AMENDING THE CONSTITUTION: IF NOT NOW, WHEN?

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In recent years, the political and jurisprudential divide over issues such as the right to privacy (including abortion and gay marriage), the right to possess firearms, First Amendment protections, voting right protections, and so many other topics has increasingly become intensified. However, instead of these issues being decided by Congress, the Supreme Court has taken up the mantel, issuing several controversial decisions. As the country recently observed, the Court's precedent can be quickly overturned with a changing of the guard. While these controversial issues may be better left to the Legislative Branch of our national government, attempts to enshrine rights in the United States Constitution are quickly blocked by Article V, which delineates the procedures to amend the Constitution. Considering the high burden required by Article V and the increasingly partisan nature of Congress, some legal scholars fear that the Constitution may have seen its last amendment. While some contend that Article V restrictions are deliberately onerous to prevent constant and reactionary changes, others argue that Article V is archaic and prohibitive of any meaningful change. This Essay explores the historical underpinnings of the constitutional amendment process, a now burdensome procedure that boasts few successes. This Essay also evaluates whether it is time to begin further discussions on amending the Constitution, specifically Article V—the amendment process. Highlighting the active role that Article III judges—particularly those in the United States Supreme Court—had in the molding of notable civil rights, this Essay concludes by identifying who *is necessary to effect change.*

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INTRODUCTION

In recent years, there appears to be a growing and glaring political divide over a variety of issues[1] that permeates the fabric of American society to such an extent that some commentators question whether President Biden, or any president for that matter, can truly "bridge the deep gulfs that divide American society."[2] A more legally-focused review of these broad topics reveals that some of those polarizing issues have recently been addressed in decisions rendered by the Supreme Court of the United States. For instance, just this past summer, the Court held that the Federal Constitution does not confer a right to abortion, that *Roe* and *Casey* are overruled, and that the authority to regulate abortion is returned to the people and their elected representatives.[3]

1. Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.

2. David Lauter, *Researchers asked people worldwide about divisiveness. Guess where U.S. ranked*, L.A. TIMES (Oct. 15, 2021), https://www.latimes.com/politics/newsletter/2021-10-15/us-most-divided-nation-in-worldwide-survey-essential-politics ("What makes the U.S. truly stand out, however—and threatens its democratic future—is that its political conflict combines with high levels of ethnic, racial and religious conflict.").

3. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022) (syllabus).

However, the *Dobbs* dissent expressed concern that in light of the majority's rationale, the larger right to privacy may be in jeopardy:

> And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.[4]

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4. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting) (some internal citations omitted). The *Dobbs* dissent mentions several notable right to privacy cases: Griswold v. Connecticut, 381 U.S. 479 (1965), which held that a Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy; Lawrence v. Texas, 539 U.S. 558 (2003), which held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause; and Obergefell v. Hodges, 576 U.S. 644 (2015), which held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

This Essay is not intended to advocate for how *Dobbs* or any other case-or-controversy should have been or should be decided. Instead, I merely emphasize that prior to the *Dobbs* decision, members of Congress on several occasions proposed an amendment to the Constitution that sought to overturn *Roe*.[5] Similar to this Human Life Amendment proposed under the Article V constitutional amendment process after *Roe*, numerous constitutional amendments have been unsuccessfully proposed after United States Supreme Court decisions on other contentious issues.[6]

The United States Supreme Court is arguably experiencing increased scrutiny, and overall confidence in the Court is reportedly the lowest that it has been in nearly four decades.[7] Whereas the overwhelming majority of Americans believe that politics should not influence the Court in its decisions, only a fraction of Americans believes the justices are doing a good job of exercising such restraint.[8] People on both sides of the political divide somewhat idealistically believe that when a president from their own party nominates a Supreme Court justice, that justice will be better at remaining apolitical in their judicial decisions

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5. *Abortion Amendment Voted by Senate Panel*, N.Y. TIMES (Mar. 26, 1983), https://www.nytimes.com/1983/03/26/us/abortion-amendment-voted-by-senate-panel.html.

6. *E.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding the government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity; federal statute barring independent corporate expenditures for electioneering communications violated First Amendment; and disclaimer and disclosure provisions of Bipartisan Campaign Reform Act of 2002 did not violate First Amendment, as applied to a nonprofit corporation's film and three advertisements). Following *Citizens United*, Democrats unsuccessfully introduced a constitutional amendment to counter the Supreme Court's decision. *See* Lauren Sforza, *Democrats introduce constitutional amendment to reverse Citizens United campaign finance ruling*, THE HILL (Jan. 19, 2023), https://thehill.com/homenews/house/3819814-democrats-introduce-constitutional-amendment-to-reverse-citizens-united-campaign-finance-ruling/ (noting how Representative Adam Schiff has introduced an amendment seeking to overturn the *Citizen United* ruling every year since 2013).

7. *See Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/.

8. *See id.*

than a nominee from the other party.[9] Arguably, myopic visions of one's favorite justices have led to individuals' believing that justices nominated by a president of the opposing party are engaging in judicial activism.[10] This combination of partisan idealism on one hand and hostile scrutiny on the other can "generate[] a vicious cycle: it triggers a lack of confidence in judicial decisions which triggers political meddling which reinforces a lack of confidence in judicial decisions."[11] If the public believes that Supreme Court rulings are mere reflections of the justices' personal ideologies and politics that are subject to change by Courts of different political compositions, then a more permanent resolution would be to have the public's view reflected in the legislative process, specifically through a constitutional amendment.[12]

Considering the growing distrust in the judiciary juxtaposed with the infrequency of successful constitutional amendments, Article V has not and cannot be so readily utilized to effect long-standing change. In fact, Article V's power to amend the Constitution has seldom been invoked successfully: Despite tens of thousands of attempts, only twenty-seven amendments to the Constitution have been made. Thus, in view of the current rending of the American fabric, Section I of this Essay begins by considering the historical backdrop of the Constitution's origins and how Article V came to be. Relatedly, Section I also highlights precisely how difficult the amendment process is, as shown by the few proposals that have successfully navigated this demanding process. Section II articulates that under the current Article V requirements, some legal scholars posit that the Constitution may never be amended again. The late-Supreme Court Justice Ginsburg opined that the onerous requirements of Article V were

9. *See id.*; Robert A. Levy & William Mellor, *Commentary: Judicial Activism and Tomorrow's Courts*, CATO INSTITUTE (Sept. 11, 2022), https://www.cato.org/commentary/judicial-activism-tomorrows-courts.

10. *See* Levy & Mellor, *supra* note 9.

11. *See* Diarmuid F. O'Scannlain, *On Judicial Activism*, OPENSPACES, https://open-spaces.com/articles/on-judicial-activism/ (last visited Mar. 26, 2023) (Diarmuid O'Scannlain, Senior Judge of the United States Court of Appeals for the Ninth Circuit, writing on judicial activism by Article III judges).

12. *See generally* Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 J. CONST. L. 443 (2013) (discussing how the Supreme Court's interpretations on controversial constitutional issues, e.g., abortion, gun rights, and speech, go "back and forth over the years," effectively amending the Constitution outside of the Article V procedures).

anticipated by the Framers, whereas the late-Justice Scalia believed that the process has become too challenging to effect meaningful change. Section III concludes by asking whether the time is ripe to discuss amending Article V's challenging procedures in light of the current political climate. Finally, Section III highlights the active role Article III judges, particularly those in the Supreme Court, have had in the molding of notable civil rights. The Essay concludes by identifying *who* is necessary to effect change.

I. THE LEGISLATIVE PROCESS VIA ARTICLE V

A. HISTORICAL BACKGROUND

Following the American Revolution, the Founding Fathers grappled over how to effectively create a solid constitutional framework that would serve as the cornerstone for a new era of politics and governance. This challenge was exacerbated by the Framers' dueling perspectives and beliefs over how American governance ought to be structured. Recall, on one hand, Federalists advocated for a stronger centralized government,[13] whereas Anti-Federalists believed power should be allocated primarily to the states for fear that the position of president could transform into another monarchy.[14]

Existing historical narratives clarify that the constitutional architects "were wise enough to know that if they made their document too rigid, if they wrote it so that it could not be revised to suit future times and events, they were inviting future revolution . . . [by] creating a situation in which the only method to effect change would be to cast aside the Constitution itself."[15] Even

13. The Federalist form of government "would set out a large, unified government whose laws and taxes would fall directly upon the citizenry." Carol M. Rose, *The Ancient Constitution v. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 NW. U.L. REV. 74, 86 (1990).

14. *Id.* at 82 ("[Anti-Federalists] insisted that a national, 'consolidated' government would necessarily quell liberty, because a national government would be too large and its representative bodies too far removed from the people to reflect multiform mores and natures.").

15. Mary Frances Berry, *Amending the Constitution; How Hard It Is to Change*, N.Y. TIMES MAG., Sept. 13, 1987, at 93–98. *See also* JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION (Scott ed. 1898) ("[It would] be better to provide for [amendments] in an easy, regular[,] and constitutional way, than to trust to chance and violence."); Sanford Levinson, *Article V after 230 Years: Time for a Tune-up*, 67 DRAKE L. REV. 913, 925 (2019) ("Article V itself is evidence of the fact that the

so, a successful invocation of Article V could be described as a force that "would significantly rupture the current allocation of governmental powers."[16]

When the dust settled, James Madison, one of the architects of Article V, famously commented on the middle ground approach that permitted both houses of Congress, or the states, to propose Constitutional amendments:

> That useful alterations will be suggested by experience could not be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and the State Governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.[17]

Although the path to including Article V was far from smooth,[18] the Constitution, ultimately including a vehicle for amending the Constitution via Article V, was ratified by all thirteen states in 1790, and its first ten amendments were ratified one year later.[19]

B. THE CURRENT PROCESS UNDER ARTICLE V

Article V of the United States Constitution delineates the procedure to propose and ratify changes to the Constitution:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution,

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[Framers] themselves recognized the certainty of imperfection and the concomitant desirability of change.").

16. Arthur H. Taylor, *Fear of an Article V Convention*, 20 BYU J. PUB. L. 407, 420 (2006) ("The activation of a State-based method of amending the Constitution strips Congress of what, in practice, has been its exclusive domain [particularly since] power-shift[s] over the years from the States to the Federal government has been gradual but significant.").

17. THE FEDERALIST NO. 43 (James Madison).

18. *See generally*, Paul J. Scheips, *Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46 (1950).

19. *The Day the Constitution was Ratified*, NAT'L CONST. CENTER, CONST. DAILY BLOG (June 21, 2022), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.

> or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[20]

Thus, there exist two methods to propose an amendment to the United States Constitution. The first option requires approval from both the House and Senate, by a two-thirds vote of all members present in each chamber.[21] The second method requires Congress to call a convention for proposing amendments, upon the request of two-thirds of the state legislatures.[22] Further, under Article V, Congress must select a ratification process of either three-fourths of the state legislatures or three-fourths of state ratifying conventions to approve a proposed amendment.[23]

As of this writing, the second proposal method via a constitutional convention has not been successfully utilized; rather, "[a]ll the amendments to the Constitution to date have been proposed through Congress."[24]

C. HOW FAR WE'VE COME

Considering the onerous process demanded by Article V, it should come as no surprise that the ratification rate is exceedingly low when juxtaposed with how many amendments have been proposed. To date, tens of thousands of proposed amendments

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20. U.S. CONST. art. V.

21. Taylor, *supra* note 16, at 407 ("The first [method] is to propose the amendment by the two-thirds vote of both the House and the Senate.").

22. *Id.* ("The second [method] is for two-thirds of the states to call for a convention, with the convention then proposing the amendment.").

23. *Id.*; *see also* Cong. Rsch. Serv., *Article V Amending the Constitution*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artV-1/ALDE_00000507/#ALDF_00017894 (last visited Jan. 30, 2023).

24. Taylor, *supra* note 16, at 407.

have addressed a diverse spectrum of important social, political, and economic issues.[25] While the purpose of this Essay is *not* to advocate for any particularized political belief or position, it highlights how many proposed amendments were either a reaction to a United States Supreme Court decision, or conversely, how the highest court of this land settled a matter at some point after the issue was addressed by a proposed constitutional amendment.

Of the hundreds of amendments that are proposed annually, Congress has sent only thirty-three proposed amendments to the states for ratification, and merely twenty-seven of those have been ratified.[26] Notably, the first ten amendments were the Bill of Rights and were considered necessary as part of the bargain struck amongst the states to secure ratification of the Constitution.[27] Another indication of the curiously low Article V success rate is the fact that the last two successful amendments were ratified in 1971 and 1992.[28]

Some scholars have defended the current stringent Article V process because otherwise "[f]requent amendments would give citizens the impression that even those rights entrenched as 'fundamental' are subject to ordinary political struggle, so much that they are reduced to statutes passed through a different

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25. *See e.g.*, *Abortion Amendment Voted by Senate Panel*, *supra* note 5 (quoting text of proposed Human Life Amendment intended to overturn *Roe*: "A right to abortion is not secured by the Constitution."); *see* AMEND. PROJECT, https://amendmentsproject.org/data.html (last visited Jan. 27, 2023) (providing a more comprehensive but not exhaustive list of previous constitutional amendment proposals). *See generally* Carl Hulse & David D. Kirkpatrick, *The 2004 Campaign: The Marriage Issue; Conservatives Press Ahead on Anti-Gay Issue*, N.Y. TIMES (July 9, 2004), https://www.nytimes.com/2004/07/09/us/the-2004-campaign-the-marriage-issue-conservatives-press-ahead-on-anti-gay-issue.html (discussing another example of a contentious proposal, the Federal Marriage Amendment, which was introduced to Congress multiple times and sought to prohibit same-sex marriage).

26. Michael Gentithes, *The Tiered Article V*, 34 WHITTER L. REV. 307, 312–13 (2013) ("While tens of thousands of amendments have been proposed, 'only thirty-three have received the necessary congressional supermajorities and only twenty-seven have been ratified by the states.'").

27. *Id.* at 313 (citing Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever,* 17 CARDOZO L. REV. 691, 694 (1996)).

28. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age."); U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

process."[29] Hence, "[i]f a particular fundamental right or rule can be altered by mere amendment, then all can, and commitments to constitutional rights become less stable than they were before."[30]

On the other hand, I ask whether the time is ripe for more robust discussions—particularly by Article III judges who encounter many issues in courts across the nation—of many issues that may already have been proposed by constitutional amendments, not to mention others that likely will be contemplated by future constitutional amendments.

II. UNDER THE CURRENT ARTICLE V REQUIREMENTS, SOME SUGGEST THAT THE CONSTITUTION WILL NEVER BE AMENDED AGAIN

While Article V of the Constitution places onerous requirements on the constitutional amendment process, there are reasoned concerns that the Constitution is now amendable only in theory due to the increased partisan nature of the current political climate.[31] Aziz Rana, professor of constitutional law at Cornell University, argues that the United States is entering a state of institutional paralysis where the federal government is unable and fails to address the significant social and economic problems plaguing the nation.[32]

Whereas Article V may have been successfully employed in the past, many "scholars agree that the Article V process has become nonviable," and the nation may have already seen its last formal amendment.[33] Together with the expansion of the number of states in the Union and the unanticipated increased

29. Gentithes, *supra* note 26, at 312.

30. *Id.* (citing Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform,* 87 TEX. L. REV. 1517, 1534 (2009)).

31. *See* Richelle Joy Gernan, *A Push for An Egalitarian Constitution*, 48 HASTINGS CONST. L.Q. 297, 308–09 (2021).

32. Jesse Wegman, Opinion, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now.*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html.

33. *Id; see* Jill M. Fraley, *Against Court Packing, or a Plea to Formally Amend the Constitution*, 42 CARDOZO L. REV. 2777, 2799 (2021).

partisanship of not only Congress,[34] but of the people,[35] there now exists a formidable barrier to achieving the necessary double supermajority[36] required by Article V.[37]

However, it does not then follow that the Constitution is unchanging.[38] Due to the disuse of the formal Article V constitutional amendment process, there has emerged an informal amendment process of "judicial amendments"[39] initiated through the federal judiciary, primarily the United States Supreme Court.[40] While the Supreme Court cannot rewrite the Constitution, it may reread it.[41] In fact, the Supreme Court has become the primary method employed to adapt the Constitution to modern needs and complex issues, though the extent of this role was unforeseen by the Framers.[42] The Supreme Court's assumption of this role has resulted in appointments to this nation's highest court becoming highly contested, and in

34. *See* Drew Desilver, *The polarization in today's Congress has roots that go back decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ ("As Democrats have grown more liberal over time and Republicans much more conservative, the 'middle'—where moderate-to-liberal Republicans could sometimes find common ground with moderate-to-conservative Democrats on contentious issues—has vanished.").

35. *See Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/; *see also* Dimock & Wike, *supra* note 1 ("[Of fourteen surveyed countries] 77% of Americans said the country was now more divided than before the [COVID-19] outbreak, as compared with a median of 47% in the [thirteen] other nations surveyed.").

36. The term "double supermajority" refers to the two-third's vote requirement by each chamber of Congress that must then be ratified by three-fourths of the states.

37. *See* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1049–51 (2014); Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution; Wegman, *supra* note 32.

38. *See* Lepore, *supra* note 37.

39. *See* James Lucas, *The Supreme Court versus the Constitution*, NAT'L REV. (Dec. 8, 2017), https://www.nationalreview.com/2017/12/constitutional-amendment-simplify-procedure/.

40. Wegman, *supra* note 32; Fraley, *supra* note 33, at 2801–04; Albert, *supra* note 37, at 1051–54 ("No single branch of government can make an informal amendment on its own; other branches or institutions must either participate directly or acquiesce.").

41. Lepore, *supra* note 37.

42. *See id*.

"transformative judicial opinions that self-consciously repudiate preexisting doctrinal premises and announce new principles that redefine the American people's constitutional identity[.]"[43] As previously discussed,[44] the notion of transformative judicial opinions is illustrated by the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, which overturned the historic *Roe v. Wade* decision, which had previously provided a constitutional right to abortion.[45] Some scholars go as far as to argue that informal judicial amendments promulgated by the Supreme Court "ha[ve] made Article V of the Constitution an afterthought."[46]

The Framers never anticipated or contemplated that the Supreme Court would become the sole usher of constitutional change.[47] It is clear that constitutional changes should comport with the Article V process, which places the onus on Congressional leadership, not solely on the Supreme Court. However, the current reality of the Court being the only meaningful avenue for modern constitutional change begs the question: Has the formal amendment process become so onerous in light of today's political landscape that the very amendment process itself is in need of amendment?[48]

A. SHOULD WE DISCUSS AMENDING THE ARTICLE V AMENDMENT PROCESS?

According to the late-Justice Ruth Bader Ginsburg, contentious interpretations of the Constitution by the Supreme

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43. *See* Albert, *supra* note 37, at 1051 (internal quotations omitted) (quoting Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1173 (1988)); Wegman, *supra* note 32; *see also* Lepore, *supra* note 37 (listing Supreme Court-implemented constitutional changes, such as rights of criminal defendants, right to contraception, abortion, same-sex marriage, interpretation of corporate campaign donations to be free speech, and the government's ability to regulate firearms under the Second Amendment).

44. *See supra* text accompanying notes 3–4.

45. Lepore, *supra* note 37.

46. *See* Lucas, *supra* note 39.

47. *See* Lepore, *supra* note 37 ("Article V explicitly provides that the Constitution is to be changed by elected legislatures, with no mention of the courts . . . . [The Framers'] solution [to altering the Constitution] was the democratic, deliberative process set out on in Article V, not the fiat of the Supreme Court.").

48. *See* Lucas, *supra* note 39 ("If judges are to be persuaded not to change the Constitution on their own, Article V must be reformed in order to make it a plausible alternative to judicial amendment.").

Court can *and have been* overridden by subsequent constitutional amendments and therefore demonstrate the efficacy and usability of the current Article V process.[49] However, as Justice Ginsburg herself noted, these overriding amendments have numbered only two per century.[50] Whereas many amendments are proposed following contentious Supreme Court decisions, she explained that "[t]ime and the rigors of the amendment process will tell whether popular support for any of these amendment proposals is sufficiently deliberate and durable to yield a twenty-seventh, twenty-eighth, twenty-ninth, even thirtieth amendment."[51] The Justice reminded that "[t]he process [of amending the Constitution] was designed to be lengthy, deliberative, and not frequently invoked," to prevent "hasty, ill-considered corrections . . . ."[52] She further opined that, as written, the Constitution can "serve through changing times if supported by judicial interpretations that are neither 'mushy' nor too 'rigid.'"[53]

However, Justice Ginsburg's opinion on the Article V amendment process was not shared by all her colleagues. When asked in an interview what hypothetical change he would make to the Constitution and why, Justice Scalia stated:

> I certainly would not want a constitutional convention. I mean woah! Who knows what would come out of that? But, if there were a targeted amendment that were adopted by the states, I think the only provision I would amend is the amendment provision. I figured out at one time what percentage of the populace could prevent an amendment to the Constitution, and if you take a bare majority in the smallest states, by population, I think something less than two percent of the

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49. *See* Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L. REV. 677, 684–89 (1990) (observing, inter alia, how the Fourteenth Amendment overruled *Dred Scott*, the Sixteenth Amendment overruled *Pollock v. Farmers' Loan & Trust Co.*, and the Nineteenth Amendment overruled *Minor v. Happersett*). *But see* Lucas, *supra* note 39 (discussing how Supreme Court decisions can undermine the amendment process, specifically considering the proposed Equal Rights Amendment in the 1970s, which passed in Congress and was quickly ratified by twenty-two states, but then was likely stymied by the Supreme Court's *Frontiero v. Richardson* decision, which held that "some forms of sex discrimination were prohibited by the [Fourteenth] Amendment").

50. Ginsburg, *supra* note 49, at 689.

51. *Id.* at 690.

52. *Id.* at 693.

53. *Id.* at 693–94.

> people can prevent a constitutional amendment . . . . [I]t ought to be hard, but it shouldn't be that hard.[54]

Justice Scalia is not alone in his opinion; several legal scholars share his sentiment that the amendment process of Article V should be amended.[55]

B. WHY NOW?

When considering whether to discuss amending the Article V amendment process, it is paramount to consider the intentions of the Framers as well as the current climate of the nation. When the Constitution was written, only thirteen states formed the Union, and in 1823, when twenty-four states comprised the United States

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54. *The Kalb Report: Justices Scalia and Ginsburg on the First Amendment and Freedom* at 1:06:37–1:07:47 (C-SPAN television broadcast Apr. 17, 2014), https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014 (interview by Marvin Kalb, Harvard School of Government Professor Emeritus, with United States Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia, produced by George Washington University's Global Media Institute in partnership with the National Press Club and the Joan Shorenstein Center on the Press, Politics and Public Policy at Harvard University's Kennedy School, and the University of Maryland).

55. *See, e.g.*, Jason Mazzone, *Amending the Amendment Procedures of Article V*, 13 DUKE J. CONST. L. & PUB. POL'Y 115, 120 (2018) (proposing amending Article V to "periodically ask[] voters whether a constitutional convention should be held," thereby offering a means of democratizing the amendment process); Timothy Lynch, *Amending Article V to Make the Constitutional Amendment Process Itself Less Onerous*, 78 TENN. L. REV. 823, 830 (2011) (while not committing to a particular proposal, advocating for the "need for some relaxation in the threshold necessary to secure the adoption of an amendment," and ultimately suggesting lowering the three-fourths ratification requirement to two-thirds); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1514 (2010) (acknowledging that the current Article V process does not work and proposing amending Article V to "allow the state legislature to draft an amendment," and after two-thirds of the states approve the amendment it would be deemed formally proposed and would then require final ratification by three-fourths of the states); Michael B. Rappaport, *Renewing Federalism by Reforming Article V Defects in the Constitutional Amendment Process and a Reform Proposal*, CATO INST.: POLICY ANALYSIS, no. 691 (2012), https://www.cato.org/sites/cato.org/files/pubs/pdf/PA691.pdf; John O. McGinnis, *Protecting the Originalist Constitution*, 42 HARVARD J. L. & PUB. POL'Y 81, 87–89 (2019) (proposing the necessity of an amendment to the amendment process without adopting a particular amendment, and arguing that Michael Rappaport's solution is the best option suggested); Sarah Isgur, Opinion, *It's Time to Amend the Constitution*, POLTICO (Jan. 8, 2022), https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780 (arguing that it is now more important than ever to amend the Constitution, but that the formal Article V process is not a viable mechanism and instead the amendment process itself should be amended).

of America, Thomas Jefferson already doubted the viability of the formal amendment process:

> [T]he States are now so numerous that I despair of ever seeing another amendment to the Constitution, although the innovations of time will certainly call, and now already call, for some, and especially the smaller States are so numerous as to render desperate every hope of obtaining a sufficient number of them in favor of [Alexander Hamilton's] proposition [regarding the method of electing the President of the United States].[56]

The United States has since doubled its number of states, which drastically changes the denominator for Article V and increases the difficulty of amending the Constitution.[57] Professor Rosalind Dixon of the University of Chicago Law School calculated the additional degree of difficulty to satisfy the amendment supermajority requirement by adjusting for a fifty-state denominator for Article V, ultimately concluding that "the *functional* equivalent to the 75% super-majority requirement adopted by the [Framers] would in fact now be as low as 62%."[58]

This functional raising of the Article V supermajority hurdle in light of the increased number of states makes it nearly impossible to override Supreme Court decisions because any amendment can be blocked by "something less than two percent of the people," as Justice Scalia described.[59] An amendment to Article V could "create a powerful new constitutional check on the Supreme Court . . . ."[60] The public's confidence in the Supreme

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56. Albert, *supra* note 37, at 1049–50; *see also* Letter from Thomas Jefferson, to George Hay (Aug. 17, 1823), https://founders.archives.gov/documents/Jefferson/98-01-02-3707; Andrew Glass, *Alexander Hamilton attacks Thomas Jefferson under a pseudonym, Oct. 20, 1796*, POLITICO (Oct. 19, 2010), https://www.politico.com/story/2010/10/alexander-hamilton-attacks-thomas-jefferson-under-a-pseudonym-oct-20-1796-043776. Alexander Hamilton published essays under the pseudonym "Phocion" criticizing Thomas Jefferson.

57. *See* Albert, *supra* note 37, at 1049.

58. *Id.* (quoting Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 653 (2011)).

59. *See The Kalb Report: Justices Scalia and Ginsburg on the First Amendment and Freedom*, *supra* note 54, at 1:06:37–1:07:47; *see also* Sarah Isgur, *supra* note 55.

60. *See* Lucas, *supra* note 39. In addition to the previously mentioned informal judicial amendments, there are also concerns about the Executive Branch passing informal amendments. Isgur, *supra* note 55 ("As Congress has done less and less legislating, the [E]xecutive [B]ranch . . . [has] faced increasing political pressure to

Court is at a historic low of 25%,[61] further indicating the need for discussion on amending Article V to curb informal judicial amendments.

Public distrust of the Supreme Court can be explained partially by the widening division in society.[62] In recent years it seems as though the polarization of American society is only growing, and in this moment "[political] divisions have collapsed onto a singular axis where we find no toehold for common cause or collective national identity."[63] Historically, the Constitution has been amended in the wake of political and social turmoil.[64] By facilitating constitutional amendments, there could be the direct or collateral benefit of mending the torn fabric of American society. However, as previously discussed, the Article V amendment process is becoming a less viable method of amendment, leaving the nation with a sense of paralysis subject only to informal amendments by other branches.[65]

With the current Article V amendment process becoming nonviable in today's climate, trust in the court system being at an all-time low, and the political divide consistently widening, if amending the amendment process is not now ripe for discussion, then when will it ever be?

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address the problems facing the country. But the Constitution doesn't allow the [E]xecutive [B]ranch to fill in as a substitute legislature—which is a large reason why so many executive orders and actions end up in federal court."); *see also* Segall, *supra* note 12, at 443 (noting that informal amendments are being passed by politicians, the courts, and federal agencies).

61. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

62. *See generally id.* (breaking down confidence in the Supreme Court by political party); Dimock & Wike, *supra* note 1; Laura Silver et al., *Diversity and Division in Advanced Economies*, PEW RSCH. CTR. (Oct. 13, 2021), https://www.pewresearch.org/global/2021/10/13/diversity-and-division-in-advanced-economies/.

63. *See* Dimock & Wike, *supra* note 1; *see also* Silver et al., *supra* note 62.

64. *See generally* Lepore, *supra* note 37 (discussing the timing of the constitutional amendments); *see also* Isgur, *supra* note 55 (discussing the requirement imposed on rebellious states that they ratify the Reconstruction Amendments as a precondition for their readmittance to the Union).

65. *See* discussion *supra* Sections II.A–B.

III. THE FEDERAL JUDICIARY: "DOING WHAT THE AMENDMENT PROCESS COULDN'T DO"?[66]

In understanding that conclusion (and question), let us begin by restating some background about the third branch of the federal government, the federal judiciary. Article III of the Constitution of the United States (COTUS) establishes the federal court system with the Supreme Court of the United States (SCOTUS), and it permits Congress to create lower federal courts, which are now known as circuit and district courts.[67]

Generally, federal courts decide cases involving the Constitution, federal laws, disputes between states, and cases between residents of different states where damages exceed a minimum threshold.[68] SCOTUS is the highest court of the nation for all "cases and controversies" arising under the COTUS.[69] As the court of last resort to decide such matters, it is charged with ensuring equal justice under law,[70] and functions, ideally, as guardian and final interpreter of the Constitution.[71]

Unlike the intermediate federal circuit courts of appeals,[72] SCOTUS is not required to hear every case that is submitted to it.[73] In fact, it hears only a very small fraction of the cases it is

66. Wegman, *supra* note 32 (attributing the evaluation that "[w]e became reliant on the courts to do what the amendment process couldn't do" to Franita Tolson, George T. and Harriet E. Pfleger Chair in Law at the University of Southern California Gould School of Law).

67. U.S. CONST. art. III, § 1.

68. U.S. CONST. art. III, § 2.

69. *Id*.

70. *About the Court: The Court and Constitutional Interpretation*, THE SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Mar. 26, 2023) ("'EQUAL JUSTICE UNDER LAW'—These words, written above the main entrance to the Supreme Court Building, express the ultimate responsibility of the Supreme Court of the United States.").

71. *Id.*; *About Federal Courts: About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Mar. 26, 2023); *see also* Marbury v. Madison, 5 U.S. 137, 178 (1803) (Congress does not have the power to pass laws that override the Constitution, thusly recognizing that in judicial review SCOTUS has the power to determine constitutionality of congressional enactments.).

72. FED. R. APP. P. 5(d)(3).

73. *See* SUP. CT. R. 10 (detailing writ of certiorari procedures).

asked to review.[74] If SCOTUS does not hear a case, the decision of the court of appeals is retained.[75] In 2001, although the circuit courts decided over 57,000 cases, SCOTUS ultimately heard and decided around ninety of those cases.[76] During its 2020 term, SCOTUS decided sixty-two cases.[77]

SCOTUS rightfully proclaims its unique status:

> The Supreme Court is "distinctly American in concept and function," as Chief Justice Charles Evans Hughes observed. Few other courts in the world have the same authority of constitutional interpretation and none [has] exercised it for as long or with as much influence. A century and a half ago, the French political observer Alexis de Tocqueville noted the unique position of the Supreme Court in the history of nations and of jurisprudence. "The representative system of government has been adopted in several states of Europe," he remarked, "but I am unaware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans . . . . A more imposing judicial power was never constituted by any people."
>
> The unique position of the Supreme Court stems, in large part, from the deep commitment of the American people to the Rule of Law and to constitutional government. The United States has demonstrated an unprecedented determination to preserve and protect its written Constitution, thereby providing the American "experiment in democracy" with the oldest written Constitution still in force.[78]

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74. *Supreme Court Statistics*, 135 HARV. L. REV. 491, 498 (2021) (demonstrating that the Supreme Court granted only 69 of the 1782 petitions that it considered—an approximate 3.9% acceptance rate).

75. Darr v. Buford, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("This Court has said again and again . . . that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else. The State court's judgment is left undisturbed without any legal reinforcement whatever of the views which the State court expressed.").

76. ADMIN. OFF. U.S. CTS., *Judicial Business*, 2001 Ann. Report of the Director 13, 15 https://www.uscourts.gov/sites/default/files/2001judicialbusiness.pdf.

77. *Supreme Court Statistics*, *supra* note 74, at 491.

78. *About the Court: The Court and Constitutional Interpretation*, *supra* note 70 (emphasis added).

The Supreme Court Historical Society aptly contextualizes the Court's long-standing presence in American society:

> Established by the United States Constitution, the Supreme Court began to take shape with the passage of the Judiciary Act of 1789 and has enjoyed a rich history since its first assembly in 1790. *The Supreme Court is deeply tied to its traditions: Of the federal government's three branches, the Court bears the closest resemblance to its original form—a 225 year old legacy.*[79]

SCOTUS's remarkable history is truly filled with landmark expressions of its imposing power and influence over the affairs of our nation and the lives of untold millions. A partial listing of its more historic and impactful decisions includes the following:

> *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the Court's power of judicial review over the constitutionality of actions taken by the legislative and executive branches of government);
>
> *McCulloch v. Maryland*, 17 U.S. 316 (1819) (declaring the supremacy of COTUS and federal law over state laws found inconsistent therewith);
>
> *U.S. v. Wong Kim Ark,* 169 U.S. 649 (1898) (recognizing the U.S. citizenship of children born in the United States to non-citizens and establishing the concept of *jus soli,* "law of the soil" or birthright citizenship);
>
> *Brown v. Board of Education,* 347 U.S. 483 (1954) (overruling another far-reaching decision of the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and unanimously agreeing that "separate but equal" facilities for African-American students are *inherently unequal* in violation of the Equal Protection Clause of the Fourteenth Amendment) (emphasis added);
>
> *Gideon v. Wainwright,* 372 U.S. 335 (1963) (unanimously agreeing that the Sixth Amendment's right to counsel in criminal cases is a *"fundamental and essential right"* that requires states to provide counsel under the Fourteenth Amendment) (emphasis added);

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79. *About the Court: History and Traditions*, THE SUP. CT. OF THE U.S. (emphasis added), https://www.supremecourt.gov/about/historyandtraditions.aspx (last visited Mar. 26, 2023).

Loving v. Virginia, 388 U.S. 1 (1967) (holding, in a unanimous opinion written by Chief Justice Earl Warren, that a Virginia law violated the Due Process Clause of the Fourteenth Amendment because "the freedom to marry, or not marry, a person of another race *resides with the individual, and cannot be infringed by the State*") (emphasis added);

Reed v. Reed, 404 U.S. 71 (1971) (finding, in yet another unanimous landmark decision, that arbitrary legislative choices that treated women in a dissimilar way from men in probate matters violated the Equal Protection Clause of the Fourteenth Amendment);

Roe v. Wade, 410 U.S. 113 (1973) (holding, in a 7–2 decision, that the Due Process Clause of the Fourteenth Amendment protects against state action *the right to privacy*, including a woman's qualified right to terminate her pregnancy) (emphasis added);

Obergefell v. Hodges, 576 U.S. 644 (2015) (In a 5–4 decision, the Court held that *the Due Process Clause* of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis *applies to same-sex couples in the same manner as it does to opposite-sex couples*. Judicial precedent has held that *the right to marry is a fundamental liberty* because it is inherent to the concept of individual autonomy, it protects the most intimate association between two people, it safeguards children and families by according legal recognition to building a home and raising children, and it has historically been recognized as the keystone of social order.[80] The four dissenting justices essentially focused upon the judiciary's lack of authority to find a right to same-sex marriage when *the Constitution does not address such a right*. While in agreement with that rationale, Chief Justice Roberts observed that "same-sex

80. *A Brief History of Civil Rights in the United States: Obergefell v. Hodges*, VERNON E. JORDAN LAW LIBRARY, https://library.law.howard.edu/civilrightshistory/lgbtq/obergefell (last updated Jan. 6, 2023, 12:25 PM) ("Before Obergefell was decided, over 70% of states and the District of Columbia already recognized same-sex marriage, and only [thirteen] states had bans. Fourteen same-sex couples and two men whose same-sex partners had since passed away claimed that Michigan, Ohio, Kentucky, and Tennessee violated the Fourteenth Amendment by denying them the right to marry or by refusing to recognize their legal marriages that were performed in another state."); *see also Obergefell*, 576 U.S. at 665–69.

marriage might be good and fair policy." Justice Alito added in a separate dissent that same-sex marriages is *not deeply rooted in the nation's history and tradition, thereby reserving to the states to decide whether to depart from the traditional definition of marriage*.) (emphasis added);

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (overruling its precedential opinions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and parts of *McConnell v. FEC*, 540 U.S. 93 (2003), and holding in a 5–4 majority that corporate funding of independent political broadcasts in candidate elections cannot be limited under the Free Speech Clause of the First Amendment);

Atkins v. Virginia, 536 U.S. 304 (2002) ("Construing and applying the Eighth Amendment *in the light of our 'evolving standards of decency*,'" the Court held in a 6–3 majority that the execution of those with intellectual disabilities violates the Eighth Amendment's "cruel and unusual punishments" prohibition. Relying upon "*the consistency of the direction of change" within the states*, the Court stated the execution of such persons "has become truly unusual, and it is *fair to say that a national consensus has developed against it*." The dissent disputed the reliability of that assessment and reliance on foreign laws, professional and religious organizations, and opinion polls. It argued that "the work product of legislatures and sentencing jury determinations ought to be the sole indicators by which *courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment*.") (emphasis added);

Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (Overruling the Court's precedential opinion in *Roe v. Wade, supra*, and using the rationale from his dissenting opinion in *Obergefell v. Hodges*, *supra*, Justice Alito spoke for the 6–3 majority, holding that "because the Constitution does not mention it, there is no constitutional right to abortion. It is neither deeply rooted in the nation's history nor an essential component of ordered liberty.");

New York State Rifle & Pistol Association Inc. v. Bruen, 142 S. Ct. 2111 (2022) (holding in a 6–3 decision that the Second Amendment protects *the right to carry a firearm* in public for self-defense *as a deeply rooted historical right*, and no other

> constitutional right requires a showing of "special need" to exercise it) (emphasis added).

I have highlighted pertinent parts of Supreme Court rulings to offer an interesting commonality, at times, between the majority and dissenting interpretations of the Constitution. Justices who view that great document as a "living Constitution"[81] describe constitutional violations that create "inherently unequal" school facilities;[82] recognize rights as being "fundamental and essential";[83] and determine liberties or freedoms that "reside with the individual, [that] cannot be infringed by the State"[84] by relying on "our evolving standards of decency[,] . . . consistency of the direction of change [within the states,] . . . [and development of] a national consensus."[85] Compare the aforementioned phraseology with that of justices who interpret the Constitution with an "originalist" perspective,[86] who describe rights that are "deeply rooted in our nation's history and traditions,"[87] and who recognize a duty of "courts [to] ascertain the contemporary American conceptions of decency."[88]

Given the context of apparent similarities in interpretive style and rationale, the division among justices is most noticeable in civil rights cases. Their division is especially pronounced where the Constitution fails to mention a specific right by name or with exactitude, such as the right to privacy or to marry.[89] Relatedly,

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81. Justice Ginsburg viewed the Constitution as a living document that required an expansive approach in interpreting its text, including the preamble "We the people," due to the Framers' limited vision into the future. RUTH BADER GINSBURG, MY OWN WORDS 195 (Mary Hartnett & Wendy W. Williams eds., 2016).

82. Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Warren, J.).

83. Gideon v. Wainwright, 372 U.S. 335, 340–41 (1963) (Black, J.).

84. Loving v. Virginia, 388 U.S. 1, 12 (1967) (Stewart, J., concurring).

85. Atkins v. Virginia, 536 U.S. 304, 315–16, 321 (2002).

86. Justice Scalia described originalist judges as those who interpret the text of the Constitution exactly as the Framers intended. ANTONIN SCALIA, SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE 8 (Kevin A. Ring ed., 2004).

87. *See Dobbs*, 142 S. Ct. at 2242 (Justice Alito writing for the majority, stating that unenumerated rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2117–18, 2127 (2022) (Justice Thomas writing for the majority, adopting a test "rooted in the Second Amendment's text, as formed by history").

88. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

89. *Obergefell*, 576 U.S. at 675, 716–17.

approaches to constitutional jurisprudence diverge on how to interpret what the Framers intended,[90] especially when the text appears vague or limiting.[91]

The increasing discourse in our jurisprudence on the constitutional text, the intentions of its authors, and the reported declines in the public's confidence in the independence of the judiciary highlights a growing need for considering Thomas Jefferson's call to allow future "generation[s] to have the solemn opportunity to *update* the constitution . . . thus allowing it to be handed on, with periodical repairs."[92] As seen earlier,[93] the people and their elected representatives, with some pushing, saw the need throughout our nation's history to make constitutional amendments to address new challenges and conflicts.[94] Even unpopular decisions of the Supreme Court occasionally incited recourse to the amendment process.[95]

As mentioned,[96] our recent constitutional jurisprudence reflects immense changes about the meaning and application of constitutional text and principles. Some jurists argue that "[r]igid texts . . . have the potential to be misused and to breed extremism."[97] Others counter that courts cannot rewrite the Constitution by adding text not mentioned therein.[98]

Although they intended the Article V amendment process to be formidable, the Constitution's Framers did not foresee just how unworkable the process would be rendered by the modern size of the national population and current number of states. In a discussion with Justice Ginsburg, Justice Scalia suggested

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90. *Id.* at 716–17.

91. *See id.* at 715–16.

92. Nicholas Stephanopoulos, *What Jefferson Said*, THE NEW REPUBLIC, (Nov. 30, 2008) (emphasis added), https://newrepublic.com/article/63773/what-jefferson-said.

93. *See* U.S. CONST. amend. XIII.

94. *See id.*

95. *See, e.g., Dobbs*, 142 S. Ct. at 2262.

96. *See supra* text accompanying notes 81–91.

97. Abdallah Fayyad, *Editing the Constitution*, BOSTON GLOBE, https://apps.bostonglobe.com/ideas/graphics/2021/12/editing-the-constitution/ (last visited Mar. 19, 2023).

98. *See* Isgur, *supra* note 55.

"amend[ing] the process of amendment, to make it easier."[99] He calculated that "less than two percent . . . of the population could prevent an amendment" and reflected that "[i]t ought to be hard, but it shouldn't be that hard."[100]

Given the above examples of constitutional jurisprudence, the growing divisions between competing judicial interpretations, and, moreover, the people's demonstrated distrust in the nation's highest court, how should we better promote the rule of constitutional law? This writer posits the answer is found in the words of the Preamble to the Constitution of the United States:

> *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.[101]

We the people must begin to be informed and inspired, once again, by the Founders of our great republic and original Framers of the Constitution. Over 230 years ago, the first ten amendments to the Constitution, known as the Bill of Rights, were ratified.[102] James Madison wrote the amendments in response to requests for greater constitutional protection for individual rights.[103] Madison's authorship was influenced in part by the Magna Carta, the Petition of Right, the English Bill of Rights, the Virginia Declaration of Rights, and the Massachusetts Body of Liberties.[104] The Bill of Rights identifies rights and liberties that were not found in the original Constitution. Centuries later, on May 7, 1992 the original second amendment relative to congressional

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99. Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2015, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html.

100. *The Kalb Report: Justices Scalia and Ginsburg on the First Amendment and Freedom*, *supra* note 54, at 1:06:37–1:07:47.

101. U.S. CONST. pmbl. (emphasis added).

102. *See* Lepore, *supra* note 37 (discussing the timing of the constitutional amendments).

103. *Bill of Rights (1791)*, BILL OF RTS. INST., https://billofrightsinstitute.org/primary-sources/bill-of-rights (last visited Mar. 19, 2023).

104. *Id*.

compensation, although rejected in 1791, was finally ratified as the Twenty-Seventh Amendment.[105]

We the people, at the end of the Civil War before southern states were restored to the Union, ratified the Thirteenth Amendment abolishing slavery in December 1865.[106] President Abraham Lincoln took an active role to assure its passage.[107]

We the people, in a second Civil War amendment, ratified in July 1868 the Fourteenth Amendment that extended liberties and rights granted by the Bill of Rights to formerly enslaved people. However, to make the Amendment a reality, Black and White citizens petitioned and initiated cases, and obtained congressional and executive actions that later led to favorable decisions, overturning Supreme Court rulings that had previously refused to extend the Bill of Rights to the states.[108]

We the people, in a third Civil War amendment, ratified the Fifteenth Amendment that granted African-American men the right to vote in February 1870. Several African-American men were subsequently elected to office in southern states during the 1880s.[109] However, in the 1890s, literacy tests and other "Jim Crow" segregationist laws enacted by former Confederate states disenfranchised and made African-Americans second-class citizens.[110] During that era, the Supreme Court's "separate but equal" pronouncement in *Plessy v. Ferguson*,[111] emanating from Louisiana, reenforced disregard of the Civil War amendments, mainly by southern states. In response, Black and White citizens organized, marched, sued, and died to eventually secure enforcement of the amendments by our three branches of the

105. *Bill of Rights: Primary Documents in American History*, LIBR. OF CONG., https://guides.loc.gov/bill-of-rights (last visited Mar. 19, 2023).

106. Lepore, *supra* note 37.

107. *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865*), NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/13th-amendment (last updated May 10, 2022).

108. Scheips, *supra* note 18, at 46.

109. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/15th-amendment (last updated Feb. 8, 2022).

110. Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HISTORY (May 13, 2021), https://www.history.com/news/jim-crow-laws-black-vote.

111. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

federal government.[112] Partial setbacks, however, began to occur in 2013, when "the Supreme Court struck down a key provision of the Voting Rights Act of 1965 involving federal oversight of voting rules in nine states."[113]

It is noteworthy to give another example of why the Civil War amendments were drafted. They were their authors' response "to the odious *Dred Scott* decision, in which the Court held not only that Black people could not be citizens," but that they were "beings of an inferior order," possessed "no rights which the white man was bound to respect," and could "justly and lawfully be reduced to slavery for his benefit."[114]

We the people ratified the Nineteenth Amendment in August 1920, granting women the right to vote.[115] Again, akin to lengthy and extremely difficult struggles for African-Americans, it took people action—mainly women—to organize, petition, picket, and unite to convince President Woodrow Wilson in 1917 "to change his position to support an amendment in 1918, [and then] the political balance began to shift."[116]

While judges are duty-bound to uphold and defend the Constitution, our rulings can be overturned. As demonstrated above, the true permanency of constitutional change has been achieved, historically and by law, through the ability and persistence of people to obtain amendments that "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[117]

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112. *Civil Rights Movement*, HISTORY (Oct. 27, 2009), https://www.history.com/topics/black-history/civil-rights-movement.

113. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, *supra* note 109; *see* Shelby County v. Holder, 570 US 529, 556–57 (2013) (5–4 decision authored by Chief Justice Roberts).

114. Wilfred Codrington, III, *The Framers Would Have Wanted Us to Change the Constitution*, THE ATLANTIC (Sept. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/09/framers-would-have-wanted-us-change-constitution/620249/; *see also* Dred Scott v. Sandford, 60 US 393, 407 (1857) (7–2 decision authored by Chief Justice Robert Taney).

115. *19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/19th-amendment (last updated Feb. 8, 2022).

116. *Id*.

117. U.S. CONST. pmbl.

A great American reminded "we the people" about the privileges and obligations of citizenship, as he simultaneously offered hope for the future. On the anniversary of the United States' independence, at Independence Hall in Philadelphia, Pennsylvania, Justice Thurgood Marshall delivered his message:

> Democracy just cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. America must get to work. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.
>
> The legal system can force open doors and sometimes even knock down walls. But it cannot build bridges. That job belongs to you and me. Our fates are bound together. We can run from each other, but we cannot escape each other. We will only attain freedom if we learn to appreciate what is different and muster the courage to discover what is fundamentally the same. America's diversity offers so much richness and opportunity.[118]

As Justice Thurgood Marshall illustrated, the legal system is significantly limited in its ability to bridge societal division. If the federal judiciary cannot bridge this gap, and the Constitution effectively cannot be amended, where does that leave this great nation? As history has proven time and time again, the answer lies in the Preamble of the Constitution: *We the People of the United States*. In order to mend the torn fabric of American society, "we the people" must shoulder the burden and "do better."

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118. *Thurgood Marshall's Stirring Acceptance Speech After Receiving the Prestigious Liberty Award on July 4, 1992*, LEGAL DEF. FUND (July 1, 2015), https://www.naacpldf.org/press-release/thurgood-marshalls-stirring-acceptance-speech-after-receiving-the-prestigious-liberty-award-on-july-4-1992/.