

2004

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Recommended Citation

Scott J. Bowman, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 Fordham L. Rev. 1017 (2004).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss4/5>

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NOTES

WILD POLITICAL DREAMING: CONSTITUTIONAL REFORMATION OF THE UNITED STATES SENATE

*Scott J. Bowman**

“No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.”¹

INTRODUCTION

Virginia was the largest state in 1790, with a population of 747,550.² With a population of 59,096, Delaware was the smallest,³ giving it, per capita, nearly thirteen times the political power of Virginia in the Senate. As of July 1, 2003, California had a population of 35,484,453 and Wyoming a population of 501,242, providing the residents of Wyoming with more than seventy times the political power of Californians in the Senate.⁴ Despite this growing discrepancy in political power, the United States Senate has, in certain respects, become a more representative body through the expansion of the franchise and the institution of direct elections.⁵ It should become

* J.D. Candidate, 2004, Fordham University School of Law. This Note grew out of a seminar paper written for Professor James E. Fleming, who helped develop many of the ideas found herein. The Note also benefited from the thoughtful comments of Dean William M. Treanor, as well as the overall encouragement of Professor Elizabeth Cooper. Many thanks to my parents for making law school a possibility and to T for making it a joy.

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

2. See 1790 State Level Census Data, University of Virginia Geospatial and Statistical Data Center, Historical Census Browser, available at <http://fisher.lib.virginia.edu/collections/stats/histcensus> (last visited Feb. 5, 2004).

3. *Id.*

4. See U.S. Census Bureau, Annual Population Estimates by State, available at <http://eire.census.gov/popest/data/states/tables/NST-EST2003-01.php> (last visited Jan. 15, 2004); see also Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?* 13 J.L. & Pol. 21, 24-29 (1997) (explaining how the allocation of representation in the Senate gives small states disproportionate power).

5. See U.S. Const. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.”); *Garcia v. San Antonio Metro. Transit*

even more so. As population disparities continue to grow, the arguments for restructuring the Senate will become increasingly compelling.

The question then becomes: Even if we wanted to, could we do anything to change the Senate? Article V of the Constitution—which plainly provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”⁶—tends to support the accepted view that we can do little. The Framers did not want subsequent generations to restructure the Senate using the “normal” procedures for amendments outlined in Article V.⁷ However, as drafted and ratified, Article V remains internally inconsistent to this day.⁸

The inconsistency resulted from a compromise between the delegates to the Constitutional Convention who were more nationalist and those who were more federalist.⁹ The final clause of Article V

Auth., 469 U.S. 528, 554 (1985) (“We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.”).

6. U.S. Const. art. V.

7. Article V of the Constitution provides:

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

Id.

8. This inconsistency is not surprising considering that the Equal Suffrage Clause represents a compromise. See *The Federalist* No. 62, at 316-17 (Alexander Hamilton or James Madison) (Max Beloff ed., 1948). Of course, the Entrenchment Clauses are not the only compromises found in the Constitution. Article III requires the creation of a Supreme Court and any lower courts that Congress may see fit to create. See U.S. Const. art. III (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). This compromise represents the result of debate regarding the nature and need for lower federal courts:

[B]oth nationalists, like Randolph and Hamilton, and more pro-state delegates, like Paterson, initially seem to have been united in a desire to create an independent national judiciary consisting of at least a supreme court with constitutionally established jurisdiction. . . . These initial proposals differed only on the need for and manner of creation of inferior federal courts and in the manner of appointment of federal judges.

Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 762 (1984).

9. See *The Federalist* No. 39, at 195 (James Madison) (Max Beloff ed., 1948) (“[The Constitution] is neither wholly *national*, nor wholly *federal*. . . . In requiring

protects this compromise.¹⁰ Its language, however, need not be read to permanently entrench the Senate's structure. Congress could simply amend the Equal Suffrage Clause out of the Constitution and be done with it. Congress has this pure power. But would such an assertion of power be constitutional given what we know, or think we know, about the Framers' intent and original understanding?

It has been suggested that simple exertion of political will can accomplish most anything,¹¹ regardless of its legitimacy. This Note argues that Article V itself gives such political exertion legitimacy by creating a supermajority process for amending the Constitution.¹² As far as Article V is concerned,¹³ there is no distinction between what can be done pursuant to its supermajority procedures and whether it is constitutional to do so.¹⁴ Specifically, this Note argues that an amendment eliminating the Equal Suffrage Clause—leading the way to the restructuring of the Senate—would be constitutional, regardless of the Framers' intent to the contrary.¹⁵ Such an amendment would

more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances toward the *federal* character.”); *see also infra* Part I.

10. U.S. Const. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

11. John Rawls, *Political Liberalism* 233 (1993) (“[I]n the long run a strong majority of the electorate can eventually make the constitution conform to its political will. This is simply a fact about political power as such. There is no way around this fact, not even by entrenchment clauses that try to fix permanently the basic democratic guarantees.”).

Throughout much of the work regarding limitations on amendments this distinction between political will and formal legality is distinguished from legitimacy. *See, e.g.*, Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 *Colum. J.L. & Soc. Probs.* 251, 277 (1996) (“Although an unamendable amendment may be *technically* legal, it would be imprudent to make such an amendment.” (emphasis added)). This Note suggests that in many instances simple exertions of political will are not legitimate means of altering the Constitution. However, it just so happens that Article V itself legitimates certain manifestations of political will—as realized during the use of the procedure set forth in the article itself.

12. *See* U.S. Const. art. V (where a particular manifestation of political will is defined as the mode for amending the Constitution); *see also infra* Part III.

13. It should be emphasized that the arguments about constitutional legitimacy relate to Article V. This Note does not argue that the realization of political will is always constitutionally legitimate. Article V, however, does clearly express a system of determining what is a legitimate constitutional change that embodies a particular form of political will.

14. *See* Katz, *supra* note 11, at 276 (referring to authors who believe “that some basic fundamental principles in the U.S. Constitution are, or should be, inviolate”). Conflating whether aspects of the Constitution are “inviolate” with whether they should be muddles an important part of the examination of limitations on the Constitution. This Note addresses why Article V scholars should limit their arguments to the “are” and leave the “should be” to the political process.

15. U.S. Const. art V.

allow us to re-strike the balance of values embodied in our Senate's representational scheme.¹⁶

Part I of this Note examines the text of Article V and the Framers' debate about the preferable form for the Senate. Part II explores theories regarding amendment of the final clause of Article V as well as alteration of the Constitution more generally.¹⁷ Part III argues that the Senate should be reformed through the passing of two amendments: the first removing the Equal Suffrage Clause and the second restructuring the Senate.

I. THE DRAFTING OF ARTICLE V

Article V presents the following mechanism for amending the 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.¹⁸

16. See *infra* Part III.

17. In addition to the theories mentioned in Part II, Professor Bruce Ackerman also offers an interesting view of amending the Constitution outside Article V in his book, *We the People: Foundations*. See 1 Bruce Ackerman, *We the People: Foundations* (1991); see also Sanford Levinson, *The Political Implications of Amending Clauses*, 13 Const. Comment. 107, 109 (1996) (arguing "that it is naive to identify 'amendment' *only* as formal textual additions (or subtractions)"). This Note only focuses on those theories that address the alteration of the formal text itself. See *infra* Part II. Professor Amar's reliance on history and originalism makes his work particularly relevant to the discussion herein even when this Note rejects an approach that gives the historical understanding of Article V dispositive weight when interpreting the text. When explaining why he focused on Amar's views instead of Ackerman's in discussing Article V, Professor Henry Paul Monaghan noted:

First, Ackerman purports to find legitimate constitutional change in the contemporary political consent of "We the People"; Amar, by contrast, attempts to enlist the traditional trappings of constitutional legitimacy—historical support and original understanding. . . . Second, as noted above, the relevance of this debate is highlighted by the fact that the outcome of recent important Supreme Court cases has turned upon judicial understandings of the original understanding of federalism.

See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 130-31 (1996). In addition, Professor Ackerman himself believes Article V should be amended to incorporate more popular sovereignty. See Ackerman, *supra*, at 54-55. While this Note only describes how the Equal Suffrage Clause could be altered, the procedure itself could be changed as well.

18. U.S. Const. art. V.

The language appears to open the door to revision of any sort.¹⁹ However, the Framers included two caveats to ensure ratification of the Constitution.²⁰

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.²¹

The limitations struck a balance between nationalist and federalist forces.²²

The Equal Suffrage Clause directly addresses the issue of restructuring the Senate. The Senate was originally designed as a counterweight to the more representative House of Representatives.²³ The Senate would, in the words of Madison, offer “more coolness, with more system, & with more wisdom” than its companion branch.²⁴ As such, it calmed the fears of the small states that the new government would eliminate them as equal sovereigns.²⁵ As stated in *The Federalist No. 62*, the equal vote in the Senate “is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.”²⁶ The Senate itself, however, was not a sufficient protection against usurpation of power by larger states. The Equal Suffrage Clause served as an additional barrier to the formation of a Congress based purely on proportional representation.²⁷

19. See *infra* Part III.

20. See *infra* Part I (discussing the text of Article V and the compromises it represents).

21. U.S. Const. art. V.

22. See *The Federalist No. 62*, *supra* note 8.

23. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 *Nw. U. L. Rev.* 500, 509 (1997) (noting that the debates in the Constitutional Convention regarding the Senate touched on two major themes, one being that “the Senate should counter the democratic excesses of the people, newly represented in the House of Representatives”).

24. 1 *The Records of the Federal Convention of 1787*, at 151 (Max Farrand ed., 1911) [hereinafter 1 Farrand]; see Bybee, *supra* note 23, at 509 (citing this passage). In his notes on the debates of June 7, 1787, Madison recorded the feelings of Mr. Dickinson regarding the strengths of the proposed Senate:

[H]e wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible; and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.

1 Farrand, *supra*, at 150.

25. See Bybee, *supra* note 23, at 509 (noting that the Senate was meant to “serve as a check on the inexorable impulse of the new government to accretion of power”).

26. See *The Federalist No. 62*, *supra* note 8, at 317.

27. See *The Federalist No. 43*, at 225 (James Madison) (Max Beloff ed., 1948) (“The exception in favour of the equality of suffrage in the senate, was probably meant as a palladium to the residuary sovereignty of the states, implied and secured

This approach to the Senate was not universally accepted among the Framers. James Wilson²⁸ argued—as recorded by Madison—that the new government should get its power from a unitary source: the People.²⁹ Wilson believed that if the two houses of Congress derived their power from different sources—one from the states and the other from the People—“dissentions [would] naturally arise between them.”³⁰ As an alternative to equal suffrage of the states, Wilson proposed a “Senate to be elected by the people as well as the other branch, and the people might be divided into proper districts for the purpose.”³¹ At the other end of the “representational” spectrum was George Read, who argued that the “Executive Magistrate” should appoint senators from a list compiled by the state legislators.³²

The ultimate form of the Senate was a moderate middle road between these extremes. Elbridge Gerry of Massachusetts expressed his views on the various proposals, providing possible insight into the collective thought process that led to the Senate’s ultimate form:

[Four] modes of appointing the Senate have been mentioned. 1. by the [first] branch of the National Legislature. This would create a dependence contrary to the end proposed. 2. by the National Executive. This is a stride towards monarchy that few will think of. 3. by the people. [T]he people have two great interests, the landed interest, and the commercial including the stockholders. To draw both branches from the people will leave no security to the latter interest; the people being chiefly composed of landed interest, and erroneously, supposing, that the other interests are adverse to it. 4.[.] by the Individual Legislatures. The elections being carried thro’ this refinement, will be most likely to provide some check in favor of the commercial interests agst. the landed; without which oppression will take place, and no free Govt. can last long when that is the case.³³

by that principle of representation in one branch of the legislature; and was probably insisted on by the states particularly attached to that equality.”).

28. Akhil Amar gives James Wilson’s populist arguments a great deal of weight. See *infra* notes 65-71 and accompanying text.

29. See 1 Farrand, *supra* note 24, at 151.

30. *Id.*

31. *Id.*; see *infra* note 112 (where alternative forms of the Senate are suggested which would maintain its better qualities—smaller size, deliberative nature, etc.). Wilson saw his proposal as ensuring the independence of the new national government. He did not see his view as destroying the states, simply as leaving them to local governance:

The state governments ought to be preserved—the freedom of the people and their internal good police depends on their existence in full vigor—but such a government can only answer local purposes—That it is not possible a general government, as despotic as even that of the Roman emperors, could be adequate to the government of the whole without this distinction.

1 Farrand, *supra* note 24, at 157.

32. 1 Farrand, *supra* note 24, at 151.

33. *Id.* at 152.

Madison concluded this passage by noting that Mr. Gerry “was therefore in favor of [the] last” suggestion.³⁴

In the end, the model the Framers decided upon may have been based on a principled view regarding the role of states as checks on the excesses of national popular representation. It is also possible, however, that the vote on the Senate simply represented a realization that it was a necessary compromise, a “lesser evil.”³⁵ In either case, the language in the Constitution creating the Senate³⁶ and in Article V limiting its reformation³⁷ is clear regarding the Senate’s composition. Whether this language represents an unabashed embrace of a particular notion of representational democracy, a pragmatic political compromise, or both, we are left with the language to apply in light of our current values.³⁸

It is crucial, therefore, to determine whether we can read the limitation created by the Equal Suffrage Clause to extend more broadly than the express language would suggest. One may look to the Framers’ underlying intent or even the understanding among those who ratified the document. However, their intentions were

34. *Id.*

35. See The Federalist No. 62, *supra* note 8, at 316-17. *The Federalist No. 62* describes the Senate as a simple nod to “prudence” and the need to bring the smaller states on board. See *id.*

36. See U.S. Const. art. I, § 3 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”).

37. See U.S. Const. art. V.

38. This Note draws a fine line between formalism and originalism. An underlying foundation of the argument in this Note is the view that constitutional text should be readable and applicable by the general public. Therefore, the people should be empowered to read and debate the text without needing to be experts in constitutional history or theory to do so. Courts should also be free to do so in light of current thinking and realities. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 2003 WL 21468502, at *21 (N.Y. Jun. 26, 2003) (“Indeed, a sound basic education back in 1894, when the Education Article was added, may well have consisted of an eighth or ninth grade education, which we unanimously reject. The definition of a sound basic education must serve the future as well as the case now before us.”).

The arguments herein are based on a rejection of strict adherence to original intent, and derive from a notion of our relationship with the Constitution. It is, however, not possible (nor would the author of this Note be able) to take on original intent in all its facets within the space of this Note. It should simply be noted that rejection of originalism does not require rejection of history and its teachings. With that said, there is a difference between simply enforcing the will of the Framers and determining what we today intend, informed by any wisdom we find in their writing. For example, we should choose to live in a country where our liberty is protected, not simply because the Framers thought so but because they were right to think so. Likewise, we have, rightly, rejected the Constitution’s support for the liberty-denying institution of slavery. The only solution is to enforce the language of the Constitution to realize what we today determine to be the best charter for our government. This Note tries to explain that the language puts some hurdles in the way of doing so too rashly, but is not able, nor should it be able, to construct an absolute bar to restructuring the Senate if we see fit.

diverse³⁹ and led to language representing a compromise. Therefore, this Note looks at the language as read today by lay people empowered to interpret our governing charter.⁴⁰ What we collectively believe the Constitution permits can be expressed through the supermajority political process defined in Article V.

That Article V lays out a simple road map is the most obvious reading of Article V:⁴¹ Congress may amend any part of the Constitution as long as it does not alter the equal suffrage of any state in the Senate without the state's consent.⁴² Yet, this interpretation need not prevail. The following part discusses different ways to read such Constitutional text, laying the foundation for this Note's argument that the Equal Suffrage Clause is surmountable without resorting to sources of authority beyond Article V.

II. THEORIES ON AMENDING THE CONSTITUTION

There are those who argue that Article V "means what it says,"⁴³ namely, that the impermissibility of restructuring the Senate without the consent of the states could not be clearer. Others disagree. In addition, there are scholars who believe that, no matter what Article V says,⁴⁴ certain constitutional provisions cannot be constitutionally amended. The following subsections present some examples.

A. *Elimination of the Equal Suffrage Clause*

In their article, *The Senate: An Institution Whose Time Has Gone?*,⁴⁵ Lynn A. Baker and Samuel H. Dinkin briefly discuss the

39. See *supra* note 33 and accompanying text.

40. It should be noted that courts have addressed the issue of Article V exclusivity both directly and indirectly. The United States Supreme Court took on the issue of the reach of Article V in the *National Prohibition Cases*, 253 U.S. 350 (1920). In that decision, the Court held that the Eighteenth Amendment was a valid part of the Constitution. *Id.* at 386. Scholars have argued that, in so doing, the Supreme Court "reject[ed] the claim that the Senate Suffrage Clause should be read broadly to prohibit fundamental alterations in the federal system." See Katz, *supra* note 11, at 279; see also *Trinsey v. United States*, No. CIV.A. 00-5700, 2000 U.S. Dist. LEXIS 18387, at *10 (E.D. Pa. Dec. 21, 2000) (rejecting the plaintiff's claim that the Electoral College was unconstitutional, finding that "[a]ny successful effort to alter the Constitution requires strict adherence to systematic procedures" (citing U.S. Const. art. V)). In other words, amendments passed pursuant to Article V, and only Article V, are part of the Constitution "for all Intents and Purposes," as any language found in the document as originally drafted. See U.S. Const. art. V.

41. See *infra* Part III (arguing that it therefore may be used to amend anything).

42. See U.S. Const. art. V.

43. David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L. Rev. 1, 4 (1990).

44. This Note is a testament to the fact that what Article V *really* says is controverted.

45. 13 J.L. & Pol. 21 (1997).

possibility of amending the final clause of Article V,⁴⁶ citing Akhil Reed Amar, who had referenced the idea.⁴⁷ Baker and Dinkin argue that whether or not we deem the Equal Suffrage Clause amendable, the Senate could be restructured through alteration of other, more clearly amendable, parts of the Constitution.⁴⁸

Not all scholars who have addressed the topic agree. One has characterized a “two-step process” to get around the Entrenchment Clauses as “disingenuous.”⁴⁹ Another has argued that even though a wholesale elimination of the Senate should be deemed valid,⁵⁰ any

46. *Id.* at 69 (“[T]he Senate clause of Article V is itself arguably subject to repeal or change under the *general* procedures outlined within the Article.”).

47. *Id.* at 69-70 n.186 (citing Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 461 (1994)).

48. Baker and Dinkin surveyed some of the possibilities in their article. *See id.* at 68-84. The authors first reference the possibility explored in this Note, suggesting that “at least as a theoretical matter” amending Article V is possible through the procedures provided therein. *Id.* at 69. Even if altering Article V were deemed unconstitutional, Article 1, Section 1 of the Constitution could be amended to place legislative powers into a one chamber Congress where representation is based on population. *Id.* at 70. Baker and Dinkin also offer an interpretation of Article IV—which relates to the subdivision and union of existing states—that would permit large states to subdivide to create proportional representation in the Senate. *Id.* at 72. They then suggest that one might argue to a court that the current scheme dilutes minority votes in violation of the Fifteenth Amendment, yet note that the Court’s interpretation of that Amendment would make success quite unlikely. *Id.* at 74-75. Therefore, Baker and Dinkin turn to the Fifth Amendment’s Due Process Clause and examine the possibility of making the argument that “the existing structure of representation in the Senate systematically affords members of racial minorities less representation than it provides non-Hispanic whites.” *Id.* at 75. They then turn to the possibility of a “large-state ‘work stoppage,’” where the Representatives in the House from the nine largest states would not appear on the floor, preventing a quorum. *Id.* at 81-83. Finally, the authors note the possibility of revolt through rebellion or the political process. *Id.* at 83-85. This final possibility, though unlikely anytime soon, is not entirely far-fetched, they argue, considering “that fully [seventy-two] percent of the American population currently resides in the [eighteen] states that today receive disproportionately little representation in the Senate.” *Id.* at 84 n.255.

This Note argues that such other routes, whatever their strength or potential, are unnecessary since the Equal Suffrage Clause may be constitutionally eliminated through simple amendment pursuant to Article V procedures. *See infra* Part III.

49. Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a “Republican Veto,”* 22 Hastings Const. L.Q. 325, 340 n.47 (1995).

50. Douglas Linder has made this argument:

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 constitutional 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.

change that “represents an effort to dilute the influence in the Senate of the smaller states . . . should be declared invalid under the article five equal suffrage proviso”⁵¹ because allowing an amendment which “violat[es] . . . a provision limiting the power of amendment . . . would be to allow Congress to do an act forbidden by the Constitution.”⁵² Viewing Article V as preventing the dilution of the small states’ power in the Senate is the most intuitive reading of that article. Nevertheless, there are those who argue that the Constitution can be amended without reference to Article V itself.

B. *Amendment Through Referendum: Akhil Reed Amar*

In two prominent articles,⁵³ Akhil Reed Amar argues that the Constitution may be constitutionally amended outside of Article V.⁵⁴ Under this theory, “extra-Article V” methods would be readily available to circumvent the Equal Suffrage Clause.⁵⁵ His theory demonstrates great flexibility in altering and interpreting the Constitution.⁵⁶

Amar begins his argument by looking at “what Article V does *not* say.”⁵⁷ He rejects the notion that Article V excludes other modes of constitutional change, arguing instead that the procedure provided for in Article V is simply the exclusive method the *government* may use to amend the Constitution.⁵⁸ This provision for governmental change of

See Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 Ariz. L. Rev. 717, 726-27 (1981).

51. *Id.* at 727.

52. *Id.* at 725.

53. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994) [hereinafter Amar, *Consent*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) [hereinafter Amar, *Philadelphia*].

54. See generally Amar, *Consent*, *supra* note 53; Amar, *Philadelphia*, *supra* note 53.

55. If Amar’s theory is correct, amending the Equal Suffrage Clause would still be legitimate but doing so through Article V would simply be the means available only to the government. This Note argues that Article V is the only means available to anybody and may not be limited. *But see* Amar, *Consent*, *supra* note 53, at 505 (while a simple majority may alter the Constitution, it is limited when it attempts to disrupt the constitutional scheme, for example, an amendment eliminating the First Amendment).

56. Professor Amar does provide textual arguments regarding references to “the People.” See Amar, *Philadelphia*, *supra* note 53, at 1065 (noting the “majoritarian strand[s]” found in the First, Ninth, and Tenth Amendments). However, in the end his argument rests on the belief that the text of Article V refers to the government exclusively even though there is no language on the face of Article V suggesting that. See Monaghan, *supra* note 17, at 132 (“The process of constitutional interpretation would be paralyzed if the simple absence of the qualifier ‘only’ meant that a clause was not ‘exclusive,’ as Professor Tribe persuasively shows.” (citing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1241-45, 1273-76 (1995))).

57. Amar, *Consent*, *supra* note 53, at 459.

58. See *id.* (“[T]here is an alternative way of understanding the implied exclusivity

the Constitution “nowhere prevents the *People* themselves, acting apart from ordinary Government, from exercising their legal right to alter or abolish Government via the proper legal procedures.”⁵⁹ Amar comes to this conclusion “[b]y widening [his] focus beyond the narrow text of Article V to consider other parts of the original Constitution, various glossing provisions of the federal Bill of Rights, and various Article V analogues in state constitutions.”⁶⁰ The answer to whether Article V is exclusive cannot be found in its text alone. Rather, sources of legitimate amending power “lie outside Article V, narrowly construed.”⁶¹ Such an interpretation should be informed by our recognition that the Constitution “is not simply a text, but an act.”⁶² The act was defined by the sovereign people of each state exercising their inalienable right to alter their government.⁶³ In this way, our Constitution was a legitimate act even though it apparently ran contrary to the text of the Articles of Confederation.⁶⁴

Amar’s arguments regarding the non-exclusivity of Article V rely a great deal on the thinking of James Wilson.⁶⁵ Wilson “was one of only six men to sign both the Declaration of Independence and the Constitution” and was, according to Amar, outshone in importance only, if at all, by Madison.⁶⁶ Amar cites Wilson’s belief “that the people may change [their] constitutions whenever and however they please” because “in our governments, the supreme, absolute, and uncontrollable power *remains* in the people.”⁶⁷ This power is

of Article V: it enumerates the only mode(s) by which ordinary *Government*—Congress and state legislatures—can change the Constitution.”).

59. *Id.*; see Amar, *Philadelphia*, *supra* note 53, at 1044 (“I believe that the first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of the majority of voters to amend the Constitution—even in ways not expressly provided for by Article V.”).

60. Amar, *Consent*, *supra* note 53, at 461.

61. *Id.* (continuing that the sources are found “in other provisions of the Constitution, in the overall structure and popular sovereignty spirit of the document, in the history of its creation and amendment, and in the history of the creation and amendment of analogous legal documents, such as state constitutions”).

62. *Id.* at 462.

63. *Id.* at 464.

64. *Id.* at 464-65 (“[I]nconsistency is not illegality.”); see *id.* at 473 (citing *The Federalist No. 39* where Madison wrote that the “Constitution is to be founded on the assent and ratification of the people of America . . . [and] derived from the supreme authority in each State—the authority of the people themselves” (alteration in original)); see also Amar, *Philadelphia*, *supra* note 53, at 1051-52 (“The Constitution was in fact *lawfully* ratified in Massachusetts and its sister states because a bare majority of the People . . . had a legal right to amend their constitution—even in the teeth of a pre-existing constitutional provision that specified a different, and seemingly exclusive, mode of amendment.”).

65. Amar, *Consent*, *supra* note 53, at 474.

66. *Id.* (“In the 1780s, Wilson was universally regarded as perhaps the most brilliant, scholarly, and visionary lawyer in America.”).

67. *Id.* (citing 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 432 (J.B. Lippincott & Co. 1881) (1836) (internal quotations and emphasis omitted)).

manifested through majoritarianism, Amar says, and he rejects the argument that the state (and Federal) constitutional amending provisions simply “implement[ed] . . . the people’s right to alter or abolish.”⁶⁸ To the contrary, it was understood that the people’s inalienable right could be manifested through a majoritarian process.⁶⁹ This majoritarian process was not affected by the text of Article V: “[A]lthough Article V is best read as the exclusive mode of governmental amendment *absent participation by the People*, it should not be understood as binding the People themselves, who are the masters, not the servants—who are, indeed, the source—of Article V and the rest of the Constitution.”⁷⁰ Therefore, Amar believes that a national referendum would be an appropriate method of altering the Constitution.⁷¹

Such a majoritarian scheme is a bedrock of our system, according to Amar.⁷² In his view, the scheme need not be formally embedded in our Constitution, for it was vested permanently in the people.⁷³ Nevertheless, in addition to exploring the text of state constitutions and the views of prominent drafters, Amar also locates justifications for his view in the text; the Preamble as well as the Ninth and Tenth Amendments demonstrate a commitment to popular sovereignty.⁷⁴ Therefore, Amar argues that we cannot—and Article V could not through its federalist procedures and Entrenchment Clauses⁷⁵—alienate our right to alter the Constitution through a majority vote.

68. *Id.* at 481 (emphasis omitted).

69. *Id.* at 482.

70. Amar, *Philadelphia*, *supra* note 53, at 1055.

71. *Id.* at 1044-45 (proposing the possibility of amendment through referendum).

72. *Id.* at 1050 (claiming that the “first principles” at the time of the Framing were “that the People were sovereign, and that a majority of them enjoyed the inalienable legal right—that is, a right that they were incapable of waiving, even if they tried—to alter or abolish their form of government whenever they pleased”).

73. See *supra* note 67 and accompanying text; Amar, *Philadelphia*, *supra* note 53, at 1057 (relating that a proposed prefix to the Preamble asserting the right of the people to alter the government “was dropped because it was deemed redundant”). But see Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 *Phil. & Pub. Aff.* 3, 35 (1992) (arguing that “[d]emocracy is not majoritarianism” and that “special voting rules” can be justified for amendment).

74. See Amar, *Consent*, *supra* note 53, at 489-94; Amar, *Philadelphia*, *supra* note 53, at 1056-57.

75. See Amar, *Philadelphia*, *supra* note 53, at 1068 (“For if (1) Article V were the exclusive mechanism and (2) the importation proviso [entrenching the slave trade until 1808] *legally* prohibited use of Article V, then we would be logically driven to the illogical conclusion that the People had somehow alienated their inalienable right to amend.”); *id.* at 1070 (“We the People of the United States can lawfully restrict—and indeed through Article V have lawfully restricted—the powers of Congress, state legislatures, and state conventions over Senate representation; but We have not—We could not—limit Our own power to alter or abolish even this seemingly entrenched feature of our government.”). Amar goes on to argue that maybe we should restructure the Senate, *id.* at 1071 n.98, but argues that to do so we must use an extra-Article V majoritarian procedure—what he calls a “Philadelphia II-type procedure,” *id.* at 1071.

Unlike Amar, there are those who believe that Article V is clearly the sole source of constitutional change.⁷⁶ These Article V formalists believe that the Constitution is clear on this point: there are procedures for amending, as well as one surviving substantive limit on such amendments. David R. Dow is an Article V formalist of this sort, and Part II.C. briefly examines his views in order to provide a measure of contrast with the breed of formalism this Note offers in Part III.

C. Article V Formalism: David R. Dow

Article V formalists believe that Article V “means what it says.”⁷⁷ Illustrating this perspective, David R. Dow has argued “that the only way to amend the Constitution is in accordance with the mechanism outlined in article V” and “that the mechanism outlined in article V is clear [and] exclusive.”⁷⁸ This view leads Dow to reject theories such as Amar’s.⁷⁹ Dow claims that unresolved conflicts in the Constitution do not make its provisions any less valid.⁸⁰ He criticizes the “gnawing institutional hunger [that] drives constitutional theorists to struggle to fit all the pieces of the puzzle neatly together,” in order to find “a holy grail of constitutional law.”⁸¹

Unlike Amar who claims that popular sovereignty is a principle Article V could not supplant,⁸² Dow suggests that Article V exclusivity is based on the “bedrock principle of federalism.”⁸³ He suggests that arguing otherwise would inevitably lead to the destruction of the states.⁸⁴ In so doing, Dow does not reject popular sovereignty per se; rather, he simply asserts that “our commitment to popular sovereignty is not truly germane” because it “is our normative commitment to the principle of majority rule” that is of greatest importance.⁸⁵ He adds that “this commitment is partial, not absolute.”⁸⁶

Dow’s work is meant to counter theories, such as Amar’s, that find

76. See generally Monaghan, *supra* note 17.

77. See Dow, *supra* note 43, at 4.

78. See *id.*; cf. Amar, *Philadelphia*, *supra* note 53, at 1072 (“We cannot say that a set of words is supreme law simply because the words say so.”).

79. See *supra* Part II.B. (reviewing Amar’s arguments).

80. See Dow, *supra* note 43, at 7-8 (arguing that the attempt to resolve all conflicts is often misguided and is based on the outmoded and “continuing allure of the pre-Realist, law-as-science mode of thinking”).

81. *Id.* at 8.

82. See *supra* Part II.B.

83. Dow, *supra* note 43, at 61.

84. *Id.* The fact that it may lead to the weakening, or even destruction of the states, does not make it per se illegitimate. The Constitution strikes a balance between the national and the federal. See *The Federalist* No. 39, *supra* note 9, at 195. We are permitted to amend it pursuant to Article V to change the weight of each.

85. Dow, *supra* note 43, at 10; see also *id.* at 11 (“The notion of popular sovereignty and the principle of majority rule are conceptually distinct.”).

86. *Id.* at 10.

sources of legitimacy outside of Article V and argue that popular sovereignty requires majoritarianism.⁸⁷ Dow believes that law may derive its power from the people without necessarily adhering religiously to majoritarianism.⁸⁸ In our scheme of government, simple majorities are not free to “do whatever they want simply because they are majorities.”⁸⁹ Therefore, legitimate constitutional alteration is defined by the dictates of Article V.

Relying on Article V exclusively to legitimate alteration of the Constitution does not require unquestioning adherence to original intent. Dow writes:

[I]t is a mistake to attempt to ascertain the “original understanding” of our beliefs. It is an especial mistake when matters of the Constitution are concerned because we may find if we look (and if we are honest) that what the framers believed is not in fact what we today believe; we may find that the political theory subscribed to by the framers is not the theory that animates our polity. What we know is what *we* believe, and it is upon these beliefs that our polity rests. That is as it ought to be.⁹⁰

Nevertheless, Dow argues that the historical record supports the view that Article V is the exclusive method of altering the Constitution.⁹¹ Perhaps more importantly, the simple structure of our government requires such a conclusion: Even if the Framers’ intentions were “unfathomable . . . the invocation of [*expressio unius*

87. See *supra* Part II.B.

88. Dow writes:

Irrespective of whether the framers believed the theory of popular sovereignty to be prescriptive or descriptive, the idea of popular sovereignty does *not* entail rule by majority will, and the rule of majority will clearly is a normative, a prescriptive, rule. . . . Popular sovereignty is not necessarily *majority* will. Law can come from the people—however understood—without coming from political majorities. Although popular sovereignty *can* be understood as fifty percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers.

Id. at 12-13 (emphases in original).

89. *Id.* at 16. Dow adds parenthetically: “I say that the majority *may* not, not that it *cannot*, for saying that it cannot would be a statement about power, and what we truly believe is that even if a majority *does* have the power it *may* not exercise it.” *Id.* (emphases in the original).

90. *Id.* at 22-23 (emphasis in the original).

91. *Id.* at 41-44. In summary, Dow writes:

The concerns of the framers were, in this area as perhaps in others, quite practical as opposed to abstractly theoretical. They wanted the Constitution to be amendable, but not *too* amendable. They wanted their work to be subject to revision, but they did not want it to be jettisoned in moments of passion. The requirement of supermajorities, the distinctive core feature of article V, achieves the framers’ goal of making the amendment process a slow, deliberative one. At the same time, it reflects the belief, prevalent among the framers and prevalent now, that certain rights are not subject to interference by mere majorities.

Id. at 42 (emphasis in the original).

*est exclusio alterius*⁹²] would be appropriate, for article V must be understood as exclusive, not precisely because the framers expected it to be, but because the structure of the government they established depends upon its exclusivity.⁹³ In rejecting Amar's theory of extra-Article V modes of amendment, Dow embraces a certain level of contradiction within our constitutional scheme: We can both value majority rule and limit it at the same time.⁹⁴ He sees Article V as an example of a constitutional provision containing a permissible and inevitable tension.⁹⁵

While these scholars focus on the procedures used to amend the Constitution, there others who argue that, regardless of the procedure, there are implied limitations on amendments.

D. *Implied Limitations on Amendments: The Looming Shadow of Constitutional Values*

Some believe that, regardless of the process used, certain amendments would be inherently unconstitutional.⁹⁶ This belief is based on the notion that certain amendments would be so at odds with basic constitutional values or principles that they would be denunciations, not simply amendments, of our Constitution. Walter F. Murphy, discussing the possible treatment of a hypothetical racist amendment, has written: "[T]he Court could explain and justify protection of human dignity as the principle value in the American constitutional system and thus reason that because the amendment violates that basic value, it is invalid."⁹⁷ James E. Fleming has argued that believing all amendments are constitutional begs "the question by unreflectively assuming a false equivalence among the amending

92. *Id.* at 39 ("The expression of one thing is the exclusion of another.").

93. *Id.* at 40 (emphasis in the original). Later in the article, Dow fleshes out the many levels in which Amar's majoritarian approach is unconstitutional:

In light of the constitutional structure of sovereignty, relying on a national majority to ratify proposed amendments rather than on majorities in discrete states is unconstitutional in the truest sense: It departs from the unmistakable language of the text as well as the concerns underlying the choice of such language. It is also inconsistent, not merely with the words of the Constitution, but with the constitutional structure of sovereignty and with our beliefs from which that structure emanates.

Id. at 58.

94. *See id.* at 8 (claiming that "we believe in . . . majority rule," yet "[a]t the same time, we also believe that not everything ought to be subject to it").

95. *See id.* at 58 (quoting *The Federalist No. 39*, where Madison wrote about Article V: "In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances toward the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal* and partakes of the *national* character" (emphases in original)).

96. This group includes Amar. *See infra* note 100 and accompanying text.

97. Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. Cal. L. Rev. 703, 756 (1980).

power, the Constitution, and the constituent power.”⁹⁸ One student Note has argued that an amendment wholly or partially eliminating the effect of the First Amendment would be unconstitutional since it would be contrary to “natural rights ‘retained by the people.’”⁹⁹ Amar has argued that popular sovereignty is an inalienable right left “unbound” by other principles found in our constitution: “Individual rights, federalism, separation of powers, and ordinary representation all exist *under* our Constitution, but they all derive from a higher source.”¹⁰⁰ In this way, the legitimacy of an amendment is not simply a question of politics or procedure, but of principle as well.

Others, however, root limitations on amendment power in the ordinary workings of government. Laurence Tribe has argued that the merits of any particular amendment is “a true ‘political question’—a matter that the Constitution addresses, but that it nevertheless commits to judicially unreviewable resolution by the political branches of government.”¹⁰¹ Tribe’s argument leaves the political process—in addition to the stringent amending procedure—as the check against abusive or unwise amendments.¹⁰² Viewing constitutional amendments in this way does not require one to give up

98. James E. Fleming, *We the Exceptional American People*, 11 Const. Comment. 355, 373 (1994); see also William L. Marbury, *The Limitations Upon the Amending Power*, 33 Harv. L. Rev. 223, 225 (1919) (“It may be safely premised that the power to ‘amend’ the Constitution was not intended to include the power to *destroy* it.”). But see Baker, *supra* note 49, at 339-40 (“Supreme Court majorities have consistently and repeatedly concluded that there are no implicit limits on the content of amendments that may be proposed and ratified, thus evidencing the seeming tautology that a provision properly added to the Constitution cannot be unconstitutional.”); Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L. Rev. 497, 548 (1992) (“If [a proposed amendment] is ratified, then it is part of the Constitution, and becomes constitutional by definition.”).

99. See Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 Yale L.J. 1073, 1073 (1991).

100. See Amar, *Philadelphia*, *supra* note 53, at 1103 (emphasis in original); see also *id.* at 1103 n.211 (arguing that “[d]ifferent visions of the Constitution’s essence may lead to different implied limitations on constitutional amendment” and concluding that popular sovereignty trumps principles such as federalism).

101. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 443 (1983).

102. Clearly this is an attractive view to not only those trying to strengthen the best principles in the Constitution, but also unfortunately to those who would like the Constitution to embody the worst values in our society. For example, Senator James Murray Mason, later delegate to the Provisional Congress of the Confederacy, declared from the floor of the 36th Congress:

What power makes a Constitution? Under the present Constitution, three fourths of the States. . . . [A]nd 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?

Cong. Globe 36th Cong., 2d Sess. 1387 (1861) (remarks of Sen. Mason).

on principle; it only eliminates one forum—the judicial branch—from the options available to prevent harm caused by an imprudent or unprincipled amendment. Therefore, the following part argues that a constitutional amendment striking the final clause of Article V would be constitutional, forbidden neither by a formalist reading of Article V nor by implied limitations on amendment.

III. AN ARGUMENT FOR CONSTITUTIONAL “UN-ENTRENCHING” OF THE EQUAL SUFFRAGE CLAUSE

We, as American citizens, are empowered by Article V to reconstitute the United States Senate. The Framers created the structure within which we work, but we may nevertheless interpret and apply the language as modern-day framers. Part III.A. explains that we should embrace popular sovereignty while remaining textualists when interpreting Article V, and that doing so will lead to permissible reformation of the Senate.¹⁰³ Part III.B. attempts to resolve some of the issues that arise with such an argument, such as potential abuse of the amending power,¹⁰⁴ rejection of federalism as an independent barrier to reformation of the Senate,¹⁰⁵ and a disregard for the text only when it suits the argument.¹⁰⁶ This Note concludes by arguing that we may reconstitute our government to reflect the reality of our current political and social world.¹⁰⁷

A. *Embracing Popular Sovereignty and Textualism*

The Equal Suffrage Clause cannot prevent the restructuring of the Senate through an amendment to the Constitution. It is surmountable in a few different ways. First, even if one believes Article V must strictly further the will of the Framers, we could restructure the Senate after acquiring the consent of any state or states that would be disenfranchised.¹⁰⁸ A second possibility is for amendment outside of Article V through a national referendum—the approach Amar supports.¹⁰⁹ He claims that if a national referendum were held passing

103. See *infra* Part III.A.

104. See *infra* Part III.B.1.

105. See *infra* Part III.B.2.

106. See *infra* Part III.B.3.

107. See *infra* notes 205-17 and accompanying text.

108. See Katz, *supra* note 11, at 285 (“For example, an amendment to reduce the number of Senators from North Dakota to one would not be unconstitutional. Rather, it would require—in addition to the regular amending process described in Article V—a vote of consent from the State of North Dakota.”). *But see* Levinson, *supra* note 17, at 122 n.32 (“Contrary to what is sometimes asserted, the Senate clause is *not* ‘unamendable’ as a matter of theory, though, as a practical matter, that is almost certainly the case, given the extreme unlikelihood of, say, Wyoming agreeing to give up its excess of power in the Senate.”).

109. See *supra* Part II.B. (reviewing the arguments of Akhil Amar).

a new amendment, that amendment would be a valid part of the Constitution.¹¹⁰

There is a third approach that is true to the text, even if not to any of the generally accepted understandings of original intent: the passage of two amendments (or of a two-part amendment).¹¹¹ The first would strike the Equal Suffrage Clause from the Constitution and the second would reapportion the Senate.¹¹² These two steps would not only be technically possible,¹¹³ but would also be constitutional and deserve principled support. A two-part process would be a manifestation of popular sovereignty—of our own power to alter our government—that remains true to the text of the Constitution.

The argument presented here should not be confused with the belief that because anything could be amended as a technical matter, as a “simpl[e]. . . fact about political power as such,”¹¹⁴ this gives any such amendment legitimacy. To hold that belief would be to conflate¹¹⁵ legitimacy and prudence.¹¹⁶ Article V mandates a

110. *Id.*

111. See Amar, *Consent*, *supra* note 53, at 461 (discussing the imprecision of Article V, Amar asks “couldn’t the ‘equal suffrage’ rules of Article V be easily evaded by two successive ‘ordinary’ amendments, the first of which repealed the equal suffrage rules themselves, and the second of which reapportioned the Senate?”).

112. Regardless of how the Senate is restructured, the Senate could still maintain its deliberative nature, see Bybee, *supra* note 23, at 513 (noting that “[t]he lengthy term for senators ensured a long view of problems”), yet would fall more in line with its preferable role as protector of national interests. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (stating that Congress “owe[s] primary allegiance not to the people of a State, but to the people of the Nation”); see also, Amar, *Philadelphia*, *supra* note 53, at 1071 n.98 (“In advocating a proportionately representative Senate, I am by no means suggesting that other differences between the House and Senate be diminished.”). Although it would not completely solve the population disparity problem, simply giving a small number of the largest states an additional senator would at least help offset the immense imbalance now in place. See *supra* note 4 and accompanying text (regarding current populations of the largest and smallest states). If California were to receive a third senator, and Wyoming were to lose one, the disparity in representation would shrink from 70.41 times to 23.47 times. Although this is still quite a disparity, it at least gets us closer to the disparity experienced by the original thirteen states. Such a proposal would obviously be incredibly unpopular in states with small populations, and would be viewed as an inappropriate usurpation of political power by large states. However, this view is based on the notion that the original division of representation was not an inappropriate usurpation resulting from the small colonies’ leverage during the original drafting of the Constitution. In any event, as noted already, the context has changed and we are still empowered to be framers if we so choose.

113. Pursuant to Article V procedure, the final clause of Article V could be stricken or declared without effect. Subsequent to this, another amendment could be passed altering representation in the Senate.

114. Rawls, *supra* note 11, at 233; see also Dow, *supra* note 43, at 52 (“Saying that the people have the power to alter their government, however, is quite different from saying that they have the *right* to do so, which is to say that they may do so lawfully.”); Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 *Cardozo L. Rev.* 691, 700 (1996) (“Perhaps a properly enacted constitutional amendment cannot literally be unconstitutional.”).

115. See Fleming, *supra* note 98, at 373 (making the opposite move, claiming that

distinction between these two concepts.¹¹⁷ It provides for how one may amend the Constitution and defines this process as a certain type of political will.¹¹⁸ We may amend the Constitution pursuant to the procedure laid out in the first half of Article V.¹¹⁹ As long as the Equal Suffrage Clause is still part of the Constitution, we may not use this ordinary procedure to alter the Senate. However, we may turn Article V upon itself, removing the Equal Suffrage Clause from the text. As David Dow writes, Article V “means what it says.”¹²⁰ However, Article V may not “say” what some think it obviously does.

Believing that political will can be equated with legitimacy should not entail acceptance that it always does.¹²¹ One may simply recognize that Article V itself creates a standard for determining the legitimacy of *constitutional amendments*.¹²² That is, this Note’s argument addresses only the legitimacy of constitutional amendments, not all manifestations of popular will.¹²³ Altering the Constitution through an “Amarian” referendum would be unconstitutional not because it is a manifestation of popular will, but because it is the wrong manifestation.¹²⁴ A sufficiently-determined majority might be able to

those who believe amendments are inherently constitutional “unreflectively assum[e] a false equivalence among the amending power, the Constitution, and the constituent power”); *see also* Dow, *supra* note 43, at 40 (arguing that Amar’s “argument . . . that the power to amend resides in the people irrespective of whether it is granted by article V . . . conflates notions of physical power and legal right”); Monaghan, *supra* note 17, at 151 (“I believe that Amar . . . conflates questions of legality and legitimacy. The ratification debates reflected a widespread belief that, whether ‘illegal’ or not, ratification of the new Constitution would establish a legitimate *national* governmental order, and thereby establish a new basis for measuring legality.”). Measured against the Constitution, an amendment striking the Equal Suffrage Clause would be legal and constitutionally legitimate. Whether it is legitimate measured against other principles we embrace as a nation is a different question.

116. Whether it is wise or principled to do something is a question of prudence. Whether something is consistent with the text of the Constitution, however, will be described as a question of legitimacy.

117. *See infra* note 124 and accompanying text (arguing that Article V itself legitimizes a particular manifestation of political will).

118. *See id.*

119. *See* U.S. Const. art. V.

120. Dow, *supra* note 43, at 10.

121. In other words, it is conceivable that in certain schemes political will manifested in any way, whether majoritarian or not, would be the basis for constitutional legitimacy. We, however, do not live in such a scheme.

122. *See* U.S. Const. art. V.

123. For instance, to elect a President or pass laws in Congress the Constitution provides for different mechanisms, whether electors or elected representatives. It is important to note, however, that these procedures also place barriers between simple majoritarian rule through referendum and formal governmental action.

124. *See* Dow, *supra* note 43, at 13 (“Majority rule is a practical (and normative) rule of who wins. Popular sovereignty is a theoretical view of who does, or who ought to, have power. Neither notion entails the other.”). It just so happens that Article V defines which form of popular sovereignty counts and, in doing so, who wins. Nevertheless, even the Framers recognized that majority will is a difficult force to stop:

amend the Constitution through sheer force, but doing so would not make the amendment constitutional.¹²⁵ In contrast, a similarly determined supermajority could amend constitutionally as long as they conformed to the mechanisms set out in the first part of Article V. More than Amar might lead one to believe, the text matters, although not in the way he or Article V formalists like Dow would suggest.

Moreover, not only is it constitutional to amend any part of the Constitution using the mechanisms provided in Article V, but the same applies to Article V itself. In essence, the Framers created an inconsistency—although a dormant one thus far—when they tried to create a procedure for amending the Constitution while also placing limits on amendments. This Note posits that the substantive limitation can be overcome if ever seriously challenged. If Congress proposed and the states ratified an amendment striking the Equal Suffrage Clause from the Constitution, it would be legitimate.¹²⁶ It might be unwise, politically imprudent, and even unprincipled in some people's eyes, but these questions are outside the scope of constitutional legitimacy once the Constitution has been altered pursuant to Article V.¹²⁷ Otherwise, whether a provision is constitutional simply becomes a question of prudence defined by differing views of what our Constitution is meant to embody.

That debate should be left to "we the people" and our arguments about the language of the Constitution. Once new language is injected into the Constitution, however, it *is* the Constitution, and one

Though I trust the friends of the proposed constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

The Federalist No. 78, at 400 (Alexander Hamilton) (Max Beloff ed., 1948) (footnote omitted).

125. See The Federalist No. 78, *supra* note 124, at 400.

126. For some views on implied limitations, see *supra* Part II.D.

127. See *infra* Part III.B.3.a. (noting that the clause would still make it politically more difficult to restructure the Senate).

should judge its legitimacy by the procedure used to enact it rather than a previous constitutional order that no longer exists.¹²⁸ Such a belief does not require silence in the wake of an amendment. We may hold the amended Constitution up against our aspirations, against what we believe to be the most principled charter for our government. But when making such arguments regarding national or personal values, one should not leap to the assumption that one's (or even the Framers') view of what is right is perfectly aligned with what is constitutional.¹²⁹

Those who would argue that “unentrenching” the Equal Suffrage Clause is unconstitutional, contrary to the text and clear intent of the Framers, must address the entrenchment of the slave trade.¹³⁰ That clause lapsed in 1808 and is therefore easier to avoid. If one is to argue that the intent of the Framers—as manifested in the Entrenchment Clauses—is to be honored without exception, then the Thirteenth Amendment¹³¹ would have been unconstitutional if the slave trade had been entrenched until 1868, instead of 1808. It is easy to see the inherent contradiction between slavery and freedom. Our current sense of morality casts a dark shadow upon what was once embedded in our constitutional scheme, and which was once deemed by many of the Framers to be a central institution in American life. As Dow has observed:

What we believe today will not always be what was once believed. Theories like those I discuss in this Article pay far too much attention to what was once believed at the expense of analyzing what we today believe. This is a terrible mistake when we are dealing with constitutional notions like freedom, right, and liberty. For example, it seems quite clear to us today that the conception of liberty prevalent among the framers was dependent upon and inextricably connected to the institution of slavery, the subjugation of blacks.¹³²

Of course, this Note does not try to equate the institution of slavery with the Senate. The comparison is used simply to highlight that contradictions reside in the Constitution and that we are free to eliminate them. Simply because the contradiction found in the Equal

128. *See supra* note 102 (remarks of Sen. Mason).

129. If we did so, it would be hard for us to argue that slavery was an evil since it was permitted at one time by the Constitution. It is too easy to say that it is no longer permitted and therefore our Constitution embodies our greatest ideals. There is no reason to think that inconsistencies remain, and to recognize that many great ideals are in the text, many are not, and that some parts of our Constitution still need some refining.

130. *See* U.S. Const. art. V (“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.”).

131. U.S. Const. amend. XIII.

132. Dow, *supra* note 43, at 7 n.29.

Suffrage Clause is not as striking nor the harm in any way as severe should not make it safe from evaluation and revision.

Whether there are provisions that cannot be removed from or added to our Constitution legitimately strikes at the heart of any interpretation of Article V. As already noted, many have argued that there are certain constitutional principles that may not be eliminated legitimately from the Constitution.¹³³ There are those, however, that argue that what is constitutional is simply what is in the Constitution.¹³⁴ Richard B. Bernstein addressed this issue in an article about the Twenty-Seventh Amendment:

May Congress or the courts reject a constitutional amendment, otherwise validly ratified, as unconstitutional? The conventional and common-sense answer to this question is "No. Before an amendment is ratified, it is just a proposal—nothing more and nothing less. If it is ratified, then it is part of the Constitution, and becomes constitutional by definition."¹³⁵

This common-sense answer is rather compelling. To believe this does not require rejection of the important values in our Constitution.¹³⁶ It simply requires we find an alternative source for these values in the event the Constitution is altered. But, as Bernstein notes in his piece, this "common-sense approach" is not accepted by many scholars,¹³⁷ who "have suggested that certain amendments could be so threatening to the fabric of the constitutional system that they might well be deemed unconstitutional."¹³⁸

Adherence to such implied limitations improperly imports values from the Constitution pre-amendment to the Constitution post-amendment. Once the document has been altered, it is debatable whether a valuable principle has been lost, but a court should not find the loss to be unconstitutional.¹³⁹ The way to prevent a reordering of the current Constitution is to argue against it in the political arena, where we retain control over our Constitution as present-day framers. We should not rely on the fact that there are inherent or unwritten limitations on such changes.¹⁴⁰

133. See *supra* Part II.D.

134. *Id.*

135. Bernstein, *supra* note 98, at 548.

136. See *infra* note 141 (citing such values).

137. Bernstein, *supra* note 98, at 548-49.

138. *Id.* at 549. Bernstein cites Walter F. Murphy, who, contemplating a hypothetical constitutional amendment, writes: "[T]he Court could explain and justify protection of human dignity as the principle value in the American constitutional system and thus reason that because the amendment violates that basic value, it is invalid." See Murphy, *supra* note 97, at 756.

139. See *supra* note 101 and accompanying text.

140. See *supra* Part II.D. (discussing the issue of implied limitations). One can even argue about the nature of our constitutional scheme to demonstrate how disruptive a particular amendment might be to the ordering of our government. This

One might argue that this Note's argument drains vital principles out of the Constitution and represents an overly technical and narrow reading of a Constitutional passage. Clearly, the Constitution embodies many abstract principles¹⁴¹ that are often read too narrowly and with an undue emphasis on original meaning and tradition.¹⁴² Article V is not such a provision. It lays out a procedure for amending the Constitution and also attempts to place limits on such amendments.¹⁴³ Regardless of what the Framers might have wanted or the values they tried to embed in the text, they faced an inherent limitation. As a written document, a constitution is limited by the force of language.¹⁴⁴ Language allows concepts such as equality to be re-interpreted with each generation.¹⁴⁵ But language cannot both provide for the amendment of any part of the Constitution as well as protect a substantive provision from alteration.¹⁴⁶

Altering Article V (and restructuring the Senate) is consistent with an abstract reading of the Constitution. We are free to interpret the language of the Constitution, to determine what is now "due process"¹⁴⁷ or "cruel and unusual,"¹⁴⁸ and to likewise reassess whether the Equal Suffrage Clause is still consistent with our values. Certainly, this is not to suggest that Article V does not embody the value of federalism.¹⁴⁹ But Article V's embrace of federalism should

Note only suggests that it would be incorrect to claim that such arguments are really about legitimacy, and not about prudence, principle, or preference.

141. See, e.g., U.S. Const. amend. I ("freedom of speech"), amend. IV ("unreasonable searches and seizures"), amend. V, XIV § 1 ("due process" and "just compensation"), amend. VIII ("Excessive" and "cruel and unusual"), amend. XIII § 2, XIV § 5, XV § 2, XIX, XXIII, XXVI § 2 ("appropriate legislation"), amend. XIV § 1 ("equal protection") (emphases added).

142. See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) ("We refer to the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 240 (1990) (claiming that even Scalia's view, while the most defensible on the Court, "assumes an illegitimate power, and the limitation will prove no restriction at all when there is only a general, unfocused tradition to be found").

143. See U.S. Const. art. V.

144. *Contra* Amar, *Consent*, *supra* note 53, at 462 (claiming that the Constitution "is not simply a text, but an act").

145. For example, see the progress and expansion of rights from *Plessy v. Ferguson*, 163 U.S. 537 (1896) to *Brown v. Board of Education*, 347 U.S. 483 (1954). No relevant constitutional text changed in the ensuing years, yet the interpretation of the language and its requirements certainly did. The Supreme Court of Canada adopted this view of constitutions generally in *Hunter v. Southam* [1984] S.C.R. 145, 155: "A constitution . . . is drafted with an eye to the future. . . . It must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."

146. Again, the language does create a barrier, just not an insurmountable one. See *infra* Part III.B.3.a.

147. U.S. Const. amend. V, XIV.

148. U.S. Const. amend. VIII.

149. It does so by protecting states as somewhat equal, sovereign political units.

not make it safe from attack if the country determines that democratic notions of equality require a more representative Senate. The American people could determine that they place a greater value on the concept of equal representation than on the equal treatment of states as political entities.¹⁵⁰ This determination should, and does, have an outlet for expression.

The Constitution embodies great principles, but the document also has embedded within it contradictions that we are free to reconcile, regardless of what the Framers might have intended. Walter Murphy has written:

The plain words of a constitutional document often . . . foster . . . disputes. In the American framework, one need look no further for examples than the potential conflict between the first amendment's guarantee of free exercise of religion and its ban against establishment of religion, or the first amendment's protection of freedom of the press and the sixth amendment's guarantee of a fair trial.¹⁵¹

Likewise, we have a constitutional scheme which not only reflects a respect for the unity and equality of American citizens,¹⁵² but which explicitly provides for it.¹⁵³ Our scheme also values federalism,¹⁵⁴ but

See U.S. Const. art. V; *The Federalist No. 39*, at 195 (James Madison) (Max Beloff ed., 1948) (“[The Constitution is] neither wholly *national*, nor wholly *federal*. . . . In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances toward the *federal* character.”).

150. This proposition is true even in light of the balance struck by the Framers between proportional and equal voting. As noted in *The Federalist No. 62*, the U.S. Congress combines two different notions of representation:

If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government: and that among independent and sovereign states, bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.

The Federalist No. 62, *supra* note 8, at 316.

151. *See*, Murphy *supra* note 97, at 710.

152. *See, e.g.*, U.S. Const. pmb. (elevating the goals of “the common defence” and “the general Welfare”).

153. *See* U.S. Const. amend XIV, § 1. Although referring to Article I and not the Equal Suffrage Clause explicitly, Samuel Freeman has commented on the conflict between the value of equal representation and the structure of the Senate:

[T]here is a problem with the provision by Article I for geographic representation in the Senate. At first appearance it runs counter to *equal* rights of political jurisdiction. Suppose it cannot be shown reasonably acceptable among equals. Then it would be inconsistent with constitutional democracy, the ideal of political relations that infuses our constitution.

Freeman, *supra* note 73, at 35 (noting, in addition, that “[i]t is . . . a separate issue whether it is for the courts (rather than the citizens) to declare this provision in the Constitution invalid”).

in its continued evolution,¹⁵⁵ and with the greater protection of civil rights,¹⁵⁶ this value has slowly given way to individual equality and more democratic representation.¹⁵⁷ This Note's breed of formalism is simply to read the words as they are meant today, to interpret them in light of what we might now consider important constitutional values.

With that said, the longstanding value we have given to federalism¹⁵⁸ is powerful, and provides a constitutional basis for arguing against changes to the Senate. If there is sufficient widespread support for an amendment removing the Equal Suffrage Clause, however, such reformation would be constitutional.¹⁵⁹ This is true even if, as an individual, one believes it to be imprudent or inconsistent with the specific dictates or overarching structure of the Constitution. In short, being constitutional need not mean being "good."¹⁶⁰

154. Indeed, federalism itself can be seen to protect individual rights. If people believe it is a superior method for doing so, then they are free to fight any attempts to reform the Senate. But, if Americans determine that a more representative Senate is in line with our current values, we are free to make the requisite changes within the confines of Article V procedure.

155. See, e.g., U.S. Const. amend. XVII (providing for the popular election of Senators).

156. See, e.g., U.S. Const. amend. XIV; 42 U.S.C. § 2000 (2003).

157. See, e.g., U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); amend. XVII; amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

158. See *The Federalist* No. 62, *supra*, note 8.

159. This Note has argued against an Amarian referendum as a legitimate manifestation of popular will. Nevertheless, it should be noted that Amar is right to argue that we, today, have the power to be modern-day framers:

There are great organizational advantages to this system of representation, but there are also obvious associated agency costs. The ultimate power to reassess those costs, and redefine the terms of agency, if deemed appropriate, must always rest with We the People Ourselves—you, me and our fellow citizens, here and now.

Amar, *Philadelphia*, *supra* note 53, at 1086.

160. Making such an argument does not imply a rejection of grand principles. To the contrary, part of the motivation for writing this Note stems from concern that undue attention would be given to the underlying principles of our Constitution during upcoming amendment discussions. Instead of being a call for more amendments, this Note is partly calling for caution and for vigilance amongst the citizenry. If imprudent or unprincipled amendments are proposed, it should not be assumed that there is any barrier to them becoming full parts of the Constitution beyond the procedures of Article V and our own political voices. We as citizens are ultimately responsible for maintaining the "goodness" of our governmental charter.

B. *Resolving Some of the Issues Raised by "Unentrenching" the Equal Suffrage Provision*

1. Abuse of the Amending Power

Some might claim that this Note imagines idealistically that any political desire to eliminate the Equal Suffrage Clause will be driven by the goal to reform the entire Senate. The more likely scenario, they might argue, would be an attempt by most states to disenfranchise one or more other states. The Framers wished to avoid this outcome, and the Equal Suffrage Clause clearly addresses this problem.¹⁶¹ But that does not mean the clause itself is free from revision. It merely creates a political barrier to the alteration of the Senate.¹⁶² This barrier would be particularly high if states attempted to disenfranchise an individual state (which would be contrary to the underlying principles of representative democracy) rather than make the Senate better reflect demographics (which would be more consistent with the underlying principles of representative democracy). Again, the Framers could not completely prevent this danger from coming to pass, unless, of course, they had provided no procedure for amending the Constitution.¹⁶³ However, under the current procedures of Article V, if forty-nine states attempted to disenfranchise the remaining state, it would be up to those taking part in the political process to argue against the invidious and abusive use of the amending power.

Such principled arguments would not be the only barrier to such abuse. As will be noted, the Equal Suffrage Clause does create a political barrier to restructuring the Senate.¹⁶⁴ In addition, some might argue that federalism would remain a barrier to restructuring the Senate even after the Equal Suffrage Clause had been removed.

2. Federalism as Extant Barrier

One might argue that even if the Equal Suffrage Clause were eliminated, the procedure set forth in Article V would not permit alteration of the Senate. If the value of federalism is not a sufficient obstacle to restructuring the Senate, why should we use a procedure that relies on the equality of states and not of individuals? Why not turn to Amar's view of majoritarian adaptation of the Constitution?¹⁶⁵

161. See U.S. Const. art. V ("[N]o State, *without its Consent*, shall be deprived of its equal Suffrage in the Senate" (emphasis added)).

162. See *infra* Part III.B.3.a.

163. See Monaghan *supra* note 17, at 145 (referring to Sherman's motion during the Constitutional Convention that Article V be struck out of the Constitution). Amar would still argue that the Constitution could be altered. See Part II.B.

164. See *infra* Part III.B.3.a.

165. See *supra* Part II.B.

This Note rejects Amar's view, however, not because it embraces a value absent from the Constitution,¹⁶⁶ but rather because it has no clear connection with the specific text of Article V,¹⁶⁷ which should be seen as the sole source of legitimate amending power.

Rejecting the legitimacy of majoritarian alteration does not require rejecting the value of popular sovereignty as Amar presents it.¹⁶⁸ To the contrary, his view of popular sovereignty fits nicely with the argument that government should be more representative, and that popular will and government action should be more directly linked.¹⁶⁹ This argument is one of the main reasons the Senate should be reformed. To argue that reform would be beneficial is different from claiming that the evolution toward greater popular sovereignty¹⁷⁰ legitimates a constitutional change through a referendum. We can freely discuss how to better represent ourselves and, to that end, how to alter the Constitution, but we are only permitted to do so through the mechanisms provided by the Constitution.¹⁷¹ This approach creates the surest form of constitutional democracy, combining contemporary responsibility for our government and its foundational principles with an appropriate adherence to the textual limitations found in the Constitution. When these two principles conflict, we are free to use the tools provided by the Framers to alter the substance of the Constitution—even those parts they tried most to ensure against amending.¹⁷² As the next section addresses, the text, not the Framers' intent, is what matters, and the two can be distinguished.

166. Certainly, popular sovereignty is embedded in our Constitution. *See, e.g.*, U.S. Const. art. I, § 2, cl. 3 (providing that “[r]epresentatives . . . shall be apportioned among the several States which may be included in this Union, according to their respective Numbers”).

167. *See* Monaghan, *supra* note 17, at 131 (“To restrict Article V to governmentally sponsored amendments is to impose a limitation that the Article does not facially contain.”).

168. In an article discussing Bruce Ackerman's theory of constitutional change, James E. Fleming asks: “Is it possible to articulate a constitutional theory that gives due regard to popular sovereignty but that also takes Article V seriously as prescribing the exclusive procedures for amending the Constitution?” *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1529 (1998). This Note's author would like to think it is.

169. It should also be noted that even if Amar is correct in believing that the Framers, or even some of them, believed in such extra-Article V change, this alone is not sufficient to make it legitimate. Regardless of their intent, the language is clear. The Constitution is a written text written to survive its drafters. Therefore, great care was put into the language used, and rightly so. The Framers' intent is not what matters, only their intent as manifested in language, language we are left to interpret as the People.

170. Surely, one may believe there has been no such evolution or that it has been an unfortunate occurrence. This does not change the argument. If enough people believe it has occurred and that it is a beneficial development, they may lobby for further change through the procedures provided by the Constitution.

171. *See* U.S. Const. art. V.

172. Clearly, a measure of conflict may be desired and deemed outweighed by the protection federalism might provide. But, there is a tension nonetheless that may be

3. Consistently Taking the Text Seriously

Some might respond that when it comes to how to amend, this Note points to the text,¹⁷³ but when it comes to what can be amended, it claims that we can disregard the words.¹⁷⁴ However, the words of the Equal Suffrage Clause, while amendable, still act as a limitation. First, the very existence of the clause creates a political barrier to amendment.¹⁷⁵ Second, an amendment that simply tries to alter the Senate without first eliminating the clause would be unconstitutional.¹⁷⁶ Third, and most importantly, the argument against the legitimacy of eliminating the clause is based partially on an unjustified belief in implied limitations.¹⁷⁷ For such an amendment to be unconstitutional,¹⁷⁸ one must argue that an unwritten limitation would survive such amending. To the contrary, once the Constitution has been altered in accordance with Article V, we can no longer point to the preexisting Constitution as a source of legitimacy because that Constitution—its scheme—no longer exists. These three arguments will be addressed in the following subsections.

a. *Entrenchment as Political Barrier*

Article V formalists, as well as originalists, would claim that this Note's argument drains the Equal Suffrage Clause of any meaning, that it gives the Equal Suffrage Clause no purpose in our Constitution.¹⁷⁹ To the contrary, the clause's presence in the Constitution certainly makes it harder to alter the Senate as a practical, if not formal, matter by expressing a clear intention of the Framers.¹⁸⁰ But if this intention contradicts our current values,¹⁸¹ an

resolved through Article V procedures, and would thereafter define our Constitutional scheme. See Monaghan, *supra* note 17, at 157 ("Ideas such as the desirability of popular sovereignty and the wish for a government 'neither wholly national nor wholly federal' pulled in different directions." (footnote omitted)).

173. See *supra* Part III.A.

174. See *supra* Part III.A.

175. See *infra* Part III.B.3.a.

176. See *infra* Part III.B.3.

177. See *supra* Part II.D. (regarding implied limitations).

178. It is important to note again that when referring to legitimacy this Note's author is making an argument about constitutional legitimacy and not prudence. Although it would be imprudent to amend away the First Amendment, this Note's argument rejects implicit limits and therefore would permit doing so, something others would not deem legitimate.

179. See *infra* note 183 and accompanying text.

180. See Linder, *supra* note 50, at 722 ("[I]t has been suggested that the [Equal Suffrage] provision is 'merely declaratory.'" (citing remarks by Senator Bigler in regard to the Corwin Amendment found in Cong. Globe 36th Cong., 2d Sess. 1387 (1861))). The proposed Corwin Amendment would have 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

amendment passed eliminating the Equal Suffrage Clause is a permissible and constitutional evolution in our constitutional structure.¹⁸²

Eric A. Posner and Adrian Vermeule addressed this issue in an article on legislative entrenchment:

In originalist terms, the Article V entrenchment of equal state suffrage would have been meaningless, and would thus have failed to reassure the small states who desired the entrenchment, if there were a background understanding among the Founding generation that the entrenchment clause could simply be repealed through the ordinary process of constitutional amendment.¹⁸³

As noted, we may repeal the clause through the “ordinary process.” However, the historical reality Posner and Vermeule describe would certainly inform any political debate surrounding such an amendment.

The form of the Senate should only be altered if the procedures of Article V are met.¹⁸⁴ Nevertheless, whether Congress chooses to act will inevitably be informed by the words in the Equal Suffrage Clause. In order to realize the political consensus required by Article V,¹⁸⁵ supporters of Senate reform would have to overcome the political obstacle of the clause. Although original understanding would not make its removal unconstitutional, it would certainly make any attempt more politically difficult.¹⁸⁶ The Framers may have recognized this fact.¹⁸⁷ They may have realized that a certain form of political will could alter any part of the Constitution.¹⁸⁸ They must have realized, however, that adding the Equal Suffrage Clause would make it much more difficult to garner such political will.¹⁸⁹ Therefore,

said State.” *Id.* at 728 (quoting Cong. Globe 36th Cong., 2d Sess. 1263 (1861)).

181. And it clearly may not. The arguments is simply that if a suitable number of people find the structure of the Senate troublesome, we should be free to alter it.

182. See Murphy, *supra* note 97, at 706 (“Insofar as constitutional interpretation, its two missions are to transform into a systematic unity the possibly conflicting clauses of the constitutional document(s), as well the prescriptions of the broader constitutional tradition; and, second, to distill from that unity a mutually consistent set of jurisprudential values and principles, ranked in importance, that fit the developing political system.”).

183. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1681-82 (2002).

184. See U.S. Const. art. V.

185. *Id.*

186. Many would, understandably, give great credence to what is a clear expression of the Framers’ original intent.

187. Though even if it had not been, the language still empowers us to make the alterations, apart from any evidence of their desired result.

188. See Amar, *Consent*, *supra* note 53, at 459 (discussing Article V as simply the exclusive source of amending power for the government).

189. See Fleming, *supra* note 98, at 363 (“[W]e can see that Article V entrenched features of the Constitution that were vulnerable to being repealed through democratic procedures, precisely because they manifested such deep compromises with our constitutive principles and ordained such an imperfect Constitution.”).

even if one adheres to original intent, one could argue that the Equal Suffrage Clause should still not be protected.¹⁹⁰ The Framers may have intended to do exactly what the clause claims, but this aspiration does not change the fact that they were attempting the impossible. Now, if we choose to resolve this contradiction, we must do so following particular procedural guidelines.

b. *Why One is Bad and Two is Good*

Although it might seem to be a technical point, whether the Senate can be altered by amendment before eliminating the Equal Suffrage Clause is a crucial issue. If altering the representative scheme of the Senate after elimination of the Equal Suffrage Clause is constitutional, one might ask why we are not permitted to simply reform the Senate directly and declare that the clause is not binding. Such an approach would be based, however, on a misreading of the argument laid out above.

That we are free to reform the Senate is not due to the illegitimacy of the Equal Suffrage Clause as it now stands. As long as the last line of Article V is a part of our Constitution, an amendment that alters the Senate's representation without the consent of the states would be unconstitutional.¹⁹¹ We are bound by the language of the document. We are also empowered by it. If we determine that, for whatever reasons, we want to strike the clause from the Constitution, we are free to do so. But if the alteration of the Senate is also desired, the clause must be removed first. This is not an overly formal or technical adherence to the words of the Constitution. Believing that Congress must redraft the Constitution before it remakes the Senate reflects

190. Professor Monaghan writes in his critique of Amar: "To my eyes, neither completely state-centered nor completely nationalist views of the founding capture the original understanding," adding, however, that "[f]ederalism, not national consolidation, was the defining feature of the Constitution of 1787." Monaghan, *supra* note 17, at 138. In either case, we are free to strike the balance where we wish. While focusing on the original understanding may inform one's personal beliefs and help in evaluating others' historical arguments, it is not dispositive. The fact that the Framers struck a certain balance between the popular and the federal need not mean that we must strike the same one. We are greatly limited by Article V, but not completely restrained.

191. This is not to say that there are not other ways that the Senate might be changed. See Baker & Dinkin, *supra* note 45, at 68-84 (where the authors offer a number of creative possibilities); see also *supra* note 48 (summarizing those possibilities). In a conversation regarding these issues, Professor James E. Fleming offered that it might be an open question whether Senators themselves—while on the floor of the Senate—could simply consent to a change in their own suffrage in the Senate. This possibility would permit reformation of the Senate outside Article V, but, unlike Amar's arguments, would not be amending the Constitution itself. It could be argued, however, that such a route would be, in effect, a Constitutional amendment because it would make the Equal Suffrage Clause moot. For the purposes of this Note, however, it is only necessary to point out that an amendment to the *text* of the Constitution using extra-Article V methods would be illegitimate.

our adherence to the principle that we are bound by the explicit language of our Constitution. Just because we are bound, however, does not mean that we must blindly adhere to the original intentions or dated interpretations of the text. In addition, we are not bound by implied limitations.

*c. Amendments as Death of the Constitution: An Argument Against Implied Limitations on Amendment*¹⁹²

Any theory that allows for anything to be amended in the Constitution will inevitably run up against arguments for implied limitations on the amending power.¹⁹³ James E. Fleming has noted that lawyers' first reaction to the concept of an unconstitutional amendment would be to claim that there could be no such thing; however, when pressed, they might conclude otherwise: "[A]lmost all lawyers might . . . believe that to adopt amendments purporting to repeal certain unalienable fundamental rights (such as freedom of speech and liberty of conscience) would be to repudiate our constitutional order, not merely to ratify a valid constitutional amendment."¹⁹⁴ Certain amendments are argued to be such radical rejections of our constitutional structure that they would be unconstitutional.

To the contrary, all amendments are a repudiation of the constitutional order, just to differing degrees.¹⁹⁵ The clarification of the succession to the presidency is an extremely minor repudiation of past practice ordained by the Constitution,¹⁹⁶ while the Thirteenth, Fourteenth, and Fifteenth Amendments mark a clear break from a previous Constitutional order.¹⁹⁷ That the latter do so does not make them unconstitutional. Clearly, one can easily claim that repudiating slavery¹⁹⁸ is different from repudiating a cherished principle, such as

192. If a follow-up to this Note is ever written, the possible implications of the Ninth Amendment may need to be addressed. By referencing unenumerated rights, the Ninth Amendment could be read to create limitations on what could be amended in the Constitution. See U.S. Const. amend. IX. For the purposes of this Note, the principle of equal representation could be one of these unenumerated rights (or for that matter, could be seen as explicitly protected by provisions in the Constitution). Therefore, amending the Equal Suffrage Clause would not raise the sorts of Ninth Amendment problems other proposed amendments might raise. Certainly, others might suggest that federalism is another right that is unenumerated and, therefore, protected by the Ninth Amendment.

193. See *supra* Part II.D. (regarding implied limitations).

194. See Fleming, *supra* note 98, at 374.

195. See Amar, *Consent*, *supra* note 53, at 500 (rejecting the notion that an amendment that "radically re-write[s] the text being amended" is no amendment at all).

196. See U.S. Const. amend. XXV.

197. See U.S. Const. amend. XIII, XIV, XV.

198. See U.S. Const. amend. XIII.

free speech, and rightly so. This distinction, however, is one of morality, value, and right, not of constitutional legitimacy.

A constitution can be both immoral and legitimate. We do not want such a constitution, and therefore are entrusted to protect against it.¹⁹⁹ Rejecting implied limitations on amendment therefore celebrates our responsibility to craft a better Constitution and will ultimately create a citizenry that does not take its rights for granted.²⁰⁰ Rejecting implied and entrenched limitations on amending the Constitution may be unsettling to some,²⁰¹ but it puts current citizens on the same footing as those in the past,²⁰² entrusting us with the job of protecting the best parts of our founding charter²⁰³ and lancing the worst.²⁰⁴

CONCLUSION

The Constitution provides both principles²⁰⁵ and the power for us to reconstitute them.²⁰⁶ The Framers only had the power to express what they envisioned for the nation in the clearest language available to them. It is our responsibility to apply the language as best we see fit, to reestablish our Constitutional scheme when we deem it appropriate. Certainly, this process will be contentious and, considering how difficult it is to amend the Constitution, will likely never lead to such an amendment.²⁰⁷ In any event, we should free ourselves from the constraints of the Equal Suffrage Clause at least to

199. We are entrusted to be perpetual framers. Article V gives us a road map for determining the hurdles we must get over before changing our governmental scheme. *See* U.S. Const. art. V. In this way we are in the same shoes as the Framers, and may alter the substance of the Constitution as long as we stay true to the procedure that legitimates our modern choices.

200. Even if we accept that there are rights that cannot be alienated from the people, it still might be difficult to explain why eliminating them from the Constitution would be illegitimate. If they are unalienable, then why must they be enacted at all? And if enacting them is simply a reiteration of these rights, the elimination of them from the text of the Constitution would not eliminate them from existence. What would the actual harm be? If the harm is that the rights would no longer be protected, then the view that rights—or at least rights with any substance—are vested and divested by the will of the people is further supported.

201. *See supra* Part II.D.

202. *See supra* note 199.

203. *See, e.g.*, U.S. Const. amend. I, XIV.

204. *See, e.g.*, U.S. Const. art. I, § 3, cl. 1 (providing each state with equal suffrage in the Senate), art. V (entrenching that equal suffrage), art. II, § 1, cl. 2 (describing the make-up of the Electoral College), amend. XVIII (prohibiting the sale and consumption of alcohol), amend. XXI (repealing the 18th Amendment).

205. *See supra* note 141 (listing abstract principles).

206. *See* U.S. Const. art. V.

207. It may not be such a far-fetched proposition, however. It is conceivable that population densities could become ever more polarized, leading to a situation where it might be politically prudent for mid-sized states to help eliminate a senator from a handful of incredibly over-represented small states and give an extra senator to a handful of the largest states.

the extent necessary to discuss the value of our representative scheme.²⁰⁸ The debate surrounding the Senate and its underlying values should resemble those surrounding other important and controversial aspects of our Constitution.²⁰⁹ This debate is especially important now that we live in a nation with more states; with ever more transitory citizens; with greater population disparities;²¹⁰ and in a time after the passage of amendments expanding the franchise²¹¹ and governed by Supreme Court decisions disallowing voter dilution.²¹²

208. This might only require a general recognition that the Equal Suffrage Clause could be eliminated—even if it never is. Until that point, the issue of our representation in the Senate may not be widely discussed because it will be deemed so unlikely. See generally Baker & Dinkin, *supra* note 4 (discussing the unlikelihood of their desired reform).

209. For example: What does “equal protection of the laws” require? U.S. Const. amend XIV. See, e.g., Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Gratz v. Bollinger, 123 S. Ct. 2411 (2003); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”); Korematsu v. United States, 323 U.S. 214, 219-20 (1944) (“Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (asserting that the Fourteenth Amendment was aimed at eliminating racial discrimination and not meant to affect, for example, “males,” “freeholders,” “citizens,” “persons within certain ages,” or “persons having educational qualifications”).

What rights are protected, if any, by the Due Process Clauses in the Constitution? U.S. Const. amend V, XIV. Compare Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003) (“The liberty protected by the Constitution allows homosexual persons the right to” express their relationship choices “in the confines of their homes.”), with Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (finding that there is no “fundamental right to engage in homosexual sodomy”).

How far does the right to speech extend? U.S. Const. amend I. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). What constitutes the free exercise of religion? U.S. Const. amend I. See, e.g., Oregon Dep’t of Human Res. v. Smith, 494 U.S. 872 (1990); Braunfeld v. Brown, 366 U.S. 599 (1961).

What is commerce? U.S. Const. art. I, § 7. See, e.g., United States v. Lopez, 514 U.S. 549 (1995); Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 Fordham L. Rev. 2177, 2178-79 (2003) (describing differing interpretations of “commerce” found in the *Lopez* decision).

210. See *supra* note 4; see also Baker & Dinkin, *supra* note 4, at 24-29 (explaining how the allocation of representation in the Senate gives small states disproportionate power).

211. See U.S. Const. amend XV (eliminating racial classifications in voting); U.S. Const. amend XVII (providing for the election of senators by popular vote); U.S. Const. amend XIX (extending the vote to women); U.S. Const. amend XXIV (abolishing the poll tax); U.S. Const. amend XXVI (lowering the voting age).

212. See, e.g., Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 673 (1964) (“[W]hether or not the House is apportioned on a population basis, the scheme of legislative representation in Maryland cannot be sustained under the Equal Protection Clause of the Federal Constitution, because of the gross disparities from population-based representation in the apportionment of seats in the Maryland Senate.”).

We are also over 200 years beyond the political compromises necessary for ratification of the Constitution.²¹³

Our Constitution embodies grand principles as well as necessary compromises,²¹⁴ and allows us, through interpretation of broad principles as well as formal amendment, to improve upon it. If one of those compromises—one of the imperfections—resides within the Equal Suffrage Clause of Article V, the clause should not be any less open to revision. If entrenchment represents a compromise between a value found in the Constitution and one we now hold more dear,²¹⁵ that alone is a strong justification for ridding ourselves of it.²¹⁶ Maybe,

213. Although the Equal Suffrage Clause could be read to reflect a deep, fundamental commitment to certain principles such as federalism, it might simply protect compromises needed to assure passage at the time of the framing. See Fleming, *supra* note 98, at 362-63.

Perhaps Article V entrenches provisions that reflect compromises with our Constitution's constitutive principles: the protection of the African slave trade with the principle that all persons are created equal, and the equal representation of the states in the Senate with the principle of the equal representation of citizens. The founders of the Constitution concluded that both compromises were necessary to 'the forging of the union': the slave states insisted upon the former, the small states upon the latter. Thus, both imperfections were considered necessary 'to form a more perfect Union' than the Articles of Confederation. From this standpoint . . . we can see that Article V entrenched features of the Constitution that were vulnerable to being repealed through democratic procedures, precisely because they manifested such deep compromises with our constitutive principles and ordained such an imperfect Constitution.

Id. at 362-63 (footnotes omitted). In *The Federalist Papers*, this sentiment is clearly expressed:

[I]t is superfluous to try, by the standard of theory, a part of the constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America.

The *Federalist* No. 62, *supra* note 8, at 316. The Senate itself was considered an evil, though a lesser one than failure to enact the Constitution:

A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former lies between the proposed government, and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

Id. at 316-17. It is not apparent why this compromise need survive over two centuries of governmental and national development.

214. See Monaghan, *supra* note 17, at 121 ("Article V . . . illuminates the state-oriented compromises and democracy-restraining features that were built into the Constitution.").

215. See *supra* notes 9-10 and accompanying text.

216. Even without this greater justification, an amendment eliminating the Equal Suffrage Clause would be legitimate. I only reference some of the arguments for reforming the Senate as persuasive reasons why doing so would also resolve a conflict

as one American People, we need to do some wild political dreaming about “breaking down the lines which separate” us.²¹⁷

embedded in the Constitution. One who is not persuaded, in my view, is simply disagreeing about the prudence of such change and using original intent to bolster their argument. As already noted, the fact that original intent may be consistent with the traditional view of entrenchment has no bearing on the legitimacy of reform, only on its prudence.

217. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819). It should be noted that many of the same arguments for ridding ourselves of the present Senate scheme apply to the Electoral College, an institution that was prophetically critiqued by Professor Amar: “The ingenious scheme of presidential selection set up by Article II and refined by the Twelfth Amendment was a brilliant eighteenth century invention that makes no sense today. Our system of selecting Presidents is a constitutional accident waiting to happen.” Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 Const. Comment. 143, 143 (1995).

Notes & Observations