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R. George Wright

*Prof. of Law, Cumberland School of Law, Stamford University*

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# Could a Constitutional Amendment Be Unconstitutional?

R. George Wright\*

## I. INTRODUCTION

Occasionally, inquiring into the most obscure, abstract, and apparently inconsequential matters can lead to results of unexpected practical significance. For example, theoretical tinkering by scientists with the apparently sterile problem of "black body radiation" led to a revolution in twentieth century physics that significantly changed the way many scientists think of the world,<sup>1</sup> and allowed the development of laser, transistor, and microchip technology.<sup>2</sup>

Unfortunately, no such technological harvest can be expected from even the most inspired reflections on constitutional theory. But the rewards of exploring certain obscure issues in constitutional law may be surprising. This Article argues that a deeper understanding of our Constitution may flow from some new thinking about the possible limits on its amendability. Exploring the question of whether a constitutional amendment could itself be unconstitutional may reward us with a better appreciation of the Constitution itself.

This Article focuses on the possible substantive unconstitutionality of purported constitutional amendments. It does not consider unconstitutionality for failure to comply with the procedural requirements article V of the Constitution imposes on the amendment process. This Article devotes little attention to the procedural side of the claim that an amendment depriving a state of its equal suffrage in the Senate would be unconstitutional unless enacted with the consent of that state.<sup>3</sup> Rather, the focus here is

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\* Professor of Law, Cumberland School of Law, Samford University.

1. See *THE GHOST IN THE ATOM* 2-4 (P. Davis & J. Brown eds. 1986); N. HERBERT, *QUANTUM REALITY: BEYOND THE NEW PHYSICS* 34-35 (1985); H. PAGELS, *THE COSMIC CODE: QUANTUM PHYSICS AS THE LANGUAGE OF NATURE* 26, 66-67 (1982); J. POLKINGHORNE, *THE QUANTUM WORLD* 5 (1984).

2. See *THE GHOST IN THE ATOM*, *supra* note 1, at 4; H. PAGELS, *supra* note 1, at 40, 49, 98.

3. The language in article V prohibiting this sort of amendment may be treated as either a unique and express limitation on the substance of the amending power, or as a procedural limitation, in that the restriction may be overridden with the consent of any adversely affected state. See U.S. CONST. art. V. See generally Lindner, *What in the*

upon what might be referred to as implied limitations on the substance of constitutional amendments.

It is hoped that the usefulness of this inquiry will transcend the number of amendments that actually have been held unconstitutional on substantive grounds. Arguments for the substantive unconstitutionality of procedurally valid amendments rarely have been presented to the Supreme Court. They uniformly, and almost summarily, have been rejected.<sup>4</sup> The mainstream position remains that "no limitations on substance have yet been found, and it is unlikely that any will ever be found."<sup>5</sup>

Nonetheless, "[o]ne of the most important subjects that can engage the attention of the . . . people of this country is the extent and scope of the power to amend the Constitution of the United States."<sup>6</sup> This is largely because "[w]hen we answer the question as to what we can never do constitutionally, we have gone a long way toward clarifying the American conception of constitutionalism."<sup>7</sup> Although this Article will reject the most commonly proposed substantive limitations on the amending power, it nonetheless will derive certain implied substantive limits from the ascertainable presuppositions and purposes underlying our Constitution, and perhaps all constitutions.

The Article will conclude that implied substantive limitations on constitutional amendments exist even absent any particular "essence" or overriding spirit that informs the whole Constitution. Neither does this theory of implied substantive limits depend upon

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*Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 717 (1981)(stating that only a few Americans think that the guarantee of equal Senate suffrage is the only part of the Constitution expressly unamendable under the Constitution's own terms).

4. See, e.g., *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (rejecting the claim that the nineteenth amendment, which extended the franchise to women, was in substance unconstitutional on states' rights grounds, or as an excessive impairment of the autonomy of any unconsenting state because the nineteenth amendment was in this regard no more of an intrusion on states' rights than the fifteenth amendment, the constitutionality of which had been long recognized). See also *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (offering only an utterly conclusory and rejection of the assertion that the eighteenth amendment, establishing Prohibition, was substantively outside the scope of the article V amending power). Justice Clarke dissented in part but concurred without further elucidation on this issue. See *id.* at 407 (Clarke, J., dissenting). Of course, the theory developed in this Article does not begin to suggest that either of these cases reached an incorrect result.

5. L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 23, 106-26 (1942).

6. Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550, 550 n.1 (1930) (quoting 2 G. CURTIS, *CONSTITUTIONAL HISTORY (OF THE UNITED STATES)* 152 (1896)).

7. Lindner, *supra* note 3, at 718.

excessive devotion to the views of the framers or upon any claim that constitutional interpreters must answer to a "higher" or natural law. Rather, implied limits on the substance of constitutional amendments flow from the inescapable logic of any reasonable view of the basic purposes underlying the Constitution, and from the requirement that a constitution exist as a minimally unified, coherent, functioning document.

## II. PRESUPPOSITION AND PURPOSE IN MODERN CONSTITUTION-MAKING

Modern constitution-making tends to be a purposive undertaking. Although there may be more to modern constitutions than the achievement of certain purposes, the element of purpose is almost always present. Constitutions certainly may have more than one purpose. One or more such purposes may be difficult to articulate, and they may also not be shared universally. The purposes may be instrumental or merely expressive. Furthermore, the purposes underlying a constitution may change over time.

This sense of coherent, ascertainable purpose pervades modern constitutionalism. For writers in the social contract vein, the purposes of the constitution must parallel the people's purposes for entering into the social contract or into political society. What is surprising is not that modern constitutional theory tends to refer to purpose, but that various theorists tend to share substantially the particular purposes identified.

A remarkable range of the most influential theorists have emphasized the aim of sheer personal security or safety in their accounts of why persons establish a society, or a particular constitution. Thomas Hobbes emphasized personal security and cultural development as the motivations or purposes for instituting civil government.<sup>8</sup> Hobbes' more republican colleague, Benedict Spinoza, later concluded that "the ultimate aim of government is . . . to free every man from fear, that he may live in all possible security."<sup>9</sup>

This constitutional emphasis on achieving peace and safety is not a mere passing historical fashion. James Harrington's *The Commonwealth of Oceana* provided political equality for the sake of "domestic peace and tranquility."<sup>10</sup> John Locke, in his *Second*

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8. See T. HOBBS, *LEVIATHAN* 100 (M. Oakshott ed. 1962).

9. B. SPINOZA, *A THEOLOGICO-POLITICAL TREATISE* 258-59 (R. Elwes trans. 1951).

10. J. HARRINGTON, *THE POLITICAL WRITINGS OF JAMES HARRINGTON* 70 (C. Blitzer ed. 1955).

*Treatise of Government*, similarly viewed entering into political society as a necessary means of preserving life, liberty, and property from the "fears and continual dangers"<sup>11</sup> of the state of nature.

Closer to the American Revolution, David Hume saw the establishment of political society as being purpose-driven "to administer justice."<sup>12</sup> Hume instrumentally justified this as necessary for public peace, safety, and mutual intercourse.<sup>13</sup> Contemporaneously with the enactment of the American Constitution, the French philosopher Condorcet made central to his account of the "rights of man"<sup>14</sup> those of "[s]ecurity of person"<sup>15</sup> and "[s]ecurity and free enjoyment of property."<sup>16</sup>

This is not to suggest that traditional liberal constitutionalism is preoccupied exclusively with safety and security. Although Rousseau, for example, was concerned with finding a basic mechanism for protecting and defending "the person and property"<sup>17</sup> of each member of society, he also wanted each person to "remain as free as before."<sup>18</sup> Condorcet recognized not merely freedom generally, but liberty of the press, as established under the American Constitution, to be "one of the most sacred rights of humanity."<sup>19</sup> Even more interestingly, Montesquieu referred to England as the "[o]ne nation . . . in the world that has for the direct end of its constitution political liberty."<sup>20</sup>

Among others, one might list as the central constitutional aims equality in the distribution of whatever rights are constitutionally recognized,<sup>21</sup> the recognition and pursuit of "the common good of the society,"<sup>22</sup> and the attainment or preservation of popular sover-

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11. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 368 (P. Laslett rev. ed. 1963).

12. DAVID HUME'S *POLITICAL ESSAYS* 39 (C. Hendel ed. 1953).

13. *See id.*

14. CONDORCET: *SELECTED WRITINGS* 73 (K. Baker ed. 1976).

15. *Id.*

16. *Id.*

17. J. ROUSSEAU, *THE SOCIAL CONTRACT* bk. I, ch. VI, at 17 (L. Crocker ed. 1967).

18. *Id.* at 18.

19. CONDORCET: *SELECTED WRITINGS*, *supra* note 14, at 78.

20. B. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (T. Nugent trans. 1949).

Intriguingly, though, Montesquieu goes on to define political liberty precisely in terms of safety, absence of fear, and tranquility of mind. *See id.* at 183-87.

21. *See, e.g.*, CONDORCET: *SELECTED WRITINGS*, *supra* note 14, at 221. Political equality partly for instrumental reasons, as well as for its own sake, or as mandated by justice, might be equally desirable.

22. Sunstein, *Constitutions and Democracies: An Epilogue*, in *CONSTITUTIONALISM AND DEMOCRACY* 331 (J. Elster & R. Slagstad eds. 1988) (discussing the views of Alexander Hamilton that every political constitution ought first to obtain for rulers people who "possess most wisdom to discern, and most virtue to pursue the common good of society.").

eignty.<sup>23</sup> Related is the concept that obtaining the consent of the governed is essential to legitimate government.<sup>24</sup> Obtaining the consent of the governed in turn may be instrumental not only to maintain political peace and stability, but to recognizing and advancing human dignity.<sup>25</sup>

Regardless of which of these aims constitutions in general, or our Constitution in particular, most strongly emphasize, constitution-making is ordinarily a purpose-driven activity. These purposes are themselves based upon certain presuppositions or assumptions about moral values, human nature, or the way the world works. Some of these presuppositions can be identified with reasonable precision. For example, the moral necessity of the consent of the governed inevitably presupposes the possibility of valid, meaningful consent by persons competent to consent.<sup>26</sup> In the absence of this capacity, a consent requirement aimed at furthering human dignity would be meaningless.

Another less obvious but widely recognized presupposition thought to underlie the Constitution is the belief that at least some constitutional rights are inalienable. Writers such as Hobbes,<sup>27</sup> Spinoza,<sup>28</sup> and Condorcet<sup>29</sup> recognized the inalienability, or non-waivability, of certain rights often thought to be essential elements of American constitutionalism.<sup>30</sup> Unfortunately, the notion of the

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23. See, e.g., Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1103 n. 211 (1988) (viewing popular sovereignty as the "true essence" of the Constitution).

24. See, e.g., G. CASPER, CONSTITUTIONALISM 4 (Occasional Papers from the Law School, University of Chicago No. 22, 1987); Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENTARY 373, 374 (1985) ("[i]n declaring independence, the American colonists asserted that governments rest upon 'the consent of the governed'") (quoting The Declaration of Independence para. 1 (U.S. 1776)).

25. See generally Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 704-08, 745 (1980) (The United States Constitution includes a tradition of values as important as those expressed in the document itself—human dignity, for example.).

26. See, e.g., *Davis v. Police Jury*, 50 U.S. (9 How.) 280, 287 (1850) (competency test applied to contract whereby Spanish government of Louisiana had granted exclusive ferry rights to an individual).

27. See T. HOBBS, *supra* note 8, at 105 (right of self-defense is inalienable because no good to the person purportedly alienating such right can arise from that alienation).

28. See B. SPINOZA, *supra* note 9, at 257 (natural rights, including that of "free reason and judgment," are not subject to abdication even by consent).

29. See CONDORCET: SELECTED WRITINGS, *supra* note 14, at 222 (one cannot bind oneself to obey a majority that has once recognized, but now violates, the rights of the individual).

30. See Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183, 183-85 (1920); Amar, *supra* note 23, at 1050 (discussing the inalienable right to alter or abolish a particular form of government); White, *Is There an Eighteenth Amendment?*, 5 CORNELL L.Q. 113, 122 (1920). Justice Stevens has argued for "liberty" as an

inalienability of certain constitutional rights tends to complicate, rather than resolve, the issue of the implied substantive unconstitutionality of particular constitutional amendments.

This complication arises because it is unclear what principles should be inferred from the text or even from the legislative history of an amendment repealing a putatively inalienable right. The repealing amendment may amount to an informed, conscientious, collective change of mind not about merely the value of the right itself, but about its inalienability as well. It is hardly clear why a collective decision in the past that a right is inalienable must control a current collective decision that it is not inalienable.<sup>31</sup> A collective change of mind about the inalienability of a right does not necessarily require starting from scratch with a new constitution. This Article does not assume that an amendment repealing a "genuinely" inalienable right therefore simply must be unjustifiable on the merits or contrary to natural law, and hence also invalid as a matter of constitutional law.

On the other hand, such a repealing amendment, at least in extreme cases, may call its own constitutionality into question if it casts a broad and deep shadow on much of the remainder of the Constitution. If one assumes that much of the Constitution necessarily is inspired by some inalienable rights theory, and given that the amendment in question can only be interpreted as implicitly repudiating the whole idea of inalienable rights, it may be impossible to give effect to the amendment only to the extent that it repeals a particular designated right. The logic of the Constitution would call into question the ability of the amendment to co-exist compatibly with what the amendment is supposed to amend—the remain-

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inalienable right. See *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). For a general argument against the constitutional application of the notion of inalienable rights, see McGovney, *Is the Eighteenth Amendment Void Because of its Contents?*, 20 COLUM. L. REV. 499, 500-02 (1920). For a sophisticated discussion of the legitimate role of inalienability in the constitutional context, see Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 22, at 238-40 (a modern constitution forecloses certain options, like self enslavement). For broader discussions of the possible rationales for inalienability rules largely apart from a constitutional context, but within a property rights context, see Calabresi & Mehlamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-13 (1972); Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

31. For a sense of some of the complications, see, e.g., T. SCHELLING, CHOICE AND CONSEQUENCE 57-58 (1984). *But cf.* Vile, *supra* note 24, at 387 ("one generation should have the right to say that the next generation must choose to follow the forms it has specified or choose another system") (emphasis in original).

ing, unrepealed body of the Constitution. Logically, an "amendment" cannot amend if it renders a constitution unrecognizable, disrupts its continuity or identity, makes it meaningless, or merely inevitably and deeply conflicts with the constitution on which it is to be engrafted.

This is not a matter of obscure metaphysics, but of common experience. The practice of medicine suggests that transplanted tissue, or an "amendment" to the body, provoking an allergic reaction beyond some degree of severity and extent cannot in any real sense be considered a genuine, functioning, actual transplant. It is so incompatible with the body to which it is grafted that the transplant and body do not form a unified, coherent, functioning whole. Doctors may be able to salvage, perhaps, either the transplanted tissue itself or the remainder of the body. But both cannot survive as a coherent unified working entity. Therefore, the result is a non-functioning transplant. So too it goes with constitutions.

This does not suggest that there cannot be a genuinely important change through "mere" constitutional amendment. There is, however, a difference between amending a constitution and starting fresh. An amendment need not in any sense be compatible with what it expressly or implicitly repeals, or all that remains, but it plainly must be compatible with some sufficient portion of the remaining constitution. If, however, the putative amendment renders incomprehensible so much of the established constitution that the amendment and the remaining portions of the constitution together do not form a viable and complete constitution, then the amendment can be validly enacted as only a part of what is really a new constitution.<sup>32</sup>

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32. Cf. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213, 221 (1920) (Unless held above every other power in the Constitution, the power of amendment is incapable of withdrawing any power the Constitution grants.). One of the closer approaches to this view found in the literature is Professor Skinner's recognition in 1920 of the argument that the states are not authorized or empowered under the amendment clause to "subvert the structure, spirit and theory" of the Constitution. *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2992-93 (1864).) The focus here is not on what may or may not be done through the amendment clause without exceeding the limits on what the states are authorized to do through the amendment process. Nor is the focus here on the claim that a putative constitutional amendment may itself be unconstitutional because it violates some prior understanding or instruction. The amendment may be precisely a repudiation of just this prior understanding or instruction. Instead, the focus is on the claim that the amendment, together with the remaining portions of the Constitution, do not together form a sufficient, intelligible, workable unity. The argument here is that an amendment may be unconstitutional not because it is improper or unauthorized, but because as a matter of logic it triggers the need for a fresh constitutional start without acknowledging that fact. More simply, an "amendment" may be unconstitutional if it purports to be a mere amendment while by



### III. HISTORICAL AND CONTEMPORARY ARGUMENTS FOR THE SUBSTANTIVE UNCONSTITUTIONALITY OF PARTICULAR CONSTITUTIONAL AMENDMENTS

Several writers have attempted to show that particular types of constitutional amendments are unconstitutional.<sup>33</sup> In the early part of the twentieth century, most such attempts focused on amendments allegedly treading unduly on the rights and powers of the states. More recently, the attempts have shifted to amendments impairing basic individual rights. Unfortunately, none of these broad attempts to show unconstitutionality have been convincing.

The early efforts based on state police powers or state sovereignty tended to begin with the uncontroversial premise that article V of the United States Constitution literally prohibits the denial of equal representation in the Senate to any unconsenting state.<sup>34</sup> Some writers infer from this that no state can be destroyed or abolished without its consent.<sup>35</sup> The further inference arises that any constitutional amendment depriving an unconsenting state of its legislative powers,<sup>36</sup> or some of its legislative powers,<sup>37</sup> or altering the composition of a state,<sup>38</sup> must itself be unconstitutional.

There certainly is force in the claim that one cannot merely circumvent constitutional restrictions, or do indirectly what is barred directly. Nonetheless, the purported states' rights or state sovereignty restriction on constitutional amendments ultimately is ineffective. First, and perhaps most surprisingly, an amendment abolishing the states would not necessarily violate the right of any unconsenting state to equal Senate suffrage. If all the states were abolished, each state would then have equal, or zero, representation in the Senate.<sup>39</sup> If but one or a few states were abolished, however, it might still be possible to interpret article V as only protecting the equal Senate suffrage of states that continue to ex-

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implication actually calling so much of the purportedly intact remainder of the Constitution into question as to leave only a fragmentary, schizophrenic, or inevitably confused residue. This is a matter not of legitimacy, or of keeping faith with our ancestors, but of logic.

33. See *infra* notes 34-77 and accompanying text.

34. See, e.g., Machen, *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169, 173 (1910); Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 229 (1920).

35. See, e.g., Machen, *supra* note 34, at 173.

36. See, e.g., Marbury, *supra* note 34, at 229; White, *supra* note 30, at 114-15.

37. See, e.g., Marbury, *supra* note 34, at 228; White, *supra* note 30, at 115.

38. See Machen, *supra* note 34, at 174-78, 186.

39. See L. ORFIELD, *supra* note 5, at 97-98.

ist.<sup>40</sup> Under this interpretation, abolishing one or more states would not violate article V.

More significantly, however, no constitutional amendment can simply abolish one or more states. The amendment, in its historical context if not by its own language, inevitably must leave something in place of the states if the inhabitants of the abolished states are not to be expelled from the Union. To abolish one or more states, of necessity, is to adopt or allow some sort of alternative government for the residents of those states. Abolishing the states need not even be a profoundly radical political change<sup>41</sup> if, for example, the states were replaced by county or broad regional governmental structures with state-like authority.

Neither does it follow, as a matter of the logic of policy, that equal Senate suffrage requires that the states continue to exist, or to exist unmodified. The equal Senate suffrage rule may have had a particular purpose or purposes that abolition of the states would not necessarily impair. If, for example, one assumes that the smaller states insisted upon equal Senate suffrage as a means of avoiding political exploitation by larger, more populous states,<sup>42</sup> then abolishing all the states may not violate that purpose behind the equal Senate suffrage requirement. An invidious, tyrannical purpose motivating a denial of equal Senate suffrage to a small state may be utterly absent from an amendment abolishing some or all the states, or an amendment abolishing the Senate itself.<sup>43</sup>

It is also useful to remember that the very process of constitutional amendment ensures that a decisive role in the enactment process will be held by the states themselves, or by those subject to the continuing political influence of the states.<sup>44</sup> Ordinarily, the states are capable of protecting their own basic interests through the political process, at least to a greater extent than individual speakers seeking to express unpopular, dissenting points of view.<sup>45</sup>

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40. *Cf. id.* at 97 (stating that article V is confined "is confined to protecting the equality of the states in the Senate").

41. *But cf. id.* at 90 (noting that the parts of the Constitution which divide state and federal powers are fundamental).

42. *See Reynolds v. Sims*, 377 U.S. 533, 574 (1964) (discussing the adoption of the equal Senate suffrage rule to avoid deadlock between the states at the Constitutional Convention).

43. *Cf. L. ORFIELD, supra* note 5, at 96-98; Orfield, *supra* note 6, at 577-78 (both expressing the view that the Senate may be abolished constitutionally).

44. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985), *cert. denied*, 488 U.S. 889 (1988) (recognizing of the ability of the states to exercise significant political control over their fate at the federal level).

45. *See id.*; *see also* Frierson, *Amending the Constitution of the United States*, 33 HARV. L. REV. 659, 660 (1920).

Thus, any reduction of the states' legislative powers generally, let alone their abolition as states, will tend in practice to be largely voluntary.<sup>46</sup>

This sort of argument provides no guarantee that, for example, the vast majority of states will not rudely gang up on an isolated state and abolish it in a procedurally legitimate way. On balance, however, it seems soundest not to view the constitutional amendment effecting this change as itself substantively unconstitutional, whatever its motive or practical impact. The Constitution before and after this amendment would still be a recognizable and viable constitution, with a continuity of identity that persists in the face of change.<sup>47</sup> Admittedly, this represents in part a value judgment regarding precisely what sorts of things are most reflective of the purposes underlying the Constitution and most indispensable to our governmental scheme.

Historically, a consensus has existed on personal safety and security, together with values such as cultural development, liberty, equality, dignity, and consent, as fundamental political and constitutional purposes.<sup>48</sup> As an example, a comparison of the abolition of one or a few states with the adoption of the Civil War era amendments reveals that the Civil War era amendments worked a further reaching reinterpretation or restatement of the basic constitutional purposes than amendments abolishing states likely would.

Bluntly put, the adoption of the thirteenth, fourteenth, and fifteenth amendments was of greater constitutional significance than any abolition of one or more states is likely to be, at least unless that abolition itself affects the same values underlying the Civil War amendments. The continued existence of all the states is largely of instrumental importance. Despite some past argument to the contrary,<sup>49</sup> the Civil War amendments represent a constitutionally valid recognition and enhancement of the basic values underlying modern constitution making. This is true regardless of their restrictions on state governmental power. Apart from any

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46. *But cf.* Marbury, *supra* note 34, at 224, 228-29 (arguing that once some legislative power is taken from the states by an amendment, all legislative powers eventually may be taken away).

47. *Cf.* D. PARFIT, REASONS AND PERSONS, 199-377 (1984); Perry, *The Importance of Being Identical*, in THE IDENTITIES OF PERSONS 89 (A. Rorty ed. 1976) (containing philosophical discussions of the continuity of personal identity that, by analogy, are at least compatible with this analysis).

48. *See supra* notes 8-25 and accompanying text.

49. *See generally* Machen, *supra* note 34, at 1, 192 n.1 (viewing the fifteenth amendment as an abuse of power valid only if its application were confined to federal elections, or possibly to persons acquiring the right to vote under state laws).

effects on values protected by entirely separate constitutional provisions and amendments, abolition of one or a few states cannot work a comparably significant constitutional change for good or ill. The abolition of one or several states, without more, does not crucially affect the recognizable core constitutional purposes or values. Such abolition does not cast uncertainty on, undermine, conflict with, or render meaningless, any purpose-based portion of the Constitution sufficient to render the amended Constitution invalid.

Because abolition of states generally would not undermine the Constitution, a states'-rights-based approach could not convincingly generate substantive limitations on constitutional amendments. Surprisingly, the more contemporary individual-rights-based approaches often fare no better in limiting amendments. Serious problems beset each of the individual rights-based attempts at substantive limitation.

One very interesting individual-rights-based attempt is Professor Amar's suggestion that "[a]n amendment abolishing free speech might . . . be unconstitutional"<sup>50</sup> even though adopted in a procedurally valid manner. Professor Amar's theory is that this sort of amendment impliedly would be unconstitutional, as it "would effectively immunize the status quo from further constitutional revision, in violation of the non-entrenchment component of neutrality."<sup>51</sup> Professor Amar's point, however, need not be decisive. Assume a set of rational constitutional framers who were proud of their work. They believed that the Constitution as drafted, subject to a certain flexibility of interpretation, adequately protected basic constitutional values. Arguably, it would not have been inconceivable for these hypothesized framers to consider that later generations might decline to use, or even abolish, the amendment process outlined in article V. Such a set of framers would not necessarily seek to lock in the then-current constitutional judgment in perpetuity. The framers could have intended merely less "neutrality," and a greater bias in favor of the constitutional status quo, than Professor Amar assumes. The framers might have preferred that sweeping changes in the elements underlying the Constitution take place not through constitutional amendment, but through the discontinuous process of rejecting the established constitution and enacting a new one.

These hypothetical framers would not necessarily have objected to a constitutional amendment that restricts or abolishes freedom

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50. Amar, *supra* note 23, at 1045 n.1.

51. *Id.*

of speech insofar as such speech is addressed to the merits of constitutional amendments radically changing the basic constitutional values. Nothing need be constitutionally amiss with constitutional non-neutrality, in the sense that significant changes in basic constitutional values are to be undertaken not by amendment, but by repudiation of the old constitution and enactment of a replacement.

Interestingly, though, Professor Amar refers to the idea of "abolition of speech."<sup>52</sup> Literally, this implies much more than either a simple repeal of the free speech and press clauses, or a prohibition on speech addressing constitutional amendments. The constitutional consequences of such an amendment essentially prohibiting political speech would be hard to confine. It might well itself be substantively unconstitutional on our approach. It might conflict with so much of what is apparently crucial in the remaining portions of the Constitution that it requires a choice between retaining the unamended Constitution, or using the putative amendment as the nucleus for an entirely new, internally consistent Constitution.

Without substantial quantities of political speech by members of the general public, it is difficult to understand a number of crucial, indispensable provisions of the Constitution. Provisions affected would include the sections that require public election of members of the House of Representatives,<sup>53</sup> those that describe the process of electing a president,<sup>54</sup> and those that guarantee to each state a republican form of government.<sup>55</sup> Also affected would be much of the remainder of the first amendment, including the right "peaceably to assemble, and to petition the Government for a redress of grievances."<sup>56</sup> It is fair to say that an amendment barring most political speech by the general public inevitably would undermine or render meaningless much of what is necessary to our current understanding of the Constitution. It would leave standing only a disjointed, unworkably insufficient, fragmentary constitutional structure. To enact such an "amendment" necessarily commits one constitutionally to starting over. This conclusion illustrates the paradox of the free speech clause in our Constitution. Free speech is both of vital importance and arguably largely superfluous, because it is implied by much of the rest of the Constitution.<sup>57</sup>

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52. *See id.*

53. *See* U.S. CONST. art. I, § 2, cl. 1.

54. *See id.* art. II, § 1, cl. 2-4.

55. *See id.* art. IV, § 4.

56. *Id.* amend. I.

57. *See, e.g.,* R. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL

If some degree of political speech must remain to ensure any recognizable continuity of identity in the federal Constitution, must any other particular values similarly be upheld lest the amended Constitution descend into a morass of contradiction? Professor Walter Murphy argues that “[t]he basic value in the United States Constitution, broadly conceived, has become a concern for human dignity.”<sup>58</sup> Professor Murphy postulates that human dignity is simultaneously the “fundamental value in the American polity”<sup>59</sup> and the root of constitutionalism itself.<sup>60</sup> The dignity, or inherent worth, of the individual reflects our capacity for responsibility and autonomy.<sup>61</sup>

Although the underlying ideas of moral responsibility and autonomy today may be controversial, Professor Murphy must face the ultimate objection that to the degree we give precise concrete content to the idea of human dignity,<sup>62</sup> we necessarily begin to lose confidence in its unquestionable constitutional status. Obviously, it would be foolish and implausible to argue against the vital moral centrality of protecting and furthering human dignity on all fronts. But in the debate over at least some important legal policy matters, more than one side can at least initially claim the support of some conception of human dignity.<sup>63</sup> Once the concept of human dignity is sufficiently definite to be constitutionally useful, however, it is no longer clear why an amendment must be unconstitutional if, for example, it limits the protection or advancement of one conception of human dignity for the sake of some other equally plausible conception of human dignity, or even for the sake of genuine de-

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OF RIGHTS 174 (Contributions in Legal Studies No. 48, 1988) (noting the controversial view at the time of enactment that the Constitution conferred no power to suppress freedom of speech).

58. Murphy, *supra* note 25, at 745. *But cf.* *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (subordinating the dignity of public figures to free expression unless such expression involves a reckless disregard for the falsity of a plausible claim of fact about the public figure plaintiff).

59. Murphy, *supra* note 25, at 708; *see also* *Cohen v. California*, 403 U.S. 15, 24 (1971) (Justice Harlan noting “the premise of individual dignity and choice upon which our political system rests”).

60. *See* Murphy, *supra* note 25, at 729 (quoting Professor Carl Friedrich in C. FRIEDRICH, *LIMITED GOVERNMENT: A COMPARISON* 123 (1974)).

61. *See* Murphy, *supra* note 25, at 749.

62. *See generally* Fellman, *Principles Other than Human Dignity in Constitutional Analysis*, 53 S. CAL. L. REV. 765, 771 (1980) (“[c]onstitutions, which are designed to endure for ages to come, are worded in vague and general language which invites judicial interpretation”).

63. *See* Brest, *Accommodation of the Majoritarianism and Rights of Human Dignity*, 53 S. CAL. L. REV. 761, 761-62 (1980) (criticizing Professor Murphy on this point).

mocracy or national union,<sup>64</sup> or personal security, or the liberty of the least advantaged, where these values may occasionally conflict with the adopted conception of human dignity.

Thus, Professor Murphy's main argument based on the general concept of human dignity is unsuccessful. However, Professor Murphy later offers a much more concrete and ultimately challenging example of an allegedly unconstitutional amendment. Although Professor Murphy couches his discussion of this hypothetical amendment in terms of human dignity, his invocation of dignity really does not materially advance the argument. Professor Murphy refers to the following example:

[A] constitutional amendment whose opening sentence reads: "Members of the various colored races are inferior to Caucasians in moral worth." The amendment goes on to limit the franchise to whites, to require state and federal governments to segregate public institutions, and to authorize other legal disabilities that clearly offend, even deny, the human dignity of noncaucasians.<sup>65</sup>

It is superficially possible to undermine this abomination by arguing for its consistency with the Constitution prior to the Civil War amendments. Regardless, the constitutionality of this putative amendment under contemporary circumstances would be dubious in the extreme. Actually, this is seen most readily not by focusing on the obvious conflicts between this amendment and the Civil War amendments, or any other constitutional provisions. Rather, to discredit this purported amendment, the most illuminating course would seem to involve a direct contrast between the amendment and at least the contemporary understanding of the basic purposes underlying modern constitutions in general, and the federal Constitution in particular.<sup>66</sup>

Obviously, the putative amendment quoted above conflicts fundamentally and irreconcilably with virtually all conceptions of the commonly cited constitutional value of equality.<sup>67</sup> Such an amendment could not plausibly be consistent with the constitutional goal of advancing the common good.<sup>68</sup> The amendment simply panders to the bare perceived advantage of entrenched, relatively powerful

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64. See Vile, *supra* note 24, at 385 (discussing the occasional need for "popular rule" or "national union" to take priority over the protection of dignity in the course of a critique of Professor Murphy's approach).

65. Murphy, *supra* note 25, at 755.

66. See *supra* notes 8-25 and accompanying text.

67. See *supra* note 21 and accompanying text.

68. See *supra* note 22 and accompanying text.

particular groups.<sup>69</sup>

Most interestingly, even those constitutionalists or social contract theorists least noted for their liberal progressivism may offer reasons to suppose that Professor Murphy's hypothetical amendment is unconstitutional. Thomas Hobbes, for example, exemplifies those theorists who emphasize the concerns for safety or security as primary reasons to enter into political society.<sup>70</sup> Hobbes argued, however, that safety and security, as a matter of the human condition and human psychology, are tied intimately to the recognition of equality of basic political rights among citizens.<sup>71</sup> In a classic passage, Hobbes argued the following with cold-eyed realism:

[n]ature hath made men so equal, in the faculties of the body, and mind; as that . . . when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim . . . any benefit, to which another may not pretend, as well as he. For . . . the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself.<sup>72</sup>

Hobbes then observed that belief in natural inequality typically reduces to "a vain conceit of one's own wisdom, which almost all men think they have in a greater degree, than the vulgar; that is, than all men but themselves, and a few others . . ." <sup>73</sup> Hobbes concluded that equality of ability naturally generates equality of hope in the realization of ends,<sup>74</sup> through violence or other means. Ultimately, the only sensible, stable arrangement upon which to build a safe and secure peace, given human capacities and human psychology, is one based on equality of right, or equality of concession of right, among ordinary citizens.<sup>75</sup> For the sake of security, members of a self-governed society must be contented with only as much liberty to act against or upon other persons as they are willing to concede to others to act against themselves.<sup>76</sup>

Thus, a cogent argument exists for the unconstitutionality of the

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69. For a discussion of the viability of distinguishing between mere group self-interest and a deliberatively arrived at common good, see generally Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (stating that many important clauses of the Constitution protect against a single evil—the distribution of resources or opportunities to the politically more powerful at the exclusion of the less powerful).

70. See *supra* note 8 and accompanying text.

71. See T. HOBBS, *supra* note 8, at 98-99.

72. *Id.* at 98.

73. *Id.*

74. *Id.*

75. See *id.* at 104.

76. See *id.* (enunciating what Hobbes refers to as the "second law of nature").



hypothetical example posed by Professor Murphy, but not by a problematic appeal to dignity.<sup>77</sup> Rather, an argument can be constructed by an appeal to the irreconcilability of the putative amendment with a broad range of basic purposes or values normally advanced for the initial enactment of a modern constitution. Such an amendment would create a pragmatic contradiction: if we adopt Professor Murphy's hypothetical amendment, it is unclear how to make sense of the rest of the Constitution. Professor Murphy's hypothetical amendment and the rest of the Constitution, under any familiar interpretation, work at cross-purposes. To adopt the amendment throws constitutional interpretation into turmoil because that amendment implicitly abandons the presumed reasons for having a constitution in the first place. Adoption of the amendment does not merely fine-tune or update the institutional means to protect or realize those purposes. Rather, adoption repudiates those purposes whether this initially is appreciated and understood by the drafters and ratifiers of the amendment or not.

#### IV. IMPLIED SUBSTANTIVE LIMITS ON CONSTITUTIONAL AMENDMENTS: REPLY TO OBJECTIONS

The idea of implied substantive limitations on constitutional amendments currently is not popular. This unpopularity to some degree merely reflects the lack of current acceptance of natural law theory. At least some versions of natural law thinking hold that an inviolable "higher law" restricts the substance of constitutional amendments.<sup>78</sup> The current and fairly widespread rejection of natural law, however, precludes this possible source of implied limitations on the substance of constitutional amendments. Accordingly, the theory of implied substantive limitations on amendments developed herein does not rely on any recognizable natural law doctrine.<sup>79</sup> No assumption is made here that any constitutional amendment objectively can be recognized to be morally wrong and nullified on a natural law basis.

Quite apart from natural law is the intuitive idea that at least some implied limits exist on the substance of constitutional amendments. This idea is difficult to discard, even before any general

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77. See *supra* notes 62-64 and accompanying text.

78. See L. ORFIELD, *supra* note 5, at 109-10.

79. For a discussion of the idea of natural law in the American legal context, see generally Rose, *The Law of Nature: An Introduction to American Legal Philosophy*, 13 OHIO ST. L.J. 121, 159 (1952) (concluding that natural law theory, whether associated with orthodox Christianity or humanism, attests to the democratic faith that "the actual does not of necessity exclude the ideal").

theory of these limits actually is established. Consider, for example, the express restriction in article V that states cannot be deprived of equal Senate representation without their consent.<sup>80</sup> Although, as demonstrated, it is difficult to infer from this that an amendment abolishing the states or the Senate must itself be unconstitutional,<sup>81</sup> this is not the only possible inference that limits the scope of the amendment power in this context.

Consider, for example, a single constitutional amendment that purports to do two things. First, the amendment repeals the article V guarantee that states retain equal representation in the Senate, as of the first day following final ratification of the amendment. Second, the amendment provides that each state be represented in the Senate only in proportion to its population, in a way comparable to representation in the House of Representatives. The effective date of the latter portion of the amendment is the second day following ratification.<sup>82</sup>

Assume this two-stage amendment were in fact adopted and duly ratified, over the vigorous objections of a number of the less populous states. A strong case could be made that this two-stage amendment is a procedurally valid constitutional amendment. The amendment, however, has no detectable purpose other than to circumvent the requirement that no state be deprived of equal representation in the Senate.

This hypothetical should give pause to all those who deny the possibility of implied substantive limitations on constitutional amendments. To deny such a possibility comes only at the cost of allowing a transparent evasion of the express restriction on amendments in article V. If one is prepared to concede that the two-stage amendment discussed above is impliedly unconstitutional, however, the door swings open. If there is one implied substantive limitation, there can be others.

One further line of objection suggests that even if the analysis offered herein does not rely on natural law, it does rely on the idea of purpose. In particular, it relies on the purposes either of constitutional drafters or ratifiers, or contemporary citizens seeking to make coherent sense of more than one constitutional provision. The problem, however, is that ascertaining a collective purpose in a

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80. See *supra* notes 34-42 and accompanying text.

81. See *supra* notes 35-46 and accompanying text.

82. The problem of evading the purposes of the article V restriction by means of two separate amendments is noted in W. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 238-39 (1956). Arguably, having to enact two separate amendments in succession affords some degree of special constitutional protection to the less populous states.

constitutional context is no easy task.<sup>83</sup>

Skepticism about the ability to detect with reasonable, if not precise, accuracy any relevant purposes must not be pushed too far.<sup>84</sup> In daily life, if we were to adopt boundless skepticism about our ability to detect our own or others' purposes, the results would be extremely unsatisfactory.<sup>85</sup> A similar, necessary faith in the ability to detect purposes is warranted in the constitutional context.

Judge Posner has expressed the matter in the following terms:

Even though the hypostatization of "legislative intent" . . . is an insult to philosophy, statutes and constitutional provisions undeniably are purposive utterances. Often the purposes can be discerned from text and context . . . and used to answer a question of interpretation in a way that advances the cooperative enterprise set on foot by the enactment. . . . The proper conception is knowledge by empathy, not knowledge by mind reading.<sup>86</sup>

Even those most skeptical of ascertaining collective subjective intent concede enough to make our point. Justice Scalia, for example, has argued that "discerning the subjective motivation of those enacting [a] statute is, to be honest, almost always an impossible task."<sup>87</sup> He nonetheless grants that "it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth."<sup>88</sup>

As for the Constitution, the very presence of the preamble is inexplicable unless the framers envisioned the Constitution as a purposive enterprise.<sup>89</sup> This does not suggest that each framer was

83. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980); Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 659-60 (1987); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1483-84 (1985).

84. But cf. Orfield, *supra* note 6, at 573 (stating that the general purpose of the Constitution cannot be precisely ascertained).

85. Consider the problem of whether to hire an otherwise qualified babysitter who sincerely professes utterly to be unable to appreciate any of the purposes underlying any instructions for the evening. It is unlikely we would view the babysitter's attempt to ascertain the purposes underlying his or her instructions as introducing "extra-documentary values" in any pejorative sense. Cf. Brest, *supra* note 63, at 761 (commenting on the role of extra-documentary values in the context of constitutional interpretation).

86. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 851 (1988).

87. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

88. *Id.* (Scalia, J., dissenting).

89. The preamble to the Constitution reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

consciously aware of a particular purpose at any particular time, or that all framers entertained the same purposes, or that the framers' purposes normatively must control our own. Nor does this suggest that the preamble itself creates such a binding legal right that no amendment contrary to any purposes expressed in the preamble ever be adopted.<sup>90</sup> The existence of the preamble at a minimum, however, constitutes evidence that the Constitution is purpose-driven, in the distinct sense of reasonably seeking to promote the perceived goals or interests of some set of persons.<sup>91</sup>

The crucial remaining step in this argument is that the reasonably identifiable purposes of the Constitution, whether embodied in the text of the preamble, or inferred from other sources, are by their nature subject to frustration. This is no more mysterious than the idea of some supervening event frustrating the purposes underlying an ordinary contract,<sup>92</sup> such that the contract becomes senseless. Similarly, no reason exists to suppose that one or more of the purposes underlying the Constitution can be frustrated only by some extrinsic event, such as an environmental catastrophe or military defeat, and not by a more directly related event, such as the enactment of a putative amendment that impeaches so much of the remainder of the Constitution as to require a choice between starting afresh, with a new constitution,<sup>93</sup> or ignoring the putative amendment.

The conclusion that there must be implied substantive limits on the scope of constitutional amendments is resisted on a number of further grounds quite apart from the unpopularity of natural law

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U.S. CONST. preamble.

90. For recognitions of the non-binding status of the preamble, see *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905); *Orfield*, *supra* note 6, at 573. See also 1A N. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 20.03, at 81 (Sands 4th ed. 1985 rev.) (statutory preamble is not conclusive, but is entitled to weight, in ascertaining statutory purpose).

91. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves. . .").

92. See A. CORBIN, *CORBIN ON CONTRACTS* § 1355, at 1133 (1952) ("Hamlet would not be Hamlet without the Prince of Denmark."); see also 2 *RESTATEMENT (SECOND) OF CONTRACTS* § 265 comment a (1981) (for discharge of a contractual obligation through supervening frustration, the frustrated aim "must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense").

93. It is perhaps ironic, but not a defect in this approach, that a society may choose to require, for example, a three-fourths vote merely to amend a constitution, but to enact an entirely new constitution upon the vote of a bare majority. This possibility is inherent in the process of constitution-making generally.

thinking.<sup>94</sup> Importantly, it may be thought that the Constitution does not have any detectable "spirit" or "essence," and that no amendment, therefore, can be impliedly unconstitutional because it allegedly violates that "spirit" or "essence."<sup>95</sup> What is interesting about this argument is that the premise under this Article's theory is true, but the conclusion does not follow.

Arguably, there is no determinate essence or spirit of the Constitution in the sense that there is no single clause or purpose which, if changed, would necessarily destroy the continuity of identity of the Constitution. Although a play cannot be *Hamlet* without the Prince of Denmark,<sup>96</sup> it probably is impossible to point to any single relatively narrow clause or determinate purpose underlying the Constitution and characterize it as indispensable. This is the lesson of the generally, but not completely, unsuccessful attempts to establish, for example, states' rights,<sup>97</sup> human dignity,<sup>98</sup> or free speech,<sup>99</sup> as independent and sufficient sources of implied substantive limits on constitutional amendments.

Under this argument, there is no essence of the Constitution, despite its being a purposive document. Although this may be surprising, ample support for similar conclusions exists in modern philosophy. Ludwig Wittgenstein, in particular, expressed the view that even institutions with recognizable purposes need not have essences.<sup>100</sup> As demonstrated, however, we cannot infer that

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94. Professor Orfield's declaration that "[t]he Constitution does not recognize any such type of law as Natural Law, or the Law of God, or the Law of Reason" accords well with the contemporary mainstream. Orfield, *supra* note 6, at 584. For the current unpopularity of any alleged "unwritten" restriction on the scope of constitutional amendments, including those based on tradition or natural law, see Grey, *Constitutionalism: An Analytic Framework*, in CONSTITUTIONALISM 189, 206 (J. Pennock & J. Chapman eds. 1979) ("It is assumed as a matter of course that the constitutional amendment or enactment process is available to override restrictions laid down in the name of unenacted constitutional norms. . . . The claim that a procedurally valid constitutional enactment cannot take effect because it violates unwritten constitutional law—fundamental tradition or natural justice—is not generally available as an accepted argument in contemporary constitutional systems.").

95. For Professor Orfield's rejection of the idea of limitations on amendments based on some overall "spirit" of the Constitution, see L. ORFIELD, *supra* note 5, at 106-07.

96. See A. CORBIN, *supra* note 92, at 1133.

97. See *supra* notes 34-47 and accompanying text.

98. See *supra* notes 58-64 and accompanying text.

99. See *supra* notes 50-51 and accompanying text. *But cf. supra* notes 52-57 and accompanying text (noting the arguable unconstitutionality of an amendment not merely repealing the free speech clause, or significantly restricting freedom of speech, but literally abolishing speech).

100. See, e.g., J. DANFORD, WITTGENSTEIN AND POLITICAL PHILOSOPHY: A REEXAMINATION OF THE FOUNDATIONS OF SOCIAL SCIENCE 97-99 (1978) (using the word "game" to illustrate his point that it is different to understand a game's purpose and to

there can be no implied substantive limits on constitutional amendments because the Constitution has no discrete essence or overriding spirit.

This result obtains because we cannot discover the true extent of the implied substantive limitations simply by picking out one or more provisions or purposes underlying the Constitution, giving them special status, and announcing that any putative amendment in conflict with those provisions or purposes in particular must be unconstitutional. Conversely, we cannot say that no putative amendment can be unconstitutional if it is not in conflict with those select, privileged provisions or purposes. In the first case, we can imagine some serious restrictions on states' rights, free speech, or particular conceptions of dignity that are not unconstitutional. In the second case, we can imagine an amendment that, although not directly impairing one or more selected constitutional provisions or purposes, nonetheless so undermines the remaining provisions and purposes that only a fragmentary, useless, incoherent, structurally incomplete residue of the Constitution remains.

Thus, Professor Lester Orfield is technically correct to say that the Bill of Rights and the fourteenth amendment "may be repealed just as any other amendment[s] and are no more sacred from a legal standpoint than any other part of the Constitution."<sup>101</sup> Professor Orfield's error, however, lies in concluding that only some unacceptable natural law doctrine could block the conclusion that anything at all could take the place of the Bill of Rights or the fourteenth amendment as long as that replacement was enacted in a procedurally proper way.

Other objections to the approach developed herein, of course, can still be raised. One obvious objection amounts to an *expressio unius* argument.<sup>102</sup> The framers, under this argument, expressly specified in the text of article V a limited number of substantive restrictions on subsequent constitutional amendments. Had the

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find an essence common to all games); A. GRAYLING, *WITTGENSTEIN* 72 (1988)(language, for example, "has no single essence which can be unearthed and stated in terms of unitary theory"); Phillips, *Wittgenstein's Full Stop*, in *PERSPECTIVES ON THE PHILOSOPHY OF WITTGENSTEIN* 180-81 (I. Block ed. 1981); H. PITKIN, *WITTGENSTEIN AND JUSTICE* 63-64 (1972) (Wittgenstein on the meaning of the word 'game' as not amounting to some single characteristic identifying feature shared by all games); L. WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 20 (1958) ("[i]f one asks what the different processes of expecting someone to tea have in common, the answer is that there is no single feature in common to all of them").

101. L. ORFIELD, *supra* note 5, at 99.

102. "Expressio unius est exclusio alterius," or "expression of one thing is the exclusion of another." *BLACK'S LAW DICTIONARY* 581 (6th ed. 1990).

framers intended broader substantive restrictions on the amendment power, they could have built those restrictions explicitly into the text of the Constitution. As they did not, no such intent or approval legitimately is inferred.<sup>103</sup>

The framers surely could have inserted an express disclaimer of any implied restrictions, but they did not. The most important response to this objection is that it would have been redundant and pointless for the framers to have incorporated anything like this Article's approach explicitly into the text. It may make perfect sense to infer from the fact that a shopping list refers to bread and milk, but not to coffee, that coffee is not wanted. But the implied substantive restriction argument advanced here is simply not a grocery list item. To simplify that substantive restriction, one might formulate it in the following terms: no 'amendment' can be valid if it leaves what it purports to amend as a smoldering, meaningless wreckage; rather, such an 'amendment' can only be enacted as part of a new constitution with which it is organically compatible. There would be little point to this language. Something parallel to it necessarily is implied by any complex, purposive document. There is simply no point to a "don't utterly defeat the purposes of this document" clause, because such a limitation is inherently, necessarily implied by undertaking the voluntary act of agreeing to further certain purposes through the document.

This, however, does not exhaust the possible objections to this Article's approach. Professor Orfield argued, for example, that amending the Constitution in horrifying ways and, by extension, amending it into an incoherent wreckage is merely an "abuse" of the power to amend the Constitution.<sup>104</sup> That the power to amend conceivably might be abused in this fashion does not mean that the legal power to amend the Constitution abusively does not exist.<sup>105</sup> Quite the opposite is true. This objection misconceives our approach, however. The sorts of implied substantive restrictions argued for in this Article are not so normative in character. The putative amendments invalidated under this Article's approach are not invalidated because they are morally objectionable to anyone, or evil, or harmful. Rather, these amendments cannot be valid because they undermine the only recognizable meanings of that with which they purport to fit—the remainder of the Constitution.

Professor Orfield further raises the interesting, if somewhat met-

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103. See L. ORFIELD, *supra* note 5, at 115-16; Orfield, *supra* note 6, at 554-55.

104. See L. ORFIELD, *supra* note 5, at 122-23.

105. See *id.* at 123.

aphysical, objection that “[i]t seems natural that somewhere there resides within the nation the power to do anything, and logically this authority resides in the amending body.”<sup>106</sup> Thus, in Professor Orfield’s argument, the amending body logically must have the power to do anything it wants without constraint. This argument is unsuccessful as well, for reasons similar to those discussed immediately above regarding the problem of “abuse” of the amending power. Again, the approach is not essentially normative, but logical. Even if the premises of Professor Orfield’s argument are conceded, we must still ask what the power to do “anything” includes. The amending body may have the power to repeal nearly every constitutional provision. But it does not, as a matter of logic, have the power to do both *X* and not-*X* at the same time. An amending body simply does not logically have the power to enact an amendment that is both compatible with and not compatible with the remainder of the Constitution.

Finally, it certainly is possible to seize in particular on the Wittgensteinian<sup>107</sup> fuzziness of our approach and demand to know who will be the final arbiter of whether a particular amendment so deeply and inescapably jeopardizes so much of the remainder of the Constitution and its several basic purposes as to cast doubt on the constitutionality of the amendment itself. Why should the federal courts be entrusted with such a determination, when the people and their representatives have by enacting the amendment presumably just spoken in super-majoritarian fashion? Shouldn’t the legitimacy of such an amendment be regarded as the clearest possible example of a political question?<sup>108</sup>

In response, the author has no objection in principle to regarding the entire issue of implied substantive limits on constitutional amendments as a political question. Political questions often involve a reluctance by courts to intrude into the proper sphere of other branches of government.<sup>109</sup> Still, in a way not directly implicated by this Article’s proposed limitations on constitutional amendments, other dimensions of the political question problem are present. For example, there is arguably at least “a lack of judi-

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106. *Id.* at 124.

107. *See supra* note 100 and accompanying text.

108. *Cf.* L. ORFIELD, *supra* note 5, at 126 (stating that this view may be justified, but opining that there are really no implied limitations on the amending power); Orfield, *supra* note 6, at 23. Vile, *supra* note 24, at 382 (“[t]o empower the courts to void amendments overturning judicial decisions would surely threaten the notion of a government founded on the consent of the governed”).

109. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).



cially discoverable and manageable standards for resolving"<sup>110</sup> what sorts of amendments are impliedly unconstitutional, or a need for "an initial policy determination of a kind clearly for non-judicial discretion."<sup>111</sup> Thus, arguably sound reasons exist for not permitting the courts to intervene to determine whether any given amendment is impliedly unconstitutional on substantive grounds. This concession, of course, goes merely to remedy and leaves utterly untouched the argument developed throughout this Article.

## V. CONCLUSION

This Article shows that an inescapably vague range of proposed amendments to the Constitution are in fact unconstitutional, or incompatible with the assumed remainder of the Constitution, on substantive as opposed to procedural grounds. This conclusion is itself unusual enough in the modern era. What is particularly noteworthy, however, is that this conclusion is reached without any reliance on natural law, excessive devotion to the views of our ancestors, or any assumption that the Constitution has some discrete essence or overriding "spirit."

At some point, an alleged "amendment" so undermines the remainder of the Constitution with which it is alleged to be compatible that it is no longer possible to pretend that such compatibility genuinely exists, just as at some point in the organ or tissue transplant process, the rejection process has become so extensive, complete, and irreversible that it becomes misleading to refer to the unsuccessfully transplanted tissue as a transplant in any substantive sense. At that point, for reasons of logic rather than morality, the "amendment" cannot reasonably be regarded as in fact a genuine amendment to the Constitution, but rather as the genesis of a new and separate constitution.

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110. *Id.*

111. *Id.*