

Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments

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I. INTRODUCTION

Selection of American judges is one of the battlefields in the contemporary culture war,¹ primarily due to judicial involvement in contentious issues such as abortion,² pornography,³ the death penalty,⁴ racial discrimination,⁵ the role of religion in public life,⁶ and the definition of marriage.⁷ As a result, the organized bar and many leaders

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1. The term “culture war” was popularized by sociology professor James Davison Hunter in his book, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). Others have argued that the cultural divide among political leaders and cultural elites identified by Dr. Hunter is far less important than the cultural similarity and tolerance shared by a majority of Americans. *See, e.g., ALAN WOLFE, ONE NATION, AFTER ALL* (1998). *See generally* James Davison Hunter & Alan Wolfe, Remarks at “Is There a Culture War?” Event Sponsored by Pew Forum on Religion & Public Life (May 23, 2006) (discussing whether there is a culture war and its impact), *available at* <http://pewforum.org/events/?EventID=112>.

2. *E.g., Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a state’s criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional).

3. *E.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (striking down prohibitions of the Child Pornography Prevention Act of 1996 as overbroad and unconstitutional).

4. *E.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008) (striking down use of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the child’s death).

5. *E.g., Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (rejecting intentional discrimination to avoid disparate impact claims under Title VII of the Civil Rights Act absent a “strong basis in evidence” that employer will be liable).

6. *E.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (holding that a non-custodial father had no standing to challenge school children’s voluntary recital of the Pledge of Allegiance containing the words “under God”).

7. *E.g., Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the common benefits clause of the state constitution requires recognition of same-sex unions as

in the judiciary gravely warn that judicial independence is “in jeopardy,”⁸ while social conservatives caution that judicial accountability is greatly diminished or non-existent and the “end of democracy” has arrived or is fast approaching.⁹

In broad terms, many Americans perceive contemporary liberals as looking to the courts as final arbiters of difficult and divisive political issues.¹⁰ Under this liberal vision, “judicial independence revolves around the theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the

marriages). These topics are listed in a publication promoted by the ABA Standing Committee on Judicial Independence as areas of “real questions” that are likely to arise in public discussions regarding the role of the courts. MARGIE ELSBERG, IN SUPPORT OF FAIR AND IMPARTIAL COURTS: COUNTERING THE CRITICS 10–13 (2006), available at <http://www.abanet.org/judind/toolkit/impartialcourts/critics.pdf>. The publication advises acknowledging the controversial nature of the topics and then moving to the “core message” that the courts need to be impartial and independent. *Id.* at 15–17. The publication does not address the question of whether courts have exceeded their authority in cases involving these topics, or what remedy is available when judges exceed their authority.

8. See, e.g., Sandra Day O’Connor, Op-Ed., *The Threat to Judicial Independence: A Ballot Initiative is the Latest Attempt to Intimidate Judges*, WALL ST. J., Oct. 1, 2006, at A18 (advocating the need to maintain “the independent judiciary that the Framers sought to establish”), available at <http://www.opinionjournal.com/extra/?id=110009019>; see also ABA COMM’N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 82–86 (July 2003) (promoting an independent judicial branch that works effectively with the political branches of government), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>. The American Bar Association has gone so far as to establish the Standing Committee on Judicial Independence to respond to infringement of judicial independence and “[e]ncourage public awareness and appreciation of the importance of judicial independence.” ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, HISTORY, MISSION AND GOALS, <http://www.abanet.org/judind>. For a careful and critical review of Justice O’Connor’s op-ed, see Arthur D. Hellman, *Justice O’Connor and “The Threat to Judicial Independence”: The Cowgirl Who Cried Wolf?*, 39 ARIZ. ST. L.J. 845 (2007).

9. See THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS (Mitchell S. Muncy ed., 1997) (providing a collection of articles discussing judicial activism).

10. See Mark Tushnet, *Democracy Versus Judicial Review: Is it Time to Amend the Constitution?*, DISSENT, Spring 2005, at 59 (“Liberals believe in the courts as vehicles for progressive social change—a belief that remains unshaken by the Supreme Court’s two-century history and the fact that it has been at best an inconstant defender of progressive values since the 1980s.”); see also Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, in THE BILL OF RIGHTS IN THE MODERN STATE 381, 383 (Geoffrey R. Stone et al. eds., 1992) (“[J]udges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement.”). The plurality opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866–67 (1992), evidences this belief:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

political branches of government.”¹¹ “Judicial supremacy”¹² is seen as a natural corollary to judicial independence since the courts’ judgments and interpretations of the Constitution purport to be free of the compromising influences of partisan politics.¹³ In theory, this supremacy stands as the ultimate protection of individual and minority rights against “majoritarian excesses,”¹⁴ and it ensures that the ultimate statement of the people’s sovereign will—the Constitution—is adhered to when it conflicts with legislative or executive acts.¹⁵

Conservatives assert a desire to leave decisions of public policy to the people’s elected representatives (or to the people themselves),¹⁶ looking

11. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

12. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed..

Id.

13. See *Flores*, 521 U.S. at 529 (internal citations omitted):

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detail amendment process contained in Article V.

For a strong critique of judicial supremacy, compare ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117–18 (1996) (arguing in favor of a constitutional amendment “making any federal or state court decision subject to being overruled by a majority vote of each House of Congress”), with MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–76 (1999) (arguing for the abolishment of judicial review in favor of populist constitutionalism).

14. THE FEDERALIST NO. 78, at 392, 397 (Alexander Hamilton) (Buccaneer Books ed., 1992).

This independence of the judges is equally requisite to guard the constitution [sic] and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id.

15. See James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 988 n.24 (1993) (“In American constitutionalism, the question of legitimacy is answered by the claim that the Constitution is law because ‘We the People,’ exercising our popular sovereignty, made it law.”) (citation omitted).

16. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting):

only to the courts to insure that the previously-agreed-to rules about public debate and decision-making are observed.¹⁷ To them, judges act more as umpires or referees,¹⁸ only intervening when necessary to “make sure everybody plays by the rules.”¹⁹ The rights of the minority are no less and no more than those defined by the constitutional limitations enacted by the people, and the right to collective self-governance is valued as highly as the rights of the individual.²⁰ Judicial accountability is seen as the necessary corrective to the excesses of judicial independence: judicial ambition²¹ and self-indulgence.²²

The relative value and relationship (if any) of judicial independence and accountability have been debated since the inception of this nation.²³ While this is a profoundly interesting and important debate, it

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speaks before all others for their constitutional ideals”—with the somewhat more modest role envisioned for these lawyers by the Founders.

17. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 19 (2d ed. 1997) (arguing that the courts’ sole role in constitutional adjudication is policing the boundaries of political power established by the Constitution).

18. The term “referee” was used by Professor John Hart Ely in describing his concept of “participation-oriented, representation-reinforcing approach to judicial review.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

19. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States).

20. In her response to Justice Scalia’s essay, Professor Mary Ann Glendon reminds us:

Tyranny of the majority does sound alarming. It conjures up visions of peasants with their pitchforks storming the scientist’s castle. Small wonder that it is a favorite slogan of those who would prefer to forget that one of the most basic American rights is the freedom to govern ourselves and our communities by bargaining, education, persuasion, and, yes, majority vote.

Mary Ann Glendon, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 95, 113 (Amy Gutmann ed., 1997).

21. Judge Guido Calabresi of the Second Circuit is quoted saying, “the greatest threats to judicial independence [are] judges with ambition.” Hon. Carolyn Dineen King, *Hallows Lecture: Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 777 (2007).

22. Of course, one person’s well-reasoned opinion may be another’s act of judicial self-indulgence. Compare Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1607 (2004) (characterizing the Court’s opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute criminalizing same-sex sodomy, as an act of “judicial self-indulgence”), with Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 656 (1987) (characterizing the holding of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld the constitutionality of a Georgia statute criminalizing sodomy, as “judicial self-indulgence”).

23. Alexander Hamilton characterized the judiciary as “the weakest of the three departments of power.” Hamilton, *supra* note 14, at 394. In contrast, Robert Yates, an associate justice of

is not the purpose of this Article to join that debate directly. Rather, the aim of this Article is more modest, as it explores the impact of an increasingly common legal argument—that there can be an “unconstitutional constitutional amendment”—on judicial independence and accountability. Two recent events suggest both the timeliness and importance of this topic.

The first event is the controversy in California regarding the passage of a state constitutional amendment, which provides that “[o]nly marriage between a man and a woman is valid or recognized”²⁴ This amendment, known as “Proposition 8,” was passed in part as a reaction against a California Supreme Court decision requiring recognition of same-sex unions as marriages.²⁵ After passage of Proposition 8, opponents sought to have the state supreme court enjoin enforcement of the amendment on the basis that it was an unconstitutional constitutional amendment.²⁶ The court declined to do so,²⁷ and gay rights activists are now challenging in federal court Proposition 8 as a violation of the Fourteenth Amendment of the United States Constitution.²⁸

The second recent event involving claims of an unconstitutional constitutional amendment has arisen in the context of the recent removal of Honduran President Manuel Zelaya from office. The

New York’s highest court and a leader of the Republicans (also known as the Anti-Federalists), writing as Brutus, argued that the courts would eventually refuse to be bound by the law:

There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

1st. There is no power above them that can correct their errors or controul [sic] their decisions—The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits.—In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

Brutus, XV, N.Y. J., Mar. 20, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 439 (Herbert J. Storing ed., 1981).

24. CAL. CONST. art. I, § 7.5; *see* Cal. Sec’y of State, Votes for and Against Nov. 4, 2008 State Ballot Measures, http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf (as of May 26, 2009) (tallying votes for and against Proposition 8).

25. *See In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that equal protection under state constitution required recognition of same-sex unions as “marriages,” notwithstanding that such unions already enjoyed all the legal benefits of marriage through a comprehensive domestic partnership law), *superseded by constitutional amendment*, CAL. CONST. art I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

26. *Strauss*, 207 P.3d at 60.

27. *Id.* at 122.

28. Complaint at 8, *Perry v. Schwarzenegger*, CV 09-2292 (N.D. Cal. May 22, 2009), *available at* <http://www.scribd.com/doc/15841006/Perry-v-Schwarzenegger-Complaint>.

Honduran Supreme Court ordered the removal of the president because of his attempts to amend the constitution to allow a president to serve beyond one term.²⁹ President Zelaya's removal initially led the United States government to characterize the events as a "military coup,"³⁰ and international organizations have demanded the reinstatement of President Zelaya.³¹

The actions of both the California Supreme Court and the Supreme Court of Honduras were in response to demands by citizens and government officials that the courts act in the face of what were claimed to be unconstitutional attempts to alter the basic political charter of the state. These claims of unconstitutional constitutional amendments are

29. An unofficial English translation of the pertinent section of the opinion provided by Laura Jacobson provides:

According to Article 328, numeral 3 of the Constitution, the government should maintain itself in the principle of the participatory government from which derives national integration, which involves the participation of all political sectors in the administration and makes function the participatory democracy, the referendum and plebiscite are instituted as the only mechanisms of consultation of the citizens, being Congress who should recognize and discuss said petitions, if they are approved with an affirmative vote of two-thirds of all members, [Congress] will approve a decree that will determine the ends of the consultation, ordaining to the Supreme Electoral Tribunal the announcement of the referendum and plebiscite for the citizenship, as established by Article 5 of the Constitution.

Corte Suprema de Justicia [Supreme Court] (Hond.), Comunicado Especial [Special Communication] Documentacion de Soporte Punto No. 12 [Supporting Document No. 12], available at <http://www.poderjudicial.gob.hn/NR/rdonlyres/87E2BFFC-AF4D-44EA-BFC5-D93730D8D81C/2413/ExpedienteJudicial1.pdf> (Laura Jacobsen, unofficial translation). The preceding Article indicates that the Supreme Electoral Tribunal is the only legitimate authority to convene, organize, and direct the consultations of the citizens, and not the Executive Power. In the same manner, it is the Congress that is competent to recognize and discuss the petitions for a plebiscite or referendum, and if they are approved with an affirmative vote of two-thirds of all members, it is the Legislative Power that is legitimate to approve a decree determining the ends of the consultation and to ordain to the Supreme Electoral Tribunal the announcement to the citizenship. *Id.* at 6–8. *But see* Alberto Valiente Thoresen, *Why President Zelaya's Actions in Honduras Were Legal and Constitutional*, REBELREPORTS, July 1, 2009, <http://rebelreports.com/post/133319827/why-president-zelayas-actions-in-honduras-were-legal> (arguing that Zelaya, acting under article 5 of the Honduran "Civil Participation Act" of 2006, intended to perform a non-binding public consultation regarding the conformation of an elected National Constituent Assembly).

30. Press Release, U.S. Dep't of State, Background Briefing on the Situation in Honduras (July 1, 2009) (on file with author), available at <http://www.state.gov/r/pa/prs/ps/2009/july/125564.htm>.

31. Press Release, Organization of American States, OAS Suspends Membership of Honduras (July 5, 2009) (on file with author), available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-219/09 (disseminating the XXXVII OAS Special General Assembly's resolution on the suspension of the right of Honduras to participate in the OAS); *General Assembly Condemns Coup in Honduras*, UN NEWS SERVICE, June 30, 2009, <http://www.un.org/apps/news/story.asp?NewsID=31314&Cr=honduras&Cr1=#>.

not unique, either domestically³² or among foreign states.³³ The proximity in time of these claims, however, suggests increasing recourse to judiciaries as the final authorities, not only as to contested meanings of existing constitutions, but also as to the legitimacy of changing or amending such documents. There are substantial implications for judicial independence and accountability if courts hold both the power to limit or direct government actions based on existing constitutional provisions, and the power to permit or prohibit amending those provisions. This Article outlines some of those implications.

Part II of this Article provides an overview of the different processes for amending a constitution. A substantial majority of the world's constitutions, and all American constitutions (both federal and state), contain provisions establishing an amendment process.³⁴ Part III of this Article discusses procedural review of constitutional amendments. Substantive review will then be examined in Part IV. Both Parts III and IV explore issues related to judicial review in particular. Finally, this Article concludes in Part V that judicial review of the procedural regularity of the amendment process is appropriate, but that substantive review should be limited to post-passage cases and rarely undertaken.

II. METHODS OF AMENDING AMERICAN CONSTITUTIONS

Article V of the United States Constitution provides two methods of initiating a constitutional amendment.³⁵ The first and only method used

32. *See, e.g.*, *Legislature of Ca. v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991) (challenging a proposition whose stated purpose was to “restore a free and democratic system of fair elections” by limiting “the powers of incumbency”); *Stumpf v. Lau*, 839 P.2d 120, 121 (Nev. 1992) (challenging an initiative proposal on a ballot, which placed limits on the number of terms a United States Congressman or Senator could serve), *overruled by* *Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224 (Nev. 2006).

33. *See, e.g.*, *A o Direta de Inconstitucionalidade-ACI No. 926/1993* (Brazil); *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India) (finding that portions of the twenty-fifth amendment to India's constitution that precluded judicial review of certain property rights violated the constitution's basic structure); *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1; *State (Ryan) v. Lemmon*, [1935] 170 I.R. 197 (Ir.); *Harris v. Minister of the Interior* 1952 (2) SA 428 (A) (S. Afr.); *Minister of the Interior v. Harris* 1952 (4) SA 769 (A) (S. Afr.).

34. Most constitutions outline the process of amendment, while a much smaller number contain provisions regarding the substance of amendments. *See, e.g.*, HOND. CONST. art. 4 (amended Jan. 20, 2004, by decree 242-2003); Grundgesetz für die Bundesrepublik Deutschland (Federal Constitution), art. 79 § 3 (F.R.G) (“[a]mendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”), *available at* http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

35. Article V provides:

to date is the passage of a bill proposing an amendment by a favorable vote of two-thirds of the members of both houses present at the time of the vote.³⁶ Additionally, although it has not been used, Article V allows the states to initiate the amendment process when two-thirds of the states issue calls for a constitutional convention. No attempt of the states to call a convention has ever succeeded, although some attempts may explain various Congressional actions. For example, “[t]he movement favoring direct election of Senators was just one state away from an amending convention when Congress proposed the Seventeenth Amendment.”³⁷ Any proposed amendment must be ratified by three-quarters of the state legislatures (or state constitutional conventions) before an amendment becomes law.³⁸ Some scholars have speculated that the people could also initiate an amendment through an initiative process,³⁹ but there has never been such an initiative presented to the people.

Generally, state constitutions can be amended by one or more of four processes: (1) voter adoption of legislatively-referred proposals,⁴⁰ (2)

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.

U.S. CONST. art. V.

36. See *Rhode Island v. Palmer*, 253 U.S. 350, 384–88 (1920) (regarding national prohibition cases).

37. Trent England & Matthew Spalding, *Article V*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 284, 286 (Edwin Meese III et al. eds., 2005).

38. See *Hawke v. Smith*, 253 U.S. 221, 225–27 (1920) (holding that state legislatures cannot delegate ratification power to citizens).

39. See, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457 (1994) (arguing that citizens have a retained right to amend the Constitution through popular referendum).

40. Legislatures may place constitutional amendments on a statewide ballot in forty-nine of the fifty states. See, e.g., TEX. CONST. art. XVII, § 1. The exception to this rule is Delaware, where the legislature has the constitutional power to amend, but not revise, the state constitution without a popular vote. *Op. of the Justices*, 264 A.2d 342, 346–47 (Del. 1970). Amendments have been defined to be changes that merely improve the current constitutional scheme of government. *Id.* at 346. In contrast, “[a] constitutional ‘revision’ makes substantial, basic, fundamental changes in the plan of government; it makes extensive alterations in the basic plan and substance of the existing document; it attains objectives and purposes beyond the lines of the present Constitution.” *Id.*

voter adoption of citizen-initiated proposals,⁴¹ (3) voter adoption of commission-referred proposals,⁴² or (4) through constitutional conventions.⁴³

The role of citizens in the amendment process varies tremendously under each of these four methods, and even within each method, depending upon the procedural requirements established by state law. The more direct the involvement of voters, the stronger the claim that the amendments are the ultimate expression of the political will of the

41. Eighteen states allow citizen-initiated proposals, although the percentage of the citizenry required to support an initiative varies from state to state. *See, e.g.*, CAL. CONST. art. II, § 8 (voting initiatives); *id.* art. XVIII, § 3 (amending and revising the constitution by initiatives). In two states, Massachusetts and Mississippi, after sufficient signatures have been obtained the proposed amendment must be considered by the state legislature prior to being placed on the ballot. Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 303 n.32 (2008). Typically, states require that constitutional initiatives be supported by ten percent or more of the population that voted in a previous election. INITIATIVE & REFERENDUM INST., CONSTITUTIONAL AMENDMENTS 1 (2006), available at <http://www.iandrinstitute.org/REPORT%202006-3%20Amendments.pdf>. About half of the states allowing initiatives require signatures to be obtained from across the state, instead of in a single area. *Id.* Experts have concluded that Arizona, Mississippi, and Oklahoma have the most cumbersome requirements for constitutional initiatives. *Id.* The requirements in Arkansas, California, Florida, Illinois, Michigan, Montana, Nebraska, Nevada, Ohio, Oregon, and South Dakota are moderately difficult to fulfill, and Colorado, Massachusetts, Missouri, and North Dakota have the most voter-friendly requirements. *Id.* Oregon, the first state to recognize the right of citizens to initiate constitutional amendments, continues to be the overall leader in initiative petitions, with 349 initiatives through 2007. INITIATIVE & REFERENDUM INST., INITIATIVE USE 1 (Feb. 2009), available at [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(1904-2008\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(1904-2008).pdf). California is second with 330, with Colorado (209), North Dakota (178), and Arizona (171) ranked respectively. *Id.*

42. Constitutional commissions are advisory groups of experts and leading citizens that study the state constitution and recommend reforms or assist in the preparation of state constitutional conventions. Albert L. Sturm, *The Procedure of State Constitutional Change—With Special Emphasis on the South and Florida*, 5 FLA. ST. U. L. REV. 569, 585–86 (1977). The commissions can be permanent or ad hoc. Historically they have been created by legislatures by statute or resolution, and by governors by executive order. Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 4–5 (1996). The Florida Constitution Revision Commission is the only commission established by state constitution. Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998). States with permanent law revision commissions include California, Connecticut, Florida, New Jersey, New York, and Oregon.

43. A constitutional convention is an extraordinary “body of representatives of the people convened only on special occasion, and for the purpose of revising or framing a Constitution.” *Bass v. Albright*, 59 S.W.2d 891, 894 (Tex. Civ. App. 1933). The constitutions of forty-one states provide procedures for calling constitutional conventions. G. Alan Tarr & Robert F. Williams, *Foreword: Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1078 (2005). Most authorize the state legislature to call a convention. *Id.* at 1079. A proposed constitutional amendment coming out of a convention must be ratified by the voters before they become law. *Id.*

people. Conversely, the more remote the involvement of voters—as in the case of Delaware, where the legislature can adopt amendments without any popular vote⁴⁴—the weaker the claim that an amendment expresses the will of the people. The process established in Article V of the United States Constitution, without any direct involvement of the citizens,⁴⁵ also falls in this latter category. These varying levels of citizen involvement should influence decisions regarding whether courts have the authority to review or set aside any particular constitutional amendment.

III. PROCEDURAL REVIEW OF CONSTITUTIONAL AMENDMENTS

American courts differ significantly from each other in their approach to the question of whether to engage in judicial review of the process used to amend a constitution.⁴⁶ The United States Supreme Court has largely taken a hands-off approach, characterizing such questions as “political” or summarily affirming legislative decisions regarding procedural requirements of Article V.⁴⁷ In contrast, many state supreme courts have taken an active role in policing the amendment process.⁴⁸ This difference is due to the variety of state constitutional provisions

44. *Op. of the Justices*, 264 A.2d at 346.

45. See *Hawke v. Smith*, 253 U.S. 221, 225–27 (1920) (holding that state legislatures cannot delegate ratification power to citizens).

46. Judicial review of the process by which a constitution is amended is common throughout the world. See, e.g., Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURISPRUDENCE 5 (2009) (applying a taxonomy of theories of constitutional change to the American, German, South African, and Indian models); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006) (discussing judicial review in India and Ireland); Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT’L & COMP. L. REV. 55 (2009) (discussing judicial review in India); Conrado Hübner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT’L L. 449 (2005) (discussing judicial review in Brazil).

47. *Coleman v. Miller*, 307 U.S. 433, 450 (1939). In *Coleman*, the Court stated:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Id.; see *United States v. Sprague*, 282 U.S. 716, 732 (1931) (holding that state ratification of a proposed amendment by constitutional convention or state legislative act “rests solely in the discretion of Congress”); *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) (holding that Congress has power to set time limit for ratification); *Hawke*, 253 U.S. at 225–27 (same); *Rhode Island v. Palmer*, 253 U.S. 350, 384–88 (1920) (same).

48. See Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL’Y SYMP. 27, 49–51 (1996) (citing examples from several states).

regarding the process of constitutional amendment⁴⁹ and the varying authority of the judiciary.⁵⁰ In some states, the amendment process is fairly simple and changes can be made quickly, while the process in others requires multiple steps and lengthy delays.⁵¹ Some states allow advisory opinions by the courts, while others require an existing case or controversy to initiate the judicial process.⁵² Similarly, foreign courts differ dramatically on the question of judicial review, due to varying terms of their domestic law and the cultural and historical context of courts in the particular country.⁵³

There seems to be a broad consensus that courts may (and often should) review the process by which a constitutional amendment is enacted to insure compliance with procedural requirements established by law.⁵⁴ Procedural regularity in the amendment of a constitution is

49. See *supra* text accompanying notes 36–43.

50. Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 593–600 (2009).

51. This is illustrated by the difficulty Massachusetts citizens had in attempting to amend their state constitution in response to *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (requiring legal recognition of same-sex unions as marriages under equal benefits clause of the state constitution), and the relative speed and ease with which Californians reversed *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (requiring legal recognition of same-sex unions as marriages as a matter of equal protection under the state constitution).

52. Eight states permit or require the state supreme court to give advisory opinions: Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota. Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 254–56 (1997). For a more comprehensive review of this topic, see Jonathan D. Persky, “Ghosts that Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155 (2005) (analyzing state supreme courts’ advisory opinions between 1990 and 2004).

53. See, e.g., Jacobsohn, *supra* note 46 (judicial review in India and Ireland); Khosla, *supra* note 46 (judicial review in India); Mendes, *supra* note 46 (judicial review in Brazil).

54. See *In re Advisory Opinion to Att’y Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020–21 (Fla. 1994) (“This Court essentially previews the ballot summary to determine if the chief purpose of the amendment is explained with sufficient clarity.”); see also *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990) (invalidating initiative petition for violating state constitution’s one subject rule and failing to inform signatories about proposal’s effect); *Legislature of Ca. v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991) (challenging a proposition whose stated purpose was to “restore a free and democratic system of fair elections” by limiting “the powers of incumbency”); *Montanans for Equal Application of Initiative Laws v. State*, 154 P.3d 1202, 1212 (Mont. 2007) (concluding that MONT. CONST. art III, § 4(3) prohibits post-election judicial review); Michael J. Farrell, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919, 921 (1985) (recommending preelection review of “threshold requirements”); James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 302–03 (1989) (categorizing types of pre-election judicial review); Krislov & Katz, *supra* note 41, at 334–35 (explaining the Massachusetts and Mississippi legislatures’ review process of proposed amendments); Douglas C. Michael, Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216, 1217 (1983) (contending that preelection review allows for correction prior to election, saves money on election campaigns

important because it promotes effective political participation.⁵⁵ Participation depends on knowledge of the opportunity and methods of participating.⁵⁶ For example, general participation is almost impossible if there is no public notice of elections⁵⁷ or if citizens do not know the means of casting their votes. These barriers to participation create unjust inequality among citizens, giving “those in the know” an opportunity to participate while denying the same opportunity to those who do not know of the process.⁵⁸

It is insufficient for citizens to learn of the process only when it is time for them to vote.⁵⁹ Effective participation in political contests begins long before election day. A robust civic life requires that citizens have ample opportunity to develop, share, and debate their views with others. Citizen participation is encouraged through procedures such as advance notice of the content of proposed amendments, publication of voter guides, and informal and formal opportunities to hear and participate in public debates on the issues.⁶⁰

Judicial review of the process of constitutional amendment seems consistent with the traditional understanding of courts as umpires or referees. When citizens have adopted rules regarding the methods of changing existing constitutional provisions, it seems unremarkable to

related to initiative that is fatally defective, and reduces political pressure on courts to uphold initiatives that violate constitutional or statutory requirements).

55. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also* *Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (acknowledging the right to vote as a fundamental right because it preserves all other rights).

56. JOHN RAWLS, *A THEORY OF JUSTICE* 222–24 (1971) (arguing that equal participation requires, among other things: a representative legislature with lawmaking powers; the right of all sane adults to participate in political affairs; elections that are fair, free, and regularly held; and the application of the “one elector, one vote” principle “as far as possible”).

57. *See, e.g.*, *Marsden v. Harlocker*, 85 P. 328, 330 (Or. 1906) (“[S]uffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where, and for what purpose he is to vote.”).

58. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (finding that the durational requirement for voting does not violate the constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction).

59. *See Walker v. Oak Cliff Volunteer Fire Prot. Dist.*, 807 P.2d 762, 769 (Okla. 1990) (holding that an advertisement in a local newspaper on the day before the election to create a fire protection district was insufficient notice).

60. It is also important that procedural rules remain constant during the amendment process to allow citizens to anticipate or plan their involvement in public and private efforts to pass or defeat the proposal. For example, in states where public initiative can drive constitutional amendments, it is important for citizens to know in advance the number of signatures needed and when the petitions must be submitted to state officials in order to allow voters to plan their campaigns promoting or opposing the proposed amendment.

require that those seeking to change the Constitution observe such rules. When conflicts arise over whether proponents of a particular amendment have complied with existing rules to amend the Constitution, the courts are the proper branch of government to review proponents' actions and determine whether they have "played by the rules."

IV. JUDICIAL REVIEW OF THE SUBSTANTIVE CONTENT OF AMENDMENTS

Judicial review of the substance of proposed constitutional amendments raises starkly different questions than procedural review. When reviewing the substance of proposed amendments, courts must decide whether there are rules that lay beyond the power of the people to enact. Historically, principles of natural law have been seen as a limitation on the powers of government, regardless of the source of the government power.⁶¹ Among the various principles of natural law is the rule that "[a]n unjust law is no law."⁶² Under this understanding of law, a constitutional provision that authorized the killing of the innocent is not a valid law, regardless of the level of popular support.

The idea of natural law as a limitation on the powers of government has come under attack during the last two centuries.⁶³ Disputes about both the method of discerning and the content of natural law precepts have undermined the historic role of natural law as a check on government powers in Western European nations.⁶⁴ Legal positivism, with its emphasis on procedural authority, is now the dominant

61. "As Augustine says, 'That which is not just seems to be no law at all.'" SAINT THOMAS AQUINAS, *THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS*, question 95, art. 2 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920), available at <http://www.newadvent.org/summa/2095.htm>. See also MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77 (1964) (illustrating the distinction between just and unjust laws).

62. SAINT AUGUSTINE, *The Free Choice of the Will*, in *THE FATHERS OF THE CHURCH* 63, 81 (Robert P. Russell trans., The Catholic Univ. of America Press 1968) (426); (*Lex iniusta non est lex*—"An unjust 'law' . . . is no law.").

63. Mark C. Murphy, *Natural Law Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 15, 19 (Martin P. Golding & William A. Edmundson eds., 2005) (discussing the criticisms of natural law: the theory is internally inconsistent, is inconsistent with other claims that natural law theorists affirm, or is inconsistent with the practice of legal officials).

64. Current claims of inherent human rights can be seen as a revival of natural law thinking insofar as certain protections and limitations are demanded because they are due every human person merely by virtue of their personhood. See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.").

jurisprudence and provides little basis to reject the will of the lawmaker on the basis of the content of the law.⁶⁵

This shift in jurisprudential view impacts arguments regarding judicial review of a proposed amendment's substance. If principles of natural law exist and are binding upon the political community, judicial review of an alleged conflict between the natural law and the substance of a constitutional amendment may be no different from the judicial practice of reviewing claims that ordinary legislation violates constitutional commands. Of course, the difficulty in this approach is the absence of a contemporary consensus that principles of natural law exist.⁶⁶ Even in the rare case where such agreement might exist, disputes over the content of the principles as well as the relationship of those principles to the positive law make judgments based on natural law difficult and susceptible to charges of judicial overreaching.⁶⁷ These difficulties mirror the difficulties courts encounter when asked to adjudicate conflicts between what they claim to be unenumerated rights and legislation.⁶⁸ Because there is no evidence of democratic

65. See Jeremy Waldron, *Can There Be A Democratic Jurisprudence?*, 58 EMORY L.J. 675, 682–91 (2009) (discussing the features of legal positivism: a preoccupation with the sources of norms, an emphasis on the recognition of norms as law, and the separation of law and morality).

66. The most prominent contemporary advocates for natural law include Robert P. George, John Finnis, and Russell Hittinger. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (H.L.A. Hart ed., Oxford Univ. Press 1980) (identifying those human goods secured only through human law and their requirements of practical reasonableness); RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* (ISI Books 2003) (demonstrating that to oppose freedom and law is to misunderstand both); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171 (2008) (explaining why the idea of natural law and natural rights is far more plausible than once thought). Critics of natural law theory include Joseph Raz, Hans Kelsen, and Richard Rorty. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Harvard Univ. Press 2d ed. 1946) (asserting that the state is the law); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979) (examining the law and its relation to morality); RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS* (1991) (discussing anti-representation, ethnocentrism, and liberalism).

67. The trial of various Nazi leaders in Nuremberg presents a case involving actions that are universally recognized as immoral and contrary to the natural law. Yet a vigorous debate continues regarding the legality of the trials. See KENNETH S. GALLANT, *Chapter 3: Nuremberg and Tokyo*, in *THE PRINCIPLE OF LEGALITY IN INT'L AND COMPARATIVE CRIM. LAW* (Cambridge Univ. Press 2009), available at <http://ssrn.com/abstract=1004374> (discussing the issues of legality raised during World War II and at the post-War trials).

68. The unenumerated constitutional right to sexual privacy, most recently articulated in the majority's opinion in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), has been used to justify striking down a Kansas statute requiring reporting of sexual activity by children under the age of fourteen, *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1099 (D. Kan. 2006), vacated (due to change in statute), *Aid for Women v. Foulston*, No. 06-3187, 2007 WL 6787808, at *1 (10th Cir. Sept. 20, 2007), and a criminal prohibition on incest, *State v. John M.*, 894 A.2d 376, 387–89 (Conn. App. Ct. 2006), rev'd, 940 A.2d 755, 767–78 (Conn. 2008).

agreement as to the existence of natural law (or unenumerated rights) and no text defining its nature and scope, there is a substantial risk of judges mistaking their political preferences for principles of natural law. Even in cases where judges correctly discover and apply the natural law (assuming this can be known), it is difficult to persuade opponents of the ruling that the judgment is legitimate since there is no consensus that there is any rule beyond that which appeals to an individual's sense of reason.

The positivist approach to constitutional adjudication does not suffer from the appearance of subjectivity and bias but provides little protection against unjust constitutional schemes. A constitutional amendment authorizing the ownership of slaves, if ratified in conformity with all procedural requirements, stands on the same footing as the Thirteenth Amendment prohibiting such ownership.⁶⁹ Such moral "neutrality" is troubling, but permitting judicial review has done little to avoid imposing similar outcomes in the guise of constitutional interpretation upon the people.⁷⁰ This is not surprising since there is no evidence that judges are inherently more moral than legislators, members of the executive branch, or the people themselves. Furthermore, there is ample evidence to believe that the unchecked exercise of power over others' lives leads to abuse of that power.⁷¹

If substantive review is to occur at all (and it is not clear that it should), it must be firmly grounded in the text of the Constitution, rather than in some judicial discovery of penumbral rights⁷² or the creation of substantive rights that are "implicit" in due process.⁷³

69. An amendment permitting slavery may seem far-fetched, especially in light of the bloody history of emancipation in this country, but consider the appeal of allowing ownership of human-animal hybrids. See, e.g., Bratislav Stanković, *Patenting the Minotaur*, 12 RICH. J.L. & TECH. 5, 6 (2005), available at <http://law.richmond.edu/jolt/v12i2/article5.pdf> (discussing the possibility of creating a human-animal hybrid creature and its patentability).

70. See *Scott v. Sandford*, 60 U.S. 393, 453 (1857) (holding that individuals of African descent were not citizens of the United States and therefore were not afforded protection under the Constitution), superseded by U.S. CONST. amend. XIV, § 1.

71. Consider the implications of the Milgram experiment in which more than ninety percent of his subjects were willing to administer dangerously high electric shocks to fellow subjects as punishment for missing questions on a meaningless quiz, merely because the person conducting the experiment instructed them to do so. Similarly, consider the Stanford Prison experiment in which a group of college students quickly engaged in brutal behavior when given unchecked power as prison guards. Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal*, 48 SANTA CLARA L. REV. 523, 561 (2008).

72. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

73. Cf. *Lawrence*, 539 U.S. at 578 (holding that the Constitution affords substantial protection to adult decisions regarding how to conduct their private lives in matters pertaining to sex);

Review of challenges based on failure to comply with existing textual requirements is less likely to require the exercise of judicial discretion, so there is less risk of political manipulation (or the appearance of political manipulation) of the law by the courts. Yet the meaning and applicability (or non-applicability) of particular words to specific situations is not always clear, and it may be necessary for courts to go beyond the plain meaning of the text to include history, tradition, or precedents. Yet even this limited foray beyond constitutional text risks judges mischaracterizing their political preferences as constitutional commands. “Selective readings” of the historical record or precedents often evidence an opinion that is more the product of political will than of careful legal analysis.⁷⁴

Evaluation of the constitutionality of an amendment based on the likely consequences of its enactment is even more problematic. Inherent in the judicial process is a focus on evidence of a particular application of law to the facts presented by the plaintiff. All other applications are largely ignored.⁷⁵ Yet evaluation of likely consequences requires courts to consider all possible applications and weigh their relative merits. Such a process requires a much broader base of evidence and is inherently speculative; as a result, it is more likely to provoke claims of judicial activism or politicization.⁷⁶

Generally, public confidence in the correctness (and therefore fairness) of a judicial determination is directly proportionate to the court’s reliance upon the plain meaning of the words of a statute or

Lochner v. New York, 198 U.S. 45, 65 (1905) (finding that the Constitution prohibits state labor laws limiting bakers’ work week to sixty hours).

74. Compare Justice Blackmun’s recount of the history of abortion in *Roe v. Wade*, 410 U.S. 113, 129–34 (1973) (discussing the abortion laws at the time as a recent occurrence enacted during the late 19th century and describing the consensus of philosophical, theological, and civil law concepts as recognizing that a fetus became a human at some point between conception and birth), with its treatment in Joseph W. Dellapenna, *DISPELLING THE MYTHS OF ABORTION HISTORY* (Carolina Academic Press 2006) (dispelling the myths of abortion law as stated in *Roe*), Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 809 (1973) (describing three generations of erroneous Supreme Court decisions classifying unborn children as less in law than whole persons), and John R. Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 123–35 (Dennis Horan et al. eds., 1987) (concluding that Justice Blackmun’s history was untrustworthy). The historical recitation in *Roe* has been characterized as “sophomoric.” Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421, 1434 (1995).

75. The legal distinction between facial constitutional challenges and as-applied challenges recognizes the superiority of non-judicial processes for broadly evaluating the impact of a law. *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007).

76. The plurality opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and its discussion of *stare decisis*, *id.* at 856, is an example of reliance upon speculative harms.

constitutional provision. The further judicial analysis strays from the text, the more likely the public will see the justices as “making it up as they go along” or imposing their own values rather than requiring compliance with the Constitution.⁷⁷ Such perception invites increased litigation by political activists seeking to enlist the courts in their causes and decreased public confidence in courts as unbiased arbiters of conflicts.⁷⁸

The U.S. Constitution contains only three textual limitations on the substance of amendments. The first two limits deal with cession of the slave trade and the prohibition of direct taxation.⁷⁹ Historical events have overtaken these limitations: the Civil War Amendments and the passage of the Sixteenth Amendment permitting taxation of income have nullified them. The only remaining limitation, “no state, without its consent, shall be deprived of its equal suffrage in the Senate,” remains effective.⁸⁰ While equal representation of the states in the Senate may appear consistent with general principles of equality among the states,⁸¹ this substantive limitation on amendments raises questions about the ability of the people to bind themselves and their posterity to particular values or political structures.

Questions of this nature emerge in the current debate regarding the removal of the Honduran president for his attempts to gauge public support for a constitutional amendment regarding term limits on the presidency. President Manuel Zelaya attempted to hold a national

77. See, e.g., Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore*, 13 STAN. L. & POL'Y REV. 33, 34 (2002) (arguing that judges “make up” policy, as well as “discover” and “vindicate” policy during judicial policy formation); Stephen B. Presser, *Judicial Ideology and the Survival of the Role of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 429 (2008) (arguing that the Supreme Court makes law rather than interprets it and insisting that the courts have become “partners” with the legislature in law making).

78. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239 (1998).

79. See U.S. CONST. art. I, § 2, cl. 3 (stating that all direct taxes are required to be apportioned among the states according to population); *id.* art. I, § 9, cl. 4. See also *id.* art. I, § 9:

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.

80. A 1978 proposed constitutional amendment to treat the District of Columbia “as if it were a state” by providing the District with two seats in the Senate might have been challenged on the basis that it diluted the senatorial representation of states, but the amendment failed to pass due to insufficient support by state legislatures. It expired in 1985. H.R.J. Res. 554, 95th Cong. (1978).

81. See Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 295 (2002) (describing political scenarios involving stripping states of senators or dividing states to increase the number of politically like-minded senators).

referendum asking the question, “Do you approve that during the general elections of 2009, a fourth ballot box be included to decide on the convening of a National Constituent Assembly to approve a new Political Constitution?”⁸² The new Political Constitution would allow successive presidential terms in office.⁸³ Currently, the Constitution of Honduras limits a President to serving only one term in office and directs the removal of any President who attempts to circumvent the limitation.⁸⁴ Any attempt to amend the Constitution must originate in the national Congress.⁸⁵

The attorney general of Honduras petitioned the Honduran Supreme Court for an order to stop the referendum.⁸⁶ After review of the evidence and arguments, the Court ordered President Zelaya to stop his efforts to hold the referendum.⁸⁷ When he refused to comply, the Court

82. Corte Suprema de Justicia [Supreme Court] (Hond.), Comunicado Especial [Special Communication] Documentacion de Soporte Punto No. 8 Anexa al Comunicado Especial [Supporting Document No. 8 Annex of Special Communication] at 33, *available at* <http://www.poderjudicial.gob.hn/NR/rdonlyres/87E2BFFC-AF4D-44EA-BFC5-D93730D8D81C/2413/ExpedienteJudicial1.pdf>.

83. There is no dispute that President Zelaya intended to seek a constitutional provision allowing successive presidential terms, but he asserted that it was to benefit his successors in office. Joshua Goodman & Blake Schmidt, *Honduras Supreme Court Judge Defends President Ouster (Update I)*, BLOOMBERG, July 1, 2009, <http://www.bloomberg.com/apps/news?pid=20601086&sid=axGENUiy9yKs> (“Zelaya said yesterday he had no plans to seek re-election when his four-year term ends in January. In an interview with Spanish newspaper El Pais the day before his overthrow, he said the non-binding vote, which included a question on allowing re-election, would only benefit his successor.”).

84. The Constitution of Honduras limits a president to one term in office and prescribes the remedy for attempts to serve beyond that:

Art. 239: The citizen who has played the title of Executive Power may not be President or Vice-President of the Republic. The [person] who broke this provision or proposes its reform, as well as those who support directly or indirectly, cease immediately in the performance of their respective positions and will be disqualified by ten years for the exercise of public office.

Art. 240: [The following] may not be elected President . . . of the Republic:

The Secretaries and Sub-Secretaries of State, . . . *Presidents*, . . . *Vice-Presidents* . . . who have exercised their functions during the year preceding the date for electing the President of the Republic.

HOND. CONST. arts. 239–40 (emphasis added).

85. Article V of the Constitution of Honduras contains a provision detailing the procedure for referendums and plebiscites and declares the Supreme Electoral Tribunal as the legitimate authority to hold said petitions. Only Congress is competent to recognize and discuss petitions for plebiscite or referendum. *Id.* art. V.

86. Miguel A. Estrada, Op-Ed., *Honduras’ Non-Coup: Under the Country’s Constitution, the Ouster of President Manuel Zelaya was Legal*, L.A. TIMES, July 10, 2009, at A29, *available at* <http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10>.

87. Letter from Seventeen U.S. Senators to Hillary Clinton, U.S. Sec’y of State (July 8, 2009) (on file with author), *available at* http://demint.senate.gov/public/_files/2009-07-08_Letter_to_Clinton_on_Honduras.pdf [hereinafter Clinton Letter].

ordered that the military remove him from office and hold him for trial.⁸⁸ At trial, the Court forced him to answer claims that he abused the power of his office and violated the Constitution.⁸⁹ The Honduran Congress affirmed the Court's order of removal by a vote of 125-to-3 and installed Zelaya's constitutional successor as President.⁹⁰ The military took Zelaya into custody, but instead of holding him for trial, it sent him out of the country to avoid domestic turmoil.⁹¹

This case illustrates the difficulties of judicial review and enforcement of constitutional provisions imposing limits on the substance of amendments. The text of the Honduran Constitution is clear in its prohibition of efforts to alter the one-term limit on the presidency. The attorney general requested a ruling by the Court regarding the application of the provision to the activities of the President, and the Court had a duty to render a ruling. In doing so, the Court adhered strictly to the text of the Constitution and issued its ruling accordingly.⁹² Yet notwithstanding clear reliance upon constitutional text and Congressional approval of the Court's determination,⁹³ Honduras is experiencing civil unrest⁹⁴ and international condemnation.⁹⁵ Cultural experience and Honduran history explain the

88. Roberto Micheletti, Op-Ed., *The Path Forward for Honduras: Zelaya's Removal from Office was a Triumph for the Rule of Law*, WALL ST. J., July 27, 2009, at A15, available at http://online.wsj.com/article_email/SB10001424052970204886304574311083177158174-1MyQjAxMDA5MDEwMzExNDMyWj.html.

89. Clinton Letter, *supra* note 87.

90. *Id.*

91. Frances Robles, *Top Honduran Military Lawyer: We Broke the Law*, MIAMI HERALD, July 3, 2009, available at <http://www.miamiherald.com/1506/story/1125872.html>. As a consequence of this decision by the military, there is no clearly correct resolution of the current conflict. "If Zelaya returns, this essentially signals approval of his unconstitutional acts; if he is not allowed to return, then the unacceptable behavior of forcibly exiling a leader is given approval." Mel Martinez, *Other Views: Foundations of Democracy Being Dismantled*, MIAMI HERALD, July 13, 2009, at A15, available at 2009 WLNR 13282922.

92. The correctness of the Court's ruling that the Constitution did not allow amendment of the limits on presidential terms is not disputed. However, supporters of President Zelaya argue that he was not seeking to amend the Constitution but rather to replace it; and if removal was the proper remedy, it should have been done through impeachment. See Alberto Valiente Thoresen, *Why President Zelaya's Actions in Honduras Were Legal and Constitutional*, REBELREPORTS, July 1, 2009, <http://rebelreports.com/post/133319827/why-president-zelayas-actions-in-honduras-were-legal> (asserting that the coup leaders violated the Honduran Constitution, not the president).

93. "Most of the country's civilian leaders insisted that the president was legally deposed, a critical matter in judging the legitimacy of the de facto government today." Ombudsman, *Legal Analysis Lacking in Coup Coverage*, MIAMI HERALD, July 12, 2009, at L1, available at 2009 WLNR 13244817.

94. Juan Zamorano, *Honduras Lifts Curfew 2 Weeks After Military Coup*, ABC NEWS, July 12, 2009, <http://abcnews.go.com/International/wireStory?id=8064694>.

95. Press Release, Org. of Am. States, OAS Suspends Membership of Honduras (July 5, 2009), available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-

existence of a constitutional limitation on presidential terms.⁹⁶ This experience also explains the strong public reaction to pictures of an elected national president, clothed only in his pajamas, being hustled out of the country by members of the military. Similar experiences throughout South America explain domestic and international resistance to actions based on a judicial opinion enforcing a clear constitutional provision.⁹⁷

The United States does not have a similar history of military interference with the political branches of government. Nor have national constitutional crises involved judicial review of attempted amendments. This is not to say that constitutional decisions by the courts have not provoked political crises. Any student of American history can detail Jefferson's opposition to *Marbury v. Madison*,⁹⁸ Lincoln's refusal to accept the Court's ruling in *Dred Scott v. Sandford*,⁹⁹ Andrew Jackson's response to *Worcester v. Georgia*,¹⁰⁰ and

219/09; *General Assembly Condemns Coup in Honduras*, U.N. NEWS CTR., June 30, 2009, <http://www.un.org/apps/news/story.asp?NewsID=31314&Cr=honduras&Cr1=#>.

96. South American history is full of dictators who operated under the guise of having been democratically elected for multiple terms. David Luhnnow, José De Córdoba & Nicholas Casey, *The Cut of the Caudillo*, WALL ST. J., July 16, 2009, at W1, available at <http://online.wsj.com/article/SB10001424052970203547904574280023928652200.html>. Nicaraguan president Daniel Ortega recently announced his intention to seek amendment of the Nicaraguan Constitution, which prohibits presidents from serving consecutive terms and limits them to two, five-year terms overall. Jaime Daremblum, *Ortega Follows Zelaya*, WKLY. STANDARD, Aug. 12, 2009, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/842emmo.asp>.

97. Luhnnow, *supra* note 96.

98. Letter from Thomas Jefferson to Monsieur A. Coray (Oct. 31, 1823), in *THE WRITINGS OF THOMAS JEFFERSON* 480, 487 (Albert Ellery Bergh ed., 1905).

Experience, however, soon showed in what way [the courts] were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.

Id.

99. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *LINCOLN: SPEECHES AND WRITINGS 1859–1865*, at 215, 221 (Roy P. Basler ed., 1974).

“[I]f the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Id.

100. In response to the Court's ruling in *Worcester v. Georgia*, 31 U.S. 515 (1832), President Jackson is reported to have said, “Well, John Marshall has made his decision, now let him enforce it.” *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1158 (7th Cir. 1983).

Franklin Delano Roosevelt's efforts to expand the Court in the face of court rulings questioning the constitutionality of New Deal legislation.¹⁰¹ Yet with the exception of the Civil War, the constitutional branches of government have managed to resolve interpretative differences without violence. It is this informal process of adjustment that has resulted in the stability of this nation's constitutional order.

It is axiomatic to the American political order that the legislature makes the laws, the executive enforces the laws, and the judiciary interprets and applies the laws.

Repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if self-restraint is not exercised in the utilization of the power to negate the actions of the other branches.¹⁰²

Public confidence in the judicial branch is based upon its belief that the people have authorized the judiciary to rule upon disputes based upon the law and that the court rulings are unbiased applications of existing law. Destroy confidence in either of these propositions, and the authority of the court disappears.

V. CONCLUSION

In the American legal scheme, existing law controls the process of proposing new constitutional amendments but rarely controls the content. This means that judicial review has some role to play in the process of constitutional amendment,¹⁰³ but there is little constitutional

101. See *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce Clause and the Tenth Amendment. It may have been the eventual abandonment of that overly restrictive construction of the commerce power that spelled defeat for the Court-packing plan, and preserved the integrity of this institution . . . , but my Brethren today are transparently trying to cut back on that recognition of the scope of the commerce power. My Brethren's approach to this case is not far different from the dissenting opinions in the cases that averted the crisis.

Id. at 868 (Brennan, J., dissenting).

102. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

103. Even with a solid constitutional basis, as the Honduran experience illustrates, public perception of the legitimacy of the amendment process is not controlled by the judiciary, even when its opinion is solidly anchored to constitutional text and supported by another constitutionally established branch of government.

basis for substantive review.¹⁰⁴ As courts expand their constitutional review to encompass constitutional changes initiated by the people or other branches of government, they risk exceeding their constitutional authority. Large numbers of Americans no longer believe that the courts are applying the law in cases involving constitutional challenges; instead, they have come to believe that the courts are imposing the political preferences of judges.¹⁰⁵ This distinction between political and legal legitimacy is at the heart of the contemporary culture war over the role of courts. Based on a belief that courts are engaged in politics, rather than legal analysis, citizens are attempting to exert greater political control over those preferences through constitutional amendments¹⁰⁶ and increased involvement in judicial elections.¹⁰⁷ This is not a new phenomenon,¹⁰⁸ and it is a reasonable response to the perceived problem.

104. See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 442–43 (1997):

[C]riteria of amendment appropriateness surely must not be elaborated or enforced by courts—not because they fail to sound in principle as opposed to mere policy or prudence, and not because courts are less adept than Congress at detecting the “consensus” that some observers believe an amendment should reflect, but because allowing the judiciary to pass on the merits of constitutional amendments would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure. Such criteria must therefore be applied by Congress (or by a constitutional convention) when it considers whether to propose an amendment, and by state legislatures (or state conventions) when they vote on ratification. The merit of a suggested constitutional amendment is thus a true “political question”—a matter that the Constitution addresses, but that it nevertheless commits to judicially unreviewable resolution by the political branches of government.

105. See THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS (Mitchell S. Muncy ed., Spence Publ'g Co. 1997) (discussing the legitimacy of the Supreme Court).

106. The passage of constitutional amendments defining marriage in thirty-one states is an example of this.

107. See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997) (discussing the decisions of state supreme court justices on hot-button issues that consequently affect their re-election).

108. John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007).

[B]eginning in the 1830s and 1840s, most states have required judges to stand for elections of some sort. Although the motives for requiring judges to stand for competitive or retention elections are varied and disputed, one effect has clearly been to increase the degree of judicial accountability for the issuance of decisions and thereby constrain judges from issuing unpopular decisions. Additionally, constitutional amendments were adopted in various states in the Progressive Era and in subsequent years to constrain courts by permitting recall of judges (adopted by twelve states); by allowing recall of judicial decisions (in place in Colorado from 1912 to 1921); or by permitting judicial review only upon a super-majority vote of state

Yet, with notable exceptions, the organized bar seems oblivious to this public perception.¹⁰⁹ Rather than responding to public concerns over the accountability of judges, leaders of the legal profession have demanded greater public respect for the independence of courts.¹¹⁰ This is a bit like saying, “The answer to your belief that judges are out of control is to understand that judges should not be under any control”; such a response is hardly persuasive. Not surprisingly, these efforts have been largely unsuccessful.¹¹¹ Unless joined with serious discussions about judicial accountability, discussions of judicial independence merely reinforce public perceptions of the courts as political actors seeking to avoid political constraints.

In contrast to the opacity of the bar on this issue of growing public distrust, some recent court opinions can be read as offering a renewed commitment to judicial restraint.¹¹² If such a reading is correct, this bodes well for the renewal of Americans’ confidence in the courts and the return of control over political issues to the political branches. If, however, such opinions merely reflect a temporary ascendancy of judges holding conservative political and social views, it is likely that public efforts to exert political control over the courts will grow as liberals will come to share conservatives’ long-held discontent with expansive judicial review.

supreme court judges (as has been the case at some point in Ohio, North Dakota, and Nebraska, and as continues to be the case in the latter two states).

Id. at 985–86.

109. Justice Scalia’s dissent in *Planned Parenthood of Se. Pa. v. Casey* is one such notable exception. “The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Scalia, J., dissenting).

110. ABA COMM’N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY: REPORT OF THE COMM’N ON THE 21ST CENTURY JUDICIARY 74 (July 2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

111. See *Republican Party of Minn. v. White*, 536 U.S. 765, 786 (2002) (noting the ABA’s longstanding opposition to judicial elections).

112. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007) (rejecting pre-enforcement facial challenge to the federal partial-birth abortion ban); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (rejecting claims that the California marriage amendment violated the California Constitution).