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LIMITATIONS ON THE CONSTITUTIONAL AMENDING PROCESS

*John R. Vile **

I

Article V of the Constitution has been variously praised as “the keystone” of the constitutional arch,¹ “one of the lynchpins of the American federal system,”² and as “perhaps the most important part” of the Constitution.³ On the surface its provisions are fairly straightforward. An amendment becomes part of the Constitution when proposed by two-thirds majorities in both Houses of Congress and subsequently ratified by three-quarters of the state legislatures or special conventions called for this purpose.⁴ Alternatively, two-thirds of the states may petition Congress to call a special convention to propose constitutional amendments, which are then again subject to the approval of three-quarters of the states. Article V contains only two stated limits on the amending process. One, designed to permit slave importation for twenty years, is no longer in force. The other, protecting the right of each state to “equal suffrage in the Senate,” is addressed later in this paper.

Despite its apparent simplicity, article V raises a number of unresolved and perplexing questions. What are the basic principles

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1. Martig, *Amending the Constitution—Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1284 (1937).

2. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563, 564 (1982).

3. Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions*, 58 TEX. L. REV. 131, (1979).

4. The precise wording of article V is as follows:

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

that underlie the amending process? What force should be given to the limitation on depriving states of their equal suffrage in the Senate? Are there unstated limits on the kinds of amendments that can be added to the Constitution?⁵ Is it possible to pass an unamendable amendment or otherwise change the current amending process? The answers to these conundrums help illuminate the most fundamental principles underlying the Constitution:

Exploration of the reach of the amending power is more than mere indulgence in a brain teaser; it is an inquiry that can give us much insight into the way we think about our Constitution. When we answer the question as to what we can never do constitutionally, we have gone a long way toward clarifying the American conception of constitutionalism.⁶

II

In declaring independence, the American colonists asserted that governments rest upon "the consent of the governed." They proclaimed the right of the people "to alter or to abolish" their existing form of government "and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."⁷ This the colonists did in creating the Articles of Confederation. When the Articles proved inadequate, a convention was called to create a government "adequate to the exigencies of the Union."⁸ In creating this new Union, the Founding Fathers exercised a domesticated version of the right to revolution that Jefferson had proclaimed eleven years earlier.

By including a process for amendment, the Founders recognized that the Constitution would not be perfect and would require change.⁹ They also acknowledged that ultimately each generation

5. Note Laurence Tribe's comment that "[b]oth because of its intrinsic interest and because of the light it may shed on procedural matters, the judiciary's potential role in the substantive arena merits more attention than it has so far received." Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 438 (1983).

6. Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 718 (1981).

7. The Declaration of Independence para. 1 (U.S. 1776).

8. THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES 59 (W. Solberg ed. 1958) (quoting a report of the Annapolis Convention that issued a call for the Constitutional Convention).

9. "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. 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 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202-03 (M. Farrand ed. 1911) (quoting the comments of George Mason).

would have to govern itself,¹⁰ if not by rewriting, at least by passively assenting to,¹¹ the rules by which it was governed. On the other hand, the Founders were keenly aware of their unique opportunity. They designed a document superior to ordinary legislation and resistant to change, so that the people would—as in a somewhat different context the Declaration had said they should¹²—take a sober second look before changing the supreme law of the land. In short, the Founders balanced ultimate popular control against the needs for stability and security for liberty. As Madison said, the amending process “guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.”¹³

One can image other approaches to the problem of constitutional change and stability. Because of inexperience, shortsightedness, or inflated egos, some founders have written constitutions that were immutable like the laws of the Medes and the Persians,¹⁴ others have written laws that could be changed only by methods too cumbersome to be effective. Cromwell’s proposed Instrument of Government¹⁵ and some early New World charters evidenced one or the other variant of this mistake and came to similar ends.¹⁶ Constitutions that are too difficult to amend are likely to be ignored or replaced, either through peaceful but extralegal means, or by revolution. The United States Constitution itself was adopted in an extralegal fashion after the Articles of Confederation proved too difficult to amend.¹⁷

If an overly rigid constitution will be ignored, flouted, or abol-

10. See Adrienne Koch’s analysis of the correspondence between Jefferson and Madison concerning Jefferson’s assertion that “[t]he earth belongs always to the living generation.” A. KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 69-96 (1950). Also note Grover Rees’s comment, “The amending process is a link, however tenuous, to the idea of government by consent.” Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL’Y 79, 82 (1982).

11. A great deal of ambiguity necessarily surrounds the notion of explicit and tacit consent. Compare J. LOCKE, *TWO TREATISES OF GOVERNMENT* 376-77 (1960) with *id.* at 388-94. Also see D. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL* (1980).

12. “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes.” The Declaration of Independence para. 1 (U.S. 1776).

13. THE FEDERALIST No. 43, at 296 (J. Madison) (J. Cooke ed. 1961).

14. Dan. 6:15, Esther 8:8.

15. See Vile, *The Saints’ New Magna Charta: The Authorized Edition* (to be published in upcoming issue of MODERN AGE).

16. Cahn, *An American Contribution*, in *SUPREME COURT AND SUPREME LAW* 13-25 (E. Cahn ed. 1954).

17. Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 L. & CONTEMP. PROBS., Autumn 1982, at 283, 285. Article XIII of the Articles of Confederation provided “nor shall any alteration at any time hereafter be made in any on them [the Articles]; unless such alteration be agreed to in a congress of the United States,

ished, a constitution that can be changed at will has even less value. A nation with no brakes on the popular will offers little or no protection for fundamental rights whose recognition may in the short term be inconvenient or unpopular. This was of course a major colonial complaint against the British doctrine of legislative sovereignty; Jefferson made a similar criticism of the Virginia State Constitution that had been adopted in the Revolutionary period.¹⁸ While the British Constitution is today praised for the security it offers to liberty, this praise rests on the grounds that informal understandings, customs, conventions,¹⁹ and the character of the people make the constitution less subject to radical change than the theory of legislative sovereignty would indicate.

Constitutions, then, may be too rigid or too flexible. Madison argued that the American Constitution fell somewhere in between. Exactly where on the continuum the United States Constitution falls is a matter of periodic debate,²⁰ but the current amending provisions appear generally satisfactory, and the requisite majorities have never utilized the article V convention mechanism.²¹

III

Given the preceding analysis, the article V provisions protecting slave importation and guaranteeing equal state suffrage in the Senate are somewhat anomalous. Why did the Founders, otherwise

and be afterwards confirmed by the legislatures of every state." THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES, *supra* note 8, at 51.

18. "173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the . . . government should be so divided and one which should not only be founded on free principles, but balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (1954).

19. The written Constitution notwithstanding, the United States is itself subject to many of these same kinds of restraints. See H. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION (1925). For the complex role that the courts play in establishing and interpreting such usages, and for the relationship of this process to article V, see Vile, *The Supreme Court and the Amending Process*, 8 GA. POL. SCI. A.J., Fall 1980, at 33-66.

20. See, e.g., Mussmano, *Is the Amendment Process Too Difficult?*, 57 AM. L. REV. 694 (1923); see also W. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 148-49 (1956); Ames, *The Amending Provision of the Federal Constitution in Practice*, 63 PROC. AM. PHIL. SOC'Y 62, 66 (1924); Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427-30 (1983).

21. Fierce debate continues to rage over such issues as the conditions under which Congress is bound to call such a convention and how it would be organized. For references to some of the major works on the subject, see AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 79-90 (1974). Also see W. EDEL, A CONSTITUTIONAL CONVENTION: THREAT OR CHALLENGE? (1981). For a discussion of past calls for a convention, see L. Healy, Past and Present Convention Calls: From Gay Abandon to Cautious Resistance (Nov. 1, 1984) (paper delivered at Southern Political Science Association, Savannah, Georgia).

so cognizant of the need for change, make these exceptions? What would happen if an amendment were passed to repeal the equal suffrage provision? Should an unamendable provision in an otherwise amendable constitution be ignored or disregarded like past unamendable constitutions, or does it have a different status?

In addressing these questions, the records of the Constitutional Convention offer guidance. The major debates on the subject came in the closing week of deliberations. By September 10 the amending provision provided for Congress to call a Convention "[on] the application of the Legislatures of two thirds of the States."²² Gerry, Hamilton, and Madison criticized this proposal. Gerry feared that two-thirds of the states might "bind the Union to innovations that may subvert the State-Constitutions altogether."²³ Hamilton argued that the state legislatures would "not apply for alterations but with a view to increase their own powers,"²⁴ and that ills would be better perceived by the national legislature. Madison objected to the vagueness of the Convention provision,²⁵ and subsequently proposed the following provision:

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 . . . when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof . . .²⁶

Almost immediately, Rutledge amended this proposal to include the slave importation reservation, noting that "he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it."²⁷

The amendment issue reemerged on September 15, when the present method of constitutional amendment was finalized. The provision requiring a constitutional convention upon the request of two-thirds of the states was adopted after Mason expressed fears that otherwise Congress would have too much control.²⁸ More to the point, the provision for equal suffrage in the Senate was also accepted. Adoption followed Sherman's animadversions: "that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of

22. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 9, at 557.

23. *Id.* at 557-58.

24. *Id.* at 558.

25. *Id.*

26. *Id.* at 559.

27. *Id.*

28. *Id.* at 629-33.

their equality in the Senate.”²⁹ Hence, he said, “[T]he proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.”³⁰ Madison feared that the floodgates were about to be opened. “Begin with these special provisos,” he noted, “and every State will insist on them, for their boundaries, experts &c.”³¹ While enough delegates shared Madison’s sentiments to narrow the range of Sherman’s reservations, after rejecting a series of amendments proposed by Sherman,³² the Convention adopted Morris’s proposal “that no State, without its consent shall be deprived of its equal suffrage in the Senate.”³³ Madison noted that, “This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on this question, saying no.”³⁴

Thus, the two limitations in article V were no mere accidents. While accepting proposals essential to pacifying the slave-holding states and the small states, the Convention rejected more radical proposals to void any interference in state police powers or to omit an amending process altogether. In effect, the Founders delineated four categories of rights and activities: those believed to need no specific constitutional protection; those thought to be protected by such mechanisms as bicameralism, the separation of powers, and judicial review;³⁵ those considered sufficiently necessary, important, or endangered to be included in the Constitution subject to amendment; and those guarantees thought to need additional security even against the amendment process.

In writing the Constitution, the framers were in a sense establishing the rules of a game governed by an association, similar in certain respect to that governing college basketball. One desiring the advantages of the Constitution must abide by its provisions, just

29. *Id.* at 629.

30. *Id.*

31. *Id.* at 630.

32. These included a proposal to omit the three-fourths requirement for state ratification and leave this to the discretion of future conventions; the proposal “that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate,” and the proposal “to strike out art V together.” *Id.*

33. *Id.* at 631.

34. *Id.*

35. The first two categories, to any meaningful extent, are indistinct. Clearly, however, mechanisms such as bicameralism and the separation of powers are means to an end rather than ends in themselves. To quote Walter Murphy, “the Constitution does not divide authority between federal and state governments so that Americans can boast that they have federalism. Nor does the Constitution create a network of shared powers at the national level so that citizens can take to the street celebrating a trifurcated institutional system.” Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 748-49 (1980).

as one wanting the thrill of playing basketball must abide by basketball rules. The nation is no more permanently bound to this Constitution than a player is prevented from trying his luck at another game. Just as one cannot, however, share the joys of one game while following the rules of another, so too, one cannot reap the rewards of the Constitution while ignoring its rules, one of which specifies an unamendable provision.

Nonetheless, some have argued that the equal suffrage provision is not legally binding. Such a view was advanced by Congressmen who opposed passage of the Corwin Amendment, an amendment proposed as part of the Crittenden Compromise introduced just prior to the Civil War with the intention of safeguarding slavery against further constitutional change.³⁶ These Congressmen argued that the equal suffrage provision, like the proposed compromise, was "a mere declaration."³⁷ More recently, Edward S. Corwin and Mary L. Ramsey have argued that the equal suffrage provision "has the moral force of a promise given more than one hundred sixty years ago."³⁸ While justifications for this view vary,³⁹ it appears largely based on notions of popular sovereignty. For example, Corwin and Ramsey argue that "[i]f the amending power is the same power which ordained and established the original Charter, any limitation on it must be considered as having only such force and validity as the amending power itself may at any time choose to accord it."⁴⁰

This view is profoundly mistaken. By accepting the Constitution and its strictures on the amending process (and every state joining the Union has given such assent), the nation has already accepted certain restraints on the momentary popular will. It is unclear why the United States should be bound by one such restraint, the super-majorities required for most amendments, and not another, the unanimous state consent required for altering a state's equal suffrage in the Senate. Acceptance of an unamendable provision in an otherwise amendable constitution is not a denial of sovereignty. The nation may indeed exercise its sovereignty by changing the equal suffrage provision but only by paying a price. That is, the nation may (to revert to the earlier analogy) choose a new constitu-

36. For a discussion of this proposal, see Linder, *supra* note 6, at 728-30.

37. The language is that of Mr. Bigler. *Id.* at 729 n.67.

38. Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 188 (1951).

39. Linder, for example, cites, but does not accept, three such justifications: one based on popular sovereignty, one based on enforcement difficulties, and one based on natural law. See Linder, *supra* note 6, at 722-25.

40. Corwin & Ramsey, *supra* note 38, at 188.

tional game, presumably either via a revolution or a revolutionary convention. A nation might even choose in writing a new constitution to keep most of the old rules but, if it is proceeding under the auspices of the existing constitutional scheme, it must follow that scheme or jeopardize the entire constitutional framework.⁴¹ In short,

We are free to touch the Constitution, to shape it to fit current needs, even, if necessary, to tear it up and write a new one. What we are not free to do is to ignore it, and that is precisely what those who urge the invalidity of the article five proviso would have us do.⁴²

IV

The question of explicit restraints leads logically to the question of whether any implicit limitations on article V exist. Early in this century, attempts were made to persuade the courts to invalidate the fifteenth, eighteenth, and nineteenth amendments.⁴³ They were based on state-sovereignty arguments that have long since gone out of constitutional favor, and even in their day the arguments were decisively rejected. While it is tempting to dismiss the controversy as an attempt "to build a mountain" from a mere "constitutional molehill,"⁴⁴ many of the same arguments are relevant to Walter Murphy's recent attempts to breathe new life into the notion of implied limits on the amending process. Murphy argues that certain provisions of the Constitution are so fundamental, and so essential to human dignity, that an amendment repealing them should be voided by the courts.

Murphy offers two examples of unconstitutional amendments. The first involves restriction of the first amendment. Murphy reasons as follows:

1. Incorporation of the First Amendment into the Fourteenth means that the operative constitutional provision effectively reads: "Neither Congress nor the states, singly or together, can make a law 'abridging' freedom of speech, press, assembly, or religion."
2. Constitutional amendments are law;
3. Therefore it is outside the scope of state and federal legislative powers to

41. I do not accept the notion, advanced by Walter Berns, that the equal state suffrage proviso would void the amendment proposing that the District of Columbia be treated as a state, and my reservations should be clear after full examination of sections III and IV of this paper. See Berns, *The Forms of Article V*, 6 HARV. J.L. & PUB. POL'Y 73, 76-77 (1982).

42. Linder, *supra* note 6, at 725.

43. For a review of this entire controversy and its theoretical implications, see Vile, *The Amending Process: The Alternative to Revolution*, 11 SE. POL. REV. 49-95 (1983).

44. Linder, *supra* note 6, at 725. Linder is specifically referring to attempts to read implicit reservations into the equal suffrage provision of article V.

amend the Constitution and restrict the First Amendment's protections.⁴⁵

In a second example Murphy imagines that an "ideology of repressive racism sweeps the country."⁴⁶ Its proponents muster the requisite majorities in Congress and in the states to ratify a constitutional amendment endorsing racial discrimination. If such an amendment were challenged in court, Murphy does "not see how the Justices, as officials of a constitutional democracy, could avoid holding the amendment invalid."⁴⁷

Murphy outlines three arguments. The first, borrowed from the Federal Constitutional Court of West Germany, suggests that the Constitution is a unit with "an inner unity" and a commitment to "certain overarching principles and fundamental decisions to which individual provisions are subordinate."⁴⁸ In this case, he argues, "the protection of human dignity" would, as a core constitutional value, take precedence over the racist amendment. Murphy adopts a second argument from a court decision in India. He reasons that Americans have chosen "a constitutional democracy which enshrines certain values, paramount among which is human dignity."⁴⁹ This value is even more important than the democratic procedures by which it was intended to be secured. "By adopting and maintaining such a system of values, the American people have surrendered their authority, *under that system*, to abridge human dignity by any procedure whatever."⁵⁰ Since this Constitution makes "no provision for destroying the old polity and creating a new one . . . its terms cannot supply legitimate procedures for such a sweeping change."⁵¹ Murphy further notes that "[c]onstitutional tradition establishes a legitimate process for establishing a totally new system through a convention chosen from the *entire polity*."⁵² Murphy's third argument is similar to the previous two. Since "[t]here are principles above the literal terms of the constitutional document," Murphy argues, the racist amendment would be invalid as a denial of "the right to respect and dignity," because it sought to "contradict the basic purpose of the whole constitutional system."⁵³

Despite Murphy's appealing objectives, his arguments should be rejected and courts should steer clear of imposing implicit limits

45. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130, 151 (M. Harmon ed. 1978).

46. Murphy, *supra* note 35, at 755.

47. *Id.*

48. *Id.* The material cited is quoted directly from the German court decision.

49. *Id.* at 756.

50. *Id.* (emphasis in original).

51. *Id.* at 757.

52. *Id.* (emphasis in original).

53. *Id.*

on the substance of amendments, even in the extreme circumstances Murphy mentions. First, however one may stress the "constitutional" as opposed to the "democratic" aspects of the American government,⁵⁴ the exercise of judicial power has always been in tension with popular rule.⁵⁵ One of the reasons judicial review has been acceptable is that the courts' judgments can be revised through the amending process. Nor can the potential impact of the amendment process on the courts be measured merely by counting those few occasions when it has been directly utilized,⁵⁶ since the possibility may have deterred court decisions in other areas as well. To empower the courts to void amendments overturning judicial decisions would surely threaten the notion of a government founded on the consent of the governed.⁵⁷

However much one might desire to provide permanent protection for certain rights, there may indeed come a point where, as Benjamin Franklin reminded the Constitutional Convention, the people, "shall become so corrupted as to need despotic Government, being incapable of any other."⁵⁸ At that point, which most surely would have been reached in Murphy's examples, judicial obstruction would be less likely to protect cherished rights than to spark revolution. As others have noted, the amending process serves a "safety-valve" function.⁵⁹ When popular sentiment has reached the boiling point, it is unlikely to be calmed by plugging the stopper. Even if the courts had the courage to oppose the raging tides of opinion in such contingencies—and cases such as *Dred Scott*, *Plessy*, *Gobitis*, *Korematsu*, and *Yamashita* show that they

54. The distinction in Murphy's. Murphy argues that "democracy stresses equality and popular rule" while "constitutionalism emphasizes that certain rights of the individual citizen are protected against government, even against popular government and majority rule." See *id.* at 707-08.

55. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962); see also Abraham, *The Judicial Function Under the Constitution: Theory and Practice*, *NEWS FOR TCHRS OF POL. SCI.*, Spring 1984, at 12.

56. The threat of using the untried convention mechanism, for example, has been linked to the passage of at least four amendments. Connely, *Amending the Constitution: Is This Any Way to Call For a Constitutional Convention?*, 22 *ARIZ. L. REV.* 1011, 1016 (1980). This is why, while agreeing with much of Walter Dellinger's analysis of judicial review of the amending process, I am not completely convinced that one can effectively ascertain the Court's relation to the amending process by counting the number of times that amendments have explicitly been overturned by the Court. See Dellinger, *supra* note 20, at 414-15. Tribe's response to this piece has been cited in *supra* note 5. Dellinger rebuts Tribe in *Constitutional Politics: A Rejoinder*, 97 *HARV. L. REV.* 446 (1983).

57. Tribe, *supra* note 5 at 435-36. While Tribe agrees with the general point made here, he is much more uncomfortable with the notion of consent. Tribe, *supra* note 5, at 441-42.

58. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 9, at 642.

59. This specific analogy is found in Williams, *What, If Any, Limitations Are There Upon the Power to Amend the Constitution of the United States?*, 6 *VA. L. REV.* 161, 167 (1920).

have often failed in similar circumstances—there is little reason to believe they would be successful.

Indeed, if the Court ever did attempt to control the amendment process, that power could as easily be used for ill as for good. There seem to be at least as many times in American history where the Court could have used implicit limits on the amending process to restrict human rights as to expand them. Surely, it would not have been preposterous (as Taney showed in *Dred Scott*)⁶⁰ to argue that the Constitution was adopted by whites and could not be extended to others, the Civil War amendments to the contrary notwithstanding. For that matter, what would keep the Court from voiding amendments to protect the handicapped, the aged, or the unborn (protection that the Court has refused to extend in the absence of such an amendment)⁶¹ on the basis that they are not fully human? Such examples should give pause to those who would vest the courts with even greater powers than they now have.

Perhaps the strongest argument against implicit limits on the amending process focuses on the Founders' intent. The presence of two explicit limits in article V, and the deliberate rejection of others, seem to argue against the existence of still more. As Chief Justice Marshall wrote in regard to provisions in article III: "Affirmative words are often, in their operations, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all."⁶²

Admittedly, some of these arguments against Murphy's position seem to deny the Court's power to enforce either explicit or implicit limits on the substance of amendments. The logic of a written constitution is, like the notion of a limited judiciary, however, much more compatible with enforcement of explicit limits than with implicit limits, and the difference is significant enough to allow such a distinction to be drawn.

These arguments notwithstanding, one must still meet Murphy's own positive examples and arguments. His argument against restrictions on the first amendment has the advantage of resting on a seemingly explicit, rather than an implicit, constitutional limit, but it does not bear up under close scrutiny. While an amendment may indeed be a form of law, it is unlikely to be the form referred to in the first amendment; the two would rarely be equated in ordinary discourse. If the Founders meant no law or amendment, surely they would have been explicit, as they were in establishing limits in

60. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

61. *Roe v. Wade*, 410 U.S. 113 (1973).

62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

article V.⁶³ Moreover, the language of the supremacy clause seems to indicate that the terms law and amendment are not used synonymously elsewhere in the Constitution.⁶⁴ Finally, Murphy's argument is inconsistent with existing constitutional interpretation under which Presidents and Governors can veto laws but not amendments.⁶⁵

As to Murphy's example of a racist amendment, he first argues that unifying constitutional principles should take precedence over contrary provisions. This argument is particularly inappropriate to a developing document like the United States Constitution. More recent constitutional provisions are presumptively in closer accord with the consent of the governed than conflicting earlier provisions. Surely, the Justices would be foolish to ask today whether blacks should be counted as three-fifths of a person or whether Senators should be elected by state legislatures. Moreover, a court proceeding from Murphy's assumptions might have heeded past requests to void several amendments whose commitment to human dignity Murphy now heralds.

Murphy's second argument is that the nation has opted for a system in which the people "have surrendered their authority, *under that system*, to abridge human dignity by any procedure," short of, "a convention chosen from the *entire polity*."⁶⁶ It is doubtful that the existing Constitution was itself written and adopted in such a convention.⁶⁷ More important, Murphy's proposal ignores the very constitutional system it purportedly defends. If use of article V, with its strenuous numerical requirements, does not accord with the constitutional system, what does? Is Murphy proposing a

63. Francis H. Heller, addressing a related issue, makes an interesting point when he observes that, "A constitution, viewed as a political document, is a framework for the exercise of power in the polity. Legal rules, by contrast, purport to determine the broad range of societal relationships. When a constitution is treated as just another form of law, there results an ambiguity of thought that tends to overshadow significant functional differences." Heller, *Article V: Changing Dimensions in Constitutional Change*, 7 U. MICH. J.L. REF. 71, 71-72 (1973).

64. The language is not conclusive, but it would appear that a proper reading would place amendments under the heading of "Constitution" rather than "the Laws of the United States." The supremacy clause, found in article VI, reads as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

65. *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

66. Murphy, *supra* note 35, at 756-57 (emphasis in original).

67. The state of Rhode Island did not send delegates to the Constitutional Convention, and delegates to the Convention were appointed by state legislatures rather than elected by conventions.

Calhounian system of concurrent majorities, with every societal group given a veto?⁶⁸ What if the Court had accepted such arguments, not on behalf of enhancing human dignity, but as a means of protecting the South's "peculiar institution," the all-white or all-male suffrage, or the election of Senators by state legislatures?

To turn, finally, to Murphy's contention that there are "principles above the literal terms of the constitutional document,"⁶⁹ is to enter a constitutional morass. Granted that such principles exist, what makes the judiciary the guardian of such principles in these circumstances? What check would there be on courts that misinterpreted such principles? As these questions suggest, not every moral wrong has a constitutional or judicial remedy. Prudence dictates that popular rule and national union may sometimes, at least in the short term, have to take priority over the protection of a specific conception of human dignity. Ultimately, the best haven for human dignity is the cleft of a constitution, changeable by a populace that will, over time, be subject to enlightenment and improvement.

V

In changing the Constitution, do the people have the right to pass unamendable amendments? In raising this question, Douglas Linder reminds us that it was a living issue at least once in the nation's history, on the occasion of the pre-Civil War Corwin Amendment.⁷⁰

Linder's judgment that the Corwin Amendment, and others similar to it, would be unconstitutional is worthy of attention, not only because Linder reasons that *only* such amendments are unconstitutional, but also because he recognizes that the existence of explicit limits in article V undercuts his position.⁷¹ Linder nonetheless opposes unamendable amendments:

The prohibition of amendments that would dismantle certain fundamental institutions and arrangements established by the Constitution, including the states themselves, was a topic specifically debated by delegates to the Philadelphia Convention; the question of amendments that would alter the nature of the Constitution itself was not discussed. The debates indicate that the framers wanted the principles and institutions established in the Constitution to be open to evaluation and change. What is not clear is whether they intended their *conception of a Constitution* to be similarly subject to modification.⁷²

68. See J. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE 19-22 (C. Post ed. 1953).

69. Murphy, *supra* note 35, at 757.

70. Linder, *supra* note 6, at 728-30.

71. *Id.* at 730.

72. *Id.* at 730-31 (emphasis in original).

Citing evidence that the Founders regarded the Constitution as “a vehicle through which change could peaceably occur,” Linder adds that “[n]othing could be more inconsistent with the conception of the living Constitution than an unamendable amendment or an amendment authorizing unamendable amendments and which by its own terms is unamendable.”⁷³ Such amendments pose the “risk of violence and revolutionary change” and “the risk that people will grow to disrespect the source of the institutions and arrangements that are forced on them.”⁷⁴ Apart from these risks, Linder also suggests that one generation should not be allowed to prevent succeeding generations from making fundamental moral and political choices.⁷⁵ He concludes that “article V itself cannot be amended so as to create any new limitations on the amending power.”⁷⁶

Presumably, Linder does not think that the precise formula mentioned in article V is somehow sacrosanct and inviolable. Surely, there is nothing talismanic about the consent of two-thirds of both Houses of Congress and three-fourths of the states (as opposed, for example, to three-fifths and seven-sixteenths or four-fifths and seven-eighths). By Linder’s own reasoning, the provisions of article V should, upon experience, be subject to the same modifications as any other constitutional provision. Presumably, Linder must consider that an unamendable amendment is distinguishable from a mere change of procedure.

What then of Linder’s question, “Is it moral or consistent with democratic theory to allow one generation to prevent succeeding generations from making certain fundamental moral and political choices?” The apparent negative answer does not, in fact, settle the controversy. In the first place, such a response calls into question the whole notion of a constitution whereby one generation decrees that succeeding generations may not change the framers’ constitutional handiwork without the concurrence of extraordinary majorities. Beyond this is Linder’s own willingness to allow the Founders to bind subsequent generations on the issue of equal state suffrage. To Linder’s question may thus be posed the following counterquestions: What gives the current generation less sovereignty than that exercised by the Founders? If they could enact an unamendable provision, why cannot the present generation? Has the sovereignty involved in writing constitutional documents somehow vanished?

If the answer to this last question is negative, a generation cre-

73. *Id.* at 731.

74. *Id.*

75. *Id.* at 732.

76. *Id.* at 733.

ating or modifying a given constitutional system has the right, within the rules of that system, to set whatever conditions it thinks are necessary to its preservation. Arguably,⁷⁷ no generation can reasonably claim authority irrevocably to bind the future; by the same token, one generation should have the right to say that the next generation must choose to follow the forms it has specified or choose another system. To analogize, a constitution is like a conditional gift or will. To enjoy it one must accept its stipulations. A nation can free itself of the gift or inheritance and its conditions by renouncing it altogether, but the nation may not enjoy it without abiding by its terms.

The analysis above certainly casts doubt on Linder's argument that the Founders, had they thought about it, would not have intended that "their conception of a Constitution" allowing for change, could be altered. As statesmen who recognized that at least two limits on the amending process were necessary to institute the Union, the Founders probably would not have been shocked to discover that similar compromises might be utilized to preserve the Union. Moreover, arguments like Linder's were rejected by the courts when faced with attempts to void the expanded suffrage amendments and the prohibition amendment. The latter amendment almost surely grafted a sumptuary regulation that the Founders would have thought inappropriate in a constitution, but the Court wisely refused to declare it unconstitutional.⁷⁸ A contrary ruling would have subjected all future amendments to a judicial hurdle unlikely to have been intended by the Founding Fathers.

This, of course, speaks only to the constitutional and theoretical, and not to the prudential, issues. On the latter ground, Linder's caution may be well taken. As a rule, unamendable amendments are surely not good public policy; extensive resort to such amendments might indeed spark revolution or instill disrespect for the Constitution. Only perhaps as a means of saving the Union, or as a means of guaranteeing the most fundamental rights, should they be utilized. To argue that such amendments are generally unwise, however, is not necessarily to say they are constitutional.⁷⁹

77. See Walter Berns's comment: "What we were not permitted to do in 1787-88 was to deprive—or pretend to deprive—our posterity of their natural right to do in the future what we did in 1776." Berns, *Do We Have a Living Constitution?*, NAT'L F., Fall 1984, at 31.

78. The National Prohibition Cases, 253 U.S. 350 (1920). For analysis, see Dellinger, *supra* note 20, at 403-04.

79. Here Linder may be too cautious. However else Murphy's arguments have been received in this paper, they could be taken to stand for the proposition that certain provisions (like the first amendment and the equal protection clause) should be guaranteed against constitutional change under our current constitutional system. One might further argue that, if

VI

In concluding, it seems appropriate to consider possible remedies. As a guard against Murphy's worst-case scenarios, one might propose that no amendment could be ratified by the states until first approved by two or three successive Congresses, or until states conducted hearings on the subject of ratification. This, or some similar measure, would expose new amendments to increased publicity and reflection before they could be incorporated into the Constitution. Murphy's worst-case scenarios seem far too unlikely, however, to justify such a change in an already difficult amending process.⁸⁰ It is certainly difficult to imagine mobilizing popular support on behalf of an amendment to deal with so esoteric an issue.

It is even less likely that the popular conscience could be sufficiently aroused to ratify an amendment to prevent future unamendable amendments. The irony of such a proviso—which, to be effective, would have to be unamendable—would itself be enough to argue against such a change. Moreover, the need for such a change seems dubious, as unamendable amendments do not seem imminent and have never been passed in nearly 200 years of practice.

In the end, then, the arguments surrounding article V do not so much point to the need for future constitutional reform, as illuminate the nature and wisdom of the existing constitutional document. The Constitution wisely protects liberty by guarding against the transient whims of the majority, while placing its ultimate faith in the consent of the governed.

the people are willing to have a revolution to suppress speech or practice racism, the existing system has, for all practical purposes, already come to an end.

80. Writing about the electoral college, Saul Brenner notes, "But the Constitution should not be amended to guard against remote possibilities." Brenner, *Should the Electoral College Be Replaced by the Direct Election of the President?*, 17 PS, Spring 1984, at 247.