WHAT IN THE CONSTITUTION CANNOT BE AMENDED?

Douglas Linder*

Ask most Americans whether the United States Constitution is amendable, and they will answer, correctly, of course, that it is. The raging controversy over the proposed equal rights amendment[1] makes it difficult to imagine many people responding otherwise. Were one to ask those same Americans whether the *entire* Constitution was amendable, however, the answers would likely be a good deal more varied. One would probably receive some hesitant " I think so's," a good share of "I don't know's," and a smattering of guesses that a few provisions were too important to be amendable. It would be a rare person indeed who would accurately respond that the guarantee to each state of equal suffrage in the Senate[2] is the only constitutional provision that is now expressly unamendable under the Constitution's own terms.[3] Perhaps

* Assistant Professor of Law, University of Missouri-Kansas City. J.D., 1976 Stanford University.

1. The proposed amendment, which provides that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," was passed by the United States Senate on March 22, 1972. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972). The House of Representatives passed the equal rights amendment on October 12, 1971. H.J. Res. 208, 92nd Cong., 1st Sess., 117 CONG. REC. 35815 (1971). As of July 1, 1981, the proposed amendment still needs to be ratified by three more states before it becomes part of the Constitution.

2. U.S. CONST. art. I, § 3: "The Senate of the United States shall be composed of two Senators from each State. . . ."

3. The equal suffrage provision is expressly made unamendable without the consent of each state by a proviso in article V of the United States Constitution:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to 1808 shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; *and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*

rarer still would be the individual who would identify certain other impliedly unamendable constitutional provisions.

Such responses are hardly surprising in view of the scant attention the matter has received. The Supreme Court has had little to say on the subject,[4] and no pronouncements seem likely in the foreseeable future.[5] Limitations on the subject matter of constitutional amendments have seldom been debated in Congress or the state legislatures.[6] And constitutional scholars, who might be expected to have the strongest interest in the matter, have, at least in recent years, left the issue largely untouched.[7]

It might be suggested that there is a good reason for such unconcern over what limitations exist on the subject matter of constitutional amendments: that the issue is unimportant. But such a suggestion is wrong. Exploration of the reach of the amending power is more than mere indulgence in a brainteaser; it is an inquiry that can give us much insight into the way we think about our Constitution. When we answer the question as to what we can never do constitutionally, we have gone a long way toward clarifying the American conception of constitutionalism.

Id. (emphasis added).

4. The Court has upheld the validity of amendments, without discussion of the issue, against claims that they were outside the power to amend. *See, e.g.*, Leser v. Garnett, 258 U.S. 130 (1922) (nineteenth amendment); National Prohibition Cases, 253 U.S. 350 (1920) (eighteenth amendment). In dictum, the Court has recognized the equal suffrage in the Senate proviso of article V as a "permanent and unalterable exceptions to the power of amendment." Dodge v. Woolsey, 59 U.S. (18 How.) 331, 348 (1855).

5. If adopted, the proposed Washington, D.C. Amendment could provide an opportunity for Supreme Court consideration of the scope of the amending power. Proposed by Congress in August, 1978, Section One of the amendment provides: "For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a state." J. GERARD, THE PROPOSED WASHINGTON, D.C. AMENDMENT 9 (1979). Because the amendment would grant the District representation in the Senate, it is seen as raising questions under the equal suffrage clause. The device of treating a city "as though it were a state" is arguably inconsistent with the intention of the framers to limit representation in the Senate to states. *See id.* at 17-22. Gerard argues that the proposed amendment would entail a deprivation of equal suffrage in the Senate and thus would be invalid unless ratified by all fifty states. *Id.* Under present political conditions, however, the controversy seems academic since ratification of the D.C. Amendment by the necessary thirty-eight states by the 1985 deadline is improbable.

6. Congressional debate on the scope of the amending power has usually occurred, unsurprisingly, in connection with consideration of proposed amendments. *See* CONG. GLOBE, 38th Cong., 1st Sess. 2992-93 (1864) (thirteenth amendment, abolishing slavery); CONG. GLOBE, 40th Cong., 3rd Sess. 707 (1869) (fifteenth amendment, extending suffrage to nonwhites).

7. Scholarly interest in the topic seems to have been limited to the early decades of this century. Among the articles appearing during that period were *e.g.*, Machen, *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910) (arguing that the fifteenth amendment, prohibiting states from denying the right to vote on account of race or color, is void because it changes the composition of the states' electorates and thus changes the identity of "states," and therefore is impliedly prohibited by the equal suffrage proviso of article V(!)); Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1930) (arguing that the equal suffrage proviso is the only limitation on the power to amend); Skinner, *Intrinsic Limitations Upon the Amending Power*, 33 HARV. L. REV. 223 (1919) (arguing that an amendment depriving states of their power to tax would be invalid).

AN EXPRESS LIMITATION ON THE SUBJECT MATTER OF AMENDMENTS: THE CASE OF EQUAL SUFFRAGE IN THE SENATE

Although it is generally assumed today that constitutions are amendable, such was not always the case. At one time, most foreign constitutions[8] and a number of state constitutions[9] failed to include any provision for their amendment. In fact, it has been said that the idea of incorporating within a constitution a provision for its own amendment was largely an invention of the Constitutional Convention in Philadelphia.[10] Article five of the United States Constitution, establishing the procedures by which future alterations to the Constitution are to be made, is more remarkable for its existence than for any limitation it imposes on the subject matter of amendments.

The Origins of Article Five

Delegates to the Constitutional Convention believed that an article providing for amendments to the Constitution was desirable for two reasons. First, the men assembled in Philadelphia were under no illusions that the constitutional scheme they were struggling to establish was perfect for present circumstances, much less perfect for the future generations of Americans that they hoped would live under it.[11] Second, they believed that a flexible constitution would provide the protection needed by a young and somewhat fragile government against revolutionary upheavals.[12] As one delegate said, "The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Government."[13]

The process by which amendments to the Constitution were to be made occupied relatively little of the delegates' time in the early sessions of the Convention. On July 23, 1787, the Convention unanimously agreed to a resolution "that provision ought to be made for the amendment of the articles of the union, whensoever it shall seem necessary."[14] The matter was referred to a committee for the purpose of

8. C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 138 (4th ed. 1968).

9. Of the thirteen state constitutions first framed after the Declaration of Independence, only six contained provision for amendment: Delaware (1776); Pennsylvania (1776); Maryland (1776); Georgia (1777); Vermont (1777); and Massachusetts (1780). 1 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS 278 (Del.), 383 (Ga.), 828 (Md.), 972 (Mass.), 1548 (Pa.), 1865 (Vt.) (2d ed. 1878).

10. C. FRIEDRICH, *supra* note 8, at 138.

11. C. WARREN, THE MAKING OF THE CONSTITUTION 673-74 (1937).

12. *Id.* at 673.

13. *Id., quoting* Elbridge Gerry at the Federal Convention, June 5, 1787.

14. 1 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170 (1888).

preparing a draft provision.[15] There was no indication in the early debates that any provisions in the constitution would not be subject to amendment.

The committee's draft of an article pertaining to the amendment process was not taken up until the closing days of the Convention.[16] When it finally did become the focus of the delegates' attention on September 10, 1787, a sharp disagreement surfaced. Some delegates feared that the committee's proposal, providing simply that Congress call a convention for the purpose of amending the Constitution when it is requested to do so by two-thirds of the states,[17] made the amendment process too easy.[18] Elbridge Gerry, a delegate from Massachusetts, expressed concern that the committee proposal would result in amendments expanding Federal powers at the expense of state powers, and over the objections of as many as one-third of the states.[19] Other delegates, including Alexander Hamilton, had a different fear: that the committee proposal would make the Constitution unduly rigid.[20] Hamilton thought the proposal was deficient in that it failed to empower Congress to call a convention on its own.[21] The states, he said, will apply for alterations only if it will increase their own powers, whereas the national legislature will be the first to perceive, and will be most sensitive to, the need for amendments.[22]

With the committee proposal being attacked as making the amendment process both too easy and too difficult, it is fortunate that there was a James Madison in attendance who was able to offer a proposal that both sides found reasonably satisfactory. Madison's substitute proposal addressed the biggest concern of those who feared subversion of the states by providing that no amendment approved by a convention would become a valid part of the constitution until ratified by three-fourths of the legislatures of the several states.[23] Hamil-

15. *Id.* at 220. The matter was considered by a five-man committee comprised of delegates Rutledge, Randolph, Gorham, Ellsworth, and Wilson. *Id.* at 223.

16. The committee reported its draft on August 6, 1787, *id.* at 230, and on August 30 it was agreed to unanimously. *Id.* at 277. On September 10, however, the Convention agreed to reconsider the article relating to amendments. *Id.* at 296. The Convention adjourned on September 17, 1787. *Id.* at 318.

17. Proposed as article XIX to the Constitution, the draft article provided: "On the application of the legislature of two-thirds of the states in the Union for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose." *Id.* at 230.

18. *Id.*, vol. 5, at 531.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Madison's proposal provided that:

> The legislature of the United States whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at

ton's fear that states would only apply for self-serving amendments was lessened by Madison's proposal that Congress, upon a vote of two-thirds of the members of both Houses, be allowed to propose amendments.[24]

Only after general agreement was reached on the nature of the amendment process was it suggested that the amendment power should be limited in any way as to subject matter. John Rutledge, a delegate from South Carolina, announced that he could not support a document that potentially gave nonslave states the power to amend provisions of the Constitution that denied to the national government the power to prohibit or tax the slave trade.[25] Rutledge's demand was acceded to in part by the Convention, which agreed to add a proviso to article five prohibiting any amendment prior to 1808 which "shall in any manner affect" the provisions of the Constitution relating to slaves.[26] In making this concession to South Carolina and Georgia, the recent and highly emotional debates between representatives from northern and southern states on the slave issue loomed large in the minds of delegates.[27] The hope was expressed that after twenty years, the subject might be reconsidered with less difficulty and greater coolness.[28]

On the last business session of the Philadelphia Convention, September 15, 1787, the subject of the amendment process came up again.[29] Connecticut delegate Roger Sherman voiced his fear that the Constitution as proposed would allow three-fourths of the states to take actions that would be fatal to particular states, such as abolishing them altogether or depriving them of their equal suffrage in the Senate.[30] In an effort to prevent that from happening, Sherman made a series of motions. His motion to amend the proposed article to provide that no amendment would become effective until it had been ratified by *all* of the states[31] failed, with three states voting for it and seven against

---

least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the U.S.

Id.

24. *Id.*

25. *Id.* at 532. Rutledge's proposal prohibited amendments affecting the first and fourth clauses in the ninth section of the first article. Those clauses provide:

Clause 1: The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year eighteen hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars per each person.

Clause 4: No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

U.S. CONST., art. I.

26. J. ELLIOT, *supra* note 14, vol. 5, at 532.

27. *Id.*

28. *Id.*, vol. 4, at 178.

29. *See id.*, vol. 1, at 315-17; vol. 5, at 551-52.

30. *Id.*, vol. 5, at 551.

31. *Id.*

it.[32] Sherman's next motion, to prohibit any amendment without the consent of the state, that would affect it in "its internal police" or deprive it of its equal suffrage in the Senate,[33] also failed, this time by a vote of eight to three.[34] Sherman persisted. His next motion was drastic: to strike the entire article relating to amendments and thus make the entire Constitution unamendable.[35] Not surprisingly, this motion was also soundly defeated.[36]

Finally, Gouverneur Morris of Pennsylvania made the motion that was to result in another proviso being added to article five of the Constitution. Morris argued that the provision guaranteeing to each state equal suffrage in the Senate should not be subject to amendment.[37] Along with the slave issue, the composition of the Congress had been one of the most divisive issues debated that summer in Philadelphia; a compromise had emerged from seemingly irreconcilable differences.[38] No one wanted to jeopardize what had been accomplished. Madison described what happened: "[T]his motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or on the question, saying no."[39]

Does the Equal Suffrage Proviso to Article Five Mean What It Says?

The words of the Constitution itself would seem to dispel any doubt as to whether there exists a limitation on the subject matter of amendments. They have not. Despite the fact that article five expressly provides that no amendment shall deprive a state of its equal suffrage in the Senate, it has been suggested that the provision is "merely declaratory."[40]

One argument denying the ultimate validity of subject matter limitations on the power of amendment is grounded in the belief that it is in the people—not in some document—that the sovereign power resides. Words in the Constitution that purport to impose limitations on

32. *Id.* The states voting in favor of Sherman's motion were Massachusetts, Connecticut, and New Jersey (New Hampshire was divided). *Id.*

33. *Id.* at 551-52. Madison objected to the motion, arguing that there should be no special provisos. *Id.* at 552. Madison warned that if this motion were agreed to, States would next insist on similar provisos for their boundaries, exports, and other matters. *Id.*

34. *Id.* Voting in favor of the motion were the small states of Connecticut, New Jersey, and Delaware. *Id.*

35. *Id.*

36. *Id.* The vote was 8-2. Only Connecticut and New Jersey voted "ay". *Id.*

37. *Id.*

38. *See generally* G. WOOD, CREATION OF THE AMERICAN REPUBLIC (1969). Madison said that the equal suffrage proviso "was probably meant as a palladium to the residual sovereignty of the states, implied and secured by the principle of representation in each branch of the Legislature; and was probably insisted on by the States particularly attached to that equality." THE FEDERALIST NO. 43 (J. Madison), at 4.

39. J. ELLIOT, *supra* note 14, vol. 5, at 552.

40. See remarks quoted in note 67 *infra*.

what is amendable, the argument runs, represent an attempt to bind the "will of the people" and may be ignored by a judge or a legislator considering an amendment of the sort prohibited by the Constitution's own terms.[41]

In a sense, the will of the people cannot be bound. If "will of the people" means the position supported by an overwhelming preponderance of the political forces in a society and not simply the view supported by a majority of society's members, then it is almost inevitable that the law will eventually come to reflect the will of the people.[42] To accept as a political fact-of-life the long-run triumph of dominant social forces is not, however, necessarily to agree that the conscientious judge or legislator should heed demands to ignore the clear words of the Constitution. Yet acceptance of the so-called "social theory of law" does raise a question: if it is nearly inevitable that a given point of view will become the law, regardless of whether a few judges temporarily prevent that from happening, would it not be better if the change were allowed to occur in the way least threatening to our values and institutions?

The problems associated with alternative means of effectuating a constitutional change may well provide the best justification for not giving effect to a limitation on the subject matter of amendments. Put most strongly, an effort to enforce such a limitation could endanger the stability of the republic. If change of the law must be accomplished through the drafting of a new constitution, the possibility exists that an insensitive or shortsighted majority may cast aside constitutional protections for states' rights and individual liberties, thereby increasing the risk that dissatisfied minorities will resort to force to achieve their objectives. On the other hand, delegates to a second constitutional convention could prove this concern to be exaggerated or even produce a document better suited than the old to the needs of today's society. But even if it is assumed that on balance it is wiser to retain a document which has benefited from 200 years of evolutionary development, the threat of a constitutional convention is only one—albeit an important one—of the factors to be weighed in deciding whether to enforce a limitation on amendments. The danger of a constitutional convention should be discounted by its improbability (which in the case of the issue of equal suffrage in the Senate is exceedingly great) and balanced against the strong societal interest in having decisions based on traditional judicial considerations, such as the language of the document

41. *Id. See also* C. FRIEDRICH, *supra* note 8, at 146.

42. *See generally* L. FRIEDMAN, THE LEGAL SYSTEM (1975); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

and the intentions of its framers, rather than on purely political considerations.

Less convincing than the consequences-oriented argument for not enforcing a subject matter limitation on amendments is the argument that such limitations are invalid because they conflict with rights guaranteed under natural law. It is an argument difficult to keep within bounds. Conceding for purposes of discussion the highly questionable proposition that judges are justified in seeking out and applying natural law precepts in cases such as this, it remains doubtful whether a principled distinction exists between article five's procedural requirements that must be satisfied before any amendment becomes effective and its proviso that makes possible deprivation of equal suffrage in the Senate only with the consent of each state. If the usual article five procedures for ratification of amendments present no conflict with natural law, at what point would requirements for adoption of an amendment become so burdensome as to cause a conflict to arise? What, for example, would be the status of a provision like that contained in the Articles of Confederation requiring approval of proposed amendments by *all* states before they were adopted,[43] or a provision like that in an amendment proposed in 1826 allowing amendments to be made only every ten years,[44] or a provision of the Hawaii constitution establishing a particularly burdensome procedure for amending certain constitutional provisions?[45] Could the Constitutional Convention, consistent with natural law, have specified one set of procedures for amendments *restricting* the power of the national government and a more burdensome set of procedures for *expanding* the power of the national government? These do not seem the sort of questions to which natural law has answers. The scant case law that exists on the validity of subject matter limitations on amendments supports the position that such limitations are properly enforceable by the courts.[46] The United States Supreme

43. Article XIII of the Articles of Confederation (1777) provided that:

> [T]he articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.

44. Representative Herrick's proposed amendment would have postponed the proposal of further amendments to the year 1830 and to every tenth year thereafter. REGISTER OF DEBATES IN CONGRESS (Gales & Seaton eds.), 19th Cong., 1st Sess., col. .554 (1826).

45. Hawaii's Constitution contains a provision relating to apportionment of the Senate which provides: "[N]o constitutional amendment altering this proviso or the representation from any senatorial district in the state shall become effective unless it is approved by a majority of the votes tallied upon the question in each of a majority of the counties." HAWAII CONST. art. 16, § 1.

46. In Eason v. State, 11 Ark. 481 (1951), the Arkansas Supreme Court considered the validity of an 1846 amendment that sought to modify the Declaration of Rights contained in the Arkansas Constitution. The amendment gave jurisdiction to justices of the peace in prosecutions for assault and battery, in contravention of a constitutional provision that "no person shall be punished for a criminal offense but by indictment or presentment." *Id.* at 487-88. Despite the fact that the Constitution provided that this and other provisions of the Declaration of Rights were

Court has never invalidated a constitutional amendment on the grounds that it was outside the amending power. It has, however, considered the content of an amendment as presenting a justiciable question.[47] And rightly so. When an amendment is proposed in violation of a provision limiting the power of amendment, the courts should declare its provisions to be void. To hold otherwise would be to allow Congress to do an act forbidden by the Constitution and to allow the states to enact a constitutional amendment by an unauthorized vote. The Court has, in dictum, recognized the equal suffrage proviso as an enforceable limitation on the amending power.[48] In *Dodge v. Woolsey*,[49] the Court referred to the proviso as a "permanent and unalterable exception of the power of amendment."[50]

Jefferson once observed, with disapproval, that "some men look at constitutions with sanctimonious reverence and deem it like the ark of the covenant, too sacred to be touched."[51] We *are* free to touch the Constitution, to shape it to fit current needs, even, if necessary, to tear it up and write a new one. What we are not free to do is to ignore it, and that is precisely what those who urge the invalidity of the article five proviso would have us do.

How Far Does the Limitation on the Amending Power Extend?

It is fortunate that the constitutional provision guaranteeing to each state equal representation in the Senate leaves so little room for judicial interpretation. The risk is thereby minimized that a controversial interpretation of the clause will provide the impetus for a constitutional amendment that could eventually lead to a confrontation between the branches of government over the enforceability of the article five proviso. Yet even a provision as precise as this one has buried within it the seeds of controversy.

Controversy over the meaning of the article five limitation on the amending power was once very real. From the equal suffrage proviso—a constitutional molehill—those opposed to various amendments attempted to build a mountain which, with the Court's help, would become an immovable object capable of withstanding the nearly irresisti-

"involate and forever excepted out of the general powers of government," *id.*, the state argued that the attempted abrogation of those rights was valid. *Id.* at 487. The court disagreed, holding that the Declaration of Rights could only be repealed or modified by a convention called to reconstruct or reform the government. *Id.* at 492-93, 503.

47. *See* Leser v. Garnett, 258 U.S. 130 (1922); National Prohibition Cases, 253 U.S. 350 (1920).

48. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 348 (1855).

49. 59 U.S. (18 How.) 331 (1855).

50. *Id.* at 348.

51. THOMAS JEFFERSON ON DEMOCRACY 67 (S. Padover ed. 1953).

ble forces pushing for constitutional change. Article five's seemingly minor exception to the amending power became the basis for deducing implied limitations on the power to abolish the Senate, alter the powers of the Senate in any significant way, modify state boundaries, change the composition of the electorate of any state, and place undue restrictions on the powers of state governments.[52] Law review articles and appellates briefs argued that the equal suffrage proviso necessitated invalidation of the fifteenth amendment (suffrage for nonwhites),[53] the eighteenth amendment (prohibition),[54] and the nineteenth amendment (suffrage for women).[55] Fortunately for the country, these arguments never gained judicial acceptance.[56] Recently, the tenuous reasoning on which objections to these earlier amendments were based has resurfaced in suggestions that the proposed amendment to give two Senate votes to Washington, D.C. would be void if adopted.[57]

Of the implied limitations allegedly deducible from the article five proviso, none has a stronger basis than the suggested limitation on the power to abolish the Senate. It could be strongly urged that the desire of the framers to protect equal suffrage in the Senate from amendment would be frustrated just as surely by an amendment abolishing the Senate as by one allocating to some states more Senate votes than to others. Indeed, although abolition of the Senate would cause all states to suffer an equal deprivation of their suffrage in the Senate, such an action would plainly be incompatible with the language of the article five proviso. No suffrage at all is not "suffrage," and there is nothing "equal" about denying large and small states alike suffrage in the Senate.[58]

Nonetheless, an amendment abolishing the Senate, however unlikely a prospect that may be, should be upheld as valid. The case for affirming the constitutionality of an amendment abolishing the Senate must be based on a holistic theory of constitutional interpretation. Such a theory would allow one to argue that actions inconsistent with the language of one constitutional provision may nonetheless be consti-

52. *See* Machen, *supra* note 7, at 171-76.

53. *See generally* Machen, *supra* note 7, *passim*; Brief for Appellant, Meyers v. Anderson, 238 U.S. 368 (1915).

54. *See generally* Brief for Appellant, National Prohibition Cases, 253 U.S. 350 (1920); Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); White, *Is There an Eighteenth Amendment?* 5 CORNELL L.Q. 115 (1920).

55. *See generally* Brief for Appellant, Leser v. Garnett, 258 U.S. 130 (1922).

56. Arguments that the fifteenth amendment exceeded the scope of the amending power were expressly rejected in Anderson v. Myers, 182 F. 223, 231 (1921). The Supreme Court simply ignored the contention. Meyers v. Anderson, 238 U.S. 368 (1915). The Supreme Court has held that both the eighteenth and nineteenth amendments are within the power to amend. National Prohibition Cases, 253 U.S. 350, 386 (1920); Leser v. Garnett, 258 U.S. 130, 136 (1922).

57. *See* J. GERARD, *supra* note 5, at 17-22.

58. *But see* the suggestion in Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1930): "[i]f the Senate were abolished the equality of suffrage would not be disturbed as each state would have no senators at all." *Id.* at 578.

tutional if affirmation of their constitutionality is necessary to effectuate the broad design of the Constitution. Thus, the framers' broad belief, embodied in article five, in the desirability of a constitution flexible enough to accommodate major alterations in the structure of government should be honored because it was "more basic" than the framers' specific belief that the right of states to equal suffrage in the Senate should never be eliminated by amendment. The equal suffrage proviso of article five was intended to prevent attempts to reduce the political impact of small states; it was not intended to prevent a shift to a new governmental structure when that shift is not motivated by the desires of large states to strengthen their political influence. Had these greater consequences been intended, it is not unreasonable to suppose that the framers would have expressly said so. Similar logic would dictate that constitutional amendments reducing the powers of the Senate under article one (e.g., removing the Senate's power to approve treaties) should be upheld unless premised on the belief that exercise of the power in question by Senators from small states—as opposed to exercise of the power by senators generally—was the cause of the mischief.

The issue need be framed only slightly differently when an amendment has the effect of diluting the voting strength of the states in the Senate. When the constitutional amendment is directed at remedying an evil unrelated to the senatorial voting patterns, as the proposed D.C. amendment arguably is, the dilution in voting strength should be constitutional. Where, on the other hand, an amendment represents an effort to dilute the influence in the Senate of the smaller states, it should be declared invalid under the article five equal suffrage proviso.

A test that focuses on whether an amendment was intended to lessen the impact of smaller states in Congress has several advantages.[59] It is true to the framers' intent, it is straightforward (as constitutional tests go), and, by the narrow construction of the proviso it represents, it reduces the danger that any future amendment ever will be invalidated. On the other hand, intentions of a collective body are difficult to determine with any degree of confidence. And here, where the relevant intentions are not only those of the congressmen who proposed an amendment but also the state legislators who voted for ratification, the difficulties are magnified. Intentions vary from person to person. Nonetheless, inferences can be drawn, and the court's task is really no different in kind from the inquiry it makes in certain equal protection cases, where evidence of purposeful discrimination is re-

59. Were an amendment actually to give some states more votes in the Senate than others, there would, of course, be no reason to inquire into the motives of Congress or the state legislatures. The words of article V clearly prohibit such an amendment. *See* U.S. CONST. art. V.

quired before a constitutional violation can be found.[60] The comparison with equal protection law is apt since the article five proviso is a sort of limited equal protection clause for the benefit of small states.

AN IMPLIED LIMITATION ON THE SUBJECT MATTER OF AMENDMENTS: THE CASE OF THE "UNAMENDABLE" AMENDMENT

In 1861, Congress proposed to the state legislatures a thirteenth amendment to the United States Constitution. It provided that: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[61] The amendment was ratified by the legislatures of Ohio and Maryland and by a constitutional convention in Illinois[62] before events of the time overtook its purpose. The proposed amendment was plainly a last-ditch effort by Congress to prevent disunion, and with the outbreak of war between the states, all efforts to adopt the amendment ended. Within a few years, the thirteenth amendment to the Constitution was adopted to do the very thing that the proposed amendment would have prohibited: to abolish slavery in the states.[63]

We can only speculate as to what might have happened had the proposed thirteenth amendment (called the Corwin Amendment[64]) become part of the Constitution. It is most unlikely, however, that the presence of the Corwin Amendment in the Constitution would have discouraged the federal government from acting on the slavery issue. The demands for federal action were simply too strong to be ignored.

The obstacle posed by the Corwin Amendment could have been dealt with in any of several ways. One way would have been for the Supreme Court to construe the amendment to allow federal abolition or regulation of slavery—a difficult task since the prevention of federal "abolition or interference" with state laws permitting slavery was clearly the purpose of the amendment. A second, revolutionary approach would have been to convene a constitutional convention for the

60. In the absence of a suspect or quasi-suspect classification, the Court has required that plaintiffs show purposeful discrimination. *See* Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

61. CONG. GLOBE, 36th Cong., 2d Sess. 1263 (1861).

62. UNITED STATES DEPT. OF STATE, 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 518 (1894). The ratification by the Illinois constitutional convention was almost certainly invalid.

63. U.S. CONST. amend. XIII.

64. It is named after Rep. Corwin (Ohio). Corwin was chairman of a special committee on conciliation. President Buchanan had urged Congress to submit amendments as a last gasp measure to save the Union. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 625-26 (1897).

purpose of drafting a new constitution that would specifically give to Congress the power denied to it by the amendment. A third, and probably more likely, scenario would have been the adoption of the thirteenth amendment—in our revised script of history, now the fourteenth amendment—with the Supreme Court eventually reaching the question of whether it could be enforced. The question could have been presented to the Court as a result of the adoption of either two amendments (one repealing the Corwin Amendment and a second abolishing slavery) or one (abolishing slavery). Only a hidebound formalist would contend the difference is significant. If the measure of constitutional adjudication is fidelity to the intentions of the Congress that proposed the amendment, the result in either case should be the same.

Since it was assumed by members of the Thirty-sixth Congress that the federal government already lacked power under the Constitution to regulate slavery in the States,[65] the Corwin Amendment, if it had any legal significance at all, must have been intended to prevent any future amendment from authorizing Congress to regulate slavery. Senator Douglas believed this to be not only the intent of the amendment, but its effect as well:

> [T]here will be a clause then in the Constitution declaring that no future amendment shall ever authorize Congress to interfere with the question of slavery in the States. That being a part of the Constitution, it will be just as sacred as the clause now in the Constitution, declaring that no future amendment shall ever deprive any State of its two Senators in Congress.[66]

Although other Senators doubted Douglas' contention that after adoption of the Corwin Amendment future amendments authorizing the regulation of slavery would be ineffective,[67] no one disputed the pur-

65. *See* CONG. GLOBE 36th Cong., 2d Sess. 1387-96 (1861).

66. *Id.* at 1387.

67. The following remarks are indicative of the skepticism of some Senators as to the effectiveness of the Amendment:

> MR. BIGLER . . . . [The Corwin Amendment] in truth amounts to nothing but a mere declaration; a declaration which, coming from the other side, I agree may be of some temporary value to the country—the declaration that the Constitution shall not be changed, so as to allow Congress to interfere with the local institutions of the States. That is all there is in it; for the article itself remains liable to change under the same rule as any other portion of the Constitution. . . .
>
> MR. CLINGMAN: . . . . [I] would call the (adoption of this resolution) a mere nullity, which the country neither desires nor expects. I will venture to affirm that there is not an intelligent man in the United States that believes it will be of any practical advantage to have this proposition adopted . . .

Id. at 1387. Consider also this exchange between Senators Douglas and Mason:

> Mr. DOUGLAS . . . . [I]t will be just as sacred as the clause now in the Constitution, declaring that no future amendment shall ever deprive any State of its two Senators in Congress.
>
> Mr. MASON. Just precisely; not more so. But, Mr. President, I am not to tell that honorable Senator that the power which makes a Constitution can unmake it. What power makes a Constitution? Under the present Constitution, three fourths of the States.

pose of the proposed amendment. All understood it as an attempt to pacify the concern of the slave states that the future admission to the Union of nonslave states would lead to passage of an anti-slavery amendment.[68]

Were the Corwin Amendment to have become part of the Constitution, no less violence would be done to the intentions of the Thirty-sixth Congress by the simple adoption of an amendment prohibiting slavery than by adoption of such an amendment only after adopting another amendment repealing the Corwin Amendment. The intention to prohibit repeal of the Corwin Amendment is implied by the terms of the amendment itself; no principled decision could depend upon whether the amendment did or did not include a clause expressly declaring the amendment not to be subject to repeal. If the Corwin Amendment had had legal significance beyond a mere admonishment to congressmen and state legislators, an act of Congress proposing an amendment repealing the Corwin Amendment would be unconstitutional, and the subsequent ratification of the amendment would be ineffective.

In view of the explicit limitations on the amending power contained in article five, the absence of any express prohibition of "unamendable" amendments such as the Corwin Amendment may argue against the existence of an implied limitation. Obviously, the existence of the equal suffrage proviso of article five indicates that the makers of the Constitution gave some consideration to the scope of the amending power. Indeed, the explicit limitation in article five is the basis of an argument denying the existence of various limitations on the subject matter of amendments supposed to be implicit in the constitutional scheme. The unamendable amendment, however, stands on a different footing.

Had the framers meant to prohibit amendments abolishing the Supreme Court, establishing a hereditary monarchy, or uniting two existing states, one could reasonably expect them to have said so. But the same cannot be said about a prohibition against enforcement of amendments that are by their own terms not subject to repeal. The prohibition of amendments that would dismantle certain fundamental institutions and arrangements established by the Constitution, includ-

---

> Three fourths of the States can alter the Constitution under the present compact; and if they find this clause there, which declares that it shall not be altered, is not that as much in their power as any other clause? And if it is not, why is it not? Senators may say there is good faith in it. There is political faith in it; there is propriety of law—I mean of moral law—in it; but there is nothing more. Cannot the power that made unmake? Does anybody deny that?

Id.

68. *Id.* at 1387-96.

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

There is little doubt, however, that the makers viewed the Constitution not as an end in itself but as a means of achieving a stable and just Union. The Constitution was to provide a vehicle through which change could peaceably occur. It was thought far preferable for dissatisfied constituent groups to work through the amending process than to resort to other means to achieve their objectives. Mason said at the Convention: "The plan now to be formed will certainly be defective, as the Confederation has been found, on trial, to be. Amendments therefore, will be necessary and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence."[69] Later, Justice Story wrote:

> [T]he Constitution of the United States . . . is confessedly a new experiment in the history of the nations. Its framers were not bold enough to believe, or to pronounce it to be perfect. They believed that the power of amendment was, . . . the safety valve to let off all temporary effervescenses and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self destruction.[70]

Mason and Story, and indeed almost all of their contemporaries, shared a conception of a constitution as a "living" document. There was disagreement over precisely how difficult or easy it should be to change the Constitution, but almost nobody argued that change should not be possible.

Nothing could be more inconsistent with the conception of the living Constitution than an unamendable amendment or an amendment authorizing unamendable amendments and which by its own terms is unamendable. As the framers recognized, the foreclosing of all possibility of constitutional change poses two dangers: it increases the risk of violence and revolutionary change, and it increases the risk that people will grow to disrespect the source of the institutions and arrangements that are forced on them. These dangers seem all the more acute when one considers the type of amendments which are most likely to be made unrepealable. As suggested by proposal of the Corwin Amend-

69. C. WARREN, *supra* note 11, at 673.
70. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1827 (1833).

ment, it is precisely when emotions are highest and divisions are deepest that an "unamendable" constitutional amendment stands the greatest chance of adoption, for it is then that the prospect of an early repeal is seen by proponents of the amendment as most likely.[71] One could, for example, conceive of anti-abortion groups urging adoption of an unamendable amendment banning abortions; support for an unamendable amendment calling for the direct election of the President seems much less probable.

Can it be said with confidence that the framers intended to prohibit amendments to the Constitution that, like the Corwin Amendment, are by their own terms not subject to repeal or amendment? Probably not. Rarely does the search for the intent of framers end in anything but ambiguity. Quite possibly the question as to whether the Constitution should prohibit such amendments never occurred to most delegates to the Philadelphia Convention. Thus, although the records of the Convention make it possible to predict that most delegates would have voted to prohibit unamendable amendments if it were proposed to do so, it is far from clear whether a majority of delegates believed that they had adopted a constitution which impliedly banned unamendable amendments.

In the face of the uncertainties that surround inquiry into the mental states of men who lived two centuries ago, it is often best for a court to frankly admit that constitutional decisionmaking always involves choices among ultimate values and goals. In the case of a court considering whether to enforce the Corwin Amendment, a balancing of competing values should lead to a decision not to give effect to the amendment. Declaring an anti-slavery amendment void or the constitutional amendment process unavailable with respect to the slavery issue would pose real dangers to political institutions and would raise moral questions as well. Is it moral or consistent with democratic theory to allow one generation to prevent succeeding generations from making certain fundamental moral and political choices?[72] If the answer is "no," then absent identification of any important values that would be jeopardized by refusal to enforce the Corwin Amendment,[73]

71. Consider, for example, the one instance in our history where a constitutional amendment has been expressly repealed: The repeal of the eighteenth amendment by the twenty-first amendment.

72. Thomas Jefferson left no doubt where he stood on the matter: "Each generation . . . has a right to choose for itself the form of government it believes the most promotive of its own happiness . . . A solemn opportunity of doing this every 19 or 20 years should be provided by the Constitution. . . . THOMAS JEFFERSON ON DEMOCRACY 67 (S. Padover ed. 1953).

73. One argument that can be advanced in favor of rigid constitutions is that they are less susceptible to overthrow from within. Although the overthrow may occur anyway, there could be some value in eliminating the pretense that the overthrow is "constitutional." A case in point is Germany, where in March of 1933 a bare majority of National Socialist and Nationalist deputies

the duty of a judge is clear.

CONCLUSION

No one worries much about the scope of the amending power until a controversial amendment is proposed or adopted. When that time comes, opponents of the amendment begin to scrutinize article five in the hopes of finding some rope, however tenuous, by which the amendment might be hung. It is far better to have the meaning of article five considered at a time when analysis is not so clouded by emotions.

Efforts to define the proper scope of the amending power should begin, but not end, with an examination of the words of article five and the pertinent records of the Federal Convention. The words and history of article five indicate that there is one express limitation on the amendment power: no state can (without its consent) be deprived of its equal suffrage in the Senate. Through an understanding of the underlying purposes of the Constitution it is possible to appreciate a second limitation on the amendment power: article five itself cannot be amended so as to create any new limitations on the amending power.

---

used their power within the German legislature to bar opposition members, and then "amended" the constitution so as to give absolute power to the government to change it. C. FRIEDRICH, *supra* note 8, at 138. The Corwin Amendment, however, would not have reduced the danger of overthrow.