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Ruth Bader Ginsburg

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ON AMENDING THE CONSTITUTION:
A PLEA FOR PATIENCE*

*Ruth Bader Ginsburg***

1. INTRODUCTION

The United States is not among the world's older nations, but our Constitution, drafted in 1787, is the oldest written constitution still in use.¹ (Half the world's nations have constitutions written since 1970.²) Apart from the Bill of Rights, made up of the first ten amendments, a Bill promised at the start and added in 1791, the Constitution has been amended only sixteen times in the two centuries it has served as our nation's fundamental instrument of government. One might say ours has been a Constitution hard to amend and hardly amended. Should we keep it that way? Comments on this question, in the daily press as well as in academic circles, were stimulated by the Supreme Court's June 21, 1989 decision in *Texas v. Johnson*.³ That decision held incompatible with the freedom of speech provision of the first amendment a Texas law making it a criminal offense to

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** United States Court of Appeals, District of Columbia Circuit.

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1. See A. PEASLEE, CONSTITUTIONS OF NATIONS 4 (1950).

2. See A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Supp. 1988).

3. 109 S. Ct. 2533 (1989).

desecrate the flag in a way the actor knows will seriously offend onlookers.⁴

Is the decision in *Texas v. Johnson* the kind of event that should trigger a constitutional amendment? In deciding on *your* answer to that question, consider which, if any, of the scores of current bills that propose amendments you would want to enshrine in the Federal Constitution. As the twenty-seventh amendment, would you favor an abortion ban;⁵ or the equal rights amendment;⁶ perhaps a balanced budget requirement;⁷ or a line-item veto for the President?⁸ Would you vote for an amendment to increase the terms of members of the House of Representatives to four years;⁹ or one to change the President's term to six years;¹⁰ or to dispense with the electoral college and, instead, directly elect the President and Vice President?¹¹ What do you think of a constitutional amendment limiting private spending on federal election campaigns;¹² or one permitting voluntary prayer in public schools;¹³ or another prohibiting busing of school children to achieve racial integration?¹⁴ How about an amendment guaranteeing employment to all citizens;¹⁵ or one reapportioning seats in the House of Representatives to take into account alien residents;¹⁶ or one declaring English the official language of the United States?¹⁷ All these, and scores more, have been proposed, unsuccessfully, as constitutional amendments.

4. See TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).

5. See, e.g., S.J. Res. 3, 21; H.R. 623, 626; H.J. Res. 25, 86, 91, 97, 103, 114, 118, 155.

6. See, e.g., S.J. Res. 1; H.J. Res. 1.

7. See, e.g., S.J. Res. 2, 9, 12, 22, 27, 29, 30; H.R. 364; H.J. Res. 3, 4, 5, 9, 16, 33, 34, 40, 42, 43, 58, 61, 70, 85, 96, 162, 189, 268. Cf. H.J. Res. 13 (proposing constitutional amendment requiring application of any budget surplus to reduce the public debt).

8. See, e.g., S.J. Res. 14, 23; H.R. 61; H.J. Res. 12, 29, 50, 184.

9. See, e.g., H.J. Res. 188, 201, 239. Other proposals would limit the number of terms a member of Congress could serve. See, e.g., S.J. Res. 17; H.J. Res. 15, 51, 69, 202. Still others would limit the tenure of judges, H.J. Res. 15, 66, or require their reconfirmation every 10 years, H.J. Res. 99.

10. See, e.g., H.J. Res. 6, 176. Another suggestion to alter presidential tenure would repeal the two-term limit on presidential service. See, e.g., S.J. Res. 36; H.R. 404; H.J. Res. 264.

11. See, e.g., H.J. Res. 2, 6, 137.

12. See, e.g., S.J. Res. 26, 48; H.J. Res. 10.

13. See, e.g., S.J. Res. 144; H.J. Res. 41.

14. See, e.g., H.J. Res. 49.

15. See, e.g., H.J. Res. 172.

16. See, e.g., H.J. Res. 199.

17. See, e.g., H.J. Res. 23, 48, 79, 81. Other proposals run the gamut from permitting presidential pardons only after conviction, and providing for forfeiture of benefits and compensation by any presidential appointee convicted of a felony, to regulating congressional pay and repealing the congressional authority to declare war. See, e.g., S.J. Res. 11; H.J. Res. 17, 18, 20, 26, 55, 193; H. Con. Res. 60, 78.

Was Congress, in years past, wise to resist amendments of a wide variety? In 1808, for example, Congress rejected a proposal to choose Presidents by lot from retiring Senators;¹⁸ in the same year, Congress turned away an amendment proposing elimination of the Vice Presidency.¹⁹ In 1893, Congress declined constitutional alteration to change the name of the nation to United States of the Earth;²⁰ the very next year, the national legislature passed over an amendment to acknowledge God and the Christian religion.²¹ In 1904, Congress refused an amendment to divide all the land in the United States so that each citizen would have an equal share;²² in 1963, Congress declined to abolish the income tax.²³ Pages from our nation's history bear consultation, I hope you will agree, as we consider what the twenty-seventh amendment should be, for the life of the Constitution has indeed been our experience in preserving its essence—both the governmental structures it establishes, and the fundamental human rights it shelters from governmental destruction or censorship.²⁴ In my article, I will survey, for the guidance history affords, the design of, and experience under, the amending process ordained by article V of the Constitution.

2. OVERVIEW

I will present first some numbers that summarize the story. Only twenty-six amendments have achieved ratification, but over ten thousand proposed amendments have been introduced by members of Congress.²⁵ Of the twenty-six successful amendments, only four overrode Supreme Court decisions.²⁶ Of the thousands of proposed

18. See H. AMES, *PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 328 (1970).

19. See *id.*

20. See Musmanno, *The Difficulty of Amending Our Federal Constitution: Defect or Asset?*, 15 A.B.A. J. 505, 507 (1929).

21. See *id.*

22. See H.R.J. Res. 83, 58th Cong., 2d Sess. (1904).

23. See H.R.J. Res. 23, 88th Cong., 1st Sess. (1963).

24. Cf. O.W. HOLMES, *THE COMMON LAW* 1 (1963) ("The life of the law has not been logic; it has been experience."); *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) ("Upon this point a page of history is worth a volume of logic.").

25. See SUBCOMMITTEE ON THE CONSTITUTION, SENATE COMM. ON THE JUDICIARY, *AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY*, S. REP. NO. 87, 99th Cong., 1st Sess. 95 (1985) (9,984 amendments through 1984) [hereafter "Senate Report"]; 135 CONG. REC. Index No. 1, at 40 (Jan. 3, 1989) (listing proposals introduced in first days of 101st Congress).

26. See U.S. CONST. amend. XI (overruling *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *id.* amend. XIV, § 1 (rejecting *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)); *id.*

amendments that lost or languished, only seven received congressional approval, but then failed because not ratified by a sufficient number of states. The equal rights amendment and the District of Columbia statehood proposal fit in this category, as does but one—the proposed Child Labor Amendment—that would have overruled a High Court judgment.²⁷

The congressional restraint and public conservatism this record shows have assured the endurance of the Constitution despite shifting political passions. Contrast a story told of the French Constitution decades after that nation's 1789 revolution: "Have you a copy of the Constitution?" a Paris bookseller was asked during the second French Empire. The bookseller's reply: No. "We do not deal in periodical literature."²⁸ Our experience in the United States is almost the polar opposite.

3. THE AMENDMENT PROCESS

May I next remind you how the amendment process works. Article V, you will recall, sets out two methods for proposing amendments and two modes of ratification. Amendments may be proposed for ratification by a two-thirds vote of each house of Congress or by a national convention called by Congress on request of the legislatures of two-thirds of the states.²⁹ The first method (two-thirds vote of the House and Senate) has been used for every amendment so far proposed for ratification.³⁰ But there have been some close calls for employing a national convention instead.³¹ Most recently, thirty-two states, just two states shy of the two-thirds required, applied for a constitutional convention to consider a balanced budget amendment.³² In the 1960s, thirty-two states petitioned for a convention to

amend. XVI (overturning *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *id.* amend. XXVI (nullifying in part *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

27. See Senate Report, *supra* note 25, at 96-98.

28. See J. BECK, *THE CONSTITUTION OF THE UNITED STATES 1787-1927*, at 16-17 (1927).

29. U.S. CONST. art. V.

30. See Mathias, *What's the Constitution Among Friends?*, 67 A.B.A. J. 861 (1981).

31. See, e.g., Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1931-32 (1983) (discussing role of convention threat in spurring passage of Bill of Rights and eleventh amendment); Mathias, *supra* note 30 (discussing convention petitions calling for outlawing polygamy, altering federal taxing power, and reversing Supreme Court's one-person, one-vote decisions).

32. See Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 2 (1979) (30 states had petitioned by 1979); Schumer, *Is There a Constitutional Convention in America's Future?*, 2 (unpublished manuscript September 18, 1984) (two more, making the total 32, filed petitions by 1984).

override the Supreme Court's one-person one-vote decisions.³³

Once an amendment is proposed, ratification requires the approval of three-fourths of the states, either by the state legislatures or by special state conventions, as Congress specifies.³⁴ To date, Congress has submitted every proposed amendment to the state legislatures for ratification rather than to specially-installed state conventions, except for the twenty-first amendment, which repealed prohibition.³⁵

This two-step process, requiring supermajorities at both proposal and ratification stages, promotes cautious deliberation and demands a strong consensus before constitutional change is ordered. The original draft of article V allowed ratification by two-thirds of the states, but the framers heightened the required proportion to three-fourths.³⁶ The framers wanted to establish a regime that would make it possible to cure "discovered faults" in our constitutional structure and system,³⁷ but they sought to build into the process "stability,"³⁸ and checks against "experiments";³⁹ they deliberately constructed "obstacles" and "delays" sufficient to block "light or frequent innovations."⁴⁰

4. FOUR EPISODES OF CONSTITUTIONAL CHANGE

I turn now to the major episodes of change accomplished by constitutional amendment. Amendments that successfully ran the arduous course from proposal through ratification cluster in four discrete periods: first, the Bill of Rights along with the next two amendments adjusted the Constitution early on (in the years 1791-1804) to meet anti-federalist concerns; second, six decades later, the thirteenth through fifteenth amendments marked the Reconstruction following the Civil War (1865-1870); change next occurred in the Populist and Progressive Era (1913-1920); in modern times, in the wake of the spreading civil rights movement of the 1960s, amendments continued

33. See Mathias, *supra* note 30.

34. See U.S. CONST. art. V.

35. Compare Senate Report, *supra* note 25, at 67 with Dellinger, *Amending Process*, 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 47 (1986).

36. Compare J. ELLIOT, DEBATE ON THE ADOPTION OF THE FEDERAL CONSTITUTION 129-32 (1937) with U.S. CONST. art. VI.

37. THE FEDERALIST No. 43, at 291 (J. Madison) (Ford ed. 1898).

38. *Id.* No. 49, at 335-36 (J. Madison).

39. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1821-24 (1933).

40. ST. G. TUCKER, BLACKSTONE'S COMMENTARIES app. at 371-72 (1803).

the expansion of the electorate.⁴¹ I will briefly survey these four clusters of constitutional alteration.

The first ten amendments, which we honor collectively as the Bill of Rights, were anticipated before adoption of the Constitution. The promise of their enactment became essential to win the support of several of the state ratifying conventions.⁴² By providing explicit recognition of states rights and safeguards for individual liberty, the Bill of Rights softened objections to the union established by the basic instrument of federal government.⁴³

Because we regard human rights protections anchored by the Bill of Rights as our nation's hallmark and pride, I will digress to note the salient character of those provisions.⁴⁴ The first ten amendments do not really declare rights; instead, they assume the existence of core individual rights and simply command that the government keep its hands off.⁴⁵ The founding fathers thought in the natural rights vein. Human rights, in their view, antedated the state (or nation). They were given by Higher Authority. They were not the government's to confer. Rather, the government was to be kept from trampling on them.

So our first amendment does not say, as the celebrated French Declaration of the Rights of Man does: "[E]very citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by law."⁴⁶ Instead, the first amendment assumes the basic right for all humankind (not only citizens) and simply says: "Congress shall make no law . . . abridging the freedom of speech or of the press."⁴⁷ Is that pristine statement worth unmodified retention? Would it be preferable to add, in line with the French and most contemporary human rights charters, "except for laws punishing abuse of this freedom"? Would it be better still to append an illustrative catalogue, so as to allow, explicitly, laws holding individuals responsible for obscene speech, indecent speech, racist

41. See Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427-29 (1983).

42. See Senate Report, *supra* note 25, at 4-5; A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 3 (1978).

43. See A. GRIMES, *supra* note 42.

44. See generally Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979); Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582 (1981).

45. See Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1584-86 (1981).

46. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF 26 AUGUST 1789, art. 11.

47. U.S. CONST. amend. I.

speech, speech denigrating women, anti-Semitic speech, blasphemy?⁴⁸ So far, we have steadfastly resisted that approach. No amendment to date has tampered with the Bill of Rights.

Returning to episodes of amendments, the eleventh and twelfth amendments might be ranked with the first ten because they also responded to initial anxieties about the rights of the states and of the people—at least those of the people who, at that time, enjoyed the franchise.⁴⁹ (The electorate of the framers' day excluded blacks, women, and even white men who owned no property.) The eleventh amendment overrode the Supreme Court's decision in *Chisholm v. Georgia*;⁵⁰ the amendment, as construed, has blocked suit against a state in federal court without the state's consent.⁵¹ The twelfth amendment, a complicated one, provided for separate voting (by the Electors) for President and Vice President; it made the presidential election process then in effect more majoritarian and, incidentally, enabled the Republicans of that day to consolidate their recent ascension to national power.⁵²

From 1804, the year the twelfth amendment was ratified, until after the Civil War, no amendments were added to the Constitution. Then, in quick progression from 1865 to 1870, the three Reconstruction amendments ended slavery, extended the franchise to black men, made equality a constitutional norm, and reinforced the supremacy of

48. See Glasser, *Bush Lowers the Flag*, N.Y. Times, June 28, 1989, at A23, col. 1.

49. See Dellinger, *supra* note 41, at 428; cf. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (commenting on exclusion of slaves and women from Founding Fathers' concept of "the People").

50. 2 U.S. (2 Dall.) 419 (1793).

51. This broad statement represents the prevailing judicial interpretation of the amendment. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (citizens of state cannot sue own state without state's consent); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (foreign governments cannot sue unconsenting states). The prevailing interpretation has been criticized in commentary, see, e.g., Gibbons, *supra* note 31, and sources cited *infra* note 80, and is disapproved by four of the current Supreme Court Justices, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (amendment precludes federal jurisdiction over suits against states only when sole basis of jurisdiction is diversity of citizenship).

52. The original election process tended to result in selection of a President and Vice President of different political parties. See Senate Report, *supra* note 25, at 19. Under the system inaugurated by the twelfth amendment, both the President and the Vice President would likely belong to the party supported by the majority of voters, thus allowing this majority more effectively to advance its desired policies. The change ordered by the amendment immediately benefitted the Republicans, who held a slim popular majority. See A. GRIMES, *supra* note 42, at 22-26; see also Senate Report, *supra* note 25, at 20 (noting that the Republicans proposed the twelfth amendment as soon as they gained a sufficiently large majority in Congress).

the national government.⁵³ The central fourteenth amendment prescription declared: "All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."⁵⁴ That statement overruled the Supreme Court's decision in *Dred Scott v. Sandford*,⁵⁵ the 1857 judgment declaring that no black person, even if freed from slavery, could be or become a "citizen" of state or nation.⁵⁶

Over forty years passed between ratification of the fifteenth amendment in 1870, giving black men the right to vote, and the first constitutional fruits of the Populist and Progressive Movements. The sixteenth amendment, ratified in 1913, overruled the Supreme Court's decision in *Pollock v. Farmers' Loan and Trust Co.*,⁵⁷ and thereby cleared the path for a personal federal income tax.⁵⁸ That same year the seventeenth amendment, providing for direct election of Senators, became part of the Constitution.⁵⁹ Before the seventeenth amendment, Senators were elected by the state legislatures. The seventeenth amendment's extension of direct democracy, some who study the Constitution believe, had as a side effect reduction of the vigilance with which state interests are represented in Congress.⁶⁰

The moral flank of the Progressive crusade shows up in the eighteenth amendment, ratified in 1919, prohibiting the manufacture, sale, or transportation of intoxicating liquors.⁶¹ It is the only individual liberty-curtailling amendment ever adopted⁶² and, coincidentally, the only amendment ever repealed. Last of the successful Progressive

53. See Senate Report, *supra* note 25, at 25-36.

54. U.S. CONST. amend. XIV.

55. 60 U.S. (19 How.) 393 (1857).

56. See *id.* at 403-27. On the extraordinary ratification history of the fourteenth amendment, see J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 192-93 (1956).

57. 158 U.S. 601 (1895).

58. The Populists desired a tax to alleviate social inequalities and to fund reforms addressing the deteriorated turn-of-the-century economic situation. See Senate Report, *supra* note 25, at 41; A. GRIMES, *supra* note 42, at 69.

59. See Senate Report, *supra* note 25, at 45-46; A. GRIMES, *supra* note 42, at 82.

60. In a letter to me dated July 27, 1989, Justice Scalia confirmed his view "that the Seventeenth Amendment was the real death knell for a federal system with any enforceable constraints upon the scope of the union's activities."

61. See A. GRIMES, *supra* note 42, at 89-90.

62. See Tribe, *A Constitution We Are Amending: In Defense of A Restrained Judicial Role*, 97 HARV. L. REV. 433, 441 (1983); A. GRIMES, *supra* note 42, at 89. The sixteenth amendment, granting Congress the power to levy income taxes without regard to any census or enumeration and without apportionment among the states, enlarged congressional power, but did not contract any individual rights or liberties contained in the Bill of Rights or elsewhere in the Constitution.

amendments,⁶³ and preceded by a century of struggle, the nineteenth amendment, ratified in 1920, secured to women citizens the right to vote.⁶⁴

Before the spate of amendments closest to the current time, three discrete, relatively uncontroversial amendments gained approval. In 1933, the states ratified the twentieth amendment, which shortened the lame duck session of Congress.⁶⁵ State conventions later the same year ratified the twenty-first amendment which repealed prohibition.⁶⁶ Last in this set of three, in 1947, following President Franklin Delano Roosevelt's death during his fourth term in office, the twenty-second amendment, which limits presidential tenure to two terms, became constitutional law.⁶⁷

The civil rights activity in the 1960s propelled the fourth major episode of amendments. Except for the twenty-fifth amendment on presidential succession, which was sparked by the assassination of President Kennedy, all amendments made from 1961 to 1971 were designed to advance participatory democracy.⁶⁸ The twenty-third amendment, ratified in 1961, gave the District of Columbia three votes in the electoral college.⁶⁹ The twenty-fourth amendment, in 1964, outlawed the poll tax.⁷⁰ The twenty-sixth amendment, prompted by the Supreme Court's decision in *Oregon v. Mitchell*,⁷¹ set eighteen as the minimum voting age in federal and state elections.⁷²

To summarize what this review of the Constitution's twenty-six

63. The unsuccessful Child Labor Amendment, sent by Congress to the states for ratification in 1924, was also a product of the Progressive Era. The amendment would have overruled the Supreme Court's decisions in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), by permitting Congress to regulate or prohibit the employment of any person under 18 years of age. See Senate Report, *supra* note 25, at 97.

64. To complement the nineteenth amendment, an Equal Rights Amendment has been proposed every year commencing in 1923. See CONSTITUTIONAL AMENDMENTS ANNUAL REPORT 1976, S. REP. NO. 126, 95th Cong., 1st Sess. 2 (1977). The nineteenth amendment and the ERA could work together in much the same mutually reinforcing way as the fifteenth and fourteenth amendments.

65. See Senate Report, *supra* note 25, at 62; Dellinger, *supra* note 41, at 428 n.214.

66. See Senate Report, *supra* note 25, at 67. The twenty-first is the only amendment for which Congress has chosen the state convention method of ratification. This method was endorsed by both the Republican and Democratic parties in their platforms because the urban-dominated parties believed that pro-prohibition rural elements were overrepresented in Congress. See *id.* at 66.

67. See *id.* at 69-72; Dellinger, *supra* note 41, at 428 n.214.

68. See A. GRIMES, *supra* note 42, at 153-54.

69. See U.S. CONST. amend. XXIII.

70. See *id.* amend. XXIV.

71. 400 U.S. 112 (1970).

72. See U.S. CONST. amend. XXVI.

amendments reveals: with the exception of a few noncontroversial amendments, constitutional changes have occurred in clusters, reflecting alterations in society long building steam and coming to full boil in particular periods. Most of the twenty-six amendments safeguarded rights, expanded the franchise, or made structural adjustments. The one liberty-restraining prohibition, the eighteenth amendment, lasted less than fifteen years.⁷³ As already underscored,⁷⁴ only four amendments reversed outcomes declared in Supreme Court decisions. I will spotlight now those four instances.

5. SUCCESSFUL OVERRIDES OF SUPREME COURT DECISIONS

The eleventh amendment, first to overturn a Supreme Court interpretation, settled a debate that originated at the Constitutional Convention itself. The Convention delegates divided sharply on the question whether federal courts should have authority to entertain lawsuits—particularly lawsuits to collect debts—prosecuted against states by citizens of other states.⁷⁵ The language devised for article III deliberately left resolution of the question unclear.⁷⁶ In *Chisholm v. Georgia*,⁷⁷ the Supreme Court sustained federal court jurisdiction when persons from out of state sued a state.⁷⁸ States rights sentiments heated up⁷⁹ and by 1795, the High Court's 1793 *Chisholm v. Georgia* decision was no longer constitutional law.⁸⁰ The overruling by constitutional amendment appears swift, but the percolation period in fact

73. Enacted in 1919, it was repealed by the twenty-first amendment in 1933. See *supra* text accompanying notes 61 and 66.

74. See *supra* note 26 and accompanying text.

75. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (1937); Senate Report, *supra* note 25, at 13.

76. See U.S. CONST. art. III, § 2, cl. 1.

77. See 2 U.S. (2 Dall.) 419 (1793).

78. See *id.*

79. See Gibbons, *supra* note 31, at 1931-32.

80. See *id.* at 1933-34. As indicated *supra* note 51, the prevailing, but much criticized, interpretation of the eleventh amendment bars all suits in federal court in which a state is the named defendant. Some maintain that the amendment precludes federal jurisdiction over suits against states only when the sole basis of federal jurisdiction is diversity of citizenship. See, e.g., Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-92 (1987); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *supra* note 31.

Others assert that the amendment restricts the authority of federal courts to adjudicate cases against the states only in the absence of a congressional enactment allowing suits against the states. See Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regula-*

ran some seven years, commencing as it did at the Convention in 1787.

Probably best known of the overruling amendments, as indicated earlier, the first section of the fourteenth amendment⁸¹ rectified in 1868 what the Supreme Court did in 1857 in the *Dred Scott Case*.⁸² That now infamous decision held the Missouri Compromise barring slavery from the territories unconstitutional; in the process, the Court had classed slaves as property and, as just mentioned, declared them, even when freed, incapable of acquiring citizenship.⁸³

Among the Progressive Era amendments, recall that I listed first the sixteenth amendment, which paved the way for a secure personal income tax. The sixteenth amendment did so by nullifying the Supreme Court's ruling in *Pollock v. Farmers' Loan and Trust Co.*;⁸⁴ in that 1895 decision, the High Court declared a federal tax on income from state and local bonds to be a "direct tax" within the meaning of article I, section 9, clause 4, and therefore impermissible unless apportioned among the states according to population. Taxation nowadays may be as certain as death, but it is not high on the public popularity list; correction to allow for a personal income tax by negating the Court's ruling in the *Pollock* case, understandably, was not swift. First, Congress passed a statute imposing a tax on corporate income.⁸⁵ Ultimately, in 1913, eighteen years after the Supreme Court's decision in *Pollock*, the sixteenth amendment achieved ratification.⁸⁶ (Undaunted, pro se litigants in federal courts, to this day, argue the unconstitutionality of the personal income tax.)

Most recent of the four amendments changing a Supreme Court outcome, the twenty-sixth amendment, ratified in 1971, guarantees

tion: *Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 683-99 (1976).

Still others offer theories that are amalgams of or variations on the above. See, e.g., Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

81. See U.S. CONST. amend. XIV.

82. 60 U.S. (19 How.) 393 (1857).

83. See *id.* at 403-27, 450-52.

84. 158 U.S. 601 (1895).

85. See Act of Aug. 5, 1909, ch. 6, 11, 36 Stat. 112-17 (1909); A. GRIMES, *supra* note 42, at 73.

86. See Senate Report, *supra* note 25, at 41-44.

the right to vote to citizens eighteen years of age and older.⁸⁷ The Supreme Court decision prompting the amendment was *Oregon v. Mitchell*,⁸⁸ which held that the equal protection clause did not prohibit the states from establishing twenty-one as the minimum voting age. It has been sensibly maintained that Congress, when it proposed the twenty-sixth amendment, did not really disagree with or alter the Supreme Court's interpretation of the equal protection clause; instead, Congress simply acted to secure, uniformly, the voting rights of all citizens at age eighteen.⁸⁹

Two facets of the twenty-sixth amendment bear emphasis. First, although ratification occurred in less than a year, the matter of the vote for eighteen year olds had been debated for decades, and the amendment confirmed an already settled consensus.⁹⁰ Second, *Oregon v. Mitchell* was brought for the very purpose of trying out whether a federal statute lowering the voting age to eighteen could obviate the need for a constitutional amendment.⁹¹ Once again, the route of constitutional change followed lengthy deliberation and was pursued only after the Supreme Court ruled that a statutory solution was not adequate to the task.

The nineteenth (sometimes called votes-for-women) amendment, I should note in this context, effectively redressed in 1920 a Supreme Court decision of 1874, *Minor v. Happersett*.⁹² In that case, brought by Virginia Minor, a citizen of Missouri and of the United States, the Supreme Court held that the right to vote was not among the fourteenth amendment "privileges and immunities of citizens of the United States," hence states were not inhibited by the Constitution from committing "that important trust to men alone."⁹³ The Court did acknowledge that, beyond doubt, women are "persons" and may be "citizens" within the meaning of the fourteenth amendment. But the Court also pointed out that children qualify under both headings.⁹⁴ And who would suggest children should have the right to vote? Coupling women with children, you see, does not always favor women.

87. See U.S. CONST. amend. XXVI.

88. 400 U.S. 112 (1970).

89. See Dellinger, *supra* note 41, at 415. See also A. GRIMES, *supra* note 42, at 143 (stating that the twenty-sixth amendment attempted "to clarify the voting situation in light of *Oregon v. Mitchell*").

90. See Senate Report, *supra* note 25, at 89-90.

91. See *id.* at 89.

92. 88 U.S. (21 Wall.) 162 (1874).

93. *Id.* at 175, 178.

94. See *id.* at 168, 174.

Virginia Minor's case caused barely a ripple in the ancient days and society in which it arose. So the nineteenth amendment has not been perceived as a reaction to the decision, and commentators have not included the votes-for-women guarantee on the list of amendments upsetting High Court dispositions.⁹⁵ The nineteenth amendment was in fact the product of protracted debate continuing for decades,⁹⁶ a debate in which Supreme Court decisions played no lead role.⁹⁷

6. AMENDMENTS PROPOSED IN CONGRESS

To recapitulate, constitutional amendments overriding Supreme Court decisions have numbered only two per century. One should not infer from that low number, however, any strong tendency among Supreme Court Justices to vote in whatever way "the home crowd wants."⁹⁸ Literally hundreds of amendments have been proposed just in the last twenty-five years to counteract Supreme Court judgments unpopular in certain quarters. I will list some familiar, testing examples.

In *Engel v. Vitale*,⁹⁹ a 1962 decision, the Supreme Court held as unconstitutional prayer at assemblies in public schools. Within three days, members of Congress reacted: over fifty bills were introduced in the span of seventy-two hours proposing constitutional amendments to upset the *Engel v. Vitale* decision. In the aftermath of a decision the next year curtailing Bible reading in public schools,¹⁰⁰ the number of bills for amendment swelled to over one hundred fifty.¹⁰¹ In the first ten years following the Supreme Court's 1973 abortion decisions, *Roe v. Wade*¹⁰² and *Doe v. Bolton*,¹⁰³ members of Congress filed over two hundred proposals for overruling the decisions by constitutional

95. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 49 & n.133 (1980); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-6, at 64-65 & n.10 (2d ed. 1988).

96. See generally E. FLEXNER, *CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES* (rev. ed. 1975).

97. *But cf.* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

98. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 *PEPPERDINE L. REV.* 227, 229-30 (1980).

99. 370 U.S. 421 (1962).

100. See *Abington School District v. Schempp*, 374 U.S. 203 (1963).

101. See Stone, *In Opposition to the School Prayer Amendment*, 50 *U. CHI. L. REV.* 823, 826 (1983).

102. 410 U.S. 113 (1973).

103. 410 U.S. 179 (1973).

amendment.¹⁰⁴ *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁰⁵ the 1971 decision (written by Chief Justice Burger) allowing busing as a remedy in urban school desegregation cases, prompted a similarly large number of amendment proposals.¹⁰⁶ In the 1970s after the Supreme Court decided *Furman v. Georgia*,¹⁰⁷ several dozen bills were introduced to root firmly in the Constitution the states' right to impose capital punishment.

Among other conspicuous targets of proposals for overruling by constitutional amendment, I call your attention particularly to the Supreme Court's legislative reapportionment (one-person, one-vote) decisions¹⁰⁸ and the Court's invalidation of the legislative veto.¹⁰⁹ Newest in the Court-checking hopper are the multiple proposals to change the Constitution to permit statutory prohibition of flag desecration.¹¹⁰

Time and the rigors of the amendment process will tell whether popular support for any of these amendment proposals is sufficiently deliberate and durable to yield a twenty-seventh, twenty-eighth, twenty-ninth, even thirtieth amendment.

7. AMENDMENTS REFERRED TO THE STATES

Indicative of our pride and faith in the Constitution, the large bulk of proposed amendments have been stopped at the initial stage. They failed to attract the endorsement of two-thirds of each house of Congress and therefore were never sent to the states for ratification. To complete this excursion over constitutional amendment terrain, I will feature the seven amendments that failed to achieve ratification after Congress gave its approval and passed them on to the states. Only one of those seven, as I said before, the Child Labor Amendment, was framed to override a Supreme Court decision.

The Child Labor Amendment, submitted to the states for ratification in 1924, would have overturned Supreme Court holdings that

104. See Davis, *Proposed Amendments to the Constitution of the United States of America Introduced in Congress from the 91st Congress, 1st Session, through the 98th Congress, 2nd Session, January 1969 - December 1984*, Congressional Research Service Report No. 85-36 GOV, at 287, 312 (February 1, 1985) [hereafter "CRS Report"].

105. 402 U.S. 1 (1971).

106. See CRS Report, *supra* note 104, at 290-99.

107. 408 U.S. 238 (1972).

108. See, e.g., CRS Report, *supra* note 104, at 287.

109. See, e.g., S.J. Res. 135, 98th Cong., 1st Sess. (1983).

110. See, e.g., S.J. Res. 165, 167, 169, 171, 179-80; H.J. Res. 302-10, 314-15, 317-19, 321-26, 328-37, 339-40, 342-43, 348-51, 359-60, 365, 377, 101st Cong., 1st Sess. (1989).

Congress lacked authority to regulate child labor.¹¹¹ By 1937, however, only twenty-eight states had ratified the proposal.¹¹² Congress once again tried a statutory solution when it dealt with the subject in the Fair Labor Standards Act of 1938.¹¹³ Constitutional doctrine had evolved in the interim, and in 1941, the Court upheld the child-protective legislation as within the range of the commerce power.¹¹⁴ Deliberation fueled by the amendment process had combined with the evolution of doctrine on a changing Court to render superfluous any embellishment of the Constitution's text.

The first two of the seven amendments that failed at the ratification stage were packaged with the Bill of Rights. One provided a formula for the number and ratio of Representatives, the other required deferral of any pay change Congress passed for its members until a new House of Representatives was elected.¹¹⁵ Only the one regulating the number of Representatives came close to ratification.¹¹⁶

Four of the state conventions that ratified the Constitution had recommended a prohibition on the acceptance of a title of nobility by any United States citizen.¹¹⁷ There was insufficient support for such an amendment in the First Congress,¹¹⁸ but the Eleventh Congress, in 1810, approved the prohibition as the prospect of the War of 1812 loomed larger.¹¹⁹ The amendment fell just one state short of the required number for ratification.¹²⁰ Thus, without fearing a federal case challenging his action, former President Ronald Reagan, on June 14, 1989, became an honorary Knight Grand Cross of the Most Honorable Order of the Bath, the fifty-seventh United States citizen so to receive an honorary knighthood from the British crown.¹²¹

Article V, on constitutional amendments, includes three subject matter limitations. Two ran out in 1808. Until that year, Congress

111. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

112. See Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 744 (1985). Unlike later proposed amendments, the Child Labor Amendment has no expiration date, but subsequent Supreme Court interpretations of the commerce clause have rendered its enactment unnecessary. See *United States v. Darby*, 312 U.S. 100 (1941).

113. Pub. L. No. 88-352, 78 Stat. 241 (1964).

114. See *United States v. Darby*, 312 U.S. 100 (1941).

115. See Senate Report, *supra* note 25, at 96.

116. The first was ratified by nine of the ten states necessary to make it effective while the second was ratified by only six states. See H. AMES, *supra* note 18, at 320.

117. See *id.* at 186.

118. See *id.*

119. See *id.* at 188.

120. See *id.*

121. See Conconi, *Personalities*, *Washington Post*, June 15, 1989, at C3.

could not amend the Constitution to cut off the slave trade or to lay a direct tax not "in Proportion to the Census."¹²² The third limit, that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,"¹²³ is still in force. In 1861, in a last ditch effort to avert the Civil War, Congress passed on to the states another limit, one that prohibited amendment of the Constitution to give Congress the power to abolish slavery. Only three states ratified that anti-Emanicipation Proclamation amendment.¹²⁴ No proposal since then sent to the states would have amended the amending process itself.¹²⁵

The Equal Rights Amendment (ERA), almost a half century after it was first introduced in Congress, was approved for state ratification in 1972. The amendment explicitly acknowledges the equal stature of men and women before the law. It never garnered more than thirty-five of the thirty-eight state votes needed for ratification. As the clock ran on the ERA, turbulent questions arose concerning the effect of purported rescissions of ratification¹²⁶ and of a three-year extension of the original seven-year ratification deadline.¹²⁷ During the years the ERA pended in state legislatures, the Supreme Court began to apply heightened scrutiny to gender-based classifications, so the need for the amendment seemed less pressing in 1979 than it did in 1972.¹²⁸

Still, if I may add a personal note, I believe we should have an ERA by the year 2000, simply to confirm a development that has already occurred in society at large.¹²⁹ Women, it is true, were not part of the political constituency in 1787, or even 1868. A provision recognizing their equal stature under the law would be at the level of grand or fundamental principle; it would complement the fourteenth

122. See U.S. CONST. art. V, § 9, cl. 1, 4; *id.* art. V.

123. See *id.* art. V.

124. See H. AMES, *supra* note 18, at 196.

125. See Senate Report, *supra* note 25, at 96-97. It is also notable as the only proposed amendment ever signed by the President, an event that is not required for ratification under article V. *Id.*

126. See Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 939-42 (1979).

127. Compare *id.* at 919-45 with Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980).

128. See generally Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQUALITY 17 (1988); Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986, at 109 (H. Schwartz ed. 1987).

129. See, e.g., Ginsburg, *Sex Discrimination*, in CIVIL RIGHTS AND EQUALITY 291 (L. Levy, K. Karst, D. Mahoney ed. 1989); Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQUALITY 1, 69-72 (1983).

amendment, just as the nineteenth amendment complements the fifteenth. ERA-style prescriptions now appear in the constitutions of several states of the United States, in the constitutions of diverse foreign nations, and in international human rights declarations.¹³⁰ Experience under these provisions should afford reassurance. That is what happened in the case of suffrage for women. Once it became clear from the experience in states with female suffrage, that votes for women would not destroy the home and family as we know and cherish those institutions, a national amendment became inevitable.

To conclude the list of seven amendments that passed in Congress but not in the states, the District of Columbia statehood amendment was opened for ratification in 1978. It had attracted only sixteen approvals when the time for ratification ran out.¹³¹

8. CONCLUSION

To sum up, what lessons does history teach about amending the Constitution? First, I suggest, in harmony with the framers' plan, hasty, ill-considered corrections are out of order. The process was designed to be lengthy, deliberative, and not frequently invoked.¹³² Second, the genius of our eighteenth century Constitution is its supple capacity to serve through changing times if supported by judicial in-

130. Sixteen states have "equal rights" provisions in their constitutions: ALASKA CONST. art. I, § 3 (1972); COLO. CONST. art. II, § 29 (1973); CONN. CONST. art. I, § 20 (1974); HAWAII CONST. art. I, § 5 (1972); ILL. CONST. art. I, § 18 (1971); MD. CONST. art. 46 (1972); MASS. CONST. part 1, art. CVI (amending art. I) (1976); MONT. CONST. art. 2, § 4 (1973); N.H. CONST. part 1, art. II (1974); N.M. CONST. art. 2, § 18 (1973); PA. CONST. art. I, § 28 (1971); TEX. CONST. art. I, § 3 (1972); UTAH CONST. art. 4, § 1 (1896); VA. CONST. art. I, § 11 (1971); WASH. CONST. art. 31, § 1 (1972); and WYO. CONST. art. 1, §§ 2, 3 & art. 6, § 1 (1890). Nine of the state provisions listed above (those for Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, and Washington) are substantially similar to the proposed federal ERA.

The constitutions of several foreign nations also contain ERA-like provisions. *See, e.g.*, CONST. OF THE GERMAN FEDERAL REPUBLIC art. 3(2) (1949); CONST. OF THE STATE OF ISRAEL art. 4 (1948); CONST. OF INDIA art. 15 (1949); CONST. OF THE REPUBLIC OF CHINA art. 48 (1982); CONST. OF THE FRENCH REPUBLIC preamble (1946); CONST. OF THE USSR art. 122 (1986). Various human rights declarations and conventions call for gender equality. *See, e.g.*, UNITED NATIONS CHARTER preamble, arts. 1(3), 55(c), 76 (1945); INTERNATIONAL LABOR ORGANIZATION CONST. preamble (1948); UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 23(2) (1948); TREATY OF ROME art. 119 (1958); INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS arts. 2(1), 3 (1966); INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS arts. 2(1), (3) (1966); DECLARATION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (1967); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1980).

131. *See* Senate Report, *supra* note 25, at 97-98.

132. *See supra* Part 3.

terpretations that are neither "mushy" nor too "rigid."¹³³ The story of the Child Labor Amendment, showing why the amendment became unnecessary, is illustrative.¹³⁴ Finally, the Constitution, through generations, has remained a foundation of fundamental law, a clean, uncluttered document. We have resisted amendments that could "trivialize the Constitution and diminish its educative and expressive force as part of our political and legal culture."¹³⁵ In the words of Woodrow Wilson, "[t]he Constitution . . . lay[s] a foundation of principles . . . and the fact that it attempts [little] more is its chief strength."¹³⁶

133. Cf. Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 336, 341 (1989) (colloquy between Chief Justice William H. Rehnquist and Professor Paul A. Freund). See also R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 174 (1979) ("The greatest expounders of the Constitution, from John Marshall to Oliver Wendell Holmes, have always insisted that the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events.").

134. See *supra* text accompanying notes 111-14.

135. Tribe, *supra* note 62, at 442. Professor Tribe, along with other commentators, suggests that state constitutions may command less respect than the Federal Constitution because they resemble statutory codes more than fundamental laws. *Id.* at 442 n.42; H. AMES, *supra* note 18, at 302; Musmanno, *supra* note 20; see also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (1921) ("A Constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars it loses flexibility, the scope of interpretation contracts, the meaning hardens.").

136. W. WILSON, *CONGRESSIONAL GOVERNMENT* 29 (1981).