December 22, 2013

Is the First Amendment Entrenched? Rawls’ Curious Claim

Gordon D Ballingrud, University of Georgia

Available at: https://works.bepress.com/gordon_ballingrud/1/
Is the First Amendment Entrenched? Rawls' Curious Claim

Abstract. This paper addresses a claim made by John Rawls in Lecture VI of Political Liberalism: any American constitutional amendment, ratified through Article V, which overturned the First Amendment would be illegitimate and justly ruled unconstitutional by the Supreme Court. Addressing the apparent contradiction that a duly enacted constitutional amendment can be unconstitutional, this paper reconstructs and critiques Rawls claim along two lines. First, I address Rawls’ philosophical claim as to the de facto entrenchment of the First Amendment, and the mechanisms that Rawls implicitly and explicitly purports to entrench it. I also address the claim that a First Amendment repeal amounts to constitutional overthrow, rather than proper amendment, by comparison with historical examples. Here I conclude that only the First Amendment’s moral stature, not history alone, can grant it entrenched status, but then critique the categorical nature of Rawls’ claim. Second, I address the possibility of de jure entrenchment through the Court’s institutional powers, limits, and the avenues through which the Court might resist such an amendment. Here I conclude that the Court is bound by the higher law, and may not draw on a law beyond the Constitution in which it is embedded to overrule an amendment to it. So, on both counts, I conclude that Rawls was incorrect to argue that the First Amendment is beyond repeal.
Introduction

This paper addresses a claim made by John Rawls in Lecture VI of Political Liberalism: any American constitutional amendment ratified through Article V which overturned the First Amendment would be illegitimate, and would be justly ruled unconstitutional by the Supreme Court. Assessing this argument proceeds in two steps. First, I address the philosophical side of the claim: the de facto entrenchment of the First Amendment, the mechanisms which Rawls implicitly and explicitly purports to entrench it, and the claim that a First Amendment repeal amounts to constitutional overthrow rather than proper amendment by citing historical examples. Second, I address the Court’s institutional powers, limits, and the avenues through which the Court might resist such an amendment.

Part I. The Philosophy

Section I. Rawls’ Claim and its Reconstruction

The Claim

In the first part, I will address Rawls’ claim that the First Amendment is intrinsic to an understanding of liberal democracy, and so thoroughly entrenched in our political culture, that the Court should summarily dismiss any amendment seeking to overturn it. This section contains a layout of the argument as Rawls makes it in Political Liberalism. I extrapolate on his reasoning as best I can.

Rawls writes,

“The Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid. Does this mean that the Bill of Rights and the other amendments are entrenched? Well, they are entrenched in the sense of being validated by long historical practice. They may be amended in the ways mentioned above but not simply repealed and reversed. Should that happen...that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.”

The two themes to be explored in this paper become apparent in this passage. First, I plan to address the claim that the First Amendment is entrenched by long historical practice. Second, I will focus on Rawls’ claim that the Court could pronounce a constitutional amendment duly enacted by

---

1 John Rawls, Political Liberalism at 239 (2005) I will interpret the “ideas and principles” of the First Amendment, for the purposes of this paper, as court-enforced, primarily. It is certainly possible to conceive of these ideas and principles as popular rather than judicial; indeed, this will become part of my argument to follow. But as the claim deals with the courts, it seems most appropriate to deal with the historical success of the ideas and principles as construed by the courts of law.
Article V’s terms as invalid. In sum, I address the first the theory and then the institutional powers undergirding Rawls’ claim.

To begin, it cannot be denied that repealing the First Amendment is clearly unjust on Rawls’ understanding\(^2\) because its absence might allow transient majorities or self-dealing politicians to silence their critics, or to oppress vulnerable, unpopular groups. However, Rawls assumes much in this claim. In this section, I will address the implicit notion that the political branches of the federal government have been co-opted by oppressive forces driving this hypothetical amendment, that rights unprotected by the higher law are essentially nonexistent, and that history itself is a legitimating principle.

**Problems with the Claim: History and Morality**

Rawls claims a difference between a valid amendment and a constitutional overthrow, or revolution “in the proper sense, not a valid amendment of the constitution.”\(^3\) He claims a critical distinction, presumably, between the Bill of Rights and other parts of the document: “The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.”\(^4\)

So, Rawls claims that the Bill of Rights, in our democracy, has been entrenched by long, successful historical practice. This is, I think, a fairly thin argument on its own, so I will attempt to elaborate as best I can, with my Rawls mask on. The holes I plan to address in this argument go as follows: why history? Is the weight of history sufficient to enhance a law’s legitimacy? Some normative theory may be required to make this case, and to distinguish between outdated or illiberal laws, and time-honored, legitimate laws. I will claim that history alone is inadequate, since slave-owners might have made the same claim about that institution by the mere preponderance of history.

The hypothetical amendment would not be illegitimate and thus dismissible because of history only, but also because of its moral content. As the Court itself has recognized,\(^5\) long practice does not ensure constitutionality. And, I would argue, if long practice cannot secure a law or government action against attack from the Court and the Constitution, then nor can it secure a part of the Constitution from amendment by its superiors. If the Constitution can correct the people’s delegates, and thus not be bound by long practice, then the Constitution’s creators and masters are not bound only by time, either. What does not bind the creation cannot bind the creator.

I claim that public reason, properly modified, provides the principle needed to distinguish among historical practices. Public reason so construed allows the unratified practices of the past an opportunity to be enshrined in the higher law.

\(^2\) This is to say, on any reasonable political conception of justice produced by an overlapping consensus, by citizens who recognize the burdens of judgment and the duty of civility.

\(^3\) Id.

\(^4\) Id.

\(^5\) *Marsh v. Chambers* 463 U.S. 783, at 790 “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees.”
without passing through Article V. This concept may provide a moral claim about the First Amendment’s legitimacy that does not hang only on history. Next, I address the question: what counts as success? I will argue for success as the fullness of civil and individual liberty, and the Court’s mixed history in that area.

**Reconstructing the Claim: Public Reason Revisited**

Why history? To argue that length of practice legitimates an institution is an argument with dangerous extensions. It requires a moral theory that can separate the historical wheat from the chaff.

Public reason, duly modified, can provide this answer. An historical representation of the content and procedure of liberal comprehensive theories and the aggregate weight of a nation’s overlapping consensus eliminates illiberal principles (slavery) and laws stemming from comprehensive or semi-comprehensive doctrines (religious laws). This modified view of public reason combines both the procedural and substantive aspects and stretches them across generations.

**Procedure of Public Reason**

Procedurally, public reason forbids any concepts dependent on comprehensive doctrines; specifically, it eliminates religious law and philosophical concepts that stem from assumptions which other citizens in a pluralistic polity cannot reasonably be expected to endorse.

Rawls writes, “A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected to endorse.”

Public reason’s procedure requires that “we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.”

Public reason is thus a language, a method of communicating based on viewing citizens as such, free and equal, and unlikely—given reasonable pluralism—to understand or accept public policies made to accord with comprehensive doctrines, whether secular or religious. It filters out those concepts and arguments for them in the public sphere. Public reason is thus a language divorced from theology or comprehensive philosophies, instead built on arguments addressing questions of basic political justice, and tailored to citizens as free equals.

**Content of Public Reason**

Rawls writes, “Thus, the content of public reason is given by a family of political conceptions of justice, and not by a single one. There are many liberalisms and related views, and therefore many forms of public reason specified by a family of reasonable political conceptions...The limiting feature of these forms is the

---

7 Id. at 776
criterion of reciprocity, viewed as applied between free and equal citizens, themselves seen as reasonable and rational.\textsuperscript{8}

Thus, public reason is both a method for communicating with citizens as free and equal, and a family of conceptions of political justice. The history of public reason represents the content that has survived the centuries as the product of an historical filter. Those legal and political traditions which both pass the test of public reason's procedural demands, and have long remained part of the American content of public reason, form the moral repository to which I refer.

The sum total of political conversation agreeing with public reason's requirements, taking place in the United States throughout its history, and including its remaining legal and political baggage from the Old World, comprises the content of public reason as I employ it here. In this way, public reason's procedural requirements define its substantive content over time.

Over the extent of our political time horizon, including the baggage from Europe and elsewhere, generations of free and equal citizens have regarded certain rights and liberties as within a reasonable political conception of justice. As long as such concepts can be separated from their comprehensive doctrine and still defended as reasonable within a liberal framework, they constitute this modified public reason.

\textit{Public Reason as Higher Law}

Combining the procedural and substantial aspects of public reason produces a political-moral consensus ratified over time. In this, the First Amendment is clearly included as one of the Constitution's\textsuperscript{9} flagship provisions.

By the higher law, I then understand both a written constitution broadly and deeply accepted as law, and principles of law or political justice that penetrate so deeply into it that a transient majority cannot alter it. In addition to its enumerated powers, limits, liberties, and rights, the higher law may contain concepts fundamental to a polity's identity, concepts which would require a constitutional moment, a basic shift in political identity, to overrule. If an overlapping consensus exists on a two-dimensional plane as the family of political conceptions of justice which disparate groups might share, then the higher law is the overlapping consensus extended over a third dimension, time.

\textsuperscript{8} Rawls, \textit{Public Reason Revisited} at 773-774

\textsuperscript{9} It seems appropriate here to remark on certain capitalization games I intend to play in this essay. First, the Constitution refers to the document that forms and regulates the American government; the constitution refers to the wider, more general term that Rawls and Samuel Freeman employ to refer to the basic structure of a society. Second, I borrow Bruce Ackerman's terminology when referring to the people of the United States, whose ordinary lawmaking duties are carried out by their elected delegates in the normal course of politics, and the People, which refers to a higher lawmaking voice, animated at discrete moments of unusually strong national attention and solidarity. In sum, where the Constitution refers to a particular document, the constitution refers to the basic structure of society. Where the People refers to the higher lawmaking voice of a polity, the people refers to ordinary periods of delegated lawmaking, where the polity operates under the rules established under earlier constitutional moments.
I intend to include in this definition not political and legal concepts explicitly endorsed or shared by most groups and individuals in each successive generation. Not even the Constitution would pass muster under so rigorous a test; we must rely on implicit consent. Further, I intend public reason and the higher law not to be simply majoritarian; I intend the public reason in the higher law to abide by Rawls’ rules for procedure and substantive content: any religious or philosophical comprehensive doctrines, no matter how dominant in a given period, must defend their claims to the higher law in terms of political conceptions of justice which other free and equal citizens can reasonably be expected to endorse pursuant to the demands of the higher law. Finally, I rely not on what judges may suppose to be the proper rights and liberties endorsed by the family of reasonable conceptions of political justice, but those that have been historically endorsed, and have withstood the test of time.

So, I will build from this claim for the rest of the paper: the First Amendment’s constitutional sanctity stems not only from time, but also from moral legitimacy accrued from the People’s approval mediated through public reason’s procedural demands. But, the source of this legitimacy will prove critical: the People, not the Court, have invested it; later, I assess the possibility that the People may divest as well as invest.

What is Success? Free Speech History

What counts as success? Is it the preservation of civil liberty? In this section, I plan to highlight the Court’s failures adequately to protect liberty even with the First Amendment in place. The Court has made many missteps in properly defending the First Amendment, only in recent years to approach a workable Rawlsian standard. Yet, the freedoms of speech and expression have survived.

This history includes the British common law, which, according to Blackstone,10 protected the freedom of the press only regarding prior restraints. Once uttered, speech was subject to all manner of regulation from the state; even the truth was no defense. This would not change even with Peter Zanger’s case, and Andrew Hamilton’s audacious defense, which mark the first time that the truth of seditious libel led to acquittal.11 But before this, the common-law precedent was

---

10 “...where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.” (Commentaries, 151-152)

11 The case of Peter Zanger, which involved prosecution for published criticism of New York’s governor in pre-Revolution America, ended with acquittal by jury nullification. Andrew Hamilton pioneered the use of the truth as a defense against seditious libel charges. It shows the bareness of the protection for free expression at common law, especially considering the jury nullification in that case had no precedential effect.
set: speech was protected only from prior restraints, and the truth of a seditious claim was no defense.

Then came the Alien and Sedition Acts. The federal courts refused to get involved, or actively defended the law as constitutional—even libertarian, in light of its greater leniency than the common law: the Sedition Act allowed the truth of a claim as a defense against the charge of seditious libel. Most cases arising under the Sedition Act were aimed at Republicans critical of the Federalist government.

In one such case, United States v. Matthew Lyon, Supreme Court Justice William Paterson and District Judge Samuel Hitchcock did not allow the jury to consider the constitutionality of the seditious libel charge, ostensibly because the tribunal was unfit to pose or answer that question. The question posed to the jury, whether Lyon had intended to bring disrepute to the President and the government, was obviously yes. In this case, Lyon made no concrete factual claims, but rather accused President Adams of a vicious power grab. Therefore, the truth of the claim, subjective as it is, could not provide a defense. This case establishes that opinionated criticisms find no protection under the Sedition Act, and left the constitutional issue untouched.

Two cases followed, establishing the factual standard that judges would demand in seditious libel cases. In United States v. Anthony Haswell and United States v. James Thomson Callender, the same Federalist judges that had ruled in Lyon now set the standard that the factual burden rested squarely on the defense, not the government. If the jury believed that there was reasonable doubt as to the accuracy of the defendant’s claims, or their defamatory intent, then the jury was required to convict.

The standard of the Sedition Act cases was elaborated—not replaced—by the “bad tendency”, or “clear and present danger” test. The communist scares in the early 20th century produced such decisions as Schenck, Gitlow, and Whitney, all permitting prosecution of individuals for professing unpopular political opinions, or belonging to unpopular groups. Whitney saw a woman prosecuted in California under the state’s Criminal Syndicalism Act, which prohibits advocating for political violence. The Court ruled unanimously “that a State...may punish those who abuse this freedom by utterances...tending to...endanger the foundations of organized government and threaten its overthrow by unlawful means.” Justice Brandeis argued that only clear, present, and imminent threats of serious evils could justify suppression of speech. However, allowing Ms. Whitney’s mere membership in the

---

12 Bruce Ragsdale, The Sedition Act Trials, at 7 (2005), referring to Justice James Iredell, who argued that the First Amendment was not intended to protect seditious libel (to speak ill of government officials) from punishment after spoken; only prior restraints were protected by the First Amendment
14 Id. at 102-105
15 Id. at 107-110, 125-131
17 Whitney v. California, 274 U.S., at 371
Communist Labor Party of California to constitute an imminent threat of serious evil stretched jurisprudential generosity to the breaking point.

Mr. Schenck had been arrested for distributing pamphlets urging draftees to resist _peacefully_ the national draft during World War I. Again, the Court ruled unanimously that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress [or a state legislature] has a right to prevent."^18 Justice Holmes ruled for the Court that the desired end of the speech need not be violence—the speech only need present a tendency to create an imminent danger, given the circumstances. Speech that would be tolerable in peacetime may be banned in war.

In _Gitlow_, the Supreme Court continued this line of reasoning. Mr. Gitlow advocated "in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism'...for the purpose of conquering and destroying the parliamentary state and establishing in its place...the system of Communist Socialism."^19 Justice Sanford wrote for the Court that the New York law in question would only be overruled if it were irrational. Upholding the law, he wrote,

"A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."^20

It is clear that in light of this brief history, the courts have failed to protect a full extent of liberty consistent with an equal liberty for all others.^21 Having fallen so short of Rawlsian standards, it is somewhat surprising that he would entrust the courts with power to preserve the amendment they have seldom applied correctly.

The key point here is that the courts are not always trustworthy at protecting the full extent of First Amendment rights. Still, Rawls might respond that now that the courts have got it right (or reasonably close to "right" under Rawlsian standards), should they not be left with the First Amendment at their disposal? After all, if the courts have fallen short of protecting free speech, surely the Congress has been worse: they, of the Alien and Sedition Acts of 1798, the Sedition Act of

---

^18 _Schenck v. United States_, 249 U.S., at 52
^20 _Id._ at 669
^21 Of course, I refer here to Rawls' First Principle of justice: the basic structure must guarantee to everyone the greatest possible extent of liberty consistent with an equal extent for all others. (John Rawls, _A Theory of Justice_ [1971] at 52-57, 171-228—especially 180-186 and 190-194) If institutions in the basic structure do not provide for this extent of liberty, then they behave unjustly according to the First Principle.
1918, the Espionage Act of 1917, and several surprisingly persistent efforts to pass a constitutional amendment to ban American flag desecration from 1995-2006.

The sordid history of First Amendment rights in the courts’ hands should serve as a cautionary tale about the future. Is it not possible that the robust protection of Brandenburg and Sullivan might erode, or be outright overruled by a future Court? I now turn to a brief discussion of the Free Exercise Clause of the First Amendment, and the questionable compatibility of current legal doctrine with Rawlsian standards. As it happens, robust protection for free exercise was gravely threatened by an infamous 1990 case, Employment Division v. Smith.22

What is Success? The Free Exercise Clause

I will focus my analysis in this section to the Free Exercise Clause because it is clearer what constitutes a violation of individual liberty under this rubric than under establishment violations. At stake in establishment cases is often sentiments or sensibilities, whereas under free-exercise cases, specific worship-related practices are at issue.

Employment Division v. Smith governs free-exercise jurisprudence. Justice Scalia, writing for the majority, said that the Court has never held that religious beliefs excuse a person from compliance with otherwise valid laws that prohibit conduct that government usually regulates. Allowing exceptions to each state law or regulation affecting religion “would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind.”23 Scalia cited compulsory military service, payment of taxes, vaccination requirements, and child-neglect laws as examples of necessary types of government regulation that would be thrown into doubt if religious exceptions were presumptively granted.

Despite Scalia’s claim, Smith overruled decades of free-exercise doctrine in such cases as Wisconsin v. Yoder and Sherbert v. Verner.24 In Yoder, the Court ruled that individual interests in the free exercise outweighed a state’s interest in compelling school attendance beyond the eighth grade. Chief Justice Burger found that the secondary schools in Wisconsin were "in sharp conflict with the fundamental mode of life mandated by the Amish religion.”25 An additional one or two years of high school would not produce the benefits of public education which Wisconsin argued would justify the law. In Sherbert, the Court decided a case similar to Smith. Adeil Sherbert, a Seventh Day Adventist, refused to work on Saturdays, and lost her job as a consequence. The Court ruled that the state’s eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert’s ability to exercise her faith freely. Further, there was no compelling state interest that justified such a substantial burden. The Court had established in this case that laws infringing on a religion’s free exercise would be judged under the strict-scrutiny test, but overturned that standard in Smith.

22 494 U.S. 872 (1990)
23 Id. at 888
25 Wisconsin v. Yoder, at 217
Ruling as *Smith* did that laws touching on free exercise would henceforth only be burdened by a rational-basis test, the Court announced far greater latitude for governments to regulate religious practice obliquely. Rawls would frown.

**What is Success? Summation**

Because the preservation of civil liberty by the courts has a checkered past, we should be wary when presuming that the Court has the moral and institutional legitimacy, drawn from its own historical practice, to tell the People that they behave unjustly, unconstitutionally, or both. Rawls argues that the *Brandenburg* test\(^{26}\) protects the freedoms of speech and expression better than any of the tests employed by the Court earlier.\(^{27}\) The fact that this test did not arrive until 1969 serves as an important reminder than courts are not always the best civil libertarians.

I do not believe that I have done violence to Rawls’ argument regarding public reason in this section. I claim that Rawls’ argument as to the tacitly entrenched nature of the First Amendment and the Bill of Rights\(^ {28}\) hangs not only on the length of history, but also on moral legitimacy that the People invest. I aimed in this section to make this claim clearer, and to highlight concerns to be addressed in Part Two: the suspicion that we ought to have when entrusting the Court to defend the First Amendment against its maker. I now raise the question: if the People invested, may they not also divest?

**Revolution or Amendment?**

Rawls argues that an amendment to overturn the First would constitute a revolution, or in Freeman’s terms, constitutional suicide. Would the constitutional structure effectively be undone by such an amendment? How do we know when

\(^{26}\) *Brandenburg v. Ohio*, 395 U.S. 444 (1969) This case establishes the current doctrine governing cases on free expression, the “imminent lawless action” test. Although this test sounds similar to “clear and present danger”, in practice the *Brandenburg* test imposes far stricter standards on the government to interfere with even inflammatory speech. The speech at issue, however offensive or unpopular, must push its listeners to a boiling point: the government is only allowed to intervene if to wait any longer poses a grave risk of a violent outbreak. Also see *Dennis v. United States* 341 U.S. 494 (1951), *Noto v. United States* 367 U.S. 290 (1961), and *Texas v. Johnson* 491 U.S. 397 (1989) for similar tests governing offensive or inflammatory expression. See *New York Times Co. v. United States* (403 U.S. 713 [1971]) and *Near v. Minnesota* (283 U.S. 697 [1931]) for cases with similar themes involving freedom of the press.

\(^{27}\) Rawls, *Political Liberalism* at 348

\(^{28}\) I would guess that Rawls probably does not really mean to lump *all* of the Bill of Rights into the same entrenched boat with the First Amendment. I think it is unlikely that the Tenth would make the cut: not only does a federal structure not seem to follow or to be implied by any of Rawls’ other arguments, but the sovereignty of the states does not seem to carry the same kind of moral freight, in a Rawlsian world, as does civic and individual protection against government action. As Rawls devotes little attention to the legitimate moral claims of governmental or institutional subdivisions (perhaps I do the states injustice by referring to them as such), I assume that the Tenth Amendment’s repeal would not be met with the same sort of outrage as the First’s. I could picture similar arguments against the coequality of the Third and Ninth Amendments as well. They simply have not meant as much in American constitutional law. Little, it seems, would necessarily be lost with their disappearance.
constitutional suicide has taken place?

This section aims to identify the criteria behind a constitution amendment as an overthrow, and to compare this hypothetical amendment to other constitutional moments in American history. What principle distinguishes between an amendment and an overthrow?

Does the intention of its writers provide an adequate test? This fails because the Federalists expressly did not want a bill of rights, though this was on the understanding that federal power would remain more tightly cabined than has proven true. The Constitution and the federal structure it creates look far different from the Founders’ days in large part because of the New Deal and its consequences: the rise of the regulatory-welfare state. If a break with the founding intention constitutes an overthrow, then surely the New Deal programs—which Rawls would not assail as some help to provide a social minimum and thus help to satisfy the difference principle—is an overthrow as well as a First Amendment repeal. Both indicate a reconstitution of the basic structure and the nature of government power with respect to individual liberties. If the New Deal survives, then surely so would this hypothetical amendment under a test of founders’ intent.

The Federalists initially opposed adding a bill of rights under the hypothesis that enumerating rights would restrict the broad scope of rights that they intended. The breakdown of the doctrine of enumerated powers and the entrance of the federal courts into state politics via the incorporation doctrine have catalyzed the general view that the Bill of Rights and due-process protections are the only substantive limits on state power. There is a general sense, well founded, that the Fourteenth Amendment, the Bill of Rights, and the First Amendment as its crown jewel, are the only substantive legal protections of individual and civil liberty from state intervention. It is important to remember that this view rises with the expansion of federal power to remedy state abuses (see the Jim Crow south). The Necessary and Proper Clause has transformed into a near-ironclad presumption of constitutionality for federal regulation. The Federalists imagined that the enumeration of powers presupposed boundaries; they feared the same for rights. The breakdown of the former’s boundaries has emphasized the importance of the latter. But this was not always so.

Thus, the criterion of drastic departure from the founders’ intentions cannot separate valid amendments from constitutional overthrows.

Second, we move to a fracture with the past, in general. The past defined here is not limited to the founding generation, but can extend to any part of our constitutional history grounded in long historical practice. It is unlikely that this test will suffice, because other constitutional moments have mirrored the

---

29 Bruce Ackerman, *We the People: Foundations* at 6-7 (1991); *We the People: Transformations* at 5-7 (1998)—Ackerman describes a constitutional moment as the second of the dualist lawmaking tracks: a nation unusually politically engaged on a topic of fundamental political significance takes charge of their national lawmaking processes in a way distinct from “ordinary” lawmaking, in which the people choose their delegates and attend casually to their behavior, but remain largely preoccupied with their private pursuits, disengaged from basic questions of political justice. At constitutional moments, the People re-write the rules under which their delegates do business rather than simply choose the delegates themselves.
Constitution’s break with the Articles—Reconstruction and the New Deal in particular.

Reconstruction is often described as a second founding; it flipped the structure of federal-state power from a presumption of state autonomy to a presumption of federal oversight—though, of course, these consequences would not be felt for decades to come. Was this also an overthrow? If so, then Rawls’ argument would fail because none today could deny that these amendments are morally legitimate, despite the substantial break with the pre-Civil War political order. Because morally legitimate, and non-justiciable under Article V, the Reconstruction amendments cannot be challenged in the Supreme Court. Under Rawls’ rubric, the Court can challenge an amendment because it is morally illegitimate even if procedurally legitimate. But even then, it may not challenge an amendment if morally legitimate, though by some standard revolutionary.

To allow a challenge to the Civil War Amendments under the theory of a) moral legitimacy, b) Article-V illegitimacy, and c) excessive constitutional change, would flip the Rawlsian rubric of procedural legitimacy/moral illegitimacy because of the revolutionary character of constitutional change. It is clear that few—least of all John Rawls—would permit a challenge to the Civil War amendments, contributing as they do to American political justice, as entrenched as they are in our constitutional fabric. Few would admit that a challenge to such amendments would be just under the theory that so drastic a shift in constitutional structure is too great to be admitted. The degree of the shift cannot be the issue, especially in the face of such extensive injustices in the antebellum (and post-war) south.

Thus, it is hard to see what exactly would constitute an overthrow by this rubric, because it is unclear that the effects of the Fourteenth Amendment, in particular, did not serve to produce the same extent of change as our hypothetical First Amendment repeal. Both represent drastic shifts in the structure of federal power and the extent of individual rights. It is difficult to find a principle that would make intelligible a distinction between the revolutionary First Amendment repeal, and the drastic-but-not-revolutionary changes of Reconstruction.

In sum, if the distinction between an overthrow and a revolution comes down to a subjective judgment as to the extent of the changes in the legal system, then it fails as a standard. Further, an amendment to overthrow the First cannot be a more substantial shift than the ratification of the Constitution itself. No one could argue that a court (either a hypothetical centralized court structure in the Articles of Confederation, or even the state courts, who saw their own constitutions amended in violation of the prescribed processes in their own constitutions when the federal

30 Akhil Amar, America’s Constitution: A Biography at 381-383 (2005); Akhil Amar, The Bill of Rights as a Constitution (1992), 100 The Yale Law Journal, 1136-37, 1147 (on the original understanding of the First Amendment as a protection against Congress, not overzealous majorities either federal or state), and the switch to the view of the Bill of Rights as a defense against state and local injustices

31 As to the claim that the Fourteenth Amendment helped to overthrow a morally bankrupt regime while the First Amendment contributes to a morally rich regime (or, contributes richly to a morally questionable regime), I ask the reader to wait until the later sections.
Constitution was ratified\textsuperscript{32}) would have been justified in rejecting the Constitution as illegitimate because it represents a legal revolution, or constitutional suicide.\textsuperscript{33} To claim that overthrows are inherently unjustifiable may be to discard the entire American legal and political tradition from its inception, even to render legally illegitimate the Revolution itself!

Third and finally, I describe the possibility that dissolution of the constitution’s essential features is illegitimate. Here we find problems: defining what is essential to the Constitution, whose task is its preservation, and what means are acceptable. Insofar as there is any pecking order, it cannot fall to the preservationist Court on the Rawlsian understanding of the judges as moral neutrals.\textsuperscript{34} The only power to define essential features falls to the People (whose considered judgments comprise the overlapping consensus and thus public reason’s content), and the power to define essential features surely includes the power to revoke that designation. If the People may designate a feature as essential in their public reason, then they may also remove this designation.

Thus we conclude that there is no constitutional overthrow if all at stake is an amendment repeal. If neither the Founding, Reconstruction, nor the New Deal represent constitutional overthrows, then although repealing part or all of the First Amendment would represent a seismic shift in the constitution, it is unclear that this shift would represent an overthrow where the others have not. Something else must be at work aside from the extent of the constitutional change.

As a result of the previous argument, I believe it is fair to conclude that the core of Rawls’ reasoning as to the de facto entrenchment of the First Amendment is both moral and historical, though history only provides the vehicle through which the moral cache accrues. The content of public reason, channeled through generations obeying its procedural rules, pays out a moral freight into the First Amendment that indeed gives it a privileged position in American law and politics. The historical specifics of this process I will not describe, as it does not seem important. I will stipulate to this part of Rawls’ argument, re-framed as such.

So now I turn to the consequences of the moral content of the First Amendment: that it is essential to the Constitution, and to political justice in general. In the next section, I analyze a world with no First Amendment, a hypothetical counterfactual that will describe the extent of the moral necessity of the amendment to political justice.

Section II. No First Amendment?

Rawls’ Implicit Assumption

Rawls refers to a First Amendment repeal and replacement with its opposite. I imagine the amendment to read something like: Congress shall have power to regulate the freedom of speech, the press, free exercise of religion, and shall have

\textsuperscript{32} Amar, \textit{America’s Constitution} at 11-13

\textsuperscript{33} Indeed, as far as state sovereignty goes, ratifying the Constitution may have

\textsuperscript{34} Rawls, \textit{Political Liberalism} at 236: “The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally.”
power to establish a state religion, should it choose to do so.\textsuperscript{35} Thus, I imagine the amendment not to be itself restrictive, but to open the matter to popular discussion.

I believe that Rawls has in mind in this scenario more than he shows. The summary manner with which he allows the Court to reject such an amendment as invalid hints at urgency—he seems to have in mind dire circumstances in which governments have been overrun with unreasonable comprehensive doctrines, which now seek to expand their power in order to repress dissenters. Let us assume for now that this is true, though the feverishness need not remain in the aftermath of the amendment repeal. Clearly it would be a radical break with public reason to allow such an amendment. But whether this is presumptively illegitimate or unconstitutional is unclear.

\textit{Historical Reality}

An overlapping consensus of comprehensive doctrines, perhaps mainly theological in nature, might see a government enact some moderate restrictions on such as public speech and prayer; or the government might create an established church (not dissimilar perhaps from the Church of England?), or invite prayer in public schools. It might become punishable by fine to blaspheme publicly. None can gainsay that these new governmental powers would sully liberalism. None can argue that such an amendment is liberal.

However, I might argue that a moderate establishment of religion, while it might taint liberalism, need not overthrow it. As there are other illiberal elements to our present public reason (notably, warrantless wiretaps, and searches and seizures of electronic data, among others) that do not produce constitutional overthrows, so these legal changes need not do so.

Rawls reminds his readers that justice is not dichotomous, but continuous.\textsuperscript{36} That is the crux point of this section: a repeal of the First Amendment does not necessarily represent a shift to a regime such as that of the Republic of Iran, for example. I have reminded the reader that the courts have not always applied the First Amendment with the same vigor as they have since 1969 in \textit{Brandenburg}. Though our country’s political justice may have been compromised by such flimsier standards as the pure prior restraint test of Blackstone, and the “bad tendency” and the misnomer “clear and present danger” tests of the early 20\textsuperscript{th} century, liberalism survived.

Finally, I believe it is worth mentioning that the original intent of the First Amendment was less the protection of individual self-realization from majoritarian norms than the protection of civic oversight on a potentially untrustworthy, self-dealing government. Though Madison’s first two proposed amendments in the First Congress failed, they shed light on the themes defining the way the amendments were read.\textsuperscript{37} The first two amendments in Madison’s bill dealt with rules by which

\textsuperscript{35} This would also free the states to regulate such matters (unless, of course, facsimiles of the First Amendment exist in a state’s constitution), as they were until the early 20\textsuperscript{th} century before the incorporation of the religion clauses through the Due Process Clause of the Fourteenth Amendment.

\textsuperscript{36} Rawls, \textit{A Theory of Justice} at 178-179

\textsuperscript{37} Amar, \textit{The Bill of Rights as a Constitution} at 1137-46
Congress could alter its own pay (which would eventually become our Twenty-Seventh Amendment), and with representative apportionment, indicating that the animating theme was preventing government corruption and self-dealing. Amar further notes that Madison’s presciently named Fourteenth Amendment would have incorporated some of the existing protections of the Constitution against the states. Its rejection by the first Congress further highlights the fact that these amendments, in their time, were considered as collective civic protections, perhaps in the tone of classical republicanism (to promote collective virtue and public spirit among the elected rulers and the populace) as well as to allow for liberal self-government.

Of course, as Rawls writes, whatever may have been the case when the Bill was enacted, things have changed now. Public reason has instilled the Bill, particularly the First Amendment, with a meaning different from and complementary to the First Congress’ intention. I bring this historical evidence to bear not to suggest that we moderns are wrong to understand the First Amendment as we do. I intend only to show that there are other possible understandings of the Bill of Rights than the protection of discrete, insular minorities from overweening majorities. On an understanding that emphasizes limited, virtuous government and collective virtue more than individual rights, a repeal of the First Amendment need not be a political catastrophe, but might only emphasize the need for other limitations, or more vigilant civic oversight.

 Nonetheless, it is difficult to make an argument that to repeal the First Amendment would be acceptable to liberalism. The First Amendment’s clauses could easily be six separate amendments, and each would seem as essential as the last. Rawls’ argument deals with what liberalism and justice require. He sees the First Amendment’s rights as a product of the burdens of judgment, which is part of the concept of reasonability, which presupposes powerful protections for free expression and religious practice. That free and equal citizens recognize these burdens and behave reasonably toward one another necessarily produces mutual recognition for free speech.

In sum, I have rested my counter-argument on the supposition of a moderate return from the fever pitch that would surely accompany such a hypothetical amendment. I also hanged my claims on the notion of justice as continuous rather than dichotomous, the original understanding of the First Amendment as a means for preserving civic liberty rather than individual liberty, and the historical reality that Rawls’ liberalism and justice did not die (though they were compromised) by the early permissive standards which the courts once used to address restrictions on speech.

38 Rawls, Political Liberalism at 47-58
39 Is a set of words necessary to preserve such civility? Can it do so? Perhaps without the amendment, one could argue that it is not necessary (as the Federalists did). But with it, Rawls assumes that an illiberal fever among the people, who do not then recognize the burdens of judgment or behave reasonably toward one another. Nonetheless, its fragility should remind us that a set of words means nothing without a people willing to behave reasonably and acknowledge the burdens of judgment.
None of these arguments can prove that to repeal the First Amendment would not be unjust or illiberal; they can only mitigate the fallout by claiming that liberalism and justice might yet survive. After all, as James Madison observed (somewhat ironically), "parchment barriers" can only do so much to protect the people from tyranny. The First Amendment’s power rests in its popular reverence as well as its application by the courts.

*Justice as Fairness and the Overlapping Consensus*

Here I borrow Freeman’s distinction between public reason as an idea and an ideal. Rawls writes that public reason, “[a]s an ideal conception of citizenship for a constitutional democratic regime, [it] presents how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be, though no less fundamental for that.”

This is the ideal of public reason. It represents citizens’ political ideals, what their public relationships, and the society/polity at large, would look like in their conception of a well ordered, just democracy. The idea, by contrast, is public reason as it is, not how it could be. As such, it represents the content of political conceptions of justice that citizens actually hold, rather than a pure concept that fully recognizes the burdens of judgment, and the concept of free and equal citizens.

The question here is how culturally contingent are the idea and the ideal? It is clear that an idea of public reason depends on the society in which it is located, as the idea need not be idealized. Is the ideal pure justice?

This is a difficult question, since the theme underlying *Political Liberalism* is a rejection of the Kantian idea that a single conception of justice can be acceptable to all citizens in a pluralistic democracy. An ideal of public reason cannot be as contingent on time and place as the ideal; while the idea of public reason can be deeply flawed, as Freeman believes that ours now is, the ideal must abide by far stricter criteria. However, public reason concerns the acceptable terms of the application of the political conception. Even an ideal political conception can admit of several different applied forms. There is no one platonic realization of the ideal political conception. Neither Rawls nor anyone can claim to have found it. Therefore, even the ideal of public reason must admit of cultural contingency.

If the ideal is determined by particular societies, which is consistent with the concept of the overlapping consensus generally, then how much leeway does a people get in deciding its content? Is the liberty principle, for example, always a prerequisite for a just democracy? If so, then the claim about the First Amendment’s

---

40 James Madison, *The Federalist* No. 48, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), at 276: Madison writes about the weakness of parchment barriers to protect the people from government ambition. It is ironic that a strong proponent of a written constitution could argue that parchment barriers are insufficient to ensure limited government and individual liberty.


42 Rawls, *Political Liberalism* at 213

43 Freeman, *Political Liberalism and a Just Constitution*, at 622-633
entrenchment holds, but we run into other problems: is justice as fairness, Rawls’ conception in *A Theory of Justice*, a semi-comprehensive doctrine of political justice? Considering the justificatory methods in Part III of *A Theory of Justice*, justice as fairness does approach rightness as fairness, the status of semi-comprehensive doctrine. Though Rawls backs off from the attempt to provide a conception of rightness which can penetrate from public reason into non-public reasons, the original conception of justice as fairness is still available to adherents as a semi-comprehensive doctrine of the same extent as such as utilitarianism or social contract doctrines like that of Kant. In its initial iteration in *Theory*, justice as fairness is at least a semi-comprehensive doctrine.

Its voice is then just one in the overlapping consensus.

Thus, I contend that justice as fairness would not be able reject the constitution’s structure as wholly unjust simply because Congress would have power to regulate speech, religion, and the press. Only if such institutions were repressed in fact by these new powers would justice as fairness be able to reject the political conception as unjust. For let us not forget all of the other aspects of the system which justice as fairness should be happy to endorse: equal protection of the laws, trial by peers, representative government, separation of powers, federalism, due process of law, limited constitutional government (though less limited without the First Amendment), voting rights, a social minimum, etc.

The loss of the constitutional protection does not by necessity imply repression along that avenue. It is not as though Congress and the state legislatures are champing at the bit to silence their critics forcefully (though, I admit, this becomes a far greater danger without the First Amendment). Its loss would nonetheless be dangerous, ill advised, and tragic. But by itself, this loss would not give adherents of justice as fairness cause to reject the whole constitutional structure as unjust.

The Idea of Public Reason and Constitutional Change

Rawls writes, “...in a democratic society, [the idea of] public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.”\(^{44}\) (emphasis added) Here again I emphasize public reason as an idea, contingent on some time and place; this seems to be what Rawls has in mind in this definition. There is some contradiction between the claims of public reason and the claim of constitutional permanence in the First Amendment. If citizens are equal, is there any right for one generation, or an aggregate of generations, to partition certain constitutional provisions from the considered (if misguided) judgments of any other generation?

To say that there is such a right gives a founding or framing generation a special right to define constitutional terms for its successors, which violates the demands of equality founded on a baseline threshold of the two moral powers.\(^{45}\) Insofar as Rawls’ concept of the overlapping consensus as the content of a political

\(^{44}\) Rawls, *Political Liberalism* at 214

\(^{45}\) Id. at 18-19
conception of justice crosses generations, this precept violates the equality of citizens as moral beings. Even if no one generation gets to say that an amendment is entrenched, then a gaggle of citizens on one side of a debate is able to dictate the terms of self-government (paradoxically) for the present and many future generations. It would be as though the generations of an overbearing past were able to govern from the grave. Or, it would mean that members of one living generation were able to impose their higher-lawmaking voice on younger generations despite the youth’s dissent. Even if Rawls did not argue explicitly for generations as free and equal, surely generational co-equality is a necessary extension of the argument for free and equal citizens because multiple generations co-exist in modern pluralistic democracies. And there appears to be no tenable reason for which dead generations ought to be granted a presumption over living.

It is as though there were a presumption of respect for predecessors, such that if equal generations were to take opposite sides on an issue, those in the past should prevail. I will explore this idea in greater detail later on: the distinctions between the demands of liberalism and popular sovereignty.

Rawls claims that the Court’s judicial review power extends to employing public reason to preserve the higher law from the will of transient majorities or concerted special interests. From such antagonists, the Court can and must preserve the higher law. Implied in this, the People are perpetually entitled to determine the content of the higher law, which judicial review and the Supreme Court may protect from erosion—the idea of public reason and the Constitution. Therefore, Rawls’ claim seems rather out of place: it assumes that the First Amendment’s repeal is only the product of a transient majority or a public duped by special interests partial to a comprehensive doctrine (or else, simply mercenary special interests).

---

46 Later in this essay, I will address the argument that Sam Freeman makes on this point: citizens may not bargain away their descendants’ constitutional rights. As a preview, I will note here that the animating principle is that a generation is free to determine the terms of their self-government. Should one generation feel that the First Amendment is not salutary—nor even tolerable—to the terms of their political beliefs, then that generation is free—morally and realistically—to overturn it. If a later generation believes the opposite, then it is free to re-enact the amendment just as its predecessor was free to overturn it. Both Rawls and Freeman thus presume an oppressive revolution accompanying such an amendment. Such dire conditions need not accompany this amendment—in fact, I should wonder whether such revolutionaries would feel the need to comply with Article V if their schemes were so nefarious, and clearly contrary to our constitutional tradition. If such conditions do evince, and a constitutional revolution were at hand, then one wonders whether the Court would have any power to resist it anyway. If such conditions are not present, then one wonders what legitimate power the Court would have to stand in the way of its master, the People.

47 Beyond a presumption for the past, I feel there is a rights-based presumption as opposed to a self-governing presumption. This is to say, I believe that among both Freeman and Rawls there is a sense that a right can be entrenched by the weight of previous generations, but that the presumption of respect for ancestors ends there: a more general tradition of self-government does not translate; only substantive rights protections do so. I would not argue that this is inappropriate or incorrect, but only that such reasoning demands justification.

48 Rawls, *Political Liberalism* at 233

49 Bruce Ackerman, *We the People: Foundations* 3-33 (1993): here Ackerman highlights his theory of dualism, and the Court’s role in the defense of the higher law from transient majorities.
But what if the repeal did not stem from such sources? What if there really were a change in the idea of public reason? If so, the Court seems to have no leg to stand on. If Rawls picks up the notion from Bruce Ackerman\(^50\) that the Court is a preservationist institution only, then it can only preserve the duly enacted considered judgments of the People. It is not entitled to reject the commands of the sovereign. For the Court to reject the People’s command in the name of liberalism, or justice, would indeed indicate a constitutional breakdown—not by fault of the People, but rather by the Court. Such an act demonstrates the Court’s unwillingness to abide by the rule of law\(^51\) and by the Constitution, but rather to set itself above the People in order to dictate the terms of their self-governance. Such is tantamount to declaring that the Court itself embodies the Constitution, that it alone determines the proper tenor of its interpretation and application,\(^52\) and that none but it may add or subtract from its meaning. Revolution it is, but not from the illiberal people. Rather, it comes from the lawless Court. Brutus’ nightmares will have come to pass.\(^53\)

**Freeman’s Take**

In the last section of his essay, Freeman takes on Rawls’ claim that the First Amendment is *de facto* entrenched. However, he does not hang the argument, as I have, on public reason, but rather on Rawls’ conception of the people.

It is a mistake, Freeman writes, to see democracy as simply a voting procedure, or a form of government where laws are decided by majority rule. “Rather, at a more fundamental level, democracy is a kind of constitution which specifies the equal status of free citizens, who themselves join together as equals to make the constitution. While democracy, as a kind of constitution, provides for equal political rights and majority legislative rule, it also affords other equal basic liberties to all citizens, provides for equality of opportunity of some form, and insures each person a social minimum.”\(^54\)

To reiterate, one key difference between Freeman’s account and my interpretation of Rawls’ claim is Freeman’s account of a constitution, which he takes not to be only the document but the whole of the basic structure. As such, it includes the document, the primary governing institutions, and the moral concepts of public reason’s ideal. Both definitions are defensible and complementary\(^55\), but it

---

50 Id.; Rawls, *Political Liberalism* at 231, 233; here Rawls accepts the dualist theory of constitutional lawmaking, the distinction between ordinary lawmaking and higher lawmaking. Rawls, *Political Liberalism* at 238; in footnote Lecture VI footnote 25, Rawls accepts Ackerman’s dualist theory, but rejects Ackerman’s claim that the Court cannot overrule an amendment; yet, he refuses to explain why he accepts dualism but rejects one of its core principles.

51 U.S. Const. Art. V

52 Rawls, *Political Liberalism* at 231, 237; a supreme court is the highest institutional interpreter, functioning on the basis of what is allowed by the People and the political branches


54 Id. at 659

55 Each term is complementary to the other (constitution and Constitution) in the same way as the ideal and the idea of public reason, respectively.
is important to note Freeman’s departure, because it will have consequences for how we interpret the loss of the First Amendment.

Specifically, I think that to interpret the term “constitution” as such implies that the loss of the First Amendment extends to the whole of the basic structure, not only to the document. Thus, this definition implies that this repeal would distend the whole constitution, the whole system; there would be no room for my argument that the freedoms of expression, association, and religion might yet survive. To define the constitution as the basic structure and the basic values means that the loss of the First Amendment is implicitly a loss of the values undergirding it. So Freeman, and perhaps Rawls as well, has been a bit disingenuous with what he believes is truly at stake: not just the First Amendment but the public values behind it.

This may represent a flaw in Freeman’s account of constitution, because Rawls only speaks of the First Amendment proper, though Rawls assumes that the values go with the text. As I have tried to argue above, conflating the two may be in error. The values in place, the text was argued as unnecessary in the *Federalist* and the First Congress. The values yet in place, the Supreme Court for years poorly enforced the fullness of the amendment. The text enfeebled, the values survived.

So, even if we define the constitution as the basic structure and the basic values, it may still be inappropriate to assume that the loss of the First Amendment implies a loss of the values underlying it. But for now, let us continue to follow Freeman’s reasoning, which continues with a basic defense of judicial review.

“But when ordinary democratic procedures, for whatever reason, consistently fail to promote the requirements of a just democratic constitution, it is democratically legitimate to impose limitations on these procedures (so long as they effectively remedy the injustice.) This justifies, Rawls claims in *A Theory of Justice*, many of the constraints on majority rule that presently exist in representative democracies...Judicial review, Rawls contends, is among the legitimate institutions that may be needed in certain constitutions to constrain potential abuses of majority legislative rule in the interests of maintaining the requirements of a democratic constitution.”

A supreme court could be one of the institutions set up by the people in the exercise of their constituent power to protect the higher law. Where they are adopted, the values of public reason provide the Court’s basis for interpretation. By applying public reason, the Court prevents the higher law from being eroded by the legislation of transient majorities and special interests. When the court effectively maintains the higher law enacted by the people, it is not antidemocratic, for it executes the people’s will in matters of basic justice. So Rawls and Freeman argue.

As Freeman reconstructs Rawls’ claim, democracy is not simply a majority-rule principle, but also contains a series of moral precepts such as equal political

56 *Id.*
rights, a social safety net, civil equality, among others; democracy is also not even super-majoritarian in the making of higher law. Freeman writes,

“These basic liberties are the most fundamental democratic freedoms, in part because they provide the basis for public reason. Without freedom of thought, inquiry, and discussion, public reasoning about the constitution and democracy itself would not be possible. For the sovereign people to attempt to give up these liberties for the sake of other values is not a legitimate amendment to the constitution. It is constitutional suicide, the destruction of the most fundamental features of a democratic society. As such they are constitutionally entrenched. If so, then, Rawls implies, the U.S. Supreme Court should have the power to overturn any such invalid amendment, to save the basic political values on which our constitution is based.”

Again, this assumes that a constitution guarded by judicial review is the only way to secure these liberties. But a constitutional amendment can serve either as a legal guard, or a sigil for popular resistance and civic oversight. The former can only function, in practice, if the people support the judicial branch. The latter equally depends on popular attention and zeal. Either way, we are left with the same conclusion: an amendment on its own is a parchment barrier. Only popular support gives it vitality; if the Court gives public reason vitality in the public sphere, it is only because the People have created public reason in the first place.

With a tinge of irony, Freeman continues with, “[lawyers hold] a procedural conception of democracy, one which holds that democracy essentially consists in bare majoritarian or, at most, super-majoritarian procedures that place no substantive restrictions on what majorities can will, at least at the constitutional level. I am not sure what the constitutional argument would be that would support this conception of our constitution. It cannot be found in the written Constitution.”

This is true. The Constitution contains but one rule of construction, the Ninth Amendment. Otherwise, it does not direct its readers how to read. But this argument cuts both ways. Further, as argued above, public reason allows a moral cache in long-standing, time-honored legal practices conforming to the duty of

57 Here Freeman perhaps retreats a bit from Rawls’ original claim, that the Supreme Court does have this power, not merely that it should. Clearly Rawls’ is a much stronger claim. Still, Freeman does argue for the same de facto entrenchment as Rawls does in Political Liberalism. He may be hedging his bets with the choice of words here.

58 Id. at 663

59 Id. at 663-664; the irony comes from the foregoing arguments; there is nothing in the constitution which restricts super-majoritarian rule as construed in Article V. Due to the procedures set out in Article V—this seems as good an argument as any that the Constitution does speak to the lack of substantive restrictions on what that level of majority consensus can produce. If Dr. Freeman wishes to speak of what the Constitution fails to say, I would argue that it contains no word or implication as to the entrenchment or substantive protection of constitutional guarantees against any and all levels of popular consensus. Even the entrenched provisions in Article V are not truly safe from amendment.
civility. Popular-sovereign democracy thus achieves a moral standing, rooted not in implied entrenchment, but in the tacit ratification of ages.

Freeman writes, “It is no more legitimate for the supermajorities of one period to perpetually bind some or all of their descendants (or even themselves) to the deprivation of basic democratic freedoms, as it is for a deranged court to deprive the people (or even some of them, as in Dred Scott) of those same freedoms.” This touches on an argument made in the second part: that each generation is constitutionally equal. Freeman argues from the opposite perspective: a given generation is not free to deprive its successors of its rights. I answer the same: what one generation does can be undone or re-done by its successors. A new generation is as free to re-enact the First Amendment as any generation is to repeal it, as free as the founding generation was to choose to enact it in the first place.

Part II. The Institution

The Supreme Court

Part II deals with the institution with which Rawls invests the weighty task of telling the People that they may not do what they wish to do. This part addresses the possible sources of the power that Court might have to overrule the overrule.

What could give the Court the power to stymie the People, acting in accordance with the Constitution?

The Constitution

Does the Constitution itself give the Supreme Court the power to strike down an amendment enacted pursuant to Article V?

Immediately apparent as one reads through the Constitution is that there is no listed power to review amendments for compliance with any part or implication of the document. But then, the Supreme Court’s only listed power is to resolve cases and controversies arising under federal law.\(^\text{60}\) None can deny that the Court really yields far greater power than this. Does judicial review, inferred from the theory of constitutionalism, grant the Court such a power?

The Court has argued that because the Constitution creates the Congress, it can also limit the Congress.\(^\text{61}\) Therefore, because the Constitution creates the Supreme Court, it also limits the Court—specific to this scenario, the procedures in Article V. Assuming, reasonably, that all parts of the Constitution limit all of the institutions it creates (notwithstanding arguments, such as Rawls would make, that some parts of the Constitution are morally superior to others), then the provisions of original and appellate jurisdiction to the federal courts in Article III bind the Congress no less than Article V binds the Court. The theory underlying judicial review also by necessity limits its reach to the text of the Constitution itself, which is amendable by Article V. Although the Court may have power to review the processes

\(^{60}\) U.S. Const. art. III, § 2, cl. 1-3  
\(^{61}\) Marbury v. Madison, 5 U.S. at 173-178 (1803)
involved in enacting an amendment pursuant to Article V, this does not imply a power to review such amendments for content.

The Constitution does spell out the actors needed for valid changes. Congress may pass amendments by two-thirds vote in each chamber, and then send the amendments to be ratified by three-fourths of the states’ legislatures. Or, three-fourths of the states may petition Congress to call for a special convention, whose proposals shall then pass as constitutional if three-fourths of the states assent. The Court, obviously, is nowhere mentioned in these formulae. That it is absent should serve as a strong presumption against its involvement.

The origins of judicial review, both in Hamilton’s Federalist essay and John Marshall’s opinion, hang the concept on the Court’s power to use the Constitution to bind the people’s delegates, not the People themselves. Therefore not the Court, but the Constitution binds the Congress; just as it creates both, it limits the Court as well as the Congress. It grants other actors the explicit power to amend the document, processes to which the Supreme Court is not privy.

Implications of Judicial Review on Amendments for Content

As a brief aside, I develop the idea of whether or not the Court may review constitutional amendments for content.

On the surface, it appears to be a contradiction. The Court wields the Constitution; the Constitution creates the Court; what power can the Court have from the Constitution that gives the Court power to deny that the product of the process set out in the Constitution itself is valid? Does this make the Court the judge in the matter of its own powers?

To allow the Court to review amendments for congruence with the Constitution itself would be to assign it a status above the document that created it. It would be as though to say that Article V lays out the process by which the document shall be amended—with such exceptions and subject to such judgment as the Court shall see fit to render. It is hard to see what the limits of such a power would be. And clearly, as pertains to amendment repeals, this does make the Court the arbiter of its own power—if no amendment may pass but at the pleasure of the Court, then two propositions are true: first, the Court may allow into the text only such matters that comport with the proper range of its own judgment of its powers; second, the Court considers the extra-constitutional sources of its power commensurate with the aims it desires. It would construe the powers it wields

---

62 Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process 97 Harv. L. Rev 386
63 Supra note, at 51
64 See the discussion on the next page of expressio unius est exclusio alterius: that the Court is not among the institutions involved in the process of constitutional change is evidence of its exclusion. Just as the doctrine, to be described below, indicates certain entrenched provisions in the Constitution, so its failure to mention any role for the Court in substantial review of amendments for constitutional compliance is evidence of its deliberate exclusion from the process.
beyond the text as appropriate to its role as the gatekeeper of its own powers within the text.

Let us consider an analogy: if the Court bowed to the constitutional revolution of the New Deal because of the weight of public demand, because of changes in our idea of public reason, but not because of the procedures laid out in the text of Article V, then surely a similar popular weight coupled with Article V’s demands provides a force no less irresistible. The only difference, then, can be the theoretical legitimacy of the grounds of the Court’s resistance: it must hinge on the greater legitimacy of the First Amendment as compared with the liberty-of-contract doctrine. I would stipulate to the greater legitimacy and significance of the First amendment as compared with the Lochner doctrine. Yet, why this power belongs to the Court, or whether it can belong to the Court at all, is unclear.

Expressio Unius Est Exclusio Alterius

The doctrine that to express one idea in the law is to exclude all other possible interpretations has deep roots in American law, regularly used in Supreme Court case law. There are only three constitutional provisions that are expressly entrenched by the terms of Article V: the Slave Trade Clause, the Census Clause, and the Two Senators Clause. The Article V clause reads, “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.”

By the doctrine, expressly entrenching these three provisions (although, admittedly, the first two were only entrenched until 1808) implicitly excludes other clauses from entrenchment. By this rule of construction, to express some as entrenched indicates that the document admits of entrenchment in no other area.

Public Reason

So, the Constitution can lend the Court no power to overrule a validly enacted amendment. If there is such a power, we will find it in public reason. The content of public reason may be a source of extra-textual constitutional power, but as in the New Deal, so in this hypothesis: the weight of popular will and/or the process of

---

66 Ackerman, Transformations at 279-311
67 Lochner v. New York, 198 U.S. 45 (1905)
69 U.S. Const. art.I § 9 Cl. 1, 4; art. I § 3, Cl. 1
70 U.S. Const., art. V Cl. 2
71 Supra note at 58: Ackerman, Transformations at 279-311, where he describes the process by which the elections of 1936, 1938, and 1940 gave the President and Congress a mandate to propose unconventional tactics to overpower an obstinate Court. Such tactics helped to cow the Court into submission, acknowledging both to New Dealers and to their opponents that the People had duly considered the nature and gravity of the shift from laissez faire to regulated markets.
Article V indicate a shift in public reason.

Only by the definition of public reason described earlier—content divided by procedure multiplied by time—can the weight of history apply: if the content of the First Amendment is at the center of the overlapping American consensus, then it occupies a privileged position in our legal framework, and in the Court’s power. Nonetheless, public reason as the source of the Court’s power is always open to revision. Should the time come that the public no longer agrees on the primacy of the right to the free exercise of religion, speech, or the press, and intends to enact this change into their higher law, then the Court would be right to resist, but only in the same way as its resistance provoked refinement and increased the legitimacy of the New Deal by forcing the People to consider their judgments duly. Still, at a point, the Court is obligated to back down not only to preserve itself, but also to acknowledge that the People have spoken, that public reason as the multi-generational content of the overlapping consensus is changed.

Just as the content of public reason is determined by generations of tacit and explicit consent, so the outright rejection of some point of public consensus by any given generation constitutes a shift in public reason. If the public decides, roundly and universally, that their public conception of justice no longer covers X practice or provision, then pursuant to the requirements that all citizens are free and equal, practice X is no longer protected by this understanding of public reason. It is then no longer part of the content of the overlapping consensus, though perhaps still present in the non-public reasons of some comprehensive doctrines. Practice X, no longer essential to the conception of political justice as conceived by the free and equal people, is then open to regulation by existing institutions.

But should it matter whether Practice X is something theoretically intrinsic to liberal democracy? Does the People’s power to alter the coverage of the political conception of justice differ with respect to, say, the Contract Clause versus the freedoms of speech, press, assembly, and religion? In other words, is there room for the Court to protect constitutional liberties because some are essential to liberalism whereas others are peripheral?

**Liberal Legitimacy**

Surely, despite the shift in public reason, such an amendment is nonetheless unjust. But the key question of this section is not whether such an amendment would be unjust. The question here is whether the Court has power to preserve liberal legitimacy in the face of a restive public. Judges' moral reasoning inculcated into law presents many problems.

---

72 Classical republicanism may be a comprehensive doctrine—describing collective civic virtue as preeminent over individual self-determination; can include a collective religious virtue, general enough to encompass most of the population. It is unclear that this constitutional structure would necessarily allow more restriction of individual liberty than the Court’s current doctrine under Smith.

73 Ackerman, *Transformations* at 349-50: “By holding up a vision of a constitutional order that sought to synthesize New Deal activism with older traditions of liberty and equality, the Court has not only challenged the modern bureaucratic state to live up to its claims of constitutional legitimacy. It has encouraged others to make the same demand—yielding a far more serious public dialogue over constitutional principle than would have been obtained under Wheeler’s mechanical alternative.”
Judge Learned Hand warned, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Rawls himself prohibits judges to impose their own moral beliefs onto the public, yet I believe that the consequence of his assertion as to the Court’s institutional powers in this case leads to that conclusion. It is necessarily so if the Court may pronounce the First Amendment morally impenetrable against the manifest will of the People. Their moral judgment, however purely liberal, would then trump the People’s. If the People choose a non-liberal polity, then there need not be a liberal polity.

But may the Court protect the First Principle—a full extent liberty consistent with an equal extent for all others? The Court would thus be charged with the familiar duty to preserve robustly a family of civil liberties from majoritarian erosion. If judicial review is good for anything, it is good for preserving civil liberties from transient majorities or concerted special interests. But what may the Court do to ensure its realization? If the Court may protect the First Principle and through it, the First Amendment, then their own moral judgment might not be at issue—rather, the Justices may be able to draw not on whimsy but on an objective moral theory, the conception of justice that would be chosen in the original position.

But again we must ask what the basis of the use of such judicial powers would be. It will not do simply to argue from Rawlsian grounds because what parties would agree to in the original position regarding the principles of justice appropriate for the basic structure of society does not bear directly on the Supreme Court’s power. Surely insofar as the Court has assumed to itself the duty of protecting the Constitution and its substantive guarantees from misguided legislation, the Bill of Rights is well within the range of its power, perhaps even central to it. Of course, the Court may draw on the Bill of Rights insofar as it bears on the First Principle.

But the Bill only exists as part of the Constitution thanks to Article V. If Article V gave rise to the Bill, and the moral superiority of the Bill a) does not bear in itself on the Court’s powers absent popular consent, and b) can be retracted at the People’s will, then the Bill of Rights as part of the First Principle gives no power to permit the Court to reject the hypothetical amendment. The Court has power to enforce the Bill, and the First Principle only as far as the Bill goes.

---

74 Learned Hand, *The Bill of Rights* at 73 (1958)
75 We of a pluralistic democracy do our best to prevent comprehensive doctrines or theologies from assuming power, but in the end there can be no guarantees. Hazards accompany the project of self-government always. Judges, in this understanding, might not impose an arbitrary or unpredictable morality (though this may be the consequence over generations, as Justices come and go), but they might impose a comprehensive or semi-comprehensive doctrine through their reading of the Constitution. If institutions are dependent on public reason and the constitution, but then the public reason and constitution change, then it is unclear what power remains to the Court to resist.
76 Rawls himself said as much about philosophy in the courts: "...the idea of public reason has to do with how questions should be decided, but it doesn’t tell you what are the good reasons or correct decisions....[the courts are] not good at philosophical arguments, they ought not to try to get engaged in them, they ought to go by lower-level, less broad decisions if possible. Otherwise, the Court opens itself up to very great controversy.” John Rawls, *Collected Papers* 618 (1999)
History only gives the bill weight insofar as popular consensus dictates. Time only offers the medium through which the gravity of the People’s respect accumulates. Because, as Rawls says, the Court draws on the idea rather than the ideal of public reason, and because the idea changes over time, so changes the moral hierarchy of parts of the Constitution. Consensus is the substance, not philosophical notions of justice, time alone, or even the mere words on the document. Should the consensus shift, should a constitutional moment reverse course on free exercise or establishment (for example), then the First Amendment’s cache of popular support from the idea of public reason would be drained.

But would one generation’s dissent be sufficient to override the consensus of dozens before it? I argue yes, not only because of historical precedent (say, in the Thirteenth Amendment’s repudiation of slavery) but also because of the Rawlsian notion of free and equal citizens. Insofar as persons in any given generation are possessed of roughly equal moral powers to those before it, then no generation can claim to supersede the claims of any other to establish the terms on which each will govern itself under the terms of the idea of public reason.

Article V itself contemplates this point: by it, the People constantly retain the power to speak in terms of their higher law. The founding generation and those after it have no greater claim than any other to set the terms by which the People will govern themselves. If this were not so, then Article V would either not exist, or would only represent a bare opportunistic device intended to ensure the Constitution’s ratification. It would then be a device of convenience rather than principle.

So, the Court’s powers to vitalize philosophical concepts like the First Principle depend on popular consensus as to what those concepts entail, so long as the Court remains a tool to preserve the higher law, and not a council of philosopher kings. The Court has no independent power to enact its own moral judgments, nor those of any favored philosopher, conditional on the notion that the Court remains a protector of the People’s considered judgments only.

What Kind of Institution?
Underlying all of these questions is the institutional character of the Court. It is important to remember that to the Constitution the Court owes its existence. The Court has taken to itself the power to review Congress’ and states’ laws, but this power has no ground in the Court’s institutional pedigree in itself. Now, Rawls poses the question: may judicial review extend even further, beyond...
only the acts of Congress, to be a supra-Constitutional power, extending beyond the existing higher law into the ideal of public reason?

This argument touches on the distinction between the idea and the ideal of public reason—the idea is the state of the overlapping or constitutional consensus as it is; the ideal is the overlapping consensus as it should or could be. The former is what the People have in fact inculcated into public reason, as defined above. The latter is what public reason might be, if a complete reasonable conception of justice were created as part of the overlapping consensus of reasonable comprehensive doctrines. It represents the public reason of the well-ordered society.

To argue for the ideal, we have gone too far. The Court already maintains the power to disavow a duly enacted law of Congress by loyalty to the Constitution; to maintain a power to disavow a constitutional amendment involves loyalty to liberalism itself. The idea of public reason provides no such power because it changes along with public consensus, which is embodied, partially, in constitutional amendments. Only the ideal can resist the People’s shifting judgments, and this idea extends beyond the duly considered higher law of the People into the philosophical realm. The Court has no business here. To say that the Court could disavow such an amendment in the name of the ideal of public reason, against the wishes of the People, is to discard popular sovereignty in the name of the rule of philosopher kings. It is to say that the Court, though created by the Constitution, nonetheless extends outside of it, becoming a purely liberal institution with an existence and power separate from it.

Rawls is right to claim that to repeal the First Amendment is folly, by liberalism’s standards (though I believe he overstates its impact). But he is wrong to claim that the Court should have any power to discard a duly enacted constitutional amendment in the name of liberal purity. To argue this is to name the Court a liberal institution rather than a constitutional institution.

III. Two Dichotomies

This section addresses two dichotomies arising from Rawls’ and Freeman’s arguments that help to explain the tension between the Supreme Court and Article V. Samuel Freeman’s work and my critique will expose the two dichotomies mentioned above, which reveal the critical problems in Rawls’ argument. The first dichotomy is the idea versus the ideal of public reason, and its implications for the powers of the Court. The second is political liberalism versus popular sovereignty regarding appropriate ways to read and to apply the Constitution.

The People as an Ideal

Not only is a democratic constitution not what the Court says it is, it is not what our ancestors say it is, nor even simply what actual current supermajorities say it is. “In the end, Rawls seems to commit himself to the view that the ‘people’ is an

81 Supra note, at 43
ideal implicit in democratic political culture: that of free and equal persons, united together as one legal body, the body politic, which exercises constituent power to make the higher law in such a way that it realizes the political values of public reason, thereby enabling them to realize the (moral) powers that make them free and equal democratic citizens.”

The source of Rawls argument appears to be defining the people as an ideal, and thus the ideal of public reason. If the ideal people gives the Court its power, and the ideal people would never assent to relegating their free expression and religion rights to the legislature, then the real people may be justly checked in their efforts to do this. But a real people ratified the Constitution; a real people created the constitution; a real people gave the Court its power. We arrive at the first dichotomy: deciding between the idea and the ideal of public reason as the more appropriate source of the higher law and the Court’s power. To this point, I have employed the idea, explicitly rejecting the ideal. Here I argue for that choice.

Dichotomy One: Ideal vs. Idea

Rawls writes, “The court is not antimajoritarian with respect to the higher law when its decisions reasonably accord with the constitution...the political values of public reason provide the basis for the Court's interpretation.”

It is ambiguous in this quote whether Rawls refers to the idea or ideal of public reason; in order to defend the First Amendment claim, Freeman claims that Rawls commits himself to the ideal version.

Public reason provides the basis for the First Amendment’s entrenchment, giving a moral cache to it. If the idea of public reason, which gives history its weight as opposed to the ideal of public reason, governs the entrenchment of the First Amendment, then it can also oversee its downfall. If the idea governs, then its content accrued over time can change with generational opinion and the overlapping consensus. This is the argument of this essay’s second section.

But if the ideal governs, then the Court has lost its connection to the political constitution. If neither the Constitution, nor the People, nor the idea of public reason gives the Court its power, then law, in any recognizable sense, does not bind it. Empowered to do what the ideal of Justice demands, the Court can rely then only on its own reasoning and judgment as to what that ideal conception requires. This is to say that the Court knows only ideal restraints, and need be accountable only to theory, not the Constitution, not the People, and not to the higher law. To make this claim, one needs a highest law.

Indeed, as Freeman describes the idea and ideal of public reason, he notes that the ideal, taking society as well ordered, cannot be applied in our modern American society. Our idea of public reason is too far from the ideal of the well

82 Id. at 664-665
83 Rawls, Political Liberalism at 234
84 Supra note at 69. In the quote above, Rawls refers to a people setting the terms of their own self-governance as an ideal. Perhaps in this sense, even the ideal can be subject to popular revision, as is the idea.
ordered society. But if the ideal makes no sense in the context of our idea, is it sensible to argue that the Supreme Court could apply the ideal of public reason in a context as foreign to it as our public reason?

Further, I note that Rawls refers to the idea, not the ideal, of public reason when referring to the Supreme Court and its powers. It is possible that he did not intend Freeman’s reading. However, I agree with Freeman: if Rawls intends to entrust the Court with power to overrule a procedurally valid constitutional amendment, he will need to give the Court more than the idea of public reason. This is why Rawls’ claim appears odd and indefensible: he refers to the idea, but needs the ideal. The ideal is inappropriate in this situation, by the terms of both his and Freeman’s arguments. So the argument fails.

Dichotomy Two: Political Liberalism vs. Popular Sovereignty

The second dichotomy which Freeman’s argument reveals is between political liberalism and popular sovereignty. In Rawls’ and Freeman’s arguments, I emphasize what I take to be the key points of political liberalism: individual rights—taken as the presumptive inviolability of the person and the lexical priority of Rawls’ First Principle—and a just social and political structure, conforming to the demands of both the First and Second Principles. The just structure requires both an equal extent of liberty consistent with the same liberty for all others, fair equality of opportunity, recognizing that disparate social advantages are morally arbitrary and thus must be mitigated, and the difference principle, which requires that a just structure must provide benefits that redound to the least-advantaged members of a society. This is Rawls’ liberalism in a nutshell, and as Freeman does not challenge its core, I will take it to be his liberalism as well.

---

85 Freeman at 652: “The ideal of public reason is not something realized in our constitutional system since we are not well-ordered (in Rawls’ sense); we only faintly approximate this ideal....Still, though we do not satisfy the ideal of public reason, the idea applies to us, for the principle of legitimacy [is a requirement] on any democratic scheme....” The liberal principle of legitimacy is given by Rawls: “[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” (Political Liberalism at 137) If the First Amendment were, at some future time, not regarded as acceptable to Americans’ common human reason as free equals, it is unclear whether the liberal principle of legitimacy could protect it.

86 Supra note, at 71: “...a democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way. The aim of public reason is to articulate this ideal.” But the ideal here is political, not metaphysical; it is the ideal chosen by a people to govern itself in a certain way. If the ideal changes, so does public reason, and with it, the powers of the supreme court.

87 Freeman’s work reveals this distinction by how he restructures Rawls’ claim. His description of the moral character of democracy, the inherent limits on what even supermajorities can do, and his critique of the procedural conception which lawyers tend to have reveals: the People are not fully in command. There is a limit even on the higher-lawmaking voice. I argue that such limits can only come from a highest law, above even the higher law. This concept is unmentioned in Rawls’ liberal theory, and untenable in a theory of popular sovereignty.
It is clear that to repeal the First Amendment threatens the First Principle: in its present iteration, an equal extent of liberty for all others may be threatened by the removal of a judicially enforceable protection for free expression. Thus, to preserve the just structure, a supreme court is part of a scheme intended to preserve a just polity. Entrenched rights may serve this scheme best because then elements of the structure might legally overrule the People. Thus, perhaps political liberalism presumes or requires entrenched rights and a structure able to protect them. This may explain how casually Rawls makes such an unorthodox claim.

By contrast, popular sovereignty, as I understand it, takes the People’s considered judgments as morally valuable simply by virtue of mass consent. Vote-counting to determine the people’s will is not only procedure, but also carries a moral presumption over time; a moral content is infused in the idea of public reason by popular consensus over time. A theory of popular sovereignty takes popular consensus not as morally arbitrary, as Freeman asserted, but as positive; consent is a moral act, and as a generation’s majority overwhelmingly approves a legal-political principle, it gains the moral cache of collective consent.88

Popular sovereignty wins this contest. Rawls makes a concrete claim about the Supreme Court and Article V, not some more general claim about the powers that a supreme tribunal ought to have. Popular sovereignty squares better with the Constitution than political liberalism because of a) the lack of explicit entrenchment of most of the Constitution, b) because of Article V itself, which contains the limited few entrenched provisions of the document, and gives the People an otherwise undifferentiated power to amend it (and which contemplates the need for sweeping future changes at the People’s judgment), and c) because of the document’s other themes, such as its unique separation-of-powers system which functions as a vehicle of higher law,89 and the wording and history of the Preamble, which contemplates a considered judgment of the People to ordain a new union out of what had been thirteen essentially independent nations. This grand act of ordination signifies a unified action of the People, and thus, through Article V, shows a commitment to the possibility of revoking what the People had called forth.90 The People of course always retain a right to restrain future generations in their ordinary lawmaking voice, but successive generations are nonetheless free to remove the past’s chains

---

88 Is there some irony in using liberal rules of public reason to inform a different theory of popular sovereignty? If popular sovereignty is distinct from political liberalism, then is it appropriate to use liberalism’s public reason to distinguish the former from the latter? I argue that it is appropriate to do so, because public reason is not a concept unique to political liberalism. Construed as above, it is perfectly compatible with popular sovereignty; indeed, it may offer answers to questions surrounding the construction of the higher law in popular sovereignty, such as why some statutes, while not part of the document of the constitution, achieve a reverence or popular authority superior to most statutes. Also, it can explain why some non-codified practices, such as the common-law prohibition on forced medicine, maintain in the modern era: because of their compatibility with both venerable and modern notions of political justice, and their endurance through time.

89 Ackerman, Transformations at 21-25, 122-125

90 Amar, America’s Constitution at 5-53; Amar describes both the popular-sovereign, revolutionary roots of the Constitution, and the states under the Articles of Confederation as independent nations in an international accord, rather than a consolidated union. Only the ratification produced a new nation, a singular People, rather than a treaty among fractious nations.
by their own duly considered judgments. A constitutional moment is always able to undo the judgments of the past.

Thus we may consider the entrenched provisions in Article V as acceptable to neither theory, considering the rest of the document’s history and structure. Entrenchment does not befit a theory of popular sovereignty, but the lack of entrenchment around the Constitution’s key provisions does not appease advocates of political liberalism. This should not surprise us, since clearly the Constitution’s entrenchments do not center on key theoretical passages, but rather on the ground-zeroes of major political controversy in the Convention. Our entrenchment is born of compromise, not liberal principle.

Thus, judging between these dichotomies—the idea of public reason in the first, and popular sovereignty in the second—leads to the conclusion that the First Amendment is not entrenched. It may be repealed if the People so desire.

IV. Conclusion

The question presented in this paper—whether the Supreme Court may overrule a duly enacted constitutional amendment if it conflicts with one of the most esteemed of the Constitution’s provisions—hinges on whether the Court’s institutional powers extend so far, and on whether the First Amendment is truly a constitutional cornerstone. To both questions, I tentatively answer no.

The First Amendment may be the flagship section of our Constitution. But even so, its presence was once not even considered advisable; the judicial tools used to enforce it were feeble; yet it protects rights nonetheless widely considered fundamental to a democratic society. Secondly, the Court’s powers extend only so far as its constitutive forces will allow. We have seen that the Constitution can give the Court no power to override its own provisions. Public reason, as the content of the higher law beyond the Constitution’s words, changes with the judgment of the People, and thus cannot grant the Court power if the People, in their considered—if inadvisable—judgments decide that their public reason no longer vests moral authority in a given set of principles.

Moreover, to argue that the Court could dismiss the will of the People, in their higher-law voice, is to argue that the Court’s powers derive from a source beyond either the People or the Constitution; it is to say that the Court calls on liberalism itself, as some philosophical ether. So that the Court remains cabined to the highest will and considered judgments of We the People, so that it remains embedded in and limited by the Constitution, the Court must not be able to substitute its own judgment for that of the higher law as though there were a highest law to which only it is privy.

It is better to describe the Constitution as incompletely liberal because it lacks entrenched rights than to describe the Constitution’s rights as entrenched because we assume it must be liberal. This is to impute a political theory onto the Constitution, to interpret it through one comprehensive doctrine’s lens. One ought to consider it as it is: a document created and interpreted ad hoc, through many generations, with Articles and Amendments born of compromise and historical context, surrounded by voluminous case law created by discrete disputes and
inspired by multiple interpretive methods. To argue that one theory or methods can adequately encompass the whole is to see one’s own Constitution, subjectively, rather than to take the whole as it is.