

**AFFIRMING (NOT REWRITING) THE CONSTITUTION:  
HIGHER LAWMAKING AS A KIND OF CIVIC  
EDUCATION**

SONU BEDI\*

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It is clear that we live in deeply partisan and dysfunctional times. Pew Research Center shows that in the last 20 years political parties are more divided than ever.<sup>1</sup> Congressional approval is at a seemingly all-time low. According to a September 2014 Gallup Poll, only 14 percent of the American public expressed approval of what Congress is doing.<sup>2</sup> A recent symposium at Boston University discussed the current crisis as “America’s Political Dysfunction.”<sup>3</sup> The usual scholarly response is that it is time to change, rewrite, or even replace the Constitution.<sup>4</sup> For instance, Sanford Levinson argues that we must amend what he calls the “Constitution of Settlement,” those structural provisions that govern voting, representation, and separation of powers.<sup>5</sup>

This Essay begins from the opposite perspective. Rather than focusing on changing or rewriting the Constitution, perhaps it is time to focus on affirming it. In doing so, I suggest one way we can use Article

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\* Associate Professor, Department of Government, Dartmouth College. I thank Howard Schweber for the kind invitation to present at the conference. I also thank the conference participants for their invaluable comments on an earlier draft.

1. *Political Polarization in the American Public*, PEW RES. CENTER (June 2014), available at <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf>.

2. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx#1> (last visited Jan. 19, 2015).

3. Editors’ Forward, *America’s Political Dysfunction: Constitutional Connections, Causes, and Cures*, 94 B.U. L. REV. 575, 575–76 (2014).

4. See, e.g., RICHARD LABUNSKI, *THE SECOND CONSTITUTIONAL CONVENTION: HOW THE AMERICAN PEOPLE CAN TAKE BACK THEIR GOVERNMENT* (2000); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED: IDEAS TO INSPIRE A NEW GENERATION* (2008); JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014).

5. Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1136–40 (2014).

V to do just that, proposing a possible 28th Amendment to the United States Constitution.

Richard Albert has recently argued that Article V has fallen into “constitutional desuetude” precisely because of its neglect.<sup>6</sup> Last used in 1992,<sup>7</sup> Article V is effectively dead as a mechanism for constitutional change. Scholarly work now sees such higher lawmaking as occurring outside of Article V. Whether these are constitutional moments, developments, durable shifts, or constructions,<sup>8</sup> there seems to be an almost universal consensus that we no longer need Article V in order to alter the constitutional landscape. After all, Article V’s super majority requirements<sup>9</sup> coupled with our current political climate make formal change hopeless. Article V as a mechanism for higher lawmaking seems destined as just an intellectual or conceptual exercise for academics.

This Essay seeks to reinvigorate the relevancy of Article V. It does so by realizing that if our emphasis is on constitutional rewriting or change, Article V is indeed a dead end. Proposals to rewrite the Constitution that include abolishing the Electoral College, setting terms limits for Congress, abolishing life tenure for Supreme Court justices, creating a mechanism for national referenda, instituting campaign finance limitations, and the like seek, in part, to enliven constitutional participatory democracy. They seek to engage “We the People.”

Although this emphasis on changing or rewriting the Constitution is noteworthy, perhaps we do better to turn our attention to affirming the document by considering Article V’s higher lawmaking procedures as a type of civic lesson or education. By “civic education,” I mean cultivating and informing a citizen’s ability, will, and interest in participating in American democracy. This Essay defends a proposal for a 28th Amendment that reads: “This Amendment affirms the Constitution of the United States.” I argue that this proposal provides an opportunity for civic education by allowing citizens to learn from constitutionally doing and emphasizes constitutional affirmation over change.

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6. Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029 (2014).

7. *Id.* at 1032–33.

8. See, e.g., BRUCE ACKERMAN, WE THE PEOPLE 266–94 (1991); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); ELVIN T. LIM, THE LOVER’S QUARREL: THE TWO FOUNDINGS AND AMERICAN POLITICAL DEVELOPMENT (2014); KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

9. U.S. CONST. art. V.

## I. LEARNING BY CONSTITUTIONALLY DOING

My proposal provides a kind of curriculum or formal education in the Constitution in the context of an actual Article V proposal. This is experiential learning at the higher lawmaking level. Americans will come to know the formal procedures of amendment. And because the proposal references the Constitution itself, it explicitly invites Americans to read the Constitution—probably for the first time. It has been almost a generation since we last amended the Constitution.<sup>10</sup> And even then, the 27th Amendment was proposed in 1789, lingering in limbo until ratified by the requisite number of states.<sup>11</sup> That amendment ensured that representatives could not increase their pay before an election.<sup>12</sup> The last time we amended the Constitution with a timely proposal was in 1971, ensuring the franchise for those 18 years or older.<sup>13</sup> Living Americans have simply not engaged each other on a constitutional level.

Alexis de Tocqueville famously suggested that American democracy began in “townships,” in local democratic experiments of self-government.<sup>14</sup> John Stuart Mill’s *Considerations on Representative Government* provides a classic argument for the relationship between democratic participation and civic education.<sup>15</sup> Contemporary scholars draw from this line of reasoning to posit the need for social capital, voluntary association, and greater jury participation.<sup>16</sup> The proposed 28th Amendment informs this relationship by drawing on higher lawmaking to do the educative work. Americans have numerous opportunities to vote (in federal, state, and local elections), participate on juries, and join voluntary associations and club. These are undoubtedly important activities that inform our civic engagement.

But we have not had an opportunity in quite some time to engage as a constitutional body. In proposing this as a possible 28th Amendment, Congress should specify that ratification be done by state convention.

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10. See U.S. CONST. amend. XXVII (ratified in 1992).

11. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 678 (1993).

12. U.S. CONST. amend. XXVII.

13. *Id.* amend. XXVI.

14. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 56–93 (Harvey C. Mansfield & Delba Winthrop eds., trans., Univ. of Chi. Press 2000) (1835).

15. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (Curran V. Shields ed., Bobbs-Merrill Educ. Publ'g 1958) (1861); see also DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT (1976).

16. See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 233–42 (2005) (discussing jury participation); EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997) (discussing liberal democracy and autonomy); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

Although the Constitution speaks of such conventions, we have deployed them only twice in American history: in approving the Constitution itself in 1789 and in ratifying the 21st Amendment that repealed Prohibition in 1933.<sup>17</sup> States would probably use the same convention procedures to ratify a possible 28th Amendment as they did for the 21st.<sup>18</sup> In 1933, most of the states put together a slate of candidates (those against and those for repeal) and had individuals vote for a particular candidate.<sup>19</sup> In effect, this served as a statewide referendum on the repeal of Prohibition.<sup>20</sup> A few states sought to make the convention more deliberative by not specifying a slate for or against.<sup>21</sup> The point is that the very act of setting up these conventions is a kind of constitutional education, as most living Americans do not even know that the Constitution explicitly contemplates the existence of these legal bodies. This kind of “doing” is a constitutional act, a formal exercise of “We the People.” Even if such a proposal is summarily approved by convention (the repeal of Prohibition was ratified in less than a year after being proposed),<sup>22</sup> the very act of successfully doing so is significant.

## II. CONSTITUTIONAL AFFIRMATION, NOT CHANGE

This proposal is one that does not seek to alter the document. We can define an “amendment” to the Constitution as one that “represents a genuine change not immanent within the preexisting materials or allowable simply by the use of the powers granted (or tolerated) by the Constitution . . . being relatively marginal.”<sup>23</sup> A revision, in turn, is a “genuine change” that is of even greater dimension.<sup>24</sup> According to this definition, the proposed 28th Amendment is not a genuine amendment. Unlike other Amendments, it does not presumptively seek to alter, change, subtract, or add to the Constitution. It merely seeks to affirm the

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17. DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 3, 140 (1979).

18. *See id.* at 160–82; *see also* RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS (1938).

19. *See* KYVIG, *supra* note 17, at 174, 178.

20. *See id.* at 174–75.

21. *Id.* at 174.

22. *Id.* at 3.

23. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended: (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 21 (Sanford Levinson ed., 1995).

24. *Id.*

document. The proposed Amendment is better characterized as an “explicit textual addition[.]”<sup>25</sup> adding only words to the document.

This focus on constitutional affirmation rather than change provides a way to avoid the problem of political will, which dooms proposals that would be seen as substantively changing the document. On one hand, constitutional change or rewriting may be necessary in order to mobilize the citizenry. On the other hand, for such change to occur a citizenry mobilized to enact it must already exist. The political will needed to engage in genuine constitutional change seems almost fanciful given our current climate of political partisanship and dysfunction. This makes it nearly impossible to pass an Amendment that would actually alter the document (e.g., abolish the Electoral College or institute campaign finance restrictions). Mark Graber puts it in the following way: “Each proposed solution can be implemented only if the problem [of dysfunction] is either assumed away or largely resolved before the proposed solution is implemented.”<sup>26</sup>

But a textually explicit addition, like the proposed 28th Amendment, avoids the problem of having to “assume away” dysfunction and partisanship. The Amendment is uncontroversial. It is the very kind of seemingly bland and platitudinal proposal that could easily pass Congress and be endorsed by individuals across the ideological spectrum. This makes it a practical proposal, one that could actually occur. Yet, the proposal still benefits from the formality and potency that comes with approving a full-blown Article V Amendment. Even if this is a trivial proposal—in so far as it does not alter the document—it has the power to invoke “We the People.”

This proposed Amendment could itself trigger a deeper debate about constitutionalism. Originalists, for instance, may see the Amendment (if ratified) as affirming the idea that judges ought to interpret the document in light of its original, public meaning. Others, who see the document as articulating some particular moral vision, may see the Amendment (if ratified) as affirming the idea that judges ought to interpret the document in light of a more contemporaneous meaning. But this very debate and ones like it suggest why such a proposal is important from a perspective of constitutional education. All of us, not just academics, ought to engage with these debates over meaning and interpretation. An Article V proposal outlined in this Essay provides a practical (and perhaps only) way for such an education to occur. So even if the proposal were voted down, it would have served its educative function.

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25. *Id.* at 25.

26. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 613 (2014).

The proposed 28th Amendment is unlike other Amendments, precisely because it seeks only to sustain or affirm the document. Its language, one that may very well invite core debates over constitutional interpretation, is not tied to any specific policy goal or agenda. And if it turns out that delegates decline to ratify the proposal, the American people will still have had a choice to vote up or down on the Constitution, something Thomas Jefferson famously believed ought to be done every 19 or so years.<sup>27</sup> The last time such an up or down vote occurred was in 1789 when the Constitution was ratified.<sup>28</sup> Such a proposal may stand to reinvigorate the American republic by self-consciously seeking to affirm our constitutional enterprise. Perhaps it will generate discussion, even inspire subsequent political or constitutional change. After all, if living Americans have experience in using Article V, it provides a blueprint, an education, in how to amend or alter the document. But if the proposal fails, we as Americans fail to affirm the Constitution. This, in turn, may suggest that fundamental change, even rewriting, is in order. In either case, if our ultimate concern is to “jumpstart” a dialogue about constitutional change, something like the proposed 28th Amendment may be the way to do it.

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27. *The Founders' Constitution*, UNIV. CHI. PRESS, <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> (last visited Jan. 19, 2015) (letter from Thomas Jefferson to James Madison dated September 6, 1789).

28. *See* AMAR, *supra* note 16, at 5–10.