

# STOPPING TIME: THE PRO-SLAVERY AND “IRREVOCABLE” THIRTEENTH AMENDMENT

A. CHRISTOPHER BRYANT\*

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In the post-secession winter of 1861, both Houses of Congress

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\* Associate Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. I thank Steven A. Bank, Tom W. Bell, Jay S. Bybee, Gabirel J. Chin, David P. Currie, G.M. Curtis, Richard A. Epstein, Charles L. Flynn, Jr., Morgan Frankel, Grant M. Hayden, Lynne N. Henderson, Steven F. Huefner, Steve R. Johnson, David Katz, Michael I. Krauss, David E. Kyvig, Margo M. Lambert, Saul Levmore, Neil Lloyd, Thomas B. McAfee, Alison Moore, Andrew P. Morriss, Erin A. O'Hara, Timothy J. Simeone, Erika Singer, and Carl Tobias for their insightful comments on prior drafts. Prior versions of this article were also presented and critiqued at the 1998 annual meeting of the American Society for Legal History and faculty workshops held at the Boyd School of Law, George Mason University School of Law, and Oklahoma City University School of Law. I thank the participants in those discussions for their many helpful comments as well. In addition, I am grateful to Amber Craig, Jason Fowler, Michael Saunders, and Andrew Spalding for excellent research assistance, and the James E. Rogers Research Grant Foundation for financial support. Remaining errors are, of course, mine alone.

approved a proposed thirteenth amendment to the U.S. Constitution. Three northern States even managed to ratify the proposal before the Civil War intervened. That version of the thirteenth amendment, introduced in the House by Representative Thomas Corwin of Ohio, purported to prohibit any future amendment granting Congress power to interfere with slavery in the States. The Congressional Globe volumes for the winter 1861 legislative session include rich debates about whether the amending power could be used to limit future exercise of that same authority. Those forgotten debates offer significant insights for modern controversies about the exclusivity of, and limitations on, the extraordinary power granted in Article V of the U.S. Constitution.

Not long ago the consensus among constitutional scholars was that, for better or worse, Article V of the U.S. Constitution was a dead letter.<sup>1</sup> But reports of Article V's demise have been greatly exaggerated, and the amending provision has more recently enjoyed something of a resurrection, both in Congress and among legal academics.<sup>2</sup> In the last decade Article V has served as an outlet for widespread discontent with Supreme Court decisions protecting flag-burning, prohibiting prayer in public schools, and voiding congressional term limits. These are only the most recurrent and high-profile examples of a growing political trend toward employing constitutional amendment as a means to address divisive and vexing national issues. Indeed, the proliferation of proposed constitutional amendments introduced in Congress has raised questions about whether they reflect a dangerous disrespect for our existing constitutional order.<sup>3</sup>

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1. As Philip Kurland put it in a 1966 essay on the amending provision, given that the U.S. Supreme Court effectively "exercised a veto power over the actions of the state legislatures, executives, and judiciaries" under a broad reading of the Civil War Amendments, and had for even longer asserted a similar prerogative with respect to the coordinate branches of the federal government, the Article V amendment process had as a consequence been rendered "all but superfluous." Philip B. Kurland, *Article V and the Amending Process*, in AN AMERICAN PRIMER 130, 132 (Daniel J. Boorstin ed., 1966).

2. To be sure, notwithstanding renewed congressional and academic interest in Article V, some scholars still adhere to Professor Kurland's assessment (see *supra* note 1) of that provision's significance. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1505 (2001) (asserting that "our constitutional order would look little different if a formal amendment process did not exist"); but see Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247 (2002).

3. See, e.g., John Conyers, Jr., *Is the United States Constitution a "Rough Draft"?* An Open Letter to the 105<sup>th</sup> Congress, 6 WIDENER J. PUB. L. 323 (1997); *Constitutional Pollution . . .*, WASH. POST, Apr. 20, 1998, at A18; David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in UNINTENDED

No doubt these recent invocations of Article V are in part responsible for the recent outpouring of academic writing on the amending power. Salient examples of this scholarship are the works of Yale Law School Professors Bruce Ackerman and Akhil Amar, who have raised distinct challenges to the claim that Article V constitutes the sole legitimate means for constitutional revision.<sup>4</sup> Their imaginative and controversial work has in turn prompted vigorous debate among constitutional scholars, political scientists, and historians about the role Article V can and should play in our constitutional order.<sup>5</sup>

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CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 9 (David E. Kyvig ed., 2000). Though none of these most recent proposals for a constitutional amendment has won the super-majorities needed to escape Congress, the 1992 ratification of the Twenty-seventh Amendment has apparently changed our shared constitutional text, notwithstanding significant constitutional questions about the elapse of time between its proposal and adoption. Not surprisingly, this amendment's unique history has produced a rich academic literature concerning the amending power. See, e.g., Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 *FORDHAM L. REV.* 497 (1992); Stewart Dalzell & Eric J. Beste, *Is the Twenty-seventh Amendment 200 Years Too Late?*, 62 *GEO. WASH. L. REV.* 501 (1994); Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 *CONST. COMMENT.* 593 (2000); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-seventh Amendment*, 11 *CONST. COMMENT.* 101 (1994); JoAnne D. Spotts, Note, *The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 *GA. ST. U. L. REV.* 337 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 *YALE L.J.* 677 (1993); William Van Alstyne, *What Do You Think About the Twenty-seventh Amendment?*, 10 *CONST. COMMENT.* 9 (1993).

4. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* 5-6 (1998); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457 (1994) [hereinafter Amar, *Consent of the Governed*]; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*]; Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 89 (Sanford Levinson ed., 1995) [hereinafter Amar, *Popular Sovereignty*].

5. See, e.g., DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION* xi (1996) (explaining that the book's thesis developed in part in response to Professor Ackerman's work); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 *TENN. L. REV.* 155, 186-93 (1997) (critiquing positions espoused by Ackerman and Amar); Carlos E. Gonzalez, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 *WASH. U. L.Q.* 127, 234 (2002) (advancing a "dual-source thesis" concerning the relative force of different constitutional amendments, which "neatly complements the current literature on Article V;" expressly referencing the works of Ackerman and Amar); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 *U. CHI. L. REV.* 375 (2001) (responding to Professor Ackerman's challenge to defend the ratification of the Thirteenth and Fourteenth Amendments as consistent with the requirements of Article V); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 *U. PA. J. CONST. L.* 609, 615-16 (2000) (criticizing Amar's

As voluminous as the recent Article V scholarship has been, at least one fundamental question has gone virtually unnoticed: what, if anything, prevents or limits the use of Article V to make procedural or substantive changes to the amending power itself? This question presents problems of the greatest theoretical difficulty. One might be tempted to dismiss the question as merely academic or historical, but a constitutional amendment proposed in the 106th Congress would have authorized two-thirds of the State legislatures to propose future amendments, which would, in turn, be referred back to the States for ratification unless two-thirds of both Houses of Congress voted to kill the proposals.<sup>6</sup> The question whether the amending power could be employed to amend the amending power was posed even more starkly by Mr. Corwin's 1861 proposal.

This article uses that Civil War-era proposal as a lens through which to study the tension between the claim that Article V articulates the exclusive procedure by which the Constitution may be amended and our nation's historical commitment to the ideal that the people are sovereign. Revisiting the long-forgotten Corwin Amendment illuminates current debates about the legal and political theory by which the U.S. Constitution can set forth the sole means for its revision. By understanding why the Corwin Amendment would have failed in its stated purpose (because a subsequent Article V amendment would have been sufficient to repeal it and grant Congress power over slavery), we discover certain fundamental constitutional principles. Those principles, important in their own

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interpretation of Article V); Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 91 n.402 (1999) (relying on Professor Ackerman's analysis of the Reconstruction-Era Amendments); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 726, 794 (2002) (responding to theses of Amar and Ackerman); Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (challenging Professor Amar's conclusions about the amending power). See also Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1042-53 (2000) (detailed analysis of the text and history of Article V); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993) (developing an economic theory of the Article V amendment process); *infra* notes 230-70 and accompanying text (applying lessons of the Corwin Amendment to debates in contemporary legal literature).

6. H.R.J. Res. 29, 106th Cong. (1999). See Guy Gugliotta, *A Noble Attempt to Amend the Constitution*, THE WASH. POST, July 1, 1997, at A17 (discussing prior version of proposed amendment); see also *infra* note 226. Whether a constitutional amendment may prohibit future amendments is also a subject of present controversy in Cuba. See Mary Jordan, *Castro Takes a Page From Foes' Playbook: Cuban Leader Counters Dissidents With Petition*, WASH. POST, July 25, 2002, at A15.

right, also raise novel questions concerning the contemporary claims of Professors Ackerman and Amar that Article V cannot be the exclusive procedure for legitimate constitutional change.

The first part of this article examines Article V's background, uncovering the founding generation's understanding of the relationship between popular sovereignty and the people's ability to amend or supplant an existing constitution. Part II places the Corwin Amendment in its historical context, which is essential to an appreciation of the legislative debates concerning the proposal. Part III explores those debates, gleaning insights from the amendment's advocates and opponents. Part IV argues that the Corwin Amendment could have been repealed by a subsequent amendment, like any other constitutional provision not expressly excluded from Article V's compass by the Article itself. The final part of this article discusses the contemporary significance of this historical conclusion for recent assertions by prominent scholars that Article V should be seen as but one among many ways to amend the Constitution.

#### I. EXTRALEGAL AUTHORITY AND THE CREATION OF ARTICLE V

In his 1796 Farewell Address, George Washington observed that "[t]he basis of our political systems is the right of the people to make and to alter their constitutions of government."<sup>7</sup> His reflection touches upon three ideas essential to an understanding of American constitutionalism in general and the Article V amending power in particular.

First, the revolutionary and founding-era generations of Americans were fiercely committed to the idea of "popular sovereignty," that the people themselves were sovereign and the powers of government derived from their consent.<sup>8</sup> Second, "the right . . . to make and to alter" forms of government reflected the founding era's assumption of a right of revolution, which achieved perhaps its most refined expression in the Declaration of Independence and its most memorable manifestation in the War for Independence. Finally, long before 1787, Americans had taken the extraordinary step of enshrining in written constitutions the means for their amendment at

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7. George Washington, Farewell Address, (1796), *reprinted in AN AMERICAN PRIMER* 192, 199 (Daniel J. Boorstin ed., 1966).

8. *See generally* EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

both the state and federal levels.<sup>9</sup> In so doing, it has been argued, “Americans had in fact institutionalized and legitimized revolution.”<sup>10</sup>

Indeed, the first constitution of the United States, the Articles of Confederation, has been characterized as “a constitutional expression of the philosophy of the Declaration of Independence.”<sup>11</sup> One place where the relationship between these two documents is most evident is in Article XIII of the Articles of Confederation, which declared both that “the Union shall be perpetual,” and that the Articles could be altered by “agree[ment] [] in a Congress of the United States, and [] afterwards confirm[ation] by the Legislature of every State.” This amending provision—part of the original, so-called Dickinson draft of the Articles—provoked relatively little controversy when the Articles were drafted and adopted.<sup>12</sup> But it proved the cause of our first federal constitution’s relatively brief tenure. As dissatisfaction with the efficacy of the Articles government mounted, and proposals for change fell victim to the unanimity requirement for state ratification, “the Confederation rapidly came to be seen as not only unsatisfactory in practice but also impossibly difficult to reform.”<sup>13</sup>

Throughout the first five years of life under the Articles, numerous proposed amendments foundered upon the shoals of Article XIII’s unanimity requirement, culminating in the fall 1786 recommendation by the woefully incomplete Annapolis convention that a new constitutional convention be held in Philadelphia the following

9. See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 25 (1992). As Professor Kyvig has observed:

Unwilling to accept the notion that the terms of government were unchangeable except by revolution yet indisposed to treat the fundamental directives to and limitations on government as ordinary law susceptible to reform by simple parliamentary majority, some states began working out arrangements by which their new constitutions could be changed . . . . Although methods varied, most states sought to ensure that amendment could be achieved only when a broad consensus, a supermajority of the sovereign people or their representatives, agreed to a change.

KYVIG, *supra* note 5, at 30.

10. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 614 (W.W. Norton & Co. 1993) (1969). See also VILE, *supra* note 9, at 27, 31. In the words of Dr. Jarvis, uttered in debate during the Massachusetts ratifying convention: “In other countries, sir, —unhappily for mankind, —the history of their respective revolutions has been written in blood; . . . When we shall have adopted the Constitution before us, we shall have in this article an adequate provision for all the purposes of political reformation.” 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 116 (Ayer Co. 1987) (Jonathan Elliot ed., 1836).

11. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 239 (1940).

12. See *id.* at 138-39.

13. KYVIG, *supra* note 5, at 37.

spring.<sup>14</sup> As the antifederalists would delight in pointing out during the state ratifying conventions, the resolution of the Confederation Congress authorizing the Philadelphia convention both incorporated by reference the Article XIII amendment procedures and purported to limit the convention's authority to

the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.<sup>15</sup>

Nevertheless, a majority of the delegates to the Philadelphia convention would eventually conclude that the power to amend the Articles of Confederation necessarily included the power to replace them altogether and, further, that ratification by conventions in nine states would be sufficient to establish a new constitution among them.<sup>16</sup>

This self-conscious departure from both the convention's authorizing resolution and the procedures for amendment under Article XIII of the Articles of Confederation was "arguably the most revolutionary act of the Philadelphia convention."<sup>17</sup> The Philadelphia convention rested its authority on neither its authorizing resolution nor on the procedures for amendment set forth in the Articles but rather relied upon, in the words of James Wilson of Pennsylvania, "the original powers of Society."<sup>18</sup> As Wilson explained, "[t]he House on fire must be extinguished, without a scrupulous regard to ordinary rights."<sup>19</sup> Professor Richard Kay has observed that the "illegality [of the Constitution of 1787] is indeed a paradox and not a contradiction.

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14. See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION* 399-421 (1950).

15. 3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 13-14 (3d. ed. 1966).

16. See U.S. CONST. art. VII.

17. KYVIG, *supra* note 5, at 42.

18. 2 Max FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 469 (3d. ed. 1966).

19. *Id.* For opposing views on the "legality" of the Constitution, compare Amar, *Popular Sovereignty*, *supra* note 4, at 92-103, with ACKERMAN, *FOUNDATIONS*, *supra* note 4, at 41-42. Notably even Professor Amar, who forcefully rejects the claim that the Philadelphia convention acted "illegally," characterizes Article VII of the Constitution as "undeniably inconsistent" with Article XIII of the Articles of Confederation. Amar, *Popular Sovereignty*, *supra* note 4, at 93. See also Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57 (1987) (concluding that the Constitution of 1787 "was itself the product of a blatant and conscious illegality").

For it is exactly its break with prior legality that invested the Constitution with the power it still exercises over us . . . .<sup>20</sup>

In other words, the power of the Philadelphia convention to propose the new constitution (and that of nine state ratifying conventions to ratify it) stemmed not from the positive-law grant of authority reflected in the thirteenth Article of the Articles of Confederation, but rather directly from the natural rights of revolution and political self-determination.<sup>21</sup> Like the Stamp Act and Continental Congresses that had come before it, the Philadelphia convention was an extralegal body, in that it operated outside the boundaries established by the existing fundamental law.<sup>22</sup> The convention's work product would be judged not by its procedural adherence to established forms but rather according to whether it succeeded in its attempt to exercise an "unalienable Right[]" of "all Men"—specifically, the "Right of the People to alter or abolish" an existing government and "institute" a new one more "likely to effect their Safety and Happiness."<sup>23</sup> The framers ultimately relied on the people, acting in state ratifying conventions, to invest the proposed Constitution with this popular authority.<sup>24</sup> Moreover, as the framers' very basis for invoking this "Right" was that it had not been, because it could not be, surrendered, the Constitution, like the Articles of Confederation before it, remains perpetually subject to an appeal to this ultimate source of political and legal authority.<sup>25</sup>

Following the example of the Articles of Confederation and many

20. Kay, *supra* note 19, at 57-58; see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 130 (1996) ("[T]he resort to popular sovereignty in 1787-88 marked the point where the distinction between a constitution and ordinary law became the fundamental doctrine of American political thinking. Far from being less legal than the other charters that had gone before it, the Constitution established a more profound criterion of legality itself.").

21. See RAKOVE, *supra* note 20, at 105 (noting that the framers justified their failure to comply with the Articles of Confederation amendment procedures by invoking principles of popular sovereignty); Kay, *supra* note 19, at 71 (noting that the "principle upon which the advocates of the Constitution relied was, above all, the sovereignty of the people").

22. See WOOD, *supra* note 10, at 102, 314-19, 354.

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. See RAKOVE, *supra* note 20, at 105-06 (arguing that the framers chose to submit the Constitution to state *conventions* rather than state *legislatures* for ratification largely because the former would more clearly be endowed with the authority provided by resort to "revolution principles").

25. Cf. RAKOVE, *supra* note 20, at 107 ("[T]he precedent set at Philadelphia proved that deference to prescribed forms need not prevail during an appeal to "first principles."); Kay, *supra* note 19, at 75, 80 (observing that "legitimacy turns on the acceptability of the substance and origins of a pre-constitutional rule to participants in the legal system" and that "that acceptability is always a current acceptability"; "[i]n this respect we are always in a situation like the one that confronted the founders in 1787-89").

of the state constitutions of the founding era, the Constitution likewise included express procedures for its own revision. Introduced at the outset of the Philadelphia convention, the Virginia plan proposed that "provision ought to be made 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>26</sup> The suggestion that congressional assent ought to be unnecessary for an amendment sparked controversy when first debated by the full convention, and resolution of the question was postponed.<sup>27</sup> Other matters occupied the delegates' attention until September 10, 1787, when they debated the Committee on Detail's succinct proposal that, "[o]n the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the U.S. shall call a Convention for the purpose."<sup>28</sup> Alexander Hamilton then argued that the national legislature ought also to be empowered to propose amendments, as "[t]he State Legislatures will not apply for alterations but with a view to increase their own powers."<sup>29</sup> On the other hand, he insisted, "The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention."<sup>30</sup> After the delegates voted in favor of a three-fourths threshold for ratification by the states, Madison proposed language that more closely anticipated the final product.<sup>31</sup>

With an acceptable framework largely in place, the Convention then turned to proposed limits on the scope of the amending power. John Rutledge of South Carolina insisted that "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>32</sup> Thus, a proviso that those clauses of Article I relating to

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26. 1 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 22 (3d. ed. 1966). See generally KYVIG, *supra* note 5, at 55-63 (discussing the framing of Article V of the U.S. Constitution); RAKOVE, *supra* note 20, at 91 (same).

27. 1 FARRAND, *supra* note 26, at 202-03.

28. 2 FARRAND, *supra* note 18, at 557; see also RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* (1988) (providing a systematic examination of the history and operation of the national convention clause of Article V); Paulsen, *supra* note 3, at 733-60 (addressing riddles raised by the national convention clause of Article V).

29. 2 FARRAND, *supra* note 18, at 558.

30. *Id.*

31. *Id.* at 559.

32. *Id.*

the slave trade could not be amended prior to 1808 was added to Madison's proposal, which then won the Convention's approval.<sup>33</sup>

The debate had yet to conclude, however, for five days later Roger Sherman of Connecticut, fearful "that 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," advocated an extension of "the proviso in favor of the States importing slaves . . . so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate. . . ."<sup>34</sup> After Sherman's proposal was defeated,<sup>35</sup> Gouverneur Morris moved "to annex [to Article V] a further proviso—that no State, without its consent shall be deprived of its equal suffrage in the Senate."<sup>36</sup> According to Madison's notes, that "motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."<sup>37</sup> Thus, the final text of the Constitution's amending article emerged from the convention as follows:

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>38</sup>

The decision to include in the Constitution a procedure for its own revision figured prominently not only in the Philadelphia convention but also in the ensuing state ratification debates. Indeed, the historical record strongly suggests that some procedure for amendment was necessary for ratification of the Constitution. The inclusion of Article V provided the proponents of ratification with a powerful rhetorical

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33. *Id.*

34. *Id.* at 629.

35. *Id.* at 630.

36. *Id.* at 631.

37. *Id.*

38. U.S. CONST. art. V.

tool, arming them with the response of last resort that any defects in the Constitution could be swiftly remedied after ratification.<sup>39</sup> The state ratifying conventions in New Hampshire, Massachusetts, New York, Virginia, and South Carolina all proposed extensive revisions for the consideration of the First Congress.<sup>40</sup> And of course this powerful political impetus for amendment of the new Constitution was reflected in the swift adoption of the Bill of Rights. As Elbridge Gerry of Massachusetts put the matter during debate in the First Congress, Article V was to the founding generation "the most important clause in the Constitution [], and one without which, I will be bold to say, this system of Government would have never been ratified."<sup>41</sup>

Like the Philadelphia convention's replacement of the Articles of Confederation unanimity requirement with the less onerous Article VII procedures for ratification, the Article V procedures for future amendment, including the substantive limitations on the scope of the amending power, reflected the delegates' understanding of their role as extralegal. Like the power to depart from the Articles of Confederation procedures for amendment, the power to prescribe positive-law procedures for future constitutional change was implicitly rooted in an appeal to "the original powers of Society," to use the words of James Wilson. The prevailing ideology also compelled the conclusion that this awesome and revolutionary authority of the sovereign could not be alienated. Thus the new Constitution, like the Articles of Confederation whose place it usurped, would forever be subject to an analogous appeal to that ultimate authority.<sup>42</sup>

Article V, however, provided a more regularized and stable method of constitutional evolution than resort to the mysterious and extralegal authority invoked by the Declaration of Independence and the

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39. See KYVIG, *supra* note 5, at 66.

40. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 14-28 (Helen E. Veit et al. eds., 1991).

41. 1 ANNALS OF CONGRESS 523 (1789).

42. Cf. RAKOVE, *supra* note 20, at 107; Kay, *supra* note 19, at 75, 80. To be sure, Madison recoiled from Jefferson's radical proposal that every constitution and every law naturally expire with the passage of nineteen years. See Denning, *supra* note 5, at 172-74 (discussing famous Jefferson-Madison correspondence on the subject). But Madison never repudiated his many prior assertions that popular sovereignty was the ultimate source of all legitimate political authority. See KYVIG, *supra* note 5, at 128-30. Rather, more mindful of practical considerations and the need for social stability, Madison merely adhered to the received notion that popular consent could be tacit as well as express. See Denning, *supra* note 5, at 174.

founders of the Constitution. Thus, future generations of U.S. citizens would be presented with what could be termed an election of constitutional remedies. A decision to forsake the extralegal power invoked in the American revolution and Philadelphia convention, and instead rely on the authority provided by compliance with the positive commands of Article V, would not only offer the shelter of normality but also subject the effort to the limits, both explicit and implicit, imposed by the founders on the Article V amending power. With a view to the conundrum presented by the Corwin Resolution, future generations could use Article V to make an unamendable amendment only if the founders granted this power to future generations. It is to that question I will return after a discussion of the debates in Congress over the Corwin Resolution.

But before jumping ahead to the secessionist winter of 1861, one more telling exchange from the founding era bears notice. That the founders of the Constitution understood themselves to be exercising extraordinary power, which enabled them to set the positive-law amendment procedures for future generations, is powerfully evidenced by James Madison's comments during the First Congress. Answering the application of the Virginia ratifying convention requesting that the First Congress, much like the Articles Congress that had preceded it, call a convention to propose amendments to the new Constitution, Madison argued that under Article V, "Congress had no deliberative power with respect to a convention; for whenever two thirds of the states should apply, they were bound to call one; but till this concurrent application took place, they had no power whatever to enter into the subject . . ." <sup>43</sup> Thus, Madison denied to his fellow Virginians the very power he as the "father of the Constitution" had relied upon not two years before. In so doing, he implicitly distinguished between constitutional amendment under Article V, which required strict adherence to form, and the appeal to "original powers of Society" that had justified creation of the Constitution itself.

## II. HISTORICAL CONTEXT OF THE CORWIN AMENDMENT

Before the Thirteenth Amendment of 1865, the United States nearly adopted a very different thirteenth amendment in 1861. The story of that thirteenth amendment begins on December 3, 1860,

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43. CREATING THE BILL OF RIGHTS, *supra* note 40, at 58.

when a lame-duck session of Congress assembled in the Capitol to address a pressing sectional and constitutional crisis. Throughout the prior eleven months, southern political leaders had made it clear that the election of Abraham Lincoln would be anathema, and immediately following his narrow victory the deep South acted swiftly on its threats. By February 1861, seven "gulf" states had seceded from the Union and formed the Confederate States of America.<sup>44</sup> Eight southern, slave-holding states remained in the balance, waiting on the resolution of compromise efforts before deciding whether to stay with the Union or go with the Confederacy. Entrenched in Springfield until his March 4 inauguration, Lincoln refused to offer the South a conciliatory gesture, declaring that any statement intended to reassure the South "would make me appear as if I repented for the crime of having been elected, and was anxious to apologize and beg forgiveness."<sup>45</sup> Any hope for compromise therefore depended on congressional leadership.

Of course Congress had a history of narrowly averting crises over sectional disputes. But in 1861 a new generation of congressional leaders struggled to replace the great statesmen—such as John C. Calhoun, Henry Clay, and Daniel Webster—who had been largely responsible for earlier compromises.<sup>46</sup> Moreover, past compromises had resolved problems that Congress had initiated.<sup>47</sup> The crisis of 1860 was bigger than Congress, however. In the Election of 1860, voters in the North had pressed the South on the issue of slavery in the territories<sup>48</sup> and challenged the South to live up to its threat of

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44. See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 442, 498-99 (1976) [hereinafter POTTER, *IMPENDING CRISIS*]; David M. POTTER, *LINCOLN AND HIS PARTY IN THE SECESSION CRISIS 20-74* (1942) [hereinafter POTTER, *LINCOLN AND HIS PARTY*].

45. 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 151-52 (Roy P. Basler ed., 1953) [hereinafter 4 *WORKS OF LINCOLN*].

46. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 101-02 & 119-20 (discussing roles Calhoun, Clay, and Webster had played in the Compromise of 1850).

47. Congress had created past crises by considering controversial legislative proposals. For example, the crisis of 1820 grew out of a House bill that would have admitted Missouri to the Union on the condition that it gradually abolish slavery. Similarly, the crisis of 1850 was, at least in part, the product of the Wilmot proviso, which would have prohibited slavery in any territory acquired from the War with Mexico. See ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 262-67 (6th ed. 1983); WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY* 69-102 (1987); GLYNDON VAN DEUSEN, *WILLIAM HENRY SEWARD* 238-54 (1967); POTTER, *IMPENDING CRISIS*, *supra* note 44, at 522 (noting that, prior to 1860, congressional resolution of such crises "had been largely a matter of internal management.").

48. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 544 (1978); POTTER, *IMPENDING CRISIS*, *supra* note 44, at 522; POTTER, *LINCOLN AND HIS PARTY*, *supra* note 44, at 1-19.

secession.

It was in this context that, during the Winter of 1861, the Second (lame-duck) Session of the Thirty-sixth Congress considered a number of compromise measures. In the tradition of his predecessor Henry Clay, another Kentucky Whig, Senator John J. Crittenden presented an Omnibus package of constitutional amendments, offered in an attempt to placate the South.<sup>49</sup> The first and most controversial of Crittenden's seven proposed amendments would have reinstated the Missouri Compromise with a vengeance. It provided that all U.S. territory then held or thereafter acquired would be free if north of latitude 36° 30' and slave if south of that line. Thus, it extended the Missouri Compromise line to the Pacific and positively guaranteed slavery south of that dividing line. This proposal repudiated the Republican party's platform, which declared that Congress had plenary power over slavery in the territories and should use that power to forbid the expansion of slavery.<sup>50</sup> Accordingly, some Republicans argued that Crittenden's proposed amendments asked the Republican party to renounce its victory on this issue in the Election of 1860.<sup>51</sup>

Crittenden's other proposed amendments would have protected slavery in the District of Columbia, prevented Congress from prohibiting interstate transportation of slaves, and directed Congress to provide compensation to slave owners who were unable to recover fugitive slaves because of abolitionist "violence or intimidation." The Crittenden Resolutions also provided that these amendments could not later be repealed or amended. The focus of much effort, the Crittenden Resolutions never received the necessary two-thirds in either House.

While the Crittenden Resolutions have appropriately been the subject of extensive scholarly commentary, legal historians have largely ignored<sup>52</sup> the history of another proposed amendment that

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49. The Crittenden Resolutions were reprinted at CONG. GLOBE, 36th Cong., 2d Sess. 1368 (1861).

50. Reinstating the 36° 30' line also defied the holding of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), in which the Supreme Court struck down the Missouri Compromise. For further discussion of *Dred Scott* and its aftermath, see *infra* notes 63-94 and accompanying text.

51. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 523, 526-27.

52. Two exceptions are Raymond Diamond, *No Call to Glory: Thurgood Marshall's Thesis On the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 128-130 (1989) (discussing briefly the Corwin Resolution as indicative of the Constitution's moral flaws); Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 276-278 (1996) (touching on the

actually passed both Houses with the necessary two-thirds and was ratified by three states.<sup>53</sup> That proposal (hereinafter referred to as the Corwin Resolution or Amendment)<sup>54</sup> provided that: "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>55</sup> Historically, the Corwin Resolution provides insight into the nature of the political debate that divided the country in 1860.<sup>56</sup> It also sheds light on the motives of the framers of the Thirteenth Amendment.

The Corwin Resolution is also of enduring legal significance because it was an unprecedented attempt to use Article V of the Constitution to shelter forever a subject from subsequent Article V amendments. Debate on the Corwin Resolution, especially in the Senate, focused on whether one set of Article V actors could bind the hands of a future set of Article V actors. Members of Congress presented competing views regarding the efficacy of the proposed amendment. Their comments raised fundamental questions about how the U.S. Constitution, or any constitution, sustains its legitimacy.

To understand the historical and constitutional significance of the Corwin Resolution, one must recall that Congress' power over slavery in the territories dominated political debate in the decade before the Civil War.<sup>57</sup> In 1850, Congress narrowly avoided secession and war with an Omnibus Compromise,<sup>58</sup> which proved to be nothing more

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historical context and theoretical issues raised by the Corwin Resolution).

53. Recently two political scientists have written insightfully about issues raised by the Corwin Resolution's claim to permanency. See WILLIAM F. HARRIS, *THE INTERPRETABLE CONSTITUTION 188-91* (1993); Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 215 (Sanford Levinson ed., 1995). These works are discussed *infra* in notes 217 & 224 and accompanying text.

54. Although Senator Seward was the first to draft and propose a version of the Resolution, Representative Corwin, head of the special House committee on sectional compromise, was responsible for the language of the final version and for shepherding the Resolution through the House. See HENRY H. SIMMS, *A DECADE OF SECTIONAL CONTROVERSY: 1851-1861*, at 226 n.19 (1942); POTTER, *IMPENDING CRISIS*, *supra* note 44, at 550; VAN DEUSEN, *supra* note 47, at 237-45.

55. CONG. GLOBE, 36th Cong. 2d Sess. 1364 (1861).

56. See Harold M. Hyman, *The Narrow Escape from a "Compromise of 1860": Secession and the Constitution*, in *FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER* 156 (Harold M. Hyman and Leonard W. Levy, eds., 1967).

57. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); SIMMS, *supra* note 54, at 46.

58. See FEHRENBACHER, *supra* note 48, at 157-77.

than a temporary settlement between the sections.<sup>59</sup> The issue of Congress' power over slavery in the territories resurfaced in 1854.<sup>60</sup> When the Kansas-Nebraska Act extended the doctrine of popular sovereignty north of the Missouri Compromise line, the issue recaptured the country's energy and imagination in 1856, and violence erupted in "bleeding Kansas."<sup>61</sup> At the same time, the frequency and intensity of by-then-familiar pleas for judicial resolution of that issue increased.<sup>62</sup> The Supreme Court answered those requests with its decision in *Dred Scott v. Sanford*.<sup>63</sup>

In *Dred Scott* the Court reached out to resolve the issue of Congress' power over slavery in the territories in an attempt to remove it from politics.<sup>64</sup> A black slave,<sup>65</sup> Dred Scott, sued for his freedom in federal court, asserting jurisdiction based on diversity of citizenship.<sup>66</sup> Scott alleged that he was a Missouri citizen and that a New York citizen, the defendant, wrongfully claimed to own him.<sup>67</sup> After the Circuit Court heard the case and returned a verdict against Scott, he took his case to the Supreme Court on a writ of error.<sup>68</sup>

Chief Justice Taney's opinion for the Court<sup>69</sup> concluded that Scott

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59. One historian has labeled the so-called Compromise of 1850 a mere "armistice" instead of a true compromise. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 90.

60. See Albert L. Brophy, Note, *Let us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 194 (1990) (providing an account of the legal history of American slavery).

61. On this dramatic series of events in the 1850s, see POTTER, *IMPENDING CRISIS*, *supra* note 44, at 199-225. See also KELLY, HARBISON & BELZ, *supra* note 47, at 273-77.

62. In his 1857 inaugural address, President Buchanan called on the country to "cheerfully submit" to the Court's impending decision regarding Congress' power over slavery in the territories. After all, the issue was "a judicial question, which legitimately [belonged] to the Supreme Court of the United States." Buchanan intimated that the Court was ready to hand down an opinion that would "speedily and finally" settle the matter. See KELLY, HARBISON & BELZ, *supra* note 47, at 278 (quoting President Buchanan's inaugural address).

63. 60 U.S. (19 How.) 393 (1857). For an excellent, brief overview and analysis of the decision, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 263-73 (1985).

64. See Paul Finkelman, *The Dred Scott Case, Slavery, and the Politics of Law*, 20 HAMLINE L. REV. 1, 33-34 (1996) (discussing Chief Justice Taney's political strategy and its impact). Admittedly, the Supreme Court was under extreme pressure to do so. See FEHRENBACHER, *supra* note 48, at 208.

65. See Finkelman, *supra* note 64, at 6 (Scott's biography).

66. For an explanation of the unusual circumstances which allowed Scott to establish diversity jurisdiction, see Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 512 (1997); Finkelman, *supra* note 64, at 18.

67. *Scott*, 60 U.S. at 400.

68. *Id.*

69. That is, the Chief Justice's opinion purported to speak for the Court. Each Justice wrote a separate opinion, however, and four Justices of the seven-member majority

could not sue for two independent reasons: he was black,<sup>70</sup> and he was a slave.<sup>71</sup> To get to the latter conclusion, Taney held that Congress had only limited powers over the territories<sup>72</sup> and that the Fifth Amendment's due process clause protected property in slaves against congressional interference.<sup>73</sup> According to Chief Justice Taney, Congress was unable either to exclude slavery from a territory or to authorize a territorial legislature to do the same.<sup>74</sup> Over strong dissents by Justices Curtis<sup>75</sup> and McLean,<sup>76</sup> the Court struck down the Missouri Compromise and recognized a positive constitutional right to slavery<sup>77</sup> in the territories for the first time in the history of the Republic.<sup>78</sup>

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apparently disposed of the case on somewhat narrower grounds than did Taney's opinion. Accordingly, legal "historians have been unwilling to accept Taney's opinion as a definitive statement of what the Court decided." FEHRENBACHER, *supra* note 48, at 324. See, e.g., Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 276 (1997). Regardless, six Justices agreed that the Missouri Compromise was unconstitutional, and Chief Justice Taney's opinion, not the several opinions of the other members of the majority, became the focus of intense political debate prior to the Election of 1860. FEHRENBACHER, *supra* note 48, at 324, 389.

70. Chief Justice Taney's view that blacks could not claim constitutional protection may have reflected the consensus of both the North and South. See, e.g., Graber, *supra* note 69, at 281. However, Justice Curtis developed an alternative notion of citizenship that held blacks were citizens within the meaning of Article III of the U.S. Constitution. See Streichler, *supra* note 66, at 515.

71. *Scott*, 60 U.S. at 431-52.

72. One author characterizes the "compact theory" of states rights which Chief Justice Taney used as quite radical, even in the context of southern antebellum political thought. See Brophy, *supra* note 60, at 193.

73. See *id.* at 211 (conducting an extensive Fifth Amendment analysis).

74. For a discussion of antebellum constitutional interpretation and its continuing relevance, see David Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1187 (1992).

75. For a thorough analysis of the argument in Justice Curtis's dissent, see Streichler, *supra* note 66; Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713 (1992) (characterizing Justice Curtis's theory of federal power as radical in the context of the conflict of laws); Earl M. Maltz, *The Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 CARDOZO L. REV. 1995 (1996) (Justice Curtis's prior opinions in slavery cases suggest that he was motivated less by any sympathy for abolitionist ideology than by a concern for comity).

76. See Maltz, *supra* note 75, at 1995 (Justice McLean's rather loose legal argument was probably calculated to advance his presidential aspirations).

77. See Brophy, *supra* note 60, at 221-25 (discussing the impact of *Scott v. Sandford* on the preservation of slavery in the states).

78. The question of which theory of constitutional interpretation Chief Justice Taney employed to arrive at this conclusion, and thus which alternative theory would have rendered a more just conclusion, has spawned an extensive scholarly debate. See Christopher Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 63-5 (1993) (Chief Justice Taney's indifference to justice is typical of originalism); William Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1291 (1986) (conceding the role of original intent in *Dred Scott*, but seeking to

Instead of removing the issue of Congress' power over slavery in the territories from politics, the *Dred Scott* decision itself became a divisive political issue.<sup>79</sup> In a June 26, 1857 address in Springfield, Illinois, Lincoln criticized the decision<sup>80</sup> and called on Republicans to oppose its force as a precedent.<sup>81</sup> In his House-Divided speech he suggested that the Supreme Court might take its aggressive reasoning one step further and recognize a federal constitutional right to slave property, even in a free State: "We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free; and we shall awake to the reality, instead, that the Supreme Court has made Illinois a slave State."<sup>82</sup> During the Lincoln-Douglas debates in 1858, Lincoln repeatedly attacked Douglas for his support of *Dred Scott*.<sup>83</sup>

Lincoln's criticisms of *Dred Scott* fueled fear of him and the Republican party. If Lincoln became President, he could appoint like-minded territorial officers, who could then effectively prevent slave

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vindicate the theory); Cass Sunstein, *The Dred Scott Case*, 1 GREEN BAG 2d 39 (1997) (arguing that the case demonstrates dangers of original intent jurisprudence). Indeed, Justice Thurgood Marshall held up *Dred Scott* as evidence of the framers' flawed moral views. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); see also Diamond, *supra* note 52, at 130 (expressing a view sympathetic to Justice Marshall but less critical of the framers). But see William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343 (1987) (arguing that the principle fault of Chief Justice Taney's opinion is not its allegiance to the framers' values, but its loose interpretation). Two scholars have concluded that either a loose or a strict interpretation of the Constitution could have arrived at Chief Justice Taney's conclusion. See Finkelman, *supra* note 64, at 3-4; Graber, *supra* note 69, at 315.

79. See Sunstein, *supra* note 78, at 41 (*Dred Scott* shows why the Supreme Court should avoid hearing politically controversial cases).

80. See Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398 (Roy P. Basler ed., 1953) [hereinafter 2 WORKS OF LINCOLN]. On Lincoln's analysis of the political nature of the ruling, see Finkelman, *supra* note 64, at 36.

81. See Speech at Springfield, Illinois, *supra* note 80, at 401. Republicans tended to hold up Justice Curtis's dissent, rather than Justice McLean's, as the preferred alternative to Chief Justice Taney's constitutional argument. See Streichler, *supra* note 66, at 510.

82. "A House Divided": speech at Springfield, Illinois (June 6, 1858) in 2 WORKS OF LINCOLN, *supra* note 80, at 467. Some historians have argued that Lincoln was reckless in suggesting that a "second *Dred Scott* decision" could extend protection for slavery to the free States. After all, they have argued, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), indicated that the first eight amendments applied only to the federal government. Other historians have countered that, although Lincoln may have exaggerated any real danger in his House-Divided speech, lawyers frequently challenged *Barron v. Baltimore* in the antebellum period. Arguably, that case alone would not have prevented a Supreme Court intent on protecting slave property from recognizing a limited constitutional right to hold slaves in the free states. See KELLY, HARBISON & BELZ, *supra* note 47, at 286-87.

83. See FEHRENBACHER, *supra* note 48, at 492. For an insightful analysis of the strategy behind Lincoln's attack on Douglas, see WILLIAM H. RIKER, THE ART OF POLITICAL MANIPULATION 4-6 (1986).

owners from enjoying the protections promised by *Dred Scott*.<sup>84</sup> Furthermore, Lincoln maintained that, ultimately, slavery had to end if the Union was to endure.<sup>85</sup> Having conceded that Congress had no power over slavery in the States, he never spelled out how he intended to eliminate slavery there. To the South, Lincoln's public hostility to the *Dred Scott* decision indicated "that a Northern majority was unwilling to accord the South, a minority section, the rights to which it was entitled under the Constitution," and that a Republican administration might try to abolish slavery in the States.<sup>86</sup> For some or all of these reasons, by 1860 southern leaders were declaring that Lincoln's<sup>87</sup> election would be followed by the secession of the southern states.

Lincoln won a sectional victory in the Election of 1860, defeating Douglas in the North and obtaining the electoral votes necessary for the Presidency.<sup>88</sup> The South was largely ignored in this contest.<sup>89</sup> As one historian pointedly observed, there were really two Presidential elections in 1860: "Each section conducted its campaign very much as if the other section simply was not there."<sup>90</sup> Lincoln's election was followed by the rapid secession of the deep South.<sup>91</sup> South Carolina was the first to go, leaving the Union on December 20, 1860.<sup>92</sup> By February, Alabama, Florida,<sup>93</sup> Georgia, Louisiana, Mississippi, and Texas had seceded as well.<sup>94</sup> As the House and the Senate debated the Corwin Resolution, eight other slave states considered whether to leave the Union.

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84. See FEHRENBACHER, *supra* note 48, at 541; see also SIMMS, *supra* note 54, at 117-18.

85. See KELLY, HARBISON & BELZ, *supra* note 47, at 284. Historians have also pointed out that the apotheosis of John Brown as a martyr in the North after his failed raid on Harper's Ferry alerted the South to the North's growing hostility towards slavery. See, e.g., POTTER, *IMPENDING CRISIS*, *supra* note 44, at 382.

86. SIMMS, *supra* note 54, at 214-15.

87. See POTTER, *LINCOLN AND HIS PARTY*, *supra* note 44, at 3.

88. See DAVID HERBERT DONALD, *LINCOLN* 256 (1995).

89. See *id.* ("It was ominous that Lincoln and Hamlin received not a single vote in ten of the Southern states.")

90. POTTER, *IMPENDING CRISIS*, *supra* note 44, at 515.

91. See DONALD, *supra* note 88, at 257.

92. See KELLY, HARBISON & BELZ, *supra* note 47, at 291.

93. See *id.*; KENNETH STAMP, *AND THE WAR CAME: THE NORTH AND THE SECESSION CRISIS, 1860-61*, at 13-45, 63-82 (1950). See generally Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2119-26 (2002) (discussing secession as a "constitutional crisis").

94. See AVERY CRAVEN, *THE COMING OF THE CIVIL WAR* 434-35 (2d ed. 1957) ("The secession of the Cotton Kingdom and the formation of the Confederate States of America left the Border States suspended geographically, and emotionally as well, between two

## III. LEGISLATIVE HISTORY OF THE CORWIN AMENDMENT

In December 1860, special compromise committees were appointed in both Houses of Congress.<sup>95</sup> The Senate's "Committee of Thirteen" proved to be more politically prominent than the House Committee of Thirty-three; the Committee of Thirteen boasted a more impressive membership, including Senators Douglas, Seward, Wade, and Jefferson Davis.<sup>96</sup> That committee drafted the Crittenden Resolutions, which became the center of debate in the Winter of 1861.<sup>97</sup>

The Committee of Thirteen crippled itself, however, with a severely restrictive procedural rule requiring a dual majority of both the five Republicans and the other eight members.<sup>98</sup> This rule, proposed by Jefferson Davis, reflected the powerful notion that a successful compromise measure would require bipartisan support.<sup>99</sup> In practice, however, it meant that the Republican members of the Committee were able to stall the progress of the Crittenden Resolutions, which were in turn rejected on the floor of the House<sup>100</sup> and the Senate.<sup>101</sup>

Representative Corwin eventually shepherded his proposal through the House, securing the required two-thirds on February 28.<sup>102</sup> Three days later, the Senate approved the Corwin Resolution with the necessary two-thirds majority, without a vote to spare.<sup>103</sup> The Corwin Resolution succeeded where the Crittenden Resolutions had failed because it won significant Republican support. Even Lincoln had indicated that he was not opposed to it.<sup>104</sup> Two states, Ohio,

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uncertain extremes.").

95. See KELLY, HARBISON & BELZ, *supra* note 47, at 292.

96. Davis served in the Senate until he announced Mississippi's secession and withdrew on January 21, 1861. Less than a month later, he was inaugurated President of the Confederacy. 5 *DICTIONARY OF AMERICAN BIOGRAPHY* 127 (Allen Johnson & Dumas Malone eds., 1930). See also VAN DEUSEN, *supra* note 47, at 243.

97. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 530.

98. See *id.*

99. See *id.* at 530-31; see also VAN DEUSEN, *supra* note 47, at 239.

100. CONG. GLOBE, 36th Cong., 2d Sess. 1261 (1861).

101. *Id.* at 1405.

102. *Id.* at 1285.

103. *Id.* at 1403.

104. Although he consistently declared that he was "inflexible" on the issue of slavery in the territories, Lincoln communicated his willingness to support the Corwin Resolution to Republican leaders in Congress. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 550. Lincoln made his position on the Corwin Resolution public in his First Inaugural Address. There he said that the content of the Corwin Resolution was already "implied constitutional law," and that he had "no objection to its being made express, and irrevocable." First Inaugural Address—Final Text (Mar. 4, 1861), in 4 *WORKS OF LINCOLN*, *supra* note 45, at 270. See also DONALD, *supra* note 88, at 268; VAN DEUSEN, *supra* note 47, at 243; DAMON WELLS, *STEPHEN DOUGLAS: THE LAST YEARS, 1857-*

Maryland, and purportedly a third, Illinois, ratified the Corwin Resolution before the Civil War intervened.<sup>105</sup>

*A. Debate in the House of Representatives*

On February 27, Representative Thomas Corwin, a Republican from Ohio, brought a draft of his Resolution from the Committee of Thirty-three to the floor of the House.<sup>106</sup> That draft referred to slavery as “the relation between [State] citizens and those described in section second of the first article of the Constitution as ‘all other persons.’”<sup>107</sup> The final version protected the “domestic institutions” within a State, “including that of persons held to labor or service by the laws of said State.”<sup>108</sup> Although one representative sarcastically noted that the revised language apparently protected other unknown and unnamed “domestic institutions,”<sup>109</sup> Corwin offered no explanation for amending his resolution, and the House treated the amendment as a purely stylistic change.<sup>110</sup>

The House then proceeded to a vote. With 123 votes in favor and 71 against, the Corwin Amendment fell just short of the necessary two-thirds.<sup>111</sup> After a rowdy struggle for control of the floor, Representative David Kilgore, a Republican from Indiana, moved to adjourn and reconsider the vote later.<sup>112</sup>

This delay proved to be an astute maneuver. On the next day, after little debate, the Corwin Resolution won two-thirds in the House.<sup>113</sup> When Kilgore first renewed his motion to reconsider, he spoke briefly in support of the Resolution, noting that it deftly avoided adding the words “slave” or “slavery” to the Constitution.<sup>114</sup> He reminded his fellow Republicans that they had consistently renounced any intention

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1861, at 265-66 (1971).

105. See KELLY, HARBISON & BELZ, *supra* note 47, at 293. The legislatures of Ohio and Maryland ratified the Corwin Amendment, as did a constitutional convention in Illinois. Resort to a convention in Illinois “arguably violated the terms set by Congress for [the] adoption [of the Corwin Amendment] (which required the vote of the state legislature).” RICHARD B. BERNSTEIN, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 92 (1993).

106. CONG. GLOBE, 36th Cong., 2d Sess. 1263 (1861).

107. *Id.*

108. *Id.*

109. *Id.* at 1264.

110. See DONALD, *supra* note 88, at 268 (equating the phrase “domestic institutions of the states” with slavery).

111. CONG. GLOBE, 36th Cong., 2d Sess. 1264 (1861).

112. *Id.*

113. *Id.* at 1285.

114. *Id.* at 1283.

to interfere with slavery in the South, and concluded that he was “willing that that principle shall be engraved upon the Mountain rocks, to endure for all time.”<sup>115</sup> Representative Kilgore assumed without argument that, if the Corwin Resolution were ratified, it would prevent future use of Article V to regulate or abolish slavery.<sup>116</sup>

Similarly, Representative Stanton, a Republican of Ohio who also spoke in favor of the Corwin Resolution, viewed control over slavery as an aspect of state sovereignty, to be protected forever from federal interference as a matter of principle:

[I]f I were to-day a citizen of a slaveholding State, and were desirous of the emancipation of the slaves in that State, I would resist the interference of the General Government; because it is a subject which the General Government does not understand, over which it ought to have no control, and which ought to be left to the States.

Stanton also assumed that the Corwin Resolution would be binding on future generations. He recognized that a foreseeable shift in the balance of power between the slave States and the free States<sup>118</sup> would soon give free States the three-fourths majority necessary to amend the Constitution. While Stanton and his fellow Republicans disclaimed any desire to affect slavery in the States, the South needed a constitutional amendment to protect slavery from “the progress of public opinion in the free States.”<sup>119</sup>

Whatever Representative Kilgore did to effect a change in opinion during the intervening twenty-four hours, it worked.<sup>120</sup> First, he obtained a majority for the motion to reconsider, which fell one vote short of two-thirds at 128/65.<sup>121</sup> Over the protests of dissenters, the Speaker of the House concluded that a simple majority was enough to carry the motion, even though the underlying resolution required two-thirds.<sup>122</sup> Then Kilgore miraculously produced five more votes for the Corwin Resolution itself, which passed with a vote of 133/65 on

115. *Id.*

116. *Id.*

117. *Id.* at 1284.

118. That foreseeable shift in power would, according to Stanton, be a product of both secession and the expectation that more free States would be organized out of the territories. *Id.*

119. *Id.*

120. See BERNSTEIN, *supra* note 105, at 91 (speculating that the House reversed itself on the Corwin Amendment “because its members [probably] realized that nothing else available to them had any chance of success.”).

121. CONG. GLOBE, 36th Cong., 2d Sess. 1284 (1861).

122. *See id.*

February 28.<sup>123</sup>*B. Debate in the Senate*

With Lincoln's impending inauguration on Monday, March 4, time would run out on the Thirty-sixth Congress.<sup>124</sup> By the end of February the House had voted down the Crittenden Resolutions<sup>125</sup> and had adjourned until Inauguration Day. Fading hopes for compromise rested on the Corwin Resolution, brought from the House to the Senate floor on March 2, 1861.<sup>126</sup> Senator Douglas, the Illinois Democrat who ran against Lincoln in both 1858 and 1860, introduced the Corwin Resolution in the Senate and championed it throughout the debate.<sup>127</sup>

Most Senators conceded that the Corwin Resolution, standing alone, could not save the Union.<sup>128</sup> Some doubted that it could be ratified before the sectional crisis would be resolved by other means.<sup>129</sup> Nonetheless, on Sunday, March 3, the eve of Lincoln's inauguration, the debate in the Senate continued well into the night.<sup>130</sup> Having devoted three months to compromise, the Senate needed to produce some tangible result. Anything else would have amounted to a concession that the congressional session had been an utter failure.

Similarly, individual Senators competed to establish a transcript that would acquit them in the court of history.<sup>131</sup> They expected future generations to look back upon the period between Lincoln's election and his inauguration in an attempt to place blame for the failure to reach a compromise. In the debate over the Corwin Resolution, Senators took to the floor to establish that their respective political parties or constituencies were not responsible for whatever tragic

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123. *Id.* at 1285. See also POTTER, *IMPENDING CRISIS*, *supra* note 44, at 550.

124. Lincoln's inauguration had symbolic importance as well. It shifted the nation's attention from compromise efforts in Congress to the new and controversial President and his policy toward secession. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 564.

125. CONG. GLOBE, 36th Cong., 2d Sess. 1261 (1861).

126. *Id.* at 1364.

127. *Id.*; WELLS, *supra* note 104, at 259-91.

128. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 553 ("[I]t was the territorial aspect of the Crittenden compromise [proposal] that Republicans rejected most emphatically and that southerners demanded most insistently."); *infra* text accompanying notes 162-168.

129. See CONG. GLOBE, 36th Cong., 2d Sess. 1365 (1861) (remarks of Senator Clingman).

130. See POTTER, *IMPENDING CRISIS*, *supra* note 44, at 551.

131. See *id.* at 522, 529.

events were to come in the months ahead.<sup>132</sup>

That debate is of enduring constitutional significance because many Senators considered whether the Corwin Resolution could legally bind future generations. An understanding of that constitutional debate, however, requires knowledge of the complex political positions that developed in response to the proposed amendment. The Corwin Resolution divided the Republican Party.<sup>133</sup> At the same time, many Democrats who spoke against it, perhaps in an effort to belittle it and obtain more desirable alternatives, ultimately voted for it.<sup>134</sup> The constitutional arguments advanced on both sides must be understood in light of their underlying political objectives. Finally, the Senate debate provides a twenty-first century reader with a window into the beleaguered politics of 1861.

### 1. Political Positions on the Corwin Resolution

The language of the Corwin Resolution implied that Congress did not have the constitutional capacity to emancipate the southern slaves, and not one Senator challenged that proposition.<sup>135</sup> Throughout the debate, no Senator suggested that Congress retained the power if not the resolve to abolish slavery in the States.<sup>136</sup>

Many radical Republicans who would later play pivotal roles in the framing and ratification of the Reconstruction Amendments proclaimed that the South's fears were fanciful because Congress lacked the power under the Constitution to outlaw slavery. According to the prevailing interpretations of Article I, § 8,<sup>137</sup> the Constitution did not grant Congress power to regulate slavery.<sup>137</sup> Moreover, the Tenth Amendment<sup>138</sup> provided added security. For example, Senator Ben

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132. *See id.* at 522.

133. *See infra* text accompanying notes 171-77.

134. *See infra* text accompanying notes 151-64.

135. *See infra* text accompanying notes 137-50.

136. Of course, Congress had considered that issue many times before. For example, in 1790 the House adopted a report declaring that Congress had "no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States." WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA* 95 (1977); *see also* JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 81-119 (2001) (exploring the context and importance of the 1790 debate in the House of Representatives).

137. *See* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 26 (1956) ("The Federal Constitution . . . accepted slavery as local institution to be protected or prohibited according to the wishes of the individual states.").

138. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X.

Wade, a Republican from Ohio, conceded that the South's peculiar institution was shielded from congressional meddling: "You have got a double guarantee [in the Constitution]: first, the power was never delegated; and then, negatively,<sup>139</sup> as the power was not delegated, it belongs to you and your State."

Similarly, Senator Lyman Trumbull, a Republican from Illinois, agreed that Congress had no power over slavery in the South. He noted that the "Federal Government was one of delegated, not of inherent, powers."<sup>140</sup> In his view the Constitution did not grant to the Government the "power to interfere with the domestic institutions of any State."<sup>141</sup> Senator Trumbull noted that the proposition that Congress lacked power over slavery in the States was beyond dispute: "there is no man of any party who contends that Congress has authority to interfere with slavery in the States."<sup>142</sup> For good measure, both Lincoln and the Chicago platform of the Republican party had renounced any intention to ever interfere with slavery in the States.<sup>143</sup>

The unanimity of opinion within the leadership of both parties on this matter is striking. Abolitionists had long argued that Congress had a constitutional duty to abolish slavery under the Guarantee Clause of Article IV, Section 4.<sup>144</sup> Moreover, modern Commerce Clause decisions have shown that the language of the Constitution could be read broadly to give Congress the power to control slavery, even without the Thirteenth Amendment.<sup>145</sup> Even under the nineteenth century's more restrained reading of the Commerce Clause, one might have expected that interstate markets in slaves would have been subject to regulation by Congress. Two members of the Supreme Court, however, had already come to the opposite

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139. CONG. GLOBE, 36th Cong., 2d Sess. 1382 (1861).

140. *Id.*

141. *Id.* Senator Trumbull noted that, for this reason, the Constitution sheltered the North from moral responsibility for slavery. Lacking the power to abolish it, white citizens in the North could not be held accountable for slavery: "we . . . have no more to do with slavery in Kentucky, than we have with slavery in Turkey." *Id.*

142. *Id.*

143. See ELBERT B. SMITH, *THE DEATH OF SLAVERY: THE UNITED STATES, 1837-65*, at 164-65 (1967).

144. According to this argument, the guarantee of a Republican form of government included a guarantee of certain natural rights, such as life, liberty, and property, because these rights were essential to Republican government. See WIECEK, *supra* note 136, at 268-70 (discussing Guarantee Clause and a number of other abolitionist constitutional arguments).

145. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (reading the commerce clause expansively to permit congressional regulation of what was previously thought to be purely intra-state activity).

conclusion. In a special concurring opinion in *Groves v. Slaughter*,<sup>146</sup> Justice McLean of Ohio concluded that Congress had no power under Article I, § 8 to regulate even the interstate trade in slaves.<sup>147</sup> He argued that slaves were “persons,” not articles of commerce, for the purposes of the Constitution. Therefore, States had exclusive power to regulate even interstate commerce in slaves.<sup>148</sup> Chief Justice Taney agreed with that conclusion.<sup>149</sup> Thus, two members of the Court, representing both North and South, had recognized a slavery exception to Congress’ power over interstate commerce.<sup>150</sup>

Ironically, some of the most passionate speeches against the Corwin Resolution came from southern Democrats who eventually voted for it. This behavior provides us with some insight into the complex politics of 1861. Although the House had already voted down the Crittenden Resolutions and, having adjourned, was effectively precluded from reconsidering them, they were introduced during the Senate debate in the form of a sweeping amendment to the Corwin Resolution.<sup>151</sup> Even though the Crittenden Resolutions could not have been submitted to the States for ratification, some Senators argued that the symbolic value of a meaningless Senate vote in their favor would have greater persuasive force in the South than actually submitting the Corwin Resolution to the States for ratification.<sup>152</sup>

Undoubtedly, hostile reaction to the Corwin Resolution must have been a negotiation strategy; some southern Democrats probably criticized the Corwin Resolution in an effort to win greater concessions from the Republicans. Other southern Democrats may have attacked the proposal in floor speeches in an effort to persuade other Senators to abandon or vote against the measure, thinking that the proposal’s failure would undermine the symbolic force of the North’s gesture towards compromise and place the blame for the

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146. 40 U.S. (15 Pet.) 449, 503 (1841) (declining to decide the issue of whether the Commerce Clause applied to slavery).

147. See Brophy, *supra* note 60, at 202, 212 (placing *Groves v. Slaughter* in legal and historical context).

148. *Groves*, 40 U.S. at 505-06.

149. *Id.* at 507-08. In another concurring opinion Justice Baldwin concluded that slaves were articles of commerce and that Congress had power over the interstate slave trade. *Id.* at 512-26.

150. See generally CURRIE, *supra* note 63, at 222-25 (discussing *Groves v. Slaughter*); Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 807-12 (1996) (placing *Groves* within the context of an extended nineteenth-century legal dispute about the status of persons as articles of commerce).

151. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

152. See, e.g., *id.* (remarks of Senator Bigler).

Senate's failure to resolve the sectional crisis squarely on northern Republicans. Judging from their comments on the Senate floor, these southern Democrats may have preferred no compromise whatsoever to the "partial" compromise embodied in the Corwin Resolution. As always, different Senators undoubtedly had different reasons for similar behavior. When forced to a vote, however, it was apparently impossible for any southern Democrats to explain to their constituents a vote against a proposed amendment that promised to protect slavery within the existing slave states. Accordingly, in the final tally, no Democrats voted against the Corwin Resolution.<sup>153</sup> Some today might be surprised to learn that the South would not have been satisfied with an express constitutional guarantee for slavery where it already existed. As noted above, however, for at least the preceding decade, political agitation over slavery had been channeled into the debate about Congress' power over the territories. Lincoln had attacked *Dred Scott* and had insisted that Congress could and should prohibit slavery in the territories.<sup>154</sup> His election meant that the South had finally suffered defeat with respect to that issue. Largely to save face, and partially out of habit, southern leaders wanted the North to renounce part of that victory by agreeing to constitutional guarantees for slavery in the territories.<sup>155</sup> The Republicans strongly resisted such a proposal, perhaps out of fear of southern expansion.<sup>156</sup> Because the Corwin Resolution did not address the issue of slavery in the territories, however, it perhaps appeared to be too painless a concession by the northern Republicans to win the South's enthusiastic support.<sup>157</sup>

Senator James M. Mason, a Virginia Democrat, made that point dramatically. He noted that a plank in the Chicago platform of the Republican Party disavowed any intention to interfere with slavery in the States.<sup>158</sup> He continued: "the [Corwin] resolution . . . in order to quiet the apprehensions in the southern States on the subject of slavery, is to make that plank . . . a part of the Constitution."<sup>159</sup> He recharacterized the Corwin Resolution as the North's refusal "to deny

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153. R. Alton Lee, *The Corwin Amendment in the Secession Crisis*, OHIO HIST. Q. 1, 24 (1961) (observing that all the senators voting against the Corwin Resolution were Republicans).

154. *See supra* text accompanying notes 80-86.

155. POTTER, *IMPENDING CRISIS*, *supra* note 44, at 553.

156. *See id.*

157. *See id.*

158. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

159. *Id.*

to Congress the right of interference with slavery in the territories.”<sup>160</sup>

He concluded with a stinging metaphor. By proposing a constitutional amendment that did not address the issue dividing the Union, the Republicans offered a placebo, a bread pill, in order to calm the South through deception.<sup>161</sup> He declared that the bread pill would not work because the South would not be deceived.<sup>162</sup> He predicted that his home State of Virginia would “not be influenced one hair’s breadth by the passage of this joint resolution.”<sup>163</sup> Notwithstanding this angry criticism, Senator Mason ultimately voted for the Corwin Resolution.<sup>164</sup>

Even Senators who spoke on behalf of the Corwin Resolution admitted that its value was largely symbolic. Senator Bigler, a Democrat from Pennsylvania, stated that the Corwin Resolution would be valuable solely because it was a declaration that the Constitution shall not be changed, “which, coming from the other side, I agree may be of some temporary value to the country.”<sup>165</sup> Senator Douglas, the Senate’s champion of the Corwin Resolution, attempted to answer Senator Mason by saying that the Resolution would have value as evidence that the North was not hostile towards the South and its institution of slavery: “if the northern States will by a three fourths majority come forward and insert this clause in the Constitution, it proves conclusively that there is no such sentiment [in] the North as you apprehend.”<sup>166</sup>

Some southern Senators resisted the Corwin Resolution because they saw it as an attempt to divide the border States from the deep South. At this time, eight slave States had not yet decided whether to stay with the Union or join the Confederacy.<sup>167</sup> Senator Johnson, an Arkansas Democrat, urged the “gentlemen of the South” to stand together until the North agreed to “a full and fair settlement of the whole question, that would bring back all the southern States to” the Union.<sup>168</sup> While Senator Johnson did not say what the “whole question” was, one can be sure that it at least included the issue of

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1389.

164. *Id.* at 1403. See also POTTER, LINCOLN AND HIS PARTY, *supra* note 44, at 200-01 (characterizing Senator Mason as among “the more rabid type of secessionist”).

165. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

166. *Id.* at 1388.

167. *Id.* at 1365.

168. *Id.*

slavery in the territories. Other southern Senators concurred in Senator Johnson's view, that the Corwin Resolution was "an inducement to half the southern States to separate themselves from the rest."<sup>169</sup> And one historian has concluded that at least some Republican leaders pursued a divide and conquer strategy against the South through compromise proposals such as the Corwin Resolution.<sup>170</sup>

The Corwin Resolution also divided the Republican Party. It was the product of a Republican drafter and Republican initiative in the House. Nonetheless, some Republicans simply would not cast a vote for slavery. For example, Senator Trumbull conceded that Congress lacked the power to interfere with slavery in the States. Yet he refused to act in support of that institution. "No sir," he declared, "no human being shall ever be made a slave by my vote."<sup>171</sup>

Senator Trumbull's position appeals to a twenty-first century reader, and given the moral convulsions over slavery in the 1850s, one wonders why the position was not more prevalent in the winter of 1861. The question presupposes the twenty-first century's values with respect to racial equality, which, as the Corwin Resolution demonstrates, were exceptional even among northern Republicans. Lincoln's victory did not reflect a mandate to abolish slavery. In fact, Lincoln supported the Corwin Resolution.<sup>172</sup> In 1861, the crisis between the sections focused on the issue of slavery in the territories.<sup>173</sup> The Senate was concerned first and foremost with that issue and the crisis of secession; the fate of black slaves in the South

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169. *Id.* (remarks of Senator Johnson).

170. *See, e.g.,* POTTER, *IMPENDING CRISIS*, *supra* note 44, at 530 (concluding that Charles Francis Adams embraced compromise efforts in the winter of 1861 in an attempt to separate the border States from the deep South).

171. CONG. GLOBE, 36th Cong., 2d Sess. 1382 (1861); *see also id.* at 1402 (remarks of Senator Wilson).

172. POTTER, *IMPENDING CRISIS*, *supra* note 44, at 550.

173. *See supra* text accompanying notes 57-84. This observation about the focus of political debate in early 1861 is not a denial that slavery constituted an ultimate cause of the war. *See* David Brion Davis, *Free at Last: The Enduring Legacy of the South's Civil War Victory*, N.Y. TIMES, August 26, 2001, at D1 (asserting that "though the South lost the battles, for more than a century it attained its goal: that the role of slavery in America's history be thoroughly diminished, even somehow removed as a cause of the war"); *see also* David Brion Davis, *Looking at Slavery from Broader Perspectives*, 105 AM. HIST. REV. 452, 455 (2000) (noting that "for many generations historians and schoolbooks virtually ignored the central problem of slavery and freedom"). *See generally* PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877*, at 201 (1993) (providing an overview incorporating insights of recent historical scholarship on the institution of slavery and its role in American history).

was of secondary importance to the nation's political leadership.<sup>174</sup>

Although most of the debate over the Corwin Resolution was superficially race-neutral, Senator Baker, an Oregon Republican, made explicit what was implicit in the proposed amendment. Senator Baker declared that, although he ardently hoped for the emancipation of the black slaves in the South, his "desire for the elevation of masses of men, of whatever creed, or race, or color, or kind, is to be limited by other conditions of government and race."<sup>175</sup> He conceded that the needs of his own race were his highest priority: "I am of the white race, and I love their interests and their honor best."<sup>176</sup>

Senator Baker's comments might partially explain why no Congressman resisted the Corwin Resolution because he intended to fight for a constitutional amendment abolishing slavery.<sup>177</sup> Admittedly, Senator Trumbull's comments could be understood as expressing reluctance to prevent such an amendment in the future. Certainly, the political coalition behind the Thirteenth Amendment had to come from somewhere. Nonetheless, the debate over the Corwin Resolution suggests that the political climate with respect to abolition changed rapidly between 1861 and 1865, as emancipation became a central war measure.<sup>178</sup>

The various political arguments discussed above depended on contradictory assumptions about the legal force of the proposed amendment. The constitutional issues were inextricably intertwined with the political ones. Indeed several Senators realized this and confronted the constitutional issue directly.

## 2. Constitutional Challenge to the Corwin Resolution

During the truncated floor debate in the House, Representatives Kilgore and Stanton apparently assumed that, if the Corwin Resolution was ratified by the States, it would be legally binding on future generations, preventing them from ever amending the

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174. See, e.g., KOLCHIN, *supra* note 173, at 201 (stressing that re-union rather than emancipation was the predominant northern goal at the war's outset).

175. CONG. GLOBE, 36th Cong., 2d Sess. 1386 (1861).

176. *Id.*

177. One Congressman articulated this position when explaining his vote on another issue. Representative Sedgwick sought an amendment that would give Congress "constitutional authority to abolish slavery." CONG. GLOBE, 36th Cong., 2d Sess. 1258 (1861).

178. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-77, at 1-11, 60-88 (1988) (discussing development of abolitionist sentiment during the War).

Constitution to abolish slavery.<sup>179</sup> In the more exhaustive debate in the Senate, however, that issue was the subject of considerable controversy.

Senator Bigler, a Democrat of Pennsylvania, put the question squarely before the Senate. He asserted that the Corwin Resolution "in truth amounts to nothing but a mere declaration."<sup>180</sup> He insisted that subsequent generations could always use Article V to amend or repeal the Corwin Amendment: "the article itself remains liable to change under the same rule as any other portion of the Constitution."<sup>181</sup> Senator Clingman endorsed Bigler's comments, calling the Corwin Resolution a "mere nullity."<sup>182</sup>

Senator Douglas resisted Bigler's characterization of the Corwin Resolution and insisted that it would be legally binding. Senator Douglas noted that by its own terms, the proposed amendment was "unalterable."<sup>183</sup> After its ratification, "it will not be in the power of any number of States, short of a unanimous vote, ever to interfere with the question of slavery in the States."<sup>184</sup> Douglas had said that he was only expressing an opinion and that he did not wish at that time to make a legal argument in support of it.<sup>185</sup> Nonetheless, Senator Mason challenged Douglas to put forward "authority" for his conclusion that the Corwin Amendment would be "irrepealable, except by the consent of all the States."<sup>186</sup> In response, Douglas argued that, if it became part of the Constitution, the Corwin Amendment would control the meaning of Article V, "which authorizes amendments in certain cases, and prohibits . . . making amendments in certain other cases."<sup>187</sup> Once ratified, the Corwin Amendment would "be just as sacred as" the final clause of Article V<sup>188</sup>, which declares that "no State, without its Consent, shall be deprived of it's [sic] equal Suffrage in the Senate."<sup>189</sup>

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179. *See supra* notes 106-23 and accompanying text.

180. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

181. *Id.*

182. *Id.* *See also id.* at 1367 (remarks of Senator Pugh); *id.* at 1392 (remarks of Senator Morrill).

183. *Id.* at 1387

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1388.

188. *Id.* at 1387. For another version of these same arguments, see the brief exchange between Pugh and Simmons. *Id.* at 1367.

189. U.S. CONST., art. V.

“Just precisely,” Senator Mason answered, “not more so.”<sup>190</sup> Asserting that no one could deny “that the power which makes a Constitution can unmake it,” Senator Mason concluded that the provision protecting a State’s representation in the Senate was not legally binding either.<sup>191</sup> According to Senator Mason, three-fourths of the States retained the power to alter the Constitution. That power extended to any part of the Constitution, including both the last clause of Article V and the Corwin Resolution.

Senator Benjamin F. Wade echoed Senator Mason. Wade implied that an amendment under Article V was legitimate because it was an act of a special constitutional convention, vested with the same power as the Constitutional Convention of 1787.<sup>192</sup> “[O]ne convention [cannot] tie the hands or lessen the power of one that is to come after it.”<sup>193</sup> Senator Wade supported this conclusion with an analogy to the inherent limits on the powers of a legislature, such as the U.S. Congress: “We can pass no laws here that a subsequent Legislature cannot repeal, because they all sit with equal powers.”<sup>194</sup> Therefore, the Corwin Resolution, and presumably the last clause of Article V as well, were subject to change according to Article V procedures. Senator Wade concluded that “the idea that this [resolution] shall never be altered I do not think means anything.”<sup>195</sup>

These answers to Senator Douglas were less than thoroughly satisfying; they read the last clause of Article V out of the Constitution.<sup>196</sup> Senator Douglas was right to point to that provision for support. It indicated that the founders endorsed a theory of sovereignty that somehow allowed them to remove certain issues from the confines of Article V. Part IV of this article will argue that the founders, who were self-conscious extralegal actors, could set substantive limits on amendment that “routine” use of Article V could not. Curiously, Senators Mason and Wade apparently ignored this possible distinction.

Other Senators noted that, even if the Corwin Amendment would not be legally binding, it might prevent future amendments because of

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190. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

191. *Id.*

192. *Id.* at 1396.

193. *Id.*

194. *Id.*

195. *Id.*

196. And yet they purported to preserve the force of Article V’s procedural commands. See *infra* Part IV.

its persuasive force. Its ratification might create a decisive inertia against any future attempt to give Congress power over slavery. Senator James F. Simmons, a Whig from Rhode Island, argued that the States and their statesmen would keep a promise not to amend the Constitution in order to interfere with slavery in the States.<sup>197</sup> Once the necessary three-fourths of the States had ratified the Corwin Resolution "in the serious manner provided by the Constitution of the United States," they would never subsequently "deal in bad faith."<sup>198</sup> Even Senator Mason conceded that, once ratified, the Corwin Amendment would carry the "propriety of law—I mean of moral law . . . but . . . nothing more."<sup>199</sup> That Congress has never proposed an Amendment reducing a State's representation in the Senate arguably supports Senator Simmons's position.<sup>200</sup>

Rather curiously, Senator George E. Pugh of Ohio, who had voiced his opposition to the Corwin Resolution at every opportunity, argued that it would be ineffective because it had been poorly drafted.<sup>201</sup> Knowing that any change in the language of the Corwin Resolution would kill it because the House had adjourned, Pugh first suggested a purely stylistic revision.<sup>202</sup> After Senator Douglas, among others, exposed that suggestion as an attempt to bury the Corwin Resolution,<sup>203</sup> Senator Pugh argued that the Resolution should have declared that it was exempt from amendment.<sup>204</sup> No other Senators

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197. CONG. GLOBE, 36th Cong., 2d Sess. 1367 (1861).

198. *Id.*

199. *Id.* at 1387. For an exploration of both the normative and descriptive legal issues raised by a politician's promises concerning future political action, see Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996).

200. Then again history teaches us that any security provided by the mere expression of constitutional sentiment may be illusory. That the American polity was capable of producing the directly opposing super-majorities necessary for a constitutional flip-flop was demonstrated by the failed experiment of national prohibition of alcoholic beverages. Even in that context, however, many prominent proponents of repealing the Eighteenth Amendment—including Arthur Hadley (a president emeritus of Yale University), Walter Lippmann, and Clarence Darrow—initially concluded that repeal of a recently enacted amendment was a constitutional impossibility and, accordingly, urged the emerging consensus against national prohibition to engage in some form of "nullification." See DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 66-67 (2d ed. 2000). Of course such an extreme response proved unnecessary. See RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920*, at 270 (1995) ("By the early 1930s, the Voluntary Committee of Lawyers had overcome the idea that repeal was a constitutional impossibility and channeled the impetus for change into workable channels.").

201. CONG. GLOBE, 36th Cong., 2d Sess. 1364 (1861).

202. *Id.*

203. *Id.*

204. *Id.*

paid attention to the latter suggestion. Senator Pugh's comment missed the Constitutional issue: whether one generation could use Article V to prevent future generations from using Article V. If that power existed, then the Corwin Resolution would have exercised it.

The Corwin Resolution ultimately won the required two-thirds, without so much as a vote to spare.<sup>205</sup> That the Thirty-sixth Congress took such an extraordinary step towards giving slavery special constitutional status provides insight into the troubled politics of the winter of 1861. As one historian concluded, the Corwin Resolution established "that what the South wanted most was *reassurance*," and that both the North and the South desperately wanted "to make any sectional settlement a *final* one."<sup>206</sup>

#### IV. EFFICACY OF THE CORWIN AMENDMENT

The Civil War preempted efforts to ratify the Corwin Resolution.<sup>207</sup> Thus, the arguments in the Senate about whether it was irrevocable were never tested.<sup>208</sup> This section analyzes that question by considering a number of instructive legal analogies and concludes that the Corwin Amendment could have been validly overridden by subsequent amendment.

The congressional debate concerning the Corwin Resolution marked an important constitutional moment insofar as it sparked discussion of whether the Constitutional Convention of 1787 set binding substantive limits on the power of amendment. During this debate, Senator Douglas argued that the Corwin Resolution would limit the amending power as did the last clause of Article V, which

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205. *Id.* at 1403.

206. POTTER, *IMPENDING CRISIS*, *supra* note 44, at 532.

207. Three non-confederate States purported to ratify the Corwin Amendment before support for its ratification subsided as fears of civil war became a reality. *See* KELLY, HARBISON & BELZ, *supra* note 47, at 293; KYVIG, *supra* note 5, at 151. The two-hundred-plus-year ratification of the Twenty-Seventh Amendment presents the question of the (theoretical) vitality of the Corwin Resolution—*i.e.*, assuming (counterfactually) a desire to do so, could the state legislatures still ratify the Corwin Amendment? As Professor Paulsen has observed, so long as the amendment were given a literal construction, it would lack any practical effect even were it now to be ratified. *See* Paulsen, *supra* note 3, at 699 n.79.

208. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Court let stand Congress' determination that the Child Labor Amendment had not been ratified. There, the Court concluded that questions concerning the validity of proposed constitutional amendments were non-justiciable. *See id.* at 454. More recently, however, scholars have challenged this conclusion. *See, e.g.*, Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 397-98 (1983); Paulsen, *supra* note 3, at 706-17.

protected a State's representation in the Senate.<sup>209</sup> Senator Mason responded that neither restriction was irrevocable.<sup>210</sup> Declaring that "the power which makes a Constitution can unmake it," he assumed that Article V ratifying conventions had the same power as the 1787 Convention.<sup>211</sup>

To the extent that Senator Mason ignored a distinction between the two entities, his argument proved too much. Taken to its logical conclusion, this argument would have established that the 1787 Convention had no power to bind future generations with Article V itself. Under Senator Mason's theory, not only did that convention lack the power to prohibit future amendments depriving a state of its representation in the Senate,<sup>212</sup> but it also was incapable of establishing exclusive procedures for amendment. If the 1787 Convention was not extraordinary, then it could not prevent future generations from changing the fundamental law through a popular referendum, for example.<sup>213</sup>

The 1787 Convention was extraordinary, however. That Convention had extraordinary powers, greater than the powers of the state legislatures or conventions that act under Article V, because the 1787 Convention was a revolutionary institution.<sup>214</sup> It was self-consciously extralegal; it did not conform to the procedures for amending the Articles of Confederation and did not claim legitimacy because of the Articles. Instead, the delegates to that Convention conceded that they were revolutionaries. They invoked the sovereignty of the people, and looked to the ratifying conventions and the court of history for vindication.<sup>215</sup> Because they did not rely on the Articles for legitimacy, they were not bound by its restrictions but instead exercised the extraordinary powers of revolutionary constitution makers.

Those extraordinary powers allowed the 1787 Convention to

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209. See *supra* notes 187-89 and accompanying text.

210. See *supra* notes 190-91 and accompanying text.

211. CONG. GLOBE, 36th Cong., 2d Sess. 1387 (1861).

212. However, if the clause protecting a State's representation in the Senate has any real meaning, then it cannot be circumvented by Article V amendment. Were this clause itself subject to amendment, it would be possible to deprive a State of its representation in the Senate without its consent simply by adding an introductory section to the proposed amendment repealing the last clause of Article V.

213. See *infra* notes 231-37 and accompanying text (discussing the possibility of amending the Constitution by a national referendum).

214. Cf. Kay, *supra* note 19, at 64-67 (discussing the "legal incapacity" of the Philadelphia Convention of 1787).

215. See *supra* notes 21-25 and accompanying text.

prescribe the procedural rules for, and put substantive limitations on, “routine” amendment. A routine amendment claims legitimacy under the Constitution, and its validity is determined by whether its framers followed the procedures prescribed in the Constitution. It is logically inconsistent to claim authority on the basis of some of the text of Article V while at the same time ignoring the Article’s limiting language. Accordingly, a routine amendment must not violate any prohibitions in the original document, such as the Constitution’s prohibition on reducing a State’s representation in the Senate without its consent.

To say that an extralegal convention, which is eventually vindicated by historical practice, can prescribe rules for routine amendment, is not to say that it has the power finally to determine the fate of future generations. A constitution is forever subject to the same revolutionary revision that created it, and thus future generations always have the power to repudiate the existing constitution and create a new one. But in such a case the new constitution’s drafters cannot claim legitimacy based on the old regime while at the same time eradicating it. In throwing out the old constitution and acting outside the realm of routine amendment, they act outside of the law. That constitution will be legitimate only if it expresses the sovereign will of the people.<sup>216</sup>

Of course, that the 1787 Convention had the power to impose limits on routine amendments did not prove, as Senator Douglas apparently assumed, that the framers of the Corwin Resolution had that same power. The 1787 Convention set forth the rules for routine amendment in Article V. The framers of the Corwin Resolution claimed that it would be legally binding because it had been enacted in conformity with Article V’s requirements. They followed the formal procedures under Article V, and clothed themselves with the legitimacy of the existing Constitution. They did not claim to be extralegal actors with extraordinary powers. In essence, they tried to have their cake and eat it too, in that they sought the legitimacy of Article V as they attempted to change the Constitution in a way that only revolutionaries could.<sup>217</sup>

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216. *Cf.* Kay, *supra* note 19, at 78-80 (discussing the rapid acceptance of the Constitution following its ratification).

217. The proffered distinction between the authority invoked by the framers of Article V of the Constitution and the proponents of the Corwin Resolution also figures prominently in Professor Harris’s analysis of the conceptual problems posed by an unamendable amendment. *See* HARRIS, *supra* note 53, at 188-91. Although Professor

Because the framers of the Corwin Resolution claimed authority under Article V, the Corwin Resolution would have been irrevocable only if Article V gave them power to make an irrevocable amendment. As noted above, the 1787 Convention had the power to make provisions of the Constitution irrevocable (at least for so long as the Constitution remained the “supreme Law of the Land”).<sup>218</sup> The issue, then, is whether the 1787 Convention gave that power to Article V ratifying conventions. Article V is silent with respect to changing the procedures for or limitations on future amendments. Explicitly, it prohibits amendments that deprive a State of its representation in the Senate without its consent. Arguably, that one explicit limit creates a negative implication that Article V permits all other conceivable amendments.<sup>219</sup> The better conclusion, however, is that a strong background presumption—against the use of Article V to limit a future generation’s use of Article V—made an explicit prohibition of such amendments unnecessary.

That background presumption existed because legal analogies suggested that a power sufficient to do a thing retained the capacity to undo it. If ratifying conventions in three-fourths of the States could pass an amendment, ratifying conventions in three-fourths of the States could repeal it as well. In the debate over the Corwin Resolution, Senator Wade suggested an analogy between ratifying conventions and legislatures. Just as one legislature could not prevent a later one from repealing its statutes, one set of Article V ratifying conventions could not prevent a subsequent one from undoing its

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Harris and I agree that Article V cannot be used to prohibit future use of Article V. Professor Harris concludes that an unamendable amendment could be added to the Constitution pursuant to the procedures reflected in Article VII of the Constitution. *Id.* at 190-91. He contends that adherence to Article VII procedures invokes the full power of the sovereign people because the founding generation deemed that process sufficient to supplant the Articles of Confederation and create new fundamental law, including the amending procedures set forth in Article V of the Constitution. In my view, however, the distinction between the founders of 1787 and the advocates of the Corwin Resolution lies not so much in the disparity between Article V and Article VII procedures. Rather, the critical difference distinguishing them is that the founders frankly conceded the extralegal, revolutionary character of their action (and won adherence in spite of the fact), whereas the authors of the Corwin Resolution rested their claim to authority solely on compliance with the existing constitution’s express procedural rules for amendment.

218. U.S. CONST. art. VI, cl. 2 (“[t]his Constitution . . . shall be the supreme Law of the Land”).

219. *Cf.* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, 177-78 n.47 (1990) (asserting in an analogous context that “[c]onsideration of the explicit limitations on the amending power contained in article V ought to have squelched the argument that the general authority to amend” was also cabined by implicit limits to be inferred from constitutional structure).

work.<sup>220</sup>

Senator Wade might have relied on weighty authority for his conclusion with respect to legislatures. That one session of Congress lacked the power to bind a subsequent one could be traced to the British doctrine of Parliamentary omnipotence.<sup>221</sup> Citing Sir Edward Coke, Blackstone declared that Parliament was vested with “transcendent and absolute” power, “sovereign and uncontrollable authority in making, confirming, enlarging, *restraining*, *abrogating*, *repealing*, reviving, and expounding of laws.”<sup>222</sup> Following Blackstone, the distinguished Professor Dicey noted that although “Parliaments have more than once intended and endeavored to pass Acts which should tie the hands of their successors[,] . . . the endeavor has always ended in failure.”<sup>223</sup>

Senator Wade’s analogy was powerful and instructive. Each session of Congress, like each session of Parliament, has the same power as its predecessors because it plays the same role in an existing constitutional system. Similarly, a set of Article V actors has power because it acts in accordance with the procedures and limitations of Article V, and thus plays the same role as its predecessors. Accordingly, it stands to reason that, like a legislature, a set of Article V actors must have the same legal powers as its predecessors.

That background presumption serves as a default rule, which gives meaning to an otherwise ambiguous Article V. It suggests that Article V cannot be used to make an irrevocable amendment.<sup>224</sup> An amending

220. See *supra* notes 192-95 and accompanying text.

221. With respect to the state legislatures, this same point has been made by declaring that they could not give away their sovereign power. See *Stone v. Mississippi*, 101 U.S. 814, 819 (1880). In *Stone* the Supreme Court concluded that the Contracts Clause, U.S. CONST. art. I, § 10, could not be read to deprive a State of its police power: “[n]o legislature can bargain away the public health or the public morals.” *Id.* at 819. The Court explained away earlier cases, which had held that the Contracts Clause prevented a legislature from reneging on a tax exemption, by declaring that, while the taxing power was incidental to the purposes of government, governments were created to exercise the police power. See CURRIE, *supra* note 219, at 218-19, 380.

222. 1 WILLIAM BLACKSTONE, COMMENTARIES \*156 (emphasis added).

223. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 65 (1959). In a recent case, however, the House of Lords upheld the supremacy of European Community Law over a 1988 Act of Parliament, suggesting that a 1972 Parliament bound its successors when it passed the European Communities Act. Lord Bridge noted that “whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act of 1972 was entirely voluntary.” *Factortame Ltd. v. Sec’y of State* (No. 2), 1 A.C. 603, 658-59 (H.L. 1991). That statement was the extent of the Lords’ analysis, which obviously did not provide a very satisfactory rationale for such an exception to the centuries old doctrine of Parliamentary omnipotence. That doctrine had always prevented Parliament from *voluntarily* giving away its power.

224. Professor Brandon rejects the notion that the Corwin Resolution would have been

procedure allowing one generation to bind the hands of their successors would have been inconsistent with the founders' experience of Parliamentary omnipotence.<sup>225</sup> Therefore Senator Wade's conclusion that one generation cannot bind the hands of another must be correct as applied to one generation's attempt to use Article V to limit a future generation's use of Article V.<sup>226</sup>

Subsequent Supreme Court cases rejecting arguments for other implicit limits on Article V are not to the contrary. In the *National Prohibition Cases*<sup>227</sup> and *Leser v. Garnett*,<sup>228</sup> the Court rightfully rejected claims that the Eighteenth and Nineteenth Amendments exceeded Article V's amending power because they invaded state sovereignty. Even if, as the complaining parties in the cases alleged, those amendments transferred to the federal government powers

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"unconstitutional" on the grounds that "it will rarely be possible to argue successfully that any amendment is unconstitutional." Brandon, *supra* note 53, at 234. Professor Brandon's conclusion flows from concerns about the persuasive, and perhaps coercive, force of any formal expression of a super-majority of the polity on a divisive constitutional issue. *Id.* at 234-35. In particular, "given the relations among the Constitution's institutional actors, any expression of sentiment sufficiently strong to produce a constitutional amendment on a matter so fundamental would stand little chance of being successfully flouted by an established institution of government." *Id.* at 235. Professor Brandon's perceptive observations go more to the assessment of raw power than legitimacy. Indeed, Professor Brandon's analysis leaves him in the somewhat awkward position of asserting the constitutionality of the Corwin Resolution and at the same time conceding that it would have been powerless against a subsequent Article V amendment abolishing slavery. *Id.* at 236 n.69. Ultimately, then, Professor Brandon's defense of the Corwin Resolution renders the proposed amendment a legal nullity.

225. Cf. THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* 126-27 (2000) (concluding that "any idea of unalterable constitutional norms" would have been inconsistent with the founders' commitment to popular sovereignty; "[t]he basically positivist idea of sovereignty, which in Great Britain has been attributed to Parliament, had now been attributed by the Constitution's leading defenders to the people of the United States."); see also Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 780-81 (2001) (discussing tension between the concepts of inalienable rights and popular sovereignty).

226. Because the amendment proposed in H.R.J. Res. 29, 106th Cong. (1999), discussed in *supra* note 6 and accompanying text, did not purport to limit (but rather expand) the power of future generations to amend the Constitution, it would not have run afoul of the background presumption identified herein. Whether that proposed amendment would nevertheless change a "preconstitutional rule" or a "basic norm" in such a way as to make it revolutionary is a question beyond the scope of this article. See Kay, *supra* note 19, at 58-62 (quoting in part H. KELSON, *PURE THEORY OF LAW* 46-48, 194-200 (1967)); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 148-52 (Sanford Levinson ed., 1995) (applying Hans Kelsen's theory of the *Grundnorm*, or basic norm, to the procedures for constitutional amendment).

227. 253 U.S. 350 (1920).

228. 258 U.S. 130 (1922).

traditionally reserved to the states,<sup>229</sup> they did not attempt to prevent future generations from using Article V. They were routine amendments subject to repeal. Therefore, they did not require the Court to consider whether Article V could be used to make an amendment irrevocable.

The Corwin Resolution tried to add another limitation to those imposed by the 1787 Convention. But the framers of the Corwin Resolution did not pretend to be revolutionaries, who, because of their extralegal status, had extraordinary powers. They could have achieved their goal of forever removing slavery from Article V only by revolutionary constitution-making, and that is not what they purported to do.

#### V. CONTEMPORARY SIGNIFICANCE OF THE CORWIN AMENDMENT

The Corwin Amendment illustrates the importance of distinguishing between the natural right of revolution—the “unalienable” right of “the People” to make and alter their forms of government<sup>230</sup>—and the positive-law power to amend the constitution granted by Article V. This distinction elucidates why the founders of the Constitution of 1787, expressly invoking the former authority, could impose limits on the power granted in Article V, whereas the framers of the Corwin Amendment, relying solely on the power granted by Article V, could not do so.

This distinction similarly clarifies a significant, on-going debate among legal scholars, historians, and political theorists about the exclusivity of Article V. Although an exhaustive analysis of this debate, which has engaged many prominent scholars in recent years, is beyond the scope of this article, a précis of this analysis is set forth below in order to underscore the contemporary significance of the Corwin Amendment. This part of the article first provides a brief overview of the current scholarly debate about the exclusivity of Article V. It then employs the insights gleaned from the foregoing analysis of the Corwin Amendment in a critique of that scholarly debate.

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229. See CURRIE, *supra* note 219, at 177-78 n.47 (discussing *National Prohibition Cases* and *Leser v. Garnett*).

230. See *supra* text accompanying notes 17-25 (discussing the founding generation’s commitment to popular sovereignty).

*A. Conflicting Understandings of Article V*

In numerous publications, Yale Law Professor Akhil Amar has developed a sophisticated, historical argument for the proposition that “We the People of the United States have a legal right to alter our government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.”<sup>231</sup> According to Professor Amar, this conclusion follows from the founding generation’s core commitment to the concept that sovereignty ultimately resides in the people.<sup>232</sup> He has argued that this commitment was reflected not only in the Declaration of Independence and other writings contemporary with the Constitution but also in several provisions of the Constitution itself.<sup>233</sup> Thus, he concludes that during the years between 1776 and 1789, the revolutionary, natural right to alter and abolish forms of government, asserted in the Declaration of Independence, was transformed into a *legal* right to amend that document “by a peaceful and simple majoritarian process,” such as a nation-wide referendum.<sup>234</sup>

Professor Amar has cogently rebuffed the claim that his argument renders Article V a nullity. Rather, his position is merely that Article V is nonexclusive.<sup>235</sup> Article V provides an alternative mechanism for constitutional change, “thus eliminat[ing] the necessity of future appeals to the People themselves. However, future appeals to the People remain sufficient, as a general matter, to effect constitutional change.”<sup>236</sup> Nor should Professor Amar be misunderstood as merely reaffirming an inalienable right of revolution. He insists that, apart from any claim based on natural rights or revolutionary theory, a majority of U.S. citizens has a *legal* right, implicitly guaranteed by

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231. Amar, *Consent of the Governed*, *supra* note 4, at 457. See also AMAR & HIRSCH, *supra* note 4, at 5-6; Amar, *Popular Sovereignty*, *supra* note 4; Amar, *Philadelphia Revisited*, *supra* note 4.

232. See, e.g., AMAR & HIRSCH, *supra* note 4, at 7 (arguing that the American founders widely believed that “the People are sovereign, and a majority of the people enjoy the inalienable legal right to alter or abolish their form of government whenever they deem fit.”); Amar, *Consent of the Governed*, *supra* note 4, at 458 (asserting that “[b]etween the Revolution and the Constitution, popular sovereignty principles in America evolved beyond the Lockean core of the Declaration and established the legal right of the polity to alter or abolish their government at any time and for any reason, by a peaceful and simple majoritarian process.”).

233. See, e.g., Amar, *Consent of the Governed*, *supra* note 4, at 470-94; Amar, *Philadelphia Revisited*, *supra* note 4, at 1050-60.

234. Amar, *Consent of the Governed*, *supra* note 4, at 458.

235. See Amar, *Philadelphia Revisited*, *supra* note 4, at 1054.

236. See *id.* (emphasis removed) (footnote omitted).

the Constitution, to amend the Constitution via a national referendum.<sup>237</sup>

Not surprisingly, Professor Amar's novel work has drawn pointed criticism. Professor Henry Paul Monaghan of Columbia Law School rejects Amar's central claim as "historically groundless," arguing that Amar ignores both "the crucial role reserved for the states in the newly established constitutional order" and "the democracy-restraining nature of the Constitution."<sup>238</sup> In an exhaustively researched philosophical analysis of Amar's argument, Professor David R. Dow rejects it, adhering instead to the common-sense proposition that "the only way to amend the Constitution is in accordance with the mechanism outlined in article V."<sup>239</sup> He reaches this conclusion, though, only after conceding that such a reading of the Constitution cannot be logically reconciled with the founding generation's commitment to popular sovereignty.<sup>240</sup> His rejection of Professor Amar's claim ultimately rests on the radical, and simultaneously unhelpful, assertions that our Constitution embodies a paradox that "is not scientifically or logically resolvable," and that citizens, judges, and scholars need to learn "to live with the tension."<sup>241</sup>

Professor Amar's Yale Law School colleague, Bruce Ackerman, has also argued that Article V cannot be the sole legitimate way to change the U.S. Constitution. In numerous law review articles<sup>242</sup> and the two published volumes of his projected three-volume *We the*

237. See Amar, *Consent of the Governed*, *supra* note 4, at 499-500.

238. Monaghan, *supra* note 5, at 121 & 130; see also King, *supra* note 5, at 615-16 (arguing that the historical record fails to support Amar's claims about the founding generation's understanding of the relationship between popular sovereignty and the Constitution's numerous super-majority requirements); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 29-33 (1995) (rejecting claims of Amar regarding non-exclusivity of Article V).

239. David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4 (1990).

240. See *id.* at 8-10.

241. *Id.* at 10-11; see also David R. Dow, *The Plain Meaning of Article V*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 117-44 (Sanford Levinson ed., 1995); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (1991) (discussing Amar's claim regarding the non-exclusivity of Article V).

242. See, e.g. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

*People* series,<sup>243</sup> Professor Ackerman has described the U.S. constitutional order as a “dualist democracy.”<sup>244</sup> By this he means that the American political order functions on two distinct tracks: (1) ordinary politics, and (2) *constitutional* politics. Government officials possess delegated authority to resolve issues in the former category, but only “We the People” have the power to engage in the “higher lawmaking” necessary for the latter category of decision.<sup>245</sup> Thus, a dualist democracy requires “leaders to return to the People and mobilize their considered support before foundational principles may be revised in a democratic way.”<sup>246</sup> According to Professor Ackerman, Article V constitutes one avenue for this sort of constitutional politics,<sup>247</sup> but not the only one sanctioned by the Constitution. Like Professor Amar, he concludes that an interpretation of the Constitution that reads Article V as the exclusive, *legally sanctioned* means for amendment—an interpretation that he concedes would follow from the well-established interpretative canon *expressio unius*<sup>248</sup>—“is inconsistent with both the Founding practice and its theory of popular sovereignty.”<sup>249</sup>

More specifically, Professor Ackerman observes that the Federalists achieved the ratification of the U.S. Constitution only by violating the pre-existing rules for amending the Articles of Confederation and many of the state constitutions.<sup>250</sup> The founders’ disregard of these limitations in turn supplied “precedent” for subsequent reform movements, *i.e.*, radical Reconstruction and Franklin Roosevelt’s New Deal, to disregard the rules of Article V and “amend” the Constitution in other ways not enumerated therein.<sup>251</sup> “[W]e should learn to look upon the Founding as a great precedent in the ongoing practice of popular sovereignty.”<sup>252</sup> Much of Professor Ackerman’s recent scholarship is devoted to distilling from our history the irreducible core of events that he identifies as essential

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243. See ACKERMAN, FOUNDATIONS, *supra* note 4; ACKERMAN, TRANSFORMATIONS, *supra* note 4.

244. See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 4, at 6.

245. See *id.* at 6-7.

246. ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 6.

247. See *id.* at 23 (“Article Five provides an enduring resource for the American people when they wish to exercise their constituent power through the states.”).

248. See *id.* at 75-77.

249. *Id.* at 16.

250. See *id.* at 34-39; see also Ackerman & Katyal, *supra* note 242, at 478-514; *supra* notes 19-21 and accompanying text.

251. See ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 279.

252. Ackerman & Katyal, *supra* note 242, at 572.

for legitimate non-Article V constitutional amendment.<sup>253</sup> He also tentatively proposes a constitutional amendment, which might in time be added to the Constitution via the process described in Article V. That amendment would in turn codify the non-Article V procedures for amendment that emerge from our over two-hundred-year history by empowering a second-term President to propose constitutional amendments that could be ratified via two successive national referenda.<sup>254</sup>

Professor Ackerman's claims that the radical-Reconstruction Republicans and New Deal Democrats legitimately changed the Constitution by means not sanctioned by Article V have prompted an outpouring of scholarship from law professors, historians, and political scientists.<sup>255</sup> As Professor Powe of the University of Texas succinctly observed, "[t]o say that Ackerman's thesis has been controversial is much like stating a Texas summer is warm."<sup>256</sup> While some commentators have endorsed Ackerman's theory,<sup>257</sup> others have identified shortcomings in Ackerman's legal or historical analysis.<sup>258</sup>

253. See, e.g., ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 10-15; Ackerman & Katyal, *supra* note 242, at 569-73.

254. See ACKERMAN, FOUNDATIONS, *supra* note 4, at 52-55; ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 410-12.

255. See, e.g., KYVIG, *supra* note 5, at xi; VILE, *supra* note 9; Denning, *supra* note 5, at 186-88; Dow, *supra* note 239, at 35-38; James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT. 355 (1994); William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917 (1999); Harrison, *supra* note 5, at 377; Candice Hoke, *Arendt, Tushnet, and Lopez: The Philosophical Challenge Behind Ackerman's Theory of Constitutional Moments*, 47 CASE W. RES. L. REV. 903 (1997); Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107 (1996); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994); David A. Pepper, *Against Legalism: Rebutting An Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 147-50 (1998); Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139 (1998); James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513 (1998) (hereinafter Fleming, *We the Unconventional American People*) (reviewing ACKERMAN, TRANSFORMATIONS); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (reviewing ACKERMAN, FOUNDATIONS); Maria Seferian, Book Note, 34 HARV. C.R.-C.L. L. REV. 311 (1999) (reviewing ACKERMAN, TRANSFORMATIONS).

256. L.A. Powe, Jr., *Ackermania or Uncomfortable Truths*, 15 CONST. COMMENT. 547 (1998) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998)).

257. See, e.g., Hoke, *supra* note 255, at 903 ("Ackerman is making startlingly original and valuable contributions [to] both" political philosophy and political theory.); Powe, *supra* note 256, at 570 (concluding that "Ackerman is right; the Constitution was fundamentally changed during Reconstruction and the New Deal" and "Article V cannot describe with acceptable accuracy what occurred").

258. See, e.g., Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2143-47 (1999). Some critics have treated Ackerman's more controversial claims with irony, if not sarcasm. See, e.g., Michael Stokes Paulsen, *I'm Even Smarter Than Bruce Ackerman: Why The President Can Veto His Own Impeachment*, 16 CONST.

The various objections include assertions that Ackerman, like Amar, accords too little significance to both federalism<sup>259</sup> and the protection of individual rights against majority tyranny.<sup>260</sup> Other critics have argued that Ackerman’s historical analysis is partial, if not also selective.<sup>261</sup> Finally, some commentators have identified weaknesses in Ackerman’s presentation to date but have nevertheless reserved final judgment pending the publication of the projected third volume in his *We the People* series.<sup>262</sup>

### B. Applying the Lessons Learned from the Corwin Amendment

Many people, when they first learn of the Corwin Amendment, voice an intuition that its effort to shelter slavery from future constitutional amendment is somehow flawed—that if the Corwin Amendment had been ratified it could have nevertheless been repealed by a subsequent amendment that at the same time abolished slavery. Part IV set forth the reasoning that leads to that conclusion without, as the senatorial opponents of the Corwin Amendment proposed to do, dispensing with the two explicit substantive limits that the founders placed on the Article V amending power. This article’s analysis of the constitutional question posed by the Corwin Amendment uncovered two fundamental principles of our constitutional order. First, the founders of the Constitution exercised

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COMMENT. 1, 5 (1999) (identifying as “the central theme of Ackerman’s brilliant academic career” the proposition “that the Constitution embodies, in no particular provision but everywhere in general, a preference for the results of popular democratic liberalism over backward-looking countermajoritarian procedures and checks that, inexplicably and unfortunately, managed to make their way into the actual text of the Constitution as written”) (citing ACKERMAN, FOUNDATIONS and ACKERMAN, TRANSFORMATIONS).

259. See, e.g., Price, *supra* note 255, at 195-202.

260. See, e.g., Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1190-91 (1992) (reviewing ACKERMAN, FOUNDATIONS) (criticizing as “question-begging in the extreme” Ackerman’s rejection of a “rights foundationalism” theory of constitutional rights). Cf., Paulsen, *supra* note 258, at 5 (emphasizing Ackerman’s neglect of the countermajoritarian nature of the Constitution).

261. See, e.g., Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003 (1999); Colin Gordon, *Rethinking the New Deal: We the People: Transformations*, 98 COLUM. L. REV. 2029 (1998) (same); William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077 (1999); McConnell, *supra* note 255; Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman’s Neo-Federalism*, 108 YALE L.J. 1931, 1940-46 (1999). *But see* Powe, *supra* note 256, at 548 (“Ackerman’s sophisticated discussion of Reconstruction and the New Deal puts to rest any claim that his thesis rests on thin or sloppy history.”).

262. See, e.g., Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731, 1793-94 (1999) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)).

the extralegal, revolutionary, natural right to make and alter existing forms of government, supplanting the Articles of Confederation with the Constitution. Second, the founders were able to invoke this extraordinary authority at least in part because they both made clear to their constituents that they sought to exercise that authority and forthrightly acknowledged their disregard of the requirements for amendment under the pre-existing constitutional regime—namely, the Articles of Confederation.

These two principles point towards a previously unarticulated resolution of the on-going academic controversy concerning the exclusivity of Article V *vel non*. Scholars who have addressed this subject have, to date, struggled to reconcile Article V's anti-majoritarian constraints with the founders' evident commitment to popular sovereignty. Both Amar and Ackerman have invoked the founders' reliance on the People as the ultimate source of lawful authority<sup>263</sup> to support their startling conclusions that Article V cannot constitute the sole means for *legal* constitutional amendment.<sup>264</sup> They have correctly concluded that the framing and ratification of the Constitution provide precedent for subsequent generations to change the Constitution without complying with the commands of Article V.<sup>265</sup> Yet in so concluding they have collapsed the distinction (which was apparent to the founders) between *lawful* amendment sanctioned by the positive-law of the existing constitutional order and the extra-legal, revolutionary, natural right to *abolish* the existing order and replace it with a new regime. Having neglected this fundamental difference, Professors Amar and Ackerman have accordingly failed to ask two crucially important subsidiary questions, namely: (1) how did the founders manage to invoke this revolutionary authority, which allowed them to act in disregard of the Articles of Confederation rules for amendment, and (2) what would subsequent generations be required to do in order to invoke the same revolutionary authority and act in disregard of Article V's limitations on the amending power?

Again, the preceding analysis of the Corwin Amendment suggests answers to both these questions. As Part I of this article demonstrated, when the proposed Constitution went to the people for ratification, its proponents openly conceded that the actions and product of the

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263. *But see supra* note 19, acknowledging dispute between Professors Amar and Ackerman as to the "legality" of the Constitution of 1787.

264. *See supra* notes 237 & 249 and accompanying text.

265. *See supra* Part I.

Philadelphia Convention could not be reconciled with the Articles of Confederation.<sup>266</sup> Instead, the Federalists forthrightly appealed to the natural right of revolution and sought redemption from this higher authority.<sup>267</sup> Whether these express confessions of illegality and invocations of revolutionary authority were alone sufficient to call forth the natural right of the people to change their form of government, their repeated utterance shows that the friends of the proposed constitution deemed such confessions and invocations as a necessary first step to laying claim to this authority. Likewise, those who seek to follow in the founders' footsteps in this regard must, at a bare minimum, disclaim the authority of the existing constitutional regime and forthrightly call upon the awesome and terrible power of revolution.<sup>268</sup>

The thorough development and application of these two principles to the rich and wide-ranging debate over the theses of Professors Amar and Ackerman is beyond the scope of this article on the Corwin Amendment. For present purposes, it suffices to observe that Professors Amar and Ackerman ignore these principles. As they both claim, incorrectly, to have established the *legality* under the U.S. Constitution of past or hypothetical future constitutional changes made in defiance of Article V, they omit any discussion of the possibility that these same past or hypothetical future changes might be illegal under the Constitution but nevertheless legitimate exercises of an ever-present natural right of revolution.

So too, the numerous critics of Amar and Ackerman have to date neglected these issues. Many have instead resisted the "Yale School's" conclusions by denying, implicitly or explicitly and for a variety of reasons, that the founders' commitment to an inalienable right of revolution survived the ratification of the Constitution.<sup>269</sup>

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266. See *supra* notes 19-21 and accompanying text.

267. *Id.*; see also Kay, *supra* note 19, at 66-67.

268. The proponents of the Corwin Amendment did no such thing, and this failure would have precluded them from adding a third substantive limitation to the two the founders had grafted onto Article V's amendment procedure if the Amendment had been ratified.

269. See, e.g. Dow, *supra* note 239, at 8-12; Monaghan, *supra* note 5, at 121 & 130; Price, *supra* note 255, at 195-202. Other critics more sympathetic to an interpretivist approach to judicial elaboration of the Constitution's meaning have dismissed the claims of Amar or Ackerman or both as not very significant. These critics assert that the meaning of the Constitution has changed and will continue to change without an Article V amendment quite frequently, whenever a majority of the sitting Justices says so. See, e.g., Fleming, *We the Unconventional American People*, *supra* note 255, at 1539 (asserting that "[t]he best way to avoid the tendency to propagate myths of rediscovery is to eschew originalism, both narrow and broad, in favor of a theory of interpretation that conceives

Other commentators have questioned particular historical claims by one or more authors.<sup>270</sup> But to date, none of the critics of Amar or Ackerman have carefully examined the possibility that a *sole* but nevertheless legitimate and *viable* alternative to Article V amendment might be to exercise the inalienable right of revolution, which (as Amar and Ackerman have so forcefully demonstrated) allowed the founders to defy the Articles of Confederation limits on constitutional amendment. Accordingly, none of the many opponents to the Amar and Ackerman theses have explored in any detail how such revolutionary authority might be properly invoked. Nor have these existing critics inquired whether this authority has ever been legitimately employed to make non-Article V changes to our Constitution after its ratification. As these inquiries lie outside the scope of an article on the Corwin Amendment, they must wait for another time and place for further examination. This detour, however, demonstrates the present theoretical importance of that 1861 proposal.

## VI. CONCLUSION

Faced with a sectional crisis and the threat of civil war, the Second Session of the Thirty-sixth Congress considered a number of extraordinary compromise measures. It eventually proposed the Corwin Resolution to the States. That proposed Amendment was never ratified, so its efficacy was never tested. Had it been ratified, however, it would have had only persuasive force. It would not have been legally binding because its framers, unlike those of the 1787 Convention, lacked the power to set the rules for future amendment under the Constitution. To remove an issue from the confines of Article V required more than a routine amendment; it required revolutionary authority.

The Corwin Resolution was historically significant because it demonstrated that the South wanted inviolable guarantees from the North and that strong political support for federal interference with slavery in the States had not yet developed. Mr. Corwin's proposed constitutional amendment was, and remains, constitutionally significant because it was an unprecedented attempt to use Article V to prevent future amendments under Article V. Analysis of that effort

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fidelity to the Constitution as integrity with the moral reading of the Constitution," providing flexibility for changes in interpretation without stretching the concepts of original meaning or popular sovereignty).

270. See, e.g., King, *supra* note 5, at 615-16; *supra* note 261 (citing commentary critical of Ackerman's history).

leads not only to an understanding as to why it would have failed legally, but also to the discovery of a fundamental distinction between routine amendment and legitimate constitutional revolution. That distinction in turn promises to clarify an important contemporary debate about whether Article V describes the sole legal means for constitutional evolution.

