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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹

ABSTRACT

“We the People.” That phrase conjures a vision of present-day U.S. citizens taking part of a continuous enterprise of constitutional development, each succeeding generation stepping into the shoes of those who framed and ratified the Constitution and, as the new performer in the role of “We the People,” reinterpreting a centuries-old role. Like those who created the role, we have power to modify the Constitution. But is each succeeding generation really allowed the same creative and expressive power to alter the role, to amend the Constitution?

The subject of this Article, in general, is the relationship between “We the People,” who “ordain[ed] and establish[ed]” the Constitution, and we the “Posterity” to whom the “Blessings of Liberty” were to be secured. The rules for amending the Constitution, and any limitation on amendment emplaced by those rules, are central to relationships between generations of the American citizenry. The more particular topic of this Article is the special case of unamendable provisions as ties that bind and the gaps that separate generations of We the People. Such permanent, unalterable provisions are the ties that bind generations inflexibly to one another; yet such provisions create the widest of gaps between the sovereignties of those same generations.²

¹ U.S. Const. pmbl.
² As to intergenerational relationships among the citizenry, and the possibility of unamendable provisions, Akhil Reed Amar has written:

[O]ne might plausibly infer from the Preamble's text about the rights of “our Posterity” and from the very act of ordainment that what We, the People originally established, We could later amend. Ongoing popular sovereignty formed the Constitution's bedrock principle, which could not be abrogated without undermining the very foundation of the document. On this view, if some putative amendment purported to eliminate the right of a later generation to adopt still further amendments, such an attempted abrogation of a genuinely inalienable right would not be a permissible amendment of the Constitution's general project. Rather, it would represent an impermissible repudiation of the basic legitimating concept.


Amar assumes an inalienable power of popular sovereignty prevents the United States citizenry from ever truly binding itself. In this way, Amar sees in the Preamble an assumed oneness of the American people over time. The “We” that “ordain[ed] and establish[ed]” the Constitu-

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INTRODUCTION

The current citizenry of the United States lives with the Constitution given to us by past generations. The supermajority requirements for constitutional amendment effectively grant the decisions of past generations a deference, a presumption that must be overcome if the Constitution is to be changed. Future generations, likewise, will need to coalesce into an amendatory supermajority to alter the Constitution we leave to them.

A similar situation exists in most national constitutions. The deference conferred upon the past by supermajority amendment requirements can raise concerns about the self-determination of present democratic majorities. And some constitutions have set aside certain provisions as subject to amendment only when even more stringent requirements are met.

3. See U.S. CONST. art. V (requiring, for amendments to be valid, that they be proposed by two-thirds of both houses of Congress, or by a constitutional convention, then ratified by legislatures or ratifying conventions of three-fourths of the states).


5. Amendment rules for contemporary constitutions across the world predominantly require multiple levels of approval, usually by supermajorities of the legislature and/or the people and/or “a complex extra-majoritarian decision rule.” Lael K. Weis, Constitutional Amendment Rules and Interpretive Fidelity to Democracy, 38 MELB. U. L. REV. 240, 265 (2014).

6. See Michael C. Dorf, The Aspirational Constitution, 77 GEO. WASH. L. REV. 1631, 1632 (2009) (asking “[w]hat entitles one generation of Americans to entrench against simple majoritarian change those values and practices it deems fundamental, but that a later generation may find unnecessary or affirmatively retrograde?”)

Likewise:

What gave men in the late eighteenth century, who lived in a world vastly different from our own, the right to impose their preferences on all future generations of Americans, unless those later generations could meet the supermajority requirements that the founding generation prescribed for constitutional amendments in Article V? For those generations that do manage to amend the Constitution, what gives them the right to bind future majorities until a supermajority can again be assembled?


7. Weis, supra note 5, at 263 (noting it is common for countries to have different amend-ment procedures, more and less onerous, depending on the subject matter of the amendment); see also Richard Albert, Amending Constitutional Amendment Rules, 13 INT’L J. CONST. L. 655, 677, 681 (2015) [hereinafter Albert, Amendment Rules] (dubbing such scaling of amendatory difficulty “relativity”).
So, the point of this Article: what of the intergenerational difficulties created when some constitutional provisions cannot be amended—when, under the terms of the constitution, no supermajority is sufficient to overcome the status quo?9

In another place, I have argued that the U.S. Constitution contained in its original form, and to this day, a permanently unamendable provision.10 I also argued that there exists today the power of an amendatory supermajority to create additional unamendable provisions. I admit I find this second result disquieting and, given my uncertainty as to that part of my result,11 I have returned to the question with a view to understanding why that result is such a troubling idea, and does an exploration of it reduce or increase that unease?

Such unamendable provisions have been decried as undermining the rights of later citizens “to adequate and equal opportunities for participating in public debate, voting equality, informed citizenship... deliberative procedures, [and] effective representation.”12 And surely
there are dangers in unamendable provisions. A constitutional supermajority may make a tragically unwise choice, perhaps an overhasty action undertaken during short-term passion or a decision made during the benightedness of a present compared to a possibly more enlightened future. Thus, one argument against a constitution containing or allowing unamendable provisions is an assumed progress by succeeding generations, a belief in not only the right of succeeding generations of citizens to amend a constitution however they please, but also a trust in the likelihood that they will correct our errors or oversights.

And yet, do we not have the power to unalterably bind ourselves to live by an ideal, to hold ourselves to a standard? “Do we not believe that we can agree today to bind ourselves tomorrow, and, further, that we can agree today that we shall not have the right tomorrow to change our minds?”

In this Article, I explore the concerns raised by the possibility of unamendable constitutional provisions and address three topics: (1) If the framers created unamendable provisions but no later generation can create them, what does it say about our constitutional heritage; what does it say about “We the People”? (2) If we can create unamendable provisions, should we amend the Constitution so such provisions are no longer possible, neither for us nor future generations? (3) If we can create unamendable provisions, with what mindset and under what precautions should we exercise that power?

The answers I reach are:

(1) If our generation has no power to create unamendable provisions, then we must confront this truth: the generation that framed and ratified the original Constitution is the one and only true “We the People.” That was a generation apart, the last with the power to say the Constitution stands permanently for any substantive proposition. All following generations are in a subordinate position. In
addition, the Constitution is merely an adaptable framework for achieving whatever stream of preferences moves an amendatory supermajority of the people of the United States at a given time.

(2) If, in the alternative, we can create unamendable provisions, we may remove that power, but we should not. Banning such provisions forever by constitutional amendment would unfairly restrict future generations as surely as any other unamendable provision. We would not be declaring a particular substantive provision unamendable, but would be prohibiting an entire class of provisions. We and the future both may need at some point an ability to disable ourselves in a believable way from certain alterations to the Constitution. There is a danger that the power to create unamendable provisions may be misused, but perhaps we should trust the future a little.

(3) If we consider creating unamendable provisions of our own, we must develop processes that filter out provisions that indulge the self-interest of the present to the detriment of future generations' sovereignty over their own times. Such processes might include requiring multiple ratifications over time to ensure intergenerational acquiescence. In addition, certain long-standing, long-approved constitutional provisions declaring protective rights might safely be made unamendable.

Part I of this Article is a necessary evil—it examines in dry, logical terms the possible basic constitutional postures a constitution may adopt toward unamendability, then offers instinctive reactions to the intergenerational fairness of each type. Part I also briefly recapitulates my argument that the United States Constitution contains an unamendable provision and allows, through the Article V amendment process, the creation of other unamendable provisions. Part II explores the literature on constitutional precommitment and the manners in which precommitment by one generation binds later generations. I then take lessons learned from that literature (which usually addresses the case in which constitutional amendment is diffi-

15. I do not mean to imply an adaptable framework that provides governmental stability is less than an ingenious creation. My use of "merely" is to drive home the point that although many Americans see the Constitution as containing permanent truths and ideals, if the Constitution is infinitely amendable, the only permanent truth or ideal it can stand for is its own flexibility.

16. Any preference, that is, except a desire to add a provision permanently to the Constitution. To be sure, one might reply, perhaps devastatingly, that what I just so blithely referred to as "achieving whatever stream of preferences moves... the people" might neatly be summed up in a single word: "liberty" (the blessings of which are secured to the framers' posterity). But it is a particular brand of liberty that does not allow Constitution-enforced self-binding.
cult, not impossible) and apply them to the case of unamendable constitutional provisions. Part III includes a reflection on whether each generation is allowed to have a “voice” in the Constitution, and also discusses what sorts of constitutional provisions might best be made unamendable, including the case in which an unamendable provision prohibits all future unamendable provisions.

I. CONSTITUTIONAL UNAMENDABILITY

A constitution, when it first takes effect, can adopt one of two stances on each of two questions about unamendability. Every constitution either contains an unamendable provision or does not contain an unamendable provision. Also, every constitution either permanently prohibits the later creation of unamendable provisions, or it does not permanently prohibit the later creation of unamendable provisions. Thus, there are four categories of constitutions, corresponding to the boxes in Table 1, below.

<table>
<thead>
<tr>
<th>Conditions of Unamendability When Constitution First Takes Effect</th>
<th>Permanently Prohibits Creation of Unamendable Provisions?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Contains at Least One Unamendable Provision?</td>
<td>1</td>
</tr>
<tr>
<td>Yes</td>
<td>Has at least one unamendable provision but permanently prohibits creation of any more</td>
</tr>
<tr>
<td>No</td>
<td>2</td>
</tr>
<tr>
<td>Has no unamendable provision and permanently prohibits creation of any more</td>
<td>Has no unamendable provisions and does not permanently prohibit creation of more</td>
</tr>
</tbody>
</table>

Table 1: Conditions of Unamendability When Constitution First Takes Effect

17. To allow for the idea that there can be, outside the text of a constitution, implicit constitutional content, I use the term “provision” to cover both written and unwritten aspects of a given constitution.
A. Two Observations About Unamendability

With the preceding as introduction, and with the table as a helpful organizing scheme, we can observe two truths about constitutions and unamendable provisions. These observations are useful background for the rest of the article.

Observation No. 1  Every constitution, when it first takes effect, either allows the eventual creation of unamendable provisions or already includes unamendable provisions, or both. An equivalent statement is that Box 2, which purports to be the case in which the original constitution neither contains any unamendable provisions nor allows their later creation, is empty.

Proof:  If a constitution can never have any unamendable provisions, there must be a provision of the constitution prohibiting unamendable provisions.\(^\text{18}\) That provision is itself either unamendable or not. If it is unamendable, then Observation No. 1 is true. So, assume to the contrary that the provision prohibiting unamendable provisions is open to amendment. Then it can be removed from the constitution, the constitution will then allow unamendable provisions, and the observation above is true.

As seen within the proof, the only way for a constitution to prohibit forever the creation of unamendable provisions is for it to already have (or add) an unamendable provision barring unamendable provisions.\(^\text{19}\) So it must be the case that every constitution has, or

\(^{18}\) I am allowing the instance in which the provision barring the creation of unamendable provisions is an implicit understanding about the constitution.

\(^{19}\) Richard Albert has said something similar, though more particular: “the exception to the general rule against unamendability in the United States presents itself: the First Amendment’s democratic rights must themselves be unamendable in order to preserve the free amendability of the United States Constitution.” Albert, Unamendable, supra note 8, at 31. Albert sees the United States Constitution as possessing no unamendable textual provisions, clearly a point on which he and I disagree. Id. at 24; see also Amar, supra note 2, at 291 (wondering whether “some things [are] unamendable by dint of the Constitution’s very essence[.] For example, [does] the bedrock idea of republican self-government mean that strong protection for core political expression [is] an irrepealable feature of the entire constitutional project?”). I consider
eventually can have, one or more unamendable provisions. The question is not whether the constitution has/allows unamendability, but rather what kind of unamendability it has and/or allows: will it have an unamendable provision that forever bars all other permanent provisions or will it be open to the creation of unamendable provisions? 20

Observation No. 2 A constitution that permanently prohibits the creation of unamendable provisions cannot regain the power to create unamendable provisions, but a constitution that allows the creation of unamendable provisions can be altered to give up that power. 21

20. Note that, whether there is a provision barring future unamendable provisions or not, there may be (other) unamendable provisions already present in the constitution.

21. A metaphor often mentioned in discussing the issues surrounding unamendability is the paradox of the omnipotent being and the boulder: can an omnipotent being create a boulder an omnipotent being cannot lift? See, e.g., AMAR, supra note 2, at 292; Jon Elster, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 147–48 (2000) [hereinafter ELSTER, ULYSSES UNBOUND]; Peter Suber, The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change, at xiii–xiv (1990). No matter the answer, the posited omnipotent being fails at a task and is therefore not omnipotent. Either the being can lift every boulder it can create, and therefore lack “creative omnipotence” or it can create a boulder it cannot lift, and therefore lack “lifting omnipotence.” The comparison is then made the amending power: either it can create an unamendable provision (and will thereafter lack “alteration omnipotence” in that it is unable to alter every aspect of the constitution) or it is able to amend every aspect of the constitution (and therefore lack “binding omnipotence” in that it cannot create a binding provision incapable of amendment). Thus, an “omnipotent” amending power is labeled a paradox.

There is, however, a problem with the analogy between the boulder-creating omnipotent being and a provision-creating amending power: In the boulder-creation and boulder-lifting paradox, the omnipotent being is not itself changed; the boulder is not a part of the being. But when an amending power creates an unamendable provision, that act affects the amending power, which is lessened by the fact that there is not something it cannot amend.

The better analogy is this: Recognize that one aspect of an omnipotent being is the ability to change any aspect of itself. So we request the omnipotent being alter itself by giving up its omnipotence. The being either will be able to give up its omnipotence (at which point it is no longer omnipotent), or it will be unable to give up its omnipotence. It might seem we again have a paradox—the being fails in either case, as it either no longer is omnipotent or it has failed at a task (and is therefore not omnipotent). But it only seems a paradox if we assume omnipotence is eternal. When the omnipotent being is asked to change itself to lose its omnipotence, the being has succeeded (displays omnipotence) at that moment only if it loses omnipotence. If the being does not lose omnipotence, the being was not omnipotent in the first place. That the being is no longer omnipotent at time t2 is not a concern as to the being’s omnipotence at time t1.

Observation No. 2 above encapsulates this result. Non-omnipotent amending powers cannot create unamendable provisions. Omnipotent amending powers can create unamendable provisions, thereby forever losing their omnipotence.
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Proof: The first part of the observation is simply an acknowledgment of what it means for a provision to be unamendable.

As to the second part of the observation: If a constitution allows the creation of unamendable provisions, then one unamendable provision that can be created is:

Article Z: This Article is unamendable. No amendment to the constitution made after the ratification of this Article shall result in an unamendable constitutional provision.

Such an amendment would bar any future unamendable provisions.

Put into the terms of Table 1, Observation No. 2 means it is possible for a constitution to move from Box 3 or Box 4 (the Boxes in which unamendable provisions may be eventually created) to Box 1 by creating an unamendable provision that bans any future unamendable provisions. The reverse movement, Box 1 to Box 3 or Box 4, is not possible.

Before moving on to an elucidation of unamendability in the United States Constitution, it is worthwhile to gauge, in a simple, intuitive way, the manner in which constitutions falling into each Box treat the constitutional aspirations of later generations.

In Box 1 of Table 1, the constitutional framers have created one or more provisions that cannot be amended and, further, have prohibited the creation of any future permanent provisions. Box 1 can be further subdivided into two cases.
Generation Gaps and Ties That Bind

<table>
<thead>
<tr>
<th>Box 1 Criterion</th>
<th>Case A</th>
<th>Case B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution has at least one unamendable provision but permanently prohibits creation of any more</td>
<td>The sole unamendable provision is one prohibiting all future unamendable provisions (the constitution can never have any other unamendable provision)</td>
<td>There are multiple unamendable provisions, including one that prohibits the addition of any other, future unamendable provisions</td>
</tr>
<tr>
<td>Relationship between constitutional framers and future: Framers bind future only in that there will be no unamendable provisions, a condition under which the framers also place themselves</td>
<td>Relationship between constitutional framers and future: Framers place unamendable restrictions on future citizens but do not allow future citizens to create additional unamendable provisions</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: The two cases of Box 1 Constitutions.

In Case A, the sole unamendable provision at the time the constitution goes into effect is a provision banning any future unamendable provisions. The constitution’s framers have determined every aspect of the constitution shall be open to amendment forever. This power of the framing generation to decide for all future generations the issue of whether unamendable provisions shall be possible is inherent in the one-way direction of time. The framing generation was required to foreclose or allow unamendability; what they did affected their future, our present. But apart from the framers deciding to ban unamendable provisions, the framers and all future generations are treated the same.

22. See John O. McGinnis & Michael B. Rappaport, Symmetric Entrenchment: A Constitutional and Normative Theory, 89 Va. L. Rev. 385, 427-28 (2003) [hereinafter McGinnis & Rappaport, Symmetric] (acknowledging that a framing generation has more power than succeeding generations in that they could decide the strictness of the entrenchment rules that would apply to both the framers and to succeeding generations of citizens). Such a “first-mover” advantage is unavoidable, though, and is mitigated as much as possible if the framing generation subjects itself to the same rules it imposes on future generations. Id.; see also Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 94 (1979) [hereinafter Elster, Sirens] (“The constituent assembly has a unique and privileged character, not by right but by historical accident. In exceptional and unpredictable historical situations, representivity of persons and the legitimacy of voting methods are decided on the spot; the drastic breach with the past leaves the assembly free to bind the future.”); infra note 100 and accompanying text.

23. It is not true that a permanently unamendable provision was the only way for the framers to prohibit themselves from creating unamendable provisions. They could have made the bar to unamendability temporary, thereby restraining only themselves and the citizenry who followed shortly. Also note that, although it is true that unamendability has been prohibited forever, there is nothing preventing the citizenry from creating onerous amendment procedures that make future amendments extremely difficult.
In Case B, there are multiple unamendable provisions, including a final one that prevents any future creation of permanent provisions. In this case, the constitution's framers have created permanent provisions, then prohibited the practice to later generations. The framers have had the final say on some topics, then prohibited all future generations not only from changing the framers' decisions on those topics, but from having their own final say on any other topics. All future generations are treated the same as one another, but here the framers have treated themselves differently in a manner beyond the unavoidable first-mover advantage.

In Box 3 of Table 1, the constitution's framers have made decisions that cannot be undone or altered, but the framers also have allowed following generations to do as the framers did—to create unamendable provisions. There is still a certain unfair asymmetry in that the framers act first, putting some amendments beyond the power of future generations, whereas the future generations of course put no powers out of reach of the framers. Each successive generation can add unamendable provisions, so the framing generation has created a situation in which there could be a hierarchy of generations, later generations receiving less power to amend than earlier generations. As noted earlier, the creation of a particular kind of amendment, one barring all future unamendable provisions, would move a constitution from Box 3 to Box 1.

In Box 4 of Table 1, the framers have deferred to future generations the entire question of unamendability. The framers have imposed no constraints on future generations, who may or may not create unamendable provisions, and may or may not (one time, by one generation) prohibit all future unamendable provisions. The creation of an unamendable provision (allowed in this Box) would, of course, move the constitution from Box 4 to Box 3, or, if the unamendable provision barred all future unamendable provisions, to Box 1.

B. Unamendability in the U.S. Constitution

Below is a greatly condensed version of my argument, made elsewhere, that the original U.S. Constitution in 1789 contained two unamendable provisions, one of which was temporary, and one of

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24. The opposite move, from Box 3 to Box 4, is not possible.
25. The text contains only the barest outline of my argument. For the full, (and I think far more convincing) argument, please see Mader, supra note 10.
which still exists. I further argued that constitutional text and historical evidence from the framing period indicate that the Constitution allows the creation of other unamendable provisions, thus placing it in Box 3 of Table 1.

We can begin by noting the U.S. Constitution contains no explicit statements about allowing or not allowing amendments containing unamendable provisions. My argument starts with the language of Article V:

[Amendments proposed by two-thirds of both houses of Congress, or by a constitutional convention] shall be valid to all Intents and purposes, as Part of this Constitution, when ratified by [legislatures or ratifying conventions] of three fourths of the several States, . . . ; Provided that no Amendment which may be made prior to [1808] shall in any Manner affect [Article I, Section 9, clauses 1 and 4]; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The first portion of Article V's concluding proviso, a so-called sunset provision, made certain aspects of the Constitution unamendable until 1808. It also was itself unamendable until 1808. One might attempt to argue the provision is ineffective by saying Article V could have been amended prior to 1808 to remove the prohibition on amendment, and then another amendment could have been enacted that “affect[ed]” the provisions previously protected. But an amendment of Article V removing the protective sunset provision would itself “in any Manner affect” the clauses protected from amendment. Various contemporaneous understandings of the word “affect” as used in Article V support that conclusion. Thus, the sunset entrenchment provision in Article V was unamendable until 1808, as were the specifically cited clauses from Article I, Section 9, and all

26. See McGinnis & Rappaport, Symmetric, supra note 22, at 411, 429–30 (stating the authors' understanding that Article V of the United States Constitution permits the creation of unamendable amendments, but deeming that situation a “definite flaw”).

27. U.S. Const. art. V.

28. The specific clauses referenced in the sunset provision are:

The Migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to [1808], but a Tax or duty may be imposed on each such Importation, not exceeding ten dollars for each Person. See Mader, supra note 10, at 855–64.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken. Id. at 860–64.
provisions whose alteration would have "affect[ed]" those clauses. This prohibition on amendment included, for example, the Three-Fifths Clause, as it "affect[ed]" Article I, Section 9, clause 4.\textsuperscript{31,32}

Article VI of the Constitution contains a provision that is unamendable.\textsuperscript{33} Article VI includes: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."\textsuperscript{34} This is the only instance of the word "ever" (or any word of such temporal illimitability) appearing in the Constitution. The best understanding of the phrase "no religious Test . . . ever" is that it prohibits not only religious tests, but also prohibits the removal of the prohibition on religious tests. The provision would bar religious tests even without the word "ever." It simply is not plausible that the only use in the Constitution of a word of permanence is a surplusage. To prevent "ever" from being extraneous, it must be that the word connotes permanence of the provision; the provision states not merely "no religious test," but "no religious test ever." There is also historical evidence that (1) this provision prohibiting religious tests was understood at the time to be unamendable, and (2) the Framers wanted the provision to be unamendable.\textsuperscript{35}

Given the precedent of multiple unamendable provisions in the original Constitution, one of which is permanent, and given Article V's provision that any amendments properly proposed and ratified are "valid to all Intents and Purposes as Part of this Constitution," new amendments to the Constitution can create unamendable provisions.

\textsuperscript{31.} The Three-Fifths Clause states in relevant part: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3.

\textsuperscript{32.} For completeness's sake, allow me to address the other entrenchment provision in Article V of the Constitution. The provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate" is ingeniously constructed to prevent changes to the states' equal vote in the Senate, but is not unamendable. The consent requirement could be removed first by ordinary amendment (with no particular state's consent being necessary, as removing the provision would not deprive any state of its equal Senate vote). Then, with the consent requirement removed, a state could be deprived of its equal vote. The provision is unamendable as a practical matter, however, until such time as all states desire a different rule of suffrage in the Senate. This is because if the provision is removed, every state is susceptible to an amendment aimed at reducing that state's Senate representation. The provision is a pin in a grenade, and to pull it puts every state's own interest in danger. U.S. Const. art. V.

\textsuperscript{33.} Mader, supra note 10, at 870–78.

\textsuperscript{34.} U.S. Const. art. VI, cl. 3.

\textsuperscript{35.} Despite the presence of religious tests in almost all the states, there was little discussion of the provision at the Constitutional Convention; much of the historical evidence referred to in the text is aimed at explaining that lack of discussion. Mader, supra note 10, at 873–78.
We also have historical evidence that post-framing statesmen believed they had the power to create unamendable provisions. Constitutional amendments that would create unamendable provisions have, in fact, been proposed. Most significantly, as the Civil War approached in the winter of 1860–61, several amendment proposals aimed at resolving that crisis contained purportedly unamendable provisions. One of those proposals unquestionably intended to be unamendable, the Corwin Amendment Proposal of 1861, was passed by two-thirds of each house of Congress and sent to the states for ratification (one of only six amendment proposals to clear both houses of Congress and fail to be ratified). President Lincoln acknowledged in his first inaugural address that such an irrevocable provision was acceptable. The proposal was ratified by two states before events overtook its war-averting goal.

So my argument as to the constitutionality of creating unamendable provisions by amendment is, in sum, that the framers appreciated the logical and textual nuances of unamendability, and chose to place

36. Perhaps chief among the many proposals were a set of six proposals by Senator Crittenden of Kentucky, the so-called Crittenden Proposals, which contained unamendable provisions. Cong. Globe, 36th Cong., 2d Sess. 114 (1861); see also Mader, supra note 10, 885–87 (discussing the Crittenden Proposals).
37. The proposed amendment read:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.

Corwin Amendment, proposed for U.S. Const. art. XIII (proposed Mar. 2, 1861); see also Cong. Globe, 36th Cong., 2d Sess. 1236 (1861).

The drafting of this provision was flawed, resulting in a provision that was intended to be unamendable but would have been amendable. See Mader, supra note 10, at 886–89.
38. The five other amendment proposals sent to the states for ratification but were not ratified are: (1) from the original list of amendment proposals that became the Bill of Rights, a proposal prescribing the size and representation standards for the House of Representatives (those standards are currently met); (2) a proposal from the early republic to require congressional permission for any U.S. citizen to accept a noble title or other boon from a foreign power; (3) one that would allow Congress to regulate the working conditions of minors, a power now considered to reside in the Commerce Clause; (4) the Equal Rights Amendment; and (5) an amendment granting congressional representation to Washington D.C. For a brief history of these unratified amendment proposals and their texts, see Staff of S. Comm. on the Judiciary, 99th Cong., Amend. to the Const.: A Brief Legis. Hist. 96–98 (Comm. Print 1985); see also John R. Vile, Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions 24–25 (1994).
39. "I understand a proposed amendment to the Constitution . . . has passed [Congress,] to the effect that the federal government shall never interfere with the domestic institutions of the States, including that of persons held to service. . . . [H]olding such a provision to now be implied [by] Constitutional law, I have no objection to its being made express and irrevocable." President Abraham Lincoln, Inaugural Address (Mar. 4, 1861), in Harold Holzer, Lincoln President-Elect 473 (2008).

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two unamendable provisions into the Constitution. The framers also
provided for amendments to the Constitution, but did not include a
textual bar to additional unamendable provisions. Historical events
show that when faced with the Civil War crisis, Congress and the Pres-
ident both assumed unamendable provisions could be proposed and
ratified into the Constitution. So, given the Framers’ creation of
unamendable provisions and Article V’s assurance amendments are
“Part of this Constitution,” I infer that later generations have the
power to create unamendable constitutional provisions.

One certainly can take issue with that inference, but such an arg-
ument would need to posit that amendments are limited to refine-
ments to the original Constitution, that they must conform to some
degree with the Constitution as a whole. In my earlier work, I ad-
dressed such arguments but did not fully resolve them.

The result, then, is that the U.S. Constitution is in Box 3 of Table
1, or, perhaps, Box 1B of Table 2 (if one believes an unwritten consti-
tutional provision bars us from creating unamendable provisions).
Box 1B indicates the framing generation had more constitutional
power than any succeeding generation—the Framers included

40. See Philip A. Hamburger, The Constitution’s Accommodation of Social Change, 88
MICH. L. REV. 239, 300–01 (1989) (arguing the Framers intended a permanent constitution and
considered amendments to be the means of perfecting the document, if necessary, by eliminating
defects rather than considering amendments to be adaptations to changed circumstances);
Roznai, supra note 9, at 670 (reprising the argument made in the first Congress that amendments
were based on a different authority (the states) from that on which the Constitution is based (the
people)); Justin DuPratt White, Is There an Eighteenth Amendment?, 5 CORNELL L.Q. 113, 116
(1920) (declaring as a limit: “whether or not the subject of [the proposed amendment] is of a
class that, followed to the end by subsequent amendments, would result in the destruction of the
United States or of the states”); R. George Wright, Could a Constitutional Amendment be Un-
ments to be unconstitutional if they are incompatible with the assumed remainder of the
Constitution); see also THE FEDERALIST No. 85, at 182–83 (Alexander Hamilton) (Issak
Kramnick ed., 1987) (forming the basis for an argument that amendments are founded on a
different, and perhaps lesser, authority because they are not of a whole with the rest of the
Constitution);

We may of course expect to see, in any body of men charged with its original formation,
very different combinations of the parts upon different points. Many of those who
form a majority on one question, may become the minority on a second, and an associa-
tion dissimilar to either may constitute the majority on a third. Hence the necessity of
moulding and arranging all the particulars which are to compose the whole, in such a
manner as to satisfy all the parties to the compact; and hence, also, an immense multi-
plication of difficulties and casualties in obtaining the collective assent to a final act. . . .
But every amendment to the Constitution, if once established, would be a single pro-
position . . . . There would be no necessity for management or compromise, in relation
to any other point—no giving nor taking.

41. Mader, supra note 10, at 882–84. As I noted in the Introduction to this Article, this
incomplete resolution, as well as my unease with the result that unamendable provisions may be
added to the Constitution, led me to write this Article.
unamendable provisions, but no later generation has that option. If the U.S. Constitution is located in Box 3, the Framers created provisions we cannot undo and we have additional questions to consider: What are the dangers and benefits of unamendable provisions; should we create any of them; and how do we go about creating such provisions in a manner likely to maximize benefits while minimizing dangers? The following section addresses those concerns.

II. THE TIES THAT BIND: INTERGENERATIONAL CONSTITUTIONAL COMMITMENTS

A key concern of constitutional theorists is the tension between democratic principles of majority rule and a constitution containing provisions entrenched against alteration by a mere majority.42 The scholarship in this area mostly addresses supermajority requirements that make constitutional amendment difficult rather than addressing unamendability, but the two situations are to a degree analogous, and many of the concepts that arise transfer usefully from the first situation to the second.

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Specifically addressing the United States Constitution, see Dow, supra note 14, at 119 (footnotes omitted):

In the United States, we believe in, and our political institutions reflect, majority rule. At the same time, we also believe that not everything ought to be subject to it. Following the majority because it is the majority is sometimes obligatory; resisting the majority even though it is the majority is sometimes required. [These] [t]wo competing principles constitute the essence of our political being.

See also id. at 136 (“The people may agree today that a mere majority tomorrow will lack the lawful power to alter the Constitution. When the people do this, they have alienated a portion of their sovereignty.”).
A. Constitutional Precommitment and the Dead Hand Objection

An incisive expression of the so-called "dead hand" objection to supermajority entrenchment of a constitutional provision⁴³ is:

[I]f a present majority is bound by the constitutional handiwork of a past majority until it can assemble the supermajority necessary to secure constitutional change, [that situation] is inconsistent with the democratic principle that present majorities rule themselves. . . . After the enacting generation has departed the scene, . . . any constitutional provision is illegitimately entrenching.⁴⁴

How much more so, then, for unamendable provisions?⁴⁵

The dead hand objection was expressed during and even before the founding of the United States and the framing of its Constitution. Thomas Jefferson famously argued that the earth belongs to the living; a constitution should expire after half of those who were adults at the time of its introduction had died.⁴⁶ His contemporaries Noah Webster and Thomas Paine voiced similar ideas.⁴⁷

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⁴³ The dead hand concern is expressed not only in terms of the supermajority requirement for constitutional amendment. It also oftentimes is expressed as a critique of originalism as a theory of interpreting the constitution, the idea being that originalism seeks to understand the intent or meaning of those (almost always long dead) who wrote or ratified a constitutional provision. See John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 GEO. L. J. 1693, 1752 (2010) [hereinafter McGinnis & Rappaport, Originalism].

⁴⁴ Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. 491, 508-09 (1997) [hereinafter Klarman, Majoritarian Judicial Review]; see also Issacharoff, supra note 42, at 1987 ("[A] constitution . . . is a precommitment that thwarts or limits deliberative choices in the future."); McGinnis & Rappaport, Originalism, supra note 43, at 1752 ("The dead hand problem refers to the question why, under the Constitution, the present day majority is prevented from taking action that displaces the decisions of people long dead.")(noting unamendable constitutional provisions are "deeply troubling for democratic theory, and doubly troubling for democratic practice"); id. at 675 (calling the denial of popular choice brought about by unamendable provisions "another matter altogether" from the restrictions imposed by supermajority requirements for constitutional amendments).

⁴⁵ "The strongest 'precommitment' device is a subject-matter restriction on formal amendment." Richard Albert, The Expressive Function of Constitutional Amendment Rules, 59 MCGILL L.J. 225, 233 (2013) [hereinafter Albert, The Expressive Function]. And therefore: "the dead hand problem is most acute with regard to so-called unamendable constitutional provisions.” Klarman, Majoritarian Judicial Review, supra note 44, at 508; see also Richard Albert, Constitutional Handcuffs, 42 ARIZ. ST. L.J. 663, 667 (2010) (hereinafter Albert, Constitutional Handcuffs] (noting unamendable constitutional provisions are “deeply troubling for democratic theory, and doubly troubling for democratic practice”); id. at 675 (calling the denial of popular choice brought about by unamendable provisions “another matter altogether” from the restrictions imposed by supermajority requirements for constitutional amendments).

⁴⁶ Jefferson stated these views several times but perhaps related them most clearly in an exchange of letters with James Madison. See DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 302-05 (1999). Using actuarial tables from the time, Jefferson determined that half of all then-existing adults would be dead in nineteen years and so suggested that period of time as the natural lifespan for constitutional provisions. HOLMES, PASSION AND CONSTRAINTS, supra note 42, at 142.

⁴⁷ For short summaries of the views of Jefferson, Paine, and Webster, along with a rejoinder to Jefferson from Madison, see HOLMES, PASSION AND CONSTRAINTS, supra note 42, at 139-42, 152-58; Louis W. Hensler III, The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy, 7 TEX. REV. L. & POL. 263, 291-94 (2003); Pettys, supra note 6, at 326.
Generation Gaps and Ties That Bind

Yet the grip of the dead hand and the resultant intergenerational binding are, to some degree, unavoidable.\textsuperscript{48} The citizenry of a nation is not a static "transient national self,"\textsuperscript{49} and any act by the current citizenry to bind itself will, as time passes, bind others who are not yet part of the participating citizenry.\textsuperscript{50} Even if we remove from consideration the ongoing naturalization of citizens, on any given day people are born into a citizenry, age into full political status, and die out of the citizenry; generations do not change all at once. Today's citizens are not identical to tomorrow's citizens, so a citizenry binding itself begins immediately to bind a future, different citizenry.\textsuperscript{51}

But to restrict the present citizenry from binding \textit{itself} also seems unfair. By what right would future generations limit the present anymore than vice versa? Must the citizenry of the present tiptoe through the world in an effort not to do anything that will bind future generations?\textsuperscript{52}

\begin{footnotesize}
\textsuperscript{48} "Unless a democratic system can solve the problem of representing the future, changing interests of the unborn, it violates a rather fundamental underlying premise of democracy—that those who bear the costs of a decision should have their interests adequately reflected in the choice. . . . Aggregative democracy based on subjective political equality among current citizens appears to be only a crude approximation to political equality." \textsc{James G. March \& Johan P. Olsen, Rediscovering Institutions} 146–47 (1989).

\textsuperscript{49} Pettys, \textit{supra} note 6, at 335 (using the term "transient national self" and describing the concept but considering the concept a failed rationale for originalist constitutional interpretation). Under a theory of the citizenry as a "transient national self," traceable at least as far back as Richard Hooker and Edmund Burke, "governmental arrangements were an inheritance that each new generation received from its predecessors" and the "[m]embers of a generation-spanning society are joined together as one body politic . . . so [that] one generation . . . binds it successors." \textit{Id.} at 335–36. Some contemporary scholars have argued similarly in support of originalism as a theory of constitutional interpretation. \textit{Id.} at 336 (collecting examples).

\textsuperscript{50} Stephen Holmes, in the process of recounting and summarizing how James Madison and David Hume reacted to Thomas Jefferson's assertions that every generation should start afresh with a new constitution, puts the point perfectly:

\textit{Precisely because generations overlap, because individuals enter into and depart from the world one by one, the living have no right to repeal, at set intervals, the legacy of the past. Closing the doors on our predecessors' commitments is impractical, because the members of every new generation must coexist promiscuously with survivors of the old. . . . [The] methods of registering public consent [must] be compatible with the unsynchronized itineraries of human lives.} \textsc{Holmes, Passion and Constraints, supra note 42, at 158.}

\textsuperscript{51} Seamless generations may be a reason to trust a commitment to constitutionalism: at any given time, several generations have representatives in the citizenry (some who have been adult citizens for 60 years and some who will still be citizens 60 years from now). See Pettys, \textit{supra} note 6, at 349–51.

\textsuperscript{52} "If this generation should not limit the capacity of future generations to make basic political choices, by what authority can future generations restrict our choices about such matters? If our bodies must respect their ghosts, why do not their ghosts have the same obligation to respect our bodies?" Walter F. Murphy, \textit{Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity, in Responding to Imperfection} 164, 179 n.52 (Sanford Levinson ed., 1995). Murphy concedes that, of course, "the specious present can inflict much more grievous harm on the future than the future can inflict on the past." \textit{Id.}
\end{footnotesize}
The answer, then, is to bind the future as lightly as will simultaneously allow for full self-government of the present. There is "a distinction between majorities seeking to control themselves through precommitment and seeking to control [the future] through entrenchment."  

B. Lending a Helping (Dead) Hand

Once it is recognized that different generations affect one another—and, of course, the temporal relationship between generations cannot be changed—it is not surprising that different generations may have different advantages and disadvantages. While the Framers may have had more input into the Constitution, later generations have other advantages. We inherit the benefits of their system—a Constitution that is stable, desirable, and strongly supported by the nation.

Precommitment by one generation to constitutional provisions that are difficult to amend can bring to future generations not only the sovereignty-restraining dead hand but also benefits, precisely because of the difficulty of amendment. "On this view, a constitutionally-bound government acquires capacity it would not otherwise have by effectively restraining itself . . . . A government which is effectively bound to pay back its loans and honor its contracts is thereby made better able to borrow money and enter into contracts."

The key in the above quote is that the government is bound "effectively." That effectiveness comes from the difficulty in amending the constitutional provisions requiring the repayment of loans and the honoring of contracts.

The benefits flowing from the stability of the provisions entrenched in a constitution include the prevention of unwise

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53. A majoritarian precommitment involves today's majority seeking to bind itself against future temptations; cross-temporal entrenchment involves today's majority seeking to control future majorities. . . . [C]onstitutionalism understood as intragenerational precommitment may be justifiable on majoritarian grounds, . . . [b]ut constitutionalism understood as the effort of current majorities (or even supermajorities) to embed fundamental values against possible efforts by future generations to repudiate them resists majoritarian justification.


54. *Id.* at 507.


majoritarian impulse; such impulse might otherwise violate minority rights or sacrifice important principles to short-term gain.

Related to, but distinct from, the just-noted restraining features of a difficult-to-change constitution, the stability of such an instrument also encourages citizens to take the long view of their own accord and to bypass short-term gains for ultimately more valuable benefits long term. Knowing the rules are unlikely to change, repeat players have an incentive to sacrifice the short term for the benefits of reciprocity, reputation, and coordination. This long-view mentality can extend even to the act of amendment, encouraging the generality of provisions.

The dead hand is usually discussed in terms of the restraint it exerts on majorities, but such intergenerational constitutional commitments also may enable that majoritarian power. A constitutional

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57. Albert, Constitutional Handcuffs, supra note 45, at 674 (noting the danger of “vicious manifestations of majoritarianism” like German Nazism, South African apartheid, and the Jim Crow laws in the United States).

58. “Constitutional designers may . . . create formal amendment rules to limit [the] future choices” of distrusted political actors. Albert, The Expressive Function, supra note 45, at 233; see also Elster, Ulysses Unbound, supra note 21, at 24–45 (analyzing the role of precommitment in overcoming the change, or “time-inconsistency,” of desires).

59. As to the benefits of the citizenry taking a long view, see Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 711 (2011).

A constitution difficult to amend (and therefore one with provisions that endure for a long time) “encourages a generality of perspective,” leading to the formation of “reasonable ground rules” and the creation of “liberty-bearing provisions . . . in ignorance of many of the details of social life to which they will come to be applied in the future.” Lawrence G. Sager, The Birth Logic of a Democratic Constitution, in Constitutional Culture and Democratic Rule 110, 123 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001).

60. As to reciprocity and reputation, see Levinson, supra note 59, at 711; see also Frank H. Easterbrook, Textualism and the Dead Hand, 66 Geo. Wash. L. Rev. 1119, 1122 (1998) (noting that today’s majority accepts limits on its power “for greater surety that its own rights will be respected when . . . power has shifted”). As to coordination, see Holmes, Passions and Constraints, supra note 42, at 172–74.

61. See Sager, supra note 59, at 124 (noting that when a constitution is “obdurate to change,” constitutional provisions may be “constrained to broad issues of structure and general propositions of political justice”).

Those who draft or are asked to ratify the content of an obdurate constitution are likely to adopt a generosity or generality of perspective, born simply of the fact that they know what they put in place is likely to remain in place. The narrow interests of an individual or a group at the time of drafting or amendment is in competition with their imaginable interests over time, and, for that matter, the interest of their children and their children’s children. Self-interest, projected over circumstances unknown and generations unborn, is likely to shed the worst of its parochial limitations.


62. “[I]t is possible to view precommitments not so much as substantive limitations on the choices of policy available to a majority at any particular point, but rather as the process values that insure the rights of participation that are indispensable for any democratic order to survive.” Issacharoff, supra note 42, at 1994; see also Holmes, Passions and Constraint, supra note 42, at 152–54.
framework can facilitate expression of majority will. A constitution requiring a supermajority for amendment may settle, beyond repeated majority oscillation, some basic issues which promote majoritarian self-rule. For instance, durable constitutional provisions may (1) facilitate democracy through the settling of basic questions (e.g., parliamentarian versus presidential form, federalist versus unitary, terms of office, etc.), and (2) entrench some constitutional rights that enhance democracy (e.g., free speech; one person, one vote; etc.).

Finally, Stephen Holmes has noted an additional, somewhat indirect benefit of one generations’ restraint on future generations:

Precommitment is justified because, rather than merely foreclosing options, it holds open possibilities that would otherwise lie beyond reach. . . . By means of a constitution, generation a can help generation c protect itself from being sold into slavery by generation b. To safeguard the choices available to distant successors, constitution makers restrict the choices available to proximate successors.

C. Intergenerational Binding—Fair Terms

The previous sections in this Part tell us that for one generation to bind other generations to constitutional provisions while mitigating detriments (and maximizing benefits) to those later generations, it is key that the self-interest of the present must be subordinated to a view that all citizens, present and future, are worthy of equal concern. Then the benefits of precommitment to well-chosen constitutional entrenchments can accrue: protected rights, enabled democracy, stability-enhancing long view, and protection of far-future citizens from the tyranny of intermediate generations.

One way to limit self-interest and provide intergenerational protection is for the earlier generation to (self-)impose a veil of ignorance. The term, “veil of ignorance” comes of course from John

“If the people cannot bind themselves, there can be neither a large-scale, peaceful, ordered society nor any constitution that is authoritative beyond declaring that the will of the people is the supreme law of the land.” Murphy, supra note 52, at 187.

63. HOLMES, PASSIONS AND CONSTRAINT, supra note 42, at 167.

64. Michael C. Dorf, The Aspirational Constitution, 77 Geo. Wash. L. Rev. 1631, 1637–38, 1640; see also HOLMES, PASSIONS AND CONSTRAINT, supra note 42, at 169–72; Albert, Unamendable, supra note 8, at 29–31; McGinnis & Rappaport, Originalism, supra note 43, at 1752 (“[A] supermajoritarian-enacted constitution likely generates desirable restrictions like the separation of powers, federalism, checks and balances, and the protection of individual rights. . . . Under these conditions the hand of the past is one that reaches out to steady the living.”).

65. HOLMES, PASSION AND CONSTRAINTS, supra note 42, at 162.

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Adrian Vermeule has adapted Rawls's conception of the veil of ignorance from one in which decision makers know the consequences of their decisions but not what positions they will occupy, to the more usual situation in which decision makers know the positions they occupy, but are uncertain as to how benefits and burdens of their decisions will be distributed. Vermeule defines: "[a] veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers . . . by subjecting [them] to uncertainty about the distribution of benefits and burdens that will result from a decision."68

Vermeule offers four veiling tactics.69 The first is prospectivity, which requires provisions be enacted in advance of the acts they govern; for instance, those creating a criminal provision do not know who will violate the provision.70

The next two of Vermeule's tactics frequently work together. Generality requires that provisions apply broadly, depriving those creating a provision of a strong predictive sense upon whom benefits and burdens will disproportionately settle.71 Durability is roughly a temporal version of the generality principle; it requires provisions be likely to exist for a long time, so although those creating a provision may have some idea of the short-term results it will have, the long-term future introduces uncertainty as to the total effect of the provision.72 To be sure of creating an effective veiling, generality and dura-

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68. Id. at 399.
69. Id. at 407–08. Vermeule does add a fifth veil tactic, randomization, which he considers "[a] straightforward means of producing a veil effect." He offers a short survey of scholarly literature and historical practice, but notes randomization has rarely if ever been used in constitutional governance. Id. at 424–25. This is not surprising, I suppose, given that we might prefer government to act in a manner dictated by reason rather than chance. However, where a thing must be done, and fairness dictates a given boon or burden be randomly assigned, it may pop up. I offer two examples Vermeule did not mention in his piece, though that may be because he did not consider them to be "constitutional governance." First, of course, is the example of a military draft lottery. Second, and more likely to be considered both constitutional and governance, is the division of the Senate into three classes, each to be elected every six years in cycling two-year intervals. See U.S. CONST. art. I, sec. 3, cl. 2. The original division of the first twenty senators was made by lot on May 15, 1789. S. JOURNAL, 1st Cong., 1st Sess., May 15, 1789. As later states were added, the Senate used lots again to determine which of each state's two new senators was in which class. See e.g., S. JOURNAL, 31st Cong., 1st Sess., 617 (1850) (noting the manner in which California's two new senators, John C. Frémont and William M. Gwin, were assigned to senatorial classes).
70. Id. at 408–11.
71. Id. at 412.
72. Id. at 415.
Vermeule’s fourth veil tactic is delayed effectiveness, which uncouples the decision from short-term interests by lengthening the time between the decision to enact the provision and the provision taking effect. This eliminates situations in which a short-term gain is so big it would swamp the self-interest-defeating properties of durable provisions. Delayed (or “sunrise”) provisions also present a moral difficulty, however: the reduced interest of the present-day designers of the constitutional provisions comes about precisely because it will not affect those in the present as much as those in the future; so the present is constitutionalizing more for the future than for itself, which exacerbates the problem of the dead hand.

Combining generality, durability and delayed effectiveness (which by its nature includes prospectivity) produces a veil of sufficient thickness to limit significantly the self-interest of those imposing a constitutional provision. Generality suggests the substance that a constitutional provision should have if it is to be resistant to self-interest of its framers; durability and delayed effectiveness suggest the manner of implementation that will best limit self-interest in the framers.

There are two more criteria, neither of them veil tactics and both of them procedural, to be added to our list of best practices for engaging in intergenerational binding. Symmetric entrenchment describes the concept that “[e]ach generation should be subject to the same

73. Vermeule, supra note 67, at 417.
74. Id. at 419. Jon Elster has expressed similar ideas as to the value of delay in reducing self-interest in those creating constitutional provisions. Elster, Ulysses Unbound, supra note 21, at 143–46. Elster suggested a delay of ten or twenty years. Id. at 144. Elster also recognized that delays could be used to get decision makers to commit to a plan when the long-term benefits are known to be better than the short-term return, and then follow through later despite any instances when the short-term gain of backing out may temporarily be greater than the short-term gain of sticking it out. Id. at 141, 143.


75. Vermeule, supra note 67, at 419.
rules for adding constitutional provisions as the other generations." 76 Basic fairness between those framing a provision and those who will later live with the provision dictates there should be a “strong presumption” that “[t]he voting rule that governs the enactment of an entrenched provision should be the same as the voting rule governing its repeal.”77 At the original framing of an entire constitution, it may be necessary to entrench some basic compromises more deeply than the rest of the constitutional provisions, but “[o]nce a constitution is up and running, it is much harder to overcome the presumption of symmetry.”78

Richard Albert suggests intertemporality as a requirement for entrenchment of especially important provisions.79 Intertemporality “respect[s] the considered judgment of the community as expressed over a period of years, and not only at one fixed point in time” and can be executed by “sequential approval—multiple votes over multiple years.”80

Intertemporality reflects the view that
[s]upermajorities are not created equal: their strength is directly proportional to their stability over time. A sustainable supermajority thus has a greater claim to representativeness than a temporary one. What underpins this view is a theory of transcendent sovereignty that assigns to some combination of previous, present, and future political actors—rather than only to the present...
generation—the shared responsibility for ratifying transformative change.\textsuperscript{81}

As Albert notes,\textsuperscript{82} this is an expression of Jed Rubenfeld's theory of "how a constitution binds"—of how, in other words, constitutional law exerts legitimate authority over time."\textsuperscript{83} Rubenfeld argues that people "live through temporally extended courses of action. . . . Self-government therefore requires that the self simultaneously be governing and governed. This is attainable only by one who lives out self-given commitments."\textsuperscript{84} The appropriate "self" for democratic self-government is "a people"\textsuperscript{85}; so "the very idea of a nation, of a national people as a subject of self-government, contemplates an entity that extends across generations."\textsuperscript{86} In Rubenfeld's view, then, "[w]ritten self-government . . . demands the creation of new constitutional commitments only when a people is prepared to make a significant temporal commitment to them."\textsuperscript{87}

Thus, Albert's intertemporality scheme binds temporally proximate generations together in constitution-making; the later generation has veto power over whether the earlier generation's suggestion becomes a binding constitutional provision. This has the effect of allowing, at least for roughly adjacent generations, an almost magical reversal of time's arrow. It also requires the proposing generation to believe the provision is a good idea even if it will not have an immediate effect on that generation.\textsuperscript{88}

D. Application to Unamendability

One might consider unamendability, the placing of a position beyond any supermajority's ability to alter, to be a facially illegitimate imposition of one generation's will upon future generations\textsuperscript{89}—it is

\textsuperscript{81} Id. at 23.
\textsuperscript{82} Id. at 24 (citing Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government (2001)).
\textsuperscript{84} Id. at 143.
\textsuperscript{85} Id. at 145.
\textsuperscript{86} Id. at 152.
\textsuperscript{87} Id. at 175.
\textsuperscript{88} Depending on the length of the delay, the effect on the proposing generation could be extremely attenuated.
\textsuperscript{89} See Akhil Reed Amar, Popular Sovereignty and Amendment, in Responding to Imperfection 91 (Sanford Levinson ed., 1995) ("Could a legitimate amendment generally purport to make itself (or any other random provision of the Constitution) immune from further amendments? If so, wouldn't that clearly violate the legal right of future generations to alter their
the dead hand with a vengeance. Unamendability certainly violates
the directive that the present should tread lightly on the sovereignty of
the future.\textsuperscript{90}

Under Jed Rubenfeld's theory of constitutionalism noted earlier,
[t]he very principle that gives the Constitution legitimate author-
ity—the principle of self-government over time—requires that a na-
ton be able to reject any part of a constitution whose commitments
are no longer the people's own. Thus written constitutionalism re-
quires a process not only of popular constitution-writing, but also of
popular constitution-rewriting.\textsuperscript{91}

Others have cautioned that unamendable provisions forestall the
possibly valuable act of continually choosing, regardless of the choice
being for good or ill.\textsuperscript{92} Unamendable provisions could “chill constitu-
tional discourse and prevent reconsideration of the constitutional
text,”\textsuperscript{93} and can, because there is no safety valve of amendment, lead
to extra-constitutional change or revolution.\textsuperscript{94}

Other problems exist as well. Unamendability introduces a spe-
cial separation of powers problem in that court interpretations of the
text of unamendable provisions cannot be undone by amendment.\textsuperscript{95}
And, of course, symmetry, of the sort in which the enacted provision is
repealable by the same supermajority, is impossible where the provi-
sion is unamendable.

Finally, when we consider the United States Constitution’s his-
tory with unamendability, we are hardly encouraged. Unamendability
has been used once to protect the right of a member of any religion to
serve in the United States government and multiple times to entrench
or attempt to entrench slavery.\textsuperscript{96}

\textsuperscript{90} Albert, \textit{Unamendable}, supra note 8, at 23 (noting his understanding that “democratic
constitutionalism . . . require[s] the continuing right of political actors and citizens to redefine
themselves through their constitution”); Issacharoff, \textit{ supra} note 42, at 199; (noting that one can
debate the relation of increased costs to concomitant benefits attending a hard-to-amend consti-
tution; but unamendability is, in those terms, an infinite cost).
\textsuperscript{91} Rubenfeld, \textit{ supra} note 52, at 178–79 (considering the argument that “a people
could not legitimately use democratic processes to destroy the essence of democracy—the right
of others, either of a current majority or minority or of a minority of future generations, to
meaningful participation in self-government.”) (footnotes omitted).
\textsuperscript{92} Albert, \textit{Unamendable}, supra note 8, at 174.
\textsuperscript{93} Albert, \textit{Unamendable}, supra note 8, at 28.
\textsuperscript{94} Albert, \textit{Counterconstitutionalism}, supra note 9, at 47 (2008); see also Albert, \textit{Unamend-
able}, supra note 8, at 24.
\textsuperscript{95} Albert, \textit{Counterconstitutionalism}, supra note 9, at 51.
\textsuperscript{96} Albert, \textit{Unamendable}, supra note 8, at 24.

\textit{See supra} notes 28–31, 36–37 and accompanying text.
What can be said to justify unamendable provisions against all of those detriments?

First, we should note that several of the objections just listed have to do with the risk of choosing unwisely what to make unamendable. That is of course a valid and significant concern; but it also is a concern that can be dealt with separately from the argument that unamendability, of itself, is somehow harmful to a citizenry.97

Second, recalling the benefits noted in Part II.B., we can see unamendability has a number of things to recommend it in the face of concerns about its inherent nature to irrevocably bind future generations. Unamendable provisions provide maximum stability and permanent settling of basic questions, enabling all of the benefits associated with reliance. They also provide maximum restraint on any impulsive, destructive passions of majorities and even supermajorities. And if carefully written, unamendable provisions may be the most effective means of preventing future generations from harming even later generations.

III. THE FRAMERS' BEQUEST(S) AND OUR FUTURE(S) AS HEIR

If we assume I am right that the original Constitution had (and has) an unamendable provision, but we leave undecided the question of whether unamendable provisions can be added by amendment, there are four possible situations:

(1) The framing generation created unamendable provisions but we do not have the power to do the same.

(2) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we create exactly one: a provision that unamendably abjures the power of the citizenry ever to create another unamendable provision.

(3) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we do so, but not of the type noted in (2). The Constitution retains the power to create more unamendable provisions in the future (including, possibly, eventually, an amendment that bars all future unamendable provisions).

(4) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we neither

97. Below, I offer strategies to improve the likelihood that unamendable provisions will be chosen well. See infra notes 105-14 and accompanying text.
create them nor prohibit them. This has been the situation since the original Constitution was ratified.

Note that in every instance the framing generation has set itself apart as unique. The framing generation decided to include unamendable provisions, and by doing so spoke in a way that prevents any future generation from speaking on the topic of religious tests (and, temporarily, on various other aspects of the Constitution).98

A. They the People

Unlike other futures I listed above and discuss below, this one is not the result of a choice we make. Rather, this future assumes, contrary to my argument above,99 the framing generation has prohibited all future unamendable provisions.100 We cannot undo that choice. Thus, we are not “We the People” of the Constitution’s Preamble, rather, the Framers are “They the People” and we are “Their Posterity.”

The prohibition on unamendable provisions may be a good thing, normatively. The Framers’ decision prevents irrepealable mistakes and prevents any generation’s infliction of irrevocable binding on a later generation. Still, it feels a bit like being set loose in the Garden of Eden and being told to avoid the Tree of Knowledge Unamendability. There is something patronizing about being told by the Framers that certain compromises were necessary to the formation of the Constitution but the similar ability to bind a bargain so long as the Constitution exists is not available to us.

B. Forever and Ever Amen[d]

If we can create unamendable provisions, one possible choice is to prohibit forever any future unamendable provisions.101 The No Religious Test Clause will remain unamendable but that will be the

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98. The framing generation was unique, too, in that it set the rules for amendment—what processes must be followed and the sizes of the supermajorities necessary to propose and ratify a constitutional amendment. But that aspect of the framers’ uniqueness was unavoidable. The framers needed to decide how, at least originally, the amending process was to function. The decision to set a few things outside that process, though, is different because while later generations could change the amending process, later generations cannot undo an unamendable provision.
99. See infra notes 36–41 and accompanying text. See also Mader, supra note 10 at 878–89.
100. Referring to Tables 1 & 2, this places the Constitution in Box 1B, from which no movement is possible.
101. Referring to Tables 1 & 2, this is a movement from Box 3 to Box 1B.
only unamendable provision for as long as the Constitution exists. In this future, “we un-lock the door and throw away the key.”102

On the one hand, this might seem an attractive option. We avoid making mistakes we (and future generations) cannot reverse. There also is a certain fairness in that the limit we impose applies to ourselves as surely as to future generations.

Still, we engage in a certain egotism: if we do abjure forever the power to create unamendable provisions, it is a choice we make for the future as well as ourselves. A citizenry should bind future generations as little as possible, and in this scenario we would be removing from future generations the power to unalterably bind themselves.

The power to bind oneself is no small thing to be without. Should a future situation require a compromise that all sides needed to be sure was binding beyond possibility of amendment, there would be no such device available. Just as with any other unamendable provision (see Section C, below), taking the irrevocable action of prohibiting all future unamendable provisions should be done with a mindfulness, and perhaps also the consent, of future citizens.

Additionally, what would it mean for us to send the nation irreversibly into a future in which everything (save the No Religious Test Provision) is officially impermanent, where the Constitution’s chief feature is its own changeability?103

One reasonable approach, should we choose to go down this road, would be to temporarily give up the right to create unamendable provisions. We could amend the Constitution to include a provision prohibiting for say, ten years, the enactment of unamendable provi-

102. Mader, supra note 10, at 889.
103. See David Fontana, A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States, 35 CONN. L. REV. 35, 35, 42-47 (2002) (discussing a case in which the court adjudicated whether a naturalized citizen, in order to prove he was "attached to the principles of the Constitution," as required to obtain citizenship, must consider some aspects of the Constitution to be unamendable); see also Sanford Levinson, Constitutional Faith 126-28, 135-38, 142-47 (1988) (discussing “constitutional attachment” in general and Schneiderman specifically).

In a story repeated in several sources, the famous mathematician and logician Kurt Gödel, when he applied for U.S. citizenship, is reported to have stated he knew how the United States, without violation of its constitution, could become a dictatorial state; his reasoning is unknown, but some commentators have concluded his conclusion was based on his understanding that there were no limits on amendment in the Constitution. See Suber, supra note 21, at 212; F. E. Guerra-Pujol, Gödel's Loophole, 41 CAPITAL U. L. REV. 637 (2013); Sanford Levinson & Jack M. Balkin, Constitutional Crises, 157 U. PA. L. REV. 707, 750-52 (2009).
sions. Such a temporary restraint would both spur discussion of the question and also allow time for the near future to make a considered judgment on the matter. Such a temporary moratorium, whether it results in a permanent disavowal of unamendable provisions or in one of the other scenarios below, may be a good place to start.

C. Finding Our Voice and Having Our Say

Another choice we can make is to add one or more unamendable provisions to the Constitution. We have as much right as any generation, including the Framers, to speak an unamendable truth. The dead hand objection expresses a concern that a given generation not needlessly inhibit majoritarian democracy in future generations, but in trying to preserve every possible voice of constitutional amendment in the future, might we unduly silence ourselves? If we are to speak, what should we say, and how best do we to temper that speech before we make it permanent?

As to substance, in an effort to cabin the conversation and to better choose from tested ideas, I will focus on which current United States Constitutional provisions are good choices for an upgrade to status as unamendable provisions. Certainly it seems that the prohibition on slavery, and the prohibitions on denying a right to vote based on race or sex, are the sorts of provisions that might be made unamendable without significant fear of later regret.

104. If we wanted to guarantee the ten years, then similarly to the U.S. Constitution's Sunset Entrenchment Provision mentioned supra in II.B., this amendment itself would need to be unamendable for the same period of time.

105. The framing generation had no special merit that of itself renders their work special status beyond their coming first. See Pettys, supra note 6, at 327–29 (illustrating that, as a response to the dead-hand objection to originalism as a method of interpreting the Constitution, there are significant problems with the argument that the framers were wiser and less self-interested than later generations); Weis, supra note 5, at 256–57 (disputing the often-made argument that "A constitution's founding is often thought to uniquely locate popular sovereignty as the source of constitutionalism . . . founding moments' represent episodes of intense public deliberation and engagement that are not found in everyday politics").

106. An additional normative problem with this scenario is if we follow up our creation of unamendable provisions by moving to scenario (2) and prohibiting all future unamendable provisions. In that case, we have become for future generations what, in scenario (1), the framing generation is to us.

107. We certainly could look at examples from other countries, though the reasons for those provisions being unamendable vary as widely as the geography, peoples, and political histories of those nations. See, e.g., Albert, Constitutional Disuse, supra note 9, at 1039–40, 1038 nn.53–57, 1040 nn.67–68. Among his copious work on unamendability, Professor Albert has categorized unamendable provisions by their purpose. See Albert, Constitutional Handcuffs, supra note 45, at 678–98 (listing preservative, transformational, and reconciliatory unamendable provisions).


109. Id. amend. XV, § 1.
If we examine these three gold-standard provisions and see what attributes they have in common, we can generalize to the sorts of provisions especially likely to make good choices for unamendability. (1) They are tried and true in the extreme, all having been present in our constitutional system for about 100 to 150 years; (2) all of them are general in application—they apply to everyone; (3) all are aimed at stopping harm to individuals without imposing a similar harm on anyone else; and (4) they express ideas that can be reasonably captured in language, especially in that they contain straightforward prohibitions. These attributes are what we might look for in fashioning other candidates for unamendability.

Commentators addressing unamendability have put forward the democratic speech rights of the First Amendment as candidates for permanent entrenchment in the Constitution, but I think the ideas expressed in the First Amendment are simply too cognitively thick to be made unamendable at this time. Court interpretation of unamendable provisions will be impervious to alteration by constitutional amendment, so such provisions must be straightforward. First Amendment provisions must somehow be narrowed and specified before they are made unamendable.

Applying special processes and/or limitations might be one way to work toward making unamendable some of the First Amendment protections. We might try making a provision temporarily unamendable. This would “relax[ ] the dead hand[‘s grip]” on future generations when the provision expires. Combining temporary

110. Id. amend. XIX.
111. Clear and focused language is necessary to avoid the problem of a Supreme Court opinion permanently inserting a problematic interpretation into the Constitution. See Albert, Unamendable, supra note 8, at 24. Yes, there may be reasonable debate as to all the possible meanings of sex, or race, or slavery, or voting, or even denial, but the idea is fairly concrete when compared to terms like “due process,” “privilege,” “speech,” or “commerce.”
112. See Bruce Ackerman, We the People: Foundations 16 (1991) (stating “I myself think it would be a good idea to entrench the Bill of Rights against subsequent revision by some future American majority caught up in some awful neo-Nazi paroxysm.”); id. at 320–21, (discussing the German constitution’s unamendable provisions guaranteeing basic human dignity, and positing the possible value of entrenching rights unamendably into the United States Constitution); see also Albert, Unamendable, supra note 8, at 31 (expressing a belief that “the First Amendment’s democratic rights must themselves be unamendable in order to preserve the free amendability of the United States Constitution”); Galston, supra note 13, at 114–15 (arguing that unamendably entrenching First Amendment values, for instance, might bring out the “enabling” benefits discussed earlier, as those values could “reinforce[ ] popular sovereignty [by preserving] the fundamental values that prevent the popular will from actions that could undermine popular government”).
113. Ozan O. Varol, Temporary Constitutions, 102 Cal. L. Rev. 409, 448–52 (2014). Varol is not addressing unamendable provisions, but Varol’s thorough discussion of the virtues and flaws
unamendability with Albert’s prescription of sequential approvals in accordance with the principle of intertemporality, we would have a situation in which we expand the base of those consulted and impose the unalterability of the provision on only those citizens most proximate to the action. Perhaps, by episodic trials and tweaks, something even so rich in meaning as the First Amendment might be rendered into provisions as surely perpetually desirable as the three provisions mentioned earlier.

Sunset unamendability combined with intertemporality may be wise in almost any instance of unamendability. Such provisions allow us to restrain ourselves, with spillover effect into only the near future. Where a provision proves desirable over time, it may be re-entrenched over and over, if the then-present citizens desire it, allowing some provisions to be ever on a continually receding horizon.

Where we are considering pronouncing perpetual truths meant to bind future generations to the lessons we have learned, we should avail ourselves of a design and assessment protocol that includes sequential approval over time and perhaps an incubation period during which we have temporary provisions before committing to perpetuity.

D.  Holding Our Tongue

We also can leave to our later selves and to future generations the decision of whether to create unamendable provisions or ban them forever. No generation of citizens since the framing has created an unamendable provision, and no one has seriously tried since 1861. We can simply refrain as well. This stance preserves options. From here, we or future citizens can adopt either of the futures mapped out in B and C above.

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I am convinced that any unamendable provisions, even one barring other unamendable provisions, should be the result of a process that forces a careful consideration of the magnitude and propriety of such an act. I therefore distill four principles from the foregoing discussion.

(1) Due concern for the sovereignty of future generations over their own times, no unamendable provision should be truly perma-
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(1) An unamendable provision is permanent; any unamendable provision should sunset by its own terms after a period of time.

(2) To merely state a special case of (1), even those provisions that designate the disallowance of unamendable provisions should be temporary. A constitutional provision declaring that unamendable provisions are banned must have a beginning and ending date.

(3) Where an unamendable provision is substantive (that is, it addresses anything other than solely the turning on or off of the power to create unamendable provisions—the sorts of provisions just noted in (2)), it should have a delayed onset. This delayed onset should also require a second ratification of the provision after a significant period of time, the better to allow: (a) a span of time during which any mistaken supermajoritarian fervor for the provision can die down, allowing sober, careful thought about the wisdom of both the provision and its unamendability; and (b) acknowledgment of the intertemporal binding of generations. Combined with (1), this means any substantive unamendable provision must have a delayed, doubly approved sunrise AND a sunset.

(4) As a first step, I recommend an amendment that would place a temporary moratorium on unamendable provisions. Such an amendment proposal itself would begin a discussion about unamendable provisions, and its ratification would allow time for such a discussion to play out in an atmosphere free from any impending permanent provision.

CONCLUSION

In the late 1780s, "We the People" wrote and ratified the United States Constitution. The original Constitution included an unamendable provision but offered no explicit guidance as to whether future unamendable provisions might be created. The answer to the question of whether we can now create unamendable provisions has profound ramifications for the relationships among generations of U.S. citizens. This Article explores the possible answers.

The results are discomfitting. If we don't have the power, then we must admit there is a profound discontinuity in the power exerted by those ratifying the Constitution and those, like us, who come after. Assuming we do have the power to create unamendable provisions, we have three options: create them, stop them forever, or leave the possibility open, but refrain from doing anything at the moment. Bar-
ring forever the creation of new unamendable provisions is appealing as a safety measure against unwise amendments, but denies us the power to bind ourselves to tenets we may wish to adopt. Creating an unamendable provision, even leaving that option open for ourselves or another generation may seem risky, but we can discern guidelines for creating unamendable provisions that offer a degree of security. Those guidelines include: requiring multiple ratifications spread over time; making the unamendability temporary; and writing the amendment with clear, simple terms.