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***1043** PHILADELPHIA REVISITED: AMENDING THE CONSTITUTION OUTSIDE ARTICLE V

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In the corridors of power of our nation's capital, and in law school classrooms everywhere, debates are raging over basic questions of constitutional theory: Does the Constitution guarantee unenumerated rights? If so, how are these rights to be derived and enforced? Should judges depart from constitutional text, history, and structure to maintain a 'living' Constitution? With increasing frequency, these debates have converged to frame the following now-standard question:

Should we (or did the Framers) rely exclusively on the formal amending process of Article V to update the Constitution, or should we (or did the Framers) also rely on the federal judiciary to act as a kind of continuous constitutional convention, ever evolving new unenumerated individual rights?

***1044** I submit, however, that a different, and perhaps more fruitful, question lies hidden in the intersection of unenumerated rights and constitutional amendment. Indeed, this question challenges two implicit but important assumptions smuggled into the more standard question--first, that the unenumerated rights retained by the People are primarily or exclusively individualistic, rather than majoritarian; second, that those rights are primarily or exclusively enforceable through judicial, rather than political, processes.

In considering modes of updating our fundamental law, our choice need not be limited to the Article V amending process versus freewheeling judicial review, as the standard question suggests, for there is a third, usually ignored, possibility: constitutional amendment by direct appeal to, and ratification by, We the People of the United States. The alternative to the standard question is then: Do We the People of the 1980s--or more specifically a majority of us--enjoy an unenumerated right to amend our Constitution in ways not explicitly set out in Article V?

My answer to this new question may at first seem fanciful, for I believe that the first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution-- even in ways not expressly provided for by Article V. In the brief space

below, I fear it may be impossible to convince you of this beyond all doubt, for my position is not self-evident. Nevertheless, I will show that this position is supported by several independent lines of analysis. Even if I fail to convert you during the course of this essay, I do hope to persuade you that the alternative question I have posed is worth asking, and that the seemingly obvious and straightforward rejoinders to my answer are not so obvious or straightforward as they seem.

I. PHILADELPHIA II: BACK TO THE FUTURE

Consider the following hypothetical: Pursuant to applications from two- thirds of the state legislatures, the 101st Congress calls a convention to propose amendments to the Constitution. The convention meets in--where else-- Philadelphia, and proposes a Twenty-Seventh Amendment, guaranteeing a right of every American citizen to minimal entitlements of food, shelter, and education. (I can dream--it is, after all, my hypothetical.) [FN1] Moreover, section ***1045** 2 of the propsoed Philadelphia document declares that 'this amendment shall be valid when ratified in a special national referendum to be called by Congress.' Congress, after considerable debate, calls the election, at which a majority of voters ratify the amendment.

Or did they? Opponents of the bill have been arguing all along that the putative amendment is a nullity, and the supposed ratification ***1046** a farce. Waving the text of Article V [FN2] in their hands, the opponents make the seemingly irrefutable argument that a proposed constitutional amendment becomes effective only after ratification by three-fourths of state legislatures or state conventions. A test case arises and you are the judge. [FN3] Are these words about food, shelter, and education part of the Constitution, or not? [FN4]

Before answering this question, consider the possibility that Article V may not be the only constitutional text on point. A more complete analysis, I submit, must include not simply Article V, but also Article VII, the Preamble, and the First, Ninth, [FN5] and Tenth ***1047** Amendments.

A. Popular Sovereignty in the Eighteenth Century [FN6]

Let's start with Article VII, which declares that '[t]he Ratification of the Coventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.' Now this (self)proclaimed rule of (self)recognition had no explicit antecedents in any prior authoritative legal text. Indeed, Article VII at first seems obviously 'unconstitutional'--whatever that means--under pre-existing law. But perhaps we have read these pre-existing legal texts incorrectly. If so, maybe Article VII was in fact 'constitutional' under pre-existing law, properly understood. And if that be the case, then perhaps we need to rethink our reading of Article V, just as we had to rethink our reading of the legal texts predating the first Philadelphia Convention in 1787. In other words, the Philadelphia I experience of the 1780s may provide a legitimate precedent supporting the constitutionality of the amendment proposed by Philadelphia II in the 1980s.

To be more specific, it is now almost commonplace for constitutional scholars to observe that Article

VII obviously violates Article XIII of the pre-existing Articles of Confederation. [FN7] Article XIII provided that the Articles of Confederation could be altered only upon unanimous agreement of all thirteen state legislatures. [FN8] ***1048** Article VII, however, abandoned the unanimity requirement, and looked to ratification by popular conventions instead of legislatures. In his 1983 Storrs Lectures, Bruce Ackerman placed great weight on Article XIII as proof of his proposition that ratification of the Philadelphia Constitution was, under pre-existing law, 'plainly illegal.' [FN9]

I'm not so sure. Of course, Article VII is inconsistent with the best reading of Article XIII, but to declare Article VII therefore illegal is to beg the question of the legal status of Article XIII, and the rest of the Articles of Confederation, in 1787. I believe, as did many Federalists in 1787, that the Articles of Confederation were a mere treaty among thirteen otherwise free and independent nations. [FN10] That treaty had been notoriously, repeatedly, and flagrantly violated on every side by 1787. Under standard principles of international law, these material breaches of a treaty freed each party--that is, each of the thirteen states--to disregard the pact, if it so chose. [FN11] Thus, if in 1787 nine (or more) states wanted, in effect, to secede from the Articles of Confederation and form a new system, that was their legal right, Article XIII notwithstanding. Indeed, in defending Article VII against accusations of illegality, leading Federalists made this very argument. [FN12]

Although I disagree with Professor Ackerman's premise about the significance of Article XIII, I share his more basic conclusions that our Constitution may be popularly amended in ways other than those explicitly set forth in Article V; and that the strongest precedent for this proposition lies in Article VII and the ratification of the Constitution itself. [FN13] But I come to this conclusion by a ***1049** different path. I focus not, as does Ackerman, on the Confederation's Article XIII, but on the pre-existing state constitutions in 1787, which Professor Ackerman ignores. For if, as I have argued, the so-called 'United States' were really separate nations in 1787-- much as the so-called 'United Nations' are today--then the most relevant pre- existing legal texts, the true prior rules of recognition, are to be found not in the Articles of Confederation, but in the state constitutions.

The real question, then, is: Was Article VII of Philadelphia I an unconstitutional violation of pre-existing state constitutions? At first blush, the answer seems to be yes. Adoption of the Philadelphia I document would in every state effect a drastic modification of that state's own form of government--that state's constitution. [FN14] Yet Article VII sought to effect this amendment of state constitutions by a procedure not explicitly included in any state constitution--namely, by a mere majority vote of a popular convention of the People of that state. In several states, including Massachusetts, Pennsylvania, and Maryland, the state constitution contained seemingly exclusive provisions for constitutional amendment. The Massachusetts document, adopted in 1780, provided for its own amendment in 1795 by a convention triggered by a two-thirds vote of the citizenry; [FN15] the Maryland document required action by two successive legislatures; [FN16] and so on. Yet in none of these states was the Philadelphia Constitution ratified pursuant to these rules.

This point was not lost on the Anti-Federalists. Waiving the texts of state constitutions in their hands, several leading Anti-Federalists argued that ratification under Article VII would be illegal. [FN17] Yet this was not one of the Anti-Federalists' main arguments--and for good reason. Federalist supporters of the Constitution ***1050** had a knock-down rejoinder, a rejoinder that we have all but forgotten today, but

that has radical implications for my Philadelphia II hypothetical. James Madison perhaps put it best. At the Philadelphia Convention, Maryland delegate Daniel Carroll objected to a precursor of Article VII. According to Madison's notes, 'Mr. Carroll mentioned the mode of altering the Constitution of Maryland pointed out therein, and that no other mode could be pursued in that State.' [FN18] But listen carefully to Madison's reply:

The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the constitution, and all officers were under oath to support it. The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bill of rights, that first principles might be resorted to. [FN19]

What were these 'first principles'? Simply that the People were sovereign, and that a majority of them enjoyed the inalienable legal right-- that is, a right that they were incapable of waiving, even if they tried--to alter or abolish their form of government whenever they pleased. [FN20] These principles represent the essence of the American Revolution. In the words of our Declaration of Independence:

We hold these truths to be self-evident . . . that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

***1051** Nor was the Declaration of Independence unique. Consider just a small sample of similar declarations, collected from various state Constitutions, and Bills or Declarations of Rights:

[W]henever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most condusive to the publick weal. [FN21]

or

[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal. [FN22]

or yet again

[T]he people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it. [FN23]

Here, then, is my argument: The Constitution was in fact lawfully ratified in Massachusetts and its sister states because a bare majority of the People (in Massachusetts the Constitution prevailed by a slim vote of 187 to 168) [FN24] had a legal right to amend ***1052** their constitution--even in the teeth of a pre-existing constitutional provision that specified a different, and seemingly exclusive, mode of amendment. Massachusetts in 1787 had its own analogoue of Article V, yet that provision was disregarded, and transcended by direct appeal to the People. I do not say violated, for I believe that when the Massachusetts analogue of Article V is read in context, it should not be read to prescribe the exclusive mode of amendment. It nowhere declared that it was the exclusive mode of amendment,

although at first blush, that seems to be the fairest reading. After a more careful consideration, however, that reading should be rejected as inconsistent with the explicit text of the Massachusetts Declaration of Rights quoted above, and the general theory of popular sovereignty underlying the Massachusetts Constitution, the indeed, the American Revolution.

Of course, it is still possible to insist that ratification in Massachusetts, Pennsylvania, and Maryland (and perhaps other states) [FN25] was illegal and revolutionary, but this characterization suffers from two interrelated problems. First, it cannot account for the immediate and widespread acquiescence of the Anti-Federalist opponents once votes were taken in the state conventions. There is a dramatic difference between the Tories' Loyalist opposition of 1776, and the Anti-Federalists' loyal opposition in 1788--a difference between military resistance to revolution and acquiescence, however sullen, in lawful change. [FN26] (Nor can it be assumed that ***1053** military resistance would have been futile in 1788; the fact that a majority of the convention delegates voted for the Constitution did not necessarily mean that a majority of able-bodied fighters, of arms, or of money stood behind the newly ratified document.) [FN27] Second, to view ratification as revolutionary is to ignore the transcendent achievement of the founding generation: the channeling of the theretofore supra-legal right of revolution into precise and peaceful legal procedures--in particular, a majority vote in a specially convened ratification convention. It is far more illuminating to view ratification as fully legal (i.e., analogous and supplemental to the explicit modes of amendment specified in state constitutions) than to assimilate ratification into the category of revolution (i.e., analogous to a resort to arms, even by a probable majority of the policy, with no formal vote ever taken). [FN28] Thus, the rhetoric of the People's right to alter or abolish their government, rhetoric ***1054** that appeared in virtually every state constitution and other legal texts, was given concrete legal meaning by the founding generation, and furnished legal support for popular ratification in Massachusetts by a mode not explicitly specified in that state's own constitution.

The same logic applies to Article V. Although Article V might at first seem to be the exclusive mode of amendment, it nowhere says so explicitly. [FN29] To be sure, it provides one mode of amendment, [FN30] and without it, even two-thirds of Congress and three-fourths of the state legislatures would be powerless to amend the Constitution on their own. In the absence of any explicit authority from the People in the Constitution, ordinary organs of government would not have been presumed competent to alter the document on their own without popular ratification. [FN31] Thus, without Article V's express (though always revocable) delegation from the People, even an 'amendment' unanimously adopted by both Houses of Congress and every state legislature would have no higher status than ordinary federal and state statutes. [FN32]

Given that Article V does authorize amendments that would otherwise be unconstitutional, it cannot fairly be said that my reading of the Constitution renders Article V a nullity; it simply renders Article V nonexclusive. Put another way, Article V makes constitutional amendment by ordinary governmental entities possible and thus eliminates the necessity of future appeals to the People themselves. However, future appeals to the People remain sufficient, as a general matter, [FN33] to effect constitutional change.

This reading of Article V draws its strength from the sharp structural distinction the Founders drew between government and the People. [FN34] The Framers well understood that ordinary government

entities were only imperfect representatives, or agents, of the ***1055** People, and might have systematically different interests and judgments. [FN35] The Constitution is a set of grants of authority from the People themselves to their government agents for limited purposes. The corollary of these limited grants of power is that government agents generally possess no authority--no 'sovereignty'--other than that expressly or impliedly delegated by the People. The Tenth Amendment, of course, later made this corollary explicit. [FN36] Thus, the implied negative corollary of Article V is that ordinary government entities have no authority outside the provisions of Article V to amend the basic charter under which they operate. [FN37] But although Article V is best read as the exclusive mode of governmental amendment absent participation by the People, it should not be understood as binding the People themselves, who are the masters, not the servants--who are, indeed, the source--of Article V and the rest of the Constitution. [FN38] Thus, although the Constitution empowers and limits government, it neither limits nor empowers the People themselves. [FN39] Rather, the Constitution is itself predicated on their pre-existing power. [FN40] Indeed, if Article V ***1056** were in fact the only made of constitutional amendment, it would violate the inalienable right of a majority of the People to alter or abolish their government, [FN41] and thus violate the 'first principles' to which Madison referred. When read in context with the Preamble, and the First, Ninth, and Tenth Amendments, Article V simply cannot suport the conclusion that it is the exclusive avenue of amendment.

The Preamble begins by declaring that the Constitution is ordanied and established by We the People of the United States. This ringing declaration incorporates by reference Madison's 'first principles'--the theory of popular sovereignty underlying the Revolution. Good lawyers of 1787 understood this. [FN42] Consider the words of President Edmund Pendleton before the Virginia ratifying convention:

> We, the people, possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? . . . Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument. [FN43]

Pendleton begins this extraordinary passage with a paraphrase of the Preamble, and then proceeds to imply that the theory underlying those words renders Article V nonexclusive. Although the passage is not wholly free from ambiguity, Pendleton appears to be claiming: first, that Article V is simply one 'easy and quiet method' of amending the Constitution without direct recourse to the People themselves; second, that the ordinary government entities empowered under Article V are simply 'servants' of the people who will sometimes 'pervert' their 'delegated powers' and 'interrupt' desirable amendments because of 'self-interest;' and ***1057** third, that this evil is easily curable, for the People retain the supra-Article V right to 'resist'-- not simply militarily, but legally, by 'assembl[ing] in Convention.' Although it is conceivable that Pendleton was referring only to the proposing convention specified in and strictly circumscribed by Article V itself, this reading makes little sense in context. Under a strict reading of Article V, the triggering of such a convention depends on state legislatures, and the ratification of any convention proposals could also, if Congress so chose, depend on state legislatures. Yet, the members of Congress and the state legislatures were the very governmental 'servants' whom

Pendleton feared might ut of 'self-interest' 'interrupt' changes desired by the People themselves.

The Preamble's implications of Article V nonexclusivity surfaced again the following year when the First Congress framed a Bill of Rights. One of Madison's proposed amendments to the Constitution was to append a prefix th the Preamble declaring 'That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government . . .' [FN44] The idea of a prefix eventually was dropped because it was deemed redundant. [FN45]

So too, the Ninth and Tenth Amendments were seen by many as redundant. But their twin references to the rights of 'the people'--both Amendments end with these two words--yet again underscore the revolutionary theory of popular sovereignty. [FN46] Both amendments caution us not to 'construe' Article V's limited grant of power to government in a way that would 'deny or disparage' the all-important--if 'unenumerated'--'rights' and 'powers' of constitutional amendment 'retained by' and 'reserved to . . . the people.' [FN47] Thus, the first clause of the Preamble and the last ***1058** clauses of the Bill of Rights serve the same function as the various declarations in state constitutions quoted above; [FN48] namely, to remind readers that in America, the People retain the legal right to alter or abolish their government themselves, acting outside of all governments. [FN49]

Finally, we should not ignore the First Amendment's explicit reservation of 'the right of the people peaceably to assemble. . . .' This clause goes well beyond protecting the ability of a cluster of self-selected individuals to confer together; it also encompasses the corporate right of the People to assemble in convention, and, by a majority vote, to peaceably exercise their sovereign right to alter or abolish their government. [FN50] Recall the words of Pendleton: 'the people . . . will assemble in Convention . . ..' [FN51] Pendleton's audience apparently shared this understanding of assembly, for his fellow delegates appended to the Virginia ratifying instrument a declaration of rights that included the following language:

> That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives . . . [FN52]

The juxtaposition of assembly and instruction here is illuminating. The rights of assembly and instruction were paired and ***1059** guaranteed by similar language in the North Carolina Constitution of 1776, [FN53] the Pennsylvania Constitution of 1776, [FN54] the Massachusetts Constitution of 1780, [FN55] the New Hampshire Constitution of 1784, [FN56] and the reports of the New York [FN57] and North Carolina [FN58] ratifying conventions of 1788. Instruction obviously has a majoritarian component; so too, does assembly. Indeed, both rights reflect attempts to displace representation in ordinary government with direct action of the People themselves, acting outside government.

Yet there is a vital difference between these two asserted rights. Instruction tends to displace everyday deliberation in ordinary government entities; it threatens to swallow up Madison's scheme of representative government even during moments of 'normal politics.' [FN59] As Garry Wills has noted, all of Madison's key arguments in Federalist 10 are premised on a rejection of instruction. [FN60] To the same effect was his Federalist 63:

> The true distinction between [ancient governments] and the American governments lies in the total exclusion of the people in their collectible capacity, from any share in the latter . . . The distinction . . .

leave[s] a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. [FN61]

So too, Madison initially opposed state legislative election of senators in part because he recognized that this mode of selection would make instruction easier, thereby undermining deliberation in the Senate itself. [FN62] It is thus not surprising that Madison and his fellow Federalists labored mightily--and successfully--to block ***1060** recognition of any right of instruction in the First Amendment. [FN63]

The right of assembly was quite different. This was not a right to continually circumvent ordinary organs of representative government in deciding the day-to-day affairs of state. Rather, it was a right to assemble to reconsider the basic charter of government, a right to be exercised only during special 'constitutional moments' [FN64]--just as the Federalists themselves had gone over the heads of ordinary state legislatures and appealed to the People themselves, in convention assembled, under Article VII. In effect, the Framers' rejection of a right of instruction affirms the exclusiveity of the process of ordinary lawmaking by ordinary government entities set out in Article I. In contrast, the First Amendment's explicit guarantee of the People's right to assemble affirms the nonexclusive character of the process of constitutional amendment by ordinary government entities set out in Article V.

B. Popular Sovereignty in the Twentieth Century

The principles of popular sovereignty underlying our Constitution require that a deliberate ajority of the People must be able to amend the Constitution if they so desire. This right is obviously not self-executing, it not only permits but requires some regulation in order to be effectively implemented (much as proportional representation requires a periodic census). [FN65] But Article V cannot be seen as exclusively regulating popular sovereignty, for its provisions cannot guarantee that a deliberate majority will prevail: a minority of small states could conceivably block ratification under Article V even in the face of overwhelming and deliberate majority support for an amendment. Thus, a better reading of the Constitution would infer that Article V's regulation of the amending process must be supplemented with procedures similar to those suggested by my Philadelphia II hypothetical.

I have chosen this particular hypothetical because it precisely parallels the events of the late 1780s. First, a constitutional convention is called in strict and literal conformity to pre-existing law. Article XIII of the Articles of Confederation required that future amendments be proposed in 'a congress of the united states'--that is, a generic assembly of states as opposed to the ***1061** 'Congress,' with a capital C, established by the Articles. [FN66] Such a congress/convention was lawfully convened in Philadelphia in 1787 pursuant to express resolutions in the confederation Congress and in individual states. Similarly, in my hypothetical, a convention is convened by the national and state legislatures in strict conformity with Article V. Second, the convention proposes a mode of ratification that is not expressly authorized by pre-existing law, but that instead rests on the right of a majority of the sovereign People to alter or abolish their government. Third, the ordinary legislative organs of power (in the 1780s, the confederation Congress and the state legislatures; in the 1980s, Congress) do not attempt to thwart this mode of popular ratification, but instead help to implement it. [FN67]

If Philadelphia I was legitimated by 'first principles,' why not ***1062** Philadelphia II? [FN68] As I see it, there are only two significant differences. First, Philadelphia I looked to ratification by the People of each state; Philadelphia II, to the People of the nation. The reason for this difference is obvious. In 1787, each state was an independent nation. Thus, at that time, the relevant sovereign entity in, say, Boston was the People of Massachusetts, and a bare majority of Massachusetts voters could bind everyone in the State. But as I have argued at length elsewhere, after Massachusetts adopted the Constitution, it lost its nationhood, and sovereignty was relocated to the People of the United States, as a whole. [FN69]

It might be asked why sovereignty is an all-or-nothing concept that must be located in one place. If the People of Massachusetts were sovereign in 1786, why were their choices in 1787-88 limited to retaining their sovereignty in toto or surrendering all of it to the larger sovereignty of the People of the United States? I believe the answer is initimately connected with the right of a majority of the people to alter or abolish their government. If sovereignty could ***1063** somehow be divided between the People of Massachusetts and the People of the United States, then it might come to pass that the Constitution could not be amended even though a majority in both Massachusetts and the United States as a whole favored amendment. Indeed if Article V were the only mode of amendment, this kind of entrenchment is easy to imagine. Perhaps for this very reason, most major American constitutional theorists from 1787 to 1865 assumed that sovereignty must be located either in the People of each state or in the People of the United States as a whole. [FN70] Divided sovereignty was almost universally recognized as a theoretical impossibility; it was axiomatic to eighteenth century thinkers that 'imperium in imperio . . . is a solecism.' [FN71]

My previous essay on sovereignty and the Constitution relies heavily on this axiom underlying popular sovereignty. In that essay I sought to establish that the express provisions of Articles V and VI were logically inconsistent with the sovereignty of the people of each state, and that therefore (since no third possibility of divided sovereignty can exist consistently with my--and the Framers'--theory of popular sovereignty) sovereignty must logically be vested in the People of the United States as a whole. [FN72] As I have already noted, nothing in Article V is logically inconsistent with that conclusion. [FN73]

James Madison seems to be a notable exception to the general consensus of unitary sovereignty theorists, [FN74] and indeed he even implied the exclusivity of Article V in Federalist 39 and again in Federalist 43. [FN75] Yet it Madison did embrace a theory of divided sovereignty, his views were uncharacteristically unrepresentative of contemporary legal thought. Moreover, such a theory cannot be ***1064** reconciled with the logic of popular sovereignty that he himself invoked on many other occasions. [FN76] Given Madison's idiosyncratic and inconsistent views on the divisibility of sovereignty, his cursory discussion of the Article V amendment process in Federalist 39 and 43 should be appropriately discounted. [FN77]

The second major difference between Philadelphia I and II is that the former looked to a majority vote within a ratifying convention, while the latter dispenses with conventions in favor of a direct referendum. [FN78] This may be an important difference, but I shall not explore its admitted intricacies here. At most, this distinction suggests that the Twenty-Seventh Amendment would have to be ratified by a majority of a special national ratifying convention, whose delegates are chosen in a special election.

[FN79] And ***1065** even this, of course, goes well beyond Article V's explicit provisions.

The logic of my underlying argument of popular sovereignty, however, carries me beyond my Philadelphia II hypothetical. The sequence of steps I have outlined is sufficient, but not necessary, to effect a lawful amendment. In particular, I do not believe that application of two-thirds of the state legislatures is needed for convening a proposing convention. A deliberate majority of the national electorate might be geographically distributed in ways that prevent getting two-thirds of the legislatures to apply for the convention. [FN80] Thus, for reasons similar to my belief that Article V's ratification mechanism is nonexclusive, I view its proposal mechanism also as nonexclusive. Ultimately, I believe that Congress would be constitutionally obliged to convene a proposing convention if a bare majority of American voters so petitioned Congress. [FN81]

This conclusion is reinforced by the First Amendment's 'right of the people . . . to petition the Government' which, like the right of assembly and the Ninth and Tenth Amendments, has a political and majoritarian strand that has been ignored by constitutional theorists who emphasize judicially enforcible minority rights. Indeed, ***1066** the majoritarian possibilities implicit in the petition clause emerge from a simple side-by-side comparison of the First Amendment language with English precedent. According to Blackstone's Commentaries:

> [I]n England no petition to the King, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter be approved by three justices of the peace or the major part of the grand jury in the country; and in London by the lord mayor, alderman, and common council; nor shall any petition be presented by more than two persons at a time. [FN82]

As St. George Tucker noted with satisfaction in his American edition of Blackstone, 'In America, there is no such restraint.' [FN83]

The questionof whether a petition could demand not a Philadelphia-style proposing convention, but simply a Congressionally-called referendum on a proposed amendment text specified in the petition itself resembles the question discussed above: whether popular sovereignty requires deliberative assemblies (conventions) at the ratification stage. [FN84] My own tentative view is that, since the amending majority must be deliberative, a convention may well be necessary for both the proposing and ratification stages. [FN85]

II. TWO PROVISOS

Two final wrinkles of Article V deserve additional discussion. The general amendment procedure of Article V is itself qualified in the following way:

> 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 [dealing with the importation of slaves]; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

These two restrictive provisions raise analogous, but not identical, issues.

***1067** A. Slave Importation

The first proviso purports to make certain provisions of the Constitution absolutely unamendable (at least through the ordinary Article V amendment procedure) for an entire generation, after which the proviso lapses. But if, as I have argued, the founding generation understood that the People were legally incapable of alienating their future legal right to alter or abolish their Constitution at any time and for any reason, [FN86] how are we to understand this proviso?

One explanation is that this first proviso is not legally binding. This view would not render the proviso absolutely meaningless. Even if the sovereign People could not legally bind themselves to refrain from amending the slave importation clauses before 1808, surely they were capable of announcing a self-imposed moral obligation, a non-enforceable promise, that they would refrain from exercising this legal right. Thus, this proviso could be understood as analogous to a 'moral obligation' bond--a promise enforceable only upon the conscience, and depending solely on the ongoing good faith, of a promisor (here, the People of the United States) that lacks the legal power to bind itself. The plausibility of this interpretation is enhanced by the 1808 sunset provision; the People of 1787 were only promising to restrain themselves, not future generations, for they would have no authority to make a promise on the behalf of others. [FN87]

As tempting as this approach to the first proviso is, I now believe it must be rejected. [FN88] Although the 'moral obligation' reading does not render the first proviso meaningless, it does strip it of all legal meaning. Surely this is a dangerous move--for if it can be made with the importation proviso, why couldn't a similar move be made to strip away the binding legal character of any other clause of the Constitution that an interpreter happened to disdain? ***1068** Moreover, the Supremacy Clause emphatically proclaims that 'this Constitution'--which presumably means every clause--is 'supreme law,' not mere promise.

There is, however, another, more satisfying and less dangerous approach to interpreting the importation proviso. What's more, this approach strengthens my main argument that Article V is not the exclusive mechanism of constitutional amendment. For if (1) Article V were the exclusive mechanism and (2) the importation proviso legally prohibited use of Article V, then we would be logically driven to the illogical conclusion that the People had somehow alienated their inalienable right to amend. [FN89] Since this conclusion is flawed, so must be at least one of the two premises. If, as argued above, premise (2) must be accepted, then premise (1) must be faulty. Put another way, the legal inability of the People to amend slave importation through Article V before 1808 is itself a strong reason for reading Article V as nonexclusive.

Thus, I read the importation proviso as prohibiting only the use of Article V procedures to abolish slave importation before 1808. Surely the People of 1787 were capable of denying this power to even supermajorities of Congress, state legislatures, and state conventions. As noted above, the People need not have granted any amendment authority whatsoever to these bodies, and in the absence of the explicit provisions of Article V, these bodies would have no such authority. [FN90] This greater power of the People to withhold all amendment authority certainly subsumes a lesser power to grant only limited

amendment authority. But the inalienable right of the People themselves to amend slave importation outside of Article V remains unimpaired. Had a Philadelphia I,-type convention convened in 1800, and proposed the abolition of slave importation upon ratification by a national majority in a national referendum (or by a national ratifying convention), the People themselves could have amended the one clause not amendable by ordinary government entities. [FN91]

The importation proviso is thus not a flat ban on amendments at all, but only a restriction on Article V. The proviso only seems to be an absolute ban when Article V is read as exclusive. But once we properly recognize the nonexclusive character of that Article, ***1069** we may properly conclude that the importation proviso has (unsurprisingly, upon reflection) no application outside Article V. [FN92]

In the end, the slave importation proviso is plain proof that Article V cannot be read as implementing the fundamental right of the People to alter or abolish their government, for the proviso obviously does not implement or regulate certain amendments, it prohibits them. The proviso thus confirms my structural argument that Article V, strictly speaking, is about the scope and limits of the power of ordinary government entities, and has no relevance to-- no empowerment of or limitation on--the analytically distinct legal right of the People themselves to alter or abolish their government. [FN93]

B. Senate Apportionment

A similar argument applies to the second proviso of Article V, which concerns equality of representation in the Senate. Given that the barbarism of slave importation is now thankfully behind us, the Senate proviso is obviously of more practical significance today. It is also trickier theoretically. For unlike the importation clause, the Senate proviso does not by its terms prohibit all amendment; it simply modifies the ordinary ratification rule of Article V for amendments dealing with Senate apportionment by requiring unanimous consent among states instead of approval by three quarters of state legislatures or conventions.

Once again, it is possible to read this proviso as merely a moral, rather than a legal, obligation; but for reasons similar to those offered above, I reject this interpretation. [FN94] Indeed, if the 'moral obligation' argument is not rejected, a states' rights advocate could devise the following slick argument:

The clear rules of Article V, which allow a state convention decision to be overridden by votes in other state conventions, ***1070** and of Article VI, which prohibit a state convention from amending its state Constitution in violation of the federal Constitution, do not (as Amar claims) [FN95] logically imply that the People of each State have lost their sovereignty. These provisions should be read as simply the nonbinding promises of the sovereign People of each State to acquiesce in certain decisions made by the confederacy. But the People of each State remain legally free to exercise their sovereign rights and thereby frustrate confederation policy. In contrast, the Senate proviso should be read as legally binding, and binding legal nature offers strong evidence of the sovereignty of the People of each State, for it harks back to the rule of the Articles of Confederation (and indeed, of all confederacies) that amendments to the mutual compact must be unanimously approved by member sovereignties. [FN96]

If the only reading of the Senate proviso I could offer reduced it to a mere moral obligation, we would

be left with an unsatisfying stalemate. My argument in favor of a national sovereign People would treat the ordinary rules of Article V and Article VI as law, but would trivialize the Senate proviso, and the argument in favor of state sovereign Peoples would return the compliment. Neither argument could provide a fully satisfying account of the legal character of all the Constitution's provisions.

As with the importation clause, however, there is another, more satisfying and less dangerous reading of the Senate clause. As with the importation clause, this reading further illustrates the nonexclusivity of Article V. Under this reading, the Senate proviso is binding law, but law which applies only to the ordinary Article V amendment process, and which has no application outside Article V, I.e., to Philadelphia II type situations. Thus We the People of the United States can lawfully restrict--and indeed through Article V have lawful restricted--the powers of Congress, state legislatures, and state conventions over Senate representation; but We have not--We could not--limit Our own power to alter or abolish even this seemingly entrenched feature of our government. [FN97] Notwithstanding ***1071** the Senate proviso, We the People can--and perhaps should--abolish the archaic apportionment rules of the Senate, [FN98] but We must do so Ourselves, through Philadelphia II-type procedures.

Thus, our true constitutional rule of recognition is not Article V, narrowly construed, but the principle of popular sovereignty that undergirds every Article of the original Constitution and every Amendment in the Bill of Rights. [FN99] Once this transcendent principle is understood, we are driven to the arresting conclusion that compliance with Article V is neither necessary nor indeed always sufficient [FN100] for legitimate constitutional amendment.

***1072** III. WE THE PEOPLE: CASTING OFF THE DEAD HAND OF THE PAST

So far, I have been developing an 'internal' argument based on the text, history, and structure of the Constitution. Yet standing alone, all internal arguments are circular. We cannot say that a set of words is supreme law simply because the words say so; nor can we say that the Framers' intent should govern our interpretation solely because they intended that. We need an additional, external, argument from political philosophy to ground our circle. Moreover, our external argument must be consistent with--though not simply grounded on--our internal argument. If not, our argument would approach contradiction. Thus, if not external theory tells us to look to the Farmers' intent, but the internal evidence shows--as Professor Powell has endeavored to establish [FN101]--that the Framers did not intend for their intentions to be binding, then (to put in mildly) we've got problems.

I dnot believe, however, that my argument suffers from these problems. My external thesis as to why the Constitution is legally binding happily harmonizes with the internal logic of the document: in two words, popular sovereignty. The Constitution has legal force because it derives from the People. 'Ah,' but you say, 'the People who adopted it are all dead.' How true. Which is precisely why they could not--even if they wanted to--bind a future generation of Americans. [FN102] Now of course, my internal argument has been that the Farmers accepted this political truth and never mtended Article V to deny our generation's inalienable right of amendment. [FN103] Hence the Preamble's promise to 'secure the Blessings of Liberty to . . . posterity'--most centrally, the public liberty of democratic self-governance. [FN104] Unless We the People of the ***1073** 1980s can amend our Constitution by a

simple majority--a majority of the polity, mind you, not of Congress (as I shall explain in more detail below, it is a gross mistake to equate Congress with the People) [FN105]--the Constitution loses its most defensible claim to derive from the People.

To see this last point most clearly, suppose that the People of 1787 had attempted to make, say, the taxing power unamendable, save perhaps by unanimous consent of all individuals. Suppose 99.9 percent of all Americans today wanted to amend that provision, but could not do so constitutionally. Could we really view our Constitution as being of, by, and for the People? [FN106] And if you accept the argument for 99.9 percent, then there is no principled way to stop short of 50 percent plus one. Any other rule impermissibly entrenches the status quo, as the political economist Kenneth May demonstrated in a famous theorem [FN107]--a theorem which, though not formally proven until the 1950s, was well intuited by the Framers, and well articulated in various bills of rights [FN108] and the first inaugural addresses of (to take but two examples) Thomas Jefferson [FN109] and Abraham Lincoln. [FN110]

Admittedly, not even popular sovereignty can avoid all forms ***1074** of entrenchment. [FN111] First, the substantive constitutional rules adopted by one generation remain the status quo default rules governing subsequent generations unless and until amended. However, if a subsequent, deliberate majority can in fact amend these default rules, then their failure to do so can plausibly be seen as reflecting their implied consent. [FN112] Since by definition, some status quo default rule must always exist, resort to some form of implied consent argument is inescapable. In contrast, if more than a deliberate majority were required to amend the Constitution, then the status quo would have to be justified on additional grounds besides just the majority's implied consent. [FN113] The distinctive feature of my reading of the Constitution is that it is the only reading that can rely solely on the concept of implied consent since it ensures that a deliberate majority of the People (if they choose to) can withhold their consent to the status quo by amendment. Thomas Jefferson went even further when he proposed that every Constitution lapse after nineteen or twenty years. [FN114] But even that rule does not avoid a status quo default rule; it simply replaces the product of earlier popular deliberation with anarchy. On this count, Madison properly criticized Jefferson [FN115]. Madison, however, went too far in the direction of entrenchment when he suggested that amendment should require a supermajority. Such a requirement gives the dead hand of the past more than simply a tie-breaking vote and an agenda setting power--and the past is not entitled to any more than this. In Jefferson's words, 'Lex majoris partis is founded in common law as well as common right. It is the natural law of every assembly of men. . . .' [FN116]

***1075** Second, the People in one generation must unavoidably entrench some definition of itself--for example, 'the sovereign People of Massachusetts' or 'the sovereign People ofAmerica.' To argue that the boundaries of any definition are perhaps arbitrary (e.g., why are New Mexicans 'in' and Mexicans 'out'?) is, however, to argue not simply with the theory of popular sovereignty, but with the entire idea of the nation state. [FN117]

***1076** Yet even the unavoidable entrenchment inherent in defining a People is itself reversible by later popular redefinition through union or secession. Of course, if this redefinition is to be constitutional as opposed to insurrectionary--whether or not popular among some self-defined group of 'people'--it must

be carried out in accordance with the preexisting inherited rules defining which people are sovereign. Thus, South Carolina's attempted unilateral secession in 1861 was unconstitutional, through perhaps popular among the people of South Carolina. [FN118]

In the end, the two types of entrenchment created by the Philadelphia Constitution's establishment of a status quo default rule and its definition of the People of the United States must be seen as qualitatively different from the type of entrenchment that would arise from reading Article V as exclusive. The first two types of entrenchment are unavoidable. Indeed, they are indispensible to any workable system of popular sovereignty; the right of a majority of the People to amend obviously presupposes these two types of entrenchment defining who gets to amend what. The third (Article V) type of entrenchment, by contrast, would rip the heart out of this fundamental right.

IV. POPULAR SOVEREIGNTY IN PRESPECTIVE: OTHER THEORISTS

A. Ely and Bickel

The popular sovereignty approach I have advocated here may be profitably contracted with several leading constitutional theories. Consider first the work of John Hart Ely. Chapter 1 of Ely's classic Democracy and Distrust opens with a ringing argument for constitutional supremacy and interpretive judicial review. Ely convincingly notes that any other approach--i.e., some form of noninterpretivism that freely deviates from the Constitution's text, history, and structure--encounters 'obvious difficulties . . . in trying to reconcile itself with the underlying democratic theory of our government.' [FN119] But a few pages later, Ely drops a bombshell:

> [T]he argument that closed Chapter 1 is largely a fake . . ..
>
> The amendments most frequently in issue in court, however--***1077** to the extent that they ever represented the 'voice of the people'--represent the voice of people who have been dead for a century or two . . .. [This] fatally undercuts the idea that in applying the Constitution--even the written Constitution of the interpretivist--judges are simply applying the people's will. Incompatibility with democratic theory is a problem that seems to confront interpretivist and non-interpretivist alike. [FN120]

Here, as elsewhere, Ely's thinking seems to reflect the influence of his remarkable teacher, Alexander Bickel, [FN121] whose own classic book, The Least Dangerous Branch, characterized judicial review as obviously 'counter- majoritarian'--a 'deviant institution' in an otherwise democratic system. [FN122]

1. Old laws.

The basic claim underlying Ely's and Bickel's arguments appears to be that Congressional statutes are generally more reflective of 'the People's' will than is the Constitution. [FN123] But why is this so? Simply because various constitutional provisions were adopted long ago? This cannot be the whole answer, for if it were, why would enforcement of, say, the Sherman Anti- Trust Act (adopted in 1890) be qualificatively more democratic than, say, enforcement of the Fourteenth Amendment (adopted in

1868)? Ely and Bickel would presumably respond that enforcement of the Sherman Act raises fewer problems of democratic legitimacy because if 'the People' today don't like the Act (or the way judges are interpreting it) We can get today's Congress to amend it. But why can't a similar--indeed, a stronger--argument be made about the Fourteenth Amendment: If 'the People' today don't like the Amendment (or the way judges are interpreting it) We can amend it Ourselves?

Underlying Bickel's and Ely's arguments is a key premise that a majority of 'the People' today cannot be deemed to have consented ***1078** to the Constitution which We have inherited, but not expressly adopted Ourselves. But this premise is valid only if we assume that Article V is exclusive, and that because of its procedural obstacle course, even a deliberate majority of We the People of the late twentieth century may not be able to alter unpopular eighteenth and nineteenth century clauses. Bickel himself makes this assumption quite explicit when he says 'the Amending Clause itself incorporates an extreme minority veto.' [FN124] If, however, my argument of popular sovereignty and the nonexclusivity of Article V is accepted, then Bickel's and Ely's key premise falls, and with it falls their peremptory conclusion that constitutional supremacy and interpretive judicial review are 'deviant' and 'counter-majoritarian.'

Indeed, my popular sovereignty argument can be pushed even further. Not only is the Constitution far more reflective of the will and judgment of 'the People' today than Ely and Bickel suggest, but acts of Congress are far less so. Assume for the moment that when Congress adopted a given statute--say, the Sherman Act--the Act did in fact represent the will of a majority of Americans at that time. (As I shall argue below, this heroic assumption may well concede too much democratic legitimacy to Congress.) [FN125] Because of bicameralism and presentment, however, that Act cannot now be changed even if two of the three 'democratic' legislative branches (House, Senate, and President) so desire. What reason is there to think that it is the third, dissenting, legislative branch that in fact represents the will of the majority of constituents today? If anything, assuming that the democratic branches are really democratic--and if they aren't, then Ely and Bickel are in even worse trouble--'two heads branches are better i.e., more likely to reflect a majority of constituents than one.' Indeed, through a strong form of the popular sovereignty argument, Ely's and Bickel's key premise about difficulty of amendment can be turned on its head: Because of bicameralism and presentment, it is ***1079** in one sense more difficult for today's Congress (democratic only by hypothesis) to repeal an old statute than it is for today's unicameral People (democratic by definition) to repeal an old constitutional clause outside Article V. (As I have argued above, popular amendment can be initiated even without ordinary bicameralism, presentment, or state legislative initiation, through the device of petition.) [FN126] Of course, in another sense it is more difficult for the People than for Congress to overrule an earlier vote; the legislative branches are regularly in session to consider amendments to old laws, whereas 'the People' qua sovereign are not, and would need to take special steps to convene itself. Nevertheless, if my argument that a majority of Us can directly amend Our Constitution, notwithstanding Article V, is accepted (and understood by the polity), then Our failure to overcome inertia can be plausibly attributed to a basic (even if not perfect) contentment with, and consent to, the constitutional status quo. Given the only modest effort that it takes for a citizen to sign a petition and mark a ballot, popular inaction may be less a sign that We can't realistically amend our Constitution than a sign that We choose not to.

2. New laws.

Still, Ely and Bickel might have responded:

Much of the above argument is beside the point. Even if an old statute cannot be assumed to represent the will of a current majority of the People, a new statute almost always does. After all, when all three of the democratic branches do concur in adopting a new statute, a majority of their constituents do quite likely favor it. 'Moreover, impurities and imperfections, if such they be, in one part of the system are no argument for total departure from the desired norm in another part.' [FN127] For even though the democratic branches are not perfectly democratic, the federal judiciary is even less so. Thus, when federal judges strike down new Congressional statutes [FN128] in the name ***1080** of an old constitutional provision [FN129] the judiciary is almost invariably acting in a (problematic, if not presumptively illegitimate) counter-majoritarian fashion, no?

No. To begin with, let's start with the House of Representatives--clearly the most popular and accountable of the three democratic branches given its large size, short tenure, and apportionment by population. But even here, it is careless to equate the House with the People themselves, or the median Representative with the median voter.

Let us put to one side recent social choice critiques of group decisionmaking that emphasize the possibility of Condorcet-cycling paradoxes, Arrow's impossibility theorem puzzles, and agenda manipulation problems. [FN130] If these critiques prove anything, they prove too much. If they destroy the idea of a rational majoritarian legislature, they can equally be deployed to destroy the idea of a rational majoritarian policy. And given that my purpose here is to resurrect popular sovereignty, I of course assume that the People as a group can, by majority vote, act rationally and deliberately to fashion meaningful constitutional norms embodying popular will and judgment. [FN131] I shall therefore indulge the same assumption about the House, and, shall simply attempt to mention a few of the many ways in which the will and judgment of the People may be very different from those of the House. In the jargon of today's legal academy, my critique focuses on agency theory and not social choice theory.

To begin with, each Representative today has close to 500,000 constituents. The mere fact of being literally almost a 'one in a million' person makes it unlikely that a 'Representative' will be wholly representative of the average voter. Worse still, this Representative spends most of his [FN132] time with other 'one in a million' ***1081** persons in a one industry town of lawyers and power brokers--a lifestyle hardly 'representative' of an average citizen. [FN133] What's more, this Representative has strong incentives to entrench himself in office, even if the average voter holds quite different views about the optimal trade-off between rotation and expertise in government service. [FN134] On average, incumbent Representatives have been quite successful in their entrenchment efforts; between 1956 and 1976, 94 percent of all House members who sought reelection won. [FN135] Interestingly, the average tenure of a senior Congressman is even longer than that of the average Supreme Court justice [FN136]--a fact that counsels caution in accepting sweeping pronouncements about countermajoritarianism based only on the naked textual difference between the 'every second year' clause of Article I and the 'good behavior' clause of Article III.

To be sure, the formal requirement of regular reelection does distinguish Representatives from judges,

but it is not obvious which way that distinction necessarily cuts in terms of representativeness. Quite bluntly, reelection campaigns require money--lots of it--and Representatives labor under constant pressure to secure campaign contributions and to keep wealthy donors happy. [FN137] Federal judges, of course, are mercifully free from these pressures. The need to return periodically to the policy for renewed authority may move a Representative closer to the average voter, but the need to finance his reelection campaign may move him in the other direction. It is not clear a priori which is the vector of greater magnitude.The ***1082** bias introduced by the intermeshing of money, entrenchment, and power lifestyles is further compounded by seniority within committee structures: those in the House who wield the most power are likely in some ways to be among the least representative. To complicate matters even further, voters are never presented with a clear choice on any single issue; rather, the People must choose among complicated 'tied goods' called 'candidates'--each an intricate bundle of issue positions (of varying degrees of clarity), commitments, character, party affiliation, demographic features, past records, and visions of the future. Nor can it be blithely assumed that voters in ordinary elections are always well informed about either issues or candidates. Finally, the single-district system introduces yet more 'noise' into elections. In theory, even if each district election were governed by majority rule (and many rely instead on simple plurality rule), a party with only 25 plus epsilon percent of the overall vote could win a legislative majority by winning a bare majority of districts, each by a bare majority. [FN138]

Those who framed and ratified our Constitution were acutely aware of the differences between the most popular branch of government and the People themselves. Precisely because '[t]he representatives of the people in a popular assembly, seem sometimes to fancy that they are the people themselves,' [FN139] the Federalist urged that 'against the enterprising ambition of this department . . . the people ought to indulge all their jealousy and exhaust all their precautions.' [FN140] In some ways the gap between the People and the House has only widened since the late eighteenth century. In 1792, there were 106 Representatives for about three million citizens--and a much smaller number of voters, given the limited franchise. Since then, the electorate of the nation has increased almost 150 fold, but the House is only four times as large. The costs of successful election campaigns today--and the corresponding bias of money in politics--would probably have astounded and shocked the likes of a Madison or a Wilson. [FN141]

***1083** The situation in the Senate is even worse, from the perspective of representativeness. The size of the chamber is even smaller; the average tenure even longer; and the campaign costs even higher. [FN142] The gross malapportionment constitutionalized by the equal state rule--a rule that gives rural interests far more influence in the Senate than in the polity--drives yet another wedge between the average voter and the average Senator. [FN143]

An objection might be made that the Senate can only veto new laws; it cannot enact them without the concurrence of the House. If the House is in fact more representative, then perhaps the overall representativeness of a new law should be measured by the representativeness of the most popular branch that approves it. Similarly, it might be argued that my emphasis on the power of the most senior (and perhaps least representative) legislators to use their control over committees to kill new bills is misplaced. After all, any new bill that is passed must have the approval of the median (and presumably more representative) member of the entire House. Thus, Jesse Choper has argued:

[W]hen the Supreme Court finds legislative acts unconstitutional it holds invalid only those enactments that have survived the many hurdles fixed between incipient proposals and standing law.

The significance of this evident fact for our purposes is that most of the antimajoritarian elements that have been found in the American legislative process . . . are negative ones. They work to prevent the translation of popular wishes into governing rules rather than to produce laws that are contrary to majority sentiment. Conceding the validity of the broad contention that the national lawmaking machinery contains a host of multifaceted undemocratic features, it is critical to recognize the primary consequence . . . that follows. It is not that far-reaching laws promulgated by the legislative system are opposed by a predominant segment of the populace, but that Congress too often refuses to enact solutions supported by national majorities. [FN144]

With all due respect to Dean Choper, this argument ignores ***1084** basic laws of political science--laws of which the framers were acutely aware. The power of one House--or of one committee chair--to veto Bill A can be leveraged into a power to force adoption of a seemingly unrelated Bill B. Clever politicians can beat their 'shields' into 'swords,' transforming 'checks' into 'spurs.' As Benjamin Franklin noted in Philadelphia:

The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. [FN145]

Similarly, Madison pointed out that a malapportioned Senate could both '1. . . . obstruct the wishes and interests of the majority [and] 2. . . . extort measures, repugnant to the wishes and interest of the majority.' [FN146] It is silly to assume (as Choper appears to assume) that a majority of the House would have voted the same way in the absence of a malapportioned Senate, or a seniority-skewed House Rules Committee. As Elliott, Ackerman, and Millian have recently written:

[The traditional view] emphasizes the impressive constitutional obstacle course that must be run before a bill becomes a law. It is implicit in this view that the resulting statutory output is both smaller and weaker than that which would arise under a simpler 'majoritarian' system . . .. Our analysis suggests a more complex view. Some of the time, at least, our polycentric lawmaking system has very different structural implications; rather than delay federal legislation . . ., [the system] may sometimes encourage rapid and extreme lawmaking. [FN147]

Turning our gaze tothe Presidency, we see still more slippages between popular majoritarianism and governmental decisionmaking. Because of the quirks of the electoral college and the possibility of Vice Presidential accession, a President need not enjoy a ***1085** personal mandate from a majority of voters. Even if he does, it is heroic to assume that one person--no matter how politically savvy--could surefootedly represent the median voter on every issue, especially given the lifestyle and likely background of the republic's first citizen. If reelectability is the democratic touchstone, a second term President is no different from federal judges. A first term President, on the other hand, must constantly attend to the amassing of a reelection war chest.

* * *

The point of all this is not to criticize a system of republican government in which a relatively small number of citizens stand in for the polity as a whole in conducting day to day affairs. I am by no means arguing that we should swap our elaborate legislative system for a simple system of ordinary lawmaking by direct national initiative and referendum. A republican system can tap the benefits of specialization of labor, can refine and concentrate the elements of wisdom, virtue, and prudence dispersed throughout the policy, can protect minorities from systematic oppression or indifference, can improve the quality of public deliberation, and can educate the citizenry by example. [FN148] Indeed, ordinary lawmaking by direct initiative poses great dangers. [FN149] (So too, it must be admitted, does constitutional amendment by national referendum, although I shall argue below that the dangers here are smaller, the philosophic justifications stronger, the alternatives less palatable, and the possible rewards greater.) [FN150]

My true purpose in this section is to criticize the unjustified assumptions of Ely and Bickel in equating the political branches with 'the People,' judges with Platonic guardians, and the Constitution with the dead hand. [FN151] All three branches of government derive, with various degrees of directness, from the People; all three are agencies of the People. No branch, or combination of branches, can uniquely claim to speak for People themselves; no branch is uniquely representative. Each represents the People in a different ***1086** and ultimately problematic way. There are great organizational advantages to this system of representation, but there are also obvious associated agency costs. The ultimate power to reassess those costs, and redefine the terms of agency, if deemed appropriate, must always rest with We the People Ourselves--you, me and our fellow citizens, here and now. Precisely because ordinary lawmaking powers are not, should not, and realistically can not be exercised by We the People, We must retain the right--the awesome right--to intervene on extraordinary occasions through constitutional amendments. [FN152]

If, as Ely and Bickel imply, our Constitution rests on no firmer foundation than the dead hand of the past, then the necessary conclusion is not simply that judicial review is countermajoritarian and thus arguably illegitimate. Although they never acknowledge it, their dead hand argument proves far more than this--far too much, in fact. If the judiciary is vulnerable, then so too is (at least) the Senate--and thus every law, old and new. The legitimacy of statutes cannot be saved by Ely's and Bickel's majoritarianism, for their equation of the tricameral legislature with 'the People' and majoritarianism is--to turn Ely's phrase against him--'largely a fake.' [FN153] If we truly accept Ely's and Bickel's invitation to adopt majoritarianism as our premise, then the compelled reading of the Constitution is not one that squints at judges and beams at Congress. ***1087** Rather it is one that acknowledges and celebrates the right of a majority of the People Themselves--Ourselves--to amend outside Article V.

B. Black and Ackerman

The deep foundations for a nonexclusive reading of Article V have been laid by Charles Black and Bruce Ackerman. In dramatic contrast to Ely and Bickel, Black and Ackerman properly emphasize the majoritarian and popular undergirding of the Constitution and judicial review. Listen to the power and

poetry of Black's The People and the Court:

No institution can survive in this country unless the people want it to survive. [FN154]

. . .

I am not speaking now entirely or principally of origins; the American people have created these things as they exist today--by their acquiescence in them, and even by their pride in them. And I am not speaking on the superficial and ephemeral level of public opinion polls; I am talking in terms of the actions and inactions of a hundred and seventy years . . .. [FN155]

. . .

If final power belongs to the people (and this is the democratic ideal toward which we aspire) then what is to prevent the ruthless trampling under, by most of the people, of the human rights of some of the people? The lines of an answer can be looked for only in the hope that the greater part of te people, having the power, will withhold themselves from exerting it in disregard of the rights of those who are powerless. It is very plain that the only control on final power must be self-control.

Judicial review is the people's institutionalized means of self- control . . .. [FN156]

. . .

On the theory that judicial review is a people's institution, confirmed by the people through history, the false antithesis between judicial action and the impulses of the people is dissolved. On this view, the people have projected on the Court a part of their desire--their long-range desire for tolerance ***1088** and fairness, their desire, basic to all sanity, to restrain themselves by law.

Living, vigorous judicial review (and this seems to me to be the deepest truth that can be stated about it) cannot be justified as something that thwarts and contradicts popular desire--but it can be justified as something that fulfills popular desire. [FN157]

For all its eloquence, however, Black's argument is not without its problems. To begin with, he never challenges the exclusivity of Article V, and indeed at times he appears to endorse it. Given Bickel's pointed observation that Article V 'incorporates an extreme minority veto,' [FN158] how can Black plausibly speak of the People's 'acquiesence in [the Constitution by their] actions and inactions of a hundred and seventy years'? The answer, it appears, lies in Black's willingness to equate Congressional action with the voice of the People. Thus at one point Black writes that:

[T]he people and Congress always have in their hands the means (not only through constitutional amendment but through the abundant power of Congress over the jurisdiction of all the federal courts) . . . to remove the Court from the function of guarding the Bill of Rights . . . [FN159]

And at another point, he elaborates:

Congress has something like plenary power over the federal courts, anytime it wants to pay the heavy price of exercising it to the limit . . .. [S]o far as the federal courts are concerned, Congress can do pretty much as it wishes with the institution of judicial review. Statutes ostensibly aimed at 'jurisdiction' could virtually eliminate the courts from the business of constitutional adjudication. [FN160]

There are several difficulties with this approach. First, Black overestimates the majoritarian character of statutory law. As we have seen, even a deliberate majority of citizens (especially if they are located predominantly in large states) may not be able to force Congress (especially the Senate) to adopt (or repeal) a particular law. The failure of Congress to pass new law (or repeal old law) ***1089** does not therefore necessarily imply acquiescence of the People.

Second, Black's structural reading of the Constitution obscures the fundamental coordinancy of the three branches, and tends to present Congress as the unique representative of the People, and the federal courts as mere agents of Congress. As we have seen, such an approach undervalues agency costs and slippages in Congress and overstates the problementics of judicial representation of the People.

Third, the Constitution simply does not give Congress the plenary jurisdiction-stripping power Black claims. Precisely because Congress does not perfectly represent the People, the People have denied (and continue to deny) Congress plenary authority over the coordinate judiciary. The clear mandatory language of Article III is hard to ignore: 'The judicial Power of the United States, shall be vested' in a federal judiciary, and 'shall extend to all Cases . . . arising under this Constitution.' [FN161] As I have argued elsewhere, powerful structural and historical arguments buttress these clear textual commandments. [FN162] If Congress in fact lacks the power to strip jurisdiction from federal courts in any constitutional case, then Black cannot invoke Congress's failure to attempt to exercise that power as evidence of congressional (much less popular) acquiescence.

Finally, even if Congress does have the authority to deny to federal courts the power of judicial review, the ultimate dead hand problem would remain. For Black nowhere claims that Congress may by mere statute amend the Constitution. Indeed, he argues (and I would agree) that such a power would obviously be an unconstitutional evasion of Article V's limitations. [FN163] (I would say, 'Article V's limitations on Congressional power.') At most, then, Congress can by statute shaks off the hand of federal court judicial review; but it cannot shake off the dead had of the Constitution itself. By their oaths of office, Congress and the President themselves would remain bound to interpret and to enforce the Constitution. Moreover, even the right and duty of judicial review would survive, albeit in fractured form, through the state courts (whose judges are also bound by oath under Article VI). Black's apparent belief in Article V's exclusivity and his admission that Article V's ***1090** mechanisms are 'normally impracticable' [FN164] significantly undermine has sweeping proclamation that '[n]o institution can survive in this country unless the people want it to survive.'

Bruce Ackerman's Storrs Lectures, which self-consciously build on Black's insights, suffer from fewer problems. Like Black, Ackerman begins by rejecting the Bickel/Ely approach and boldly proclaiming that the Constitution and interpretive judicial review are populist creatures:

> Rather than solving the countermajoritarian difficulty, I mean to dis-solve it, by undermining the vision of American democracy and American history that constitutional lawyers had developed by the Progressive era. In contrast to the image of the Founding inherited from the Progressive historians, this first Lecture seeks to recover the distinctly democratic foundations of our Federalist Constitution. [FN165]

Even more promising, Ackerman skillfully avoids the peculiar pitfalls of Black's argument. First, he

emphatically affirms the coordinancy of the three branches of the federal government and rejects the easy equation of Congress and the People:

In short, we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the genuine voice of the American people. [FN166]

Second, and better still, Ackerman explicitly rejects the exclusivity of Article V and indeed grounds his rejection on the Philadelphia I experience:

Rather than insulating Article V from the precedent of the Phildelphia Convention, sensitive readers of the text must alert themselves to the possibility that future generations of Americans might, like the Federalists themselves, be called upon to elaborate the higher law of We the People of the United States through legally anomalous lawmaking forums.

. . .

For doubtless there will again be moments when political movements will try to change our Constitution without strictly complying with Article V. [FN167]

***1091** At this point, however, Ackerman's account begins to run into trouble. As noted earlier, his preoccupation with Article XIII of the Articles of Confederation leads him to conclude that the Constitution's ratification under Article VII was 'plainly illegal.' [FN168] As a result, Ackerman interprets Philadelphia I as authorizing, at least by example, future lawless action so long as such action can plausibly be seen as representing the People's will in some rough and ready way--much as the nine-thirteenths vote under Article VII seems a rough, ready and plausible, if lawless, demonstration of the Constitution's popularity. In turn, this reading of Philadelphia I leads Ackerman to formulate the idea of 'structural amendment' as an alternative to Article V: When 'a series of decisive victories at the polls permits the newly triumphant spokesmen of the People to proclaim their new higher law from all three of the branches constituted by the first three Articles . . . a structural amendment . . . achieves its legitimate ratification . . ..' [FN169]

All this is quite elegant, and quite clever. It is also quite fishy. If ordinary branches of government can only imperfectly represent the People during periods of normal politics--as Ackerman is at pains to emphasize [FN170]--how are they suddenly transmogrified into the People themselves at key moments? Do agency costs magically disappear? To be sure, Ackerman emphasizes the role of critical elections--in his phrase, 'decisive victories at the polls'--but at best these can be only analogized to constitutional referenda. [FN171] Many of the agency slippages noted above remain: distributing distortions, the inherent bundling of constitutional issues with a host of other factors in individual races, Senate malapportionment and staggered elections, electroal college quirks, accidents of death, resignation and accession in the Oval Office, oligrachic arrangements within each House, and so on. In the end, Ackerman champions a mechanism of amendment in which ordinary government agencies are allowed to alter the express constitutional limitations imposed on their own authority by the People without either complying with Article V or securing the express approval of the People themselves in a constitutional referendum--and indeed, without even framing a text. It is hard to see how all this follows from Philadelphia I, whose main features, according to Chief Justice Marshall's ***1092** fountainhead

opinion in Marbury v Madison were the adoption of (1) express written limitations (2) on the powers of ordinary government agencies based on (3) explicit popular ratification. [FN172]

Ackerman is, I believe, led astray by the subtle yet important ways in which he misreads Philadelphia I. First, he fails to fully appreciate the legal character of ratification--the basic consistency of Philadelphia I with pre- existing (even if somewhat ambiguous and rapidly changing) [FN173] legal understandings of popular sovereighty. Because Ackerman sees Philadelphia I as a sharp break with its legal past, he feesl free to approve mechanisms of non- Article V amendment (such as structural amendment) that are likewise lawless-- poorly grounded in constitutional text [FN174] or structure, [FN175] and resting largely on a misreading of Philadelphia I history. [FN176] This move betrays the founding generation's extraordinary accomplishment of fully legalizing popular revolution by channelling it through precise legal procedures. [FN177]

Second and related, Ackerman undervalues the formal character of Philadelphia I. Rather than turning on some rough and ready test of popularity as the 9/13ths ratification rule might suggest, the Cosntitution was adopted within each state--and this was the relevant sovereign entity in 1787--by a precise, clean, and quite technical rule: majority vote within convention. The 9/13th rule is also clean and precise in one sense, but it has an obviously contrived and ad hoc quality (why not eight or ten states instead of nine?) that majority rule does not. (indeed majority rule within conventions was os intuitive it was not even specified in Article ***1093** VII.) If anything, Ackerman's rules about structural amendment are less precise (query: What makes victory at the polls 'desivie?' How many elections constiute 'a series?' How strong must control of each of the three branches be? How self- conscious must branch officials be? And how long must control last?) [FN178] and seem equally ad hoc and contrived. Moreover, Ackerman's rules for the amendment game are derived post hoc, and were probably not clear to the participants at the time. Thus, Ackerman stands vulnerable to the charge that he has simply manipulated his criteria of higher lawmaking rules to validate those quasi-constitutional moments of which he approves (specifically, the New Deal), and to screen out others that he does not (such as the Reagan Revolution).

Third, Ackerman slights the majoritarian character of Philadelphia I. In ratifying the Constitution, the critical rule of decision was within each state and required only a simple majority. Ackerman's focus on Article VII's 9/13 ratio--especially when combined with Article V's use of 2/3 and 3/4 ratios-- suggests that amendment may legitimately require supermajorities. (Sto too with Ackerman's own requirement of unanamity--3/3--among the branches.) The too-quick collapsing of Articles V and VII also obscures key differences between their two supermajority provisions; under Article VII, the supermajority claimed no authority to bind minority states, but Article V does give a supermajority of state conventions this power. This difference had sweeping implications for sovereignty theorists. [FN179] In addition, the supermajority requirements of Article V, and Ackerman's own unanimity rule, divert attention from the key distinction between the People and their government. Given that ordinary government entities cannot be fully trusted to spak faithfully for the People, it is quite sensible to require supermajorities withinordinary government institutions, and/or concurrence ofmore than one institution before the charter under which governments operate may be changed. But the agency cost ***1094** slippage that support supermajority requirements for ordinary government do not apply when the People themselves act to ratify an amendment. [FN180]

This leads to a fourth point: Ackerman is not fully faithful to the populist character of Philadelphia I. Ratification did not occur until the People themselves--acting outside ordinary branches of government--took the stage. To be sure, the People acted in convention, but unlike ordinary organs of government, these ratifying conventions were understood as embodying the People themselves. [FN181] This equation of convention and People was not simply fuzzy reification, but was firmly rooted in sophisticated agency theory. Each convention had far fewer agency costs than did ordinary branches of government: delegates were selected in a special 'unbundled' election focusing only on the proposed constitutional amendment; they met only to consider the issue and to vote yes or no (thus reducing agenda manipulation and vote trading problems); their internal deliberations were unskewed by seniority; they were not grossly malapportioned; and they immediately dispersed thereafter (unlike entrenched legislators who develop their own institutional interests that diverge from their constituents'). The Founders maintained a healthy distrust of ordinary government agencies and for this reason sharply limited their authority to expand their own powers without obtaining explicit and direct popular authorization. Thus, although Article V is not exclusive, and in no way limits the People, it does delimit the exclusive amendment powers of ordinary government. [FN182] Ironically, Ackerman ends up betraying his own insight that ordinary branches of ***1095** government are not, and cannot be, the People themselves. In the name of popular sovereignty, he champions a mode of amendment that even he, in a recent sequel to his Storrs Lectures, has acknowledged as unfortunately 'elitist.' [FN183]

Even worse, Ackerman's mode of amendment undercuts a vital feature of Article V, and the Constitution as a whole: namely, a brand of federalism in which state governments check possible abuses of federal officials and vice versa. If ordinary branches of government are to amend the Constitution, both state and national levels must be involved, for the Framers relied heavily on their mutual jealousy to prevent tyranny. [FN184] Although Ackerman correctly notes that the Civil War confirmed national supremacy, the blood of that war consecrated the supremacy of the national People, not the national government. [FN185] Vis-a-vis state governments, national officials have authority only to interpret the existing Constitution, not to change it unilaterally. [FN186] The possibility that the three national branches could collude to aggrandize their own powers unjustly without either popular or state governmental approval is far from trivial, yet Ackerman seems unaware of or unconcerned about this danger.

Finally, Ackerman devotes insufficient attention to the textual character of Philadelphia I. Indeed, he nowhere specifically defends his provocative view that legitimate amendment may occur even in the absence of a written text. Philadelphia I is obviously a bad precedent for Ackerman (and indeed, so too is Reconstruction--Ackerman's second 'constitutional moment'). Establishing a written Constitution was one of the founders' most important achievements, and one on which they justly prided themselves. [FN187] To be sure, this point should not be overstated; historical events (such as Philadelphia I) can themselves be understood as 'texts' that can be interpreted, [FN188] and even the most carefully drafted words require interpretation and an understanding of context. Nevertheless, there are obvious advantages to reducing proposed ***1096** amendments to written verbal formulae, as Ackerman himself has recently admitted. [FN189] Given this admission, Ackerman is once again vulnerable to the charge that he has tinkered with his criteria in a result-oriented fashion to constitutionalize the 'New Deal.'

V. HORRIBLES ON PARADE

Popular sovereignty is strong stuff. My argument here about the right of a current majority to amend our Constitution may scare you. To be honest, it scares me a little too. However, as scary as my argument is, the alternatives seem even scarier.

A. Ajority Tyranny

Would popular sovereignty lead to the demise of individual and minority rights--to a classic tyranny of the majority? Anything is possible, but I find this scenario unlikely. Because each American sees herself in the minority on some issues, each is likely to embrace some general idea of 'minority rights' out of self-interest, if nothing else. People recognize that their party will not always be in power, and will therefore seek limits on government authority. Thus, strong majorities--conglomerations of various discrete individuals and minority groups--would likely always rally behind at least some protection of 'minority' or 'individual' rights to property, privacy, free exercise, due process, equal protection, and so on.

What's more, the American People tend to hold deeply conservative views about our Constitution. If anything, perhaps we venerate the document overmuch; more danger probably lies in our collective unwillingness to consider needed changes than in our reckless pursuit of change for its own sake. [FN190]

John Hart Ely has written that '[p]ollsters never tire of reminding us that most Americans would reject many provisions of the Bill of Rights.' [FN191] But would they really, when the awesome moment of truth arrived? To be sure, many Americans might thoughtlessly register their disagreement with a proposition read over the phone by some unknown questioner, but would they continue ***1097** to disagree if told by the pollster that the proposition is already in our venerable and venerated Constitution? (Pollsters, of course, never tell their subjects this--at least never before getting the subject's response.) Would they continue to disagree after a vigorous campaign to educate the public about the proposition, and its living history in American constitutional law? Would they disagree so deeply as to sign a petition and vote to expunge it from the Constitution? And if they would, by what right should they be thwarted?

It must be remembered that we are speaking here of a national majority, not simply a statewide one--a majority of the whole, and not of a part. As the Federalist repeatedly reminds us, an individual state is far more likely to be dominated by a single tyrannous majority faction than is the nation. [FN192] Thus, there is a certain 'safety in numbers' provided by the larger polity (just as there is a certain risk reduction in a diversified financial portfolio). Yet Publius' safety in numbers argument makes sense only if the average citizen is seen as basically trustworthy and capable of self- government. (If not, we would be better off casting our lot with some smaller group, which might, by some happy statistical quirk, be sufficiently above the mean as to make internal self-government possible.) The Federalist makes this assumption quite explicit:

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and

distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another. [FN193]

Ultimate legal authority must reside somewhere in a society. By its very nature it can be abused. But the authority must lie either with the majority or with a minority (held up by the dead hand of the past). And minority rule necessarily violates principles ***1098** of equality and neutrality, as May has demonstrated. [FN194] If ultimate authority is based on will, why should the will of the minority prevail over that of the majority? Alternatively, if ultimate political legitimacy is based on judgment and reason [FN195]--on a good faith effort to discern the common good and principles of moral justice--why is the minority's good faith judgment entitled to trump the majority's good faith judgment? To give the past more than a tie-breaking vote is itself fraught with danger; the record of past efforts to entrench substantive values by immunizing them from national revision is not a particularly happy one. Asuming Article V is indeed exclusive, the polity (propertied white men) of 1787 successfully entrenched slave importation and malapportionment, and the polity of 1861 (ditto) unsuccessfully attempted to entrench slavery itself: The Corwin amendment of 1861, passed by the relevant two-third majorities in both Houses and ratified in a couple of states, would have forbidden national abolition of slavery in any state--even by subsequent Article V amendment-- absent that state's consent. [FN196]

As the Corwin amendment dramatically illustrates, substantively evil amendments are theoretically possible under any amendment scheme, including Article V's. Unless all amendment is prohibited, tyrannous amendment is always possible. And if amendment is prohibited, changed circumstances may require amendment to avoid tyranny. Why are we willing to trust government to amend, but not the People?

Moreover, the popular sovereignty approach does not necessarily make constitutional amendment easier; it simply relocates ultimate power, taking it out of the hands of Article V bodies and placing it into the hands of a majority of the People. A priori, we cannot say whether my reading or the traditional reading of Article V will generate more amendments. Given all the agency slippages noted above, it is quite possible for the Constitution to be amended under Article V even if the amendment is in fact opposed ***1099** by a majority of the electorate. Under the traditional reading of Article V, the amendment would prevail over earlier constitutional provisions, and might itself be practically irreversible within Article V's procedures. Under the popular sovereignty approach, by contrast, the amendment could be repealed by a Philadelphia II-type process. And the possibility of such a repeal might well deter Article V bodies from voting for the amendment in the first place. Thus, a popular sovereignty approach could conceivably result in fewer, rather than more, effective amendments of our existing Constitution.

To be more concrete, although my theory of amendment would probably have made adoption of the Equal Rights Amendment easier by allowing Congress to propose ratification by a single national ratifying convention, [FN197] my theory would probably have made adoption of the Eighteenth

Amendment more difficult, as there is some evidence that prohibition was in fact opposed by a majority of voters even at the time of its adoption. [FN198]

My arguments on behalf of the popular sovereignty are thus not rooted in any claim that the Constitution should be easier to amend. Rather, I am claiming, first, that the last word on the Constitution should not be irreversibly vested in government officials to the exclusion of the People themselves; and second, that any political process that weights some Americans (for example, Nevadans) more than others (for example, Californians)--as does Article V through the role of the Senate and state legislatures or conventions--is legitimate only if that process itself is approved by, and is subordinate to, a process which weights all Americans equally. Thus, Article V is justifiable only because a majority of We the People of the United States can be deemed to have consented to it by not exercising our supra-Article V power to amend the rules of Article V itself. [FN199]

***1100** B. Majority Instability

Closely related to the danger of majority tyranny is that of majority instability. The imagined scenario is an endless series of amendments and counteramendments, with the result that constitutional law is constantly in flux. This spectre is made vivid by the frequent amendment of the California State Constitution by popular referendum, and the regulr use in some states of initiative and referendum to enact ordinary laws. But for the reasons advanced in the Federalist and reiterated above, [FN200] it is a mistake to extrapolate from a single state to the nation. Indeed, California may be a particularly unrepresentative state; given its extraordinary growth and rapidly changing demographic structure, California may need frequent amendments to accommodate the changing needs of its people. Moreover, the People may experiment by amending state laws and state constitutions only because the federal Constitution stands as a secure political safety net--a floor below which state law may not fall. Yet, the state experience with popular referendum should not be viewed as a complete success. Indeed, from one angle, ordinary lawmaking by initiative and referendum seems less attractive than constitutional amendment by similar process; ordinary lawmaking by the People enjoys neither the elaborate procedural protection of the ordinary legislative process nor the self-restraining solemnity of constitutional amendment. [FN201]

Furthermore, as noted above, popular sovereignty need not necessarily lead to more frequent amendment, and could actually lead to less. At first, it might seem that adding another mode of amendment would necessarily make amendment easier. The proponents of a proposed amendment have a 'choice of weapons' and can be expected to arbitrage the amendment process by choosing the amendment route most likely to guarantee success for that particular amendment. Thus, any additional choice would seem to increase the rate of constitutional change. But this static model ignores dynamic interaction in much the same way as the Choper approach to bicameralism and presentment criticized above. [FN202] Just as the Senate can deploy its veto on House action as a prod to jolt the lower chamber into action, so the People can wield their Philadelphia-II 'sword' of amendment to deter unpopular Article ***1101** V amendments, and thus preserve the constitutional status quo. The power to veto change can be used to initiate change, and viceversa.

Just as it would be a mistake to assume that the popular sovereignty approach necessarily makes the amending process easier, so it would be erroneous to view this approach as making amending less deliberative. Popular sovereignty is consistent with, and may even require, special deliberative assemblies-- conventions--at both the proposing and ratification stages. [FN203] Once again, the popular sovereignty approach simply relocates rights and powers distributed under Article V: that Article looks to deliberation in ordinary and malapportioned assemblies, while the popular sovereignty approach instead champions deliberation in popular and proportionately representative bodies.

C. Majority Ignorance

But are the People truly wise enough? This is perhaps the deepest question of all, and any answer will undoubtedly be too glib. Indeed, one's answer to this question may ultimately turn on one's basic disposition: does one have the faith of an optimist or the pessimism of a cynic? For myself, I can only say that perhaps the People today are at times irresponsible because they have not been given responsibility, and trained themselves in its exercise. The relegation of all constitutional issues to ordinary branches of government has caused the People's constitutional muscles to atrophy through disuse--much as James Bradley Thayer warned that too great an emphasis on judicial review as the unique mechanism of ensuring constitutional compliance would erode the legislature's own sense of constitutional responsibility. [FN204]

In the end, I cast my lot on this question with Jefferson:

> [T]he remedy [for an ignorant citizenry] is not to take [control] from them, but to inform their discretion by education. [FN205]
>
> Educate and inform the whole mass of the people . . .. The are the only sure reliance for the preservation of our liberty. After all it is my principle that the will of the majority ***1102** should prevail. [FN206]

This is for me perhaps the strongest argument of all for popular sovereignty. For if we take popular sovereignty seriously, we will be forced to educate ourselves, and each other. Public education will no longer be primarily an issue of individual right and self-actualization, but will be seen as a structural requirement of a working democracy, no less vital than speech itself. To protect ourselves from the ignorance of our fellow citizens, we will be forced to devote more resources, public and private, to their education--and they, to ours. [FN207]

VI. CONCLUSION

It is axiomatic that no legal rules in our society enjoy a higher status than the rules in the Constitution. This is of course one of the main reasons why so much attention has been devoted to the document. It is equally axiomatic that no legal rules in the Constitution enjoy a higher status than the rules for its own amendment, for these rules specify the conditions under which all other constitutional rules may be changed. [FN208] Yet much less attention has been paid to these implicit and explicit rules than their special status would seem to warrant. Indeed, my unavoidably sweeping argument here has been that

legal scholars have fundamentally misunderstood the most important features of our Constitution. [FN209] Even ***1103** worse, this misunderstanding has probably skewed not simply discussion about amendment, but analysis of virtually every other area of constitutional scholarship: judicial review, jurisdiction stripping, federalism, representation, the First Amendment, and unenumerated rights, to name just a few.

Once again, the main culprit it our tendency to think statically rather than dynamically. By focusing exclusively on protections of minorities under our existing Constitution, statically construed, we risk missing the majoritarian character of permissible change over the document, and therefore, the majoritarian character of minority and individual rights. For example, takings clause scholars emphasize that clause's strong protection of individuals, but almost never remind their readers that the People could abolish the rights of individuals to just compensation even though some individuals object. [FN210] (Indeed, the Thirteenth Amendment effected a massive deprivation of slaveholder 'property' without compensation, notwithstanding the Fifth.) Individual rights, federalism, separation of powers, and ordinary representation all exist under our Constitution, but they all derive from a higher source, unbound by these principles. [FN211] To understand our Constitution fully, we must understand ***1104** that source: 'We the People of the United States.' These are words that need to be repeated more, and understood better, in the corridors of power of our nation's capital, and in law school classrooms everywhere.

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[FN1] Nothing in the analysis that follows turns in any important way on the substantive content of this hypothetical Twenty-Seventh Amendment. Instead, I shall focus solely on the process-based rules of recognition by which a judge would determine whether the proposed amendment had in fact become part of the supreme law of the land. Nevertheless, every process-based account is informed by some underlying substantive values. See generally John Hart Ely, Democracy and Distrust 73-75 (especially note at 75), 100 (Harvard, 1980); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L J 1063 (1980). As will become clear below, the substantive vision underlying my (and the Framers') process-based theory of constitutional amendment is a vision of popular sovereignty, which in turn is rooted in the substantive values of equality (no citizen's vote should count for more than another's) and neutrality (no substantive outcome--including the status quo--should be specially privileged). See generally text at note 107 (discussing May's theorem).

This substantive vision, in turn, may ultimately limit the permissible content of proposed constitutional amendments. Thus, an amendment that in substance purported to make itself unamendable would be generally pro tanto unconstitutional, even if adopted in strict conformity with Article V (or any other

amending process). An amendment abolishing free speech might also be unconstitutional--regardless of the mode of adoption--since abolition of speech would effectively immunize the status quo from further constitutional revision, in violation of the non-entrenchment component of neutrality. Such a provision might one day become 'supreme law,' but its adoption would be arguably a fundamental departure from the pre-existing rule of recognition, a kind of coup d'etat, notwithstanding the provision's adotpion in apparent conformity with Article V, narrowly construed. Thus, the First Amendment may itself be a seemingly paradoxical exception to the general rule that amendments must not be unamendable. Ironically, in order to prevent illegitimate entrenchment of the status quo, constitutional rules that disentrench by keeping open the channels of constitutional change must themselves be entrenched. (Similarly, some free market transactions such as selling oneself into slavery or agreeing to form a cartel must themselves be invalidated in order to protect free market transactions generally.)

Nor do the examples above necessarily exhaust the substantive content of popular sovereignty. One could argue, for example, that popular sovereignty presupposes certain economic and social prerequisites. A person's formally equal vote might be meaning-less--totally unreflective of her will or judgment--in the absence of minimal entitlements to food, shelter, and education. Thus, perhaps popular sovereignty, properly (if expansively) understood, compels acceptance of my proposed Twenty-Seventh Amendment. Indeed, I believe that the Reconstruction Amendments do reflect this expansive understanding of popular sovereignty, and that the 13th Amendment, properly (if expansively) read, already guarantees minimal entitlements akin to 'forty acres and a mule,' thus rendering my proposed Twenty-Seventh Amendment largely superfluous. Nothing in the argument below, however, requires acceptance of this more expansive and controversial argument, which I hope to develop in more detail in a subsequent essay. See generally text at note 207. Compare Frank I. Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash U L Q 659 (deriving substantive minimal entitlements from an expansive understanding of Ely's process-based premises) with Robert H. Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash U L Q 695 (arguing that Michelman's thesis ignores 'constitutional text, history, and structure' and 'convert[s] our government . . . to one by judiciary.' Id at 696.)

[FN2] The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

US Const, Art V.

[FN3] For reasons that would take me far beyond my main topic, I reject the language of Coleman v Miller, 307 US 433 (1939), suggesting that constitutional issues surrounding the amendment process are generally non- justiciable. Even if Coleman were embraced, however, these constitutional issues would

not disappear. Members of the legislative and executive branches still would be bound by their oaths of office to determine whether the alleged Twenty-Seventh Amendment was in fact constitutionally ratified.

[FN4] In asking the purely positive(ist) question of whether or not these words are part of the 'supreme law of the land,' I am of course setting off to one side some of the most important and interesting questions, such as the anarchist's query: 'given that X is law, why should I obey 'X?' To claim that my hypothetical Twenty-Seventh Amendment was in fact properly ratified, is only to claim that it conformed to pre-existing rules of recognition, properly understood, and is therefore law. It is not to claim that ipso facto the law must necessarily in all cases be obeyed, even by judges. Surely it is possible to imagine a rule that is clearly the 'supreme law,' and just as clearly so unjust as to warrant civil disobedience, even by justices. See generally Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (Yale, 1975). Nevertheless, although I believe that law and morality do not necessarily converage, I am by no means arguing that law is devoid of all moral content. Indeed, I am attempting to offer the most morally attractive process- based account of law possible: that is, an account that gives a law its greatest presumptive moral legitimacy owing to the moral worthiness of the process that generated it. At some point, however, the substantive immorality of a given law might overcome even a strong presumption created by the law's procedural pedigree.

[FN5] Although my argument countenances a role for judicial enforcement of the Ninth Amendment, that role is quite different from the one suggested by the rhetoric of standard Ninth Amendment scholarship. I shall argue that, on the facts of my hypothetical, judges should invoke the Ninth Amendment to uphold, rather than invalidate, majoritarian action. See text at notes 46-49. Compare Bennett B. Patterson, The Foretten Ninth Amendment 19 (Bobbs-Merrill, 1955) ('The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual. . . . [and] of individual sovereignty.'); id at 58 (Amendment was 'intended solely as a protection of our unenumerated personal rights as individuals as distinguished from our public or collective rights.'); The Supreme Court, 1985 Term, 100 Harv L Rev 100, 219 and note 53 (1986) (invoking the Ninth Amendment as embodying the 'fundamental principle' of 'preservation of the rights of minorities against majority action.'); John J. Gibbons, Judicial Review of the Constitution, 48 U Pitt L Rev 963, 984 (1987) (Amendment 'is an explicit recognition, in a Constitution intended to have the force of law, of zones of individual and familial autonomy that are to be protected by the courts from gross intrusions ordered by legislative majorities.').

[FN6] The specific ideas presented in this section build on general foundations laid in an earlier essay of mine. See generally Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L J 1425 (1987). Wherever possible I shall refer to the appropriate passages of that essay rather than repeating its arguments and evidence in full here.

[FN7] See, for example, Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93

Yale L J 1013, 1017-23, especially n 6, 1058 (1984); John Leubsdorf, Deconstructing the Constitution, 40 Stan L Rev 181, 187 (1987); Richard S. Kay, The Illegality of the Constitution, 4 Const Comm 57 (1987).

[FN8] AND the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.
US Articles of Confederation, Art XIII, reprinted in Max Farrand, The Framing of the Constitution of the United States 211, 223 (Yale, 1913).

[FN9] Ackerman, 93 Yale L J at 1058 (cited in note 7). See also Kay, 4 Const Comm at 57, 64-70 (cited in note 7) (Constitution 'was itself the product of blatant and conscious illegality.'); Sanford Levinson, Constitutional Faith 130-31 (Princeton, 1988) (similar).

[FN10] See Amar, 96 Yale L J at 1446-48 (cited in note 6).

[FN11] See Amar, 96 Yale L J at 1448 and n 90, and sources cited therein.

[FN12] See id at 1460-62, 1448 and n 90, and sources cited therein. See also, Max Farrand, ed, 1 The Records of the Federal Convention of 1787 462-63 (Yale, rev ed 1937) ('Farrand') (remarks of Nathaniel Gorham); 2 id at 469 (remarks of James Wilson); Federalist 43 (Madison) in Clinton Rossiter, ed, The Federalist Papers 271, 279-80 (Mentor, 1961).

[FN13] See Ackerman, 93 Yale L J at 1017 n 6, 1057-70 (cited in note 7). Important differences remain between Professor Ackerman's conclusions and my own. For example, I am deeply skeptical of Ackerman's claim that the Constitution may be structurally amended even in the absence of a proposed amendment text. More generally, my account of how Article V may be supplemented is less nebulous and government-driven--more formalistic and plebiscitary--than Ackerman's. To my mind, popular sovereignty has a far more precise and populist meaning than Ackerman seems to acknowledge. See also text at notes 66-85, 168-88.

[FN14] See, for example, 2 Farrand at 92-93 (cited in note 12) (remarks of James Madison) ('These changes would make essential inroads on the State Constitutions . . . ratification must of necessity be obtained from the people.').

[FN15] Mass Const of 1780, ch VI, Art X, reprinted in Francis Newton Thorpe, 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies 1911 (GPO, 1909) ('Thorpe'). Interestingly, the legislature was constitutionally required to hold this vote in 1795, approximately one generation after the ratification of the Massachusetts Constitution of 1780. See text at note 114 (discussing Jefferson's idea for including a sunset provision in the Constitution).

[FN16] Md Const of 1776, Art LIX, reprinted in 3 Thorpe at 1701 (cited in note 15).

[FN17] This argument was advanced in several different states. See, for example, A Republican Federalist, in Cecelia M. Kenyon, ed, The Antifederalists 112, 121-22 (Northeastern, 1985) ('Kenyon') (Massachusetts); The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constitutions in id at 32-33 (Pennsylvania); 3 Farrand at 172, 229 (cited in note 12) (speech by Luther Martin) (Maryland).

[FN18] 2 Farrand at 475 (cited in note 12).

[FN19] Id at 476. See also 1 Farrand at 301 (remarks of Alexander Hamilton) ('The people may come in [and ratify the Constitution] on revolution Principles'). We must take care not to misunderstand Hamilton's last two words. He is speaking of the principles of the American Revolution, rather than of revolutionary as opposed to lawful principles. Indeed the modern dichotomy between 'revolutionary' and 'legal' is anachronistic to the extent it ignores the ways in which the Framers legitimated--recognized as lawful-- certain kinds of popular revolutions through the device of conventions. See text at notes 24-28; Amar, 96 Yale L J at 1435 and n 41 (cited in note 6); id at 1459 and n 148.

For a brief discussion of the legitimacy of reliance on the legislative history of the Philadelphia I convention, see Akhil Reed Amar, Our Forgotten Constitution: A Bicentenial Comment, 97 Yale L J 281, 287-89 (1987).

[FN20] See generally Amar, 96 Yale L J at 1435-36, 1441, 1458-64 (cited in note 6). The American understanding of the right of the People to alter their government at any time and for any reason went beyond Locke's more limited understanding of popular sovereignty. See id at 1435 n 41; id at 1437 n 50.

[FN21] Virginia Declaration of Rights, Art 3, reprinted in Philip B. Kurland and Ralph Lerner, eds, 5 The Founders' Constitution 3 (Chicago, 1987) ('Founders' Constitution'). Note the explicit emphasis on the right of the majority to speak for the whole community. See also 2 Farrand at 92 (cited in note 12) (remarks of Gouveneur Morris) ('in like manner . . . the Constitution of a particular State may be altered by a majority of the people of the State.'); Federalist 39 (Madison), in Federalist Papers at 246 (cited in note 12) ('a majority of every national society' is 'competent at all times . . . to alter or abolish its

established government.'); Joseph Story, 1 Commentaries on the Constitution of the United States § 330 (Da Capo, 1970) ('The declaration of independence . . . puts the doctrine on its true grounds . . .. Whenever any form of government becomes destructive of these ends, it is the right of the people [plainly intending, the majority of the people] to alter, or to abolish it. . . .' (insert in original)); Gordon S. Wood, The Creation of the American Republic, 1776-1787 281 (W.W. Norton, 1969) (quoting Thomas Tudor Tucker, Conciliatory Hints (Charleston, 1784) (a constitution should be 'unalterable by any authority but the express consent of a majority of the citizens. . . .'); id at 307 (quoting Samuel West) ('it is only the major part of the community that can claim the right of altering the constitution . . .'). See also notes 109, 116 and 209.

[FN22] Pa Const of 1776, Declaration of Rights, Art V, reprinted in 5 Founders' Constitution at 7 (cited in note 21).

[FN23] Mass Const of 1780, Declaration of Rights, Art VII, reprinted in id at 8 (cited in note 21).

[FN24] Edmund S. Morgan, The Birth of the Republic 1763-89 153 (Chicago, 1964).

[FN25] See, for exaple, Del Const of 1776, Art 30, reprinted in 1 Thorpe at 568 (cited in note 15); Ga Const of 1777, Art LXIII, reprinted in 2 Thorpe at 785; NH Const of 1784, Section entitled 'Oath and Subscriptions, Provision for a Future Revision of the Constitution' in 4 Thorpe at 2470.

[FN26] Even Professor Kay, after arguing that the Constitution was in fact 'the product of blatant and conscious illegality' (Kay, Illegality of the Constitution, 4 Const Comm at 57 (cited in note 7)), has acknowledged the immediate and widespread acquiescence of its opponents in its (alleged) ratification. Id at 77. By contrast, the argument I have made here helps to solve the admitted puzzle Kay's account presents. This argument also sheds powerful new light on Hamilton's famous Federalist 78. Long dubbed 'countermajoritarian' (Alexander M. Bickel, The Least Dangerous Branch 16-23 (Yale, 1962)), Hamilton's argument on behalf of judicial review is in fact explicitly rooted in majoritarian principles of popular sovereignty. See generally Ackerman, 93 Yale L J at 1030 (cited in note 7). Indeed, Hamilton explicitly invokes the above-quoted language of the Declaration of Independence (see text at notes 20-21); and specifically singles out for criticism two of the three above-mentioned Anti-Federalist tracts that claimed that ratification by state convention would violate pre-existing state constitutions (see note 17):

> I trust the friends of the proposed Constitution will never concur with its enemies* in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness . . ..
> * [footnote in original] Vide Protest of the Minority of the Convention of Pennsylvania, Martin's speech, etc.

Federalist 78 (Hamilton), in Federalist Papers at 464, 469 (cited in note 12).

See also Federalist 22 (Hamilton), in id at 146 (the 'fundamental maxim of republican government . . . requires that the sense of the majority should prevail.'); id. at 152 ('The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE . . . that pure, original fountain of all legitimate authority.'); 1 Farrand at 301 (cited in note 12) (remarks of Alexander Hamilton) (quoted in note 19).

[FN27] See generally Federalist 43 (Madison), in Federalist Papers at 271, 276-77 (cited in note 12).

[FN28] See note 19. See also Benjamin Franklin Hallett, Argument In the Rhode Island Causes on the Rights of People 54 (Beals and Greene, 1848) (based on oral argument of Luther v Borden, 48 US 1 (1849)) (under 'the American doctrine of popular government . . . peaceful changes of government are provided as the substitute of violence and bloodshed').

If you still insist on viewing Philadelphia I as 'illegal,' then at least recognize how its illegality was qualitatively different from the following, revoluntary, changes:

A. A military coup d'etat that probably lacks support of a majority of citizens (of course, no vote is ever taken), yet nevertheless succeeds in establishing a de facto government.

B. A successful appeal to arms by a probable majority of the citizenry (although once again, no vote is ever taken).

C. A successful appeal to arms following a majority vote in convention, but where the polity behind the convention is defined in a way different from the polity defined by the pre-existing Constitution. See generally note 69. See also text at note 118 (discussing session). From the British perspective, this describes the American Revolution. Jefferson's original Declaration of Independence, however, was predicated on the claim, rejected by his fellow delegates, that from the founding of British America in the early seventeenth century, the People of each colony had always been legally distinct from the People of England. See Gary Wills, Inventing America 76- 90 (Vintage, 1979).

D. Action taken by a majority vote of a popular convention, but where the convention was convened in direct violation of laws enacted by the pre- existing legislature. See Roger Sherman Hoar, Constitutional Conventions 21- 22, 76 (Little, Brown, 1917) (discussing Dorr's Rebellion in Rhode Island in the 1840s); text at note 67.

Thus, even if Philadelphia II is seen as 'illegal,' it should be seen as 'illegal' in precisely the same way that Philadelphia I was, and not more so.

[FN29] Compare the Articles of Confederation, which explicitly states that 'any alteration' must follow the procedure set forth in the document. US Art of Confed, Art XIII (quoted in note 8).

[FN30] Perhaps it would be more precise to say that Article V sets out four modes of amendment, for it identifies two mechanisms of proposal and two mechanisms of ratification, thus yielding four possible amendment paths.

[FN31] See 2 Farrand at 92-93 (cited in note 12) (remarks of James Madison) ('it would be a novel and dangerous doctrine that a Legislature could change the Constitution under which it held its existence.'); Amar, 96 Yale L J at 1459 n 147 (cited in note 6) (discussing differences between conventions and ordinary legislatures); text at notes 180-83 (similar).

[FN32] Indeed, it would not even have force of ordinary law unless the specific procedures for creating law (including presentment) were followed.

[FN33] But see note 1 (arguing that some amendments would be unconstitutional regardless of the amending process).

[FN34] See generally Amar, 96 Yale L J at 1432-66 (cited in note 6).

[FN35] See id at 1435-36. See also text at notes 130-47.

[FN36] 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' US Const, Amend X. See generally Amar, 96 Yale L J at 1439-40 (cited in note 6).

[FN37] Professor Ackerman's 'structural amendment' theory violates this corollary. Ackerman argues that separation of powers can serve as a substitute for the dual federalism scheme of Article V; for him, agreement among all three branches of the federal government can displace the need for strict compliance with Article V's procedures. See Bruce A. Ackerman, Discovering the Constitution ch 11 (1986) (unpublished manuscript on file with author). By contrast, I believe that amendment by ordinary branches of the national government without formal participation by the People themselves or the state governments violates Article V, as glossed by the Tenth Amendment.

[FN38] See note 106.

[FN39] This general statement must be qualified. Ratification of the Constitution itself created--constituted--the People of the United States as the relevant sovereign entity. See Amar, 96 Yale L J at 1446-66 (cited in note 6). See also note 69. This constitution of the People of the United States can be seen as both empowering and limiting in some respects. See text at notes 111-18.
See also Hallett, Argument in Rhode Island Causes at 55 (cited in note 28) ('all these [constitutional] provisions [concerning amendment] limit the Legislature and not the people'); id at 40 ('And so [the People] prescribe the modes of amending constitutions. But who [sic] do they limit in this power of

making and amending constitutions? The Legislature and not Themselves!'); William Rawle, A View of the Constitution of the United States of America 16-17 (Nicklin, 2d ed 1829) ('the people retains--the people cannot perhaps divest itself, of the power to make such alterations . . .. If a particular mode of effecting such alterations has been agreed on, it is most convenient to adhere to it, but it is not exclusively binding.'). See generally Hoar, Constitutional Conventions (cited in note 28).

[FN40] This is the obvious import of the Preamble, and the Ninth and Tenth Amendments. See text at notes 42-49.

[FN41] See text at note 65.

[FN42] See Amar, 96 Yale L J at 1439 (cited in note 6).

[FN43] Jonathan Elliot, 3 The Debates of the Several State Conventions on the Adoption of the Federal Constitution 37 (1836) ('Elliot's Debate').

[FN44] See 5 Founders' Constitution at 25 (cited in note 21).

[FN45] See, for example, id at 37 (remarks of Rep. Jackson of Georgia) ('[T]he words, as they now stand, speak as much as it is possible to speak; it is a practical recognition of the right of the people to ordain and establish Governments, and is more expressive than any other mere paper declaration.'). Redundancy was not the only factor behind deletion of a prefix. Madison originally proposed to interweave his amendments into the text of the original Constitution. When this mode of amendment was rejected in favor of adding amendments to the end of the Philadelphia document, largely at the insistence of Roger Sherman (see id at 34-35, 38), Madison's proposed prefix was left dangling in mid-air.

[FN46] See note 36 for the entire text of the Tenth Amendment. The Ninth Amendment reads as follows: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' US Const, Amend IX. For other implications of the Ninth and Tenth Amendments, see Amar, 95 Yale L J at 1440, 1456, 1466, 1483 n 234, and 1491- 1519 (cited in note 6).

[FN47] Deriving specific 'unenumerated' rights in always a tricky business. See generally Ely, Democracy and Distrust (cited in note 1). But if there be any 'unenumerated' rights at all--and the Ninth Amendment insists that there must be--the right that legalizes the Constitution itself must surely be one

of them.

[FN48] See text at notes 21-23.

[FN49]. Although the United States Constitution is less explicit than some state constitutions in its affirmation of the right of a majority of the People to amend (compare the Declaration of Rights of the Virginia Constitution of 1776, quoted in text at note 21), it is at least as explicit as several other state constitutions. For example, the Georgia Constitution of 1777 nowhere proclaimed, in so many words, the right of the people to alter or abolish their government. Rather, it simply declared that 'All power originates' from the people and is 'intended' for their 'benefit.' Ga Const of 1777, Preamble reprinted in 2 Thorpe at 778 (cited in note 15). Despite their varying degrees of specificity, all the constitutions of the period are best read as incorporating by reference the 'first principles' of the American Revolution, namely, popular sovereignty and its corollary right of popular amendment.

[FN50] See Hallett, Argument in Rhode Island Causes at 29 (cited in note 28) ('The right to begin this work [i.e., popular amendment] rests in the right of the people to assemble') (emphasis deleted).

[FN51] See text at note 43. See also Mass Const of 1780, ch. VI, Art X, reprinted in 3 Thorpe at 1911 (cited in note 15) (enabling the People to 'assemble and vote' to call a constitutional convention); Kamper v. Hawkins, 3 Va 20, 69 (1793) (opinion of Justice Tucker) (describing Virginia convention of 1776 as 'the people themselves, assembled by their delegates . . .') (emphasis in original); Jean-Jacques Rousseau, The Social Contract, bk III, ch 12 at 136 (Penguin, Maurice Cranston, tr, 1968) ('the sovereign can act only when the people is assembled.') (in 1762 original: 'le souverain ne sauroit agir que quand le people est assemble').

[FN52] 3 Elliot's Debates at 658-59 (cited in note 43).

[FN53] NC Const of 1776, Art XVIII, reprinted in 5 Thorpe at 2788 (cited in note 15).

[FN54] Pa Const of 1776, Declaration of Rights, Art XVI, reprinted in id at 3084 (cited in note 15).

[FN55] Mass Const of 1780, Art XIX, reprinted in 5 Founders' Constitution at 199-200 (cited in note 21).

[FN56] NH Const of 1784, Art XXXII, reprinted in 4 Thorpe at 2457 (cited in note 15).

[FN57] 1 Elliot's Debates at 328 (cited in note 43).

[FN58] 4 Elliot's Debates at 240 (cited in note 43).

[FN59] I borrow here the terminollgy of Bruce Ackerman, who distinguishes between 'constitutional moments' and periods of normal politics.' See Ackerman, 93 Yale L J at 1031 (cited in note 7).

[FN60] Garry Wills, Explaining America 216-30 (Penguin, 1981).

[FN61] Federalist 63 (Madison) in Federalist Papers at 382, 387 (cited in note 12) (emphasis in original).

[FN62] I farrand at 367 (cited in note 12).

[FN63] See 5 Founders' Constitution at 200-06 (cited in note 21). See also Wood, Creation of the American Republic at 380 (cited in note 21) (discussing Noah Webster's attack on instruction).

[FN64] See note 59.

[FN65] See US Const, Art I, § 2.

[FN66] For example, Article V of the Articles provided that 'delegates shall be annually appointed . . . to meet in Congress on the first Monday in November, in every year . . ..' US Articles of Confederation, Art V, reprinted in Farrand, Framing of the Constitution 211, 213 (cited in note 8). Compare the less definite phrase 'a congress of the united states' found in Article XIII (quoted in note 8). On the significance of the word 'Congress' in the Articles of Confederation and the Constitution, see Amar, 96 Yale L J at 1447, 1457 n 134 (cited in note 6).

[FN67] See Hoar, Constitutional Conventions at 15-29, 38-57 (cited in note 28) (discussing importance of electorate speaking only in regularly called elections); Rousseau, The Social Contract bk III, ch 13 at 136-37 (cited in note 51) (similar).

It might be asked where Congress gets the legal authority to call and regulate a referendum that transcends Article V's explicit ratification process. Here, as elsewhere, my main answer is structural:

the national legislature has inherent structural authority to implement the national people's sovereign right to amend. Compare Hoar, Constitutional Conventions at 38-78 (cited in note 28) (discussing analogous authority of state legislatures regardless of lack of specific authority to do so in state constitutions). Since the People's right is not self-enforcing, it requires implementation by existing organs of government; and Congress seems to be the obvious strutural chose. This structural argument is bolstered by Article V's explicit recognition of the unique role of Congress in regulating ratification (Although that Article of course does not explicitly authorize a Congressionally called referendum). Unlike Professor Ackerman's 'structural amendment,' see text at notes 168-89 Congressional action that goes beyond Article V does not violate the Tenth Amendment gloss on that Article because of the direct and formal participation of the People themselves in the ratification process. See text at notes 38, 181-86. See also US Const, Art I, § 4, cl 1 (giving Congress a role in regulating House and Senate elections); id, Art II, § 1, cl. 4 (giving Congress a role in regulating Presidential elections). Finally, it should be noted that if Philadelphia II delegates can be considered 'officers of the United States'--and it is not implausible to view them as such--Congress has an explicit textual mandate to implement the Convention's effort to lay its proposal before the People. See id, Art I, § 8, cl 18 (empowering Congress '[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.') (emphasis added). See generally William Van Alystyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 L & Contempt Probs 502 (1976).

[FN68] See Charles A. Beard, An Economic Interpretation of the Constitution 217-18 (MacMillan, 1935) (posing similar hypothetical).

[FN69] See Amar, 96 Yale L J at 1446-66 (cited in note 6). See also 2 Elliot's Debates at 526 (cited in note 43) (remarks of James Wilson at Pennsylvania ratifying convention) ('by adopting this system we become a nation; at present we are not one.') (emphasis in original). For this reason, representation in any future convention should be apportioned by population, even though Philadelphia I, as 'a congress' of states (see note 66), accord each state an equal vote. See 1 Farrand, at 10-11, 66 (cited in note 12). Perhaps the best method to select delegates to any future proposing or ratifying convention is lottery voting. See Note, Choosing Representatives By Lottery Voting, 93 Yale L J 1283 (1984).

Popular sovereignty theory presupposes that at any given moment in time sovereignty is vested in a unique set of electors, a majority of whom may speak for the whole. One sovereign may lawfully lose its sovereignty only by irrevocably transferring it to another sovereign entity or entities. Thus, sovereign individuals could (by unanimous mutual agreement) create a sovereign people, which in turn could (by a majority vote) become part of some larger sovereign people. See John Locke, The Second Treatise of Government § 95 (MacMillan, Thomas P. Peardon, ed, 1952) ('When any number of men have so consented to make one community or government, they are thereby presently incorporated and make one body politic wherein the majority have a right to act and conclude the rest.'); Rousseau, Social Contract bd I, ch 6 at 60 (cited in note 51) ('These articles of association, rightly understood, are reducible to a single one, namely, the total alienation by each associate of himself and all his rights to the whole community.'); id at bk I, ch 5 at 59 ('The law of majority-voting itself rests on a covenant, and

implies that there has been on at least one occasion unanimity.') See also 3 Elliot's Debates at 55 (cited in note 43) (remarks of Patrick Henry at the Virginia Ratifying Convention) ('Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other states.') A majority vote in each of the pre-union component entities would necessarily also guarantee that a majority in the new union favored unification. Legitimate session poses a somewhat more difficult question, and perhaps requires not simply a majority of the pre- secession union, but also a majority within each of the post-break-up units. (The latter necessarily implies the former.)

[FN70] Amar, 96 Yale L J at 1451-55 (cited in note 6).

[FN71] Amar, 96 Yale L J at 1430-35 (cited in note 6). See Bernard Bailyn, The Ideological Origins of the American Revolution 205-206, and n 47 (Harvard, 1967). See also Rousseau, Social Contract bk II, ch 2 at 70-72 (cited in note 51) (chapter entitled 'That Sovereignty is Indivisible').

[FN72] Amar, 96 Yale L J at 1458 (Article VI,), and 1462 (Article V) (cited in note 6).

[FN73] See text at notes 29-41, and 86-98. Even after ratification, it may be useful to consider the People of a state as sovereign when no Supremacy Clause issue is at stake. Thus, for the purposes of state constitutional amendment, the People of a state may still be treated as 'sovereign' over its state legislature and state constitution, but not over federal laws or the federal Constitution or the national People. See Amar, 96 Yale L J at 1465 (cited in note 6). Since the 1780s, innumerable amendments have been made to state constitutions by modes of state popular action not explicitly authorized by the pre-existing state constitution. See generally Hoar, Constitutional Conventions, especially 38-57 (cited in note 28).

[FN74] See Amar, 96 Yale L J at 1435 n 40, 1452 n 113 (cited in note 6)9

[FN75] See Federalist 39 (Madison), in Federalist Papers at 240, 246 (cited in note 12); Federalist 43 (Madison), in id at 271, 278-79.

[FN76] See Federalist 46 (Madison), in id at 294 (emphasis added):

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments . . . as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must be reminded of their error. They must be

told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . .. Compare Marvin Meyers, ed, The Mind of the Founder: Sources of the Political Thought of James Madison 230-34 (Bobbs-Merrill, 1973) (Madison's overbroad and status-quo oriented critique of Jefferson's concern about one generation impermissibily binding its successors).

[FN77] Other Framers and ratifiers may have blithely assumed Article V to be exclusive, yet these others also embraced basic maxims about the indivisibility of sovereignty, and the People's inalienable legal right to alter or abolish their government.

To the extent their understandings were simply logically inconsistent, we today must necessarily choose among them. I have chosen to embrace the general axioms of indivisibility and inalienability rather than specific assumptions about Article V exclusivity for three reasons. First, these two general axioms lie at the center of the theory of popular sovereignty, which in turn served as the foundational principle of the Constitution. Rejection of these principles would destroy the Constitution's unifying structure. In effect, the theory of popular sovereignty provides the most coherent account of our Constitution. See generally Richard H. Fallon, Jr., A Constructivist Conherence Theory of Constitutional Interpretation, 100 Harv L Rev 1189 (1987). Second, assumptions about exclusivity were less widely shared, deeply held, and well thought out than axioms of indivisibility and inalienability. See text at notes 43-65. Finally, my choice is informed by normative arguments external to the Constitution. See generally text at notes 102-18.

[FN78] So long as a referendum is properly called by the legislature, the majority necessary for adoption is simply a majority of those voting, rather than a majority of those eligible or registered to vote. In effect, those who choose not to vote at a properly called election are deemed to have given their proxies to those who do. See Hoar, Constitutional Conventions at 19 (cited in note 28) (quoting Wells v. Bain, 75 Pa 39, 47 (1872)).

[FN79] A strong argument can be made that the People must in fact deliberate on a proposed amendment rather than reflexively registering exogenous preferences. Such a requirement of deliberation would be especially compatible with the widespread eighteenth century view that the People were an entity that must deliberate on the public good, the res publica, rather than a mere assortment of individuals whose private preferences must be mechanically aggregated. See generally Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum L Rev 1689 (1984); Cass R Sunstein, Interest Groups in American Public Law, 38 Stan L Rev 29 (1985); Cass R. Sunstein, Legal Interference with Private Preferences, 53 U Chi L Rev 1129 (1986). See also Amar, 96 Yale L J at 1459 n 147 (cited in note 6) (discussing deliberative role of conventions); Note, 93 Yale L J at 1304-05 (cited in note 69) (discussing need for deliberation).

[FN80] This problem would exist even if all states were equal in population and if each state law always reflected the will or judgment of the majority of constituents on that precise issue. Wide population differences among states, malapportionment, gerrymandering, agency costs, bicameralism,

and multi-issue campaigns for office within each state drive additional wedges between the proposal mechanism of Article V, and the deliberate will and judgment of a majority of the electorate. See text at notes 132-47.

[FN81] See Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L J 142, 155-58, 163-64 (1986) (right to petition originally implied corresponding Congressional duty to respond); Ga Const of 1777, Art LXIII, reprinted in 2 Thorpe at 785 (cited in note 15) (requiring legislature to call constitutional convention upon receipt of petitions from a majority of counties, each petition 'to be signed by a majority of voters in each county . . .'). By analogy to the principles discussed in note 78, a successful petition would seem to require signatures of a majority of registered voters, rather than eligible voters.

Although effective implementation of the right of the People to alter or abolish their government requires assistance from the ordinary organs of government (see note 67 and accompanying text), the right does not and should not depend on the will of ordinary government. Hence the need to infer from the Constitution's structure a constitutional obligation on the part of Congress. Nor is the unhappy possibility of congressional defiance of this constitutional obligation uniquely embarassing to my theory. After all, Article V itself creates a similar possibility should Congress refuse to convene a convention after receiving petitions from two-thirds of the state legislatures.

[FN82] William M. Blackstone, 1 Commentaries 139 (Chicago, 1979); also reprinted in 5 Founders' Constitution at 198 (cited in note 21).

[FN83] St. George Tucker, Blackstone's Commentaries I: App 299-300, reprinted in 5 Founders' Constitution at 207 (cited in note 21).

[FN84] See note 79 and accompanying text.

[FN85] Id.

[FN86] See Hoar, Constitutional Conventions at 167-68 (cited in note 28) ('It seems absurd to think that the people could preclude themselves as to subject matter of amendments any more than one generation could preclude another as to methods of amendment.').

[FN87] Interestingly, the twenty year period between the adoption of the Constitution and the sunset of the importation clause corresponds exactly to Jefferson's argument--based on an intricate actuarial formula--that every constitution lapse after nineteen or twenty years, lest one generation usurp the right to govern another. See Wills, Inventing America at 123-24 (cited in note 28); text at note 114.

[FN88] See Amar, 96 Yale L J at 1465 n 167 (cited in note 6). The present essay attempts to precisely define the argument I was groping towards in my earlier footnote. To the extent my arguments here are inconsistent with some ill-chosen language in that footnote, I hereby recant my earlier formulation of the argument.

[FN89] See text at notes 20-23.

[FN90] See text at notes 31-32.

[FN91] See Hoar, Constitutional Conventions at 229 (cited in note 28) ('Unamendable portions of a constitution may be amended by a convention, although not by the [ordinary] legislative method.'). See also id at 167-68.

[FN92] As a textual matter, my argument may seem inconsistent with the proviso's apparently absolutist phrase 'no amendment.' But this phrase is itself qualified by an earlier one--'provided that'--which seems to confine the scope of the later clause to Article V amendment. The internal tension between these two Article V clauses is best resolved by looking outside Article V--at the Preamble, the Bill of Rights, Article VII, and the ideology of popular sovereignty that informs the structure of the Constitution.

[FN93] See Hallett, Rhode Island Causes at 56 (cited in note 28) ('But to say the amendment each of these [state] constitutions provides through the Legislature is the only way they can be amended, except by revolution or bloodshed, is to affirm that the Bill of Rights [declaring the right of the People to alter and abolish government] is a mere repetition of the provision for amendment by Legislative action.').

[FN94] See text at note 88.

[FN95] See Amar, 96 Yale L J at 1458-66 (cited in note 6).

[FN96] See id at 1462 n 160.

[FN97] It is worthy of mention that the Senate proviso was no part of the famous 'Connecticut Compromise' at Philadelphia I between equal representation and proportional representation. That compromise, which resulted in a lower house based on population and an upper house based on state

equality, was hinted at during the convention's first week (see 1 Farrand at 52 (cited in note 12)), and was cemented in early summer after weeks of prolonged discussion. By contrast, the Senate proviso was not even mentioned until the penultimate day of the convention, and was voted on with virtually no discussion or analysis of its implications. See note 7.

[FN98] The malapportionment of the United States Senate is hardly trivial or outcome neutral; it drastically overrepresents the perspective of rural over urban America. Compare Reynolds v. Sims, 377 US 533 (1964) (invalidating drastic overrepresentation of rural areas within state as violation of equal protection of law). The problem is compounded by the power and centrality of the Senate, given its roles in ordinary legislation, treaty making, appointments, impeachment, and constitutional amendment under Article V. See Note, The Senate and the Constitution, 97 Yale L J 1111 (1988).

To be sure, amending the Senate's structure would be radical, but not qualitatively more radical than, say, amending the structure of the Presidency or the provisions of the Fourth Amendment. See text at note 211 (drawing analogy between federalism, separation of powers, and individual rights).

In advocating a proportionately representative Senate, I am by no means suggesting that other differences between the House and Senate be diminished. On the contrary, Senators should continue to have longer tenures and staggered elections. Indeed, perhaps the Seventeenth Amendment should be repealed, and the indirect selection of Senators by state legislatures brought back. True federalism is not served by equal representation--this simply favors some states at the expense of other states--but it is served by maintaining all state governments as healthy and independent power centers to check, balance, and monitor possible abuses of power by federal officials. See Amar, 96 Yale L J at 1448-51, 1492-1520 (cited in note 6); text at notes 184-86. Compare Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 554 (1985); id at 565-566 n 9 (Powell dissenting) (noting the restriction of federalism principles resulting from the Seventeenth Amendment). Repeal of the Seventeenth Amendment might help to both reinvigorate state governments, and enhance national government deliberations.

[FN99] See Amar, 96 Yale L J at 1439, 1455-66. Clause-bound interpretivism is is no more sensible in the context of Article V than in other constitutional contexts. See generally McCulloch v. Maryland, 17 US 316, 407 (1819) ('we must never forget, that it is a constitution we are expounding' (emphasis in original)); Ely, Democracy and Distrust at 11-41 (cited in note 1) (chapter entitled 'The Impossibility of a Clause-Bound Interpretivism'); Charles Black, Structure and Relationship in Constitutional Law (LSU, 1969).

[FN100] Adoption of certain types of entrenching amendments would be unconstitutional regardless of the amending process. See note 1. In addition, Article V procedures are subordinated to the superior power of the People. See text at notes 196-99 (arguing that the amendments ratified through ordinary Article V procedures could be effectively 'vetoed' by a subsequent Philadelphia II procedure).

[FN101] See generally, H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv L

Rev 885 (1985).

[FN102] See generally Paul W. Kahn, Gramm-Rudman and the Capacity of Congress to Control the Future, 13 Hastings Const L Q 185 (1986) (arguing current Congress cannot generally control future Congresses by statute); Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am Bar Found Res J 379.

[FN103] Candor compels me to admit that my internal and by external argument may not be as independent as they seem. In a kind of meta-application of Justice Brandeis's seventh principle in Ashwander v. T.V.A., 297 US 288, 348 (1936) (Brandeis concurring) (arguing that statutes should be construed to avoid possible inconsistency with Constitution), perhaps I am straining, slightly, to avoid reading the Constitution as inconsistent with my external theory of political legitimacy.

[FN104] See Wood, Creation of American Republic at 24-25, 60-61 (cited in note 21) (discussing centrality of public liberty); id at 362 (quoting 1777 speech defining 'civil liberty' as 'a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead'). See also Declaration of Rights of Virginia ratifying convention in 3 Elliot's Debates at 657 (cited in note 43) (discussing 'natural' and inalienable rights of 'posterity' to 'liberty'); Declaration of Rights of North Carolina ratifying convention, in 4 Elliot's Debates at 243 (same).

[FN105] See text at notes 132-47.

[FN106] See 2 Elliot's Debates at 432 (cited in note 43) (remarks of James Wilson at Pennsylvania ratifying Convention) (As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in the last instance, is much greater, for the people possess over our constitutions control in act, as well as right.'); Spencer Roane, Roane's 'Hampden' Essays, reprinted in Gerald Gunther, ed, John Marshall's Defense of McCulloch v. Maryland 106, 130-31 (Stanford, 1969) ("The people only are supreme. The constitution is subordinateto them . . .. '[T]he authority of constitutions over governments, and of the people over constitutions, are truths which should be ever kept in mind.") (quoting Virginia Report of 1799).

[FN107] Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 Econometrica 680, 683 (1952) ('[A] group decision . . . that is not based on simple majority decision, . . . will either fail to give a definite result in some situation, favor one individual over another, favor one alternative over the other, or fail to respond positively to individual preferences.'). See also Bruce A. Ackerman, Social Justice and the Liberal State 274-85 (Yale, 1980).

[FN108] See, for example, text at notes 21-23.

[FN109] Thomas Jefferson, First Inaugural Address, March 4, 1801, reprinted in Richard Hofstadter, ed, 1 Great Issues in American History: A Documentary Record 186, 189 (Vintage Books, 1958) ('absolute acquisence in the decisions of the majority [is] the vital principle of republics, from which there is no appeal but to force. . . .').

[FN110] Abraham Lincoln, First Inaugural Address, March 4, 1861, reprinted in Hofstadter, 1 Great Issues at 389, 393 (cited in note 109) ('Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form is all that is left.').

[FN111] See note 1.

[FN112] See Rousseau, Social Contract bk III, ch 11 at 135 (cited in note 51) ('Yesterday's law is not binding today, but for the fact that silence gives a presumption of tacit consent and the sovereign is taken to confirm perpetually the laws it does not abrogate while it has power to abrogate them.').

[FN113] See Bruce A. Ackerman, Transformative Appointments, 101 Harv L Rev 1164, 1179 n 20 (1988).

[FN114] See, for example, Thomas Jefferson, Letter to Samuel Kercheval, July 12, 1816 in Merrill Peterson, ed, The Portable Thomas Jefferson 552, 560 (Viking, 1975).

[FN115] See note 76.

[FN116] Thomas Jefferson, Notes on the State of Virginia, in Peterson, Portable Jefferson at 23, 171 (cited in note 114) (citing Brooke, Hakewell, and Puffendorf). See also Locke, Second Treatise § 96 at 55 (cited in note 69) ('it being necessary to that which is one body to move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority . . .. [I]n assemblies impowered to act by positive laws, where no number is set by that positive law which impowers them, the act of the majority passes for the act of the whole and, of course, determines, as having by the law of nature and reason the power of the whole.'); Story, 1 Commentaries § 327 at 297 (cited in note 21) ('the majority has at all times a right to govern the minority'); id § 337 at 306 ('every individual has surrendered to the majority of the society the right permanently to control, and direct the operations of government therein').

[FN117] The alternatives to the nation-state and its attendant boundaries are either anarchy or world government. The choice among these three schemes raises profound questions which, alas, lie beyond the scope of my remarks here. See generally Paul W. Kahn, From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law, 12 Yale J Intl L 1 (1987).

The definition of the people involves more than geographic boundaries. The founding generation used concepts of virtual representation to establish rules defining virtual equivalences among different entities, thus enabling one entity to speak for--to virtually represent--another, larger one. First, the electorate--the polity--could, at least at regularly called elections and by petition, speak for the larger society (which included children, incompetents, women, slaves, etc.). Second, a convention was viewed as the virtual embodiment of the electorate. Finally, a majority was empowered to speak for the whole. See text at notes 20-24.

My external argument embraces the second and third linkages. The second, the equation of convention and polity, promotes deliberation yet avoids most of the agency slippages that make it quite dangerous to treat an ordinary legislature as virtually embodying the people. See notes 79 and 181-83 and accompanying text. The third, the authorization of majority rule, is rooted in the substantive principles of equality and neutrality underlying May's theorem. See note 1, text at notes 107-116, 194-195.

The first linkage, between the polity and the larger society, is more problematic. Obviously not all members of society can be full and equal members of the polity (consider infants, for example)8 yet equality principles demand that there be no discrimination--no unequal weighting of votes--within the polity. See Note, 93 Yale L J at 1294-1295 n 70 (cited in note 69). Analytically, the notion of popular sovereignty does not logically dictate either a narrow or a broadly inclusive polity, yet I believe the principles underlying popular sovereignty--rooted in recognition of the individual's capacity for will and judgment--exert a gravitational pull toward expanding the electorate to include all citizens capable of will and judgment. Thus, although the framers of 1787 defined their polity in a radically under-inclusive and exclusionary way--salves and women are the chief exhibits--their own rhetoric of popular sovereignty was in part responsible for subsequent expansions of the franchise. See Amar, 96 Yale L J at 1451 n 101, 1463-64 (cited in note 6); Ely, Democracy and Distrust at 6-7 (cited in note 1) (citing Alexis de Tocqueville, Democracy in America at 59 (Anchor, 1959) ('[o]nce a people begins to interfere with the voting qualifications, one can be sure that sooner or later it will abolish it altogether.'). The broadly inclusive definition of the electorate today makes the idea of popular sovereignty in the 1980s far more attractive from an external perspective than the framers' version of popular sovereignty in the 1780s.

Rejection of either the first or third linkages noted abve would ultimately render popular sovereignty unworkable. See generally Story, 1 Commentaries §§ 327-37 at 296-306 (cited in note 21). The linkages admittedly introduce imperfections, but my goal here is to praise popular sovereignty (even if imperfect), not to bury it. Rejection of the second linkage would not destroy popular sovereignty theory, but would require that the People act directly through petition and referendum. See text at notes 78-81. Such a requirement, however, might undermine deliberation, rendering popular sovereignty less externally appealing. See note 79.

[FN118] See note 69; Amar, 96 Yale L J at 1454-66 (cited in note 6).

[FN119] Ely, Democracy and Distrust at 4 (cited in note 1).

[FN120] Id at 11-12.

[FN121] See, for example, id at 71-72 ('The Odyssey of Alexander Bickel').

[FN122] Bickel, Least Dangerous Branch at 16, 18 (cited in note 26).

[FN123] See, for example, id at 16-17 ('[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.'). As I shall explain below, that is not necessarily what happens at all; frankly, the mysticism (or at least the confusion) is Bickel's.

[FN124] Id at 21. Ely's reference to the Amendment Clause is somewhat more oblique, but in the same spirit. Ely's proclamation that the argument for strict interpretivism grounded in democratic theory is largely 'a fake' is immediately followed by the qualification '[g]iven what it takes to amend the Constitution.' In the very next sentence, Ely postulates that much of the Constitution only represents people of one or two hundred years past. Ely, Democracy and Distrust at 11 (cited in note 1). For a more complete passage, see quote in text at note 120. See also Ely, Democracy and Distrust at 46 (stating that constitutional amendment 'seldom works').

[FN125] See text at notes 132-47. My skepticism and my assumption here about old statutes parallel Ely's skepticism and his assumption about old constitutional provisions representing the dead. See Ely's 'to the extent . . .' aside in the passage quoted in text at note 120.

[FN126] See text at notes 80-85.

[FN127] Bickel, Least Dangerous Branch at 18 (cited in note 26); Ely, Democracy and Distrust at 205-206 n 9 (cited in note 1) (quoting Bickel).

[FN128] Judicial review of state statutes raises quite different issues, given that the statutes invalidated represent at most, the will of only a local majority. Although Bickel acknowledges this difference (Bickel, Least Dangerous Branch at 33 (cited in note 26)), he streats the two cases for the most part

indiscriminately.' Id. But see Charles L. Black, Jr., Structure and Relationship in Constitutional Law 71-76 (LSU, 1969).

[FN129] This is the classic 'intertemporal difficulty' discussed in Ackerman, 93 Yale L J at 1045-49 (cited in note 7). Ackerman's account self-consciously tracks that of Hamilton's Federalist 78.

[FN130] See, for example, Amartya K. Sen, Collective Choice and Social Welfare (Holden-Day, 1970); Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv L Rev 802 (1982).

[FN131] By sidestepping most issues of modern social choice theory, I do not mean to suggest that these issues are unimportant. On the contrary, they are so important as to warrant much more treatment than I could hope to offer in this essay, and therefore perforce lie outside the scope of my remarks here.

[FN132] The use of the male pronoun here is intentional, given the overwhelming dominance of men in the House--itself yet another illustration of the unrepresentativeness of the chamber, at least demographically. In general, the House is far more male, white, old, and rich than the polity at large. By invoking demography, I do not mean to suggest that the best measure of representativeness is demographic. An ideally representative legislature is simply one whose make-up mirrors the distribution of first-choice votes cast by the electorate. Such a legislature might or might not demographically mirror the electorate, depending on the weight each voter placed on demographic characteristics in casting her vote. See generally, Note, 93 Yale L J at 1291-96 nn 51, 61, 62, 70, 79 (cited in note 69).

[FN133] In contrast, the framers generally believed that 'representatives should meet frequently and for a short time to correct laws, returning immediately to private life to experience the consequence of their actions along with other members of society.' Wood, Creation of the American Republic at 25 (cited in note 21).

[FN134] See generally Note, 93 Yale L J at 1297-99 (cited in note 69) (discussing rotation-expertise trade-off).

[FN135] See Candice J. Nelson, The Effect of Incumbency on Voting in Congressional Elections, 1964-1974, 93 Pol Sci Q 665 (1978). In the 1986 elections, the figure rose to a staggering 98 percent. Peter H. Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum L Rev 1325, 1373 n 179 (1987).

[FN136] See Philip Bobbitt, Constitutional Fate, 58 Tex L Rev 695, 754 n 238 (1980).

[FN137] In 1984, successful House candidates spent an average of nearly $300,000 apiece. David Lempert, A Return to Democracy 80 (unpublished manuscript on file with author).

[FN138] The danger here is not unlike that posed by the classic holding company. See Note, 93 Yale L J at 1295 n 72 (cited in note 69).

[FN139] Federalist 71 (Hamilton), in Federalist Papers at 431, 433 (cited in note 12).

[FN140] Federalist 48 (Madison), in id at 308, 309.

[FN141] See Douglas S. Adair, Fame and the Founding Fathers 132 (Norton, 1974) (chronicling Madison's refusal to buy drinks for electors). Although many Federalists may have wanted to see the federal government, especially the Senate, peopled with statesmen of wealth, wealth was understood as making these men less corruptible; one who had enough personal wealth could not be bought-- or so the Federalists thought.

[FN142] In 1984, successful Senate candidates spent an average of $3 million each. Lempert, Return to Democracy at 80 (cited in note 137).

[FN143] See note 98 and accompanying text.

[FN144] Jesse H. Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U Pa L Rev 810, 830 (1974).

[FN145] 1 Farrand at 99 (cited in note 12).

[FN146] Id at 486 (emphasis in original).

[FN147] E. Donald Elliott, Bruce A. Ackerman, and John C. Millian, Toward a Theory of Statutory Evolution: The Federalization of Enviornmental Law, 1 J L Econ & Org 313, 328 (1985).

[FN148] See generally, Federalist 10 (Madison) in Federalist Papers at 77 (cited in note 12) (discussing advantages of representative republic over direct democracy); Note, 93 Yale L J at 1304-07 (cited in note 69) (similar).

[FN149] See Charles L. Black, Jr., National Lawmaking by Initiative? Let's Think Twice, 8 Human Rights 28 (Fall, 1979).

[FN150] See text at notes 190-207.

[FN151] If you found my analysis of the 'popular' branches of government a trifle one-sided in its emphasis on their 'unpopular' features, I plead guilty. My discussion intentionally leaned in one direction to illustrate how Bickel and Ely lean too far the other way.

[FN152] There is an obvious analogy here to the respective roles of shareholders and managers in a large publicly-held corporation. See generally Amar, 96 Yale L J at 1432-37, 1488 (cited in note 6) (developing organization theory parallels between governments and corporations).
To be sure, the corporate analogy has its limits. For example, a corporation's charter may lawfully require supermajorities for its own amendment. But any inference from this back to the Constitution would be misguided for a number of reasons, only two of which I shall briefly mention here. First, contract theory, unlike sovereignty theory, permits contracts that are not 'all or nothing.' See text at notes 70-77. Property rights have never been seen as indivisible in the same way as sovereignty. Second and more fundamental, there are important differences in privity of succession between shareholders and the People. If today's shareholders entrench silly rules in a difficult-to-amend charter, their share prices will immediately drop. The (expected and discounted) views of future generations of would-be shareholder are automatically reflected in the current price of the stock. There is no similarly strong mechanism to deter today's People from attempting to entrench silly (from the perspective of future generations) rules in a difficult-to- amend Constitution. Altruism towards future generations and competition from other governments enforced by the ability of future generations to 'vote with their feet' (see generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J Pol Econ 416 (1956)) are rather weak substitutes for the strong incentives created by the price mechanism that establishes privity between present and future shareholders. Put another way, because the market adequately protects against generational self-dealing, there is much less need for a legal requirement of nonentrenchment in the corporate context.

[FN153] See text at note 120.

[FN154] Charles L. Black, Jr., The People and the Court 2 (Macmillan, 1960).

[FN155] Id. at 105.

[FN156] Id. at 106-07.

[FN157] Id at 117.

[FN158] See text at note 124.

[FN159] Black, People and the Court at 103 (cited in note 154).

[FN160] Id. at 186. See also id at 209 ('the people are in a position, through their [elected] representatives, to do just about what they like with the American institution of judicial review').

[FN161] US Const, Art III, §§ 1, 2 (emphasis added).

[FN162] See generally Akhil Reed Amr, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 BU L Rev 205 (1985).

[FN163] Black, People and the Court at 8 (cited in note 154).

[FN164] Id at 186.

[FN165] Ackerman,93 Yale L J at 1016 (cited in note 7).

[FN166] Id at 1027.

[FN167] Id at 1062, 1069.

[FN168] See text at note 9. See also, ackerman, 93 Yale L J at 1017 n 6 (cited in note 7).

[FN169] Id at 1056 (emphasis in original).

[FN170] See text at note 166.

[FN171] See Amar, 96 Yale L J at 1503 (cited in note 6) (referring to 'elections of 1866 and 1936 as constitutional referenda of sorts') (emphasis added).

[FN172] Marbury v. Madison, 5 US (1 Cranch) 137, 176-77 (1803).

[FN173] See note 20; Amar, 96 Yale L J at 1432-39, 1451 (cited in note 6).

[FN174] Ackerman's main textual argument focuses on Article V's explicit reference to a proposing 'convention.' Ackerman, 93 Yale L J at 1058 (cited in note 7). Yet the 'textual bridge' that this word furnishes towards Ackerman's conclusion seems none to too sturdy. As Ackerman himself acknowledges on the same page, the proposing convention was plainly understood as a 'rival institution . . . displac[ing] Congress' from the role of proposing amendments. It is thus far from clear how the Reconstruction Congress could itself be a convention, as Acerkman argues. Id at 1065. See generally Hoar, Constitutional Conventions at 79-85 (cited in note 28).

[FN175] Ackerman's main structural argument, developed at length in an as yet unpublished book, is that separation of powers can serve as a substitute for the dual federalism requirements of Article V. Bruce A. Ackerman, Discovering the Constitution ch 11 (cited in note 37). Although I share Ackerman's general view that separation of powers and federalism often serve analogous functions (see Amar, 96 Yale L J at 1450, 1493-1519 (cited in note 6)), I find his specific argument here in conflict with the structural rules embodied by the Tenth Amendment. See note 37.

[FN176] See text at notes 9-28. Ackerman's argument also rests heavily on his historical account of Reconstruction. Discussion of that account must await another day.

[FN177] See note 19.

[FN178] Precise rules are obviously of special desirability when approaching an issue as momentous as a constitutional amendment. Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv L Rev 386, 387 (1983). Indeed, the desire for certainty and precision might incline many interpretivists towards a reading of Article V as exclusive. This inclination, though

understandable, is misguided. Article V itself is far less specific than it first seems. For example: Can states call for a limited convention? How does Congress call a convention? Does the President have a presentment role? What voting rule must a convention follow? What apportionment ratio? Who sets therules as to selection of delegates? and so on. Conversely, a popular sovereignty supplement to Article V is far more precise than it seems at first.

[FN179] See Amar, 96 Yale L J at 1462 (cited in note 6).

[FN180] See Hallett, Rhode Island Causes at 40 (cited in note 28) ('True, the State Constitutions require more than a majority of the Legislature to propose amendments, but this only limits the Legislature, and does not touch the majority principle in the people.')

[FN181] See Amar, 96 Yale L J at 1459 (cited in note 6).

[FN182] At this point, an interesting and difficult question arises: Could Congress, by simple majorities in each house (and presentment) propose an amendment to be ratified by a simple majority in a national referendum (or a national convention, see text at noe 79)? One reading of Article V would allow this, emphasizing the power of the People in the ratification process to either check Congressioal abuse by voting no, or cure any antecedent irregularities by voting yes. A second reading would insist that Congress has no proposing role outside Article V. If Article V is to be transcended by direct popular sovereignty, then (according to this reading) the proposed amendment must emerge outside of ordinary government--by a national proposing convention, or by petition. This second reading would point to the tremendous agenda-setting power enjoyed by the proposing body, and would emphasize the special supermajority requirements imposed by Article V upon Congressional agenda-setting in the amendment process. My own tentative inclination is to opt for a third reading of Article V between these two extremes: Congress may propose amendments for popular ratification, but only by two-thirds vote of each house, as required by Article V.

[FN183] Ackerman, 101 Harv L Rev at 1182 (cited in note 113).

[FN184] See Amar, 96 Yale L J at 1492-1519 (cited in note 6).

[FN185] Id at 1492.

[FN186] Id at 1498-99.

[FN187] See, for example, Marbury, 5 US at 178; Powell, 98 Harv L Rev at 903 (cited in note 101); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum L Rev 723, 769-70 (1988); Wood, Creation of American Republic at 259-268, 536-43 (cited in note 21); Bailyn, Ideological Origins at 175-98 (cited in note 71).

[FN188] See generally Clifford Geertz, The Interpretation of Cultures: Selected Essays (Basic Books, 1973).

[FN189] Ackerman, 101 Harv L Rev at 1181 (cited in note 113). Ackerman notes that a text can help frame debate within the polity. It can also help to establish the level of generality at which a constitutional change (such as 'Reconstruction' or the 'New Deal') is to be understood. See Amar, 65 BU L Rev at 258 n 169 (cited in note 162).

[FN190] See Amar, 97 Yale L J at 289-93 (cited in note 19); Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (Knopf, 1986).

[FN191] Ely, Democracy and Distrust at 189 n 2 (cited in note 1).

[FN192] See Federalist 9 (Hamilton), in Federalist Papers at 71, 75 (cited in note 12); Federalist 10 (Madison) in id at 77, 82-84; Federalist 43 (Madison), in id at 271, 276-78.

[FN193] Federalist 55 (Madison), in id at 341, 346.

[FN194] See text at note 107.

[FN195] On the tension between will and reason, see Paul Kahn, Reason and Will in the Origins of American Constitionalism, 98 Yale L J ___ (forthcoming, 1988); Levinson, Constitutional Faith at 64-65 (cited in note 9).

[FN196] 'No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.' The Constitution of the United States of America: Analysis and Interpretation, S Doc 99-16, 99th Cong, 1st Sess 52 (1987). See generally William S. Livingston, Federalism and Constitutional Change 203, 223, 235 (Oxford, 1956); R. Alton Lee, The Corwin Amendment in the Secession Crisis, 70 Ohio Hist Q 1 (1961).

[FN197] See note 182.

[FN198] See William L. Marbury, The Limitations Upon the Amending Power, 33 Harv L Rev 223, 223-24 (1919).

[FN199] See Lucas v Colorado Gen. Assembly, 377 US 713, 757-59 (1964) (Stewart dissenting) (voting to uphold against equal protection attack malapportionment scheme approved by a 2-1 majority of all voters in Colorado) ('Thus the majority has consciously chosen to protect the minority's interests, and under the liberal initiative provisions of the Colorado Constitution, it retains the power to reverse its decision to do so. Therefore, there can be no question of frustration of the basic principle of majority rule.'). My argument here is stronger than Justice Stewart's because the Equal Protection Clause clearly limits even a majority of the people of Colorado, whereas it is harder to derive a meta-constitutional legal norm limiting a majority of the People of the United States. See text at notes 192-95. See also Ely, Democracy and Distrust at 239 n 60 (cited in note 1) (discussing Lucas).

[FN200] See text at note 192.

[FN201] See Charles L. Black Jr., National Lawmaking by Initiative? Let's Think Twice, 8 Human Rights 28 (1979); see also text at notes 50-64 (discussing the difficulties with right of instruction).

[FN202] See text at notes 144-47.

[FN203] See notes 79, 84-85 and accompanying text.

[FN204] See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Hharv L Rev 129, 155-56 (1893).

[FN205] Henry Steele Commager, Majority Rule and Minority Rights 18 (Oxford, 1943) (quoting letter to William Jarvis, September 28, 1820).

[FN206] Id at 16 (quoting letter to James Madison, December 20, 1787).

[FN207] This last point brings me back full circle, to the set of issues raised in the last paragraph of

note 1.

[FN208] The Constitution's explicit and implicit rules for its own amendment thus define its very essence. There is an obvious tension between a Constitution that is inherently federal, and one that is at base populist and majoritarian. See generally Livingston, Federalism and Constitutional Change (cited in note 196). Although exclusive focus on Article V might suggest that our Constitution is the former, examination of the entire document, I suggest, compels the latter conclusion. 'Thus, the most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, [nor even Article V,] but one sovereign national People, who may alter their government or supreme law [or Article V] at will.' Amar, 96 Yale L J at 1463 n 163 (cited in note 6). In the end, it is the constitution of the national people that establishes the most fundamental--and surprisingly precise--rules for constitutional amendment.

[FN209] Although the ideas presented above may strike modern readers as quixotic, late eighteenth and nineteenth century lawyers would, I believe, have found my account more comprehensible. See, for example, James Madison, Vices of the Political System of the United States, in Meyers, Mind of the Founder at 82, 85 (cited in note 76) ('According to Republican Theory, Right and power [are] both vested in the majority'); Federalist 39 (Madison), in Federalist Papers at 240, 246 (cited in note 12) ('Were [the Constitution] 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.') (emphasis in original); John C. Calhoun, Letter to General Hamilton on the subject of State Interposition, in 6 Works of John C. Calhoun 144, 146 (D. Appleton, 1855) (similar); 6 Cong Deb 269 (1830) (remarks of Sen. Edward Livingston) (similar). Even early in this century, the implioations of popular sovereignty were understood among lawyers far better than is the case today. See, for example, Hoar, constitutional Conventions (cited in note 28); James Bradley Thayer, 1 Cases on Constitutional Law 228-51 (Cambridge, 1895); Note, The Powers of Constitutional Conventions, 29 Harv L Rev 528 (1916).

[FN210] See, for example, Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard, 1985). Compare Amar, 97 Yale L J at 291-92 (cited in note 19).

[FN211] Different visions of the Constitution's essence may lead to different implied limitations on constitutional amendment. If one viewed federalism as essential, then the existence of states and the Senate could well seem to be unamendable features of the Constitution. See, for example, Marbury, 83 Harv L Rev at 225-230 (cited in note 198) (arguing that amendment power is limited by federalism principles). If, on the other hand, one saw separation of powers as the Constitution's defining feature, one would be more concerned with the unamendability of the core features of Articles II and II. One who saw individual rights as the Constitution's foundational principle might have a rather different view of amendment, and might, for example, argue that the Fourth and Ninth Amendments somehow supersede Article V. See, for example, Walter Murphy, An Ordering of Constitutional Values, 53 S Cal

L Rev 703, 754-57 (1980) (amendments violating 'human dignity' are void). See also note 5. The popular sovereignty approach advanced here suggests yet another set of implied limitations on amendment. See note 1. Thus, other perspectives on the Constitution are of limited usefulness not because they may imply limitations on amendment based on the Constitution's essence--so too, does my approach--but because they tend to misperceive the Constitution's true essence: popular sovereignty. The principle of popular sovereignty 'informs every article of the Federalist Constitution, from the Preamble to Article VII.' Amar, 96 Yale L J at 1439 (cited in note 6). The principle also furnishes the strongest external foundation for the Constitution's legitimacy. See text at notes 102-118. Becuse this principle is analytically prior to federalism, separation of powers, and individual rights, it, and not the others, furnishes the clearest analytic lens on issues of constitutional amendment. (We cannot simply adopt an 'all-of-the-above' approach and require a would-be amendment to clear the hurdles created by each perspective, because the other perspectives' limitations on amendment are logically inconsistent with the general empowerment of amendments under the popular sovereignty approach. At most, these other perspectives might suggest implied limitations on Rticle V amendments. See text at notes 86-98.)

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