The Relevance of Constitutional Amendments: A Response to David Strauss

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ESSAY

The Relevance of Constitutional Amendments: A Response to David Strauss

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David Strauss recently argued that constitutional amendments are irrelevant, in the sense that American constitutional law would look very much like it does today, even if the Constitution had been ratified without a formal amendment mechanism like that found in Article V. We argue that Professor Strauss's main claims—that amendments are often neither necessary nor sufficient for producing constitutional change—while true, do not support his irrelevancy thesis. Moreover, we argue that the few benefits of formal constitutional amendments that he does concede are unduly minimized, and that he has overlooked several other benefits of formal constitutional amendments, which we describe.

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I. INTRODUCTION

In a recent issue of the Harvard Law Review, Professor David Strauss provocatively argues that the constitutional amending process established in Article V of the United States Constitution is irrelevant. Strauss’s major premise is that America’s small-c-constitution—by which Strauss means its constitutional regime, as opposed to the large-C-Constitution, which is only a part of that regime consisting of the written constitution and its amendments—would operate substantially the same had Article V never been adopted and our Constitution had no provision for its formal amendment. The minor premises, each of which have considerably more validity, but need to be understood in context, are that (1) constitutional change occurs more often than not, informally, outside the Article V amending process; and, (2) that formal additions to the Constitution through Article V are neither a necessary nor a sufficient condition for the occurrence of constitutional change. Strauss expands discussion of

2. U.S. Const., art. V. Article V reads 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.
3. For a similar distinction, see William F. Harris II, The Interpretable Constitution, at xiii (1993). Numerous other writers have argued that, like the unwritten constitution of Great Britain, the American written constitution is shaped by many customs and usages. For a classic discussion, see Christopher Tiedeman, The Unwritten Constitution of the United States (1890), reprinted in 27 Classics in Legal History (Roy M. Mersky & J. Myron Jacobstein eds., 1974). See also James G. Wilson, American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior, 40 Buff. L. Rev. 645, 651, 667-70 (1992) (advocating the use of constitutional “custom and usage” to constrain law and power).
4. See Strauss, supra note 1, at 1459 (“[A] case can be made that, subject to only a few qualifications, our system would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment.”).
5. See id. (stating that “sometimes matters addressed by the Constitution change even though the text of the Constitution is unchanged”).
6. See id. Strauss states that
the second point by referring to historical examples and making three further points: (1) that constitutional change can occur even when formal amendments are rejected,\(^7\) (2) that amendments often merely ratify changes in society, and (3) that amendments that are adopted too far in advance of society are destined to be evaded.\(^8\)

The most Strauss is willing to concede to Article V amendments is that they settle matters one way or the other, and in doing so, convert a near-unanimous consensus into unanimity by operation of law.\(^9\) But even these achievements are modest, Strauss argues, because (1) in a "mature republic,"\(^10\) the courts and Congress, in all likelihood, would have brought forth the same sort of small-c-constitutional change in the absence of an amendment;\(^11\) and (2) any outliers would eventually have been brought to heel.\(^12\)

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when amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment. The changes produce the amendment, rather than the other way around. . . . [W]hen amendments are adopted even though society has not changed, the amendments are systematically evaded. They end up having little effect until society catches up with the ambitions of the amendment.

7. See id. ("[S]ome constitutional changes occur even though amendments that would have brought about those very changes are explicitly rejected.").

8. See supra note 6 and accompanying text.


10. Id. at 1460. Though he does not describe what, exactly, a "mature republic" is, or when the United States became one, he does concede that "when a constitutional system is first getting underway and making its shakedown voyage . . . amendments are more properly seen as part of the initial establishment of the regime, rather than as a means of changing it."

11. See id. at 1480. Strauss discusses several amendments, beginning with the Thirteenth Amendment, which prohibits slavery:

The practical effect of the Thirteenth Amendment was, at most, to abolish slavery only in the four border states . . . that had not joined the Confederacy [and to whom the Emancipation Proclamation was not addressed]. . . . As a practical matter, slavery probably could not have persisted in the border states for long after the end of the Civil War; in any event, Congress very likely would have outlawed it, and the Supreme Court might have upheld Congress's action.

12. Strauss also addressed the Twenty-Fourth Amendment: "[T]he net effect of the Twenty-fourth Amendment was, at most, to abolish the poll tax in federal elections, in a few states, two years before it would have been abolished across the board anyway." Id. at 1481.

Strauss next discussed the Fourteenth Amendment:

Had the Supreme Court accepted [the view that the Guaranty Clause or some other provision of the Constitution empowered Congress to pass the Civil Rights Act of 1866], neither Section 1 of the Fourteenth Amendment, outlawing Black Codes and similar state legislation, nor Section 5, authorizing congressional action to enforce the Amendment, would have been needed at all.
Strauss’s argument is not only intellectually provocative but also consequential for public policy making. For if Strauss’s central premise is true, or substantially so, not only have numerous scholars wasted considerable ink explaining a relatively useless process, but citizens and legislators—who have introduced more than 11,000 amending proposals in Congress\(^{13}\)—have also wasted their time.\(^{14}\)

\(^{13}\) Id. at 1484. He went on to say:

The Supreme Court’s willingness to decide [Bolling v. Sharpe, 347 U.S. 497 (1954)] without a secure (or, many would say, even a plausible) textual basis in the Constitution suggests that events in the 1950s and 1960s would not have taken a dramatically different course if the victors of the Civil War had not added the language of the Fourteenth Amendment to the Constitution. It is difficult to believe that the Supreme Court would have ruled differently in [Brown v. Board of Education, 347 U.S. 483 (1954)] if the Fourteenth Amendment had not been adopted . . . .

\(^{14}\) Id. at 1485.

He then addressed the Twenty-Sixth Amendment: “The lack of resistance to the Twenty-sixth Amendment suggests that inevitably most of the states, and probably all of them, would have changed their laws within a relatively short time.” Id. at 1489.

He next argued that the Sixteenth Amendment, which overruled Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895), was unnecessary because, “Pollock had all the earmarks of a precedent that was destined to be overruled . . . .” Id. at 1492. Strauss stated that changes in state election practices rendered the Seventeenth Amendment superfluous: “[T]he effect of the Amendment was to ratify a change that had already taken place.” Id. at 1496. He finally argued that ratification of the Nineteenth Amendment “suggests that a state-by-state campaign for women’s suffrage might also have succeeded.” Id. at 1502.

12. See id. at 1480-81. Strauss stated: “Probably the most that can be said for the Thirteenth Amendment is that it hastened the end of slavery in a few border states by a few years.” Id. “[B]y the time Congress sent the Twenty-sixth Amendment to the states, it was already a foregone conclusion that eighteen-year-olds would soon be voting in all elections.” Id. at 1489. Strauss then addressed the Seventeenth Amendment: “It is true that the Seventeenth Amendment made [direct election of Senators] uniform before it otherwise would have become uniform. . . . But again the principal forces bringing about the direct election of Senators . . . were on their way to prevailing, one way or another, with or without a formal constitutional amendment.” Id. at 1498. He continued:

The Nineteenth Amendment certainly suppressed outliers; it made women’s suffrage uniform before it otherwise would have been. Beyond that, probably the best estimate is that if the suffragists had been forced to concentrate solely on the state level, they would have achieved substantial but not complete success within a few years.

\(^{13}\) Id. at 1502-03.


14. This includes Strauss, who is a member of Citizens for the Constitution, which issued a paper with guidelines that ought to be followed before proposing amendments to the Constitution. The group, recently renamed the “Constitution Amendments Initiative” and
Despite the emotions generated by amendments that have outlawed slavery, defined American citizenship, and guaranteed women and eighteen-year-olds the right to vote, Strauss argues that such amendments have had little effect. Moreover, advocates or opponents of proposals to restore prayer to public schools, limit or outlaw abortion, prohibit flag-burning, outlaw busing, overturn Supreme Court decisions relative to state legislative apportionment, etc., it seems, could better spend their time worrying about other things.

In this Essay, we challenge Strauss’s main premise, and argue that his minor premises themselves need qualification. To say that constitutional change occurs informally and that even change secured through an Article V amendment depends on the other branches of government for its efficacy, we argue, is to state a truism of the sort for which Strauss chided the Supreme Court when it said that the Constitution could not be added to or subtracted from without a formal amendment.\(^\text{15}\) We concede both of Strauss’s points, but argue below that, taken together, they do not justify Strauss’s claim that the amendment process is irrelevant. We also take issue with his narrow characterization of what amendments, in fact, do. Not only does Strauss sell short the “settling” and “suppressing” functions of amendments, but he also ignores several other roles that formal amendments play in our constitutional system.

We begin, however, by taking issue with explicit qualifications Strauss makes, as well as with a number of assumptions, often unstated, that are critical to Strauss’s argument. All of these, we argue, are flawed, or at least contestable.

II. PRIMA FACIE OBJECTIONS TO STRAUSS’S ARGUMENT

Strauss’s premises are built on a number of questionable assumptions that are crucial to maintaining his argument, and the evidence he cites in support of them is, to put it mildly, susceptible to...
more than one interpretation. In this Part, we highlight these assumptions, and criticize them. In addition, Strauss's argument begins with two telling qualifications of his thesis: he limits his thesis to "mature democracies" and he excludes the Bill of Rights from his universe of irrelevant amendments. From these qualifications flow assumptions that are not always clearly articulated, but are nevertheless crucial to sustaining his argument.

A. Exclusion of the Bill of Rights from Discussion

Strauss limits his observations to "mature democracies," not "fledgling" republics, without describing the differences between the two, or indicating when the United States made its transition from the one to the other. Because he excludes the Bill of Rights, but includes the Reconstruction Amendments in his discussion, presumably the transformation occurred sometime between 1791 and 1865. This qualification allows Strauss to avoid discussing the Bill of Rights, which contains well over a third of the amendments added to the United States Constitution in American history, and which has, because of the theory of incorporation, undoubtedly been more important to our small-c-constitutional system during the twentieth century than at any other point following the Bill's ratification. It is possible, as Dan Farber pointed out with his characteristic wit, to imagine circumstances in which many of the protections in the Bill of Rights could have been lodged elsewhere in the Constitution had the

16. See id. at 1460.
17. See id. ("I consider this claim about the irrelevance of the amendment process in the context of a mature democratic society, not a fledgling constitutional order. It is a claim about how a constitutional system changes, not about how one becomes established in the first place."). It is difficult to know whether Strauss is simply arguing that amendments are unimportant or whether he is challenging the whole idea of a written constitution. The American Founders thought that they were making a substantial improvement over the English system that relied on an unwritten constitution, not simply because the constitution the Americans formulated was written but also because it was unchangeable by ordinary legislative means. The American Founders thus thought they provided greater security for liberty than the people would have without such written guarantees.
first ten amendments never been ratified. But the very presence of Article V—and the promise that it held out to opponents of the Constitution for correcting the Convention’s oversight in leaving out a declaration of rights—was probably crucial in securing the ratification of the Constitution and the allegiance of its opponents once ratified.


Consider the epistolary dialogue on the subject between Jefferson and Madison. After Jefferson had suggested the need for a bill of rights, Madison had further suggested:

Altho’ it be generally true . . . that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in James Madison: Writings 418, 422 (Jack N. Rakove ed., 1999). Responding, Jefferson noted both that language of an amendment would be important because of “the legal check which it puts into the hands of the judiciary,” and that “tho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in Thomas Jefferson: Writings 942, 943-44 (Merrill D. Peterson ed., 1984).

This argument was later repeated by Madison in his argument placing the proposed Bill of Rights before the House of Representatives:

It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular states. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

B. Assuming Emergence of Informal Change Absent Article V

The necessary relationship between Article V and the Bill of Rights gives reason to question another of Strauss's assumptions: that, absent Article V, we would have even had the opportunity as a Nation to see our fledgling republic become a mature democracy. Given the frustration experienced with the provision requiring unanimous consent to formal changes under the Articles of Confederation and the importance that the Virginia Plan placed on securing an orderly method for formal change, it is difficult to imagine a situation in which the delegates to the Philadelphia Convention would have signed their names to a document that contained no opportunity for formal changes in the written document.

Even if one can imagine the Constitution having been ratified without an amending mechanism and, thus, without the possibility of adding a bill of rights, Strauss's argument, that without amendments, Congress, or the courts, or both, would have arrived at the same end result on the major constitutional questions of our history, depends entirely on the development of mechanisms for accommodating informal change. The underlying assumption of his argument is that our political system would have accepted and legitimized systems of informal change (judicial review, "custom and usage," etc.) in the absence of a formal amendment scheme. That assumption is certainly a questionable one; history provides powerful counterexamples.

The American Revolution is itself testimony to the fact that individuals who find means of constitutional change ignored or blocked may resort to force—note the emphasis that the Declaration

21. See 1 The Records of the Federal Convention of 1787, at 22 (Max Farrand ed., rev. ed. 1966) ("13. Resd. 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."). Even while initially denying the need for a bill of rights, the amending process was also lauded in The Federalist as one of the features that made the new Constitution so acceptable. See, e.g., The Federalist No. 43, at 315 (James Madison) (Benjamin Wright Fletcher ed., 1961) (lauding the amendment procedure as "stamped with every mark of propriety" and noting that Article V "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults").

22. The debate in Philadelphia centered around who would control the levers to such formal change—Congress or the people. In the end, there was a compromise. Congress could initiate change and seek approval from state legislatures or conventions, while the states themselves could start the process rolling if enough states petitioned Congress to call a national convention. See Brannon P. Denning, Means to Amend: Theories of Constitutional Change, 65 Tenn. L. Rev. 155, 162-65 (1997) (describing the debates over Article V).

23. See supra note 11 and accompanying text.
of Independence places on the king’s rebuff of colonial petitions.\textsuperscript{24} In the face of the Articles of Confederation’s insurmountable requirement of unanimity to effect formal change, it collapsed, and was replaced \textit{in toto} by the draft that emerged from the Philadelphia Convention. The famous Dorr’s Rebellion in 1842 was caused by Rhode Island’s failure to draft a new constitution following independence and the state’s use instead of the royal charter \textit{sans} expressions of loyalty to the Crown.\textsuperscript{25} Because that charter had no provision for its amendment or replacement, near civil war resulted when the state’s citizens found themselves having to choose between rival governments.\textsuperscript{26} In none of these cases did mediating institutions develop to accommodate informal change in the absence of a formal (and workable) amending process.\textsuperscript{27}

\section*{C. Strauss’s Whig Theory of Constitutional Change}

But let us concede, for the sake of argument, that informal channels for constitutional change would have developed.\textsuperscript{28} We are then faced with another of Strauss’s troubling assumptions: that constitutional change advances, uninterrupted, toward whatever progressive norms that we have heretofore relied on amendments to install in the Constitution—racial equality, full political participation for women and eighteen-year-olds, and the elimination of barriers to

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\textsuperscript{24} \textit{See} The Declaration of Independence para. 28 (1776) (“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”).

\textsuperscript{25} \textit{See} George M. Dennison, \textit{The Dorr War: Republicanism on Trial}, 1831-1861, at 11-31 (1976).

\textsuperscript{26} \textit{See} Bernard Schwartz, \textit{A History of the Supreme Court} 95 (1993) (“[Prior to the] Dorr Rebellion[,] Rhode Island . . . was . . . still operating under the royal charter granted in 1663. It provided for a very limited suffrage and, worse still from the point of view of those who considered it completely out of date, no procedure by which amendments might be made.”); \textit{see also} Dennison, supra note 25, at 11-31 (explaining the origins of the Dorr Rebellion and the struggle to obtain a reformed Constitution); Marvin E. Gettleman, \textit{The Dorr Rebellion: A Study in American Radicalism}, 1833-1849, at 68-69 (1973) (noting that the royal charter used by Rhode Island, which did not allow for change or amendment, instigated Rhode Island radicals who wanted their own constitution).

\textsuperscript{27} All states have amending processes, but historically, courts have recognized the right of state legislatures to call constitutional conventions in states with constitutions that did not specifically provide for them. \textit{See} John Alexander Jameson, \textit{A Treatise on Constitutional Conventions} 211 (4th ed. 1887).

\textsuperscript{28} Because one can argue that such informal modes of change would never have arisen absent Article V, as the Constitution would never have been ratified without it, perhaps Strauss should have framed his argument the following way: In a “mature democracy,” constitutional change would progress along the same lines even if Article V was stricken from the Constitution, as opposed to its never having been included in the first place.

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full enfranchisement for the poor and other minorities. In Strauss's world, there is no reaction, no backlash that forestalls future gains (perhaps placing them out of reach), and no backsliding by courts or legislatures. Again and again, he assures us that whatever gains were secured by amendment were already secured in large part or would have been in due time, amendment or not. But often these assertions are made on his own authority, and he does not entertain the possibility that circumstances would have intervened that slowed change, or reversed its direction. Even in the case of a failed amendment, one might argue that by putting the change sought on the Nation's political agenda, the amendment's proponents acted as a catalyst for that change, which, in the absence of an amending mechanism, would not have otherwise progressed in the same way.

Strauss also ignores the inherently unstable nature of informal change. Congress may pass laws, but those laws are subject to repeal (or presidential veto). Executive orders may be rescinded. Court decisions may be overruled, distinguished, or ignored. And so on. Consider the New Deal. David Kyvig contrasts Reconstruction with the New Deal by noting the absence of any trace left by the latter in

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29. In an earlier work, one of us (Vile) classified amendments into a number of overlapping categories. According to this analysis, amendments, like other forms of informal change, could fulfill any one of five functions: (1) preserve the status quo; (2) forestall change; (3) reverse change; (4) initiate change; or (5) sanction change. JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS 15-34 (1994).

These functions are not always easy to identify with precision because supporters of amendments sometimes have different goals. Thus, Federalist supporters of the Bill of Rights essentially regarded themselves as preserving the status quo by putting in language against contingencies they did not expect, while Anti-Federalist supporters saw the Bill either as a way of forestalling or reversing the vesting of new powers over individual rights in the national government. The Thirteenth Amendment, abolishing slavery, and the Seventeenth Amendment, providing for direct election of U.S. Senators, arguably not only sanctioned changes that had already been largely accomplished (in the first case by war and in the second by changes within individual states) but also initiated additional change and forestalled the likelihood that such changes would be reversed. The Eleventh Amendment may be viewed as either instituting a change in constitutional understandings in regard to suits initiated against states or reversing a change in constitutional understandings that the Supreme Court had sanctioned in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 425 (1793). The Twenty-First Amendment, repealing national alcoholic beverage prohibition, can be understood either to have reversed changes that were initiated by the Eighteenth Amendment, and to have returned the nation to the status quo prior to the Eighteenth Amendment, or as having sanctioned changes in drinking habits that were already reflected in the creation of speak-easies and illegal bootlegging. The point is this: constitutional change is not always unidirectional, as Strauss seems to assume.

30. See supra note 11.

31. See infra notes 85-90 and accompanying text (discussing the ERA).
the text of the Constitution. If Strauss’s theory is correct, one would have expected that the Supreme Court’s federalism decisions during the 1990s (and early 2000s) would have encountered more resistance from a public that had demanded substantial changes to the small-c-constitution effected after 1937. Yet it is precisely because the New Deal did not enshrine its changes in the Constitution that change was provisional and subject to yet more change in the future.

D. Minimizing the Functions of Formal Amendments

Strauss’s Whig theory of constitutional change—his belief that, left to their own devices, the other branches of government would move ineluctably towards progressive small-c-constitutional change—also leads him to minimize the only two roles he sees for formal amendments in our constitution: settling certain questions and suppressing outliers that refuse to subscribe to the norm embodied in the formal change. We argue in this Part that his description of these

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32. See Kyvig, supra note 20, at 480-81. Kyvig notes:

The New Deal . . . ignored the pattern that the Civil War generation provided of using the Article V process to incorporate fundamental changes achieved through blood and struggle into the Constitution. By this means a second American revolution had been rendered permanent. A new measure of federal authority and civil rights was secured in the 1860s, though admittedly full implementation would be long delayed. In contrast, the New Deal failed to revise the Constitution, settling instead for a new interpretation of its existing terms, initiated by the executive, endorsed by the legislature, and sanctioned by the judiciary.

The decision of Franklin Roosevelt . . . to forgo a quest for amendment in favor of political maneuvers to influence the Supreme Court cost the third great revolution in American government the security and stability of its predecessors in the 1780s and 1860s . . . [by leaving] the New Deal vision of government responsibility on a less firm foundation. Id.; see also id. at 314 (“Failure to pursue amendment meant . . . that the New Deal was not erected on as strong and solid a constitutional foundation as might well have been possible at the time.”).


34. For an argument that this instability contributes to a broader stability in our small-c-constitution, see Glenn Harlan Reynolds, Chaos and the Court, 91 COLUM. L. REV. 110, 115 (1991).
functions is more narrow than is warranted by equally plausible readings of the history of the amendments that he cites in his article. In Part V of our Essay, we describe other important functions of a formal amendment process that Strauss neglects.

1. The Settling Function

Strauss argues that while amendments do furnish "rules of the road" and serve to settle matters once and for all, this function is not all that important in the end because it is likely that—assuming that there is sufficient public support for the ends of the amendment—judicial decisions or legislation would have achieved the same result eventually.35 Here we examine examples Strauss gives and offer a critique of his "inevitability" thesis.

Consider the case of the Thirteenth Amendment. The original Thirteenth Amendment was not the amendment that we recognize as putting the final nails in the coffin of slavery, but an amendment usually referred to as the Corwin Amendment, after Republican representative Thomas Corwin of Ohio.36 In its final form, which was accepted by a House vote of 133 to 65 and a Senate vote of 24 to 12, this amendment proposed that "[n]o amendment shall ever be made to the Constitution which will authorize or give to Congress 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 the said State."37 This amendment, ratified by three states, was introduced in the hope that it would provide adequate security against the fears of the Southern states and keep them in the Union.38 Because it was not ratified by the necessary number of states, it is difficult to know whether it could have succeeded in preventing secession or not, but it certainly appears likely that, if adopted, the amendment would have prohibited adoption of the very amendment that we today know as the Thirteenth (though it might have allowed for a much slower process of state abolition like that which had taken place in the North in the late eighteenth and early nineteenth centuries). It should be noted that, when the Union did split, Southern states adopted a constitution that specifically recognized that slaves

35. See supra note 11 and accompanying text.
36. VILE, supra note 13, at 84.
37. Id. (describing the proposed Corwin Amendment in detail).
38. See id.
were property)—a constitution that was overthrown by war rather than amended or adjusted by judicial decisions.

By forever prohibiting slavery, the Thirteenth Amendment to the United States Constitution that was ratified in 1865 did almost the opposite of what the Corwin Amendment had proposed. Prior to adoption of the Amendment, Lincoln had already widened the purposes of the Civil War to include a “new birth of freedom,” and slavery had already been declared illegal by the Emancipation Proclamation in states that continued in rebellion. On this basis, one could argue, with Strauss, that the complete abolition of slavery was almost inevitable, with or without the Thirteenth Amendment. However, one of the most thorough studies of that Amendment ever written, Michael Vorenberg’s recently published Final Freedom, argues that this Amendment, and not the Emancipation Proclamation or Lincoln’s Gettysburg Address, was viewed by contemporaries as “the transforming act.” Prior to adoption of the Thirteenth Amendment, a number of prominent abolitionists had argued that the Constitution was “a covenant with death,” more deserving of public burnings than of praise. Vorenberg convincingly argues that formalizing the abolition of slavery through the amending process “allowed Americans to conceive of the Constitution as a document that could be altered without being sacrificed.”

It is consoling to think that slavery could never have been reimposed even without the Amendment, but the later history of segregation may show that racial relations were just as subject to regress as to progress. Moreover, African-Americans and their supporters may be forgiven for preferring, like the authors and ratifiers of the Bill of Rights before them, to rest their security on the foundation of written words rather than on notions of the inevitability of progress. Vorenberg goes on to argue that the Thirteenth Amendment could have proven far more important than it did, doing much of the heavy lifting that we today attribute to the Fourteenth

39. CONFEDERATE CONST. art. I, § 9, cl. 4, reprinted in CHARLES ROBERT LEE, JR., THE CONFEDERATE CONSTITUTIONS app. C, at 182 (1963) (“No ... law denying or impairing the right of property in negro slaves shall be passed.”).
40. See Strauss, supra note 1, at 1480.
43. VORENBERG, supra note 41, at 6.
Amendment, had the latter Amendment not been adopted. But even after adoption of the Fourteenth Amendment, the Thirteenth remains a potent symbol for the proposition that the United States Constitution does not recognize property in human beings.

And what about the Fourteenth Amendment? Did it do anything to further the struggle for racial equality? Strauss seems to think not. Apparently forgetting the Amendment’s role in overturning the infamous \textit{Dred Scott} decision of 1857 and the notorious three-fifths compromise, and skipping to almost a century after its ratification, Strauss writes that “[i]t is difficult to believe that the Supreme Court would have ruled differently in \textit{Brown} if the Fourteenth Amendment had not been adopted,” and that “there are good reasons to believe that the absence of such a provision would not have stood in the way of outlawing segregation in 1954.” Yet, by being able to point to a portion of the text of the Constitution—the fundamental law of the land—that guaranteed equality of persons, and to contrast that guarantee with conditions in Jim Crow states, civil rights advocates could make a claim that state-mandated segregation was not only \textit{immoral} and a betrayal of the ideals of the Declaration of Independence, but also that states were acting \textit{illegally and unconstitutionally}.

Thus, civil rights advocates could demand that the institutions of the federal government make good on the promise expressed in the text of the Fourteenth Amendment. Similarly, advocates of equality like Dr. Martin Luther King, Jr., were able to

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44. One might recall that Justice John Marshall Harlan I rested much of his analysis in the \textit{Civil Rights Cases}, 109 U.S. 3, 33-62 (1883) (Harlan, J., dissenting), and in \textit{Plessy v. Ferguson}, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting) (\textit{overruled by Brown v. Board of Education}, 347 U.S. 483 (1954)), not simply on the Fourteenth Amendment, but also on the idea that the Thirteenth Amendment had intended not only to eliminate the institution but also the “badges and incidents of slavery.” See \textit{The Civil Rights Cases}, 109 U.S. at 21 (Harlan, J., dissenting).
45. 60 U.S. (19 How.) 393 (1857).
46. Strauss, \textit{supra} note 1, at 1485.
47. See, \textit{e.g.}, Brief for Appellants, \textit{Brown v. Bd. of Educ.}, \textit{reprinted in 49 Landmark Briefs and Arguments of the Supreme Court of the United States} 36 (Philip B. Kurland & Gerhard Casper eds., 1975). The brief states that
\begin{quote}
\textit{under the Fourteenth Amendment equality of educational opportunities necessitates an evaluation of all factors affecting the educational process}... \textit{Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.}
\end{quote}
\textit{Id. (citations omitted)); see also James T. Patterson, Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy} 10, 15, 24, 39, 41, 64, 67, 69 (2001) (describing the central role that the Fourteenth Amendment played in arguments that \textit{de jure} segregation was unconstitutional, and the role it played in the Court’s decision in \textit{Brown}).
\end{quote}
agitate for change without fomenting revolution and rely on civil disobedience rather than on violence.

Whether Strauss finds an alternative outcome “difficult” to believe or not, it bears remembering that Brown itself was a close-run thing.48 In fact, what is “difficult” to imagine is the Court unanimously backing a major change like a reversal of Plessy absent a significant textual hook, like the proclamation in Section 1 of the Fourteenth Amendment that all persons born in the United States were citizens or the provision guaranteeing all persons equal protection of the law. As far as the “good reasons” to believe that Brown would have happened as it did without the Fourteenth Amendment, Strauss never indicates what those good reasons are. Without unanimity on the Court, stiffer resistance and greater delay (if that is possible to imagine) would have been even more likely. Given the general efficacy of “massive resistance,” who knows how long it would have taken to secure some semblance of equality before the law in the most recalcitrant areas of the South? Apartheid, after all, persisted in South Africa until the late 1980s, despite intense international pressure.49

The NAACP’s entire legal strategy, moreover, hinged on being able to demonstrate, on a case-by-case basis, first how the separate-but-equal rule established in Plessy could not be squared with the reality of conditions in the Jim Crow states,50 and, eventually, the

48. See Patterson, supra note 47, at 55-56 (describing Justice Frankfurter’s fears that he could count only five votes to overturn Plessy and his efforts to secure uniformity). Justice Douglas claimed that had the vote been taken after argument, five Justices (including Frankfurter) would have voted to uphold Plessy. William O. Douglas, The Court Years 1939-1975, at 113 (1980). Douglas’s autobiographical recollections are not, it should be noted, infallible. See G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 376 (expanded ed. 1988) (noting that “the accuracy of Douglas’s information about his own life is highly suspect”).

49. It is worth noting that even after the triumph over apartheid, the South African people were not content to leave the future of their successful revolution to chance; they promptly enshrined notions of racial equality in their new constitution. See S. Afr. Const. ch. 2, § 9, cl. 4, reprinted in Constitutions of the Countries of the World 8 (Gisbert H. Flanz ed., 1997) (“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) [including race].”).

50. Charles Black, who served as part of the NAACP litigation team that briefed and argued Brown, perhaps put it best in his 1960 article defending the decision:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

incompatibility of *Plessy* with the idea of legal equality established by the Fourteenth Amendment. Take away the Fourteenth Amendment, and what remains that could overcome the inertia of “settling” decisions like *Plessy*—or *Dred Scott*? Congress? Not if the Supreme Court decided that the Constitution had settled the issue. The inevitable success of “an idea whose time had come”? Perhaps, but how long would it take, and at what cost would such an idea prevail?

Strauss then makes the fascinating argument that because the Supreme Court, in *Bolling v. Sharpe*, overturned racial segregation in the District of Columbia via the Due Process Clause of the Fifth Amendment, it did not actually need the language of the Equal Protection Clause to overturn *Plessy*. Although it is ironic that Strauss’s argument here hinges on language from an earlier amendment, it is possible that Strauss is correct on this point. It seems more likely, however, that the Court felt free to stretch the Due Process Clause because it recognized the anomaly of permitting segregation at the national level and not in the states and that this rather shows the effectiveness of the language of equal protection in the Fourteenth Amendment. Without the equality norm contained in the language of the Fourteenth Amendment, would the Court have had the tools with which to fashion the “equal protection component” it found in the Fifth? While possible, it would seem to have been a much more difficult decision to sell both internally and to the public.

It does not take great effort for Strauss to demonstrate that the Fifteenth Amendment has been, through much of its history, quite ineffective, and yet, even when it was most moribund, it was not


> There had always been an air of unreality about the notion of “separate but equal” facilities for blacks and whites. Those who lived with the system knew perfectly well, as Chief Justice Taney had declared in a related context in the *Dred Scott* case, that its purpose and effect were to keep blacks in an inferior position.

Id. (footnotes omitted).


53. See Strauss, supra note 1, at 1485.

54. See *Bolling*, 347 U.S. at 500 (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

55. See id. at 499.

completely dead. Less than twenty years after one commentator had declared that the amendment was a dead letter and should be repealed, the Supreme Court used the amendment to strike down Maryland’s grandfather clause in Myers v. Anderson. Moreover, as Benno Schmidt points out in his account of the cases in the Holmes Devise History of the Supreme Court, the Government relied entirely on the Fifteenth Amendment to strike down the grandfather clauses, while opponents tried to argue that the Amendment did not apply. Ten years before Brown v. Board of Education, the Court used this Amendment to invalidate the all-white primary in Smith v. Allwright.

Consider another of Strauss’s examples: the Twenty-Sixth Amendment, which granted eighteen-year-olds the right to vote. The Amendment was necessary because the Supreme Court held, in Oregon v. Mitchell, that Congress could, by legislation, enfranchise eighteen-year-olds only in federal elections. “But by the time Congress sent the Twenty-Sixth Amendment to the states,” Strauss writes, “it was already a foregone conclusion that eighteen-year-olds would soon be voting in all elections.” Leaving aside the question of how “soon” this would occur, because he notes that ten states—20% of the country—had rejected such proposals before the Amendment was submitted to the states, one might consider that, at the same time, states were lowering the drinking ages from twenty-one to eighteen for many of the same reasons that eighteen-year-olds were demanding the right to vote. Did this issue stay settled? In less than a generation, states found themselves faced with the loss of federal highway funds if they did not restore the drinking age to twenty-one.

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57. See id. at 909 (noting the problem that disenfranchisement posed for the South: “explicit state laws would force the federal courts to abide by the promise of the Fifteenth Amendment”).
58. Goldwin Smith, Is the Constitution Outworn?, 166 N. Am. Rev. 257, 257-67 (1898); see also Arthur W. Macken, Jr., Is the Fifteenth Amendment Void?, 23 Harv. L. Rev. 169, 180-91 (1910) (arguing that because the Fifteenth Amendment cannot be enforced in all of the states it should be void).
59. 238 U.S. 368, 380 (1915).
60. Bickel & Schmidt, supra note 56, at 939-40.
63. U.S. Const. amend. XVI.
65. Strauss, supra note 1, at 1489 (emphasis added).
66. See id.
But for the settling of the issue in a constitutional amendment, who is to say that states, either by themselves or at the behest of the federal government, would not begin raising the voting age again, perhaps in response to backlash against “youth culture” or because it did not appear that the youth were taking part in elections or because the war in Vietnam was over? After the Twenty-Sixth Amendment, states simply no longer have that option.

2. The Suppression Function

Strauss concedes that, in addition to setting “rules of the road,” amendments also suppress outliers. But he belittles this function, too: “Probably the most accurate description of amendments that suppress outliers … is that they allow near-unanimity to become unanimity a little sooner ….” Outliers, he assures us, “might not have held out much longer” in the face of small-c-constitutional change spurred by other branches and commanding popular support. The Thirteenth Amendment, Strauss writes, “at most … abolish[ed] slavery only in the four border states … that had not joined the Confederacy.” He considers it a “foregone conclusion” that eighteen-year-olds would “soon” have been voting in federal and state elections, whether or not the Twenty-Sixth Amendment was submitted to the states. “Pollock had all the earmarks of a precedent that was destined to be overruled” and that eventual overruling would have ended the “sideshow” over the constitutionality of the income tax. Forces urging the direct election of senators “were on their way to prevailing … with or without a formal constitutional amendment”; again, the suppression of outliers was only a matter of time. According to Strauss, “the best estimate is that if the suffragists had been forced to concentrate solely on the state level [as opposed to securing relief through a constitutional amendment], they would have achieved substantial but not complete success within a few years.”

69. Strauss, supra note 1, at 1461.
70. Id. at 1461-62.
71. Id. at 1461.
72. Id. at 1480.
73. Id. at 1489.
74. Id. at 1492.
75. Id. at 1498.
76. Id. at 1503 (emphasis added).
But such statements are counterfactual and unverifiable (How much longer? At what cost would outliers be suppressed? Did other branches have the political will to suppress outliers?). Moreover, they again reflect Strauss's firm belief that changes of the "right" sort will eventually fix themselves into our constitutional regime with or without the amendment process. 77 So what does it matter, he seems to argue, when they occur? We submit that it matters very much when they occur, particularly to the beneficiaries of the change. By effecting those changes through the amendment process, the potential beneficiaries have an opportunity to engage the engine of popular sovereignty in making their favored change part of the Constitution sooner, rather than later. Otherwise, there is simply no way of knowing how long it will take for unanimity to prevail (history suggests that there will always be at least one holdout). For someone living in an outlier state, it is cold comfort to be told that change will "eventually" come "soon," but that nothing more can be done to hasten it. One may just as soon see fulfillment of the communist hope for the eventual withering away of the state first.

III. CONSTITUTIONAL CHANGE AND THE INEVITABLE TRIUMPH OF REJECTED AMENDMENTS

Having lodged those initial objections, the next two Parts of this Essay will focus on the two main claims Strauss offers in support of his irrelevance-of-amendments thesis. First, Strauss argues that when the popular will demands it, small-c-constitutional change will occur even if the formal amendment embodying the change is rejected. 78 Second, he argues that even large-C-constitutional change, like an Article V amendment, will not produce any lasting change in the regime if its norms are too far ahead of the zeitgeist. 79 These arguments are not necessarily false, but Strauss overrates their significance. We take up the latter case of the "premature amendment" in Part IV. In this Part, however, we look at his claim that change would have occurred, amendment or not, with special attention to his two examples: the Equal Rights Amendment (ERA) and the Child Labor Amendment.

77. See supra Part II.C.
78. See Strauss, supra note 1, at 1459 (arguing that "some constitutional changes occur even though amendments that would have brought about those very changes are explicitly rejected").
79. See id. ("When amendments are adopted even though society has not changed, the amendments are systematically evaded.").
After an impressive start down the road towards ratification, efforts to pass the ERA stalled. Social conservatives warned of far-reaching consequences that would result from writing sexual equality into the Constitution and then inviting a "liberal" and "activist" judiciary to interpret that guarantee in myriad unforeseeable fact situations. At the same time, legal scholars like Paul Freund urged that most pernicious and irrational forms of sexual discrimination could be remedied through judicial interpretation of the Fourteenth Amendment. The combination of a handy (and, presumably, a more easily calibrated) remedy with the fear of unintended consequences brought ratification efforts to a halt. When ERA supporters gained a little more time from Congress through a controversial extension of the time limit, not only were new ratifications not forthcoming, but a number of states rescinded earlier ratifications. Had Congress again extended the time limit, or if supporters were successful in recent attempts to resuscitate the ERA à la the Twenty-Seventh Amendment, it is likely that even more states would attempt to withdraw their assent.

Following the rejection of the Amendment, however, the Supreme Court began to subject sex-based classifications to a standard of review—under the Fourteenth Amendment, mainly—that has become virtually indistinguishable from strict scrutiny. Strauss thus concludes that the norms embodied in the ERA have become the law of the land without an amendment—in fact, in spite of the rejection of a formal amendment. This seeming anomaly, he argues, is easily explained by the fact that constitutional protection against

80. See KYVIG, supra note 20, at 408.
81. See id. at 411 (describing Senator Sam Ervin’s deployment of the “unisex toilet” as a scare tactic).
82. See id. at 405.
83. See id. at 409-10.
84. See id. at 413-16. The constitutionality of such rescissions is not undisputed. For a discussion, see John R. Vile, Permitting States to Rescind Ratifications of Pending Amendments to the U.S. Constitution, 20 PUBLIUS: THE JOURNAL OF FEDERALISM 109 (1990).
gender discrimination was a goal that, the ERA's rejection notwithstanding, a majority of people supported. Thus, with that kind of widespread public support, the result was small-c-constitutional change.

First, there is again something ironic about Straus's citing this example in support of his irrelevancy thesis. After all it was the very presence of the Fourteenth Amendment that enabled ERA opponents to claim with plausibility that tools already existed to combat gender discrimination, a position that the Court itself eventually adopted. Leaving this point to one side, however, if one imagines a Constitution without Article V—in which the ERA could never have been proposed—is it inevitable that sex equality would have been addressed by the Court? We think not. An equally plausible interpretation of events suggests that norm entrepreneurship by women's groups—which brought the issue to the fore—along with the possibility that the norm of sex equality could become part of the Constitution through the amendment process, raised the issue in a way that made the small-c-constitutional change possible. Given this choice between formal and informal change, opponents of the ERA, like Senator Sam Ervin, clearly preferred informal change and counted on the fact that it would be slower, more controlled, and less revolutionary than formal change. Were there no Article V, no such

87. See Straus, supra note 1, at 1478.
88. See id. ("[I]t would be a mistake to say that an overly activist Court 'ratified' the ERA in the face of a contrary verdict from the country. What 'ratified' the ERA, in effect, was ... insistent pressure from society as a whole.").
89. See KYVIG, supra note 20, at 405. Kyvig describes Senate hearings on the ERA in which Ervin's prize witness was Harvard law professor Paul Freund, who had argued for more than twenty years that the Fifth and Fourteenth Amendments should be sufficient to guarantee women legal equality and that protective discrimination was not unfair. Ervin drew particular attention to Freund's judgment that the ERA would abolish gender distinctions in military service.

Id. That there was both considerable initial support for, and even stronger opposition—which increased over time—to the ERA suggests that at least the public at large and its representatives do not see amendments as irrelevant. The ERA clearly raised expectations that its ratification would herald the coming of a new era of judicially enforceable gender equality, and political opposition to it tended to play to the fears that courts would be enthusiastic handmaidens to the birth of these raised expectations. For examples of both, see id. at 400-16. By the same token, serious discussion for ratifying the amendment, despite the fact that much of what it promised has otherwise been secured by Court decisions, suggests that people generally see amendments as important and as distinct from mere judicial decisions, even Supreme Court decisions. See Denning & Vile, supra note 85, at 600 n.28 (noting that support for ratifying the ERA despite court gains is often rooted in its perceived symbolic importance).
choice would be possible, and so the status quo might have held for many more years.

After all, the ratification of the Nineteenth Amendment and the language of the Fourteenth Amendment did not prevent a unanimous Court from holding, in 1948, that a state could prohibit most women from becoming bartenders with the following observation:

The Fourteenth Amendment did not tear history up by the roots, and regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. . . . The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced does not preclude the States from drawing a sharp line between the sexes . . . in such matters as the regulation of the liquor traffic.\(^\text{90}\)

Who is to say that, without the ERA, *Goesaert v. Cleary* would not have remained the law of the land? Even with the entrepreneurship of women’s groups and ERA supporters, which has eventually resulted in the fact that “it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted,”\(^\text{91}\) it has taken the Court more than twenty-five years and numerous decisions to arrive where the ERA, had it been ratified, would have taken us almost at once, *viz.*, strict scrutiny of gender classifications.\(^\text{92}\) If Justice Lewis Powell’s opinion in *Frontiero v. Richardson* is to be believed, the failure of the Amendment to be ratified at the time that decision was rendered led, at the very least, to the refusal of the Supreme Court majority to adopt a strict scrutiny test for gender classifications.\(^\text{93}\) As we pointed out in

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\(^\text{90}\) Goesaert v. Cleary, 335 U.S. 464, 465-66 (1948), overruling recognized by Payne v. Tennessee, 501 U.S. 808, 829 n.1 (1991) (emphasis added). A later court observed that such statutes might have reflected “[w]hat was then gallantry,” but now seemed to embody “Victorian condescension or even misogyny.” Women’s Liberation Union of R.I. v. Israel, 512 F.2d 106, 109 (1st Cir. 1975) (striking down Rhode Island statute prohibiting liquor licenses from serving women).

\(^\text{91}\) Strauss, *supra* note 1, at 1476-77.

\(^\text{92}\) The possibility of such dramatic effects was one factor that ERA opponents used to their advantage. See *Kvvig*, *supra* note 20, at 411 (“Recent experience with dramatic social change as the result of constitutional reform enhanced apprehensions about the ERA in some circles.”).

\(^\text{93}\) Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (citing the pending ratification of the ERA as a reason not to regard sex-based classifications as inherently suspect). On the other hand, had the Supreme Court reacted in *Frontiero* (and arguably in *Roe v. Wade*, 410 U.S. 113 (1973)) by restricting women’s rights, it certainly seems far more likely that greater pressures would have been generated on behalf of the Equal Rights Amendment, as those avenues of small-c-constitutional change were closed.
a previous Part, moreover, taking away the possibility of constitutional amendment does not guarantee that informal change will triumph. It may instead mean that the legal status quo is secured for generations to come.

Consider Strauss's other example, the failed Child Labor Amendment. During the time that Supreme Court decisions were striking down national child labor laws, it made sense for advocates of such laws to work for a constitutional amendment. The fact that the Child Labor Amendment was not adopted and that the Court eventually accepted the constitutionality of such laws anyway is likely a greater testimony to the perspicacity of the view that Congress already had power to regulate child labor law under the Commerce Clause and other constitutional provisions than an explicit rejection of vesting that body with such authority by amendment. It is probably more true to say of Hammer v. Dagenhart, which held that Congress had no power to combat child labor, that it was an opinion whose shelf life was destined to be brief, than it is to say that Pollock v. Farmers' Loan & Trust was destined for the dustbin of history, as Strauss does. But the failure to secure a formal amendment, as proponents of the income tax did, does not prove that change inevitably wins out, nor that it does not matter whether a formal amendment mechanism is available or not.

IV. THE "PREMATURE" AMENDMENT AND EVASION

Not only is formal change not a necessary condition for altering the small-c-constitution, Strauss writes, it is not even a sufficient
condition.99 If there is not a correspondence between societal norms and norms embodied in constitutional amendments, he argues, the latter will be evaded:

When there is no lasting social consensus behind a textual amendment, the change in the text of the Constitution is unlikely to make a lasting difference . . . unless society changes in the way that the amendment envisions. Until that happens, the amendment is likely to be evaded, or interpreted in a way that blunts its effectiveness.100

Exhibit A is, of course, the Reconstruction Amendments, whose promises largely eluded African-Americans for several generations following their inclusion in the Constitution.101

And yet there they sat. They did not cease to be a part of the Constitution, and the failure of the courts,102 Congress, and the executive branch to enforce them to their conceptual limits did not result in their repeal.103 They served as a reminder of the promise of Reconstruction and were a rallying point for those who waged a legal battle for equal treatment. When Congress did get around to making good on the amendments’ promise, by passing, inter alia, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, there was no prolonged battle with other branches over their constitutionality as might have been the case if no such amendments existed.104 Again, the fact that the amendments became a part of our fundamental law is not without significance. Had they never been ratified, Strauss provides little convincing evidence that those principles would have effectively lodged themselves in our small-c-constitution. As David Kyvig eloquently put it:

To many observers . . . judicial developments [restricting the scope of the Reconstruction Amendments] signified that the Civil War amendments had failed. They did not override an earlier constitutional commitment to federalism and immediately produce a new

99. Id. at 1492.
100. Id. at 1463.
101. See id. at 1478-86 (discussing the failure of the Reconstruction Amendments following the end of Reconstruction).
102. Of course, the failure was not total. There were some efforts by the Court to eliminate some forms of racial discrimination prior to Brown. See infra notes 106-107 and accompanying text.
constitutional order based on equality. However, ... the Civil War amendments did enter the fabric of the Constitution. They did enlarge the Constitution’s authority and, as the South remained acutely aware, retained at least the potential for sanctioning change ... Eventually, during the 1930s and 1950s in particular, the Civil War amendments would be reconsidered. They then served as the legal foundation for a new structure of federalism and civil rights that would have been much harder, indeed perhaps impossible, to establish without them.\footnote{105}

Moreover, the Reconstruction Amendments, under-enforced though they were, were not totally without effect. In the years after their ratification and before Brown, the Supreme Court did, on occasion, strike down state laws on their authority.\footnote{106} One should add that while we are rightly inclined to disparage the doctrine of “separate but equal” announced in the Plessy case, it is quite possible that, had there been no Fourteenth Amendment, the Supreme Court would have permitted states to separate the races without even a bow in the direction of equality. Arguably, the demonstration that “equal” in the doctrine of “separate but equal” (clearly the direct result of the language of the Fourteenth Amendment) would never result in true equality as long as races were “separate” was one of the most important factors that led to this doctrine’s eventual demise.\footnote{107}

\footnote{105. Kyvig, supra note 20, at 187.}

\footnote{106. See Sweatt v. Painter, 339 U.S. 629, 631-36 (1950) (requiring admission of black law student to the University of Texas because no “equal” school was available); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 638-42 (1950) (holding that forced segregation of college students was not permitted); Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (striking down racially restrictive covenants in private real estate contracts); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 348-50 (1938) (striking down Missouri policy of sending black students out of state for law school); Buchanan v. Warley, 245 U.S. 60, 81-82 (1917) (striking down state law requiring racial segregation in housing); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (invalidating ordinance requiring all laundries to be housed in brick or stone buildings, unless waiver obtained, where only Chinese laundries in wooden buildings were closed); Strauder v. West Virginia, 100 U.S. 303, 308-10 (1879) (striking down statute limiting jury duty to whites).}

\footnote{107. See, e.g., Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation 201 (1987). Lofgren elaborates:}

The United States Supreme Court’s decision in Plessy ... removed all doubt: separate-but-equal was unambiguously a part of the law of the Constitution. ... [But] [t]he justices had not gone so far as to hold explicitly that the Constitution recognized two categories of citizenship, one for whites and the other for non-whites ... Rather, whatever the realities of the hardening color line in America, the formula associated with Plessy could be invoked against the worst deprivations. ...

Because of this “promising” side to Plessy, ... the 1896 decision proved eventually to be a useful tool in the attack on racial segregation. ... Blacks, both individually and especially through the National Association for the Advancement
Though these efforts fell far short of the promise of equality embodied in the amendments, it is difficult to imagine the success of even those efforts—minor and halting though they were—had the amendments not been available for use by the Court. Certainly, Congress and the President at the time of these decisions were not inclined aggressively to promote civil rights. Thus, if the Reconstruction Amendments initially fell woefully short of their promise, perhaps they were not the failed irrelevancies that Strauss portrays either.

Take another example, one that Strauss does not discuss. The Eighteenth Amendment was adopted and ratified owing to a peculiar synergy of patriotism and reformist zeal. The zeal, alas, did not long survive the end of World War I (the source of the patriotism). The federal government and the states were then faced with enforcing a set of laws that a substantial number of Americans were determined to evade. If Strauss’s thesis holds, then why was so much energy devoted, a dozen years later, to securing the Amendment’s repeal? The wets (prohibition opponents) did not presume to have any other choice. Nor were they willing to wait until the federal government and the states simply stopped enforcing the Prohibition laws. Moreover, despite the considerable wane in enthusiasm for Prohibition, which suggested that American society did not agree with the aims of the Amendment, the federal government continued to enforce the Prohibition laws. And no court interpreted the Amendment so as to “blunt its effectiveness,” despite the fact that many Americans did their best to evade it.

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of Colored People, used legal action to complicate and make more costly the enforcement of separation . . .

Id.


110. See id. at 53 (“Nearly everyone who contemplated trying to overturn the Eighteenth Amendment became discouraged by the political requirements of repeal.”).

111. Id. at 71 (discussing arrests and prosecutions in 1926 and commenting that “every available index registered growing rates of violation rather than an increasingly effective law”).

112. Id. (“While many Americans observed the liquor ban . . . many others broke the law without being apprehended. The rising arrest rate provided a crude reflection of spreading disdain for national prohibition and a parallel growth of alarm on the part of many citizens.”).
If Strauss concedes (as he must) that formal constitutional changes cannot be wished out of the document, then his main point is not that premature, formal change is ineffective because of some flaw in the Article V amending process, but rather that the language of some amendments has proven to be ambiguous, and the promises contained in constitutional amendments depend in part on a commitment by other political actors for their realization. Both points are true. But that is only to say that constitutional amendments are rarely self-interpreting or self-enforcing. This would be a major criticism if amendments were somehow unique in this respect, but they are not. The same is true of executive orders, legislation, administrative regulations, court decisions, or nearly any other form of "law" in our system—the catalysts for informal constitutional change that, according to Strauss, would fill any void left by Article V's absence in our system.

At most, then, Strauss's point about the formal amendment process not foreclosing the possibility that the amendment will be ignored or given a parsimonious interpretation just proves that, more than we would perhaps like to admit, our system of laws depends for its efficacy on men and women to enforce them. What it does not do is advance his argument that our small-c-constitution would have ended up in the same place, formal amendments or no, much less the claim in his title that constitutional amendments are irrelevant. In the

113. See generally Richard Neustadt, Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan 150 (Free Press 1990) (1960) (noting that the scope of presidential power is determined by (1) the power of the president to persuade, (2) the expectations of others, and (3) the public perception of official prestige).


116. See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change (1991) (questioning the degree to which courts can bring about enduring social change through judicial decisions).

117. Professor Bickel's characteristically astute observation captures this point nicely:

The Supreme Court's judgments may be put forth as universally prescriptive; but they actually become so only when they gain widespread assent. They bind of their own force no one but the parties to a litigation. To realize the promise that all others similarly situated will be similarly bound, the Court's judgments need the assent and the cooperation first of the political institutions, and ultimately of the people.

next Part, we argue that the formal amending process serves a number of relevant and important functions in our constitutional system, which we list and describe.

V. THE USES OF AMENDMENTS

In Part II.D, we questioned the slight importance Strauss grants to the settling and suppressing functions of amendments. By assuming that small-c-constitutional change would occur inevitably, Strauss minimizes the importance of the only two roles he sees for amendments: to suppress outliers and settle matters one way or the other. If change is inevitable, then the matter would have been settled (the "right way," Strauss assumes) anyway by other branches, and resistance would have crumbled with would-be resisters throwing in the towel once they realized the futility of continued opposition. Even if one accepts Strauss’s minimalist picture of the settling and suppressing functions, one may still question whether Strauss has ignored other important uses of amendments.

We suggest that, in fact, amendments are useful in ways that Strauss has not considered. Specifically, we argue in this Part that amendments serve at least five functions. Our enumeration is not meant to be exhaustive; rather, it is merely suggestive of the benefits of a formal amendment process that are slighted by Strauss’s minimalist account.

First, we argue that amendments serve a corrective function by correcting deficiencies in the Constitution that become apparent as circumstances arise. Second, Article V serves a checking function by permitting a popular check on branches of government, notably the Supreme Court, which are not otherwise immediately susceptible to direct public pressure. Third, we argue that Article V, by furnishing both a correcting and a checking mechanism, has helped to domesticate revolution by providing the legal means to alter the fundamental law short of revolution. Fourth, the requirements of Article V that make formal amendments difficult ensure that changes to the fundamental law are legitimate. This legitimizing function, in turn, permits institutions charged with implementing the changes, like courts, to presume that new norms written into the Constitution can be enforced to their conceptual limits. Finally, we argue that, by providing for a method to add text to the Constitution, the Framers ensured a way for constitutional norms to be publicized and reinforced. We term this Article V’s publicity function.
A. The Corrective Function

If the nation is to continue with a written constitution that contains the specificity of some of the provisions of the existing document, there will be times when, absent flagrant disregard for constitutional language, some amendments will be required as defects become apparent, or changes are desired. Although the electoral college has shown itself to be extremely adaptable to the emergence of nineteenth- and twentieth-century democracy and the political party system, it is doubtful that the original requirement that each elector cast two undesignated votes could have been changed absent adoption of the Twelfth Amendment. Given the terms specified in the Constitution, it is unlikely that the dates of presidential and congressional inaugurations could have been changed without adoption of the Twentieth Amendment. It is doubtful that a president could have been legally limited to two terms without the Twenty-Second Amendment; that the District of Columbia could have been given electoral representation without the Twenty-Third Amendment (decades later, the more populous Commonwealth of Puerto Rico still has none; moreover, after the failed ratification of an amendment giving the District of Columbia voting representatives in Congress, it still lacks them); or that vice-presidents could have been replaced prior to new elections (one such replacement, Gerald Ford, went on to become president) without the Twenty-Fifth Amendment.

Strauss himself admits that this corrective function exists, and even cites the Twentieth and Twenty-Fifth Amendments as examples, but he again minimizes it. First, he lumps this role in with his “settling” function. Then he claims that because these “rules of the road” amendments do not “work[] a fundamental change in society,” their existence tends to support his irrelevancy thesis because, absent a formal amendment mechanism, the courts would “allow Congress to settle such matters by ordinary legislation,” especially because “the stakes are low.”

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118. See Strauss, supra note 1, at 1487-88.
119. See id. at 1487. Strauss argues that many constitutional amendments, although not important in the way that amendments are usually thought to be, still serve a nontrivial purpose. They address matters that must be settled one way or another—but how they are settled is not so important. An analogy is to the rule that traffic must keep to the right.
120. Id. at 1487-88.
But it would be an extremely pliant Court that would allow Congress to flout an explicit constitutional provision and legislate a different result. And settling issues of presidential succession (and, consequently, legitimacy) is hardly on the order of establishing traffic rules. While lacking the drama of the Reconstruction Amendments or the proposal of the ERA, these corrective amendments—though they may seem of slight importance to Strauss—perform a valuable function. The lack of drama neither renders the amending process irrelevant, nor do the “low stakes” involved assure judicial acquiescence in a legislative solution for constitutional lacunae, or assure public acceptance of that solution.

B. The Checking Function

Perhaps the most important function that the Article V amending process potentially plays is that it offers a check on the Supreme Court’s decisions, short of outright defiance. In fact, of our twenty-seven amendments, at least four were ratified to overturn, or in reaction to, a specific Supreme Court decision. Strauss’s argument that many of these Court opinions were aberrant and would not have survived for very long anyway is beside the point. By resort to the amendment process, “We the People” are not dependent upon the Court seeing the errors of its ways and correcting them. The standard amending process does require the cooperation of Congress, but, even here, the Founders provided an alternative in case this institution proved to be unreliable. Although the Article V convention mechanism has not been used, it appears to have prompted Congress to propose amendments on a number of occasions, most notably in the case of the Seventeenth Amendment, providing for direct election of the Senate. That process can be hastened without the interference of, or dependence upon, intermediating institutions.

Strauss may be correct that, absent Article V, the Court or Congress would eventually arrive at the same place as a formal amendment, but, to paraphrase Keynes, eventually we will all be dead.

121. On the other hand, the presidential election of 1800, which occasioned the Twelfth Amendment, was pretty dramatic.

Issues of ultimate efficacy aside, it would seem to be psychologically important to have open a process for amendment, lest a polity be unable to loosen the dead hand of the past other than by severing its connections with the past completely through revolution (with all the uncertainty that accompanies such radical surgery), or be unable to escape the occasional ill-starred decision of a branch, like the Supreme Court, which is insulated from the application of ordinary political pressure.

C. Domesticating Revolution

Though Strauss derides the idea of fundamental change enacted by “We the People,” assuming our sovereign prerogative as romantic piffle that the United States, as a “mature [democratic] republic,” should have outgrown, it is clear that the Framers saw the Article V amendment process as a way to domesticate revolution. At the Constitutional Convention, Virginia’s George Mason noted: “The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.”

Recognizing the potential power of amendments and the potential for frequent changes to undermine respect for the Constitution, the American Founders generally counseled great restraint in its use. But despite the fact that it has never been used,

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123. See Strauss, supra note 1, at 1505.
124. See, for example, Marbury v. Madison.
125. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated.
126. 5 U.S. (1 Cranch) 137, 176 (1803).
127. I The Records of the Federal Convention, supra note 21, at 202-03.
128. See The Federalist No. 49, at 348-49 (James Madison) (Benjamin Wright Fletcher ed., 1961). Madison wrote:

[A] constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and
the way for a reprise of the 1787 Convention is clearly marked by Article V. This allows a method for “We the People” to enact our own version of the Founding, while providing continuity with the past by using mechanisms in the old Constitution to midwife a new political order. Article V respects the right of the present to correct mistakes, while allowing us to precommit future generations to a present generation’s version of the good life. The amending process, moreover, ensures that large-C- Constitutional changes enacted through Article V will come into being with a presumption of legitimacy, as we discuss in the next Part.

D. Legitimization

The Article V process is, as the Framers intended, rigorous. The supermajority provisions for both proposal and ratification almost always guarantee that additions will not be made to the Constitution without both deep and broad support. Though some have criticized the necessity of such supermajorities, holding additions to the Constitution in abeyance until it is clear that support is broad generally prevents populous regions from dominating less populous ones. This, in turn, allows the amendment to become part of the Constitution with a near-conclusive presumption of legitimacy. This legitimacy, then, helps free the other branches (courts, for example) to enforce it vigorously; indeed, such enforcement would likely be expected after an amendment makes it through Article V’s arduous process. And if, after popular expectations were raised through the debates over proposal and ratification, the amendment is not enforced, institutions responsible for the foot-dragging may again face costs for evasion. This legitimization element is so crucial that the examples Strauss cites of amendments that, he argues, did not do anything immediately (the Reconstruction Amendments) or are not likely to have a significant effect despite their eventual ratification (the Twenty-Seventh Amendment), could be cited as proof of what

\[\text{intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied.}\]

Id.


128. See Strauss, supra note 1, at 1478-87.
happens when attempts are made to short-circuit (or play games with) Article V's procedural requirements.\footnote{129}

E. The Publicity Function of Written Amendments

Proposals for constitutional amendment inevitably attract publicity. The debates in Congress publicize the change and allow a forum for proponents and opponents of the change to make their case both to members of Congress and to those who will eventually be called upon to ratify the amendment, if passed. Even amendments that Strauss would characterize as "do-nothing" amendments (the Twenty-Seventh Amendment, for example) received the attention of Congress and the press\footnote{130} that only the most dramatic informal constitutional changes do.

The educative function of the debate aside, if proposed and ratified, a formal amendment undeniably changes the Constitution in one significant respect: it adds language to the Constitution. Thus, to every person who bothers to look at a copy of the Constitution, the change will be noticed. This textual referent, being available and apparent, enables more people to understand the fact that there has been constitutional change and to take note of it than if the change comes informally, as the culmination of doctrinal evolution in the Supreme Court or by accretions that harden into custom in the other branches. The publicity accompanying the change may, in fact, increase public expectations that the change will be honored by the other branches, raising the costs of evasion or under-enforcement.\footnote{131}

\footnote{129. On the irregularity of the Fourteenth Amendment's adoption, see 2 Bruce Ackerman, We the People: Transformations 99-119 (1998). But see John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 380-409 (2001) (describing the history preceding the adoption of the Fourteenth Amendment during and after the Civil War). In a previous article, we argued that the irregular ratification procedure accompanying the Twenty-Seventh Amendment resulted in its being treated as a demi-amendment by the other branches (the courts, in particular) and recommended against attempts to invoke the Twenty-Seventh Amendment as a precedent for reviving the Equal Rights Amendment. See Denning & Vile, supra note 85, at 598-600.}

\footnote{130. Albeit, in the case of the Twenty-Seventh Amendment, somewhat belatedly. At the time it was being adopted, one of the authors of this piece characterized the Twenty-Seventh Amendment as a "stealth amendment." See John R. Vile, Just Say No to 'Stealth' Amendment, NAT'L L.J., June 22, 1992, at 15.}

\footnote{131. When the wisdom of the United States Constitution was being argued in America, Thomas Jefferson wrote to his friend James Madison, who would ultimately guide the Bill of Rights through the First Congress, arguing that the new Constitution needed a bill of rights. Describing his objections to the proposed constitution in a letter to Madison, Jefferson wrote that "a bill of rights is what the people are entitled to against every government on earth, general or particular [and] what no just government should refuse, or rest on inferences." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787),
One might as well argue against a written constitution as against amendments; neither are sure guarantees. There is reason to believe, however, that the American Founders, drawing in part from the Protestant heritage that stressed the authority of written scriptures, were not completely mistaken in believing that written words available for inspection by all may often have a force that words not reduced to writing may not. Not for nothing did Washington’s farewell speech refer to constitutional change through explicit, as well as authentic acts.\textsuperscript{132} It might be worth remembering that the correspondence between Jefferson and Madison in many ways echoed the debates that had taken place when America separated from England. Students of comparative government know that Great Britain does not have a written constitution.\textsuperscript{133} Perhaps more accurately, while parts of the British constitution are written and parts are unwritten, the “constitution” is not perceived—like the American Constitution—to be superior law unchangeable by ordinary legislative means. Although believing that natural law should regulate the conduct of lawmakers, De Lolme argued that the Parliament had the power to do anything but change a woman into a man or a man into a woman—that is, anything other than that which was then considered beyond the realm of human action.\textsuperscript{134}

While such an understanding elevates the idea of democratic lawmaking, it left the American Founders, and many of their heirs, distinctly uncomfortable. They believed that it was just such a conception of government that had led the British to ignore longstanding rights such as the right of individuals unrepresented in Parliament not to be taxed. The colonists therefore preferred the idea of limiting legislative actions through the adoption of a written constitution, creating guarantees that would be enforceable in

\textit{reprinted in Thomas Jefferson: Writings} 916 (Merrill D. Peterson ed., 1984). Although initially tepid toward bills of rights, which he felt to have been largely ineffective at the state level, Madison did note that “[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.” Letter from James Madison to Thomas Jefferson, \textit{supra} note 20, at 421-22.


133. Note, however, that Great Britain’s participation in the European Union and its ratification of international human rights conventions may push it in that direction. \textit{See infra} note 137.

VI. CONCLUSION

Despite Strauss's iconoclastic title and sweeping statements about the worthlessness of constitutional amendments, we think that Strauss's argument can be recast in two parts, both of which we affirm. First, Article V amendments are neither the alpha nor omega of constitutional change in America; change occurs in a variety of informal ways with effects that can be just as momentous as a formal amendment. Second, a formal amendment is neither a necessary nor a sufficient condition for effecting constitutional change. These points are true. But neither point proves amendments' irrelevance, nor proves that constitutional changes wrought through the amendment process would have come about even in the absence of a formal amendment process. Moreover, we argue that Strauss unnecessarily downplays the values of formal amendments that he identifies—the settling and suppression functions—and ignores or does not consider other, valuable functions that the Article V amendment process and written constitutions serve in general.

Furthermore, Strauss's thesis has troubling implications for the rest of the Constitution. Its logic does not seem easily confined to constitutional amendments. If the amendments are not important, then what about the rest of the Constitution? Written constitutions in general? Strauss might say that, eventually, institutions would develop on their own, and that taking the trouble to write a constitution is either superfluous (since everyone would agree anyway) or futile (since, if everyone does not agree, they will just find ways around the inconvenient parts). If so, then Strauss's vision for our political future is much more radical than he lets on. For if formal changes are irrelevant and unimportant, then why should the rest of the document (including the Bill of Rights) warrant any respect from citizens or their governmental agents?136

135. Id. at 72-89.

136. Strauss has argued elsewhere that a written constitution is less important in American constitutional law than we let on, that constitutional law is really just so much common law. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 883-90 (1996). But even if this is an accurate statement—one that we somewhat doubt given the importance the Court (and scholars) attach to history, text, and original intent—it begs the question whether such developments are healthy or should be encouraged.
If he is constructing a brief for the "unwritten constitution," like Great Britain's, it is perhaps interesting to note that "mature democracies" like Britain are, at the dawn of the twenty-first century, opting for more and more written-ness by adopting bills of rights. In any case, the suggestion that constitutional amendments are worthless may carry with it an element of the self-fulfilling prophesy, as well as the germ of an idea that is alien to the United States' primary contribution to modern political theory, the written constitution.