

GUEST ESSAY

How to Stave Off Constitutional Extinction

July 1, 2023

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Every Fourth of July, Americans celebrate independence, but it might be more significant, more pregnant with meaning, to celebrate amendment — the writing, ratifying and especially the amending of constitutions. Except lately there hasn't been much to celebrate, with amendment having become a lost art. And a constitution that can no longer be amended is dead.

The U.S. Constitution hasn't been meaningfully amended since 1971. Congress sent the Equal Rights Amendment to the states for ratification in 1972, but its derailment rendered the

Constitution effectively unamendable. It's not that people stopped trying. Conservatives, especially, tried.

In 1982, President Ronald Reagan endorsed a balanced-budget amendment. In the 1990s, Republicans proposed anti-flag-burning amendments, fetal-personhood amendments and defense-of-marriage amendments. Lately, amendments have been coming from the left. "Nationally, Democrats generally wish to amend constitutions and Republicans to preserve them," The Economist proclaimed last month, on the same day that California's Democratic governor, Gavin Newsom, proposed a federal constitutional amendment that would regulate gun ownership. "I don't know what the hell else to do," he said, desperate.

The consequences of a constitution frozen in time in the age of Evel Knievel, "Shaft" and the Pentagon Papers are dire. Consider, for instance, climate change. Members of Congress first began proposing environmental rights amendments in 1970. They got nowhere. Today, according to one researcher, 148 of the world's 196 national constitutions include environmental protection provisions. But not ours. Or take democratic legitimacy. Over the last decades, and beginning even earlier, as the political scientists Daniel Ziblatt and Steven Levitsky point out in a forthcoming book, "The Tyranny of the Minority," nearly every other established democracy has eliminated the type of

antiquated, antidemocratic provisions that still hobble the United States: the Electoral College, malapportionment in the Senate and lifetime tenure for Supreme Court justices. None of these problems can be fixed except by amending the Constitution, which, seemingly, can't be done.

It's a constitutional Catch-22: To repair Senate malapportionment, for instance, you'd have to get a constitutional amendment through that malapportioned Senate.

While it's true that Americans can no longer, for all practical purposes, revise the Constitution, they can still change it, as long as they can convince five Supreme Court justices to read it differently. But how well has that worked out? That's what happened, beginning in the early 1970s, with abortion and guns, the north and south poles of America's life-or-death politics, in which either abortion is freedom and guns are murder or guns are freedom and abortion is murder. Chances are that if you like the current court, you like this method of constitutional change and if you don't like the current court, you don't like this method. But either way, it's not a great boon to democracy.

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Troublingly, our current era of unamendability is also the era of originalism, which also began in 1971. Originalists, who now dominate the Supreme Court, insist that rights and other ideas not discoverable in the debates over the Constitution at its framing do not exist. Perversely, they rely on a wildly impoverished historical record, one that fails even to comprehend the nature of amendment.

A written constitution ratified by the people — and subject to amendment by the people — is an American invention. In the 18th century, people who drafted constitutions and commented on constitutionalism came to agree that if such a strange, new and fragile thing as a written constitution were to endure, it would, as time passed, need to be both repaired and improved, mended and amended. To amend meant, at the time, to correct a fault; to repair an omission; to fix what's broken; or to improve, in a moral sense: to make something better. The word shares a root, four of its five letters, and almost the entirety of its meaning, with the verb “mend.” You can mend a dress but you can also mend your ways; you can amend your will but, for your errors, you can also make amends. All this was contained within the philosophy of amendment.

“We have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth,” Thomas Paine wrote in “Common Sense,” published in

January 1776. The states and the new federal government began writing constitutions that spring. Delegates to the Continental Congress who drafted what became the Declaration of Independence were also working on state constitutions: Thomas Jefferson was drafting the preamble for the Virginia Constitution and John Adams was involved in the drafting of the constitutions of Virginia and New Jersey while avidly following the constitutional goings-on in New Hampshire, South Carolina and Maryland.

From the very start, Americans proposed amendments. After the Declaration of Independence was issued, on July 4, 1776, Lemuel Haynes, a 23-year-old Massachusetts man who was the son of a Black father and a white mother and who had fought in the Continental Army, copied out its opening lines on a manuscript he titled “Liberty Further Extended.” And then he wrote an amendment: “An affrican has equally as good a right to his Liberty in common with Englishmen: Consequently, the practise of slave-keeping which so much abounds in this land is illicit.” (I have left all sources in their original spelling.)

The demand for amendability came from ordinary Americans who insisted that their constitutions be revisable, “to rectify the errors that will creep in through lapse of time or alteration of situation,” as one Massachusetts town meeting put it. When Massachusetts sent a constitution to voters for ratification in

1778, they rejected it by a margin of almost five to one, mainly because, as one town complained, “We don’t find any sufficient provision for any alteration or amendment of this Constitution,” except by the legislature itself, “whereas, it appears to us, at least, of the highest importance, that a door should be left open for the people to move in this matter,” because without such a door the only way people would be able to change the government would be “commotions, mobs, bloodshed and Civil War.”

Amendment is a constitutional mechanism necessary to avoid insurrection. The U.S. Constitution was itself an act of amendment, written in 1787 because the Articles of Confederation were technically amendable but, for all practical purposes, not. At the constitutional convention in Philadelphia, the Virginia delegate George Mason, pointing out that everyone knew the Constitution that they were drafting was imperfect, argued that “amendments therefore will be necessary, and it will be better to provide for them in an easy, regular and constitutional way than to trust to chance and violence.”

But Americans ought to think more expansively about the history of those amendments. In April 1788, Hugh Henry Brackenridge, who had served in Pennsylvania’s ratifying convention and would go on to serve on the state’s Supreme Court, mocked the Constitution’s critics, who refused to ratify it

without the promise of amendments. The Constitution lacked a bill of rights, they pointed out. So what? Brackenridge asked. It also didn't specify that the president of the United States "shall be of the male gender," but did that really need spelling out? "What shall we think if, in progress of time, we should come to have an old woman at the head of our affairs? What security have we that he shall be a white man? What would be the national disgrace if ... a vile Negro should come to rule over us?" These possibilities were, to Brackenridge, absurd. Amendments to clarify these points were as unnecessary as a bill of rights. The original meaning of the Constitution was plain, Brackenridge insisted. That's what originalists think, too.

The rejected Supreme Court nominee Robert Bork once explained how originalists think about the Constitution and the historical record. "If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest," Bork wrote. Seemingly more irrelevant are constitutional opinions that might have been expressed, for instance, in a letter from Martha to George, or in any evidence left behind by any of the more than 300 people held in human bondage at the Washingtons' plantation in Virginia. But Americans are

descended from all of those people, and if the courts are going to claim to be ruled by history, the justices ought to consult a broader and more democratic historical record.

Last year, in *New York State Rifle and Pistol Association v. Bruen*, the court struck down a 110-year-old firearms law by arguing that the government has an obligation to justify any such regulation “by demonstrating that it is consistent with this nation’s historical tradition of firearm regulation.” But given that for more than half of the nation’s history women and Black people, Native people and many immigrants could not vote, should the court not look further than legislation for a “historical tradition” of views about guns?

Just how far afield the court ought to look is something reasonable people can debate. But consider: Days before the constitutional convention, Jane Franklin Mecom wrote to her brother Benjamin Franklin, begging the “wise men as you are conected with in the convention” to consider ways to usher in an era of civil peace through disarmament: “I had rather hear of the sword being beat into plow-shares,” she wrote, “if by that means we may be brought to live peaceably with won a nother.” For originalists, this letter has no constitutional meaning. But what if it did? Mecom’s biblical plea for nonviolence, for beating

swords into plowshares, can be read as the constitutional preference of a constituency — women — unrepresented at the convention. Should it bear on Bruen?

In 1788, after Connecticut voted to ratify the Constitution, a group of Black men in New Haven submitted a petition to the state legislature but addressed to “all mankind.” They asserted their rights; asked the government to “grant us a liberration”; and criticized “eni law” — any law or constitution — that sanctions slavery, asking, “Is this to be rite and justes?” Their answer: “No it murder.” For originalists, this petition has no constitutional meaning. But isn’t this, too, a kind of proposed amendment? How would incorporating it into an originalist canon alter American jurisprudence?

If only the Supreme Court can change the Constitution, it needs a fuller archive. This Fourth of July, the Amendments Project, a research collaborative I’ve directed for the last three years, is publishing a vast new trove of past proposals, a free and fully searchable archive of every notable documented attempt to amend the U.S. Constitution. It includes at least 11,000 proposals introduced on the floor of Congress between 1789 and 2022, tagged with topics devised by the Comparative Constitutions Project; about 9,000 petitions submitted to Congress between 1789 and 1949, from the Congressional Petitions Database; and

many, many more proposals made outside of Congress, by everyone from political parties to activist organizations and people posting petitions on Change.org.

What this archive reveals is extraordinary, especially for what it suggests about amendments proposed by disenfranchised or poorly enfranchised people. In 1840, inhabitants of Clinton, N.Y., submitted a petition “praying that the Constitution may be so altered as that none other than free persons shall be counted in fixing the rates of representation in Congress.” In 1862, citizens from Ohio petitioned Congress “to amend the Constitution so that it will not sustain slavery.” Beginning in the 1880s, Jim Crow terrorism rendered much of the 14th and 15th Amendments ineffective, but Black Americans still exercised their right to petition: In 1902, an AME church in Cleveland submitted a petition asking Congress to enforce the 14th Amendment by “cutting down the congressional representation of states disfranchising its citizens.”

This archive of failed amendments is full of fascinating snapshots, like the time in 1876 that the Republican Party platform forbade the use of public funds for private schools: “The public school system of the several states is the bulwark of the American republic; and, with a view to its security and permanence, we recommend an amendment to the Constitution of the United States, forbidding the application of any public

funds or property for the benefit of any school or institution under sectarian control.” Or the time in 1911 when the Socialist Party wanted to abolish the Senate, or the time in 1912 when the Progressive Party wanted to amend the amendment provision, “believing that a free people should have the power from time to time to amend their fundamental law so as to adapt it progressively to the changing needs of the people.” Or how public opinion polls showed that as many as three fourths of Americans favored the Child Labor Amendment, which was sent to the states in 1924 but never ratified. Or the time in 1980 that Jimmy Carter, running against Ronald Reagan, said, “Six presidents before me, and counting me, have all been for the Equal Rights Amendment.” Or when Reagan, in 1986, said: “We need a constitutional amendment that says what Thomas Jefferson asked for clear back at the beginning of the Constitution then let us have an amendment that says the federal government cannot borrow.”

Supreme Court term limits, presidential pardon power, congressional apportionment, parental rights, abortion rights, fetal rights, the debt ceiling. It’s all in there.

No one has ever taken stock of this history of failed amendments, an America that never was but was wanted by some, and sometimes by very many, or even most. Americans won’t be able to agree anytime soon on how to amend the U.S.

Constitution and will instead face the ongoing risk of “commotions, mobs, bloodshed and Civil War.” Amending is what makes the Constitution everyone’s. But until the Constitution can once again be amended, only the court can change it. And if that bench insists, perversely, illogically and in defiance of the very idea of constitutionalism that all change must be rooted in the past, its justices have got a whole lot of reading to do, into a richer, wider, better history.

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A version of this article appears in print on , Section SR, Page 6 of the New York edition with the headline: How to Stave Off Constitutional Extinction