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# UPDATING THE CONSTITUTION: AMENDING, TINKERING, INTERPRETING

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## ABSTRACT

*The U.S. Constitution is now 230 years old, and it is showing its age. Its text, taken in the sense that its enactors understood it, is, unsurprisingly, inadequate to the needs of a large, populous twenty-first century nation. The Constitution creates a government that is carefully insulated from the democratic preferences of the population. It fails to vest the central government with the tools needed to manage and regulate a vast, complicated, and interrelated society and economy. On the other hand, it guarantees its citizens protection of only a limited set of human rights. Notwithstanding these blatant defects, the means provided in the constitutional text to change it, to improve it, are insufficient to make it appropriate for current conditions. There is reason to be skeptical of studies purporting to measure the difficulty of constitutional amendment procedures. But combined with an inspection of the text and the history of amendment, this research is persuasive and supports the claim that reliance on Article V's procedures are unlikely to successfully reform the Constitution. On top of these objective measures, moreover, constitutional revision in the United States is hampered by a widely held, though uninformed, opinion that the current Constitution is still protecting national welfare and that any change—any tinkering—with the rules in that document bears a heavy burden of persuasion. Reform by amendment, that is, appears to be a dead end. The U.S. judiciary, however, has, in an important way, come to the rescue of a polity that would otherwise be in a perpetual thrall to the principles of the eighteenth century. In “interpreting” the Constitution, the courts have gone a long way to correct the defects listed. But their “interpretations” have little relationship to the fixed rules installed by the constitutional enactors. Judges have assumed what amounts to a power of constitutional amendment. But such an amendment technique is irregular, unpredictable, and devoid of the sanction of the “people,” past or present, whose assent is usually thought essential to constitutional legitimacy. The United States has escaped the disadvantages of an outdated Constitution but at the price of subverting the constitutional rule of law.*

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## I. THE PROBLEM WITH THE CONSTITUTION

Does the U.S. Constitution need to be updated? Like all complicated legal questions, the answer must be, “It depends.” In this case, it depends, among other things, on what we mean by the Constitution. I will relax this assumption later, but in the first instance, I will stipulate a definition that is consistent with the understanding of many ordinary citizens: The Constitution is a set of rules formulated at certain historical moments by identifiable individuals who, at the time, were perceived as having either political (in the case of the original constitutional enactment) or legal (in the case of amendments) attributes that made them suitable legislators of the legal system’s highest law. Insofar as the Constitution’s current status is a result of the choices made by these enactors, it is, in an essential sense, *their* constitution. That is, it reflects their understanding of the society it was to govern, their values, their insights, and their intelligence. And, by the same token, it will also be defined by their limitations, including political experience, moral judgment, and knowledge of the facts of the world. Since the society to be governed by the Constitution was necessarily going to change over time, it was inevitable that, sooner or later, the Constitution, so understood, would become a clumsy, if not a perverse, instrument of government.

The U.S. Constitution is, in many of its most important aspects, a very old constitution. It has been amended but, remarkably, rarely.<sup>1</sup> The critical Reconstruction Amendments, for example, are now about 150 years old. In these circumstances, only the most improbable good luck would have obviated the need for significant revision. And we can, in fact, identify many ways in which the Constitution has turned out to be inadequate to our current situation. Again, by *Constitution*, I mean those rules that were

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1. Richard S. Kay, *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMP. L. (SUPPLEMENT) 243, 243 (2018) [hereinafter Kay, *Amendment*].

intentionally created by the enactors in 1787–1789 and by the amending authorities acting according to the procedures of Article V. Of course, that is not the same thing as the rules that are *attributed* to the Constitution by courts and other public actors. I will come back to the latter at the end of this Article.<sup>2</sup>

We might look at three broad areas that illustrate ways in which the original text has become unsatisfactory. First, given current views about the proper basis of political authority, the original constitutional machinery of government now appears unjustifiably careless of the democratic preferences of the governed population.<sup>3</sup> The equal representation of states in the Senate, notwithstanding vast differences in population, is one example.<sup>4</sup> That malapportionment, in turn, impairs the representative capacity of the presidential election procedure, since a state's votes in the Electoral College are determined by the size of its congressional delegation.<sup>5</sup> Beyond this, the original text withdrew several important decisions from simple majorities of the various legislative bodies.<sup>6</sup> These decisions instead require the agreement of some supermajority of the relevant body, thus undemocratically empowering the dissenting minority. The *sine qua non* of this technique is the procedure necessary to amend the Constitution, something examined more closely below.

For the founders, the undemocratic character of the national government was a feature, not a bug. They believed sensitivity to popular opinion was an indispensable element in any republican government, but they were also convinced that raw public preferences needed to be filtered and refined by wiser and more careful statespersons.<sup>7</sup> A significant number of the Constitution's architects understood its structure exactly as “a cure for the evils under which the [preconstitutional United States]

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2. See *infra* Part IV.

3. For a thorough treatment, see generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT) 25–78 (2006).

4. The House of Representatives suffers from a similar—if less egregious—deficiency by virtue of the constitutional requirement that every state have at least one representative. U.S. CONST. art I, § 2.

5. See *id.* art. II, § 1.

6. See, e.g., *id.* art. V.

7. Jeffrey Rosen, *America Is Living James Madison's Nightmare*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/> [https://perma.cc/3CZN-V8E7].

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laboured . . . [arising from] the turbulence and follies of democracy.”<sup>8</sup> Over time, as the priority of democratic choice became more widely accepted, U.S. political institutions were altered by law, practice, and constitutional amendment to make them better mirrors of popular opinion. In this environment, the remaining countermajoritarian aspects of the Constitution have increasingly stood out as anomalies in need of correction.<sup>9</sup>

Second, the existing Constitution sets out what now appears to be an unworkable division of power between the states and the federal government. A strictly limited assignment of powers to the federal government made sense when the normal activities of government were few and technology and geography made it inevitable that the bulk of public functions would be exercised at the state level. It was obvious to James Madison during the ratification debates that the lion’s share of governing would—and ought to—belong to the states.<sup>10</sup> These days there are varying views about what the federal government ought to be able to do in our complicated, variegated, technologically advanced, interconnected, and geographically extended society. Almost no one, however, favors a central government confined to the limited subject matters listed in Article I of the Constitution.<sup>11</sup>

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8. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 32–34 (Gaillard Hunt & James Brown Scott eds., 1920) (remarks of Edmund Randolph, speaking specifically of the Senate).

9. Richard S. Kay, *Democracy, Mixed Government and Judicial Review*, in LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY 199, 206–10 (Lisa Burton Crawford, Patrick Emerton & Dale Smith eds., 2019) [hereinafter Kay, *Democracy*].

10. As Madison explained:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 292–93 (James Madison) (Am. Bar Ass’n ed., 2009).

11. See, e.g., Edward L. Rubin, *Puppy Federalism and the Blessings of America*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 37 (2001).

Lastly, most people today believe that an essential component of any fair constitution is the protection of basic individual rights. The extent and the scope of these rights are inevitably controversial. Although the original U.S. Constitution as amended does include a number of important rights provisions, it is reasonable to say that, honestly interpreted, it falls far short of what most citizens think constitutional rights ought to protect.<sup>12</sup> The most extensive list, the first eight amendments, constrained only the federal government, whereas now people tend to think every government ought to be similarly controlled.<sup>13</sup> The prohibitions on racial discrimination in the Reconstruction Amendments do explicitly apply to the states, but they are limited to fields of action far narrower than what the current moral consensus requires.<sup>14</sup> And other objectionable forms of discrimination, such as those based on gender or sexual orientation, were omitted entirely. There are, moreover, whole swathes of protection that non-U.S. jurisdictions have determined are appropriate for protection that our original Constitution makers never dreamed of.<sup>15</sup>

I could go on, but the point is clear enough. As originally conceived and understood, the U.S. Constitution is grossly ill-suited for the jobs we now expect a constitutional government to do. It bars the government from taking those steps essential to the welfare of the population being governed, while permitting the government to take actions that offend widely and deeply held social values. That is hardly surprising since we live in a world qualitatively and quantitatively foreign to the world the eighteenth-century Constitution makers inhabited. What then can be done about the inevitable problems of an old constitution?

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12. *See, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES, 4–10 (2013).

13. *See, e.g.*, Barron v. Baltimore, 32 U.S. 243 (1833).

14. *See* U.S. CONST. amends. XIII, XIV, XV.

15. In this respect it is enough to examine the very widely adopted international human rights instruments. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3. In fact, a cursory inspection of U.S. state constitutions discloses scores of rights absent from the U.S. Constitution. *See* ZACKIN, *supra* note 12, at 4–10.

## II. THE DIFFICULTY OF AMENDMENT

Although the constitutional enactors probably could not have foreseen that their text would govern for more than 230 years, they did take into account the inevitable need for “useful alterations.”<sup>16</sup> They followed the example of several of the state constitutions adopted at independence<sup>17</sup> by setting out a procedure for amendment in Article V.<sup>18</sup> The deliberations at the Philadelphia Convention reveal disagreements about the best method for revision but none as to the desirability of including some procedure for constitutional change.<sup>19</sup> The Constitution makers also understood that the necessity of revision had to be balanced against the risk that frequent change would undermine the stability of constitutional rules that would be essential if the benefits of constitutional government were to be realized.<sup>20</sup>

Madison warned in *The Federalist No. 49* against too frequent “recurrence to the people.”<sup>21</sup> That would deprive the Constitution of the “veneration . . . without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>22</sup> He expanded on this view in his reply to Thomas Jefferson’s suggestion that all laws, including a constitution, ought to expire in 19 years; that is when the adopting generation could no longer be presumed to constitute the majority of those subject to them. Madison worried that such “a Government[,] depending for its existence beyond a fixed date[] on some positive and authentic intervention . . . [would] be too subject to the casualty and consequences of an actual

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16. See *THE FEDERALIST* No. 43, *supra* note 10, at 249 (James Madison).

17. Of the 10 state constitutions adopted at independence, only 4 provided any special procedure for amendment. GA. CONST. art. LXIII; MD. CONST. art. LIX; PA. CONST. § 47; S.C. CONST. art. XLIV.

18. The Articles of Confederation had also contemplated the need for modification, although that provision specified that no change would be made “unless such alteration be agreed to in a congress of the united states and be afterwards confirmed by the legislatures of every state.” ARTICLES OF CONFEDERATION of 1781, art. XIII. In *The Federalist No. 40*, Madison cursorily dismissed an argument that the adoption of the new Constitution required this unanimous consent. *THE FEDERALIST* No. 40 (James Madison). The Articles’ rule embodied the “absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth.” *THE FEDERALIST* No. 40, *supra* note 10, at 222 (James Madison).

19. Kay, *Amendment*, *supra* note 1, at 244.

20. *See id.* at 268.

21. *THE FEDERALIST* No. 49, *supra* note 10, at 286 (James Madison).

22. *Id.*

interregnum.”<sup>23</sup> And, referring to ordinary statutes as well as constitutions, he denounced “the uncertainty incident to such a state of things [that] would on one side discourage the steady exertions of industry produced by permanent laws, and on the other, give a disproportionate advantage to the more, over the less, sagacious and interprizing part of the Society.”<sup>24</sup> The trick therefore, as Madison recognized when defending the Philadelphia Convention’s amendment formula, was to “guard[] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>25</sup>

Like much else in the original Constitution, the balance struck in Article V has been disparaged. Recent criticism has, for the most part, converged on the proposition that its requirements make amendment too difficult, with the result being that it has become impossible to deal adequately with the evermore urgent need for revision.<sup>26</sup> Various studies have been conducted comparing the rules for amendment of the U.S. Constitution to the processes employed in other jurisdictions, including both foreign nations and U.S. states.<sup>27</sup> Whatever differences these studies exhibit, they all conclude the Article V criteria are the most—or almost the most—difficult to satisfy.<sup>28</sup> This quality is sometimes cited as explaining the fact that, despite being one of the world’s oldest written constitutions, the U.S. Constitution has been so infrequently amended.<sup>29</sup>

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23. Letter from James Madison to Thomas Jefferson (Feb. 4, 1970), <https://founders.archives.gov/documents/Madison/01-13-02-0020> [https://perma.cc/67YS-Y897].

24. *Id.*

25. THE FEDERALIST NO. 43, *supra* note 10, at 278 (James Madison).

26. Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 576 (1915); Richard Albert, *America’s Unamendable Constitution*, CATO UNBOUND (Dec. 11, 2015), <https://www.cato-unbound.org/2015/12/11/richard-albert/americas-unamendable-constitution> [https://perma.cc/MQ3W-JFXF] [hereinafter Albert, *Unamendable Constitution*].

27. See Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. (2d) 181, 182 (2014) [hereinafter Albert, *Canada and the United States*].

28. Kay, *Amendment*, *supra* note 1, at 248 n.37.

29. There have been 28 amendments, but as the first 10 amendments were approved more or less simultaneously, we can say the Constitution has been amended only 18 times. Comparative analyses of constitutional-amendment experiences often call for examining not the absolute number of amendments of a given constitution but an amendment rate, taking into account the years of a constitution’s existence. See Jonathan

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Whether the United States' process is too difficult, of course, depends on one's estimate of the relative importance of stability and adaptability in the law generally and in constitutional law in particular. It is reasonable to argue that the very point of a constitution is ordinarily to frustrate the desire to "improve" the legal system, at least insofar as it touches on certain especially sensitive areas of human activity.<sup>30</sup> Efforts to compare the difficulty of various amendment formulas, moreover, encounter apparently insurmountable problems of incommensurability. Is it harder to secure a three-fourths majority in a legislature or two-thirds majorities in consecutive legislatures?<sup>31</sup> Evidence provided by the history of U.S. constitutional amendment is at best equivocal. It consists of relatively concentrated periods of amendment activity (four amendments were added in the seven years from 1913 to 1920), along with extended periods with no amendments. (We are currently in what is effectively a 48-year amendment drought.)<sup>32</sup>

Admitting these difficulties, however, need not preclude us from deciding that, at least in the short and medium terms, the obstacles to U.S. constitutional reform are unjustifiably steep. The Constitution makers believed they were ensuring a certain level of caution before potentially dangerous changes could be introduced in the basic rules of the polity.<sup>33</sup> But changes in underlying social and political facts have made these same procedural steps harder to effect, converting a deliberate process into a near impossible one.<sup>34</sup> For reasons to be discussed, our current situation may have made utilization of the Article V procedure especially difficult.<sup>35</sup> To use Richard Albert's phrase, we may have entered an era of "constructive unamendability."<sup>36</sup>

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Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 81 n.145 (2018) (citing authorities).

30. See Richard S. Kay, *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16, 22–25 (Larry Alexander ed., 1998) [hereinafter Kay, *Constitutionalism*].

31. See Marshfield, *supra* note 29, at 79–80.

32. See Kay, *Amendment*, *supra* note 1, at 249–50 (summarizing the chronology of amendment adoption). I omit, as *sui generis*, the Twenty-Seventh Amendment declared ratified in 1992. Its approval by state legislatures stretched over 200 years. See *id.* at 259.

33. Letter from James Madison to Thomas Jefferson, *supra* note 23.

34. See Albert, *Canada and the United States*, *supra* note 27, at 191; Albert, *Unamendable Constitution*, *supra* note 26.

35. See Albert, *Canada and the United States*, *supra* note 27, at 191.

36. *Id.* at 182. I agree with Albert that this kind of contingent incapacity is even more pronounced in Canada, although for reasons somewhat different than those underlying the U.S. amendment culture. Albert, *Unamendable Constitution*, *supra* note

There are some obvious causes. First is the simple enlargement of the state. The Article V process requires supermajorities in Congress and among state legislatures.<sup>37</sup> With the growth of both the total population and the number of states, these supermajorities have become harder to assemble.<sup>38</sup> The agreement of 44 members of the House of Representatives was necessary to propose amendments in 1789.<sup>39</sup> Now, 290 must agree.<sup>40</sup> The number of state legislatures that must assent has grown from 10 to 38.<sup>41</sup> When we factor in the vast disparity in state populations, it is clear that even a powerful consensus for constitutional change in the national population may be insufficient to secure an amendment's adoption. At the extreme, the legislatures of states with only 5 percent of the population can block an amendment desired by the representatives of the other 95 percent.<sup>42</sup> The

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26. Some scholars have argued that U.S. law provides ways to change the Constitution without invoking the Article V machinery. I discuss the utility of judicial updating below. *See infra* notes 100–31 and accompanying text. In an ambitious project, Bruce Ackerman has posited the existence of “constitutional moments,” where a society is intensively engaged in a reconsideration of basic postulates of the constitutional order. Ackerman’s thesis has been presented in detail in a multivolume series. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, FOUNDATIONS]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014). It has elicited numerous challenges. *See, e.g.*, Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992). Akhil Amar has contended the Constitution permits its amendment by a national referendum. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988). Amar’s theory is criticized in Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 122 (1996).

37. U.S. CONST. art. V.

38. *See* Kay, *Amendment*, *supra* note 1, at 267.

39. *See id.* at 244; *Apportionment of the U.S. House of Representatives*, U.S. CENSUS BUREAU, <https://www.census.gov/prod/3/98pubs/CPH-2-US.PDF> [perma.cc/9PPA-HNZ4].

40. *See* Kay, *Amendment*, *supra* note 1, at 244; *Apportionment of the U.S. House of Representatives*, *supra* note 39.

41. Kay, *Amendment*, *supra* note 1, at 259.

42. *Id.* at 267 (describing the failure of the Equal Rights Amendment in the 1970s). However, as Vicki Jackson has pointed out, only 6 of the 33 proposed amendments have failed to be ratified, indicating the greater difficulty may be congressional proposal, not state ratification. Vicki C. Jackson, *The (Myth of Un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575, 578–89 (2015).

consequences of this empowerment of a distinct and disaffected minority have, if anything, been intensified by the increasing partisan rancor of recent decades. Adherents of particular political views increasingly inhabit opinion silos where their positions are more likely to be reinforced than to be challenged. That is, it has become harder and harder to find common ground or reach political compromise.<sup>43</sup> More disagreement means fewer amendments.

### III. THE DANGERS OF “TINKERING”

Even if the intrinsic difficulty of amendment were less challenging than it is usually agreed to be, it would still, in our current situation, face formidable obstacles. That is because any proposed constitutional change confronts a presumption that it poses serious legal and political risks.<sup>44</sup> Studies of relative amendment flexibility have increasingly recognized the importance of these qualitative factors under the caption of “amendment culture.”<sup>45</sup> The evaluation of such a culture presents obvious problems of measurement. Tom Ginsburg and James Melton have attempted to “operationalize amendment culture as the rate at which a country’s *previous* constitution was amended” and concluded that, so measured, it was a better predictor of subsequent amendment rates than the formal attributes of the procedure.<sup>46</sup> There is good reason to think that the current amendment culture in the United States exhibits a decided reluctance to change the Constitution. The clearest evidence of this attitude is the pronounced anxiety that appears whenever we get close to reaching the number of state

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43. See Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2019, at 234–36.

44. See Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 319, 331 (Roger D. Congleton & Birgitta Swedenborg eds., 2006).

45. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L J. CONST. L. 686, 687–88 (2015); see also Rasch & Congleton, *supra* note 44, at 338; see generally Xenophon Contiades & Alkmene Fotiadou, *Review Essay, The Determinants of Constitutional Amendability: Amendment Models or Amendment Culture?*, 12 EUR. CONST. L. REV. 192 (2016).

46. Ginsburg & Melton, *supra* note 45, at 708–11 (emphasis added). The United States, with only one constitution, was therefore omitted from this study.

legislatures necessary to approve a national constitutional convention<sup>47</sup> in light of worries about the extent of the changes such a convention might propose.<sup>48</sup>

The fear that any constitutional reform is likely to make things worse has a long history. The original ratification of the Constitution was closely contested and spawned “bitter disagreement of great ideological depth.”<sup>49</sup> Despite this inauspicious beginning, the Constitution’s authority was promptly accepted on all sides.<sup>50</sup> Its former Anti-Federalist opponents, in fact, were soon citing “the strict words of this frail Constitution, insisting on a literal interpretation of a document that many of them had vilified on fundamental grounds.”<sup>51</sup> The historian, Lance Banning, explained that the generation of the Constitution makers, steeped in classical republican thought, held a deep attachment to a mixed or balanced government. Maintaining such a government demanded an “unremitting attention to the stability of the state.”<sup>52</sup> “According to their favorite histories of England and of Rome, constitutional change, like water, always flowed downhill.”<sup>53</sup> In light of these fears, the Constitution began to look better, even to those who had been its vigorous opponents. These beliefs set the stage for what Banning described as “constitutional apotheosis.”<sup>54</sup> Even the disagreements that led to the great crisis of disunion in the mid-nineteenth century were not about the merits of the Constitution. Southern statespersons on the brink of secession continued to cite the Constitution in their defense.<sup>55</sup>

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47. *Id.* at 700.

48. While provided for in Article V, such a body has never been successfully called into existence. The worry over a convention often is founded on the possibility that, feeling the extraordinary power of a national sovereign people, it might turn “runaway,” scrapping the Constitution wholesale. Ironically, the most persuasive precedent for such a result is the Philadelphia Constitution of 1787. See Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 57–58 (1987).

49. Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167, 170, 176–79 (1974).

50. *Id.* at 167–68.

51. *Id.* at 172.

52. *Id.* at 174.

53. *Id.* at 177.

54. *Id.* at 167–68, 172–74, 177–79.

55. Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIBBEAN L. REV. 161, 172–82 (1997).

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The prospects of amendment cannot be evaluated without taking into account the continued existence of U.S. “Constitution worship.”<sup>56</sup> This attitude naturally discourages any attempts to improve or replace the original text.<sup>57</sup> When the National Constitution Center’s website posted the video of a debate on the propriety of a national amendment convention, it introduced the subject by noting, “[I]t is always tempting to invoke Article V to amend the Constitution—to ‘fix’ it, or ‘restore’ it, or ‘improve’ it. But, on the other hand, there is a substantial risk to tinkering with the Constitution: many amendments seem to have unintended consequences.”<sup>58</sup>

Worries about “tinkering with the Constitution” come up whenever constitutional revision is suggested.<sup>59</sup> That description connotes something trivial, something to be contrasted with the solemn majesty of the Constitution. In 1915, an article with that title, by Joseph R. Long, was published in the Yale Law Journal.<sup>60</sup> Long criticized a proposal to amend Article V to make the adoption of new amendments easier.<sup>61</sup> The recent approval of the Sixteenth and Seventeenth Amendments, he argued, belied the claim that amendment was near impossible.<sup>62</sup> But mainly, like Madison, he worried that too many revisions would “impair the dignity of a constitution.”<sup>63</sup> The substantive reforms motivating many proposed amendments would be better accomplished by federal or state legislation.<sup>64</sup>

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56. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–15 (1988).

57. See *id.* at 14–15.

58. *Call a Convention to Amend the Constitution?*, NAT’L CONST. CTR., <https://constitutioncenter.org/debate/past-programs/call-a-convention-to-amend-the-constitution> [<https://perma.cc/BL3B-P3M3>].

59. *Id.*

60. Long, *supra* note 26.

61. *Id.* at 581.

62. *Id.* at 587.

63. *Id.* at 581. Long contrasted the rare amendment of the U.S. Constitution with the easy and frequent amendment of state constitutions. “No one now entertains any particular respect for a state constitution.” *Id.* at 580.

64. *Id.* at 578. Among the reforms Long mentioned were women’s suffrage and prohibition. Amendments dealing with both of these topics were then being seriously promoted and would shortly be adopted as the Eighteenth and Nineteenth Amendments. *Id.* at 583. Long’s constitutional concerns may be inferred from his assertion that a women’s suffrage amendment was undesirable given that “the suffrage question in the Fourteenth and Fifteenth Amendments were not so successful as to invite other adventures in that field. The practical nullification of these provisions meets with general satisfaction, and their formal repeal has more than once been proposed.” *Id.* at 583–84. Among his reasons for opposing an amendment giving Congress the power to

The Constitution, he conceded, “is not perfect,” but a careful and deliberate process was essential before altering a document that “is justly regarded as the greatest instrument of government ever ordained by man.”<sup>65</sup>

A more recent illustration of the same phenomenon is the response to efforts to procure a constitutional amendment giving Congress the power to punish desecration of the United States’ flag. These proposals were seriously mooted in the wake of decisions by the Supreme Court, holding that prosecutions for flag defilement were prohibited by the First and Fourteenth Amendments.<sup>66</sup> Many people considered disrespect for the flag to be a grave offense, and opinion polls showed a fairly consistent majority favoring criminal prosecution.<sup>67</sup> Opponents of such a constitutional amendment, however, were able to mount effective arguments exactly along the lines discussed.<sup>68</sup> That is, they did not stress the rightness of constitutional protection for flag burners. Instead, they emphasized the dangers of toying with the Constitution and especially with the Bill of Rights.<sup>69</sup> A 1990 opinion column in *Newsweek* magazine reminded readers of the history of frivolous attempts to “retrofit the Constitution” and quoted a Democratic congressman’s warning: “The country ought to be very anxious about doing open-heart surgery on the First Amendment . . .”<sup>70</sup> A constitutional amendment on this point was introduced in every Congress from 1995 through 2006, and it passed the House of Representatives with the necessary two-thirds majority six times.<sup>71</sup> It also easily won majorities in three Senate

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legislate on marriage and divorce was his fear that Congress might force southern states to permit interracial marriage. *Id.* at 585. Long was on the faculty of the Washington & Lee University Law School and would shortly become its dean. *Law School Notes*, 16 WASH. & LEE L. REV. 212, 212 (1959).

65. Long, *supra* note 26, at 581, 589.

66. *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Texas v. Johnson*, 491 U.S. 397, 404, 418 (1989).

67. Poll results taken in 2006 are collected at *Law and Civil Liberties*, POLLING REP., <http://www.pollingreport.com/law.htm> [<https://perma.cc/2YWU-26QL>].

68. See David A. Kaplan, *Tinkering with the Constitution*, NEWSWEEK (June 24, 1990), <https://www.newsweek.com/tinkering-with-the-constitution-206266> [perma.cc/k5PM-5UNC].

69. *See id.*

70. *Id.*

71. H.R.J. Res. 10, 109th Cong. (2005); H.R.J. Res. 4, 108th Cong. (2003); H.R.J. Res. 36, 107th Cong. (2001); H.R.J. Res. 33, 106th Cong. (1999); H.R.J. Res. 54, 105th Cong. (1998); H.R.J. Res. 79, 104th Cong. (1995).

votes but narrowly failed the needed supermajority on each occasion.<sup>72</sup> The last time, in 2006, it failed by one vote.<sup>73</sup> Among those voting no was Kentucky Republican Senator, Mitch McConnell.<sup>74</sup> Explaining his position in an opinion column, he assured readers he did not “share the slightest shred of sympathy with any who would dare desecrate the flag. . . . They deserve rebuke and condemnation, if not a punch in the nose.” But “[n]o act of speech is so obnoxious that it merits tampering with our First Amendment.”<sup>75</sup>

There is little indication that U.S. attitudes toward the Constitution and, derivatively, the danger of constitutional amendment is moderating.<sup>76</sup> Take the creation of the National Constitution Center. A 1988 act of Congress provided for the creation of a center, headquartered in Philadelphia, to undertake educational activities intended “to increase the awareness and understanding of the Constitution among the American people.”<sup>77</sup> In 2003, a 160,000 square foot museum and visitors’ center, designed by Pei Cobb Freed & Partners and costing \$137 million of public and private funds, opened a short distance from Independence Hall.<sup>78</sup> Visitors attend performances of “Freedom Rising, [a] 17-minute 360-degree live theatrical production that tells the story of the U.S. Constitution and the American quest for freedom.”<sup>79</sup> Numerous exhibits attempt to explain both the history of the Constitution and the operation of the institutions it created.<sup>80</sup> The center’s reverential attitude toward the Constitution is

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72. S.J. Res. 12, 109th Cong. (2006); S.J. Res. 14, 106th Cong. (2000); S.J. Res. 31, 104th Cong. (1995).

73. S.J. Res. 12.

74. Mitch McConnell, *Column by Mitch McConnell on Opposing the Flag Desecration Amendment*, VOTESMART (June 26, 2006), <https://votesmart.org/public-statement/184925/column-by-senator-mitch-mcconnell-on-passing-the-falg-desecration-amendment> [https://perma.cc/RPF9-VWXQ].

75. *Id.* On the relation between constitutional veneration and the difficulty of amendment, see Albert, *Unamendable Constitution*, *supra* note 26.

76. See Albert, *Canada and the United States*, *supra* note 27, at 195.

77. Constitution Heritage Act of 1988 § 3(a), 16 U.S.C. § 407bb (2018).

78. Witold Rybczynski, *Architecture Review; More Perfect Union of Function and Form*, N.Y. TIMES (July 8, 2003), <https://www.nytimes.com/2003/07/08/arts/architecture-review-more-perfect-union-of-function-and-form.html?pagewanted=all&src=pm> [https://perma.cc/4T63-ZYZD].

79. 2016-2017 Annual Report, NAT'L CONST. CTR., [https://constitutioncenter.org/media/files/NCC\\_Annual\\_Report\\_2016-2017v1.pdf](https://constitutioncenter.org/media/files/NCC_Annual_Report_2016-2017v1.pdf) [https://perma.cc/3F4K-YLS4].

80. *Id.*

evident in its exhibitions as well as in the supersized reproduction of the Preamble on its outer wall.<sup>81</sup> Its website confirms the center is devoted to the “greatest vision of human freedom in our history, the U.S. Constitution.”<sup>82</sup>

#### IV. REINTERPRETING CONSTITUTIONAL RULES

To this point, we have assumed that the Constitution that needs updating is the set of rules formulated and approved in 1787–1789 by the founders, specific people whose names we know or could find out. And by *constitutional amendment*, we have referred to overt and formal invocations of the method of revision that those original rules set forth in Article V. While that is a fairly accurate description of most people’s understanding, more careful observers know that the reality is quite different. The *effective* constitution, the set of rules that are enforced in the name of the Constitution, often exhibits only the most attenuated connection to the rules created in 1789 or the various amendments.<sup>83</sup> In practice, most “constitutional” rules are legislated by courts—especially the U.S. Supreme Court—in the course of deciding cases that invoke the Constitution as governing law. They are, that is, “interpretations” of the Constitution, even though a candid evaluation would conclude they are in no way necessary implications from the historical rules. To the extent these new rules are effective, it is not unfair to think of them as “amendments” to the constitutional text.<sup>84</sup>

To a considerable extent, these “amendments” have responded to the kinds of defects in the original Constitution that I canvassed in the opening paragraphs of this Article.<sup>85</sup> To give just two of many examples, the limited legislative reach of the federal government has been radically extended by, among other things, an elastic reading of the Constitution’s grant of congressional power “[t]o regulate Commerce with foreign Nations, and

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81. *Id.*

82. *Mission & History*, NAT’L CONST. CTR., <https://constitutioncenter.org/about/mission-history> [perma.cc/B6UF-V4RE].

83. See generally Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 229, 231–34 (Richard W. Bauman & Tsvi Kahana eds., 2006).

84. *Id.* at 247, 260–61.

85. See *supra* Part I.

among the several States.”<sup>86</sup> Similarly, these new judicially created rules respond to modern sensitivities about unjust discrimination. So, in the course of interpreting the Fifth and Fourteenth Amendments, the courts have forbidden discrimination on grounds believed unexceptional at the time these rules were ratified. Likewise, they have condemned unequal treatment in connection with activities beyond the scope of regulation the original enactors had in mind.<sup>87</sup> This kind of constitutional revision has not only been noticed by scholars but has been defended as superior to the Article V technique, not least because of its superior capacity to respond promptly and accurately to the changing facts and needs of society.<sup>88</sup>

While it is, in some ways, fortunate that judges have come to the rescue of the outdated rules of the original text, this solution to the dilemma created by the practical unamendability of the Constitution comes at a price.<sup>89</sup> The legitimacy of the constitutional rules promulgated by judges is necessarily doubtful in a state supposedly founded on the ultimate authority of “the people.”<sup>90</sup> Justices of the Supreme Court are appointed for life and are deliberately insulated from the influence of public opinion.<sup>91</sup> In fact, given the critical importance of constitutional rules, most observers conclude their promulgation should be committed to a particularly pure and authentic method of popular approval.<sup>92</sup> The supermajorities required by the rules of Article V are probably intended to replicate roughly the extraordinary popular process that created the Constitution in the first place.

There is another important objection to the judicial creation of constitutional rules. It means the content of the Constitution may be always changing.<sup>93</sup> The pace and content of that change, moreover, depends on

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86. U.S. CONST. art. I, § 8.

87. DAVID A. STRAUSS, THE LIVING CONSTITUTION 77–80 (Geoffrey R. Stone ed., 2010).

88. *See, e.g.*, *id.* at 33–50.

89. *See* Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 31, 44 (2000) [hereinafter Kay, *Chrononomy*].

90. This is true notwithstanding the fact that a clear-eyed evaluation of the process followed in 1787–1789 may seem more than a little deficient to express the will of the American people, at least when judged by twenty-first century standards. Nevertheless, regard for the Constitution as the authentic act of *We the People* appears to be ineradicably entrenched in national consciousness. *See id.*

91. *See id.*

92. Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 748–58 (2011).

93. *See* Kay, *Amendment*, *supra* note 1, at 265.

numerous unpredictable decisions—by individuals to initiate litigation, by the actions of lower courts, by the decisions of the justices of the Supreme Court, and, of course, by the nomination and confirmation of those justices by the President and the Senate.<sup>94</sup> The cumulative result of these unknowns is a process deeply inconsistent with the central idea behind constitutionalism.<sup>95</sup> The peculiar innovation that written constitutions were supposed to have introduced into legal and political systems was the control of public power by prior fixed law. Constitutions do not just reduce the reach of the state; they do so by creating limits that are stable and are therefore knowable in advance by those subject to the relevant government. This allows individuals and private associations to plan their activities, knowing in advance which are at risk and which are immune from state interference.<sup>96</sup> This security is the central value of a “rule of law society,” one responding to the evil that Coke identified when he said that it was a “miserable slavery to live under a vague or uncertain jurisprudence.”<sup>97</sup> Here again, judicial “amendment” that is both unpredictable and retrospective may be contrasted with the Article V procedure. Amendments issuing from the latter machinery go into effect only after a protracted legislative process and then only prospectively.<sup>98</sup>

Judicial updating of the written Constitution may have yet another unwelcome effect. Advocates for constitutional reform may find it easier to pursue their projects through litigation than through attempting to work the cumbersome machinery of Article V. To the extent they are successful, they set an example for others that can further marginalize the process of formal amendment. A standard example of this is the failed ratification of the Equal Rights Amendment (ERA), which would have provided the following: “Equality of rights under the law shall not be denied or abridged by the

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94. *See id.*

95. *See* Wil Waluchow, *Constitutionalism*, STAN. ENCYCLOPEDIA PHIL. (Dec. 20, 2017), <https://plato.stanford.edu/entries/constitutionalism/> [https://perma.cc/CN9F-RM8U].

96. *See* Kay, *Constitutionalism*, *supra* note 30, at 22–24.

97. EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1797), reprinted in 5B HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 2, 246 (1986) (“[M]isera est servitus, ubi jus est vagum, aut incognitum.”); *see* Kay, *Constitutionalism*, *supra* note 30, at 22–24.

98. *See* Richard S. Kay, *Judicial Policy-Making and the Peculiar Function of Law*, 26 U. QUEENSL. L.J. 237, 251–54 (2007).

United States or by any state on account of sex.”<sup>99</sup> The amendment was proposed in Congress by large majorities in both houses. The ratification effort, however, stalled at 3 votes short of the necessary 38. In 1978, Congress extended the 7-year deadline originally set for the amendment by another 3 years, but when that period expired in 1982, no additional ratifications had occurred.<sup>100</sup> Meanwhile, in the 10 years following its congressional proposal, many of the substantive results that proponents had hoped the amendment would guarantee were decided by the Supreme Court to be already protected by the Equal Protection Clause of the Fourteenth Amendment.<sup>101</sup> This experience may be looked at in two ways. On the one hand, the social movement that gave rise to the proposed amendment simply manifested itself in a different way that was equally effective.<sup>102</sup> Alternatively, the successful pursuit of judicially managed constitutional reform took the steam out of the ratification movement, assuring the proposed amendment’s failure.<sup>103</sup> More generally, some commentators have argued the judiciary’s seizure of the process of constitutional revision bears much of the responsibility for the atrophy of the Article V technique of constitutional change.<sup>104</sup>

## V. CONCLUSION

Our constitutional system therefore is afflicted with a serious internal contradiction. The ultimate limits of public action are determined by judges in an ongoing and unpredictable process.<sup>105</sup> At the same time, the public justification for those limits is founded on their supposed derivation from the original rules of the Constitution as amended, rules that are, in fact,

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99. *Equal Rights Amendment*, ERA, [equalrightsamendment.org](http://equalrightsamendment.org) [https://perma.cc/2S4K-4NGG].

100. See Kay, *Amendment*, *supra* note 1, at 258, 267.

101. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476–78 (2001).

102. See *id.* at 1476 (stating the amendment was “rejected, yet ultimately triumphant”).

103. *Id.* at 1477–78.

104. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L. J. 1693, 1728 (2010) (noting the Supreme Court’s “attempts to judicially enact amendments that have frustrated the proper working of the amendment process”). By the same token, some commentators have suggested that the rigidity of Article V is a cause of the untethered constitutional interpretation by U.S. courts. For a critical examination of that claim, see generally Marshfield, *supra* note 29.

105. See Kay, *Constitutionalism*, *supra* note 30, at 24.

largely inconsistent with the practical needs and the moral values of a twenty-first century society.<sup>106</sup> It is possible, however, to exaggerate the difficulties arising from this situation. In practice, we have ended up with a kind of “mixed government.”<sup>107</sup> The great bulk of its decisions are driven by institutions that are, at least in the long and medium terms, answerable to popular opinion.<sup>108</sup> Those decisions are then reviewable by unelected judges who measure them not against abstract fixed rules but against their own understanding of appropriate political and social principles.<sup>109</sup> Given the increasingly political character of the selection and confirmation of judges, however, their decisions are unlikely, over the long run, to depart very much from widely held collective values.<sup>110</sup>

This is not an unattractive setup, but for reasons I have outlined above, it is not a constitutional state, one bound by the rule of law. It is true that the need for coordination among its constituent parts may end up reducing the sum total of the activities such a state undertakes, but there are no limits to what it might do if sufficient cooperation were achieved.<sup>111</sup> In the context of the United States, moreover, these arrangements are particularly problematic. That is because, as shown, the unavailability of formal amendment is, in large part, a consequence of exaggerated regard for the 1789 Constitution as amended.<sup>112</sup> It would not do for the judiciary to adopt openly the policy role described. In fact, the Supreme Court always explains even its most creative judgments by first invoking one or more provisions of the constitutional text and then declaring the supposed consistency or inconsistency of the challenged action with those provisions. “The way an institution advertises tells you what it thinks its customers demand.”<sup>113</sup>

It would not be unreasonable to think that this tension between what the courts do and what they say they do cannot be maintained indefinitely.

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106. See generally *id.* at 24–25.

107. See Kay, *Democracy*, *supra* note 9, at 220–26.

108. See *id.* at 222.

109. See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

110. *Id.* at 285.

111. Richard S. Kay, *Substance and Structure as Constitutional Protections: Centennial Comparisons*, PUB. L., Autumn 2019, at 428.

112. LEVINSON, *supra* note 56, at 14–15.

113. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971).

Its continuation depends on the general failure of society to grasp the real facts of the situation. The movement promoting “originalist” constitutional interpretation, insofar as it insists on a demonstrable connection between judicial decisions and the original constitutional rules,<sup>114</sup> may be understood as one reaction to the resulting incongruity. An honest originalist jurisprudence, however, would quickly produce results that were themselves practically unworkable or were offensive to an unacceptably large part of the population.

Two things might resolve the difficulty. Popular dissatisfaction with existing rules, textual or judicial, may become sufficiently widespread to overcome the reluctance to tinker with the Constitution, and an extensive set of amendments could be adopted.<sup>115</sup> As described, this has happened before.<sup>116</sup> If, however, a minority exploits the stringent requirements of Article V to thwart that reform, a sufficiently determined and energized majority might simply abandon what would appear to them, quite reasonably, as a failed constitution and set in motion the establishment of an explicitly new legal regime. This too has happened before—notably in 1787—1789.<sup>117</sup>

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114. See Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASH. POST (Feb. 1, 2017), [washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/](https://washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/) [https://perma.cc/688D-E4X9].

115. The amendments necessary to make the original text adequate to the needs of a modern economy and conformable to evolved social values would work fairly radical changes on the existing institutions, raising the question of whether these revisions could fairly qualify as Article V amendments. These days many national constitutions contain explicit limits on the reach of amendments. Others distinguish between modest changes that may be the subject of amendment and revisions or replacements that require a more rigorous procedure. And, texts aside, some courts have held amendments that alter the core identity of a constitution to be ineffective. For a thorough discussion see generally YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWER* (2017). The sparse U.S. constitutional jurisprudence on the subject has uniformly rejected this kind of argument. See, e.g., *United States v. Sprague*, 282 U.S. 716 (1931).

116. See, e.g., Kay, *Amendment*, *supra* note 1, at 249–50.

117. See Kay, *Chrononomy*, *supra* note 89, at 45–47. In *The Federalist No. 40*, Madison noted that the members of the Philadelphia Convention:

must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness” . . . .

Either course of action would bring into alignment the nominal and the actual practice of our government. But the political reality is that neither of these developments is a reasonable prospect in the foreseeable future. There are few indications that the factors preventing constitutional amendment have in any way weakened. Those same factors militate at least as strongly against the kind of coup pulled off by the eighteenth-century founders. The alternative is the indefinite continuation of what we have now: a mixed government with the aristocratic element performed—but also disguised—by judges. It is satisfactory in many ways, but it is not the legal system the founders had in mind when they declared themselves committed to a “government of laws and not men.”<sup>118</sup>

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THE FEDERALIST NO. 40, *supra* note 10, at 224 (James Madison) (quoting the Declaration of Independence).

118. MASS. CONST. art. XXX.