THE DEAD HAND AND CONSTITUTIONAL AMENDMENT

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My remarks concern originalism and the problem of the "dead hand." I am explicitly offering an alternative to originalism, and identifying at least one intersection between most accounts of constitutionalism and originalism.

At a conference that I attended at Northwestern, I presented a "justice-seeking" account of constitutionalism in the United States. This approach recognizes the liberty-bearing provisions of the Constitution as general principles of political justice set out at a high level of generality, and it holds that the aim of constitutionalism is to bring us closer to achieving the conditions of political justice in the United States. The collaboration between popular constitutional decisionmaking and a detailed judicial articulation of liberty-bearing principles is a reasonably effective mechanism for moving the society closer to the conditions of political justice.

I say all of this for two reasons. The first is that I obviously have identified myself as something other than an originalist. The second reason is that my justice-seeking account of the Constitution actually does involve a story about originalism and needs to confront a problem about the dead hand. It is the issue of originalism and the claim of the dead hand that I want to talk about briefly. On the account that I have offered, it is not just an accident that our Constitution's most important liberty-bearing provisions speak at a high level of moral principle. On my account it is the combination of Article VII's[1] conditions for ratifying the Constitution and Article V's[2] conditions for amending the Constitution that have the important common element of making the Constitution difficult to launch and difficult to amend.

Articles VII and V reflect a certain stance in the drafting and amendment of the Constitution. This stance encourages the adoption of general principles that are acceptable to a diverse

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1. U.S. CONST. art. VII (requiring ratification of the Constitution by conventions in nine States).

2. U.S. CONST. art. V (allowing amendments to the Constitution by conventions or the state legislatures of three-fourths of the States, upon a proposal by either two-thirds of each House of Congress or by a convention called by two-thirds of the States).

population. Because of Article's V's resistance to change, thoughtful persons realize that they are installing provisions in their Constitution, not just for themselves today, but for themselves twenty-five years hence, and not just for themselves, but for their children and their children's children. Such people will be driven naturally both to sound principles of justice and, more importantly, to principles of justice that speak at a high enough level of generality that it makes sense to install them in an enduring Constitution.

Thus, in my view, Article V is a rather critical part of the Constitution. It might be seen as the Constitution's Constitution because it derives an outcome of constitutionalism that is important and attractive. It is important to press the view that Article V has a kind of enduring, stable, original meaning. Article V is, in fact, the exclusive mechanism for amendment, and it cannot be subverted by democratic majorities who hold a different view of how their government should be run.

Someone might think that this scenario does not pose a problem. After all, there is something very different between the broad principles of justice, such as due process and equal protection, and the mechanics of the Constitution, such as the provision that there be two representatives from each State in the Senate of the United States.[3] Someone might say that it is possible to be original about the latter—the mechanics—without being originalist about the former—the broad principles of justice.

I want to address a special objection to originalism in the Article V context that offers a particularly poignant version of the dead hand claim, and then I hope ultimately to reject that argument. This is by no means the only argument that is advanced in favor of the nonexclusivity of Article V. It is one argument that is peculiarly apt to this conference, and I also think that it is perhaps the strongest argument in favor of the nonexclusivity of Article V.

In essence, the argument goes like this: "In a democracy, the people own the government, and the government does not own the people. To treat Article V as exclusive and enduring is to deny the capacity of a democratic people to decide that their government has become inconvenient and inappropriately shaped. In an appropriately deliberative, reflective manner, the people

3. *See* U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . .").

decide that it is time to change. The straight jacket of Article V itself ought to be open to democratic revisiting and revision." This argument issues from the dead hand, in the spirit that precisely animates the claim about the dead hand. The argument says that Article V may be the Constitution's Constitution. The argument is most vulnerable to this objection because it insists that a people renounce their own democratic consensus if it does not assume Article V's shape and form.

The answer to this argument that I want to offer turns on the following problem. What do we mean by "the people" in this story? When we say that the people have the right to change their Constitution, what do we mean by that? What fraction of the people, and after what kind of deliberation? What procedure for resolving dissent among a population will we use to represent the people to displace Article V? In this sense it is interesting to recognize that the drafters of the Constitution had to invent a people. They were in a very peculiar situation because they had to devise the circumstances under which their Constitution would be ratified. The Framers could not turn to the people and ask for approval of their mechanism for ratification because they did not have a people, so they invented a people. Article V is appropriate and sound in large measure because it promotes the right kind of constitutional decisionmaking by the popular constitutional decisionmaker—the popular sovereign. Article V therefore promotes a constitutionalism that accomplishes the task that I believe should be its main purpose: to seek justice and just outcomes.

Another way of phrasing this proposition is that the claim that the people are entitled to change their government does not contain a placeholder for the people. There is no readily available placeholder for the people other than Article V. When individuals talk about "we the people" in constitutional theory, I want to reach for my wallet and hang on to it very tight. At most, We the People, whether it is put in capital letters or quotations, in every instance refers to a state of social dissent, measured by a given procedure, and in the claim that the people have the capacity to displace Article V or any other inconvenient part of their government, there is no placeholder for the idea of people other than Article V itself. In response, it might be argued that the story that I have told up to now cannot be completely true. It cannot be the case, conceptually, that a democratic people can

tie themselves up to any given mechanism like Article V, and then, if they eventually discover that in some way the mechanism is a grotesque error, they have no way to release themselves from their own prior formulation.

This objection is correct, but the circumstances of relief have to be both substantively and procedurally extreme. That is to say, to take the procedural question first, the circumstances that justify release from Article V must be widely acknowledged to exist within the society. Because we do not have a fact finder other than the people and we do not even have a people, we must reach a very broad consensus and understanding. Secondly, the circumstances substantively must be extreme. The circumstances of constitutional breakdown are characterized by a widespread belief that the Constitution's arrangements have become a serious obstacle to our ongoing governance. There also must be a view that Article V somehow poses an insuperable barrier to changing those constitutional arrangements, and that Article V poorly represents the people.

It is now logical to ask, which circumstances might ever justify the view that there has been a constitutional breakdown? The period prior to Reconstruction may have constituted a constitutional breakdown because Article V required a consensus among a supermajority of the States at the same time that the claim by a large group of States that a whole segment of American humanity was property became controverted by another large group of States. This condition of Article V paralysis constituted circumstances of constitutional breakdown.

The Framers may have believed that they were in circumstances of breakdown when they withdrew from the Articles of Confederation because they announced their capacity to disregard the legal circumstances for amending the Articles of Confederation and their respective state constitutions. At the same time, however, the Framers installed the Constitution, which announced to succeeding generations that the Constitution could only be changed under prescribed procedures. The question is, what did the Framers have in mind with this Janus-faced view about the circumstances of constitutional change?

The Framers might have thought that they were engaging in a bit of hypocrisy because they were telling us both that we could not change our Constitution, but of course we really could change our Constitution. This answer is not entirely satisfying. It

is necessary to differentiate between people such as the Framers who hold the view that there are limited circumstances in which one is prepared to step outside the governing law and launch a new government, and others who are willing to launch a new government even when the existing system is, on the whole, a successful constitutional regime.

These are the circumstances in which we find ourselves. Article V is a legitimate example of the dead hand, and it is quite crucial to a sound understanding of a constitutionalism which is not pervasively originalist.