; see also DUMBAULD, *supra* note 44, at 434.

central government.¹⁰⁶ Thus, he proposed that Congress itself be allowed, by two-thirds vote of each house, to call a convention for proposing a constitutional amendment.¹⁰⁷ Hamilton reasoned: "The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered to call a Convention— . . . There could be no danger in giving this power, as the people would finally decide in the case."¹⁰⁸ Sherman then moved to add a provision that allowed Congress itself to draft amendments and propose them directly to the states.¹⁰⁹ This was adopted.¹¹⁰

James Wilson proposed that amendments take effect once ratified by two-thirds of the states.¹¹¹ This proposal, however, was rejected.¹¹² But Wilson's motion to increase the requisite number of states to "three fourths" passed.¹¹³ At this point, Madison summarized these elements to produce a section that bears close similarity to what became Article V.¹¹⁴

¹⁰⁶2 FARRAND, RECORDS, at 558 (Sept. 10). Of course, Hamilton was concerned about lessons learned from many ancient republics' disintegrations due to usurpation of the central authority power by localities. See *supra* note 69 and accompanying text (noting Hamilton's study of preceding republics).

¹⁰⁷2 FARRAND, RECORDS, at 558 (Sept. 10).

¹⁰⁸2 *id.*

¹⁰⁹2 *id.*

¹¹⁰2 *id.* at 558-59.

¹¹¹2 *id.* This calculus was a reaction against the unanimity required under the Articles of Confederation. See ARTICLES OF CONFEDERATION art. XIII (U.S. 1778) ("[N]or shall any alteration at any time hereafter be made . . . unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."). It was a sore point in that the tiniest state, Rhode Island, had blocked several amendments and actions that were much desired by the other twelve states. See 1 Debate, at 1067, 1069; BERNSTEIN & AGEL, *supra* note 37, at 17-18.

¹¹²2 FARRAND, RECORDS, at 558-59.

¹¹³2 *id.* at 559.

¹¹⁴ Madison suggested the following language:

That the Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Convention in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S:

² FARRAND, RECORDS, at 559 (Sept. 10). Madison's draft differs from what became Article V in that it allowed Congress itself to draft the amendments demanded by two-thirds of states. Ultimately, this power to draft a called-for amendment was relegated to constitutional conventions convened for that purpose.

2. Amendments Originating With Two-thirds of the States Legislatures

The second procedure for amending the Constitution has not yet produced a constitutional amendment. Although this procedure received considerable attention during the Philadelphia convention,¹¹⁵ the constitutional ratification debates marked the start of the trend of ignoring this procedure. Since 1789, interest in this procedure has, with few exceptions, continued to wane. A number of modern scholars either dismiss it or argue against its use.¹¹⁶

The second procedure for amending the Constitution requires that two-thirds of state legislatures call Congress to convene a constitutional convention for the purpose of proposing a particular amendment, and ratification by three-quarters of the state legislatures or special conventions.¹¹⁷ Although this procedure involves Congress in convening the convention, Congress has no discretion to decline calling a convention.¹¹⁸

During the past two centuries, some topics have come close to the two-thirds requisite, but none has received the full two-thirds requirement.¹¹⁹ This inability to secure enough states to call for a convention was unanticipated by the Framers who considered it to be an "easy" method for constitutional amendment.¹²⁰ Hamilton noted that this provision responded to the difficulty encountered in amending the Articles of Confederation. "It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation."¹²¹ Compared to the unanimity required by the Articles of Con-

¹¹⁵From the initial presentation of the Virginia plan, this method was often the only agreed-upon method for amendment the Constitution through until September 17.

¹¹⁶See, e.g., Gerald Gunther, *Constitutional Roulette: The Dimensions of Risk*, in *THE CONSTITUTION AND THE BUDGET* 5 (1980); Kobach, *supra* note 87; Tribe, *supra* note 64.

¹¹⁷It seems that citizens of a state may not constrain their legislature to issue such a call. See Jonathan L. Walcoff, Note, *The Unconstitutionality of Voter Initiative Applications for Federal Convention Conventions*, 85 COLUM. L. REV. 1525, 1526 (1985). Again, it is the prerogative of Congress to determine that the state legislatures be the mode of ratification. U.S. CONST. art. V; see also *United States v. Sprague*, 282 U.S. 716, 730 (1931).

¹¹⁸THE FEDERALIST No. 85, at 529 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.").

¹¹⁹See WEBER & PERRY, *supra* note 13, at 75 (surveying state calls for convention and concluding that "those who fear a constitutional convention should be heartened by the unlikelihood of its ever happening.").

¹²⁰See, e.g., Patrick Henry's Speech before Virginia Ratifying Convention, in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 203 (Ralph Ketchum ed., 1986) ("To encourage us to adopt it, they tell us, that there is a plain easy way of getting amendments") [hereinafter ANTI-FEDERALIST PAPERS & DEBATES].

¹²¹2 FARRAND, RECORDS, at 558; see also BERNSTEIN & AGEL, *supra* note 37, at 23-24.

federation, a two-thirds requirement seemed easy; so much so that a mere majority of states seemed insufficient.¹²²

This procedure derived from the Virginia plan, which proposed that amendments be possible without the assent of the national legislature.¹²³ Taking this into account, the Committee of Detail proposed to the convention that the application of two-thirds of the state legislatures suffice to convene a convention for proposing a particular constitutional amendment.¹²⁴ James Madison consolidated the plans to allow amendments to originate in Congress and by demand of the state legislatures in a draft article that proved similar to Article V as finally accepted. The difference was that in Madison's draft Congress was to draft the amendments called for by the states. George Mason thought this plan to be "exceptional & dangerous. As the proposing of amendments [would be] in both the modes to depend on, in the first immediately, and in the second, ultimately, on Congress . . ." ¹²⁵ Thus, the convention agreed to shift the duty of drafting amendments called for by the state legislatures away from Congress to a special convention.¹²⁶ Satisfied that states thus had a remedy against an unresponsive Congress, the Framers considered the Constitution to be complete.¹²⁷

Why did this scheme to allow states to call for amendments go by the wayside? In the debates on the ratification of the Constitution, we may see the beginning of the end. When the Continental Congress submitted the proposed Constitution for ratification by the states, the famous debates ensued between the Federalist supporters and Anti-Federalist skeptics. Despite the Constitution's large number of admirers, modifications of the proposed Constitution seemed to be desired by all.¹²⁸ Of these desiderata, perhaps the

¹²²Cf. Governor Edmund Randolph Explains Why He Now Supports the Constitution with Amendments, in 2 DEBATE, at 603 ("For would it not be lamentable, that nothing could be done for the defection of one State? A majority of the whole would have been too few. Nine States therefore seem to be a most proper number.").

¹²³See 1 FARRAND, RECORDS, at 22. Virginia plan resolution XIII stated "that provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto." *Id.*

¹²⁴See 2 FARRAND, RECORDS, at 148 (Edmund Randolph's working draft as revised by John Rutledge); see also 2 *id.* at 159, 174. The committee forwarded this suggestion, which was agreed to in convention. See 2 *id.* at 188.

¹²⁵2 *id.*, at 629.

¹²⁶2 *id.*; see also DUMBAULD, *supra* note 44, at 434.

¹²⁷2 FARRAND, RECORDS, at 630. Of course, this was not considered the only, or even the main, remedy against an unresponsive Congress, but as a last resort. Election of congressional representatives was the main remedy. See *The Weakness of Brutus Exposed: "A Citizen of Philadelphia" [Pelatiah Webster] (Nov. 8, 1787)*, in 1 DEBATE, at 184-185.

¹²⁸Speech of Patrick Henry in Virginia Ratifying Convention (June 12, 1788), in 2 DEBATE, *supra* at 675 ("The necessity of amendments is universally admitted."); see also

Anti-Federalists' desire for the inclusion of a Bill of Rights carried the greatest weight.¹²⁹ However, even Federalist supporters offered suggestions for improvement of the proposed government.¹³⁰

Many hoped that a second convention would be held to incorporate the various suggestions of the states in a revised plan.¹³¹ Key supporters of the Constitution, including Washington, Madison, Wilson, and Hamilton balked at this idea. They feared that a second convention would fatally delay the adoption of a badly needed new government.¹³² The failure under the Articles of Confederation to repay the colonies' war debts to their allies and often ineffectual Congress imbued a sense of urgency into the quest for a more effective central government.¹³³ Further, these key supporters who had been present at the Philadelphia convention realized that the compromises necessary to achieve an acceptable union would not admit much departure from the original proposal.¹³⁴ Thus, they urged states to ratify the Constitution

Storing, *supra* note 33, at 3 ("[T]he Constitution that came out of the deliberations of 1787 and 1788 was not the same Constitution that went in; for it was accepted subject to the understanding that it would be amended immediately to provide for a bill of rights.").

¹²⁹See generally Storing, *supra* note 33, at 64-70. Of course, Anti-Federalist objections were not limited to the lack of a Bill of Rights, but also included in their focus the perceived pernicious effects of centralized government at the expense of state powers, Congress' ability to raise troops even in times of peace, and the prerogative of the federal government to impose a direct tax without consent of the states. See, e.g., Patrick Henry's Objections to a National Army and James Madison's Reply, in 2 DEBATE, *supra* at 695; "Brutus" VI (Dec. 27, 1787), in 1 DEBATE, at 617 (objecting to direct taxation).

¹³⁰See, e.g., John Hancock Proposes Ratification, with Amendments Recommended to "Quiet the Apprehensions of Gentlemen," in 1 DEBATE, at 921-922. More than two hundred proposals for changes accompanied the ratifications of the Constitution by the states. In fact, every state that ratified after Massachusetts followed its example and offered recommendations. BERNSTEIN & AGEL, *supra* note 37, at 23-24.

¹³¹WEBER & PERRY, *supra* note 13, at 37-49 (discussing calls for second constitutional convention following Philadelphia convention).

¹³²See THE FEDERALIST No. 85, at 524 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It appears to me susceptible of absolute demonstration that it will be far easier to obtain subsequent than previous amendment to the Constitution. The moment an alteration is made in the present plan it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State."); Letter of George Washington to the Marquis de Lafayette, in 2 DEBATE 179 ("Should that which is now offered to the People of America, be found an experiment less perfect than it can be made a Constitutional door is left open for its amelioration.").

¹³³See THE FEDERALIST No. 85, at 523 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (pointing out "precarious state" of national affairs and need for ratification of Constitution). Indeed, Anti-Federalists too acknowledged the necessity for a more effective central power among the colonies. See Storing, *supra* note 45, at 24 (noting Anti-Federalists' interest in union).

¹³⁴E.g., Letter of George Washington to John Armstrong (April 25, 1788), in 2 DEBATE, at 421 ("When I reflect upon these circumstances I am surprised to find that any person who is acquainted with the critical state of our public affairs, and knows the variety of views, interests, feelings and prejudices which must be consulted and conciliated in

as proposed and then to seek amendments after the new government was established.

In support of this position, the Constitution's supporters pointed out that amendments would easily be proposed with the concurrence ten of the thirteen states.¹³⁵ However, they emphasized the amendment procedure originating with Congress rather than the one arising out of a call of two-thirds of states. James Wilson set this tone of emphasis early in the ratification debates during an important public meeting when he concluded: "If there are errors, it should be remembered, that the seeds of reformation are sown in the work itself, and the concurrence of two thirds of the congress may at any time introduce alterations and amendments."¹³⁶ Why did Wilson not mention the second amendment procedure? After all, it was intended to reassure states that they could act to improve the new system without the assent of Congress. Because the number of states needed to ratify the Constitution and to call for amendments was the same, the specter of nine states attempting to ratify and call for specific amendments at that same time did not bode well. Consider George Washington's description of the problems encountered with amendments desired contemporaneous with the ratification of the Constitution itself:

That the proposed Constitution will admit of amendments is acknowledged by its warmest advocates but to make such amendments as may be proposed by the several States the condition of its adoption would, in my opinion amount to a compleat rejection of it; for upon examination of the objections which are made by the opponents in different States and the amendments which have been proposed it will be found that what would be a favourite object with one State is the very thing which is strenuously opposed by another

.....¹³⁷

In addition to the desire to avoid a second constitutional convention, these supporters of the Constitution worried that the multiplicitous and conflicting

framing a general Government for these States, and how little propositions in themselves so opposite to each other, will tend to promote that desirable an end, can wish to make amendments the ultimatum for adopting the offered system."); THE FEDERALIST No. 85, at 523 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit").

¹³⁵THE FEDERALIST No. 85, at 524 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹³⁶James Wilson's Speech at a Public Meeting, in 1 DEBATE, at 69. Note that this speech "soon became one of the most widely reprinted defenses of the new Constitution, appearing in newspapers throughout the states, and marked Wilson as its leading public advocate." ANTI-FEDERALIST PAPERS & DEBATES, *supra* note 120, at 183.

¹³⁷Letter of George Washington to John Armstrong, in 2 DEBATE, at 421.

natures of the calls for amendments would pose an intractable problem that the second procedure of Article V was intended to remedy.¹³⁸

By providing that Congress call a constitutional convention upon a call by the states, the Framers hoped to avoid multiple competing amendments on the same topic, each getting the assent of several, but not the requisite three-quarters of states.¹³⁹ Before the United States Congress could ensure such a consolidated focus, the Constitution would have to be ratified. Thus, the supporters adopted the position that states needed to accept the Constitution *pro tanto*, despite the fact that the same number would compel a convention for purposes of amendment once the new government existed.¹⁴⁰ Essentially, no power to amend the Constitution existed before the Constitution's initial ratification. Once ratified, the procedure requiring calls by the states for a constitutional amendment was never reinvigorated.

Further contributing to this lack of interest in the second procedure was the fact that Congress indeed proved to be the most efficient way to generate amendments when it quickly proposed twelve amendments as Bill of Rights.¹⁴¹ Since then, Congress has generated every proposed amendment that has been submitted to the states for ratification. In the few instances in which calls for a particular amendment have come close to the requisite two-thirds of states, Congress has acted to propose the amendment rather than allow a special convention to take over the opportunity to debate and draft a proposal.¹⁴² In light of Congress's ability to avert a called convention, a number of scholars now declare the second procedure to be almost irrelevant.¹⁴³ Whatever the merits of such an assertion, this latter procedure has remained unfruitful for

¹³⁸See *infra* Part II.B.4.

¹³⁹See THE FEDERALIST No. 85, at 525-26 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁴⁰See Charles Jarvis on the Amendment Procedure: An Irrefutable Argument for Ratification (Jan. 30, 1788), in 1 DEBATE, at 918 (arguing that Constitution "may admit of measures being taken, in any moment after it is adopted") (emphasis added); Charles Jarvis Supports John Hancock's Strategy on Amendments (Feb. 4, 1788), in 1 DEBATE, at 935 ("[A] conditional amendment must operate as a total rejection.")

¹⁴¹See ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 9 (1978); see also 1 DEBATE, at 1100-01 (chronicling events of 1789).

¹⁴²The Seventeenth Amendment was one such instance. See Kobach, *supra* note 87, at 1978-79.

¹⁴³See, e.g., *id.* at 1973 (characterizing process of seeking constitutional convention by call of states as "hopeless quest"); Donald S. Lutz, Toward a Theory of Constitutional Amendment, in RESPONDING TO IMPERFECTION, *supra* note 8, at 237, 257, 265 (concluding that "the U.S. Constitution is unusually, and probably excessively, difficult to amend" especially with respect to the second method of amendment).

purposes of amendment.¹⁴⁴ Nonetheless, it too shows the elements that the Framers thought essential for constitutional amendment procedures.

B. The Essential Elements of Article V's Amendment Procedures

1. Congress or the State Legislatures, Rather Than Citizens, Act to Originate Amendments

Although Professor Amar contends that citizens themselves may act to amend the Constitution, neither Article V nor the ratification debates acknowledge this as an option. Time and again, the two methods for originating the amendments were acknowledged to be exclusive—especially by Anti-Federalists who would have liked that amendments come by a call of the people. Consider famous Anti-Federalist Patrick Henry's lament in the Virginia ratifying convention:

The way to amendment, is, in my conception, shut. . . . Let us suppose . . . that you happen to deal these powers to unworthy hands; will they relinquish powers already in their possession, or, agree to amendments? *Two thirds of the Congress, or, of the State Legislatures, are necessary even to propose amendments.*¹⁴⁵

Professor Amar, however, contends that the Framers understood that a majority of citizens could always amend their form of government, and that this understanding was so basic as to be unnecessary to articulate.¹⁴⁶ He asserts that "majority rule popular sovereignty outside Article V" entails a "national majority rather than some constellation of state majorities."¹⁴⁷

In particular, he relies on James Wilson's statements during the ratification debates that affirmed the democratic nature of the new government.¹⁴⁸ Professor Amar contends that Wilson took for granted the idea that a majority of citizens may alter or abolish the Constitution at any time. In contrast, Amar rejects Madison's "path" of requiring states to ratify as incompatible with true popular sovereignty, "the central meaning of republican government."¹⁴⁹ He also notes another putative version of popular sovereignty in Jefferson Davis' declaration that majorities within an individual state have the right to veto federal authority by state secession. Because "Davis was wrong," Professor

¹⁴⁴Unless, of course, Congress can be spurred to activity when state calls for a convention approach the requisite two-thirds. See Van Alstyne, *supra* note 87, at 943 (suggesting this to have been the case with Seventeenth Amendment).

¹⁴⁵Patrick Henry's Speech before Virginia Ratifying Convention, in ANTI-FEDERALIST PAPERS & DEBATES, *supra* note 120, at 203-04 (emphasis added); see also "An Old Whig," in 1 DEBATE, at 122-23.

¹⁴⁶Amar, *Consent*, *supra* note 7, at 474-84.

¹⁴⁷*Id.* at 506-07.

¹⁴⁸*Id.* at 474-75.

¹⁴⁹*Id.* at 507; Amar, *Central Meaning*, *supra* note 52, at 749.

Amar reasons that "Wilson must be right."¹⁵⁰ This syllogistic reasoning, however, is weak and ignores the circumstances that the Framers considered in the Philadelphia convention that would make this reading of Wilson's position highly implausible.

The path of Davis does not stand for a single-state veto of constitutional amendments, but for something entirely different. It represents a veto power over federal authority in the form of secession by resolution of the majority within a state. Professor Amar acknowledges that states do not have the same power over the central government as they did under the Articles of Confederation even though he asserts that action at the state level should be by simple majority of the electorate. The path of Davis is inapposite to the amendment process because it is the path to disintegration, not improvements to the union.¹⁵¹

The path of Madison, however, is apposite to constitutional amendment. To assert that such a conception of the power of popular amendment is inconsistent with the "fundamental principle of republican government" that "the majority should rule"¹⁵² is to suggest that the Framers somehow got it wrong, and their government was not "republican" because it was also federal.¹⁵³ Perhaps this may seem insufficiently republican to some. But it is erroneous to assume that it is beyond argument that such a federal/democratic mixture is incompatible with the political theory of the Framers and the Constitution that they adopted. Nonetheless, Professor Amar adheres to a reading of Wilson as understanding that the Constitution itself admits of direct democratic action by citizens themselves.

Professor Amar's popular amendment proposal could hardly have been "understood and self-consciously acted upon" by the ratifying conventions of the southern states that were anxious to protect slavery.¹⁵⁴ For it would have permitted the more populous free states to have accomplished exactly what Article V forbade—a national petition for a national convention for the national abolition of slavery upon the national ratification of a constitutional amend-

¹⁵⁰Amar, *Consent*, *supra* note 7, at 507.

¹⁵¹The right of secession is properly denied—once a state ratified the Constitution under Article VII—it was bound by the Constitution, like it or not—but the arguments for ratification were premised importantly on the protection of state autonomy promised by the state-by-state three-quarter supermajority ratification process for amendments, overlaid by the veto power of any state over the diminishment of its equal suffrage in the Senate.

¹⁵²Amar, *Consent*, *supra* note 7, at 507.

¹⁵³The federal government has never been a strict "majority rule" government, and the only enduring express substantive limitation on the power of amendment—the preservation of equal suffrage of every state in the Senate—powerfully underscores that fact.

¹⁵⁴Amar, *Consent*, *supra* note 7, at 495.

ment to that effect.¹⁵⁵ Yet, the Framers took pains to note that no proposal had even been suggested in the Philadelphia convention that would have resulted in two separate unions.¹⁵⁶

This is not to say that Wilson would not have desired a majority rule of citizens of the whole of the United States or that this majority would eradicate slavery from the nation; he clearly would have relished this.¹⁵⁷ But as a matter of forming a just republic in a world of vices, he understood—as did the other Philadelphia convention delegates—that the southern states would not join a union whereby the more populous north could so easily trump them and abolish slavery.¹⁵⁸ Wilson was no stranger to realpolitik, and must have understood that the union could be founded upon a provision that would be an anathema to several states.¹⁵⁹

Furthermore, the denial of equal suffrage in the Senate would also be fair game under Professor Amar's proposal. Again, it would have been extremely unlikely that the smaller states would have agreed to join a union when their status would have been so tenuous.¹⁶⁰ Remember that when the Delaware legislature appointed its representatives to the Philadelphia convention, it instructed them not to agree to any changes that would deny their state's equal representation.¹⁶¹ During the convention, delegates of the smaller states reminded their peers of the need for preservation of this equal representation.¹⁶² Again, Wilson understood the necessity of this protection in Article V if the union would have a chance at securing all thirteen states.¹⁶³

¹⁵⁵The southern states were very aware of the population demographics that favored the north. See, e.g., C.C. Pinckney: Speech in South Carolina House of Representatives, in 3 FARRAND, RECORDS, at 253 (stating populations of each state including three-fifths calculation of slaves for representation purposes).

¹⁵⁶Letter of James Madison to Thomas Jefferson (Oct. 24, 1787), in DEBATE, at 193.

¹⁵⁷James Wilson on the Slave Trade Clause (Dec. 3, 1787), in 1 DEBATE, at 829-30.

¹⁵⁸*id.* Wilson no doubt understood and shared Madison's perception that "S. Carolina & Georgia were inflexible on the point of slaves." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 DEBATE, at 202. Yet, because Professor Amar denies that Article V's constraints apply to the people, the provision that forbade eradication of the slave trade prior to 1808 would not have been binding on such a democratic movement for constitutional amendment. Clearly, this would not have gotten by South Carolina and Georgia.

¹⁵⁹See General William Heath on Slavery (Jan. 30, 1788), in 1 DEBATE, at 916 ("[T]he slavery of our fellow men, a restriction . . . laid on the federal government, which could not be avoided and a union taken place: The federal Convention went as far as they could, the migration or importation, &c. is confined to the States now *existing only*, new States cannot claim it.").

¹⁶⁰See VILE, *supra* note 97, at 128 (characterizing Article V substantive constraints as "essential to pacifying small states and those with slaves").

¹⁶¹1 DEBATE, at 1076.

¹⁶²1 FARRAND, RECORDS, at 37 (May 30); 1 *id.* at 178 (June 9).

¹⁶³1 *id.* at 179 (recounting that delegates had understood Mr. Wilson's "hint" that the

2. State Legislatures or Special Conventions—Rather Than Citizens—Must Ratify

Federalists and Anti-Federalists agreed that the Constitution required three-quarters of states to ratify any constitutional amendment, though they disagreed on the wisdom of this scheme.¹⁶⁴ Just as with the first element of amendment, this requirement ensured that the more populous northern states could not ride roughshod over the more agrarian southern states. Moreover, the Framers understood that states would not cede all of their powers to the federal government after serving as the hegemonic unit of government under the Articles of Confederation. Thus, an aspect of federalism under the new Constitution would give states a way to protect themselves against usurpations by the central government.¹⁶⁵ By allowing the state governments to reject changes to the federal system, their vitality was thus expected to be protected.¹⁶⁶

But doesn't this violate the democratic principles that James Wilson declared to be enshrined in the process of amendment under the Constitution? Ultimately, no. Even with the states being the principle actors under Article V, the spirit of democracy still exists. Wilson argued that we should judge the democratic nature of government by the nature of its relation to the people. Wilson identified several sources of authority antithetical to democracy.

For it is not any part of the British constitution, as practised at this time, that the king derives his authority from the people. Formerly that authority was claimed by *hereditary* or *divine right*; and even at the revolution, when the government was essentially improved, no other principle was recognized, but that of an *original contract* between the sovereign and the people¹⁶⁷

small states would refuse to join government in which their position would be tenuous).

¹⁶⁴See, e.g., Speech of Patrick Henry (June 5, 1788), in ANTI-FEDERALIST PAPERS & DEBATES, *supra* note 120, at 204 ("A bare majority in these four small States may hinder the adoption of amendments"); "An Old Whig," in 1 DEBATE, at 123-24.

¹⁶⁵See generally Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987).

¹⁶⁶Article V's reliance on states—rather than citizens—parallels Article I, section 3's reliance on states to select senators. Both measures were seen as guarantees that states would have the power to check the central government. See *id.* at 191-96. As already noted, a constitutional amendment complying with Article V's requirements was required to change the allocation of power within the federal system. Similarly, Article V's balance of federalism between the states and federal government may not simply be ignored under the rubric of popular sovereignty.

¹⁶⁷James Wilson's Opening Address in the Pennsylvania Ratifying Convention, in 1 DEBATE, at 795 (emphasis added).

Authority deriving from other sources was antithetical to the new republican government because it would deny the political agency of the people in favor of some reified, external authority or physical coercion.¹⁶⁸ Wilson acknowledged that government could be democratic in nature without having to involve every citizen in every decision so long as authority ultimately derived from the consent of the governed. In fact, he thought the "idea of representation" to be "essential to every system of wise, good, and efficient government."¹⁶⁹

Wilson had no doubt that government under the Constitution would preserve the right of the people to exercise their political agency because all governmental action would be taken by officials chosen by election, rather than force, heredity, divine right, or social contract. A government in which no representative may rise to and remain in power except by electorate approval must be republican, and sufficiently democratic in nature.

A free government has often been compared to a pyramid. This allusion is made with peculiar propriety in the system before you; it is laid on the broad basis of the people, while they are confined, in proportion as they ascend, until they end in that most permanent of all forms. When you examine all its parts, they will invariably be found to preserve that essential mark of free governments—a *chain of connection with the people*.¹⁷⁰

Because the people serve as the only constant in republican government—nothing essential inheres in the form or continued existence of the federal or state governments—Wilson did not consider federal principles to be incompatible with the popular nature of the Constitution. Thus, requiring state legislatures or special conventions to act in amending the Constitution did not abrogate the political rights of citizens in their individual capacities.

3. Super Majorities—Not Simple Majorities—Must Act to Amend

That republican government derives its authority from the consent of the governed for its authority does not, as a corollary, require that a bare majority of citizens have the prerogative to amend the Constitution. Instead, the

¹⁶⁸In addition to such abstract authorities, Wilson noted additional methods by which government has denied the political agency of the governed. "The greatest part of government have been founded on conquest; perhaps a few early ones may have had their origin in paternal authority." James Wilson's Summation and Final Rebuttal (Dec. 11, 1787), in 1 DEBATE, at 836. Wilson was not alone in this thinking. See, e.g., "A Citizen of America" [Noah Webster] (Oct. 17, 1787), in 1 DEBATE, at 154-55 (juxtaposing military force, monarchy, paternal authority, and religion against authority derived from democracy).

¹⁶⁹Wilson's Opening Address, in 1 DEBATE, at 795.

¹⁷⁰James Wilson's Summation & Final Rebuttal in the Pennsylvania Ratifying Convention, in 1 DEBATE, at 863 (emphasis added).

supermajority requirement ensures sufficient popular support to justify working a new mandate into the fundament of government.

During the convention's consideration of the amendment process, James Wilson initially suggested a two-thirds requirement.¹⁷¹ Seemingly without hesitation, he then proposed a higher figure (three-quarters) upon the defeat of his initial suggestion.¹⁷² The convention adopted the three-quarters requisite, which met with approval by the Constitutions supporters during ratification.¹⁷³ Although this requisite met with consternation from a number of leading Anti-Federalists, none seem to have disputed the existence of the supermajority requirement.

The conditions, I say, upon which any alterations can take place, appear to me to be such as never will exist two thirds of both houses of Congress or the legislatures of two thirds of the states must agree in desiring a convention to be called. This will probably never happen; but if it should happen, then the convention may agree to the amendments or not as they think right; and after all, three fourths of the states must ratify the amendments.¹⁷⁴

In short, simple majorities of states or citizens simply do not suffice to amend the Constitution.

Professor Amar, however, argues against this conclusion even while justifying the legality of the Constitution's initial ratification by fewer states than the unanimity required under the Articles of Confederation.¹⁷⁵ He searches for a way to defend this initial exclusive method of ratifying the Constitution by a supermajority of states while adhering to his thesis that the same method cannot now be required to amend the same document. His ploy is to justify the initial ratification on the basis that it required majoritarian action within the states.

Thus, the key voting rule in Article VII is simple majority rule, and not supermajority rule, as might be inferred from a too casual glance at its seeming 9/13 voting rule. . . . The true voting rule occurs *within* each state, where a simple majority did bind dissenters. . . . The 9/13 provision is thus best understood as a substantive condition subsequent . . . so that the new scheme could achieve a workable critical mass.¹⁷⁶

¹⁷¹*Cf.* 2 FARRAND, RECORDS, at 557-59.

¹⁷²*Id.* at 558-59.

¹⁷³Governor Edmund Randolph Explains Why He Now Supports the Constitution with Amendments, in 2 DEBATE, at 603.

¹⁷⁴"An Old Whig," in 1 DEBATE, at 123.

¹⁷⁵Amar, *Consent*, *supra* note 7, at 462-69 (defending the Constitution's legality vis-a-vis the Articles of Confederation).

¹⁷⁶*Id.* at 487 n.112.

But Professor Amar cannot have it both ways. If popular sovereignty always inheres in people whatever the unit of sovereignty may be¹⁷⁷ a mere majority of citizens acting in their individual capacities could have adopted the Constitution. There is nothing about the sovereign nature of the states that Amar's theorem would admit as precluding this result.

Even if there were something "essential" about simple majority rule at the local level,¹⁷⁸ this does not deny the propriety of requiring a supermajority to facilitate constitutional amendments. Amar does not explain why the supermajority requirement should not continue to ensure a continuing "workable critical mass" of support for a particular amendment to the extant Constitution. Ultimately, the clearest and most satisfying account of Article VII's initial ratification requirements is that the people were constrained to act then, as today, in their representative forms of state legislatures or conventions, and by supermajority.

Professor Amar, however, fears that if more than a simple majority is required there seems to be no principled basis for establishing another, higher requisite number.¹⁷⁹ Perhaps there is no principle that establishes another magic fraction. But this does not prove that a simple majority suffices to amend the Constitution. Simple majority rule represents the smallest number that may democratically bind the greatest number of dissenters. Such a thin advantage is inappropriate to secure the "critical mass" of acceptance of a new constitutional scheme.

4. Congress Must be Involved

The involvement of Congress constitutes the final element that is common to both of Article V's amendment procedures. Congress either drafts the amendment itself or convenes a special convention for that purpose. That Congress is integral to the process is a sign of the need for focus in originating constitutional amendments. Hamilton noted that the involvement of Congress serves to ensure that only one amendment on a particular issue pend ratification, rather than having a myriad of competing, and possibly conflicting, versions of an amendment on a particular subject, the involvement of Congress serves to ensure that only one amendment on an issue pend ratification. Thus, he urged support of Article V because "every amendment to the Constitution, if once established, would be a single proposition, and might

¹⁷⁷*Id.* at 489 ("To be sure, the Constitution redefined the relevant polity, but that redefinition cannot change the basic nature of popular sovereignty.").

¹⁷⁸Note that Amar argues that state constitutions that require more than a majority of citizens to amend violate the spirit of republican government. *See id.* at 484. By this token, most states today would have unrepublican charters.

¹⁷⁹Professor Amar asserts that "simple majority rule has unique mathematical properties. It is the only workable rule that treats all voters and all policy proposals equally. Once majority rule is abandoned, there is no logical stopping point between say 50% plus *two* rule, and a 99.9% rule. And the latter of course is not rule by the people." *Id.* at 503.

be brought forward singly."¹⁸⁰ The danger inhering in a lack of focus is that enough states may ratify substantially similar amendments on a topic to show that three-quarters desire a particular change—but no single proposal receive the requisite number and each version differing in important details. Happily, Article V has proven effective in averting this problem.

C. *Professor Amar's Procedure not Provided for in Article V*

Professor Amar recognizes the necessity of this fourth element of amendment procedure and incorporates it in his proposal for popular constitutional change. His proposal involves Congress calling a special convention—just like that required by Article V's second procedure—to propose an amendment. Professor Amar's proposal, however, dispenses with the other three elements. Amar summarizes by stating "that *Congress would be obliged to call a convention* to propose revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate."¹⁸¹ Thus, he seemingly folds his idea of popular amendment back into the convention procedure of Article V by incorporating the idea of Congress as the convening body.¹⁸² This

¹⁸⁰THE FEDERALIST No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961). That the Framers correctly anticipated the problems involved with competing, unfocused calls for amendment was demonstrated by the debates over the ratification of the Constitution. In fact, every state ratifying after Massachusetts followed that state's example by adopting a list of recommended amendments. BERNSTEIN & AGEL, *supra* note 37, at 23-24. A number of these proclamations, however, conflicted. See *The Ratifications and Resolutions of Seven State Conventions* (adopted Feb. 6-Aug. 2, 1788, printed early Sept. 1788), in 2 DEBATE, at 536-74. And thus it would have been chaotic to circulate competing measures for each state to consider.

¹⁸¹Amar, *Consent*, *supra* note 7, at 459.

¹⁸²*Id.* In essence, Professor Amar's proposal reintroduces the idea that citizens may give binding instructions to their governmental representatives on matters of constitutional importance. This idea is not new. Instead, it occupied the minds of many Americans during the period after Independence and before the adoption of the United States Constitution. "[S]ome Americans had come to believe that it was precisely on these 'great and leading questions' of public policy, such as the formation of governments or the disestablishment of religion, rather than on more parochial questions, that binding instructions were most necessary." WOOD, *supra* note 61, at 191. The theory behind the power of the people to instruct their representatives rests on a narrow conception of delegated political agency.

Petitioning implied that the representative was a superior so completely possessed of the full authority of all the people that he must be solicited, never commanded, by his particular electors and must speak only for the general good and not merely for the interests of his local constituents. Instructing, on the other hand, implied that the delegate represented no one but the people who elected him and that he was simply a mistrusted agent of his electors, bound to follow their directions.

Id. at 189. Interestingly, the First Amendment states that the people may "*petition* the government for redress of grievances." U.S. CONST. amend. I (emphasis added). And, indeed the Preamble affirms that the Constitution was established in part to form a more perfect union, general welfare, and common defense. Yet, this alone begs the question

is a surprising move in light of his view that Amar seems to consider the convention process simply as an alternative governmental means of amending the Constitution.¹⁸³

But his proposal seems to accept that Article V provides the means for implementing direct amendment through its national conventions process, with the popular process differing from the governmental process in that a national referendum rather than state legislative application would require Congress to convene a national constitutional convention.¹⁸⁴ He thus enlists the Article V *national* convention process as the means, but rejects the Article V *state* convention process as inconsistent with government respecting the consent of the governed. Thus he would permit ratification by national referendum so that majority rule would not be frustrated by a minority of voters nationwide who might constitute a majority of the voters of one-quarter of the states plus one.

1. The Wished-For Ideal: The Popular Element in Constitutional Amendment Process

While Professor Amar's proposal would have been impracticable at the time of the founding—both as a matter of getting all thirteen states to join the union and the impossibility of orchestrating a national referendum over so large a territory—certainly a number of the founding generation would have liked to have obtained closer connection of the federal government to the people. James Wilson, in particular, articulated such a desire.

If it could be effected all the people of the same society ought to meet in one place, and communicate freely with each other on the great business of representation. Though this is cannot be done in fact, yet we find that it is the most favorite and constitutional idea. It is supported by this principle too, that every member is a representative of the whole community and not a particular part.¹⁸⁵

of whether the Constitution admits of instructions on matters of amendments.

This issue ultimately turns on whether the power to instruct may be denied without undermining the democratic elements of our republican government. Can we claim to be democratic if we retain only the power to petition for redress of our grievances within the rules of our Constitution? (The power to abolish the Constitution *entirely* when it no longer enjoys the consent of the governed being a distinctly different question.) Ultimately, yes insofar as the power to instruct is tempered to disallow the majority from undermining its own authority or denying the fundamental rights of others. Cf. generally Amar, *Consent*, *supra* note 7, at 504-05 nn.170-71.

¹⁸³Amar, *Consent*, *supra* note 7, at 459.

¹⁸⁴Perhaps Professor Amar would deem allowable a national referendum that attempted to constitute a national convention independently of one called by Congress, but he does not commit himself to this point.

¹⁸⁵James Wilson's Summation and Final Rebuttal in the Pennsylvania Ratifying Convention, in 1 DEBATE, at 846.

Perhaps the changed circumstances of modern technology and the result of the Civil War Amendments may allow for a greater element of popular sovereignty in the constitutional amendment process than would have been possible in 1789.¹⁸⁶ Modernly, calls for greater popular governmental determinations have been fostered by continuing advances in technology. Consider the following rumination, drawn from a recent issue of *The Economist*:

When the public view can be tested so easily, another question arises: why have elected representatives at all? If individual voters can pose questions and offer views, will representative democracy prove to be merely a 200-year intermediate technology, a bridge between the direct voting of ancient Greece and the electronic voting of modern California?¹⁸⁷

Although this idea is provocative, any "improvement" to the constitutional amendment process that incorporates greater elements of popular sovereignty cannot entirely forego federal elements that characterize our republican system. While technology and civil rights improvements advance, federalism has not yet become obsolete. Tyranny of the majority that arises from "temporary inclinations," fears and prejudices can oppress more efficiently and on a greater scale than before.¹⁸⁸ Federalism has become more important than ever in checking tyranny of the majority in an age when citizens absorb instantaneous, nation-wide, media coverage. Thus, if popular sovereignty is to be incorporated into the amendment process to a greater extent, it must be done so with a wary eye toward heeding Madison's *Federalist* caveats and federal solution.

D. Amar's Theorem Reconstructed

Federalism and popular sovereignty are not mutually exclusive. Professor Amar's theorem does not necessarily entail the once unthinkable proposition that every state was at the mercy of the national population's desire to amend the Constitution. Suppose instead we reconstruct Amar's theorem in the following fashion: Article V's provision for Congress to convene a national

¹⁸⁶Amar, *Consent*, *supra* note 7, at 502-03 ("Today, because of vast improvements in communication and transportation technology—radio, television, cable, fiber-optics, electronic town meetings, etc.—there may be ways to retain the deliberation of the convention while providing for even more direct popular participation, akin to *referenda*.").

¹⁸⁷*Democracy and Technology: e-lectioneering*, THE ECONOMIST, June 17, 1995, at 23; *see also The Future of Democracy*, THE ECONOMIST, June 17, 1995, at 14 ("If democrats have spent much of the century telling fascists and communists that they ought to trust the people, can democrats now tell the people themselves that this trust operates only once every few years?").

¹⁸⁸Even Jefferson noted the problems of instability and ill-considered changes to be avoided even though "the will of the Majority should always prevail." Letter of Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 DEBATE, at 213.

constitutional convention upon the demand of a two-thirds vote in both houses, or upon a demand of two-thirds of the legislatures of the states, is not exclusive of a national convention called by Congress upon petition of a majority of the national electorate. But the amendments (or new Constitution) proposed by such a national convention, whether governmentally or popularly ordained, must still be ratified by "one or the other Mode of Ratification" as proposed by Congress and provided under Article V.

This is, of course, just "half a loaf" of true popular sovereignty majority rule on a national basis. But it gives effect to virtually all of Amar's arguments of reserved popular sovereignty to demand amendments that might reconstitute the governmental structure of the United States in ways that the existing governmental structure might resist, if it were exclusively in control of proposing amendments to the Constitution, without abandoning the reserved federal powers of individual states to protect their welfare as states absent a supermajority of support for the amendment by sister states.

IV. CONCLUSION

The Preamble stands at the head of the Constitution to remind us that our Constitution was established in order to create a more perfect union. This means that the majority cannot simply do as it pleases, even in a democracy. We must remember that the Constitution rightly places certain fundamental principles above majoritarian right, such as the need to ensure justice for even the minority, due process for unpopular individuals, and a focus on the whole, not just a half plus one. Properly read, the Constitution relies on majoritarian action as the engine that moves us toward a more perfect union. But the Constitution also prohibits that impetus to amend the Constitution unchecked.

