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AMENDING THE CONSTITUTION

*Erwin Chemerinsky**

EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995. By *David E. Kyvig*. Kansas: University Press of Kansas. 1996. Pp. xx, 604. \$55.

The ultimate measure of a constitution is how it balances entrenchment and change. On the one hand, a constitution differs from all other laws in that it is much more difficult to revise. For example, the next session of Congress can amend or repeal a statute, but altering the U.S. Constitution requires a complex process involving supermajorities of both houses of Congress and the states. A constitution thus reflects a desire to place a society's core values of governance — such as the structure of government and the rights of individuals — in a document that is hard to revise. By enacting a constitution, society limits itself in an effort to protect the values it most cherishes. For a constitution to achieve this goal it must endure.

But in order for a constitution to endure, it must contain mechanisms for adaptation to changing circumstances. Changes in social organization, in technology, and in morality all require that the constitution evolve. The agrarian slave society of 1787 is so vastly different from the world of the coming twenty-first century that it is unthinkable that the understandings of 200 years ago could solely govern modern society. Those drafting a constitution cannot possibly imagine the myriad of issues that will arise decades and centuries later.

A constitution thus must mediate the competing desires for entrenchment and flexibility, for stability and change. Sometimes constitutions emphasize the former and make revisions impossible or very difficult. Long ago, in ancient Greece, Lycurgus, the ruler of Sparta, insisted that his laws not be changed until he returned from a long journey.¹ Lycurgus then killed himself to ensure that the laws not be altered, and they survived for 500 years.² Some countries have constitutional provisions that are immune from revi-

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1. See Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 251 (1996).

2. See *id.*

sion. The constitutions of Germany and Brazil expressly state that the division of power between the national and local governments is not subject to amendment.³ Morocco's constitution states that it may not be amended to eliminate the monarchy or Islam as the official religion.⁴

Nations that have experienced foreign occupation often have provisions limiting amendment in the case of future foreign invasions. For example, the constitution of the French Fourth Republic, adopted in 1946 in the wake of liberation from Nazi control, prohibited amendment of the constitution "in case of occupation of all or part of the metropolitan territory by foreign force."⁵

In fact, even the U.S. Constitution specifies certain matters that may not be changed, even by amendment. Article V, which details the amendment process, states 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 . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."⁶ The two clauses in Article I that could not be changed prohibited Congress from banning the importing of slaves and prevented a direct tax unless it was apportioned based on the census.

On the other hand, some constitutions provide very little in the way of entrenchment or resistance to change. State constitutions generally are much easier to amend than the U.S. Constitution and have been amended much more frequently.⁷ The doctrine of Parliament's sovereignty in Great Britain means that legislative acts trump the constitution. As Professor David E. Kyvig⁸ observes: "As the concept of parliamentary supremacy emerged from notions that sovereignty belonged to the people rather than to the monarch and that Parliament legitimately represented the sovereign will, any thought of limiting Parliament's power to alter the terms of government faded away" (p. 20).

The key challenge for a constitution is to strike the optimal balance between entrenchment and flexibility. If a constitution makes

3. See Ivo D. DUCHACEK, *POWER MAPS: COMPARATIVE POLITICS OF CONSTITUTIONS* 210 (1973).

4. See *id.*

5. *Id.* (quoting FR. CONST. (constitution of the French Fourth Republic, 1946) art. 94).

6. U.S. CONST. art. V. Article I, Section Nine, Clause One, prohibits Congress from prohibiting the importation of slaves until 1808. Clause four states: "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

7. See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 289 n.43 (1985); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1353-56 (1982).

8. Professor of History, University of Akron.

change too difficult, it will obstruct necessary and desirable social reforms. Revolution will become the only way of altering the government. But if change is too easy, then a constitution fails to achieve its objective of protecting society's most cherished values from majoritarian control.

The amendment process is thus not peripheral to the constitution, but is its essence. Professor Kyvig's new book, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, provides an excellent history of the amendment process, from the ratification of the Constitution until 1995. Professor Kyvig shows that from its inception, the amendment process was integral to the very existence of the Constitution. For example, at the state ratifying conventions, supporters of the Constitution could answer objections by pointing to Article V and the ability to change imperfections (pp. 81, 85). Unlike the Articles of Confederation, which required unanimous consent of the states for amendments, the Constitution offered a more realistic process for change. Thus, state calls for a bill of rights could be met, not by defeating ratification until a new constitutional convention was held, but by the amendment process (pp. 81-85). As Professor Kyvig notes, "At several crucial junctures in the struggle over ratification, most notably in the Massachusetts, Virginia, and New York conventions, the promise of amendment swung the balance in favor of acceptance" (p. 85).

Professor Kyvig's book describes in detail the attempts, successful and unsuccessful, to amend the Constitution since 1787. The book provides a wealth of fascinating facts. For example, I had not known that James Madison, the crucial figure in drafting the Bill of Rights, almost was not elected to the first Congress. Patrick Henry, Madison's foe, successfully kept the Virginia legislature from choosing Madison for the United States Senate and Madison's home county was gerrymandered into a largely anti-Federalist district (p. 95). Madison defeated his opponent, James Monroe, for the House seat only after promising his commitment to adding a bill of rights to the Constitution.

Even more important, I did not know that in 1861, on the eve of the Civil War, both houses of Congress ratified an amendment to protect the institution of slavery. The amendment, introduced by Thomas Corwin and supported by President Lincoln, provided: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State" (p. 151). The House of Representatives passed the amendment by a vote of 133 to 65, and the Senate did so by a vote of 24 to 12 (p. 151). The

amendment was meant to prevent the Civil War, and it is frightening to fathom the course of American history if it had succeeded.

Kyvig's careful history of the amendment process shows how well Article V strikes a balance between entrenchment and flexibility. Over the course of American history, more than 10,000 amendments have been proposed through the mechanisms provided in Article V of the Constitution. Only thirty-three received approval by both the House and the Senate, and just twenty-seven have been ratified by the states. Yet, most of the ratified amendments, by any measure, were desirable revisions to the Constitution. The Bill of Rights was crucial to the ratification of the document and has been key in protecting basic liberties. The post-Civil War Amendments were essential in ending slavery and ensuring the federalization of fundamental rights. Many of the amendments were crucial in perfecting democracy by extending the franchise to blacks, to women, to the poor, and to eighteen-year-olds.

Professor Kyvig's history of the amendment process, and consideration of the tension between constraint and change, raise two questions. First, what are the assumptions and implications of having a brief constitution that is relatively difficult to change? Professor Kyvig's book provides a powerful reminder that this is the core nature of the U.S. Constitution. Professor Kyvig's book reveals how much such a constitution is based on trust in the government it creates and how much it relies on a judiciary with the authority to interpret and adapt the constitution to a world so vastly different from what the Framers could have imagined.

Second, when should the Constitution be amended? In the past few years, countless proposals have been introduced in Congress to amend the Constitution to achieve goals ranging from balancing the budget, to allowing school prayer, to prohibiting abortion, to outlawing flag burning. In light of Professor Kyvig's history, is it possible to develop a theory of when amendments are worthy? Professor Kyvig's enterprise is historical, recounting the successful and unsuccessful attempts at amendment. Professor Kyvig offers no conclusions as to when the amendment process is appropriate and when it should remain unused. Yet his history offers an excellent vehicle for considering the proper use of the amendment process to preserve the delicate balance between entrenchment and flexibility.

This review essay uses Professor Kyvig's careful, well-written history as the starting point for examining these two questions. Although Professor Kyvig's book is not the first recent attempt to examine the amendment process,⁹ it is the most systematic history to date. This excellent book should be of great interest to anyone

9. See, e.g., RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA* (1993); JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES* (1994); *RESPONDING TO*

interested in the amendment process or, indeed, in the Constitution of the United States.

I. WHAT ARE THE ASSUMPTIONS OF A RELATIVELY SHORT CONSTITUTION THAT IS DIFFICULT TO AMEND?

In April 1997, I was elected by Los Angeles voters to a fifteen-person commission to rewrite the Los Angeles City Charter. The Charter has many of the characteristics of a constitution.¹⁰ It creates the structure of government and allocates power among its branches. It prescribes much of how the government operates. It can protect rights, so long as its safeguards are greater than those contained in federal or state law. The current Los Angeles Charter was adopted by the voters in 1925. It has been amended over 400 times by voter initiative, and it is several hundred pages long.

The Charter's contrast to the U.S. Constitution could not be more striking. The Constitution is a blueprint for a government. In the words of Chief Justice John Marshall, "[a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."¹¹ Marshall then uttered some of the most famous words in all of the *United States Reports*: "In considering this question, then, we must never forget, that it is *a constitution* we are expounding."¹² In contrast, the Los Angeles City Charter is much more an operations manual than a blueprint.

The amendment processes of the two documents are quite different. The Constitution is difficult to alter and has been amended just twenty-seven times in 220 years. The Charter is easy to revise; it takes just a majority vote in an election to approve a Charter amendment. The differences between the U.S. Constitution and the L.A. Charter cannot be explained by the level of government or the varying functions of the two documents. A constitution could be just as long and just as detailed as the Los Angeles Charter, and a charter could be just as brief as the U.S. Constitution.

Simultaneously reading Kyvig's book and struggling with the Charter revision process in Los Angeles bring to mind the question: What are the assumptions of creating or being governed by a short document that is relatively difficult to change? Kyvig's book helps

IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

10. Charter of the City of Los Angeles Annotated (Revision 7, 1990 Edition Revised, 1997).

11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

12. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

show that the style of the United States Constitution rests on two premises.

First, a short constitution that is relatively immune from change assumes great trust in those who will be governing under it. Frequently it is said that the Framers of the Constitution acted on a distrust of those who would be governing them in the future. Certainly, the Constitution's division of powers, via separation of powers and federalism, is based on such distrust. The strong call for a Bill of Rights, which Kyvig describes in detail (pp. 66-109), reflected a widely perceived need to further limit those who would be governing.

Yet it is striking how much detail the Framers left out of the Constitution, with the trust that government officials would be true to the spirit of the document. Perhaps most notably, the power of judicial review is not specified, but the Framers likely assumed it as implicit in a Constitution of limited powers with an Article III judiciary.¹³ This is but one of countless examples of major matters that the Constitution leaves to those who would govern under it. For example, the Constitution does not mandate the funding of any office or agency. Nothing in the Constitution expressly requires that Congress provide money for the operation of the executive or the judiciary.¹⁴

The Constitution does not mention many basic powers of government. Although the Constitution specifies who has the appointment power, it is silent about removal authority.¹⁵ This is not a trivial power; it is crucial to a President's ability to control the executive branch, and the issue of removal was the core of the only successful effort to impeach a President. The Constitution says nothing about countless other issues that undoubtedly could have been foreseen in 1787. For example, no provision explicitly addresses who has the power to recognize foreign governments.

The lack of detail is also reflected in the broad phrasing of so many of the Constitution's provisions. Article II, for example, provides for impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors."¹⁶ The Framers offered no criteria as to what constitute "high crimes and misdemeanors," and the Constitution outlines only the most basic procedures for the impeachment process.

13. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *THE FEDERALIST* NO. 78, at 490 (Alexander Hamilton) (B. Wright ed., 1961).

14. There is, of course, the prohibition against decreasing judicial salaries for Article III judges. U.S. CONST. art. III, § 1.

15. See *Morrison v. Olson*, 487 U.S. 654 (1988) (discussing the removal power of the President and Congress's ability to limit it); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (same); *Myers v. United States*, 272 U.S. 52 (1926) (same).

16. U.S. CONST. art. II, § 4.

For all of these examples, and countless more, the Constitution could have been very specific. As I suggested above, what has been overlooked, and this is evident in reading Professor Kyvig's book, is the degree to which the Constitution was based on trust in those who would be governing to work out these matters and the knowledge that there was an amendment process to solve the problems that might develop. The conventional wisdom about the Constitution emphasizes the Framers' distrust in government, as reflected in their desire for separation of powers, federalism, and ultimately a bill of rights. This account is undoubtedly accurate, but equally important is the extent to which the Constitution reflects a profound trust in those who would be governing under it.

Moreover, when the Constitution is viewed in this light, it is striking that at a time of relatively great public distrust and cynicism about government, trust remains in the basic framework set out by the Constitution. Kyvig's book does not discuss a single proposal to replace the Constitution with a modern document. Indeed, Kyvig shows that proposals for a constitutional convention for limited purposes, such as for a balanced budget amendment, are fiercely opposed based on the fear that the convention might seek to propose a broader overhaul in the document (pp. 440-42). The profound public trust in the Constitution is one of its most important features, and the one most often taken for granted. Professor Kyvig's analysis shows how much Article V's mechanisms for amendment have been crucial to this public confidence since the Constitution's inception.

Reading Kyvig's book made clear the challenge for us in writing a new Los Angeles Charter or for anyone attempting to draft a new state constitution or city charter. A short document is possible if there is confidence in those who will hold office and confidence in the process the document allows for its change. At a time of a loss of public confidence in government at all levels, is it possible to write a blueprint rather than a legal code? Every detail in a document like the Los Angeles Charter is there because a constituency wanted the protection of details. How can such groups be satisfied that their interests will be adequately safeguarded without very specific delineations?

A second assumption demonstrated by Kyvig's book involves the nature of the amendment process. An understanding of the Constitution as a short document that is relatively immune from change provides powerful support for the view that the Constitution's meaning should evolve by judicial interpretation as well as by amendment. The debate over the method of constitutional interpretation is a familiar one. Over the last two decades, it frequently has been characterized as one between originalism, sometimes

called interpretivism, and nonoriginalism, sometimes termed noninterpretivism. Originalism is the view that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”¹⁷ In contrast, nonoriginalism is the “contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”¹⁸

Originalists believe that the Constitution should evolve solely by amendment.¹⁹ If there is to be a right to use contraceptives or a right to abortion, originalists would say that the Constitution must be amended. In contrast, nonoriginalists believe that since the Constitution’s meaning is not limited to what the framers intended, the meaning and application of constitutional provisions can evolve by interpretation as well as by amendment.²⁰ The fact that the Framers of the Fourteenth Amendment did not intend to prohibit gender discrimination or to apply the Bill of Rights to the states is not decisive for the nonoriginalist in deciding what the Constitution means.

The Supreme Court, at various times, has professed adherence to both of these competing philosophies. In *South Carolina v. United States*, in 1905, the Court stated: “The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”²¹ But equally strong statements from the Court reject an originalist approach. In *Home Building & Loan Assn. v. Blaisdell*, in 1934, the Court declared:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — “We must never forget that it is a constitution we are expounding.”²²

17. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

18. *Id.*

19. See, e.g., Raoul Berger, *G. Edward White’s Apology for Judicial Activism*, 63 TEXAS L. REV. 367, 372 (1984); William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 234 n.66 (1983).

20. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting) (arguing that the Cruel and Unusual Punishment Clause should be interpreted according to contemporary norms); see also PETER IRONS, *BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION* (1994); Bernard Schwartz, *Brennan vs. Rehnquist — Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213 (1994).

21. 199 U.S. 437, 448 (1905) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (internal quotation marks omitted)).

22. 290 U.S. 398, 442-43 (1934).

Professor Kyvig's book is directly relevant to this debate because the ease of amendment is crucial in appraising whether change can occur only through that process. Professor Kyvig's book demonstrates that perceptions about the relative ease and difficulty of amendments have varied over time (pp. 188-89, 216-18, 240-41). Overall, though, Professor Kyvig's book shows a consistent recognition that amendment was a difficult process and likely to occur only relatively infrequently.

Therefore, to say, as originalists do, that the Constitution may be modified only by amendment is to say that there will be virtually no evolution in the meaning of the document. As noted above, though, constitutional evolution is essential for the document to deal with modern problems and to adapt to changes, such as in technology and social values. Unless the Constitution evolves, over time ever greater areas of governance will be left solely to the majoritarian processes. The Constitution's promise of constraint and entrenched protections will increasingly be lost. For example, it is highly unlikely that the Constitution could have been amended successfully to eliminate school segregation or require reapportionment of legislatures. These examples show why it would be wrong for the Constitution to evolve solely by amendment: the rights of minorities, political or racial, should not be made to depend solely on a supermajority's willingness to act.

Moreover, evolution solely by amendment is inferior because it is unlikely that society would be willing to devote the energy and resources to amend the Constitution constantly. If all evolution were by amendment, frequent amendments would need to be added to the Constitution. But Professor Kyvig's history shows that the cumbersome nature of the amendment process, and the need for approval from so many different institutions, makes it highly unlikely that a sufficient number of amendments would be ratified.

Even more important, frequent amendment could create problems of its own. If amendments were routine and not exceptional, there is reason to fear that precisely when it matters most, constitutional protections might be eliminated by amendment. The Framers feared that in times of crisis there would be strong pressures to centralize power and to compromise rights. Making amendment difficult protects against those temptations. The obstacles to successful amendments that Professor Kyvig describes are thus integral to the Constitution's central function of entrenchment.

Also, if amendments were frequent, the Constitution would lose its symbolic value as a brief, abstract document. The comparison to state constitutions and city charters is again illustrative. Joseph Long observed over 80 years ago:

The federal constitution . . . has happily escaped the fate that has befallen the constitutions of the states. Not only are they subject to constant change, but they have long since ceased to be constitutions in a true sense. Instead of embodying broad general propositions of fundamental permanent law, they now exhibit the prolixity of a code and consist largely of mere legislation. No one now entertains any particular respect for a state constitution. It has little more dignity than an ordinary act of the legislature.²³

More recently, Laurence Tribe similarly remarked how the "cluttered" nature of state constitutions explains why they "rarely command the respect routinely paid to federal constitutional guarantees."²⁴

Thus, crucial to the very nature of the Constitution is an amendment process, that as Professor Kyvig shows, is likely to be used successfully only relatively infrequently. The result is that essential constitutional evolution must occur by judicial interpretation and not just through the rare and occasional amendment.

II. WHEN AMEND THE CONSTITUTION?

Reading Professor Kyvig's history of the amendment process causes one to feel relief that the Framers made constitutional revisions relatively difficult. He describes many efforts to amend the Constitution that thankfully failed. For example, James Madison's first proposed amendment to the Constitution would have limited each member of the House of Representatives to representing a district of no more than 50,000 residents. If ratified, the amendment, over time, would have led to a House that was truly unworkable. Kyvig notes: "If constituencies were limited to 50,000 citizens, the nature of republican government in a nation of 250 million people would change dramatically. A representative would bear a very different relationship to 50,000 constituents than to the present average of nearly 600,000 and to 4,999 colleagues than to the current 434" (p. 470).

Most striking, as mentioned above, it defies comprehension to imagine the course of U.S. history if the amendment proposed by Congress in 1861 to institutionalize slavery had been adopted (p. 151). More recently, serious efforts to amend the Constitution to overturn the Supreme Court's reapportionment decisions failed (pp. 371-79), and the assurance of one-person, one-vote is now almost universally accepted as an essential protection of the democratic process.²⁵

23. Joseph R. Long, *Tinkering with the Constitution*, 24 *YALE L.J.* 573, 580 (1915).

24. *TRIBE*, *supra* note 7, at 289 n.43.

25. *See, e.g.*, *ELY*, *supra* note 17, at 101-02. *But see* ROBERT H. BORK, *THE TEMPTING OF AMERICA* 87 (1990) (criticizing the decisions on the grounds that the "Warren majority's new constitutional doctrine was supported by nothing").

But Kyvig's history also shows that it is wrong to assume that the rejection of proposed constitutional amendments always, in hindsight, should be regarded as a good thing. Kyvig recites in detail the fight over the Equal Rights Amendment (pp. 395-419). The National Women's party began drafting an equal rights amendment in September 1921 and unanimously endorsed it in 1923 (p. 396). "[The] first equal rights amendment, drafted by [Alice] Paul and introduced in Congress in December 1923 by Republican Senator Charles Curtis, simply declared, 'Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction'" (p. 396). Even after reading Kyvig's description of the history, it is astounding and disheartening that the country could not approve a basic statement that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."²⁶

Other beneficial constitutional amendments also never were adopted. After the Supreme Court invalidated a federal law prohibiting child labor in *Hammer v. Dagenhart*,²⁷ a serious effort was made to amend the Constitution to outlaw such practices (pp. 255-61, 307-13). The proposed amendment to forbid child labor never was ratified. The Supreme Court changed course in 1937, later expressly overruling *Hammer*, and thus the amendment became unnecessary.²⁸ Yet I think it is wrong to say that the ultimate prohibition of child labor shows that the child labor amendment was unnecessary. For over twenty years, from 1918 when the Court struck down the federal child labor law until the Court permitted the regulation, countless children were hurt who might have been protected by a constitutional amendment.

Another example of a desirable amendment proposed by Congress and not ratified by the states would have granted residents of the District of Columbia representation in Congress (pp. 394-95, 420-25). Under any theory of representative government it is impossible to justify the fact that those who live in the District of Columbia are not represented by voting members in the House of

26. Proposed Equal Rights Amendment. There can, of course, be disagreement over how much it would have mattered to add the Equal Rights Amendment to the Constitution. First, I believe that it would have been an important symbolic declaration of gender equality. Second, the amendment likely would have meant strict scrutiny for gender classifications, rather than the intermediate scrutiny that the Court has used since 1976. See *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (reaffirming the use of intermediate scrutiny but stating that there must be an "exceedingly persuasive justification" for gender classifications). Some cases likely would have been decided differently if the Equal Rights Amendment had been in place, such as *Michael M. v. Superior Court*, 450 U.S. 464 (1981), which allowed sex-based discrimination in statutory rape laws, and *Rostker v. Goldberg*, 453 U.S. 57 (1981), which upheld male-only draft registration.

27. 247 U.S. 251 (1918).

28. See *United States v. Darby*, 312 U.S. 100, 116-17 (1941) (overruling *Hammer*).

Representatives or the Senate. Although Congress passed an amendment to correct the problem, only sixteen states had approved it before the time period for its ratification expired (p. 423). The rejection was not based on a defensible principle, but rather based on the perception that the District of Columbia's African-American-majority population likely would elect Democrats to the House and the Senate.

It should not be assumed, however, that all amendments that made it through the gauntlet and were adopted were desirable changes. Kyvig provides a detailed description of how the Eighteenth Amendment, mandating prohibition of alcohol, was enacted (pp. 218-26), how quickly it came to be regarded as a colossal mistake, and how the Twenty-first Amendment repealed it just thirteen years later (pp. 261-67).

For me, the key question in reading Professor Kyvig's book is whether any lessons can be drawn from history as to when the Constitution should be amended. In the 1990s, as Republicans gained control over both the House and the Senate, countless proposals have been introduced to amend the Constitution for matters ranging from ensuring a balanced budget, to prohibiting flag burning, to allowing school prayer, to reforming campaign finance, to ensuring religious equality, to changing the procedures for imposing new taxes, to safeguarding victims' rights. Is it possible from a study of history, such as Kyvig's, to derive criteria as to when the Constitution should be amended and when left unchanged? Professor Kyvig offers no such analysis — though, in fairness, that was not his goal in the book. He sought to provide a history of the amendment process and not a normative analysis of when it should be used.

Recently, others have attempted to articulate criteria for when constitutional amendment is appropriate. In August 1997, a group called Citizens for the Constitution released a draft titled, *'Great and Extraordinary Occasions': Developing Standards for Constitutional Change*.²⁹ A distinguished group that included law professors Michael Seidman, Kathleen Sullivan, and Don Wallace and attorneys Alan Morrison, Robert Peck, and Peter Wallison prepared the report. The draft report urges the need for restraint in amending the Constitution and presents criteria for when amendment is appropriate.

Specifically, the draft report states the following principles for constitutional amendment:

1. Constitutional amendments should address matters of more than immediate concern that are likely to be recognized as of abiding importance by subsequent generations.

29. Citizens for the Constitution, *'Great and Extraordinary Occasions': Developing Standards for Constitutional Change* (Aug. 1997) (unpublished draft report on file with author).

2. Constitutional amendments should not make our system less politically responsive except to the extent necessary to protect individual rights.
3. Constitutional amendments should be utilized only when there are significant practical or legal obstacles to the achievement of the same objectives by other means.
4. Constitutional amendments should not be adopted when they would damage the cohesiveness of constitutional doctrine as a whole.
5. Constitutional amendments should embody enforceable, and not purely aspirational, standards.
6. Proponents of constitutional amendments should attempt to think through and articulate the consequences of their proposals, including the ways in which the amendments would interact with other constitutional provisions and principles.
7. Constitutional amendments should be enacted using procedures designed to ensure full and fair debate.
8. Constitutional amendments should have a non-extendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the amendment is desirable.³⁰

It is difficult to disagree with any of these principles. Some seem unassailable. For example, who could possibly object to the sixth principle, which urges reflection as to the effect of proposed amendments on other aspects of the Constitution, or the seventh principle, which calls for full and fair debate in amending the Constitution? The first through fifth proposals likewise seem desirable and almost axiomatic.

In addition, the very recent experience with the ratification of the Twenty-seventh Amendment shows the wisdom of the eighth proposal. Kyvig describes the story of the Twenty-seventh Amendment (pp. 462-70), which prohibits pay raises to members of Congress during their terms of office, and how it was ratified by the states and added to the Constitution nearly 200 years after it was proposed by Congress. An amendment should be deemed ratified when a supermajority of states, as prescribed in Article V, approves it. The problem when ratification occurs over decades or centuries is that there may never have been a time when a super-majority approved it, but rather different groups at varying times.

In fact, Kyvig points out that there are several other amendments, passed by Congress and still pending before the states without a time limit for ratification, such as "Madison's first amendment limiting the size of congressional districts to 50,000 residents, the 1810 amendment banning citizens from accepting foreign titles, the 1861 amendment guaranteeing the continuation of slavery in states

30. *Id.*

where it then existed, and the 1924 child labor amendment" (p. 469).

Yet, appraising these principles after reading Kyvig's history raises questions as to whether the Citizens for the Constitution's criteria are useful in distinguishing good from bad amendments. For example, I certainly agree with the first proposition that "Constitutional amendments should address matters of more than immediate concern that are likely to be recognized as of abiding importance by subsequent generations."³¹ Yet I imagine that the supporters of any amendment would defend their proposal as dealing with matters of "abiding importance." Kyvig shows that supporters of Prohibition, surely regarded as the largest mistake in the use of the amendment process, defended it as dealing with a significant and long-term problem (pp. 218-26). Kyvig observes that "[i]n 1919 national prohibition appeared to be a widely supported innovation in public policy and constitutionalism" (p. 225).

The Citizens for the Constitution draft report uses the proposed flag desecration amendment as an illustration of a reform that does not meet the first proposition. Although I share their opposition to the amendment, I am skeptical as to whether supporters of the proposal would accept that conclusion. Those favoring a flag desecration amendment likely would argue that the flag is a unique and abiding symbol that should be protected now and forever.

More generally, I question whether it is possible at any moment in time to know which issues will be of concern only briefly and which will have lasting significance. No one could have known in 1920 whether the Supreme Court's preclusion of federal laws prohibiting child labor would have lasted for years or decades. Also, significant social problems might exist that require immediate attention by amendment, even if they turn out to be relatively short-term in duration. Again, the failed child labor amendment is illustrative. Even if it only would have had legal significance for twenty years, during that time it might have protected the health and lives of innumerable children. The Twenty-fourth Amendment, which prohibited poll taxes, likely was not dealing with a problem of enduring significance; few states still had them when the Amendment passed, and in those few they likely were on the way out. The Amendment, though, mattered in that it extended the franchise and symbolically reaffirmed the right of every person, regardless of wealth, to participate in the democratic process.

Perhaps more significant from a constitutional perspective is the question of the proper use of the amendment process as a check on the Supreme Court. Kyvig's book details four instances in which

31. *Id.*

the Constitution was amended to overturn Supreme Court decisions. The Eleventh Amendment, which protects state governments from being sued in federal court, was ratified to overturn the Court's decision in *Chisholm v. Georgia*³² (pp. 111-14). The Fourteenth Amendment's declaration that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"³³ overrules the Court's contrary ruling in *Dred Scott v. Sandford*³⁴ (p. 156-163). The Sixteenth Amendment, which authorizes the personal income tax, was adopted to overrule the Court's decision in *Pollock v. Farmers' Loan & Trust Co.*³⁵ (pp. 193-218). Finally, the Twenty-sixth Amendment, which protected the right of those over eighteen to vote, was enacted in response to *Oregon v. Mitchell*³⁶ that invalidated a federal law that created the same requirement (pp. 363-68).

If it is accepted, as I argued in Part I, that the Supreme Court should have discretion in interpreting the Constitution to ensure necessary evolution, then the amendment process becomes crucial as the only direct political check on the judiciary. When is it appropriate to use the amendment process to overturn a Supreme Court decision that is regarded as seriously misguided? Although I disagree with virtually all of the contemporary proposals to overturn Supreme Court decisions by constitutional amendments, I cannot yet articulate a reason why this is an illegitimate use of the amending process. To the contrary, Kyvig's history shows that since its inception the amendment process has been used in just this way. The first amendment adopted after the Bill of Rights, the Eleventh Amendment, was enacted to overturn a Supreme Court decision, and there have been countless proposals to try by amendment to overrule other decisions.

Again, I do not disagree with the effort to articulate criteria for when the Constitution should be amended. Professor Kyvig's book puts that issue directly before the reader. Nor do I disagree with the initial efforts by Citizens for the Constitution. I think, however, that Professor Kyvig's excellent history shows that developing useful criteria will be a very difficult task. Good proposals for amendments have been defeated and bad ones adopted; bad ones have been defeated and many good ones adopted. Supporters of all thought that they were making essential reforms; opponents of all claimed that they were protecting the majesty of the Constitution.

32. 2 U.S. (2 Dall.) 419 (1793).

33. U.S. CONST. amend. XIV, § 1.

34. 60 U.S. (19 How.) 393 (1857).

35. 157 U.S. 429 (1895).

36. 400 U.S. 112 (1971).

Reading the descriptions of the contemporaneous debates over the proposals shows how difficult it is at any moment in time to assess how an amendment later will be regarded. Remember, even President Lincoln supported an amendment to deny Congress “the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State” (p. 151).

CONCLUSION

Professor David Kyvig’s book begins by quoting President George Washington’s farewell address, that the Constitution “till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all” (p. 1). Washington further said: “If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates” (p. 1).

Professor Kyvig’s book provides an excellent history of the use of this amending process and a powerful argument that the mechanisms created by Article V of the Constitution are at the very core of the Constitution’s existence and survival. More than the Framers ever could have imagined, they created a process that provided an almost ideal balance between stability and change, between entrenchment and flexibility.

As the Elected Los Angeles Charter Reform Commission struggles with the task of proposing a new “constitution” for Los Angeles, Professor Kyvig’s book provides crucial insights. The issues for the Charter are remarkably the same as those confronted in drafting a constitution. What branches of government should be created and how should power be allocated among them? Should power be decentralized, such as by empowering boroughs or neighborhood councils with tasks that previously had been done in a centralized fashion? Should there be an enforceable bill of rights and if so, what rights should be protected?

The central tensions identified in Professor Kyvig’s book also are identical in writing a constitution or a charter. If successful in the Charter reform process, we are writing a document to last for decades and to deal with problems that we cannot begin to imagine. The document must constrain and check, but it must be adaptable too. The document must be general enough to be comprehensible and unifying, but specific enough to create a workable government. Professor Kyvig’s book forces attention on how the document should be subject to change. What mechanism for revision will best strike the balance between constraint and flexibility, allowing needed reforms, but avoiding too frequent modifications?