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# THE CASE FOR PRESIDENTIAL ILLEGALITY IN CONSTITUTIONAL AMENDMENT

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## ABSTRACT

*The current amendment stasis in the United States raises a serious question with potentially grave consequences for the U.S. project of constitutional democracy: Has the Constitution seen its last amendment? The answer is quite likely yes—if the extraordinary level of political disagreement in the country remains as high as it is now. But this affirmative answer presupposes that reformers will continue to consider themselves bound by the codified rules in Article V. What if reformers instead come to believe the political climate makes it necessary to pursue unconventional methods to break through the barriers standing in the way of a constitutional amendment? Freed from their strict fidelity to the rigid rules in Article V, reformers might ultimately innovate a new path to formal constitutional change. This strategy would of course invite the powerful claim that reformers are acting illegally. But could their breach of Article V be simultaneously illegal yet legitimate? In this invited contribution for a symposium held at Drake Law School on the topic *Is it Time to Amend the Constitution?*, I suggest the answer is yes, provided reformers justify their violation of Article V as both a return to the popular-sovereignist beginnings of modern U.S. constitutional democracy and an essential step to ensure the Constitution remains responsive to the needs of the country and reflective of the people's values.*

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## I. INTRODUCTION—THE LAST AMENDMENT?

Today it is difficult, perhaps even impossible, to amend the U.S. Constitution. The reasons for the Constitution's rigidity are easy to explain but hard to reverse: the intense political polarization across political parties in Congress and the states, the virtual impossibility of assembling the supermajorities required by Article V,<sup>1</sup> and the enormous size of the Union, which now comprises 50 states, 4 times more than the original 13 that existed at the founding.

The difficulty of formal amendment in our present moment is evident in the pace of constitutional change now in relation to the past. Of the 27 successful Article V amendments in U.S. history, 15 were ratified from the founding through 1870,<sup>2</sup> 6 from 1871 to 1933,<sup>3</sup> 4 from 1934 to 1967,<sup>4</sup> and yet there have been only 2 since 1968,<sup>5</sup> the last one ratified nearly 30 years ago in 1992.<sup>6</sup> The U.S. Constitution has become so infrequently amended that Article V amendments have been described as irrelevant.<sup>7</sup>

The current amendment stasis in the United States raises a serious question with potentially grave consequences for the project of constitutional democracy in this country: Has the Constitution seen its last amendment? The answer is quite likely yes—if the extraordinary level of political disagreement in the country remains as high as it is now.<sup>8</sup> But this

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1. U.S. CONST. art. V.

2. *See id.* amends. XV (1870), XIV (1868), XIII (1865), XII (1804), XI (1795), X (1791), IX (1791), VIII (1791), VII (1791), VI (1791), V (1791), IV (1791), III (1791), II (1791), I (1791).

3. *See id.* amends. XXI (1933), XX (1933), XIX (1920), XVIII (1919), XVII (1913), XVI (1913).

4. *See id.* amends. XXV (1967), XXIV (1964), XXIII (1961), XXII (1951).

5. *See id.* amends. XXVII (1992), XXVI (1971).

6. *See id.* amend. XXVII (1992).

7. *See generally* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

8. *See* Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation's Top Priorities Should Be*, PEW RES. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be> [https://perma.cc/KD78-FXPS].

affirmative answer presupposes that reformers will continue to consider themselves bound by the codified rules in Article V.

What if, alternatively, reformers come to believe the political climate makes it necessary to pursue unconventional methods to break through the barriers standing in the way of a constitutional amendment? Freed from their strict fidelity to the rigid rules in Article V, reformers would ultimately innovate a new path to formal constitutional change. Their bold but irregular strategy would of course invite the powerful claim that they were acting illegally.

Could their breach of Article V be simultaneously illegal yet legitimate? The answer is yes, but only if they justify their illegality as both a return to the popular-sovereignist beginnings of constitutional democracy in the United States and an essential step toward ensuring the Constitution remains responsive to the needs of the country and reflective of the people's values. This strategy seems promising but also quite problematic. How could reformers pull off this power play?

## II. THE GATEKEEPER PROBLEM IN ARTICLE V

The biggest roadblock to constitutional amendment in the United States resides in the design of Article V itself. Yet its most aggravating design feature is not what most observers think it is.

The Constitution establishes two pairs of procedures for a valid constitutional amendment.<sup>9</sup> The first pair requires two-thirds of Congress to agree on an amendment proposal and thereafter transmit the proposal to the states for their ratification by a three-fourths supermajority vote in either state legislatures or state conventions, the choice being up to Congress.<sup>10</sup> The second pair requires two-thirds of all states to petition Congress to call a constitutional convention for the purpose of proposing one or more constitutional amendments.<sup>11</sup> Assuming the convention agrees on one or

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9. U.S. CONST. art. V. The procedures for constitutional amendment are quite complex, and indeed, there is a fifth procedure in Article V that is not directly relevant here. I discuss in detail the design and use of Article V elsewhere. *See generally* RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (2019).

10. U.S. CONST. art. V.

11. *Id.*

more amendment proposals, those proposals are then transmitted to the states for their ratification, also by a three-fourths supermajority vote, and again, the mode of ratification is up to Congress.<sup>12</sup> These supermajorities are hard to assemble.<sup>13</sup> But these supermajorities are not the most significant barrier standing in the way of an amendment today.

What contributes most to amendment difficulty in the United States is not that supermajority approvals are required at both the national and state levels of government but more squarely that all roads to constitutional amendment run through Congress.<sup>14</sup> Without Congress agreeing to propose an amendment for the states to consider or absent Congress recognizing the states' petitions to call a constitutional convention, the procedures of change in Article V cannot proceed.<sup>15</sup> The result is that Congress exercises a gatekeeper role for all constitutional amendments—even those that would be proposed in an extraordinary national convention, because Congress must first recognize the validity of the petitions of the states and then agree to call the convention.<sup>16</sup> Congress possesses the ultimate power of veto over any and all prospective Article V amendments.<sup>17</sup>

This is a flaw in the design of an amendment procedure for an advanced constitutional democracy. The United States is not alone in channeling all amendment activity through one path, with no alternative routes.<sup>18</sup> The German Basic Law, for instance, specifies only one way to make a formal amendment: “Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.”<sup>19</sup> The Japanese constitution is similar: An amendment can begin only with the bicameral national legislature initiating the amendment process by a two-thirds vote, the amendment proposal must then be ratified in a referendum by a majority

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12. *Id.*

13. See, e.g., Tara Law, *The U.S. Constitution Doesn't Guarantee Equal Rights for Women. Here's Why*, TIME (Aug. 23, 2019), <https://time.com/5657997/equal-rights-amendment-history> [https://perma.cc/5JW8-NT7N].

14. See U.S. CONST. art. V.

15. *See id.*

16. *See id.*

17. *See id.*

18. See, e.g., GRUNDEGESETZ [GG] [BASIC LAW] art. 79, § 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0414](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0414) [https://perma.cc/8MAA-8JJW]; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

19. GRUNDEGESETZ [GG] [BASIC LAW] art. 79, § 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0414](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0414) [https://perma.cc/8M AA-8JJW].

vote, and the Emperor must subsequently promulgate it.<sup>20</sup> The list also includes Belgium, Cape Verde, the Czech Republic, Ireland, Norway, and Portugal, among others.<sup>21</sup>

Some constitutional democracies have adopted alternatives to the restrictive design in the United States.<sup>22</sup> These constitutions distribute the power to initiate an amendment across different institutional actors in order to avoid the problem of amendment obstruction by a single actor.<sup>23</sup> Under this alternative design, even if one path is blocked by institutional resistance, there exists at least one other path to lawful constitutional change.<sup>24</sup>

In Brazil, for example, there are three independent methods to initiate an amendment.<sup>25</sup> One-third of either house of the national legislature may propose an amendment, a majority of the subnational legislatures may jointly begin the process of amendment, and finally, the President of Brazil may also start the amendment process.<sup>26</sup> These three quite different procedures to initiate an amendment guard against the problem that looms in the United States: A single institution—here, Congress—could frustrate amendments by refusing or failing to gather two-thirds agreement to propose a change or by declining to recognize the validity of state petitions to call a convention.<sup>27</sup>

Likewise, in Canada, an amendment to the country's most important national institutions may be initiated either in the national legislature or in one of the several provincial legislatures.<sup>28</sup> The prospect of a successful constitutional amendment is not held hostage by a single institution, as is the

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20. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

21. *See, e.g.*, 1994 CONST. art. 195 (Belg.); CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE [CONSTITUTION] 2010, arts. 286–92 (Cape Verde); Ústavní zákon č. 39/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic]; Constitution of Ireland 1937 art. 46; GRUNNLOVEN [GRL] [CONSTITUTION] May 17, 1814, § 121 (Nor.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] April 4, 1976, arts. 285–86 (Portugal).

22. *See, e.g.*, CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.).

23. *See id.*

24. *See id.*

25. *Id.*

26. *See id.*

27. *Compare id.*, with U.S. CONST. art. V.

28. *See* Procedure for Amending Constitution of Canada, Part V of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

case in the United States.<sup>29</sup> Parliament cannot block the official initiation of an amendment by a province.<sup>30</sup> This is unlike the United States, where Congress can block an amendment simply by not voting with the required supermajority to propose an amendment or by not crediting the states as having properly formulated their petitions to call a constitutional convention.<sup>31</sup> In addition to Brazil and Canada, we see a similar design in Costa Rica,<sup>32</sup> Italy,<sup>33</sup> and Switzerland.<sup>34</sup>

Comparative inquiry therefore reveals alternatives to requiring all amendments to pass through the same institution. The restrictive design of Article V does not exhaust the possibilities for how modern constitutional democracies either do, or should, amend their constitution.

But the U.S. Constitution is law, and its rules must govern the conduct of political actors in the country. The integrity of the Constitution requires incumbents and reformers to abide by the rules the text codifies for how and when the Constitution may be amended. Or does it?

### III. THE TWENTY-EIGHTH AMENDMENT

In his first State of the Union Address,<sup>35</sup> then-President Barack Obama urged Congress to take action to reverse the Supreme Court's judgment in *Citizens United v. Federal Election Committee*, a case holding in relevant part that corporations are not restricted in how much they can lawfully spend independently in federal elections.<sup>36</sup> The President later pressed the country to adopt what would have been the Twenty-Eighth Amendment to the U.S. Constitution.<sup>37</sup> Many amendments were proposed in Congress, but it is no

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29. *Compare id.*, with U.S. CONST. art. V.

30. *See* Procedure for Amending Constitution of Canada, Part V of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

31. *See* U.S. CONST. art. V.

32. *See* CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE COSTA RICA [CONSTITUTION] Nov. 7, 1949, arts. 195–96.

33. *See* Art. 138 Costituzione [Cost.] (It.).

34. *See* BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, arts. 192–95 (Switz.).

35. *The 2010 State of the Union Address*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 27, 2010), <https://obamawhitehouse.archives.gov/photos-and-video/video/2010-state-union-address#transcript> [https://perma.cc/EG44-5D9D].

36. *Id.*; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 385 (2010).

37. *See* Fredreka Schouten, *President Obama Wants to Reverse Citizens United*, USA TODAY (Feb. 9, 2015), <https://www.usatoday.com/story/news/politics/onpolitics>

surprise that none of them succeeded.<sup>38</sup> Neither Congress as an institution nor most of its individual members have an interest in reversing the ruling in *Citizens United*.<sup>39</sup> They raise boatloads of money on the promise that they will work to repeal the Court's holding.<sup>40</sup> Why would they ever do anything to stop the money from pouring into their coffers to support their reelection? The path to formally reversing the Court's holding using Article V was therefore closed from the beginning. What, then, could President Obama have done at the time to pass an amendment overturning *Citizens United* in the face of congressional resistance or inaction?

#### IV. THE FOUNDING PRECEDENT

Before the U.S. Constitution, there was the Articles of Confederation, adopted by the Continental Congress in 1777 shortly after the Declaration of Independence.<sup>41</sup> The Articles were ratified by all 13 states by 1781 and remained in force until 1789, when the new Constitution became effective upon its own ratification, this time by only 9 states.<sup>42</sup> This transition from the Articles of Confederation to the U.S. Constitution is a powerful precedent that President Obama could have followed to overcome the resistance of Congress.

The Articles of Confederation codified an onerous formal-amendment rule requiring the unanimous support of all states for a constitutional amendment.<sup>43</sup> Amending the Articles under this unanimity threshold was virtually impossible from the very beginning.<sup>44</sup> Within a matter of months

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/2015/02/09/president-obama-wants-to-reverse-citizens-united/81582308 [https://perma.cc/2QXZ-X2TN].

38. Jordain Carney, *Democrats Introduce Constitutional Amendment to Overturn Citizens United*, HILL (July 30, 2019), <https://thehill.com/homenews/senate/455342-democrats-introduce-constitutional-amendment-to-overturn-citizens-united> [https://perma.cc/T98T-8N6U].

39. *See id.*

40. *See id.*; *see also* Sara Swann, *100+ Democracy Reform Groups Push Congress to Overturn Citizens United*, FULCRUM (Sept. 5, 2019), <https://thefulcrum.us/campaign-finance/congress-overturn-citizens-united> [https://perma.cc/3CXU-DEYT].

41. ARTICLES OF CONFEDERATION of 1781, pmb.

42. *See* U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

43. ARTICLES OF CONFEDERATION of 1781, art. XIII.

44. *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of*

after the ratification of the Articles, there were serious efforts to amend them, as the Continental Congress instructed a committee to make suggestions for improving the Articles to in turn strengthen the Union.<sup>45</sup> The committee made its recommendations, but no amendments followed.<sup>46</sup> All other amendment ideas failed, perhaps predictably given the need for unanimous agreement among the 13 states.<sup>47</sup> The future of the Articles seemed hopeless.

The Continental Congress proposed a way to break the impasse. The congress convened an extraordinary assembly of lawmakers from across the Union and gave them one mission: Find a way to fix the Articles.<sup>48</sup> The congress prepared precise instructions for the state delegates who were brought together in Philadelphia for one purpose alone: Revise the Articles in order to preserve the Union.<sup>49</sup> The resolution instructing the delegates on their task was narrow and precise and, by its own terms, directed delegates to gather for one “sole and express purpose”:

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*Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 299–300 n.159 (1997).

45. 20 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 773 (Gaillard Hunt ed., 1912).

46. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 894–96.

47. See 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 494–98 (John C. Fitzpatrick ed., 1934) (proposing seven additional articles to the Articles of Confederation); 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 201–05 (John C. Fitzpatrick ed., 1933) (proposing to give the Continental Congress permanent and broader powers over the regulation of commerce); 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 317–22 (Gaillard Hunt ed., 1928) (proposing a temporary grant of congressional power for 15 years to regulate commerce with the states and requiring the assent of only 9 states); 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 260 (Gaillard Hunt ed., 1922) (proposing expense sharing for the common defense or general welfare according to population); 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 257–59 (Gaillard Hunt ed., 1922) (proposing a temporary grant of congressional power to collect import duties and requesting supplementary funds from states); 20 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 469–71 (proposing congressional power over states); 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 112–13, 124–25 (proposing congressional power to collect import duties).

48. See Sanford Levinson, “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH. L. REV. 2443, 2448–49 (1990).

49. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 74 (Roscoe R. Hill ed., 1936).

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Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.<sup>50</sup>

The convention ultimately defied the instructions it had been given by the Continental Congress to propose revisions to the Articles.<sup>51</sup> It also broke from the Articles, which required that any change had to be ratified by all 13 states.<sup>52</sup> The convention instead proposed an altogether new constitution that would become valid when ratified by 9 out of the 13 states—creating a much lower threshold for constitutional creation than for constitutional amendment under the Articles.<sup>53</sup>

#### V. LEGALITY AND LEGITIMACY

From the perspective of the Articles of Confederation in force at the time of the Philadelphia Convention, the process that generated the second founding did not conform to the rules of change codified in the existing constitution.<sup>54</sup> Those rules in the Articles of Confederation required that any change to the Articles—including the revisions that the Continental Congress had authorized the Philadelphia Convention to propose—must be first approved by the Continental Congress itself and then approved by each of the state legislatures.<sup>55</sup> Yet the Continental Congress neither approved nor rejected the draft constitution the convention sent to it.<sup>56</sup> The decision was made simply to convey to each of the states a copy of the convention’s report along with its accompanying resolutions.<sup>57</sup> Nor did the states

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50. *Id.*

51. *See generally* U.S. CONST. art. VII.

52. ARTICLES OF CONFEDERATION of 1781, art. XIII.

53. U.S. CONST. art. VII.

54. ARTICLES OF CONFEDERATION of 1781, art. XIII.

55. *Id.*

56. *See* 1 JAMES SCHOULER, HISTORY OF THE UNITED STATES OF AMERICA, UNDER THE CONSTITUTION 60 (Dodd, Mead & Co. rev. ed. 1894) (1880).

57. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 45, at 544 (Roscoe R. Hill ed., 1936).

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ultimately approve the new Constitution by unanimous agreement; the Constitution became effective when, as indicated in its text, 9 out of the 13 states approved it.<sup>58</sup> On at least these two counts then, the adoption of the second Constitution of the United States was an illegal violation of the terms of the first constitution, the Articles of Confederation.

But legality in this formal sense operates on a different plane from legitimacy. The state conventions that ratified the proposed Constitution served a dual purpose, the second just as important as the first. The first purpose was rooted in the legality of ratification. Legality here was evaluated from the perspective of the proposed constitution, not the Articles, since the ratification of the Constitution was inconsistent with the legal requirements of change codified in the Articles.<sup>59</sup> The ratification threshold codified in the proposed constitution required a supermajority of states to approve the change—a difficult but considerably lower threshold than the unanimity threshold required by the Articles of Confederation for its own amendment.<sup>60</sup> The state conventions ultimately satisfied this condition to replace the Articles with the Constitution, fulfilling their functional purpose of ratification.<sup>61</sup>

The second purpose of the state conventions was legitimization. The draft constitution had to be founded by the people themselves and not by their state governments alone, both because the states could not agree among themselves as a practical matter and also because the people's consent would give the new charter a higher authority.<sup>62</sup> Legitimacy would come from the process of ratification itself, endowing the Constitution with a strong, sociological legitimacy rather than a legal legitimacy, the latter having been forfeited when the Continental Congress transmitted the proposed constitution to the states for their deliberations in defiance of the formal rules of change in the Articles.<sup>63</sup> As Jack Rakove explains, “Madison understood that a constitution adopted through some process of popular ratification could be said to have attained a superior authority” than the state

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58. U.S. CONST. art. VII; SCHOULER, *supra* note 56, at 75.

59. ARTICLES OF CONFEDERATION of 1781, art. XIII.

60. Compare U.S. CONST. art. VII, with ARTICLES OF CONFEDERATION of 1781, art. XIII.

61. See U.S. CONST. art. VII.

62. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 532 (2d ed. 1998).

63. *Id.*

legislative approval that had sanctioned the Articles and the state constitutions.<sup>64</sup>

This superior authority derived from the popular consent that had been expressed in the extraordinary forum of a constitutional convention—a form of revolutionary deliberation and decision-making whose product was validated by the very process of convention.<sup>65</sup> With ratification eventually achieved, “[t]he result was that the Constitution was regarded as the product of a process in which the ultimate source of legitimacy, the sovereignty of the people, was expressed as fully and as clearly as the accepted political beliefs and institutions of the time allowed.”<sup>66</sup> The Constitution therefore took a unique path to consolidating its legitimacy in the founding period: It won popular authority not in a normal election but over the course of a long period of dialogues in state conventions.<sup>67</sup>

The ratifying convention was a peculiarly U.S. institution, reimagining what had historically been an unrepresentative and spontaneous body into the democratic and institutionalized one it became when it was created to write state constitutions and later to ratify the U.S. Constitution.<sup>68</sup> This institution was rooted in the exercise of what Bruce Ackerman and Neal Katyal have called “quasi-direct democracy.”<sup>69</sup> The convention did not ask voters to express themselves in quite the same way as they would in a popular referendum nor was the convention itself a purely representative body.<sup>70</sup> Instead, voters were to cast ballots for delegates who would gather in the convention with a mandate from the people, some delegates having campaigned for or against ratification and others having been publicly

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64. Jack N. Rakove, *Constitutional Problematics, Circa 1787*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 65 (John Ferejohn et al. eds., 2001).

65. *See id.*

66. Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 75 (1987).

67. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 84–85 (2000) [hereinafter ACKERMAN, TRANSFORMATIONS].

68. *See* ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS* 1–10 (1917).

69. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 562 (1995).

70. *Id.* at 562–63.

uncommitted.<sup>71</sup> Ackerman and Katyal explain that the objective had been to organize a “deliberative plebiscite”:

The convention mode, in short, represented a distinctive mix of popular will and elite deliberation. On the one hand, debate and decisions in the electoral campaign pushed the convention in a definite direction. On the other, the delegates still had leeway to debate and refine the nature of the “mandate” that their success at the polls represented. The Federalists were trying for the best of two worlds—combining the popular involvement of “direct democracy” with the enhanced deliberation of “representative democracy.” The aim, in short, was for a *deliberative plebiscite*.<sup>72</sup>

The opportunity for this extraordinary form of popular deliberation across the land would be critical because of what the Constitutional Convention was asking of the states: Violate the formal rules of constitutional amendment codified in the Articles of Confederation.<sup>73</sup>

By inviting the voting-eligible people to deliberate publicly on the draft constitution, the question was transformed from a narrow inquiry about the legality of breaking from the Articles into a collective reflection on what would best serve the people and the republic.<sup>74</sup> The outcome was not fated to be what it ultimately became, however, because “if the citizenry found the illegality really troubling, they would simply elect so many Antifederalist delegates to the convention that the Constitution would be doomed.”<sup>75</sup> As James Madison observed at the time, given that the Constitution “was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.”<sup>76</sup> In the end, the ratification of the Constitution made its formal illegality irrelevant.<sup>77</sup>

## VI. A TRADITION OF ILLEGALITY

The founding precedent reveals a fundamental truth about U.S. constitutionalism: illegality does not entail illegitimacy. To put it another

71. *Id.* at 563.

72. *Id.*

73. ARTICLES OF CONFEDERATION of 1781, art. XIII.

74. See Ackerman & Katyal, *supra* note 69, at 562–63.

75. *Id.* at 562.

76. THE FEDERALIST NO. 40, at 224 (James Madison) (Am. Bar Ass’n ed., 2009).

77. See Kay, *supra* note 66, at 67–68.

way, what is accepted as legitimate need not necessarily comply with the law as written.<sup>78</sup> This is the lesson that emerged from the illegal violation of the Articles of Confederation and the subsequent adoption of the U.S. Constitution, contrary to the rules set forth in the Articles.<sup>79</sup> Despite its illegal beginnings, the Constitution escaped concerns about its illegitimacy when the people later ratified it in extraordinary constitutional conventions.<sup>80</sup> In a retrospective cleansing of its stain of illegality, the legal defect in the origins of the Constitution was remedied by popular validation. The point may be stated quite simply: The tradition of popular sovereignty in the United States credits clear expressions of the people's will as legitimate, irrespective of the legality of the people's choice.

We can now return to the proposed Twenty-Eighth Amendment that President Obama had urged upon Congress and the states—an amendment to reverse the Supreme Court's judgment in *Citizens United*.<sup>81</sup> Despite strong supermajority support among Americans to overturn *Citizens United*, Congress chose not to propose an amendment to the states.<sup>82</sup> As President Obama stared down an obstructive Congress, he seemed powerless to do much of anything to pursue an amendment that he believed was necessary to restore integrity to elections in the country. But he was far from powerless. He held a trump card, had he been prepared to act unconventionally. The precedent from the founding era offered him a roadmap to amend the Constitution without Congress initiating the amendment—a roadmap that allowed him to circumvent Congress altogether.<sup>83</sup>

The President could legitimately make an end run around the strictures of Article V. Provided the process is extraordinarily democratic and reflects a massive expression of popular will, it would be difficult to deny the legitimacy of the outcome, whatever might be said about its legality. Just as the extraordinary conventions the Philadelphia Convention proposed to the

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78. *Id.* at 73.

79. *See id.* at 67–70.

80. *See id.* at 70.

81. Schouten, *supra* note 37.

82. See Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <https://www.bloomberg.com/news/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot> [https://perma.cc/8AM4-33Q2] (reporting 78 percent of Americans oppose *Citizens United*).

83. *See supra* Parts IV–V.

country for state ratifications of the illegal constitution had never been used before then, the President would need to invoke something appropriately radically democratic to justify the departure from the codified rules of Article V.<sup>84</sup> The answer is a device that has never yet been deployed on a national scale: a national referendum.

Much like the Philadelphia Convention circumvented the rule of unanimity in the Articles of Confederation, President Obama could have proposed to hold a national referendum inviting all eligible voters to answer a yes-or-no question on whether to reverse *Citizens United* and accordingly amend the U.S. Constitution. There would of course have been important subsidiary details to consider, including how the question would be phrased, where the vote would be held, and who would tabulate the ballots since elections are ordinarily conducted by state officials. It may also be useful to consider the use of a confirmatory vote after a successful first vote.<sup>85</sup>

For a country whose people understand themselves as part of a collaborative project of self-government and self-definition<sup>86</sup>—and for a Constitution whose first words are *We the People*<sup>87</sup>—recourse to a referendum may admittedly be new, but it is neither out of place nor inappropriate, particularly given the long tradition of referendums in the U.S. state experience.<sup>88</sup> After all, nothing in Article V purports to prescribe an exclusive method of formal constitutional change.<sup>89</sup> The Constitution is silent, not prohibitory, on the use of methods of direct democracy.

## VII. AN UNCONVENTIONAL CONSTITUTIONAL REFERENDUM

Presidents around the world have held unconventional constitutional referendums when confronted with an uncooperative legislature determined to block an amendment proposal. The most prominent instance comes from France, whose revolutionary constitutional beginnings make it an ideal

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84. See Kay, *supra* note 66, at 70.

85. Elsewhere, I have discussed the importance of evaluating the durability of a popular choice in this way. See generally Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655 (2015) (suggesting design strategies for new constitutions).

86. See Kay, *supra* note 66, at 70.

87. U.S. CONST. pmb.

88. See generally William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. (SUPPLEMENTAL ISSUE) 485 (2006).

89. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1043–44 (1988).

comparison for the United States, itself a jurisdiction in the revolutionary tradition.<sup>90</sup>

To understand the French case, we must begin with its 1958 constitution, currently still in force.<sup>91</sup> At its creation, the constitution established an electoral college for presidential selection, not unlike the one used in the United States.<sup>92</sup> The French electoral college consisted of roughly 80,000 persons, including parliamentarians, mayors, municipal councillors, and other officials.<sup>93</sup>

President Charles de Gaulle was elected president by the electoral college—the first and only president elected in this way under the constitution.<sup>94</sup> Yet he believed the French President should be elected instead by direct popular vote.<sup>95</sup> Consistent with his views on presidential election, President de Gaulle followed through after his electoral college win.<sup>96</sup> He urged the Parliament to introduce an amendment to replace the electoral college with direct elections.<sup>97</sup> Parliament rejected his idea, and President de Gaulle was left with no parliamentary path to amend the constitution.<sup>98</sup> So he improvised.<sup>99</sup>

The rules of constitutional amendment in France are not complicated. The constitution codifies in Article 89 the procedures for initiating and ratifying an amendment.<sup>100</sup> Either the President or a member of Parliament may initiate an amendment,<sup>101</sup> after which both chambers of Parliament must pass identical versions of the amendment bill within certain time limits in

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90. See BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 169–78 (2019).

91. See *id.* at 225–26.

92. 1958 CONST. art. 6 (Fr.) (later amended in 1962).

93. Stanley H. Hoffmann, *The French Constitution of 1958: I. The Final Text and Its Prospects*, 53 AM. POL. SCI. REV. 332, 342 (1963).

94. See Manuel Álvarez-Rivera, *Election Resources on the Internet: Presidential and Legislative Elections in France*, ELECTION RESOURCES (May 18, 2018), <http://electionresources.org/fr> [https://perma.cc/RBJ9-4QLZ].

95. *Id.*

96. *Id.*

97. *Id.*

98. See *id.*

99. See *id.*

100. 1958 CONST. art. 89 (Fr.).

101. *Id.* art. 89(1).

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order for the proposal to proceed to the next step.<sup>102</sup> That next step—ratification—requires approval by national referendum.<sup>103</sup> There is only one expressly codified exception to this procedure: an amendment proposal need not be ratified by a national referendum where the President chooses to submit a government amendment bill to the bicameral Parliament convened as a single body, in which case the proposal will become official if approved by a three-fifths vote of all parliamentarians.<sup>104</sup>

Faced with a constitution requiring all amendments to pass through Parliament in some way—and confronted by a Parliament that was inhospitable to his idea of a constitutional amendment to create a directly elected president—President de Gaulle turned to another part of the constitution to execute his plan.<sup>105</sup> President de Gaulle decided to hold a national referendum under his authority in Article 11 of the constitution.<sup>106</sup> His power as President under Article 11 appears to authorize referendums only for limited purposes that are not connected to amending the constitution.<sup>107</sup> The text appears below:

The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the *Journal Officiel*, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.<sup>108</sup>

Because Article 11 authorizes the President to poll the people directly without parliamentary authorization, President de Gaulle was able to hold a referendum on whether the people wished to move from indirect to direct presidential election.<sup>109</sup> Parliament opposed this change because it would divest it “of its role as the sole bearer of national sovereignty.”<sup>110</sup> Parliament

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102. *Id.* art. 89(2).

103. *Id.*

104. *Id.* art. 89(3).

105. See Álvarez-Rivera, *supra* note 94.

106. *Id.*; see also 1958 CONST. art. 11 (Fr.).

107. See 1958 CONST. art. 11 (Fr.).

108. *Id.* art. 11(1).

109. See Álvarez-Rivera, *supra* note 94.

110. Henry W. Ehrmann, *Direct Democracy in France*, 57 AM. POL. SCI. REV. 883,

was understandably concerned that direct presidential election would give the President an independent mandate from the people and would erode Parliament's power over the President.<sup>111</sup>

In the end, the referendum passed with 61.75 percent of voters in favor of direct presidential election.<sup>112</sup> The Constitutional Court later heard a challenge to this unconventional use of the referendum.<sup>113</sup> The Constitutional Court concluded that it had no jurisdiction to rule that the will of the people as expressed in the referendum was invalid.<sup>114</sup> The Constitutional Court's dismissal of the case on jurisdictional grounds coupled with the strong popular voice in favor of the referendum has had an important effect on the country's constitutional law and politics—political actors and the people treat the referendum as having amended the constitution, despite the President's unconventional use of the referendum as a vehicle for amending the constitution.<sup>115</sup> The text of the constitution has been altered to reflect the amendment, and presidents have since been elected by direct popular vote. President de Gaulle chose this unconventional route to amend the constitution instead of abiding by the formal amendment rules because the referendum allowed him to bypass Parliament.<sup>116</sup>

### VIII. THE EFFECT OF AN ILLEGAL AMENDMENT

Back to the United States. What would have been the effect of President Obama's successful referendum to reverse *Citizens United*? Two effects could have followed: codification and transformation. First, it is possible the sociological and moral force of the successful referendum could have compelled the legal and political elite to recognize the validity of this

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883 (1963).

111. See Jean-Philippe Derosier, *The French People's Role in Amending the Constitution: A French Constitutional Analysis from a Pure Legal Perspective*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 315, 321 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017).

112. Ehrmann, *supra* note 110, at 896.

113. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

114. *Id.*

115. See Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 661–65 (2019).

116. *Id.* at 662.

unconventional change to the U.S. Constitution and, as a consequence, accept that it was proper to codify the new rule in the Constitution. The legal and political elite would have treated the result of the referendum as altering the Constitution—both in its meaning and in its text. Just as the Reconstruction Amendments had been passed irregularly yet nonetheless codified in the Constitution,<sup>117</sup> so too would this Twenty-Eighth Amendment have been adopted in an irregular fashion; however, this would not have been reason enough to deny codifying it in the text. The proposed amendment would have been appended to the end of the Constitution, after the Twenty-Seventh Amendment, and it would have had no more or less authority than other amendments. It would have had illegal origins, but from the moment of its acceptance and codification, it would have been accepted as a legitimate addition to the body of constitutional rules that govern official conduct.

The second effect would have been more subtle but just as important. It is possible that the successful use of a referendum to amend the Constitution would have informally amended the constitutional amendment rules codified in Article V. In other words, a successful referendum—and the subsequent recognition by the legal and political elite that the irregular referendum had formally amended the Constitution—would have changed the rules of constitutional amendment but without a corresponding alteration of the codified rules of Article V.<sup>118</sup> It would have instead become an uncodified constitutional norm that is accepted as a valid way to amend the Constitution even though this new path to constitutional change is not codified in the text.<sup>119</sup>

Informal changes to constitutional rules are not out of the ordinary.<sup>120</sup> On the contrary, it has long been taken for granted that codified constitutions do not (because they cannot) fully reflect the content of a constitutional regime, nor in fact can they shield themselves from change through interpretation, practice, and conduct.<sup>121</sup> As Hans Kelsen rightly

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117. See ACKERMAN, TRANSFORMATIONS, *supra* note 67, at 88.

118. See Kay, *supra* note 66, at 71 (arguing that proposed reforms under ad hoc conventions can amount to “more than just a revision within a continuing legal system” and could “lay[] the foundation of a new legal system”).

119. *See id.*

120. See *Marbury v. Madison*, 5 U.S. 137 (1803) (asserting the power of constitutional review, often exercised with the same functional result as a formal amendment).

121. *See, e.g.*, Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB.

observes, “There is no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called ‘written’ constitution.”<sup>122</sup>

Yet we would not know for certain if the successful use of the referendum had informally changed the rules of amendment in Article V until a referendum had been tried again. At that point, the use of a referendum to amend the Constitution outside of the rules of Article V would confirm that at least some legal and political elites recognized its first use as precedential and as a valid way of altering the Constitution.<sup>123</sup> If the referendum again succeeded and the amendment once again came to be accepted as altering the meaning and text of the Constitution, it would become clear that the first use of the referendum had not been an aberration and that its use had matured from a violative practice to an accepted method of constitutional amendment. Nothing succeeds like success, the saying goes. This second successful amendment-by-referendum would have confirmed that the Constitution may now be legitimately amended according to a procedure that remains uncodified in Article V. Some might well continue to contest the use of the referendum as a vehicle for valid constitutional change, and they could work to change the new rule on amendment-by-referendum. They might even succeed in the end. But it would be difficult to deny that amendment-by-referendum had become a valid way to amend the Constitution.

#### IX. CONCLUSION—THE ULTIMATE RULE OF LAW IN THE UNITED STATES

The Constitution contemplates its own imperfection.<sup>124</sup> We know this to be true because it codifies rules for changing its text when the circumstances warrant.<sup>125</sup> Amendments are a central part of the ongoing project of constitutionalism in this country and indeed an indispensable feature of a codified constitution. Without it, the Constitution would have a hard time responding to the needs of modern life.<sup>126</sup> And it might not survive

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CHOICE 37, 37 (2003).

122. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 260 (Anders Wedberg trans., Russell & Russell 1961) (1945).

123. *See, e.g.*, Kay, *supra* note 66, at 71.

124. *See* U.S. CONST. art. V.

125. *See id.*

126. *See, e.g.*, *id.*; *id.* amends. XXVI (expanding the right to vote to include those 18 years or older), XXV (refining the rules of presidential succession), XXII (establishing

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for long without an amendment procedure, as political actors and the people quickly confront the reality that their Constitution cannot do what it should if it remains frozen in the past, stuck in its original (and by then outdated) form. This may well be why 96 percent of codified constitutions contain a procedure for their own amendment.<sup>127</sup>

What should the people's chosen representatives do when they believe the Constitution needs changing but the gatekeepers to constitutional amendment block the only legal path to constitutional reform? Should they acquiesce to this obstruction, or should they find an alternative?

In the United States, the tradition of popular sovereignty suggests an answer: To chart a new path to constitutional change that is rooted in the consent of the governed. There are many ways to reflect popular will, but one effective device is the referendum.<sup>128</sup> Faced with an obstructive Congress that refuses to entertain the possibility of a constitutional amendment on a matter that Americans believe needs attention, a reform-minded president could call upon the ultimate rule of law in the United States to break through the impasse. The President could go over the heads of the obstructive Congress and directly to the people in an unconventional referendum, asking the people to amend the Constitution in a nationwide vote of eligible voters.<sup>129</sup> A successful referendum would be formally illegal, but it would not be illegitimate. The approval of the referendum directly by the people would retrospectively validate the President's choice to circumvent an obstructive Congress, and it would validate the constitutional amendment itself.

Codification is critical for the rule of law. But there is a reason why reformers find it hard to resist unshackling themselves from the strictures of the text in order to appeal directly to the people when codified amendment rules block needed reforms: There is no higher source of authority in constitutional law and politics than the informed and considered consent of the people.

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presidential term limits), XIX (expanding the right to vote to include women).

127. See Giovannoni, *supra* note 121, at 37.

128. *Initiative, Referendum, and Recall*, NAT'L CONF. ST. LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> [https://perma.cc/4VFW-PBK7].

129. ACKERMAN, TRANSFORMATIONS, *supra* note 67, at 74.