

# Binding Authority: Unamendability in the United States Constitution—A Textual and Historical Analysis

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**BINDING AUTHORITY:  
UNAMENDABILITY IN THE UNITED  
STATES CONSTITUTION—A TEXTUAL  
AND HISTORICAL ANALYSIS**

GEORGE MADER\*

*We think of constitutional provisions as having contingent permanence—they are effective today and, barring amendment, tomorrow and the day after and so on until superseded by amendment. Once superseded, a provision is void.<sup>1</sup> But are there exceptions to this default state of contingent permanence? Are there any provisions in the current United States Constitution that cannot be superseded by amendment—that are unamendable? And could a future amendment make itself or some portion of the existing Constitution unamendable?<sup>2</sup>*

*Commentators investigating limits on constitutional amendment frequently focus on limits imposed by natural law, the democratic underpinnings of our nation, or some other combination of normative forces exterior to the Constitution.<sup>3</sup> Those analyses, while both interesting and important, require injecting into the Constitution ideas and ideals*

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1. The Eighteenth Amendment, for example, was formally repealed by the Twenty-First Amendment. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. Likewise, the manner of electing the President as presented in the original Constitution was superseded by the Twelfth Amendment. *Compare id.* amend XII, *with id.* art II, § 1, cl. 3.

2. For instance, could an amendment to the U.S. Constitution declare human life begins at conception, or birth, or some other stage of pregnancy, and declare the definition unalterable and irrepealable?

3. *See infra* Part II.A.

outside its text. This Article analyzes what limits on amendment we may find expressed in the text of the Constitution itself.

A careful analysis of the text of the original Constitution and the history of its framing offer rewarding insights in addition to new answers to the questions posed in the opening paragraph.<sup>4</sup> We learn the Framers of the U.S. Constitution understood the difficulties—logical, syntactic, and political—inherent in unamendable constitutional provisions, and yet decided to include them.

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## I. INTRODUCTION

One limit on amendment in the U.S. Constitution is widely noted: the provision in Article V that declares, “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>5</sup> But

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4. “[A] deeper understanding of our Constitution may flow from some new thinking about the possible limits on its amendability. Exploring the question of whether a constitutional amendment could itself be unconstitutional may reward us with a better appreciation of the Constitution itself.” R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?*, 22 LOY. U. CHI. L.J. 741, 741 (1991).

5. U.S. CONST. art. V.

that provision is far from the whole story and, by its terms, does not actually prohibit any type of amendment.<sup>6</sup>

There are two provisions in the original Constitution that actually did prohibit amendment, and each enforced key political compromises. First, there is the Article V declaration that “no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect [two named clauses].”<sup>7</sup> That prohibition, temporary though it was, had a breadth not previously appreciated. It prohibited, for instance, amendment of the Three-Fifths Clause<sup>8</sup> and amendment of itself.<sup>9</sup>

The other prohibition on amendment is in Article VI: “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>10</sup> This is the only instance of the word “ever” in the Constitution, and it is the only time any word indicating permanence appears in the Constitution. This Article appears to be the first significant scholarly investigation into the idea that the prohibition on religious tests for federal officers is a permanent, unamendable condition of the Constitution. The paths leading into and away from that investigation are central features of this Article.

The permanence of the prohibition on religious tests helps answer the question whether an amendment can be irrevocable. As aspects of the original Constitution were and are unamendable, and Article V declares amendments are to be “valid to all Intents and Purposes, as Part of this Constitution,”<sup>11</sup> it follows that one can carefully write an amendment to be irrevocable or to make permanent an existing provision in the Constitution. In this instance, too, investigating the question offers a renewed understanding of and appreciation for the history of high-stakes compromise in our Constitution.

Deeper questions follow from these results: That one generation can bind another without recourse, even to constitutional amendment, brings up serious questions of cross-generational, even cross-epochal, restriction on self-government.<sup>12</sup> Can and should the past reach into the

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6. *See infra* Part III.B.

7. U.S. CONST. art. V.

8. *Id.* art. I, § 2, cl. 3 (apportioning representatives and direct taxes among the states according to population, with each slave counting as three-fifths of a free person).

9. *See infra* Part III.A.

10. U.S. CONST. art. VI, cl. 3.

11. *Id.* art. V.

12. Certainly, there is always the option of extra-legal change (revolution, if you like)

future to enforce a permanent bargain necessary at one time to survive a crisis? If there are already unamendable aspects to our Constitution, must there always be the option to add more such permanent aspects, or can we by amendment prevent them?

Part II introduces the scholarship on unamendability in the U.S. Constitution and distinguishes this Article's focus from those works. Part II also briefly addresses some of the logical concepts required for a discussion of limitations on the power of constitutional amendment, including the self-referential problems that arise when rules of amendment are applied to themselves.

Parts III, IV, and V form the core of this Article. Part III presents a detailed analysis of the meaning and effectiveness of the two explicit limits on amendment in Article V of the original Constitution: The first of which barred until 1808 any amendment affecting provisions regarding taxation or the importation of slaves;<sup>13</sup> the second protected states' equal vote in the Senate.<sup>14</sup> The first of these, during the time before its preset expiration date, was unamendable. The second, despite significant argument to the contrary, is, and always has been, amendable.

Part IV introduces an additional permanent limit on amendment: The No Religious Test Provision in Article VI. This provision, along with the two just mentioned, resulted from compromises on significant, even determinative, issues facing the Framers of the Constitution.

Part V considers whether the U.S. Constitution allows amendments that would be in the future irrevocable. First, it disproves the argument sometimes made that the First Amendment is such an amendment. Then Part V analyzes attempts by Congress from 1860 to 1861 to avoid the Civil War through irrevocable amendments, which demonstrates an understanding at that time that such actions were possible. Several of the Crittenden proposals, seriously considered by Congress but ultimately not adopted, would have been unamendable.<sup>15</sup> The Corwin Amendment, approved by Congress but ratified by only two states

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without concern for the niceties of conformance with the Constitution's rules for amendment. We and future generations of Americans can do as we wish—we can “re-constitute” ourselves outside the dictates of the existing Constitution. But if we hold to the Constitution and its unamendability, what are the ramifications of the ability of one polity to unamendably bind future polities?

13. *Id.* art. I, § 9, cls. 1, 4.

14. *Id.* art. V.

15. *See infra* Part V.B.

before events overtook and mooted its attempt to avoid war, was intended to forever prevent the federal government from interfering with slavery in the states.<sup>16</sup> It had logical flaws that would have left it ineffective in accomplishing that task had it been ratified. There have not (yet) been any irrevocable amendments, but they are possible.

Part VI shows that the ability to create unamendable provisions can be given up, permanently, and discusses briefly whether that is something U.S. citizens should do. I conclude we should neither add any unamendable provisions to the Constitution, but nor should we remove from future generations the opportunity to create such provisions.

## II. LIMITATIONS ON CONSTITUTIONAL AMENDMENT: A BACKGROUND

My goal is to examine limitations on the content of constitutional amendments as expressed in the text of the Constitution. In this part, I (1) clarify the manners in which my endeavor is related (or not) to other scholarship on constitutional amendment and (2) introduce the terms and logical concepts necessary to undertake the journey ahead.

### A. *The Goal: Analysis of Express Limits on Constitutional Amendment*

To begin, I distinguish *explicit, textual* limitations from *implicit* limitations on amendment. My concern is the former, not the latter. By implicit limitations, I mean limits based on anything other than a specific portion of constitutional text limiting amendment on identifiable topics. Lying outside my inquiry, therefore, are arguments that norms outside the text of the Constitution impose limits on the content of constitutional amendments.<sup>17</sup> Some have argued, for instance, that natural law, morality, or general legal principles place limits on what is

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16. See *infra* notes 207–09 and accompanying text.

17. The argument over whether there are implicit limitations on amendment is about as old as the Constitution itself. See, e.g., DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 54–58 (2001) (collecting debates in the 8th Congress surrounding the proposal of the Twelfth Amendment in which various implicit limits on the amending power were argued to exist); *id.* at 342 (noting similar debates in the 19th Congress).

For modern arguments *against* the existence of implicit limitations on constitutional amendment, see JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 127–54 (1993), and David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990).

an allowable amendment.<sup>18</sup> Others find limits imposed by general principles emanating from the Constitution as a whole<sup>19</sup> or emanating from particular provisions.<sup>20</sup> There are some who argue that unamendability itself is assumedly forbidden because it prevents future generations from exercising their own sovereignty.<sup>21</sup> Such a limit, of

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18. See, e.g., Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487 (2004) (investigating whether certain rights and liberties are “constitutional essentials” in the Rawlsian sense); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 *S. CAL. L. REV.* 703, 754–57 (1980) (revealing a hierarchy of constitutional values, with the protection of human dignity at the pinnacle, and arguing that amendments repudiating this fundamental constitutional norm would be unconstitutional).

19. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 291 (2005) (“Were some things unamendable by dint of the Constitution’s very essence? For example, did the bedrock idea of republican self-government mean that strong protection for core political expression was an unrepealable feature of the entire constitutional project?” (footnote omitted)); 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”); Wright, *supra* note 4, at 764 (finding, “for reasons of logic,” amendments to be unconstitutional if they are incompatible with the assumed remainder of the Constitution).

20. See Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 *VA. L. REV.* 771 (1930) (arguing implicit limitations on the substance of constitutional amendments emanate from the combination of the Tenth Amendment and the Equal Suffrage Entrenchment Provision of Article V); Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 *YALE L.J.* 1073, 1073–74 (1991) (finding limits on constitutional amendment emanating from “natural rights retained by the people” as acknowledged by the Ninth Amendment); George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 *MICH. L. REV.* 213 (1920) (implicit limitations on the substance of constitutional amendments emanate from the confluence of the Ninth and Tenth Amendments and the Equal Suffrage Entrenchment Provision of Article V). *But see* Lester B. Orfield, *The Scope of the Federal Amending Power*, 28 *MICH. L. REV.* 550 (1930) (listing limitations proposed in the contemporary scholarship and arguing there are no limitations on constitutional amendment beyond those listed in Article V).

21. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 461 (1994) (“Could a legitimate amendment generally purport[ing] to make itself . . . immune from further amendment . . . clearly violate the legal right of future generations to alter their Government?”); A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 *HARV. J.L. & PUB. POL’Y* 501, 536–40 (2003) (no irrevocable amendments allowed); Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 *ARIZ. L. REV.* 717, 728–32 (1981) (rejecting several implied limitations on amendment because explicit limitations appear in the constitutional text but arguing unamendable amendments are invalid because, inconsistent with democratic theory and morality, they allow one generation to prevent succeeding generations from making fundamental political and moral choices). *But see* John R. Vile, *Limitations on the Constitutional Amending Process*, 2 *CONST. COMMENT.* 373 (1985) (arguing there are no limits on amendment and particularly making an argument against Linder’s position).

course, assumes away the question I address: whether the *text* of the Constitution contains or allows unamendable provisions.

*B. A Brief Introduction to Constitutional Entrenchment and Self-Amendment*

The rules by which, and the extent to which, a constitution may be changed are stated in its amending provisions.<sup>22</sup> Those provisions “perform the function of recognizing which rules attain constitutional status, which rules do not, and which rules cannot attain constitutional validity.”<sup>23</sup> That amending provisions provide the rules of recognition for amendments makes them tremendously important,<sup>24</sup> and when amending provisions are used to amend the amending provisions themselves, it brings to the surface the puzzles inherent in self-referential logic.<sup>25</sup>

22. *See, e.g.*, U.S. CONST. art. V.

23. Brendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 U.C. DAVIS J. INT’L L. & POL’Y 267, 288 (1996).

24. *See, e.g.*, DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at xvii (1996) (presenting a historical consideration of amending the United States Constitution and “locat[ing] the amending process at the very center of American constitutionalism [and] concluding that in practice as well as by design formal amendment has no equal in the American constitutional order”); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1058 (1984) (“Article V is the most fundamental text of our Constitution, since it seeks to tell us the conditions under which all other constitutional texts and principles may be legitimately transformed. Rather than treating it as a part of the Constitution’s code of good housekeeping, we should accord the text of Article V the kind of elaborate reflection we presently devote to the First and Fourteenth Amendments.”); Amar, *supra* note 21, at 461 (“[T]he legal rules [the Constitution] establishes for its own amendment are of unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced.”); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 157 (1997) (“Article V is arguably the most important structural provision of the Constitution.”).

25. By far the most complete and clear investigation of the knotty logical difficulties inherent in any type of self-amendment (that is, amendment of a legal text in accordance with procedures laid out in the text itself) is PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990). Suber’s excellent book provides a full treatment of the logical issues presented by the interplay between a constitution being at once the highest source of law and also amendable according to its own provisions. I borrow much of his vocabulary to define and explain my project. I caution the reader, however, not to suppose any analytical mistakes the reader may feel appear here are the fault of Suber—indeed, I believe he might disagree with my analysis in places. In addition, Suber’s work is far deeper and broader than my use of it. For an introduction to the logical concerns regarding self-amendment, see *id.* at xi–xvii. For discussion of unamendability, see generally *id.* at 73–136, 163–96.

If an amending provision is itself subject to amendment under its own terms, it is a “self-embracing” amending provision.<sup>26</sup> It is generally accepted that constitutional amending provisions can be used to amend themselves.<sup>27</sup> An example may be helpful. One way an amendment proposal becomes a valid part of the Constitution is if it receives the approval of at least two-thirds of each house of Congress and then is ratified by three-fourths of the state legislatures.<sup>28</sup> Suppose an amendment were proposed to make those requirements more restrictive: 80% of each house of Congress must approve the amendment proposal and then 90% of the state legislatures must ratify the amendment. That amendment would become part of the Constitution if it satisfied the amending requirements at the time it was proposed (two-thirds of each house approved and three-fourths of the state legislatures ratified). The new, more stringent amending process

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26. *Id.* at 73.

27. Many proposals for amendment of the U.S. Constitution’s Article V amending provisions have been made in Congress. *See, e.g., id.* at 321–26 (reviewing various proposals for amendment of Article V); *id.* at 333–55 (collecting information on amendment of state constitutions and noting that, as of 1981, thirty-five states had amended their then-current amending procedures and twelve of the remaining fifteen had amended a prior amending procedure); *see also* 1 JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2010*, at 16–18 (3d ed. 2010) (noting members of Congress have submitted about 150 proposals to amend the amending process, most falling into two broad categories: proposals for popular referendum and changes in ratification procedures). About 11,700 amendment proposals have been introduced in Congress as of 2010. *Id.* at xxi–xxii.

Article V has never been amended expressly. *See* SUBER, *supra* note 25, at 44. Nor does it appear to have been in any way implicitly amended. Edward Hartnett in *A “Uniform and Entire” Constitution; or, What If Madison Had Won?*, 15 *CONST. COMMENT.* 251 (1998), constructs the Constitution as it would look if the decision to display the amendments as an appendix rather than as interlineations had come out in favor of interlineations. By Hartnett’s account, Article V is the only article of the original Constitution that remains unamended. *Id.* at 298. For more on the debate regarding whether the amendments should be listed as supplements or interlineated with the original text, *see* 1 *ANNALS OF CONG.* 706–17 (1789) (Joseph Gales ed., 1834), and *infra* pp. 882–84.

28. This is, of course, only one of the manners in which the U.S. Constitution may be amended. The procedural half of Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

would become effective, despite not satisfying its provisions, for the very good reason that those provisions were not part of the Constitution at the time it was proposed and ratified. A later amendment could return the requirements to two-thirds of Congress and three-fourths of the states only by meeting the requirements that 80% of each house of Congress approved and then 90% of the state legislatures ratified.

At this point, we need to introduce some background terminology on entrenchment. A “constitutional entrenchment provision” stipulates an extraordinary (more restrictive than ordinary) amending procedure for certain amendment(s).<sup>29</sup> The aspects of the Constitution protected from ordinary amendment by the entrenchment provisions are said to be “entrenched” by the entrenching provision.<sup>30</sup>

Two clarifications are in order. First, although what is entrenched must be some identifiable concept expressed in the text of the entrenchment provision, it need not be a particular section of the Constitution.<sup>31</sup> That is, while some entrenchment provisions may specifically reference a portion of text (for example, “Clause X is not amendable”) it is possible for an entrenchment provision to declare something more general is not amendable (like “no amendment may revoke the right to be secure in one’s property”). Although I will continue to speak generally of “provisions” being entrenched, the understanding is that a quality or condition of the Constitution may be entrenched other than by naming specific provisions.<sup>32</sup> Second, it matters not whether the entrenchment is phrased as a declaration of permanence or a prohibition on change: “Clause X is permanent” is the same as “amendments that would alter Clause X are prohibited.”<sup>33</sup>

If the restriction imposed by an entrenchment provision prohibits all amendment whatsoever of the entrenched provision, the entrenchment is “complete.”<sup>34</sup> But sometimes a restriction short of unamendability is

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29. SUBER, *supra* note 25, at 75–76.

30. *Id.*

31. *Id.* at 76.

32. For another example, discussed in detail in *infra* Part III.B, the U.S. Constitution entrenches an equal Senate vote for each state. U.S. CONST. art. V. Article I, Section 3, Clause 1 of the Constitution stipulates each state has two Senators who each have one vote, but *that clause* is not entrenched. Rather, the concept of equal vote in the Senate (whether one vote per state, or two, or seven) is entrenched.

33. Again, “Clause X” may also be a concept. So “equal suffrage in the Senate is permanent” is equivalent to “any amendment altering equal suffrage in the Senate is prohibited.”

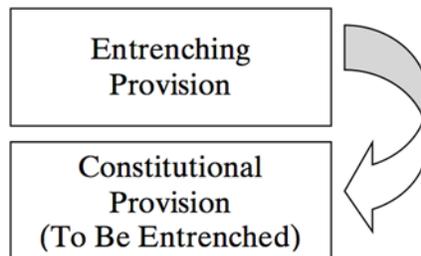
34. SUBER, *supra* note 25, at 77.

desired. Such an entrenchment is “incomplete.”<sup>35</sup> For example, if the ordinary process of amendment required a majority vote in a popular referendum but an entrenchment provision required a 60% supermajority vote for amendment of Clause X, the entrenchment of Clause X would be incomplete.

An entrenchment provision may entrench itself. A provision is “self-entrenched” (completely or incompletely depending on the nature of the restriction) if it declares itself subject to a more-restrictive-than-ordinary amending process.<sup>36</sup> If a provision entrenches *only* itself, it is “immediately self-entrenched,” but a provision is “mediately self-entrenched” if it entrenches a class of content or provisions of which it is a member.<sup>37</sup>

Four examples will elucidate the definition-dense paragraphs above and also serve to illustrate the final ideas in this section.

First, an example of simple entrenchment. Suppose a provision of the Constitution states, “Any amendment to Article II is valid only if ratified by all states.” Such a provision would entrench Article II. The entrenchment would be incomplete because the article is still amendable, so long as any proposed change to it is unanimously ratified by the states. If the entrenching provision said instead, “Article II may not be amended,” then the entrenchment would be complete.



**Figure 1: Entrenchment of Constitutional Provision by Entrenchment Provision**

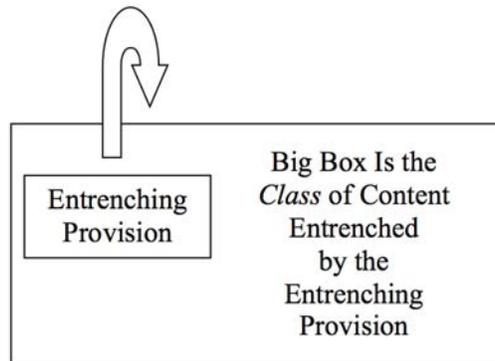
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35. *Id.*

36. *Id.* at 75.

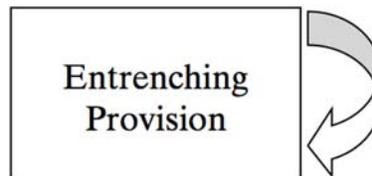
37. *See id.* at 108. Suber uses the terms mediate and immediate to refer to the relationships among amending provisions, but I find it useful to expand the definition to act upon all provisions of a constitution.

Second, mediate self-entrenchment. If we take the entrenchment provision above, “Article II may not be amended,” and place it inside Article II,<sup>38</sup> then the entrenching provision entrenches not only the rest of the article but also itself. It is a member of the set of things it entrenches, so it is mediately self-entrenched.



**Figure 2: Mediate Self-Entrenchment Where the Entrenching Provision Entrenches a Class of Content, of Which the Entrenching Provision Is a Part**

Third, an example of immediate self-entrenchment. For example: “This provision, which guarantees to each state a republican form of government, may not be amended.”<sup>39</sup>



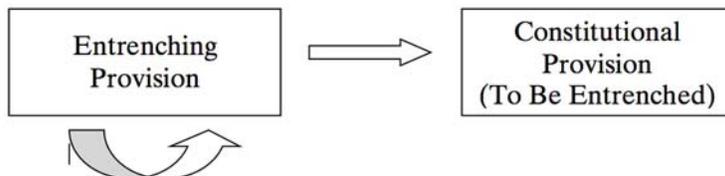
**Figure 3: Immediate Self-Entrenchment of Entrenching Provision**

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38. Because entrenchment provisions limit or alter the ordinary amending process, they are de facto amending provisions of the Constitution whether or not they are placed textually with other parts of an amending provision. *See id.* at 80.

39. *Cf.* U.S. CONST. art. IV, § 4 (guaranteeing to each state a republican form of government).

Last, an example of an entrenching provision that is self-entrenched and also entrenches another provision located elsewhere in the Constitution. For instance, suppose the following provision is *not* located in Article II: “Neither Article II nor this clause may be amended.” Such an entrenching provision entrenches itself, immediately, and also entrenches Article II.



**Figure 4: Immediate Self-Entrenchment of Entrenching Provision, Which Is Also Entrenching Another Provision**

Now we reach the last and most difficult part of this journey: The combination of constitutional entrenchment and self-amendment. What happens when an amending provision that contains entrenching language is amended? Can the amending provision be used to *remove* an entrenchment of its own creation? And if so, is the provision that was previously entrenched no longer protected?

That’s a bit to take in one gulp; luckily, the examples and figures above go a long way to clarifying the point. Consider the simplest situation, shown in Figure 1. The example of complete entrenchment was an entrenching provision stating: “Article II may not be amended.” But suppose the entrenching provision itself is not entrenched (either by self-entrenchment or entrenchment by another entrenchment provision). That means the entrenching provision itself is subject to amendment (including its removal). As a result, despite Article II’s supposed complete entrenchment, Article II may be amended in two steps, each of which requires only ordinary amendment. The first step is an amendment that removes the entrenching provision (which, as it is not entrenched, is subject to ordinary amendment). That amendment did not violate the entrenching provision because it did not amend Article II. The second step is an amendment that alters Article II

(which is no longer entrenched).<sup>40</sup> This “two-step process” will defeat any entrenchment provision that is not itself entrenched.<sup>41</sup>

Compare the above situation to that in Figure 4. In that example, the entrenching provision stated: “Neither Article II nor this clause may be amended.” Any amendment to the entrenching provision would violate the requirement that it not be amended. The provision’s self-entrenchment prevents step one of the two-step process just mentioned, thus protecting all of the entrenched Article II. So for an entrenchment provision to be effective, it must itself be entrenched (or entrench itself) at least as deeply as it entrenches the provision(s) it protects.<sup>42</sup>

So for a constitutional provision to be unamendable, it must be either (1) completely self-entrenched or (2) ultimately entrenched by a provision that is itself completely self-entrenched. Below I show the original U.S. Constitution had two completely self-entrenched provisions, and still has one.

### III. ENTRENCHMENT IN ARTICLE V OF THE ORIGINAL CONSTITUTION

The explicitly stated means of amending the Constitution are located in Article V<sup>43</sup>:

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40. See SUBER, *supra* note 25, at 75–76.

41. A series of entrenchment provisions will work as well, provided it terminates in a self-entrenched provision. For instance, “Entrenching Provision 1” is unamendable (even if it is not itself self-entrenched) if it is completely entrenched by a separate “Entrenching Provision 2,” which is completely entrenched. Likewise for any finite chain of completely entrenching provisions ultimately ending in a completely self-entrenched provision.

42. See *id.* at 75–77. What I mean by “as deeply entrenched” is merely (1) if the entrenched provision is completely entrenched by the entrenchment provision, then the entrenchment provision must also be completely entrenched; and (2) if the entrenched provision is incompletely entrenched (amendment allowed, albeit requiring some extraordinary measure), then the entrenchment provision must be at least as difficult to amend.

43. That Article V is not the sole means of constitutional amendment has been explored by, among others, Bruce Ackerman (espousing a view that constitutional transformation occurs in two ways, through both Article V amendment and through a process of transformative statutory law and judicial review) and Akhil Reed Amar (arguing that in addition to the process available under Article V, the Constitution can constitutionally be amended by popular vote because the Constitution includes an understanding that the people retained their right to popular sovereignty). See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Ackerman, *supra* note 24, at 1058; Amar, *supra* note 21, at 457; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Among those who argue for exclusivity of the Article V amending process and against the views expressed by Ackerman and Amar, see Dow, *supra* note 17; Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996); John R. Vile, *Legally Amending the United*

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; *Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*<sup>44</sup>

The two provisions in italics are express limits on the amending power—in the language of the previous section of this Article, they are entrenchment provisions. The first provision, restricting until 1808 any amendment “affect[ing]” Article I, Section 9, Clauses 1 and 4, I will refer to as the “Sunset Entrenchment Provision” due to its explicit expiration date. I will refer to the second italicized provision, for obvious reasons, as the “Equal Suffrage Entrenchment Provision.”

The drafting history of Article V is informative for the argument that follows. On May 29, 1787, the third day of the Constitutional Convention, Edmund Randolph introduced a series of resolutions that became the initial framework for the summer-long process of creating the Constitution.<sup>45</sup> The thirteenth of Randolph’s fifteen resolutions provided “for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”<sup>46</sup> That resolution was barely touched in the first two months of the Convention; on July 26, as referred to the Committee of Detail, the provision had merely been shortened to read, “That Provision ought to be made for the Amendment of the Articles of

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*States Constitution: The Exclusivity of Article V’s Mechanisms*, 21 CUMB. L. REV. 271 (1990–1991).

For purposes of my argument, I am setting aside the question of whether Article V offers the exclusive means of amending the Constitution. Doing so allows me to more clearly explain my argument and more narrowly focus on the issue of limits on amendment as declared in the text of the Constitution itself.

44. U.S. CONST. art. V (emphasis added).

45. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–23 (Max Farrand ed., 1911).

46. *Id.* at 22.

Union, whensoever it shall seem necessary.”<sup>47</sup> The Convention then adjourned for eleven days to allow the Committee of Detail to “prepare & report the Constitution.”<sup>48</sup> When the Committee of Detail reported its draft on August 6, the amending provision was still a simple statement: “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.”<sup>49</sup>

Over the next twenty-four days, the Convention took up, more or less in numerical order, each of the twenty-three articles in the Committee of Detail’s draft.<sup>50</sup> As the amending provision was Article XIX<sup>51</sup> of the draft, it was not reached until August 30, at which point the only recorded discussion among the delegates was whether to allow Congress to call an amending convention without state application, which was agreed to without dissent.<sup>52</sup> There were no entrenchment clauses, and for the next eleven days the Convention debated and rewrote other portions of the draft constitution.<sup>53</sup> It was not until September 10 that constitutional amendment and entrenchment came to the fore.<sup>54</sup>

#### A. *Sunset Entrenchment Provision*

The Sunset Entrenchment Provision has received scant attention from those analyzing the limits of constitutional amendment; most often, it is quickly noted that the provision prevented until 1808 amendment of the clauses it entrenched, with little or no additional analysis.<sup>55</sup> But to understand entrenchment within the original

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47. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (Max Farrand ed., 1911) [hereinafter 2 THE FEDERAL CONVENTION].

48. *Id.* at 128.

49. *Id.* at 188.

50. *Id.* at 193–482.

51. A misnumbering in the printed copy of the report of the Committee of Detail resulted in there being two Articles numbered “VI.” *Id.* at 181 n.5. Thus, the printed number for the amending provision was XVIII, but in the deliberations it was referred to as Article XIX.

52. *Id.* at 467–68.

53. *Id.* at 470–554.

54. *Id.* at 557.

55. This inattention may be because the Sunset Entrenchment Provision is doubly mooted—first by its 1808 expiration date and second in that its specific reference is to two provisions no longer in effect: one addressing the importation of slaves and the other a

Constitution, we must consider every instance of it. Fortunately, the Constitution often rewards careful study of its nooks and crannies, and this case is no different. An analysis of the provision reveals much about the Framers' understanding of both this provision in particular and constitutional entrenchment in general.

On September 10, 1787, exactly one week before the delegates signed the final version of the Constitution, the Convention again took up the amending provision in an attempt to cure the dissatisfactions expressed by various members.<sup>56</sup> James Madison then proposed a rewriting of the article, the substance of which would become much of the first, procedural half of Article V.<sup>57</sup> Still, there were no entrenchment provisions.

Before Madison's motion could be voted on, John Rutledge, delegate of South Carolina, moved to include the Sunset Entrenchment Provision.<sup>58</sup> Rutledge stated he "never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it."<sup>59</sup> He successfully moved that the following be appended to Madison's proposed language: "provided that no amendments which may be made prior to the year 1808, shall in any manner affect the 4 & 5 sections of the VII article,"

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taxation provision amended (by the Sixteenth Amendment) over 100 years ago. See U.S. CONST. amends. XIII, XVI.

56. Some delegates were dissatisfied with the vagueness of the amending provision's wording, others feared the possibility a majority of states at a future amending convention might be able to alter the Constitution, and some desired a means by which the federal legislature might propose amendments to the states for ratification. 2 THE FEDERAL CONVENTION, *supra* note 47, at 557-59; see also Linder, *supra* note 21, at 720 (summarizing concerns of the delegates).

57. Madison's proposal read:

The Legislature of the U[nited] S[tates] whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.

2 THE FEDERAL CONVENTION, *supra* note 47, at 559. The amending provision this proposal replaced would have allowed two-thirds of the states to require Congress to call a convention for the proposing of amendments. See *supra* note 49 and accompanying text. That requirement was re-added on September 15. See 2 THE FEDERAL CONVENTION, *supra* note 47, at 629-30.

58. 2 THE FEDERAL CONVENTION, *supra* note 47, at 559.

59. *Id.*

the numbered clauses of the then-existing constitutional draft that were later to become Article I, Section 9, Clauses 1 and 4.<sup>60</sup>

The resulting Sunset Entrenchment Provision, as approved by the Convention on September 15, read: “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . . .”<sup>61</sup> And the constitutional provisions entrenched until 1808 were:

[Article I, Section 9, Clause 1:] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

. . . .

[Article I, Section 9, Clause 4:] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.<sup>62</sup>

The presence of 1808 as an expiration date in both the Sunset Entrenchment Provision and one of the provisions it entrenched<sup>63</sup> is significant—the temporal link demonstrates the delegates understood and attempted to avoid an analog of the two-step process previously described<sup>64</sup> by which an entrenched provision could be amended. Article I, Section 9, Clause 1 prohibited certain *legislation* until 1808.<sup>65</sup> But Rutledge feared the provision could be amended out of the

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60. This motion was agreed to by a vote of nine states in favor, one against, and one state’s delegation divided on the question. *Id.*

61. U.S. CONST. art. V.

62. *Id.* art. I, § 9, cls. 1, 4.

63. As of 1808, Article I, Section 9, Clause 1 was to expire conterminally with the provision entrenching it; thereafter Congress would be free to legislate on the slave trade. Congress did just that—by an act effective on January 1, 1808. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

The other provision referenced in the entrenching provision, Clause 4 of Article I, Section 9, the provision as to proportionate taxation, was to be protected from amendment until 1808. At that point, it was no longer entrenched and reverted to an ordinary constitutional provision amendable by ordinary means—as it eventually was by the Sixteenth Amendment in 1913. U.S. CONST. amend. XVI.

64. *See supra* pp. 852–53.

65. *See* U.S. CONST. art. 1, § 9, cl. 1.

Constitution early on, allowing Congress to ban the slave trade by statute before 1808.<sup>66</sup> One goal of the Sunset Entrenchment Provision was to prevent, until that same year, any *constitutional amendment* removing the prohibition on legislation. Thus the delegates understood the amendment + legislation analog of the amendment + amendment two-step process.<sup>67</sup>

Having that understanding, the delegates would have known the Sunset Entrenchment Provision *itself* needed, as we have noted earlier, to be at least as deeply entrenched as the provision it entrenched. They must have intended to entrench the Sunset Entrenchment Provision until 1808 as well.<sup>68</sup>

But intent alone is not enough;<sup>69</sup> we need to investigate whether the words of the Sunset Entrenchment Provision created a truly effective entrenchment.

As we are testing whether the first step of the two-step process can be taken, we ask whether removal of the Sunset Entrenchment Provision prior to 1808 would have violated the entrenchment provision itself. By its terms, the Sunset Entrenchment Provision prohibits amendments that “shall in any Manner affect” the entrenched provisions.<sup>70</sup> Therefore, the test for determining which amendments are prohibited is whether the amendment “shall affect” the entrenched provisions “in any manner.”<sup>71</sup> Removing the Sunset Entrenchment Provision would have changed the amendatory status of the previously entrenched provisions; they would have become unprotected from ordinary amendment. Such a disentanglement, though it would not have *removed* the provisions themselves, would have “*affect[ed]*” them “*in any manner.*”<sup>72</sup> Thus, the Sunset Entrenchment Provision is itself a

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66. See 2 THE FEDERAL CONVENTION, *supra* note 47, at 559.

67. See *supra* pp. 852–53.

68. See *supra* note 63.

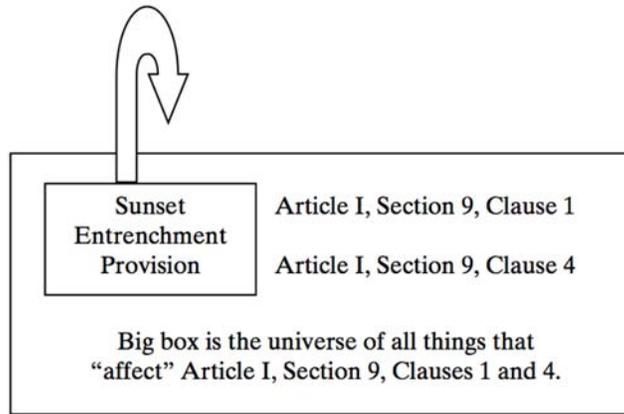
69. Because an entrenchment provision is ineffective when it is not entrenched at least as deeply as the provision(s) it protects, some will assume self-entrenchment where an entrenching provision appears not to be self-entrenched, thus keeping the entrenchment provision from being ineffective. Such *assumed entrenchment* is the rough equivalent to wishful thinking and is invalid. See SUBER, *supra* note 25, at 75, 81 (noting “there is a temptation to read every entrenchment clause as impliedly self-entrenched” to avoid the two-step difficulty).

70. U.S. CONST. art. V.

71. See *id.*

72. Thus, the first step in any attempted two-step amendment process fails. *But see* AMAR, *supra* note 19, at 292–93 (offering the possibility that a two-step amendment

member of the class of provisions it entrenches—it mediately entrenches itself.<sup>73</sup>



**Figure 5: Sunset Entrenchment Provision Entrenching a Set of Constitutional Provisions, of Which It Is Itself a Member**

This argument—that the words “in any Manner affect” mediately self-entrenches the Sunset Entrenchment Provision—places a heavy interpretive weight on those words. But the words can bear the weight.

Let us assume for a moment that John Rutledge, when he proposed the Sunset Entrenchment Provision, intended to entrench only the two clauses it named. If that were the case, why not something simpler: “Sections X and Y may not be amended before 1808”? Why use the phrase “shall in any Manner affect,” unless it was intended to entrench a broader set of provisions?<sup>74</sup> Nor does it appear the wording was offhanded—Rutledge had eleven days from the previous August 30 discussion of the amending provision to consider and frame his amendment.<sup>75</sup>

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process—first removing the Sunset Entrenchment Provision, then amending the previously entrenched provisions—would be effective).

73. See *supra* note 37 and accompanying text (describing mediate self-entrenchment).

74. For instance, Arthur W. Machen, Jr., in *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 172 (1910), observes, “[T]he prohibition of an amendment prior to 1808 interfering with the slave trade . . . necessarily implied that no constitutional amendment should be adopted prior to 1808 abolishing slavery in the original states.”

75. 2 THE FEDERAL CONVENTION, *supra* note 47, at 468, 559. Compare those eleven days to *infra* pp. 864–66, 869, discussing the more spontaneous creation of the Equal Suffrage Entrenchment Provision.

If Rutledge intended the Sunset Entrenchment Provision to reach beyond the named clauses, to what would it reach? Consider the interpretation offered of the Sunset Entrenchment Provision by James Iredell, later Supreme Court Justice,<sup>76</sup> at the 1788 North Carolina ratifying convention:

It is, however, to be observed, that the 1st and 4th clauses in the 9th section of the 1st article are protected from any alteration till the year 1808 . . . . [These] prohibitions *are with respect to the census, (according to which direct taxes are imposed,)* and with respect to the importation of slaves. As to the first, [which states any “direct tax” must be “in Proportion to the Census or Enumeration herein before directed to be taken,”] it must be observed, that there is a material difference between the Northern and Southern States. *The Northern States have been much longer settled, and are much fuller of people, than the Southern, but have not land in equal proportion, nor scarcely any slaves.* The subject of this article was regulated with great difficulty, and by a spirit of concession which it would not be prudent to disturb for a good many years. *In twenty years, there will probably be a great alteration, and then the subject may be reconsidered with less difficulty and greater coolness.*<sup>77</sup>

The census provision to which Iredell referred states:

Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress . . . .<sup>78</sup>

Iredell’s discussion of the census, populations, and slaves indicates he considered the census provision, including its Three-Fifths Clause, to be entrenched (at least as to taxation) until 1808. That means Iredell believed the Three-Fifths Clause to “in any Manner affect”<sup>79</sup> Clauses 1 and 4 of Article I, Section 9. If this is a correct interpretation of Iredell’s

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76. Iredell is perhaps best known as the lone dissenter in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the overturning of which was the basis of the Eleventh Amendment.

77. Debate in North Carolina Ratifying Convention (July 29, 1788), *as reprinted in 4 THE FOUNDERS’ CONSTITUTION* 582, 583 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of James Iredell) (emphasis added).

78. U.S. CONST. art. I, § 2, cl. 3.

79. *Id.* art. V.

statement, it demonstrates the Sunset Entrenchment Provision entrenches provisions beyond the clauses it names specifically.

But however reasonable one finds my interpretation of Iredell's statement, it is a slender cord upon which to hang a weighty argument. We need more evidence that the Three-Fifths Clause was understood to be entrenched until 1808 on the ground that amending it would "in any Manner affect" Article I, Section 9, Clause 4's requirement that no direct tax should be levied "unless in Proportion to the Census or Enumeration herein before directed to be taken."<sup>80</sup>

We can expect such evidence to be scarce because, if it was understood the Three-Fifths Clause was unamendable until 1808, nothing would happen. Even those who wanted to change the clause would wait for 1808. But such inaction does not prove anything—people could have sat on their hands with respect to the Three-Fifths Clause for any of several reasons beyond an understanding that it was unamendable. What *would* provide support for the argument is a discussion before 1808 exhibiting a desire to amend the Three-Fifths Clause but expressing an understanding that such an amendment must wait until 1808. And that is what we have—at least twice.

First, and of lesser importance, in October of 1803, in the process of debating what was to become the Twelfth Amendment, Representative Seth Hastings of Massachusetts stated: "I hope, sir, that in the year 1808, an alteration will be made in this part of the Constitution, [the Three-Fifths Clause] and that the representation, by being proportioned only to the number of free persons, will be rendered equal and just."<sup>81</sup> This indicates that, in Mr. Hastings' view, the Three-Fifths Clause was unalterable until 1808, not only as to taxation but also as to representation. Hastings's comment gains a little additional value because he was speaking against his interest; he would have preferred not to wait, but he understood the Constitution to require it.

A far more convincing piece of evidence comes from the Senate floor a year later. In December 1804, Senator Timothy Pickering of Massachusetts proposed an amendment to the Constitution "in such manner that representatives and direct taxes may be apportioned among the several States according to the number of their free inhabitants, respectively."<sup>82</sup> The amendment, however, specified that it was not to

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80. *Id.* art. I, § 9, cl. 4.

81. 12 ANNALS OF CONG. 536 (1803).

82. 14 ANNALS OF CONG. 21 (1804).

take effect until after 1808:

From and after the third day of March, one thousand eight hundred and nine, representatives and direct taxes, shall be apportioned among the several states, which may be included within this Union, according to the numbers of their free inhabitants, respectively.<sup>83</sup>

This is the only constitutional amendment proposal prior to 1808 to suggest altering the formula by which representation, let alone direct taxation, was to be apportioned.<sup>84</sup> The March 3, 1809, date in Pickering's proposal would have required the Congress elected in 1808 (which would take office March 4, 1809),<sup>85</sup> be apportioned in accordance with the population of free inhabitants, rather than under the formula created by the Three-Fifths Clause.<sup>86</sup> In a letter to the Massachusetts governor that Pickering and his fellow Senator from Massachusetts, John Quincy Adams, wrote shortly after introducing the proposal, they clarified their understanding that (1) the amendment could not constitutionally take effect before 1808 and (2) attempting to change the apportionment of representation in the middle of a congressional term

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83. Motion offering a resolution that representatives and direct taxes be apportioned among the several states according to their free inhabitants, 8th Cong., 2d Sess. (Dec. 7, 1804) (digital copy on file with author).

84. HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* (1896), *reprinted in* 2 AM. HISTORICAL ASS'N, ANNUAL REPORT 244 (1897) ("The first [amendment touching on direct taxes] was presented in 1804 by Senator Pickering of Massachusetts . . .").

Although the proposal appears to have been drafted by Pickering and his fellow Massachusetts Senator John Quincy Adams, *see infra* note 87, the subject matter of the amendment came to them from the Massachusetts state legislature and was known as the "Ely Amendment" after a chief proponent of the measure in that body. AMES, *supra*, at 45 & n.5; *see also* 3 JOHN BACH MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR* 44–45 (1891). As was customary at that time, the Massachusetts resolutions had been sent to the other states; the reaction was overwhelmingly negative. MCMASTER, *supra*, at 45–46; *see also* LINDA K. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* 36–39, 64–65 (1970); LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION 1780–1860*, at 43–44 (2000).

85. Except for the second Congress, which concluded business on March 2, 1793 (March 3 being a Sunday), the biennial Congresses through the date of Pickering's amendment proposal had ended their terms on March 3 of each odd-numbered year. *Dates of Sessions of the Congress, 1789–Present*, SENATE.GOV, (<http://www.senate.gov/reference/Sessions/sessionDates.htm>) [<https://perma.cc/TR9R-JQAM>] (last visited May 24, 2016).

86. RICHARDS, *supra* note 84, at 43.

was impractical.<sup>87</sup> Thus, under the proposed amendment, representation in the House would be recalculated in 1808 based on free population, elections in 1808 would reflect that apportionment, and the newly apportioned Congress would take office March 4, 1809.<sup>88</sup>

Thus, the words “in any Manner affect”<sup>89</sup> were understood early on to include within their ambit the Three-Fifths Clause, a provision

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87.

Until we attempted to frame an amendment, which, conformably to the resolution of the two houses of our [Massachusetts] Legislature, should exclude slaves from representation in the government of the United States, we were not fully aware of the distant period to which an effectual adoption of the amendment might, in compliance with existing provisions of the Constitution, be postponed.

By the 4th clause of the 9th section of the 1st article, it is declared, that “no capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.” That census, for the purposes of representation & taxation, constitutes five slaves as equivalent to three freemen. The 5th article provides that no amendment which may be made prior to the year 1808, shall in any manner affect the first & fourth clauses in the 9th section of the first article: consequently, no direct tax can be laid, prior to the year 1808, but according to the census which embraces slaves; and pursuant to the third clause of the second section of the first article, Representation must correspond with the rule of taxation.

The representation for slaves, must then be admitted until the year 1808. But prior to that year, the tenth Congress comprehending representatives for slaves will necessarily be in session; and not finish its term until the third day of March 1809: Hence the impossibility of rendering the proposed amendment operative prior to that day. For if the principle were not opposed in Congress or in the state legislatures, the measure to be founded on the principle which should involve the necessity of reducing the number of representatives from the states having slaves, after they were elected & actually convened in Congress would certainly be rejected.

Letter from Timothy Pickering and John Quincy Adams to Governor of Massachusetts Caleb Strong (Jan. 28, 1805), in 14 PAPERS OF TIMOTHY PICKERING Doc. 117 (Massachusetts Historical Society ed.) (underlines as in original).

88. *Id.*

89. Similar wording in another part of the Constitution bolsters a broad reading of the word “affect.” The related word “affecting” occurs twice in the original Constitution. Both instances are in Article III, Section 2’s description of the jurisdiction of the Supreme Court, through which “Cases affecting Ambassadors, other public Ministers and Consuls” are placed under the Supreme Court’s original jurisdiction. U.S. CONST. art. III, § 2, cls. 1–2.

A case may “affect” diplomatic personnel without engaging them as parties, much as an amendment may “in any Manner affect” Article I, Section 9, Clauses 1 and 4 without directly amending them. The Judiciary Act of 1789, codifying the “affecting” jurisdiction, included “all . . . suits or proceedings against ambassadors, or other public ministers, *or their domestics, or domestic servants*, as a court of law can have or exercise consistently with the law of nations.” Judiciary Act of 1789, ch. 20, sec. 13, 1 Stat. 73, 80–81 (emphasis added). As an illustration, consider the situation in which the baker of the chargé d’affaires of the King of

textually separate from the provisions specifically identified in the entrenching provision. The Sunset Entrenchment Provision entrenched a class of constitutional provisions radiating out from the Article I provisions it specifically named, and the entrenchment provision itself fits comfortably into that class of entrenched provisions.

The Framers understood the ability of a two-step process of amendments to disentrench constitutional provisions and, in creating the Sunset Entrenchment Provision, they intended to avoid that difficulty.<sup>90</sup> Rutledge chose, and the Convention approved, broad language to achieve the purpose of entrenching “articles relat[ing] to slaves.”<sup>91</sup> The prohibition on all amendments “in any Manner affect[ing]”<sup>92</sup> the named clauses in Article I, Section 9 includes amendments altering the Sunset Entrenchment Provision itself; thus, the provision entrenched itself and was unamendable until it expired under its own terms in 1808.

### B. Equal Suffrage Entrenchment Provision

The very last changes made to the Constitution before the complete document was agreed to on September 15, 1787, and engrossed were alterations made to Article V.<sup>93</sup> First, the delegates voted to add to

Sweden was able under the Judiciary Act to quash his criminal indictment issued by a circuit court on grounds his case must be heard originally in the U.S. Supreme Court because the criminal indictment of his baker “affected” the Swedish chargé d’affaires. *United States v. LaFontaine*, 26 F. Cas. 832 (C.C.D.C. 1831) (No. 15,500).

Even this understanding of “affect” may be too narrow. John C. Massaro makes an originalist argument that the 1789 Judiciary Act and its successors, in codifying “affecting” jurisdiction, have not extended the jurisdiction to its full constitutional reach. John C. Massaro, *The Forgotten Jurisdiction*, 33 N. ILL. U. L. REV. 83, 87–94, 141–43 (2012).

I note, merely for completeness, that “affect” also appears in the third clause of the Seventeenth Amendment: “This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.” U.S. CONST. amend. XVII. My inquiry here is the meaning the Framers gave “affect” in Article V, so I am not concerned with the meaning of that term in the Seventeenth Amendment. That said, I have found no case law or other relevant construction of the word “affect” as used in the Seventeenth Amendment.

90. See SUBER, *supra* note 25, at 75–76, 80–81.

91. 2 THE FEDERAL CONVENTION, *supra* note 47, at 559.

92. U.S. CONST. art. V.

93. See 2 THE FEDERAL CONVENTION, *supra* note 47, at 629–31. There was one more change to the Constitution, on September 17, by erasure and rewriting after the engrossed Constitution had been read to the members of the Convention, and just before the delegates signed the document. *Id.* at 643–44. This was the famous instance in which the President of the Convention, George Washington, who had not participated in any debate to that point, supported a proposal by Massachusetts delegate Nathaniel Gorham to provide one

Article V the convention method of proposing amendments.<sup>94</sup> At that moment, Article V read exactly as it does today, except for the absence of the Equal Suffrage Entrenchment Provision.<sup>95</sup> Connecticut delegate Roger Sherman expressed concern that, under the amending provision, “three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.”<sup>96</sup> Therefore, “[h]e thought it reasonable that the proviso in favor of the States importing slaves [, the Sunset Entrenchment Provision,] should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.”<sup>97</sup>

Sherman’s solution to this problem took the form of a series of proposed amendments to Article V, each with a view to protecting the small states, and each defeated.<sup>98</sup> As presaged by his previous comment, Sherman moved<sup>99</sup> to annex to the Sunset Entrenchment Provision a declaration “that no State shall without its consent be affected in its internal police, or deprived of equal suffrage in the Senate”; this motion was defeated.<sup>100</sup> Next, Sherman moved to strike Article V altogether,

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representative in the House of Representatives for each 30,000 inhabitants, rather than for every 40,000; this proposal was agreed to unanimously. *Id.*

94. *Id.* at 629–30; *see also supra* note 57. This provision had previously been removed.

95. 2 THE FEDERAL CONVENTION, *supra* note 47, at 629–30.

96. *Id.* at 629.

97. *Id.*

98. *Id.* at 630–31.

99. Shortly before the motion described in the text, Sherman had moved the removal of the three-fourths requirement for ratification by state legislatures or conventions, thus “leaving future conventions to act in this matter, like the present Convention according to circumstances.” 2 THE FEDERAL CONVENTION, *supra* note 47, at 630. Future drafting conventions would be able to specify the numbers necessary to ratify, as the Convention did in Article VII. *See* Carlos E. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1473 (2005) (so interpreting Sherman’s motion).

For such an amendment to protect states from federal power (as wielded by collections of states), as Sherman apparently intended, his idea must have been that the ratification scheme for any such future convention would allow any states displeased by the Convention’s results to opt out of the Union at that point by refusing to ratify the amended Constitution. *Cf.* John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1005–06 (1992) (addressing whether amendments proposed by a constitutional convention would require ratification in accordance with Article V or whether the convention could make its own rule for adoption of the amendments, as did the Constitutional Convention of 1787).

100. 2 THE FEDERAL CONVENTION, *supra* note 47, at 630.

leaving the Constitution with no explicit amending provision.<sup>101</sup> This, too, was defeated.<sup>102</sup>

With the delegations from some of the small states clearly disgruntled by the run of defeated proposals, Gouverneur Morris (delegate from Pennsylvania, a large state) then proposed adopting a portion of Sherman's earlier proposal—dropping the prohibition on amendments “affect[ing a state] in its internal police” and keeping the rest; this passed.<sup>103</sup> The resulting Equal Suffrage Entrenchment Provision declares amendments, proposed and ratified in accordance with the procedure set out in the first half of Article V, “shall be valid . . . Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>104</sup>

The Equal Suffrage Entrenchment Provision entrenches only incompletely the equal suffrage of the Senate,<sup>105</sup> as there is no outright ban on unequal Senate suffrage but rather a requirement that any state “deprived” of equal suffrage must “consent” to the deprivation for it to be valid.<sup>106</sup>

But is even that incomplete entrenchment truly effective? Recall that to prevent the two-step amendment process, the entrenching provision must be as deeply entrenched as the provision it is entrenching. The important question for our purposes, then, is how deeply entrenched is the *consent requirement* itself? Is it entrenched at least so deeply as the provision it protects (consent of each state)?

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101. *Id.*

102. *Id.* at 630–31. The votes were not close. Only Connecticut and New Jersey supported all of Sherman's motions, and no motion was supported by more than three states. *Id.*

103. *Id.* Madison reported this addition to Article V was “dictated by the circulating murmurs of the small States [and] was agreed to without debate, no one opposing it, or on the question, saying no.” *Id.*

104. U.S. CONST. art. V.

105. *See supra* note 42 and accompanying text (defining incomplete entrenchment).

106. The precise manner in which the requirements of the Equal Suffrage Entrenchment Provision would be satisfied depends on the meanings of the words “consent” and “deprived.” How would a state consent to a reduction in its Senate vote? Because nonequal suffrage would require constitutional amendment, perhaps the “consent” of a state may be expressed by its ratification of the amendment depriving it of equal suffrage in the Senate. One might also argue that under the terms of the Equal Suffrage Entrenchment Provision, any change in Senate suffrage would require consent of all states, the argument being no state at that point has an equal vote. *See, e.g.,* Vile, *supra* note 21, at 379 (“[U]nanimous state consent [is] required for altering a state's equal suffrage in the Senate.”).

Some commentators have assumed the consent requirement in the Equal Suffrage Entrenchment Provision is perpetual—completely unamendable.<sup>107</sup> Based on the text, this is simply incorrect. The consent requirement for the loss of a state’s equal Senate vote does not specifically entrench itself. Nor does it, as the Sunset Entrenchment Provision did,<sup>108</sup> entrench a class of provisions of which it is a member. Thus, by the two-step process, two ordinary amendments could alter suffrage in the Senate.

Here is the refutation in detail. The Equal Suffrage Entrenchment Provision bars any amendment that deprives a state of its equal Senate suffrage without consent.<sup>109</sup> An amendment removing the entire Equal Suffrage Entrenchment provision, and thereby removing the consent requirement, would not violate the entrenchment provision because such an amendment would deprive no state of its equal vote in the Senate (let alone without its consent). Thus, the Equal Suffrage Entrenchment Provision could be removed by ordinary amendment without violating its own requirement. Once that provision were removed, Article V’s rules for amending the Constitution would no longer require consent from a state for its vote in the Senate to be altered. Such an alteration could be proposed and ratified, again by ordinary amendment.

Several commentators have discussed the two-step amendment process for eliminating the requirement of equal suffrage in the Senate,<sup>110</sup> but most balk at allowing it—regarding it to be a circumvention of an obvious intent by the Framers.<sup>111</sup> This argument is

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107. See, e.g., William L. Frierson, *Amending the Constitution of the United States*, 33 HARV. L. REV. 659, 661 (1920) (describing the Equal Suffrage Entrenchment Provision as requiring “no state should ever, without its consent, be deprived of its equal suffrage in the Senate” (emphasis added)); Machen, *supra* note 74, at 172 (“The provision . . . that no state without its consent shall be deprived of its equal suffrage in the Senate [is] perpetual . . .”).

Most such arguments note the dicta in *Dodge v. Woolsey*, 59 U.S. 331, 348 (1855) (stating that the Equal Suffrage Entrenchment Provision is a “permanent and unalterable exception[] to the power of amendment”); see also Vile, *supra* note 43, at 295.

108. See *supra* Part III.A.

109. U.S. CONST. art. V.

110. For recognition of the possibility that the two-step process might be successful, see, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 111–12 (3d ed. 2000); Amar, *supra* note 21, at 461; Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION* 163, 176 n.41 (Sanford Levinson ed., 1995).

111. AMAR, *supra* note 19, at 293 (characterizing the two-step process as a “sly scheme”); GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 192 (1989)

simply a retreat to assumed entrenchment, the assumption being that the consent requirement of the Equal Suffrage Entrenchment Provision may be removed only under the same conditions that a state might lose equal suffrage in the Senate—the state’s consent.<sup>112</sup> As every state would be losing the protection, then, removal of the consent requirement would require unanimous ratification.<sup>113</sup> As noted earlier, I am unwilling to countenance such assumed entrenchment.<sup>114</sup> It may well have been the intent of the delegates that the Equal Suffrage Entrenchment Provision be itself entrenched. But that is not enough.

The best textual argument for unanimous ratification being required to remove the Equal Suffrage Entrenchment Provision goes like this: Removing the provision would be to remove the *protection* of consent it offers to states; therefore, removal of the consent requirement itself requires consent of each state—and thus, removing the entrenchment provision would require unanimous ratification of the change by the states.

But that argument requires a somewhat tortured reading of the text. The provision says, “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>115</sup> The provision clearly requires consent for deprivation of an equal vote, but not for loss of the entrenchment provision itself. That reading gives full meaning to, and use of, the word “consent.” Adding a consent requirement to alter the

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(calling the two-step process “devious”); Wright, *supra* note 4, at 757 (agreeing there is a strong case that the two-step process is procedurally valid but has “no detectable purpose other than to circumvent the requirement that no state be deprived of equal representation in the Senate” because its “transparent evasion of the express restriction on amendments in article V” violates an implicit limitation on constitutional amendment).

112. See, e.g., SUBER, *supra* note 25, at 101 (“In general one might find in any [amending provision] an implied limitation self-entrenching any incomplete entrenchment clause at the same level of difficulty it requires for the amendment of the rule it protects. Such an implied limitation is certainly a reasonable reading of the intent of the framers . . . because an incomplete entrenchment clause that is not self-entrenched is virtually pointless.”).

113. Akhil Reed Amar apparently assumes such entrenchment. See AMAR, *supra* note 19, at 293. He notes the Equal Suffrage Entrenchment Provision does not “contradict the idea of general amendability. Even had these words [of the provision] been airtight, they did not purport to make anything formally unamendable. Rather, they merely provided for an alternative amendment procedure that in effect required unanimity among the states.” *Id.*; see also Orfield, *supra* note 20, at 577 (“The only legal way to drop the [equal suffrage] proviso would be by a unanimous ratification . . .”).

114. See *supra* note 69 and accompanying text.

115. U.S. CONST. art. V.

provision itself requires the word “consent” to perform double duty where such a reading is unwarranted.

If double consent were the goal, why not use the word twice? The provision might have read: “No state, without its consent, shall be deprived of its equal suffrage in the Senate, and all states must consent to any alteration in this provision.” That would have been clear. If that appears too clunky, why not simply “no state shall *ever* be deprived of its equal suffrage in the Senate without its consent.”<sup>116</sup> That sentence can bear the weight of entrenching both the consent requirement and itself. Without the word “ever” the provision would require consent for a change in equal suffrage. With the word “ever” the consent requirement itself becomes entrenched.

So we are left with the question: If the Framers understood the two-step process of disentanglement, as I have argued they did,<sup>117</sup> and they also intended the Equal Suffrage Entrenchment Provision to permanently provide a consent requirement for alteration of the equality of Senate suffrage, why did they fail to write an effective entrenchment provision? Perhaps it was haste. Recall that the Equal Suffrage Entrenchment Provision was added on the final business day of the Convention.<sup>118</sup> Also, whereas the Sunset Entrenchment Provision was the entirety of John Rutledge’s proposal,<sup>119</sup> the Equal Suffrage Entrenchment Provision was the borrowed second half of Roger Sherman’s original proposal—proposed in a moment of discord by Gouverneur Morris.<sup>120</sup>

It is worth noting, too, that even if the Equal Suffrage Entrenchment Provision is not itself entrenched, and thus may be removed from the Constitution, that removal itself would serve as a warning of the possibility of change and simultaneously expose every state to potential loss. Equal suffrage in the Senate is not protected to the degree it is

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116. Note that this is precisely what is done by the commentators who argue the Equal Suffrage Entrenchment Provision is flatly unamendable. *See supra* note 107 and accompanying text. Also, compare this use of “ever” to the argument in *infra* Part IV at notes 123–25 and accompanying text.

117. *See supra* notes 63–67 and accompanying text.

118. *See supra* notes 93–97 and accompanying text.

119. *See supra* note 60 and accompanying text.

120. *See AMAR, supra* note 19, at 293–95 (noting the Equal Suffrage Entrenchment Provision “was far from airtight, perhaps reflecting the unconsidered manner in which it was adopted late in the Philadelphia deliberations”).

sometimes thought to be protected, but it is protected to a degree greater than almost all other provisions in the Constitution.

Article V's two entrenchment provisions, despite their differences in effectiveness, sprang from the common cause of compromise and were designed to seal two bargains across the deepest divisions in the nation: slave states and non-slave states; small states and large states.<sup>121</sup>

#### IV. THE ARTICLE VI NO RELIGIOUS TEST PROVISION

Article V displays complete but temporary self-entrenchment in the Sunset Entrenchment Provision, and perhaps attempted, but ultimately ineffective, self-entrenchment in the Equal Suffrage Entrenchment Provision. Now we consider a provision outside Article V—the No Religious Test Provision (emphasized below) in Clause 3 of Article VI of the Constitution:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but *no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.*<sup>122</sup>

The No Religious Test Provision is the only provision in the original Constitution (or in any amendment) to include the word “ever.”<sup>123</sup> Nor can I locate any other term of permanence in the Constitution: the words never, forever, always, continual, permanent, and perpetual do not appear in the Constitution. I argue this signature use of “ever” means the prohibition on religious tests was intended to be, and is,

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121. James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT. 355, 362 (1994) (“Perhaps Article V entrenches provisions that reflect deep compromises with our Constitution’s constitutive principles: the protection of the African slave trade with the principle that all persons are created equal, and the equal representation of the states in the Senate with the principle of the equal representation of citizens. The founders of the Constitution concluded that both compromises were necessary to ‘the forging of the Union’: the slave states insisted upon the former, the small states upon the latter.” (footnote omitted)); see also ANASTAPLO, *supra* note 111, at 193–95 (noting the relationship between entrenchment and the two major compromises).

122. U.S. CONST. art. VI, cl. 3 (emphasis added).

123. This use of “ever” in the No Religious Test Provision makes the word’s omission from the Equal Suffrage Entrenchment Provision even more pointed. See *supra* note 116 and accompanying text.

unamendable.<sup>124</sup> That word is the difference between the usual case in which a constitutional provision has a life with an indefinite length (effective until amended) and a special case in which a provision is guaranteed perpetuity. The No Religious Test Provision bans religious tests not merely into an indefinite but possibly terminable future, but for “ever.”<sup>125</sup>

Both the usual meaning of “ever” and the word’s particular role in the No Religious Test Provision indicate it creates a self-entrenched (and therefore permanent) prohibition on religious tests. The plain meaning of “ever” is an indication of perpetuity.<sup>126</sup> That it is the only word of permanence in a constitution otherwise filled with effective-until-amended provisions indicates its novelty is significant. Were “ever” merely some sort of intensifier or aspiration, one might expect the word or something similar to be used in other places where similar intensity or aspiration were intended. But “ever” stands alone. The uniqueness of “ever” is not happenstance. A few other provisions containing words of permanence were offered as motions or even referred to the Committee of Detail, but none survived to enter the Constitution’s text.<sup>127</sup>

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124. Several years ago, I wondered at the uniqueness of the “no . . . ever” phrasing in the No Religious Test Clause. Then and now, to the best of my research ability, I have uncovered in the scholarly literature only one reference to the Religious Test Provision being a potentially unamendable provision—Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187 (1992), a book review of Bruce Ackerman’s book, *We the People: Foundations*. In a footnote Schauer writes there are “two or three explicitly unamendable provisions [in] the U.S. Constitution”: the “Article V” entrenchment provisions and “somewhat more ambiguously, [the provision in] Article VI . . . ‘no religious Test shall ever be required as a Qualification to any Office.’” *Id.* at 1190 n.5.

125. U.S. CONST. art. VI, cl. 3. Consider the statement of Supreme Court Justice Joseph Story, who served on the Court from 1811 to 1845. In his 1833 classic, *Commentaries on the Constitution of the United States*, Story wrote the No Religious Test Provision’s “higher object” is “to cut off *for ever* every pretence of any alliance between church and state in the national government.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 705 (1833) (emphasis added).

126. *Ever*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 2001).

127. During the Convention, Elbridge Gerry proposed the representatives from new states in what would come to be named the House of Representatives “shall *never* exceed in number, the Representatives from such of the [original thirteen] States (as shall accede to this confederation),” which was defeated by a vote of 4–5–1. 2 THE FEDERAL CONVENTION, *supra* note 47, at 2–3 (emphasis added).

Two of South Carolina delegate Charles Pinckney’s August 20 proposals to the convention, *see infra* notes 137–43 and accompanying text, contain words of permanency: (1) “The military shall *always* be subordinate to the Civil power”; and (2) “The U.S. shall be *for ever* considered as one Body corporate and politic in law, and be entitled to all the rights

Consider, too, what happens if the word “ever” is removed from the No Religious Test Provision. Without the word “ever,” the key part of the provision reads: “[N]o religious test shall be required,” which would prohibit religious tests every bit as well as the actual provision does. The modified provision, however, clearly would be amendable. To read the provision exactly the same way without “ever” as with it, makes the word superfluous, a situation generally considered intolerable in constitutional interpretation.<sup>128</sup>

That “ever” adds nothing to the provision’s substantive prohibition on religious tests indicates its role is to distinguish the clause from the general category of provisions that are effective-until-amended. That is the only way for the word “ever” to be given effect.<sup>129</sup> “[N]o religious Test shall ever be required”<sup>130</sup> is identical to a provision stating: “No religious test shall be required and no amendment may be made that would allow a religious test.” As a modifier to the verb form “shall . . . be required,” “no[t] . . . ever” creates a permanent prohibition on religious tests by barring any change in the Constitution that would make such tests *possible*.

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privileges, and immunities, which to Bodies corporate do or ought to appertain.” 2 THE FEDERAL CONVENTION, *supra* note 47, at 340–42 (emphasis added). Both were referred to committee and never acted upon. *Id.*

Among the Committee of Detail’s papers is a draft that would limit the size of the House of Representatives to an unspecified maximum—“shall *never* be greater in number than [\_\_\_\_]”—this proposal was eliminated before the committee reported. *Id.* at 138 (emphasis added); *see also* SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 184 (James H. Hutson ed., 1987). Also among the Committee of Detail’s papers is a draft with this provision: “*Direct Taxation* shall *always* be in Proportion to . . . Representation in the House of Representatives.” 2 THE FEDERAL CONVENTION, *supra* note 47, at 153 (emphasis added). The same provision is crossed out in a later draft and was not reported by the committee to the Convention. *Id.* at 168.

128. *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”); THE FEDERALIST NO. 40, at 260 (James Madison) (Penguin Books 1987) (advocating as a rule of construction “dictated by plain reason as well as founded on legal axioms” that “every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end”); Amar, *supra* note 43, at 1068 (“[T]he Supremacy Clause emphatically proclaims that ‘this Constitution’—which presumably means *every* clause—is ‘supreme law’ . . .”).

129. Compare this to the situation of the word “consent” in the Equal Suffrage Entrenchment Provision, where that word needed to perform double duty if the provision was to be self-entrenched. Here, “ever” is not needed to prohibit religious tests, rather it is needed (and useful only for) the entrenchment of the prohibition on religious tests.

130. U.S. CONST. art. VI, cl. 3.

Imagine an amendment that would attempt to remove the No Religious Test Provision. At step one of the two-step process, we ask whether removal of the provision would violate the provision itself. It is true the removal of the No Religious Test Provision would not impose a religious test, but there being no religious test is not what the No Religious Test Provision stands for. It stands for there *never* being a religious test.<sup>131</sup> So the appropriate question is: would removal of the provision be a violation of there “no[t] . . . ever”<sup>132</sup> being a religious test? To violate a proscription on religious tests forever, there would have to be a test “at some point in time.” So the only way an amendment ridding the Constitution of the provision would *not* violate the provision itself is if the amendment came with a guarantee that despite it allowing a religious test at “some point in time,” that time would never come. But that is simply the No Religious Test Provision back again—no religious test ever. One cannot disentrench the prohibition on religious tests by means of the two-step process previously discussed;<sup>133</sup> the first step is impossible. Thus, under a textual analysis, the prohibition on a religious test as qualification for federal officeholders is a permanent part of the U.S. Constitution; it is completely self-entrenched and is unamendable.

The No Religious Test Provision was a stark departure from the practices in the states, so one possible argument against the Framers intending a perpetual ban on religious tests for federal officeholders is the seeming oddness of the ban itself in its historical context.<sup>134</sup> In 1787, of the thirteen states, only New York and Virginia did not require a religious test for public office, and New York soon would add a test.<sup>135</sup>

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131. *See id.*

132. *Id.*

133. *See supra* pp. 852–53.

134. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 680 (1986–1987) (“[A]rticle VI was a significant departure from existing legal practice and from popular beliefs. . . . [T]he test ban is explainable not by any sudden eruption of Enlightenment rationalism or Jeffersonian skepticism, which transformed overnight a society’s thinking . . . . To put the proposition most [succinctly]: the founding generation entered the process of constitution-making firmly convinced that only Christians (and largely, only Protestants) should hold public office. They exited the process with those views intact. Yet article VI was clearly understood to contravene that belief.”).

135. *See* Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261, 265–68 (1996) (collecting state constitutional provisions and laws); *see also* EDWIN S. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION 159–74 (1987) (excerpting religion clauses from the early

Taking together all state constitutions, statutes, and oaths at the time of the Constitutional Convention, non-Christians were barred from state office everywhere with the possible exception of Virginia, and Catholics were barred everywhere with the exceptions of Virginia, Pennsylvania, Maryland, and Delaware.<sup>136</sup>

Yet despite the prevalence of religious tests in the states, there was almost no discussion on the topic at the Convention, not even when the ban on religious tests was proposed.<sup>137</sup> On August 20, Charles Pinckney, delegate of South Carolina, proposed a list of changes to the draft constitution.<sup>138</sup> The proposals addressed several different issues scattered through the articles—and included the following: “No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States.”<sup>139</sup> These proposals were referred to the Committee of Detail without consideration or debate.<sup>140</sup> Ten days later, when the delegates took up Article XX of the constitutional draft, which at that time read, “The members of the Legislatures, and the Executive and Judicial officers of the United

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state constitutions). Five state constitutions required officeholders to be Protestant, four more required officeholders to be Christian. Dreisbach, *supra*, at 265–68. In addition to these nine states, Connecticut and Rhode Island (in 1787, still functioning under Crown charters that did not mandate religious tests for officeholders) had enacted such tests by statute. AMAR, *supra* note 19, at 166 n.98.

Some states with oaths ostensibly requiring mere Christianity rather than Protestantism yet had means of excluding Catholics. Massachusetts, one of the states requiring an oath professing Christianity, but not Protestantism, had an additional oath abjuring the “power, in any matter, civil, ecclesiastical, or spiritual” of any “foreign prince, person, prelate, state, or potentate”—an oath directed at Roman Catholics and, perhaps, Anglicans. Dreisbach, *supra*, at 267 (quoting MASS. CONST. of 1780 chap. VI, art. I, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1888, 1908 (Thorpe ed., 1909)). The New York constitution required prospective citizens to take a similar oath barring Catholics, Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1, 29 n.131 (2006), and in 1788 the New York legislature passed a statute barring Catholics from office, *see* Dreisbach, *supra*, at 268.

136. Bradley, *supra* note 134, at 681–83. Bradley notes that there were virtually no Catholics in Connecticut, due in part to fact that legal ecclesiastical corporate privileges were limited to Protestant sects. *Id.* at 683. In Virginia, any non-Christians (or unorthodox Christians, for example Unitarians) elected to a governmental office had the right to serve but “would have had to serve from jail, because both by common law and statute Virginia criminalized at least the public utterance of such views.” *Id.*

137. *See* GAUSTAD, *supra* note 135, at 159.

138. 2 THE FEDERAL CONVENTION, *supra* note 47, at 334–39 (House Journal), 340–42 (Madison’s Notes).

139. *Id.*

140. *Id.* at 342.

States, and of the several States, shall be bound by oath to support this Constitution,” Pinckney moved to add to the oath provision “but no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States.”<sup>141</sup> The Convention unanimously agreed to the amendment.<sup>142</sup> The only recorded debate, if it could be called debate, was Roger Sherman’s strange remark, given the context noted above, that the provision seemed “unnecessary, the prevailing liberality being a sufficient security [against] such tests.”<sup>143</sup>

However uncontroversial the prohibition on religious tests for federal officeholders was in the Convention, the topic was contended in the debates between Federalists and Antifederalists during the ratification period.<sup>144</sup> Across the nation, Antifederalists criticized the Constitution for mentioning God too little, for being insufficiently Christian.<sup>145</sup> More particularly, delegates in various of the state ratifying

141. *Id.* at 461 (House Journal), 468 (Madison’s Notes).

142. *Id.* The article itself, as amended, was passed by a vote of eight or nine states, North Carolina against, with Maryland’s delegation divided (and perhaps Connecticut’s too—the House Journal shows Connecticut divided, Madison reports Connecticut in favor). *Id.* at 460 (House Journal), 468 (Madison’s Notes).

143. *Id.* at 468. The No Religious Test Provision “was adopted by a great majority of the convention, and without much debate.” LUTHER MARTIN, *THE GENUINE INFORMATION*, in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, at 172, 227 (Max Farrand ed., 1911).

Referring to the delegates to the Constitutional Convention, Bradley writes:

Here were fifty-odd of the leading men of a generation . . . who, as state leaders, had expended great energy on the problem [of the proper scope of “religious liberty” from government]. . . . [E]very state constitution drawn up in that time spoke directly, frequently at substantial length, to the issue. This group of men drafted an entire scheme of national government in this climate, and religion is barely, rarely mentioned. A total “non-issue.”

How much of a “non-issue”? . . . Religion is not mentioned at all until after, and only because of, proposals to bind all state and federal officers to the Constitution by “oath[.]” [which led to Pinckney’s proposal] that “[n]o religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.”

Bradley, *supra* note 134, at 691–92 (footnote omitted).

144. See Bradley, *supra* note 134, at 694–721.

145. Luther Martin, delegate from Maryland, wrote during the ratification period:

[T]here were some members *so unfashionable* as to think, that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that, in a Christian country, it would be *at least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism.

conventions objected to non-Christians being eligible for office in the new United States government.<sup>146</sup>

One might argue that this radical departure from state practice indicates perpetuity of the prohibition on religious tests could not have been intended, that perpetuity is, given the socio-political context in 1787,<sup>147</sup> an absurd result. But that argument proves too much. It is an argument for the ban on religious tests not being in the Constitution at all, but does not address the permanence of that ban.

In actuality, given that there was to be a prohibition on religious tests, it made sense that the prohibition be unamendable. There were already religious tests in the states.<sup>148</sup> If, at the federal level a test could be imposed<sup>149</sup>—if, that is, the No Religious Test Provision were amendable—a religious test would be imposed when some religious denomination had achieved a supermajority status throughout the nation. That is precisely the situation that would allow use of a religious test to oppress those adhering to minority religious faiths.<sup>150</sup>

That specter of religious tyranny at the federal level was the winning argument for the Federalists in the ratification debates on the No Religious Test Provision.<sup>151</sup> The variety of sects in the United States in

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MARTIN, *supra* note 143, at 227; *see also* Bradley, *supra* note 134, at 694–95.

146. Bradley, *supra* note 134, at 695–96.

147. *See id.* at 679–94.

148. Dreisbach, *supra* note 135, at 265–69.

149. The provision applied only to federal officers, not state officers. This is clear from the provision's application only to "Office or public Trust *under* the United States" (rather than *in* the United States). U.S. CONST. art. VI, cl. 3 (emphasis added); *see also* Bradley, *supra* note 134, at 693; Dreisbach, *supra* note 135, at 262 & n.5 (citing 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 523 (1950)).

150. Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 951 (1996) ("Religious tests had long been a favored instrument for preserving the political power of established churches and denying equal political opportunity to adherents of other creeds. . . . [T]he test ban preempted the prospect of a *national* ecclesiastical establishment by removing a useful mechanism for a religious denomination to exert control over the political processes.").

Justice Joseph Story, closer in time to the events, put it this way: "It is easy to foresee, that without some prohibition of religious tests, a successful sect, in our country, might, by once possessing power, pass test-laws, which would secure to themselves a monopoly of all the offices of trust and profit, under the national government." STORY, *supra* note 125, at 709.

151. *See* Bradley, *supra* note 134, at 702. The Federalists also argued: (1) religious tests were useless in keeping the amoral and immoral from office—those without scruples would swear to any oath without fear and (2) the tests were counterproductive in that the very people who were principled and scrupulous (and therefore desired for public office) would be

1787 meant that *on the national scene*, no sect yet had the power to impose itself.<sup>152</sup> In a letter to Thomas Jefferson written in October of 1787, Madison showed an awareness of the dangers of a dominant religion when he outlined the argument that later appeared in *The Federalist No. 10*.<sup>153</sup> In analyzing whether religion can restrain majority oppression of the minority, Madison wrote: “When Indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of the multitude. . . . If the same sect form a majority and have the power, other sects will be sure to be depressed.”<sup>154</sup>

A year later, James Iredell, at the North Carolina ratifying convention, put it slightly differently: “This article is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution.”<sup>155</sup>

Other Federalists argued similarly, and in a manner that looked to the future, perhaps indicating an appreciation of the perpetuity of the No Religious Test Provision. Lieutenant Governor Oliver Wolcott, in the Connecticut ratifying convention, stated:

For myself, I should be content either with or without the clause in the constitution which excludes Test-Laws. Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities. *But as we know not what may take place hereafter*, and any such test would be exceedingly injurious to the rights of free citizens, I cannot think it altogether superfluous to add a clause *which secures us from the possibility of such oppression*.<sup>156</sup>

The emphasized language here—“we know not what may take place hereafter” and “secur[ity] . . . from the possibility of such

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the ones to refuse the test. *Id.* at 698.

152. *See id.* at 702–11.

153. *Id.* at 704 (summarizing Madison’s letter to Jefferson and noting the letter was a “fleshy outline” for Federalist 10).

154. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE FOUNDERS’ CONSTITUTION 644, 647 (Philip B. Kurland & Ralph Lerner eds., 1987).

155. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196 (Jonathan Elliot ed., 2d ed. 1836).

156. Speeches of Samuel Huntington, Oliver Wolcott, Sr., and Richard Law in the Connecticut Convention (Jan. 9, 1788), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 312, 316 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (emphasis added).

oppression”<sup>157</sup>—can be taken to be a nod to the permanence of the language in the No Religious Test Provision, as can the following, from a Federalist writing in the Pennsylvania Gazette:

The Presbyterians, the Quakers, the Congregationalists, the Anabaptists, the Roman Catholics, and several other churches, all of whom now enjoy the most perfect religious liberty, . . . and all of whom have the freest access to places of honor or profit in the government [of Pennsylvania]. The new [federal] constitution confirms and secures to all *for ever* those great blessings, by providing, in the most clear and positive terms, that no religious test shall ever be required of any officer of the United States.<sup>158</sup>

This concern about religious liberty and religious domination is what drove the lack of controversy at the Constitutional Convention. The No Religious Test Provision is “attribute[ed] . . . to the conditions of pluralism. No Abstract principle but the jealousies of antagonistic sects wrought the test ban.”<sup>159</sup>

Both the plain meaning of “ever” and its unique presence in the No Religious Test Provision demonstrate the provision is completely self-entrenched. The provision is yet another compromise to join those that gave rise to the Sunset Entrenchment Provision and the Equal Suffrage Entrenchment Provision, though this compromise is different in that it was multi-lateral rather than bilateral. This was an instance of every state wanting to preserve religious freedom rather than two sides battling over middle ground.

## V. UNAMENDABLE AMENDMENTS

Now we leave behind the original Constitution and ask whether we can entrench into the Constitution our own permanent provisions. It is

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157. *Id.*

158. Pennsylvania Gazette (July 16, 1788), reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 269, 270 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (emphasis added).

159. Bradley, *supra* note 134, at 721; see also ANASTAPLO, *supra* note 111, at 207 (writing the No Religious Test Provision was “shaped . . . by an awareness of the problem, and hence the danger, of any effort by the General Government to order a religious test for the Country at large, especially considering the diversity in religious sentiments from State to State” and comparing this concern to that which brought about the provision as to electors for the House of Representatives having the same qualifications as the state required for electors of the most numerous house of the state legislature).

all well and good that a portion of the Constitution was truly unamendable until 1808, and that the somewhat obscure No Religious Test Provision, which in great part has been overtaken by the Establishment Clause,<sup>160</sup> is unamendable. But the real question in all of this is can we do the same? My answer is that there have been, to this point, no amendments that are unamendable, but there is also, at this point, nothing to prevent our creating one.

This part first addresses the argument sometimes made that the First Amendment is entrenched into the Constitution. It is not. Then the next part addresses whether it is constitutional for an amendment to make itself, or a part of the existing Constitution, unamendable. That is possible, and it has been seriously attempted, though not achieved.

#### A. *The First Amendment Is Not Entrenched*

Some have argued that the First Amendment may not be amended because it contains its own explicit limit on amendment.<sup>161</sup> This is not the same argument noted earlier in which it is posited free speech or other aspects of the First Amendment are *implicit* limitations on the amending power due to their overriding importance to the United States mode of government.<sup>162</sup> Rather, this argument is based on the introductory phrase to the First Amendment, admonishing that “Congress shall make no law respecting[,] . . . prohibiting[,] . . . or abridging” the various topics contained in the First Amendment.<sup>163</sup> Proponents of the argument take this language to mean Congress may not propose such an amendment, as by passing the proposal Congress is “mak[ing] law”—thus such an amendment may be proposed only through the convention method of amendment.<sup>164</sup>

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160. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down Maryland’s religious test requiring “a declaration of a belief in the existence of God” as a violation of the federal First Amendment Establishment Clause).

161. See, e.g., Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535 (1990); Murphy, *supra* note 110, at 175 n.40.

162. See *supra* notes 17–21 and accompanying text.

163. U.S. CONST. amend. I.

164. See, e.g., Isaacson, *supra* note 161, at 587–99 (noting that a literal reading of the First Amendment’s “Congress shall make no law” might require that any amendment of its substance be carried out under the constitutional convention method); Murphy, *supra* note 110, 175 n.40; see also Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 289 (1996) (“[T]he language of the First Amendment itself may be interpreted to require any revision of First Amendment to go through the convention process.”). But see John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in RESPONDING TO IMPERFECTION:

The argument is incorrect. First, consider that the Framers determined it necessary to entrench (in the Sunset Entrenchment Provision) the first clause of Section 9 of Article I, which reads:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, *shall not be prohibited by the Congress* prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.<sup>165</sup>

If the First Amendment phrase, “Congress shall make no law,”<sup>166</sup> entrenched itself by prohibiting Congress from proposing a repealing amendment, then the very similar phrase “shall not be prohibited by the Congress” would have done the same. Yet we know the above language was not self-entrenching; if “shall not be prohibited by Congress” would have barred Congress proposing an amendment of the provision, there would have been no need for the Sunset Entrenchment Provision.<sup>167</sup> The resulting inference is that the clause declaring the slave trade “shall not be prohibited by the Congress” does not itself prohibit Congress from proposing constitutional amendments that prohibit the slave trade. Thus, the similar phrase, “Congress shall make no law,”<sup>168</sup> does not prohibit congressional proposals for amending the First Amendment.

In addition, there simply is no indication in the pre-Bill-of-Rights Constitution that the word “law” included constitutional amendment proposals.<sup>169</sup> “Law” or “laws” appear thirty-four times in the original

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THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 191, 204 (Sanford Levinson ed., 1995) (replying to Isaacson’s argument and noting Isaacson cites no direct evidence that one of the intentions of those who pressed for or ratified the First Amendment was to limit the amending process, nor explains why it would be more acceptable for conventions, rather than Congress, to do it).

Katz goes on to note that later incorporation of the First Amendment to apply to the states arguably implies that both congressional proposal of an amendment *and* legislative ratification by the states would be “laws,” thus requiring both the amendment proposal and ratification be by convention method. Katz, *supra*, at 289 & n.173.

165. U.S. CONST. art. 1, § 9, cl. 1 (emphasis added).

166. *Id.* amend. I.

167. Nor can one make the argument that the Sunset Entrenchment Provision was created to prevent amendment by convention. John Rutledge proposed the Sunset Entrenchment Provision as an alteration to an amending provision that allowed amendment only by congressional proposal. See *supra* notes 57–60 and accompanying text (laying out a timeline of Article V’s construction and the details of Rutledge’s proposal).

168. *Id.* amend. I.

169. An argument slightly different from the one in the text was made by Attorney General Charles Lee in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), in which the

Constitution, but in no instance is the word “law” used to mean a constitutional amendment proposal. Indeed, only with specific modifying language is the Constitution itself referred to as “law.”<sup>170</sup> The words “law” and “laws” appear fourteen times in situations where they are explicitly or implicitly tied to Congress in such a way as to make clear that “law” and “laws” indicate statutes and an additional four times in the description of the Article I, Section 7, process by which a bill becomes a law.<sup>171</sup> The word appears four more times in terms of art with well-established meanings<sup>172</sup> and in seven instances, the reference is to state laws.<sup>173</sup> Twice more the text refers to “Laws” *in juxtaposition* to the Constitution.<sup>174</sup> Three more instances are the Take Care Clause, the Supremacy Clause’s “Law of the Land,” and the Militia Clause’s “Laws of the Union.”<sup>175</sup> Throughout the original Constitution, without specific language indicating otherwise, “law” and “laws” refers to statutory law.<sup>176</sup> Article V does not refer to amendment proposals as “law.”<sup>177</sup> The First Amendment is not an example of an unamendable amendment.

### B. *Is It Possible to Create an Unamendable Amendment?*

Recall the language from Article V: “The Congress . . . shall propose Amendments to this Constitution, or . . . shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all

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Eleventh Amendment was challenged on the ground that the President had not signed the Congressional proposal sent to the states. Lee argued that “[a]n amendment of the constitution, and the repeal of a law, are not, manifestly, on the same footing” and that policies and rules that applied to legislation (e.g., prohibition on ex post facto laws) did not apply to amendment of the Constitution. *Id.* at 380–81. The Court accepted the distinction between a law and an amendment proposal and held that the President’s signature was unnecessary. *Id.* at 382.

170. See TRIBE, *supra* note 110, at 112 n.6.

171. See U.S. CONST. art. I, § 2, cl. 3, § 3, cl. 7, § 4, cls. 1–2, § 6, cl. 1, § 7, cl. 2, § 8, cls. 4, 18, § 9, cls. 3, 7; *id.* art. II, § 1, cl. 6, § 2, cl. 2 (twice); *id.* art. III, § 2, cl. 3; *id.* art. IV, § 1.

172. See *id.* art. I, § 8, cl. 10 (“Law of Nations”); *id.* art. II, § 2, cl. 2 (“Courts of Law”); *id.* art. III, § 2, cls. 1–2 (“Law and Equity” and “Law and Fact”).

173. See *id.* art. I, § 10, cl. 1 (twice), cl. 2 (twice); *id.* art. IV, § 2, cl. 3 (twice); *id.* art. VI, cl. 2.

174. *Id.* art. III, § 2, cl. 1; *id.* art. VI, § 1, cl. 2 (the Supremacy Clause). Professor Vile notes this same distinction as to Article VI’s Supremacy Clause. Vile, *supra* note 164, at 205.

175. U.S. CONST. art. I, § 8, cl. 15, *id.* art. II, § 3; *id.* art. VI, cl. 2.

176. TRIBE, *supra* note 110, at 112 n.6.

177. VILE, *supra* note 17, at 138 (“[T]he language of Article V where the amending power is specified does not refer to amendments as laws but as amendments”); Vile, *supra* note 164, at 204.

*Intents and Purposes, as Part of this Constitution*, when ratified . . . .”<sup>178</sup> A plain reading suggests ratified amendments are part of the Constitution on equal footing with provisions of the original Constitution. Amendments are “*valid as part of [this] Constitution*.”<sup>179</sup> This language would seem to indicate amendments are not second-class provisions, somehow lesser than the original Constitution or somehow limited in what they may contain. So, if the original Constitution contains unamendable provisions (as I have argued), there may be unamendable amendments.

Countering this plain reading, one might attempt to argue that amendments really are somehow different from the original Constitution—created under a different procedure as part of less encompassing bargains than the original Constitution.<sup>180</sup> Under this argument, any unamendability present in the Constitution of 1787 might be part of a one-time-only “package deal” and, as amendments were not part of this arrangement, they are not allowed to take on permanence in the same way parts of the original Constitution did.<sup>181</sup>

Indeed, one can find some pedigreed discussion seemingly supporting this sentiment, at least insofar as there is a difference between the political means of amendment versus the political means of drafting and ratifying the Constitution. During the 1st Congress in 1789, when James Madison’s proposals for constitutional amendments (ten of which became the Bill of Rights) were considered in the House of Representatives, they were intended to be interlineated into the Constitution as it existed rather than appended as separate articles.<sup>182</sup>

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178. U.S. CONST. art. V (emphasis added).

179. González, *supra* note 99, at 1455.

180. *Id.* Professor González argues the “Intents and Purposes” language does *not* mean amendments have the same hierarchic status as the main body of the Constitution. *Id.* at 1454–55.

181. One might draw inferences from Hamilton, in *The Federalist No. 85*, of a difference between amendments and an original bargain. THE FEDERALIST NO. 85 (Alexander Hamilton). There Hamilton compares trying to perfect the Constitution before ratification rather than by amendment afterward:

[E]very amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point . . . . There can, therefore, be no comparison between the facility of effecting an amendment and that of establishing, in the first instance, a complete Constitution.

*Id.* at 485 (Penguin Books 1987).

182. See 1 ANNALS OF CONG. 706 (1789) (Joseph Gales ed., 1834); see also Hartnett,

Roger Sherman of Connecticut argued: “We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric.”<sup>183</sup> Sherman continued:

Besides . . . , it is questionable whether we have the right to propose amendments in this way. The Constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments. . . . [I]f we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build.<sup>184</sup>

And again later:

[C]onsider the authorities upon which the two Constitutions are to stand. The original was established by the people at large, by conventions chosen by them for the express purpose. The preamble to the Constitution declares the act; but will it be a truth in ratifying the next Constitution, which is to be done perhaps by the State Legislatures, and not conventions chosen for the purpose? Will gentlemen say it is “We the people” in this case? . . . . All that is granted us by the 5th article is, that . . . we may propose amendments to the Constitution; not that we may propose to repeal the old, and substitute a new one.<sup>185</sup>

Several speakers weighed in on the topic.<sup>186</sup> Some speakers expressed a concern that appending the amendments, rather than incorporating them, would insinuate they were less than equal with the original text.<sup>187</sup> In the end, after a second debate on the topic, Sherman

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*supra* note 27, at 252–58, 284–99 (reprising the argument and reproducing the Constitution as Hartnett believes it would look if the decision to display the amendments as an appendix rather than as interlineations, had come out in favor of interlineations).

183. 1 ANNALS OF CONG. 707 (1789) (Joseph Gales ed., 1834).

184. *Id.* at 707–08; *cf.* Rogers & Molzon, *supra* note 99, at 1005–06 (addressing whether amendments proposed by a constitutional convention would require ratification in accordance with Article V, or whether the convention could make its own rule for adoption of the amendments, as did the Constitutional Convention of 1787).

185. 1 ANNALS OF CONG. 715 (1789) (Joseph Gales ed., 1834).

186. *Id.* at 707–17; *see also* Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 127–29 (1993) (tracking the ensuing debate as to placement of the amendments).

187. *See* 1 ANNALS OF CONG. 708–09 (1789) (Joseph Gales ed., 1834) (recording how Mr. William L. Smith of South Carolina noted that appending the amendments would seem to violate Article V’s provision that amendments duly ratified were to be “part” of the Constitution); *id.* at 712 (Elbridge Gerry of Massachusetts arguing that “if . . . the original is to be kept sacred, amendments will be of no use” but if amendments are to be “equal in authority” and appended, “we shall have five or six constitutions, perhaps differing in

and those in favor of appending the amendments, rather than incorporating them, won.<sup>188</sup>

Although the debate sometimes contained words distinguishing amendments from the original Constitution, the debate was fundamentally about textual separation, not the legal reach of the amendments. Already in 1804 the Twelfth Amendment rewrote the manner of electing the President, thereby altering the original Constitution.<sup>189</sup> So the text—“valid to all Intents and Purposes, as Part of this Constitution”<sup>190</sup>—does indicate amendments have at least the full creative sweep of the original Constitution.

If amendments are every bit as much a part of the Constitution as those portions that have been there since 1787, the Sunset Entrenchment Provision and the prohibition on religious tests for federal officers provide precedents in the original Constitution for an amendment to entrench either itself or already-existing provisions of the Constitution. A new amendment to the Constitution could declare: “Neither Article II of this Constitution, nor this clause, may be amended.” Or the amendment could declare and entrench a completely new provision: “No person shall be eligible to be elected Senator if such person has served a total of 12 years as a Senator of the United States. This article is not amendable.”

United States citizens can choose to bind themselves and citizens of the future just as the Framers did. Indeed, a previous generation of Americans attempted to create and ratify into the Constitution unamendable provisions.

Just as compromise drove the entrenchment provisions in Article V, (north–south, small state–large state),<sup>191</sup> and concerns about religious freedom and domination led to the No Religious Test Provision,<sup>192</sup> attempts during the winter of 1860 to 1861 to avert civil war drove the next round of proposals to substantively limit amendment to the Constitution.

For some time prior to Lincoln’s election in 1860, statesmen had argued that the solution to north–south tensions lay in entrenching into

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material points from each other, but all equally valid”).

188. *Id.* at 766.

189. U.S. CONST. amend. XII.

190. *Id.* art. V.

191. *See supra* Part III.

192. *See supra* Part IV.

the Constitution accommodations to slavery.<sup>193</sup> Throughout the 1840s and 1850s, westward expansion and the admission of new states—new free states—led the slaveholding South to ever-increasingly fear slavery would be abolished by constitutional amendment.<sup>194</sup> Immediately prior to the Civil War, several constitutional amendments aimed at compromise were proposed; amid the string of southern secessions, each house of Congress established special ad hoc committees to consider and propose amendments that might avert disunion.<sup>195</sup> Between December 3, 1860, and Lincoln’s inauguration on March 4, 1861, “fifty-seven distinct amendment proposals, contained in over 200 individual resolutions, were laid before Congress.”<sup>196</sup>

Of the many offerings, two proposals were the most significant. The earlier and more comprehensive of these was proposed by Kentucky Senator John J. Crittenden; but it was the later, largely derivative proposal by Ohio Representative Thomas Corwin that resulted in a formal constitutional amendment proposal.<sup>197</sup>

The so-called Crittenden proposals comprised a set of six amendments, the first five of which (1) divided U.S. territories into free and slave, depending on which side of the 36°30' latitude the territory sat, with states to be admitted slave and free as their constitutions stated; (2) declared Congress had no power to abolish slavery in federal enclaves in southern states; (3) declared Congress had no power to abolish slavery in the District of Columbia so long as slavery existed in Maryland or Virginia, and required just compensation in the event of abolition; (4) declared Congress had no power to prohibit or hinder transportation of slaves; and (5) added to the Constitution’s fugitive slave provision.<sup>198</sup>

The sixth and last of Crittenden’s proposals is the key one for our discussion. It bound the other five proposals together by entrenching

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193. See KYVIG, *supra* note 24, at 145.

194. *Id.* at 144–45 (citing AMES, *supra* note 84, at 354) (noting that a North Carolina congressman in 1850 proposed a constitutional amendment forbidding the abolition of slavery).

195. *Id.* at 146–47.

196. *Id.* at 146. For a full account of the various amendment proposals and other stratagems occurring during the second session of the 36th Congress, see Patsy S. Ledbetter, *John J. Crittenden and the Compromise Debacle*, 51 *FILSON CLUB HIST. Q.* 125 (1977) (comprising a carefully researched timeline of various peace proposals and containing very helpful, specific citations to the congressional debates).

197. Bryant, *supra* note 21, at 514–15.

198. CONG. GLOBE, 36th Cong., 2d Sess. 114 (1861).

them, and added other entrenchments as well:

No future amendment of the Constitution shall affect the five preceding articles; nor the third paragraph of the second section of the first article [representation and direct taxes to be apportioned according to the Three-Fifths Clause] of said Constitution; and no amendment shall be made to the Constitution which shall authorize or give to Congress any power to abolish or interfere with slavery in any of the States by whose laws it is, or may be, allowed or permitted.<sup>199</sup>

Consider the first half of this sixth proposal, up to “and no amendment.” It follows the template of the Sunset Entrenchment Provision, using the “no future amendment . . . shall affect”<sup>200</sup> language. Just as the Sunset Entrenchment Provision was mediately self-entrenched, so is this first half of the proposal. To remove it would “affect” the preceding five proposals by disentrenching them. Thus, if they had entered the Constitution, the first five proposals and the first half of the sixth proposal would have been unamendable.

This second half of the sixth Crittenden proposal, however, was logically flawed and would not have been effective in barring the sorts of amendments it was designed to prohibit—it would not have completely entrench anything because it was not itself completely entrenched. Seeing this result is not easy, so let’s take it slowly, step by step.

The second half of the proposal states, “[N]o amendment shall be made . . . which shall authorize or give to Congress any power to abolish or interfere with slavery [where it exists].”<sup>201</sup> If the Crittenden proposals had become part of the Constitution, the Constitution at that moment in time either would or would not already have granted power to Congress to “interfere with slavery.”<sup>202</sup> Let us take each case one at a time.

If, on the one hand, Congress had such power already, the provision’s bar on *future* amendments from *authorizing* the power would not have removed that already-existing power. Nor would the provision have stopped Congress from exercising the power it had. Thus, repeal of the provision would have no effect on congressional power, and repeal of the provision would not violate the provision by

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199. *Id.*

200. U.S. CONST. art. V.

201. CONG. GLOBE, 36th Cong., 2d Sess. 114 (1861).

202. The extent of such a power to “interfere,” if it existed, would have been diminished by the preceding five Crittenden proposals, which, as noted above, would have been effective.

authorizing Congress to do anything. The provision was not self-entrenched and would have been revocable.

If, on the other hand, Congress had no such power to interfere with slavery,<sup>203</sup> then an amendment removing the part of the proposal addressing “future amendment[s]” would not itself authorize or give to Congress any power (as there would be no latent power ready to spring to life once the provision was removed). So, a removal of that portion of the sixth provision would not violate it. Once removed, there would be no bar to an amendment giving to Congress the power to interfere with slavery (up to the limits imposed by the other five Crittenden proposals).

Crittenden’s plan for an amendatory compromise failed in the Senate in January 1861.<sup>204</sup> It was revived and remained in play right up to the final days before Lincoln’s inauguration.<sup>205</sup> Its importance here is that (1) it was a serious proposal, much debated and discussed, and (2) it was intended to contain, and did in fact contain, unamendable provisions.

The Crittenden proposals aimed to be, and in large part would have been, truly unamendable amendments. They were taken seriously and display an understanding and acceptance by many members of Congress that unamendable constitutional provisions and unamendable amendments were possible.<sup>206</sup>

In late February, the House of Representatives passed by the required two-thirds majority and sent to the Senate an amendment proposal put forward by Representative Thomas Corwin of Ohio.<sup>207</sup> After several counterproposals, the Senate, on the last day of the session, finally concurred in the House’s proposal, which was then sent out to the states for ratification.<sup>208</sup> The Corwin amendment proposal stated:

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203. This appears to have been President Abraham Lincoln’s view on the issue. *See infra* note 214 and accompanying text.

204. Ledbetter, *supra* note 196, at 136.

205. *Id.* at 137–39; *see also* R. Alton Lee, *The Corwin Amendment in the Secession Crisis*, 70 OHIO HIST. Q. 1 (1961).

206. Ledbetter, *supra* note 196, at 129–30.

207. *Id.* at 138.

208. *Id.* at 139–41. The amendment proposal was ratified by Ohio and Maryland, and ineffectively ratified by convention in Illinois (the proposal had stated it was to be ratified by state legislatures). It remains one of just six amendment proposals to clear Congress yet fail to be ratified by the states.

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.<sup>209</sup>

The first half of this proposal (the logical framework and, therefore, the part relevant to this investigation) is virtually identical to the second half of the sixth Crittenden proposal and suffers from the same logical flaws.<sup>210</sup> Had the Corwin amendment been ratified, it would not have been unamendable.<sup>211</sup>

What the Corwin proposal adds to our discussion is a legally significant act—a formal amendment proposal to the states<sup>212</sup>—applied to a proposal argued at the time to be unamendable.<sup>213</sup> This legal status occasioned incoming President Lincoln to address it in his inauguration speech:

I understand a proposed amendment to the constitution which amendment, however, I have not seen, 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 Constitutional law, I have no objection to it's being made *express, and irrevocable*.<sup>214</sup>

We therefore have, during the crisis of the winter of 1860 to 1861, official presidential and congressional recognition of the possibility of an

209. Corwin Amendment, No. 36-13, 12 Stat. 251 (1861); *see also* CONG. GLOBE, 36th Cong., 2d Sess. 1236 (1861).

210. Perhaps in a subconscious understanding of the flaw, Lee, *supra* note 205, at 22, incorrectly inserts the word “ever” into the Corwin Amendment (“No amendment shall *ever* be made”). This error is perpetuated in VILE, *supra* note 27, at 118.

211. It appears at least some members of the Senate recognized those logical flaws in the Corwin Amendment. *See* CONG. GLOBE, 36th Cong., 2d Sess. 1364 (1861) (Senator Pugh remarking: “[A] future amendment may . . . as equally supersede this as supersede the present Constitution. If this had provided that the article itself should not be amended, except with the consent of all the States, then it would have had some practical benefit.”).

212. It remains one of just six amendment proposals to clear Congress yet fail to be ratified by the states. *See supra* note 208.

213. There was significant Senate and House debate on the question of whether the proposal, should it be ratified, was truly unamendable. For a digested legislative history of the Corwin amendment proposal, see Bryant, *supra* note 21, at 520–34; Lee, *supra* note 205.

214. President Abraham Lincoln, Inaugural Address (Mar. 4, 1861), *reprinted in* HAROLD HOLZER, LINCOLN PRESIDENT-ELECT 473 (2008) (emphasis added).

irrevocable amendment. When faced with a situation in which it seemed the only way to keep the Union was through a permanently binding compromise, Congress reached for exactly that tool, in a knowing, comprehending way. This is our history.

#### VI. SOME RAMIFICATIONS OF EXPLICIT UNAMENDABILITY

We have looked at the text of the Constitution and found unamendability to be part of our constitutional past and our constitutional present. The Crittenden and Corwin amendment proposals show unamendability has been understood to be an option in constitutional amendment, but we as a nation have not inserted any unamendability into the Constitution since its establishment. This part, then, is dedicated to considering, if only in light, broad strokes, the wisdom of unamendable provisions.

One of the mind-bending aspects of self-referential logic and unamendability is that an amending provision possessing the power to create provisions that will for all time be unamendable can, in seeming paradox, use that power to abjure forever the use of that same power. The Constitution can thus transform itself by amendment into a Constitution that can no longer create unamendability provisions.

I said mind-bending—so once again, let's take things one step at a time.

I have argued that the Constitution's amending power can create unamendable constitutional provisions. One of those unamendable provisions the amending power can create is a ban on any future unamendable provisions. All we need is an amendment eschewing them permanently: "Every future amendment to the Constitution shall be subject to amendment, but this provision may never be amended."

So we can choose, in a permanently binding way, to never, ever again allow the amending provision to create a permanent binding. We can permanently give up our capability to permanently bind ourselves and our posterity.

Should we? There would be no going back. Once unamendable amendments are (unamendably) forsaken, they are gone forever. Should we *un*-lock the door and throw away the key?

One argument in favor of permanently throwing away the power to create unamendable provisions is the danger of making an irrevocable mistake by creating an unamendable provision we regret. History warns us. Our nation has used unamendability once to preserve religious diversity and once to (temporarily) entrench the slave trade and the

Three-Fifths Clause. The Crittenden and Corwin amendment proposals were near misses that aimed to irrevocably allow slavery.

Another consideration is the self-determination of future generations—by what right can we forever bind future generations?<sup>215</sup> The answer to that question, of course, is by right inserted into the Constitution by the Framers, who gave themselves the power to bind us. And perhaps we are glad they did. Perhaps there is a value to having the ability to bind ourselves. Surely there is that—value in being able to bind *ourselves*. But again, the problem is that we bind not just ourselves but all other citizens, present and future, for all time.

Still, though, it is not *quite* right to say if we discard our ability to make unamendable provisions, we show trust to future citizens and give them power. In at least one respect, we actually remove power from them, and permanently. We do not trust them with the power to bind permanently. We take from them a tool they may one day wish available.

In the end, my conclusion is this: I want to provide future generations with all the power that can be given them. We do not know what they may need to do, so we ought not bind them. The way to do that is by self-restraint, by not binding them with unamendable provisions of any kind, including a ban on future unamendable provisions. The power we should hand over is an unused power to permanently bind.

## VII. CONCLUSION

The states represented at the Constitutional Convention brought with them three major divisions: two bilateral splits (slave/non-slave, large/small) and one multilateral fragmentation (diversity of religion). The delegates fashioned compromises to fuse those divisions and created constitutional entrenchment provisions to bind the bargains. In doing so, the Framers exhibited an appreciation of the logical and linguistic complexities inherent in such entrenchment and gave us a permanently unamendable ban on religious tests for federal officeholders.

Those 1787 entrenchment provisions are part of our past and present as a nation, and they have served as models for later, ultimately

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215. Amar, *supra* note 21, at 461 (“Could a legitimate amendment generally purport[ing] to make itself . . . immune from further amendment clearly violate the legal right of future generations to alter their Government?”).

unsuccessful attempts to create yet more unamendable constitutional provisions. Such provisions are still possible—there is no constitutional bar to them. We do have a choice: we can keep the power to one day again create an unamendable constitutional provision, or we can permanently give it up. One choice allows us as a nation to bind ourselves, for better or worse, the other allows us to alter anything save the Framers' ban on religious tests.