

FOREWORD: IS IT TIME TO AMEND THE CONSTITUTION?

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The Constitution of the United States is exceptional in its brevity, intellectual importance, and longevity. The Constitution has been in continuous operation since 1787. No other constitution in the world has endured for so long.¹ The building blocks of our constitutional order are among our most important intellectual exports.² Written constitutions, amendment procedures, and judicial review have spread and become commonplace around the globe.³

Our Constitution is also exceptionally difficult to amend.⁴ The Framers understood their handiwork would have defects that later generations would need to address, but they also believed changes should not be undertaken lightly.⁵ James Madison in *The Federalist No. 49* warns of the “dangers” that repeated constitutional amendment might occasion.⁶ Madison concludes, “[F]requent appeals [to the people] would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”⁷ There is little doubt that citizen attachment to institutions helps explain why some nations maintain republican governments while others fail to do so.⁸

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1. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 1–2 (2009).

2. See Herman Schwartz, *Building Blocks for a Constitution*, in 9 *ISSUES OF DEMOCRACY: CONSTITUTIONALISM AND EMERGING DEMOCRACIES* 12 (2004).

3. GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* (2009).

4. Richard Albert, *The Case for Presidential Illegality in Constitutional Amendment*, 67 *DRAKE L. REV.* 857, 858 (2019); Richard S. Kay, *Updating the Constitution: Amending, Tinkering, Interpreting*, 67 *DRAKE L. REV.* 887, 892 (2019); Sanford Levinson, *Article V After 230 Years: Time for a Tune-up*, 67 *DRAKE L. REV.* 913, 938 (2019); Lisa L. Miller, *Amending Constitutional Myths*, 67 *DRAKE L. REV.* 947, 971 (2019).

5. See U.S. CONST. art. V.

6. *THE FEDERALIST NO. 49* (James Madison) (Am. Bar Ass’n ed., 2009).

7. *Id.*

8. Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*, NAT’L CONST. CTR., <https://constitutioncenter.org/learn/educational->

We must be careful, however, not to overly venerate our Constitution. It may be that our institutions are not fulfilling the great goals set forth in the Preamble to the Constitution. That is a judgment incumbent on the American people to make, as it is their responsibility to maintain the Constitution. Alexander Hamilton begins *The Federalist No. 1* by observing the United States is the first nation in which the people played a crucial role in deciding their form of government.⁹ The historian Gordon Wood writes the framing generation believed that by debating and adopting the Constitution, the United States had “demonstrated to the world how a people could diagnose the ills of its society and work out a peaceable process of cure.”¹⁰ No idea was more central to the project of the framing generation than the power of ordinary people to alter or abolish their form of government when circumstances so dictated.¹¹

When faced with difficult national circumstances in the past, Americans squarely faced the problem of constitutional change. The defects in the Articles of Confederation and the difficult economic circumstances following the Revolution led to the adoption of the Constitution.¹² The gravest defect of the original Constitution was undoubtedly slavery. Following the Civil War, the Reconstruction Amendments provided the legal and constitutional basis for dealing with this problem. It would take Americans another century and the tumultuous Civil Rights Movement, however, to begin to address the issue of racial equality. Americans dealt with the economic and social problems of the Gilded Age with the Progressive Era Amendments. Contemporary Americans may face problems as grave as those faced by almost any previous generation.¹³

The question we are facing today is whether it is time for Americans to take up the task of amending the Constitution. That task should not be undertaken lightly. The Constitution, as well as the deep learning that went into its design, is entitled to our respect. We are, however, a very different

resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it [https://perma.cc/UWR7-Y54B].

9. THE FEDERALIST NO. 1, *supra* note 6, at 1 (Alexander Hamilton).

10. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 614 (1998).

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

12. See MICHAEL KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 11–72 (2016).

13. See generally SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION (2019).

country in 2019 than we were in 1787. The election of 2016 was especially wrenching, as Republicans and Democrats alike believed the other party's candidate to be an existential threat to the nation.¹⁴ Gallup polls over the last 50 years show a drop in public confidence in key democratic institutions.¹⁵ The problems we face today suggest it may be prudent for Americans to once again take up the task of constitutional change. The four distinguished panelists at the 2019 Drake Constitutional Law Symposium were asked to address the following question: Is it time to amend the Constitution?

Professor Lisa Miller observes that while it is time for us to amend the Constitution, “[W]e must determine what it is we want our Constitution to do”¹⁶ Our Constitution famously fragments power. Although we believe that these “veto points” protect our liberties, Professor Miller argues that the reality is that they facilitate oligarchical rule by enabling political minorities with access to power to block policy.¹⁷ The United States, for example, is exceptional among the world's wealthy democracies in that it lacks protection for second-generation rights, such as health care and education,¹⁸ which, in turn, may be due to the difficulty majorities have in governing. The undemocratic nature of the Constitution is an important critique made by contemporary scholars,¹⁹ as well as by the Anti-Federalists who opposed the adoption of the Constitution.²⁰

Professor Sanford Levinson also believes amendment is needed and argues, “To believe otherwise . . . is simply an example of psychological denial: We want to avoid coming to terms with afflictions that might

14. See Lee Drutman, *Political Diversions in 2016 and Beyond: Tensions Between and Within the Two Parties*, VOTER STUDY GROUP (June 2017), <https://www.voterstudygroup.org/publication/political-divisions-in-2016-and-beyond> [<https://perma.cc/XT8C-QA3E>].

15. Eric A. Posner, *The Trump Presidency: A Constitutional Crisis in the United States?*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 109 (Mark A. Graber et al. eds., 2018).

16. Miller, *supra* note 4, at 947.

17. See *id.* at 953.

18. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 520–21 (1992).

19. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); KLARMAN, *supra* note 12; SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

20. See generally HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981).

seriously threaten us.”²¹ Professor Levinson argues Article V of the Constitution makes amendment excruciatingly difficult and is therefore “from both theoretical and empirical perspectives, the worst single feature of the Constitution that is itself full of defective features.”²² Article V effectively flips the script on how the Constitution is supposed to operate. The difficulty of amendment makes a mockery of the idea that *We the People* have the power to amend the Constitution and deprives citizens of the ability to engage in “reflection and choice” over their document.²³

Article V, however, may not be an insurmountable hurdle to formal constitutional change. Professor Richard Albert argues the problem with Article V is that it assigns to Congress a “gatekeeper function,” as Congress must either propose an amendment or recognize the states’ petition for a convention.²⁴ Consequently, “Congress possesses the ultimate power of veto over any and all prospective Article V amendments.”²⁵ The solution, he argues, is for presidents to propose an amendment and subject it to a popular referendum.²⁶ Professor Albert argues this would be illegal but not illegitimate.²⁷ The Framers, for example, violated the rules contained in the Articles of Confederation, which required the unanimous consent of the states for amendments, when adopting the Constitution—which went into effect when ratified by 9 of the original 13 states.²⁸ The Constitution was, when originally adopted, illegal *and* legitimate.²⁹ Consequently, citizens have the ultimate power over their Constitution, and presidents may seek to avail themselves of that source of legitimacy in amending the Constitution.³⁰ Article V, in short, does not and cannot circumscribe the power of *We the People*.

21. Levinson, *supra* note 4, at 914.

22. *Id.* at 924.

23. THE FEDERALIST NO. 1, *supra* note 6, at 1 (Alexander Hamilton). That power is exercised with some regularity when it comes to state constitutions, which typically are much easier to amend than the federal Constitution. See CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2009).

24. Albert, *supra* note 4, at 860.

25. *Id.*

26. *Id.* at 873.

27. *Id.* at 876.

28. U.S. CONST. art. VII.

29. Albert, *supra* note 30, at 869.

30. See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

Professor Richard Kay distinguishes the formal from the “effective” Constitution that includes a variety of informal amendments, “legislated” mainly by the Supreme Court.³¹ The formal Constitution is virtually impossible to change because of the strictures of Article V and because our amendment culture fears reform. The problem with having the U.S. Supreme Court do the work of changing the Constitution is that it undermines the core idea of constitutionalism, which is that power is to be controlled by prior fixed law.³² The Court cannot acknowledge that it is engaged in policymaking, and the tension between what courts do and what they say they do “cannot be maintained indefinitely.”³³ Our current constitutional culture is deeply divided between originalists and living constitutionalists who disagree on the legitimacy of having the Court “update” the Constitution.³⁴

In short, while amending the Constitution is ultimately a political question for the people of the United States, the rich articles written by the 2019 Drake Constitutional Law Symposium illustrate that scholars also have much to offer in illuminating this issue. The United States, as is the case with democracies around the globe, is facing difficult crosswinds. Income inequality, illegal migration caused by poor government and climate change, and the rise of social media platforms that amplify false speech have led to considerable democratic turmoil around the globe.³⁵ The question is whether the citizens of the United States will find it necessary to take up the task of amending the Constitution to deal with these crosswinds.

31. Kay, *supra* note 4, at 901.

32. *Id.* at 903.

33. *Id.* at 905.

34. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Black, J., dissenting).

35. See YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER & HOW TO SAVE IT* 135 (2018).