

## Article

# Amending the Exceptions Clause

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In March 2007, legislators across the country renewed the long-dormant campaign for an Equal Rights Amendment (ERA),<sup>1</sup> which would create a constitutional guarantee of equal treatment on the basis of gender.<sup>2</sup> If approved by two-thirds of both houses of Congress, and ratified by three-fourths of the states, the ERA (or Women's Equality Amendment, as it is sometimes called)<sup>3</sup> will become the Twenty-eighth Amendment of the United States Constitution.<sup>4</sup> And although the ERA faces long odds,<sup>5</sup> it is representative of a much larger wave of amendment proposals involving such politically and constitu-

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1. Juliet Eilperin, *New Drive Afoot to Pass Equal Rights Amendment*, WASH. POST, Mar. 28, 2007, at A1.

2. The original Equal Rights Amendment was approved by thirty-five states—just short of the thirty-eight it needed for ratification. Jim Abrams, *Uphill Fight Forecast for Equal Rights Amendment*, BOSTON GLOBE, Apr. 4, 2007, at A4. The text of the Amendment reads as follows:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

3. Abrams, *supra* note 2.

4. U.S. CONST. art. V (establishing process for constitutional amendment).

5. See Abrams, *supra* note 2.

tionally controversial issues as school prayer, flag burning, and gay marriage.<sup>6</sup>

Many of these same issues have recently been the target of another form of court-centered constitutional politics: jurisdiction-stripping legislation that keeps certain claims (or claimants) out of federal courts, including in some cases the Supreme Court itself. Rather than requiring courts to pronounce something constitutional, as amendments do, these acts deny federal courts the power to pronounce on the issue at all. The effect, in any case, is often the same, since both prevent the federal courts from declaring unconstitutional acts that they otherwise might have struck down.

Perhaps the most notable recent jurisdiction-stripping legislation targets claims filed by Guantánamo detainees. In the past two years, Congress has passed two major pieces of jurisdiction-stripping legislation: the Graham-Levin Amendment to the Detainee Treatment Act (DTA)<sup>7</sup> and the later and more sweeping Military Commissions Act (MCA).<sup>8</sup> And while Congress's power to keep Guantánamo detainees' claims out of the Supreme Court remains controversial and somewhat unclear,<sup>9</sup>

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6. Alexander K. Hooper, Recent Developments, *Jurisdiction Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511, 513 (2005) ("This surge of court-stripping legislation is the strongest since the early 1980s, when court decisions upholding school busing programs provoked an equally strong congressional reaction."). Of course, this is not the first decade in which scholars have felt besieged by amendment proposals. See, e.g., Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20.

7. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741-43; see also 151 CONG. REC. S12,752-53 (daily ed. Nov. 15, 2005) (statement of Sen. Graham) (presenting the text of the Graham-Levin Amendment).

8. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.). Section 7(a) of the MCA purports to strip federal courts of all jurisdiction over habeas claims brought by aliens detained by the United States government whom the government has determined to be enemy combatants or who are awaiting determination of such status. *Id.* § 7(a), 120 Stat. at 2635-36 (to be codified at 28 U.S.C. § 2241(e)).

9. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006) (denying the government's motion to dismiss), the Supreme Court considered and rejected an argument that the Graham-Levin Amendment stripped it of jurisdiction over Hamdan's then-pending case. Because the Court found that the Graham-Levin Amendment did not apply to pending cases, it did not address the Amendment's constitutionality. *Id.* at 2763-64, 2769 n.15.

In February 2007, a divided panel of the United States Court of Appeals for the District of Columbia held that the MCA denied all federal jurisdiction over pending habeas cases filed by aliens held at Guantánamo. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (2007),

the Guantánamo bills are not the only recent examples of legislation designed to “zone” congressionally disfavored legal claims out of the federal courts.<sup>10</sup> Other proposals, many of which attracted widespread support, would have eliminated diversity jurisdiction,<sup>11</sup> jurisdiction over cases involving school desegregation,<sup>12</sup> abortion,<sup>13</sup> or, as discussed in more detail below, public prayer.<sup>14</sup> Although the exact boundary of Congress’s jurisdiction-stripping power is murky, making it a continuing source of grist for academic mills,<sup>15</sup> it is clear that Congress re-

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*cert. granted*, 127 S. Ct. 3078 (2007). The Supreme Court refused to hear an expedited appeal from the D.C. Circuit’s decision, *Boumediene v. Bush*, 127 S. Ct. 1478 (2007), but Justices Breyer, Souter, and Ginsburg published a dissent from denial of certiorari, *id.* at 1479 (Souter, Ginsburg & Breyer, JJ., dissenting), and Justices Stevens and Kennedy published a joint statement pointedly indicating their willingness to review future claims “[w]ere the Government to take additional steps to prejudice the position of petitioners seeking review in this Court,” *id.* at 1478 (statement of Stevens & Kennedy, JJ.). In June 2007, the Court reversed course and mustered the necessary five votes in *favor* of oral argument. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting certiorari). The case was heard on December 5, 2007. *Supreme Court Revisits Habeas Rights of Guantánamo Enemy Combatant Detainees*, 76 U.S.L.W. 3297 (2007).

10. See Laurence H. Tribe, Commentary, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) (discussing eighteen proposals to reduce the jurisdiction of federal courts).

11. See, e.g., H.R. 9622, 95th Cong. (1978) (abolishing diversity jurisdiction except for alienage and statutory interpleader); S. 2389, 95th Cong. (1978); S. REP. NO. 691, 71st Cong., 2d Sess. (1930). To modern lawyers, the elimination of federal diversity jurisdiction may seem radical, but many eminent scholars and judges have supported the idea over the years. *E.g.*, *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (referring to the “mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction”); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 650–51 (1949) (Frankfurter, J., dissenting).

12. See generally Chip Jones, Comment, *Freeman v. Pitts: Congress Can (and Should?) Limit Federal Court Jurisdiction in School Desegregation Cases*, 47 SMU L. REV. 1889 (1994); Constance W. Watson, Comment, *The Helms-Johnston Amendment: A Congressional Effort to Curb the Jurisdiction of Federal Courts and to Restrict Busing as a Remedy in School Desegregation Cases*, 26 HOW. L.J. 1661 (1983).

13. S. 210, 98th Cong. (1983) (stripping lower federal court jurisdiction over abortion cases). The Ninety-seventh Congress proposed similar bills. See H.R. 3225, 97th Cong. § 4 (1981); S. 158, 97th Cong. § 2 (1981).

14. See *infra* Part II.C.

15. See *infra* Part II.B for a partial review of the rich literature. For more current discussion, see Conference, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 895 (2007).

tains broad power under Article III's Exceptions Clause<sup>16</sup> to keep certain claims out of federal court.<sup>17</sup>

These two forms of constitutional politicking<sup>18</sup>—amendment and jurisdiction stripping—are on a colossal collision course, one that threatens to transform processes of “higher” constitutional- and court-centered politics into tools for everyday legislative battles.<sup>19</sup> Indeed, constitutional amendment and jurisdiction-stripping legislation already have more in common than constitutional and federal courts scholars seem to

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16. U.S. CONST. art. III, § 2, cl. 2 (describing the Supreme Court's appellate jurisdiction “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”).

17. This does not mean, of course, that such claims cannot be heard, only that federal courts cannot hear them. State court judges also swear to uphold federal law and have concurrent jurisdiction to consider federal law claims. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341–44, 346 (1816).

18. *See* Laurence H. Tribe, Comment, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 436 (1983) (referring to amendment as “constitutional politics as opposed to constitutional law”). I do not mean here to invoke the same kind of “higher lawmaking” Bruce Ackerman describes as involving “Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms.” Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) [hereinafter Ackerman, *Discovering the Constitution*] (footnotes omitted); *see also* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*] (discussing “higher lawmaking”); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, *Constitutional Politics*].

19. Writing in 1984, Ackerman noted that, “[t]hough no permanent damage has yet been done, the law of constitutional amendment has increasingly been dominated by short-term considerations of factional advantage rather than a long-run sense of constitutional development.” Ackerman, *Discovering the Constitution*, *supra* note 18, at 1065. The same might easily be said of jurisdiction-stripping proposals. *See* Laura N. Fellow, Note, *Congressional Strip-tease: How the Failures of the 108th Congress's Jurisdiction-Stripping Bills Were Used for Political Success*, 14 WM. & MARY BILL RTS. J. 1121 *passim* (2006) (explaining the political benefits to legislators of supporting such proposals).

To borrow and alter slightly Ackerman's conception of a dualist democracy—which separates “constitutional” from “normal” politics, Ackerman, *Constitutional Politics*, *supra* note 18, at 461–62—this trend suggests that the distinction between the two tiers of politics is collapsing, or at least that means of politics traditionally associated with the former are now becoming common currency for the latter. I say “alter” because Ackerman is not particularly concerned with these characterization-of-process questions. Constitutional politics, in his conception, can and usually do occur without regard to Article V. *See id.* at 509–15 (noting examples of higher lawmaking in ways that supplement the process of Article V).

realize.<sup>20</sup> Both are legislative attempts to undo or avoid court decisions, and both generally find support in a reclaiming-the-Constitution-from-the-courts rhetoric. Even the targeted subject matters are similar: flag burning,<sup>21</sup> gay marriage,<sup>22</sup> and school prayer,<sup>23</sup> for example, have been the subject of both amendment and jurisdiction-stripping proposals in recent years. And despite spotty success records,<sup>24</sup> politicians increasingly utilize both of these procedures to advance substantive political issues, particularly in areas such as school prayer, where courts might otherwise declare politically popular legislation unconstitutional.

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20. One scholar who has devoted sustained attention to both areas is Akhil Amar, whose work has addressed both constitutional amendment, *see, e.g.*, Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*], and federal jurisdiction, *see, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

21. Following the Supreme Court's rulings in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), the Senate came within three votes of approving an amendment that would have criminalized desecration of an American flag. Robin Toner, *Flag-Burning Amendment Fails in Senate, but Margin Narrows*, N.Y. TIMES, Dec. 13, 1995, at A1. Similar amendments have been proposed since, and last year came within a single vote of Senate approval. Carl Hulse, *Flag Amendment Narrowly Fails in Senate Vote*, N.Y. TIMES, June 28, 2006, at A1. Those who believe that an amendment would be "overkill" have suggested that jurisdiction-stripping measures might suffice instead. Ramesh Ponnuru, *One Branch Among Three*, NAT'L REV., July 29, 2002, at 32.

22. In the aftermath of the Massachusetts Supreme Court's ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), multiple amendments defining marriage as existing only between a man and a woman were proposed in both houses of Congress. *See, e.g.*, H.R.J. Res. 106, 108th Cong. (2004); S.J. Res. 40, 108th Cong. (2004); S.J. Res. 30, 108th Cong. (2004). These amendments failed in both the House and Senate, but were quickly followed with the Marriage Protection Act, H.R. 3313, 108th Cong. (2004), which would have severely curtailed federal jurisdiction. For a helpful chronology of events, see Fellow, *supra* note 19, at 1154–56.

23. Amendments protecting school prayer have been proposed many times, though few have gained much currency. *See, e.g.*, H.R.J. Res. 11, 110th Cong. (2007). Jurisdiction-stripping proposals have been proposed just as frequently. *See infra* notes 170–78 and accompanying text.

24. More than 10,000 amendment proposals have been brought before Congress. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112 (1993). Jurisdiction-stripping legislation has fared little better. Fellow, *supra* note 19, at 1123 (noting the "eternal failure" of such bills).

Constitutional amendment and jurisdiction stripping, however, operate under something of an uneasy truce. The proposed ERA provides a brief but illustrative hypothetical of how the two processes interact, rather than simply proceeding on parallel tracks. If proposed and ratified, the ERA would subject gender discrimination to strict scrutiny, the same “strict in theory and fatal in fact”<sup>25</sup> level of review that federal and state courts commonly apply to invalidate racially discriminatory acts under the Equal Protection Clause.<sup>26</sup> But like all constitutional-rights guarantees, the ERA would rely heavily on the federal courts to give it meaning and enforce its protections. What if a future Congress, unhappy with the ERA but unable to muster the votes necessary to re-amend the Constitution and excise it,<sup>27</sup> were instead to pass a law stripping federal courts of jurisdiction over ERA claims?<sup>28</sup> Petitioners bringing ERA challenges would not be zoned out of court entirely, since state courts would remain responsible for enforcing the amendment.

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25. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

26. U.S. CONST. amend. XIV, § 1; see, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (striking down a race-based medical school admissions program); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”).

27. Only once has the U.S. Constitution been explicitly amended to remove another amendment. See U.S. CONST. amend. XXI, § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”); see also *id.* amend. XVIII (prohibiting the “manufacture, sale, or transportation of intoxicating liquors” within the United States and its jurisdiction); Richard F. Hamm, *Short Euphorias Followed by Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-first Amendments*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 164, 182 (David E. Kyvig ed., 2000).

28. See Christopher T. Handman, Note, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress’s Exceptions Clause Power*, 106 YALE L.J. 197, 199 (1996) (noting that jurisdiction stripping may be a second-best alternative for legislators who are unable to muster support for a revising amendment).

A 2004 Republican Policy Committee paper endorsed jurisdiction stripping as a better “check” on the judiciary than impeachment or amendment:

The best check available to the people is for their representatives to eliminate the jurisdiction of the federal courts over particular issues. The alternatives are too cumbersome for all but the most fundamental matters. For example, it is very difficult to remove judges from office, and the constitutional amendment process is inadequate to address all ill-advised judicial pronouncements.

U.S. Senate Republican Policy Comm., *The Case for Jurisdiction-Stripping Legislation: Restoring Popular Control of the Constitution* 4 (Sept. 28, 2004), available at [http://rpc.senate.gov/\\_files/Sept2804CourtStrippingSD.pdf](http://rpc.senate.gov/_files/Sept2804CourtStrippingSD.pdf).

But like the Guantánamo detainees, ERA claimants would find themselves facing sharply limited forum choices and potentially hostile judges.<sup>29</sup> A jurisdiction-stripping bill could thus effectively re-amend the post-ERA Constitution, at least in part.

But can Congress really use the Exceptions Clause to effectively re-amend the Constitution by stripping federal jurisdiction over amendment-based claims?<sup>30</sup> This Article argues that it cannot, at least not always. In fact, Congress's power to strip federal jurisdiction over constitutional claims is more limited than commonly supposed because the Exceptions Clause can be—and may already have been—limited through subsequent amendment. Some version of this argument has already won widespread support in the academy. Ever since Lawrence Sager's 1981 *Harvard Law Review* Foreword,<sup>31</sup> federal courts scholars have increasingly embraced the idea that the rest of the Constitution places “external constraints” on the Exceptions Clause. Under this theory, Congress cannot strip federal jurisdiction in ways that would violate certain amendments, or per-

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29. Many jurisdiction-stripping proposals are premised on the belief that state courts will find a way around Supreme Court precedent, or else will simply ignore it, knowing that their decisions cannot be overturned by the Court. *See, e.g.*, Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 505 (1983); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 926 (1982); Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 197 (1981); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68 (1981).

Indeed, it seems almost inevitable that some state courts would ignore federal mandates in hotly contested areas of law, such as those typically targeted by current amendment and jurisdiction-stripping proposals. Public prayer—the target of both constitutional amendments and a jurisdiction-stripping proposal considered in Part II.C—is only the most prominent example. *See also* Todd Kleffman, *Moore Won't Move Display*, MONTGOMERY ADVERTISER (Ala.), Aug. 15, 2003, at A1, available at <http://www.montgomeryadvertiser.com/specialreports/TENcommandments/StoryAlabamamoore15w.htm> (reporting Alabama Supreme Court Justice Moore's defiance of a federal court order to remove a monument of the Ten Commandments).

30. The Supreme Court has been wary of congressional attempts to “amend” the Constitution outside of Article V. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (overturning the Religious Freedom Restoration Act, and stating that upholding the Act would mean that “[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V”).

31. Sager, *supra* note 29.

haps even provisions of the original Constitution.<sup>32</sup> How exactly these external constraints function, and to what degree they limit legislative power, largely remain open and difficult questions.

But there is another predicate question that external constraints theorists must answer: how do constitutional amendments revise preexisting constitutional provisions like the Exceptions Clause, and why should we read amendments as imposing constraints on the clear language of the Clause when not a single amendment—nor any other provision in the Constitution—even mentions it? This Article attempts to answer those questions by advancing a thicker understanding of the amendment process and a more nuanced understanding of the Exceptions Clause itself. If successful, this effort should partially relieve two of legal academia's central obsessions—defining the impact of constitutional amendments and establishing limits on Congress's power to strip federal jurisdiction—by showing how the two shed light on one another.

Part I of the Article begins that project by elaborating the implicit but undertheorized point that constitutional amendments can, and usually do, trump provisions of the original constitutional text, even though they rarely identify the specific sections of the Constitution that they alter. The argument in this Part draws on evidence from the text and structure of the Constitution and from current constitutional theory. But while many scholars have addressed the foundational problems relating to how constitutional amendments come about<sup>33</sup> or what specific amendments say,<sup>34</sup> few have explored the *relationship*

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32. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984) (arguing that congressional power over federal jurisdiction is subject to limitations “inferable from other provisions of the Constitution”).

33. The depth of the literature makes even a cursory sampling nearly impossible. For some of the most recent and provocative thinking on the subject of the process of constitutional amendment, see Ackerman, *Discovering the Constitution*, *supra* note 18, at 1051–57; Amar, *Philadelphia Revisited*, *supra* note 20; Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387 (1983); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993).

Discussion of the “convention method” of constitutional amendment—which I will discuss in even less detail, because it has never been successfully pursued—has spawned an almost embarrassing richness of scholarship. See *infra* note 52.

34. Space constraints prevent even a partial listing of the scholarship addressing the content of particular amendments. Suffice it to say, entire aca-



between constitutional amendments and specific provisions of the Constitution's original text. Part I concludes by drawing on existing theory to suggest how courts and scholars can better understand this relationship.

Part II of the Article applies Part I's theory to the legendarily intractable problem of the "limited" Exceptions Clause. Theories of the Clause's limits tend to fall into two major categories. The first explains the Clause's limitations by pointing to "internal" constraints that are inherent to Article III and the "essential functions" of the judiciary in our constitutional system. The second includes "external" constraints imposed on the Clause by the rest of the Constitution, particularly the amendments. Although external constraints theories have gained increasing currency,<sup>35</sup> they remain hampered by a relatively thin understanding of exactly how those constraints interact with the Exceptions Clause itself. The amendment theory described in Part I, which concludes that amendments implicitly alter rather than add to the Constitution, provides a new justification for the external constraints theory. In doing so, it places the external constraints theory on stronger footing by giving textual, logical, and historical support to the argument that constitutional provisions—including the Exceptions Clause—can be implicitly amended.<sup>36</sup>

#### I. THE IMPACT OF CONSTITUTIONAL AMENDMENTS

This Part provides the basis for a more robust external constraints theory by analyzing the impact of constitutional amendments on the original Constitution. Drawing from the text and history of the Constitution, as well as from constitutional scholarship, it revisits the interpretive relationship between the amendments and the provisions of the original document. The discussion here demonstrates that the amendments' placement at the end of the Constitution—an undertheorized but important part of the constitutional story—

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demic careers (not to mention thousands of reported federal decisions) have been spent unpacking the meaning of a handful of words from the First and Fourteenth Amendments.

35. See, e.g., Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1379–81 (2007) (arguing that jurisdiction-stripping proposals should be governed by the Fourteenth Amendment's guarantee of equality).

36. See Tribe, *supra* note 18, at 445 ("In short, remembering that it is an *amendment* to the Constitution we are considering may be almost as important as remembering that it is a *Constitution* we are, in the end, amending.").

makes their impact on certain constitutional provisions harder to identify, though no less important.

A. AMENDMENTS ARE NOT ADDITIONS: PUTTING THE “AMEND” INTO CONSTITUTIONAL AMENDMENT

Constitutional amendments can, and generally do, change provisions of the original Constitution without ever specifically identifying which part of its text they mean to change. Establishing the impact of an amendment thus requires an interpretive synthesis between the amendment and the document it amends, in order to determine what has and has not been changed.

This of course does not mean that amendments automatically and unavoidably “trump” the language of the original Constitution.<sup>37</sup> Alex Kozinski and Eugene Volokh have rightly pointed out that a presumption that later-in-time amendments radically change the meaning of all prior provisions could lead to absurd results.<sup>38</sup> But while amendments may not always change *everything* that comes before them,<sup>39</sup> they are—by virtue of their placement, timing, and intended impact—necessarily on different footing from the rest of the Constitution. They were passed to alter or add something—to “amend” or improve the original document. Sometimes it is clear what defect or omission an amendment means to correct, even when the amendment does not specifically identify its target. For ex-

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37. Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 157 n.180 (1992) (arguing that neither of two different-in-time amendments “trumps” the other; rather they must be synthesized into a coherent doctrinal whole”).

38. Alex Kozinski & Eugene Volokh, Commentary, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1650 (1993) (“[W]hile the chronology might mean the Thirteenth Amendment *could* alter the First, this doesn’t mean it *does* alter it. The notion that every constitutional amendment is a partial repeal of every previously-enacted constitutional provision has hair-raising implications. Does the Sixteenth Amendment, which grants Congress the power to ‘lay and collect taxes on incomes, from whatever source derived,’ authorize a tax levied only on income derived from sale of antigovernment literature, or a tax only on blacks? Does it allow collection techniques that violate the Fourth Amendment? Does the Fourteenth Amendment’s Enforcement Clause authorize ex post facto laws, or the suspension of habeas corpus?” (footnotes omitted)).

39. See *Granholt v. Heald*, 544 U.S. 460, 484 (2005) (expressing the “framers’ clear intention of constitutionalizing the Commerce Clause”); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (finding that “the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause” and that “the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful”).

ample, the Seventeenth Amendment nowhere mentions Article I, yet it clearly amends Section 3 of Article I by providing for direct election of senators rather than their election or appointment by a state legislature.<sup>40</sup> Usually, however, amendments do not make it so clear what part of the original Constitution they address, and it is up to interpreters of the Constitution to divine their impact. For example, the Supreme Court has implied that Congress's power to grant copyright protections—a power specifically listed in Article I<sup>41</sup>—may be limited by the First Amendment,<sup>42</sup> despite the fact that nothing in the First Amendment specifically declares its intention to change the Copyright Clause.<sup>43</sup> Nor have constitutional scholars seen any reason to busy themselves demonstrating that the drafters of the First Amendment had the Copyright Clause or any other specific provision of the original Constitution in mind when they proposed the Amendment.<sup>44</sup> It is simply understood that the First Amendment limits the enumerated powers that Article I gives to Congress.<sup>45</sup> The example may

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40. Compare U.S. CONST. amend. XVII (providing that senators shall “be elected by the people” of each state), *with id.* art. I, § 3 (stating that the Senate was to be “chosen by the Legislature” of each state).

41. *Id.* art. I, § 8, cl. 8 (giving Congress power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

42. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (suggesting that copyright statutes may raise First Amendment problems if they lack “built-in free speech safeguards”).

43. Cf. U.S. CONST. amend. I (failing to refer to the Copyright Clause).

44. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 907 (1996) (“‘Congress’ in the First Amendment is taken, without controversy, to mean the entire federal government, even though elsewhere ‘Congress’ certainly does not include the courts or the President.”).

Those who are already familiar with the jurisdiction-stripping literature, which I discuss below in Part II.B, may note that these arguments have much in common with the “external constraints” approach. See *infra* notes 191–212 and accompanying text.

45. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961) (“[C]ongressional power in this sphere, as in all spheres, is limited by the First Amendment.”); *Trop v. Dulles*, 356 U.S. 86, 106 n.2 (1958) (Brennan, J., concurring) (noting that the First Amendment “of course would have the effect in appropriate cases of limiting congressional power otherwise possessed”); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935) (“The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.”).

Adrian Vermeule and Ernest Young argue that “there is little reason to think that the Fourteenth Amendment’s framers and ratifiers had any special insight into the Fifth Amendment’s original meaning. It is an empirical question whether the framers of later provisions are skilled interpreters of the

seem simplistic, but it illustrates the generally unexamined proposition that constitutional amendments often trump “original” constitutional text even when they do not specifically refer to the text they alter.<sup>46</sup> As the Supreme Court has recognized, “the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”<sup>47</sup>

Understanding that amendments often have an unstated impact does not, of course, commit courts and scholars to any particular understanding of an individual amendment’s content or reach. An amendment might broadly alter the text of the original Constitution, or it might do so narrowly, or it might in some limited cases be more of an addition than a true amendment.<sup>48</sup> In the First Amendment context, for example, one does not have to agree with Justice Hugo Black’s famously absolutist reading<sup>49</sup> to believe that whatever limits the First Amend-

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original meaning of earlier provisions . . . .” Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 765 (2000). Kurt Lash’s recent historical analysis of the Ninth Amendment, by contrast, suggests that the drafters of later-in-time amendments did consider (and alter) the content of prior amendments. Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. (forthcoming 2008) (manuscript at 6–7, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=953008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953008)) (arguing that the Ninth Amendment’s reference to “‘certain rights’ enumerated in the Constitution” includes, at a minimum, “the rights ‘numbered’ or listed in the first eight amendments to the Constitution”); *see also id.* (manuscript at 23) (“Also, even if the Ninth was originally understood as a guardian of local autonomy, later amendments substantially altered the original federalist structure of the Ninth Amendment.”).

46. The same is true of the relationship between different-in-time amendments. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (“[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” (citation omitted)).

47. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (striking down Ohio election laws on equal protection grounds).

48. *See infra* Part I.C.

49. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. . . . Neither as offered nor as adopted is the language of this amendment anything less than absolute.”). The Supreme Court has rejected Justice Black’s absolutist position in a variety of cases, *see, e.g.*, *Konigsberg v. State Bar*, 366 U.S. 36, 44 (1961), and various scholars have debated the merits of his approach as opposed to a “balancing” or “categorization” test. *See, e.g.*, John H. Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV.

ment imposes, it imposes on Congress. Similarly, whether the First Amendment covers obscene speech is an entirely separate question from whether that coverage limits congressional power under Article I.<sup>50</sup> Nor does the potential of amendments to change what comes before them mean that there is *no* limit on what an amendment can achieve.<sup>51</sup> Just as a self-described amendment can occasionally be nothing more than an addition—an issue explored in greater detail in Part I.C—it is possible that a particularly radical amendment (whether passed by the convention method<sup>52</sup> or the legislative proposal method)

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1482 (1975); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912–16 (1963) (discussing “ad hoc balancing” and “absolute” tests); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440–45 (1962) (analyzing seven objections to the balancing approach).

50. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270, 276 (1981) (differentiating between cases “covered” by the First Amendment and those cases “protected” thereunder, with the former referring to whether a certain speech act receives constitutional protection at all and the latter referring to the level of protection it receives).

51. See Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754–57 (1980); Walter F. Murphy, Slaughter-House, Civil Rights, and Limits on Constitutional Change, 32 AM. J. JURIS. 1, 22 (1987); Walter F. Murphy, *The Right to Privacy and Legitimate Constitutional Change*, in THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 213, 227 (Shlomo Slonim ed., 1990); cf. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 118 (1893) (“Now an amendment . . . must be in harmony with the thing amended . . . . It must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it.”); John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 191, 213 (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION] (arguing that the Constitution’s implicit limits on Article V “wisely protect[] liberty by guarding against the transient whims of the majority”). Donald Lutz has also considered the possibility of amendment as “periodic replacement of the entire document.” Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION, *supra*, at 237, 237.

52. For highlights of the debate regarding the constitutional convention method, see generally Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972) [hereinafter Black, *A Letter to a Congressman*]; Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963) [hereinafter Black, *The Proposed Amendment of Article V*]; Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623 (1979); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979); and William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295. For a discussion of the constitutional convention method, see

might better be classified as a constitutional revision,<sup>53</sup> or the creation of an entirely new constitution.<sup>54</sup>

Even this brief explanation of the impact of amendments would be superfluous if amendments specifically identified the constitutional text they were meant to alter. Amendments have such potentially variant scope and reach primarily because they do not identify the provisions they alter, as do other legal changes. Statutory amendments, for example, tend to clearly identify, strike out and replace particular provisions.<sup>55</sup> Contracts and other “practical” legal documents also generally make amendments and changes to the text itself.<sup>56</sup> It is indeed difficult to imagine it any other way. But whether through historical accident or constitutional design,<sup>57</sup> amendments to the U.S. Constitution are not interwoven with the text, but rather appended to the end, leaving it to later generations to determine what the drafters of the amendments intended to amend.

Naturally, the need to identify amendments’ impact on the preexisting Constitution increases the demands on constitutional interpretation. Judges considering an amendment-based case must not only determine what the amendment enables or prohibits (What does it mean to pass no law “respecting an Es-

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Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 628–30 (1979).

53. Sanford Levinson notes that some state constitutions differentiate between “amendment” and “revision” and prescribe different procedures for the two. 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, *supra* note 51, at 13, 19 (citing Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1118 (1993)).

54. See Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION, *supra* note 51, at 163, 176–77 (distinguishing between amending, revising, and transforming a constitution).

55. Interestingly, “amendments” to bills do not serve a strike-out function, at least not always. They are often attached as “riders” that do not “amend,” nor necessarily even relate to, the subject matter of the bill itself. See *Commonwealth v. Burnett*, 48 A. 976, 977 (Pa. 1901) (describing a rider as a “new and unrelated enactment or provision”); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 842–43 (2006) (explaining the process by which committee members attach riders).

56. Cf. *House v. McMullen*, 100 P. 344, 345 (Cal. Ct. App. 1909) (“The particulars wherein it was sought to revise the written agreement are, as stated by respondent: ‘First, to substitute the word ‘exchange’ for the word ‘sell’; second, to insert a more particular description of the real property which is the subject matter of the contract; third, to strike out a certain term in the contract; and, fourth, to insert a certain other term in the contract.’”).

57. See *infra* Part II.B.

tablishment of Religion”?) but also what part of the Constitution the amendment addresses (Who is not allowed to pass such laws?). This is akin to determining what presumed defect the amendment corrects. Drafters of the First Amendment, for example, probably targeted Article I, Sections 8 and 9 (the sections listing grants and limits on congressional power)<sup>58</sup> which, it turns out, is where Madison originally proposed the amendment’s placement.<sup>59</sup> The following Section considers in more detail the decisions the Founders made with regard to placement, and what impact that placement has on the meaning of the amendments.

## B. EVIDENCE FROM THE TEXT AND HISTORY OF THE CONSTITUTION

Textual and historical evidence from the Founding Era both support an understanding of amendments as changes rather than additions to the Constitution. The text of Article V and the preamble to the amendments demonstrate the framers’ belief that, in amending the Constitution, subsequent generations would essentially be re-creating the document. Further illustrating the framers’ belief in the power of the amendments, some expressed concern that placing the amendments at the end would render their impact uncertain, and thus possibly more sweeping.

### 1. The Constitution’s Text

While the Constitution provides for its own amendment, it says nothing explicit about how amendments interact with its provisions. But a close reading of the Constitution’s text supports the theory laid out in the previous Section—amendments do not simply add to the Constitution, but actually *change* what came before them, despite the fact that few amendments actually identify the text they mean to alter.

The natural place to begin—and, for some, the place to end<sup>60</sup>—is with the text of Article V. By providing for peaceful,

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58. See U.S. CONST. art. I, §§ 8–9.

59. See *infra* notes 100–10 and accompanying text for a retelling of the framers’ brief discussion about whether the amendments should be interwoven with the Constitution’s text or appended to the end.

60. For arguments that Article V is the only way in which the Constitution may be amended, see generally David R. Dow, *The Plain Meaning of Article V*, in *RESPONDING TO IMPERFECTION*, *supra* note 51, at 117; David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) [hereinafter Dow, *The Case of Article V*]; and John R.

democratic alteration of the Constitution, Article V effectively codifies the constitutional revolution that produced the Constitution in the first place. Although his own theory of constitutional amendment emphatically disclaims reliance on Article V, Bruce Ackerman has proclaimed that

Article V is *the* most fundamental text of our Constitution, since it seeks to tell us the conditions under which all other constitutional texts and principles may be legitimately transformed. Rather than treating it as a part of the Constitution's code of good housekeeping, we should accord the text of Article V the kind of elaborate reflection we presently devote to the First and Fourteenth Amendments.<sup>61</sup>

Article V reads in full:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, 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.<sup>62</sup>

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Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanics*, 21 CUMB. L. REV. 271 (1991).

For arguments to the contrary, see Ackerman, *Constitutional Politics*, *supra* note 18; Ackerman, *Discovering the Constitution*, *supra* note 18; Amar, *Philadelphia Revisited*, *supra* note 20; and Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 51, at 89. I limit the discussion here to amendments which have been passed through Article V's enumerated processes. I thus do not consider here the impact, if any, of "amendments" occurring outside the confines of Article V. My initial sense is that the general framework I have advanced should translate without much problem to any kind of amendment, no matter the process by which it was approved.

I also have not addressed the impact on my Exceptions Clause analysis of what many have referred to as "judicial amendments." See, e.g., JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS* 35-55 (1994) (considering Supreme Court decisions and their impact on constitutional change). Again, the analysis would be the same.

61. Ackerman, *Discovering the Constitution*, *supra* note 18, at 1058; see also Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1563 (1998) (reviewing DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995* (1996)) ("The amendment process is thus not peripheral to the constitution, but is its essence.").

62. U.S. CONST. art. V.



By its terms, Article V thus enumerates only two limitations on its own scope<sup>63</sup>—one relating to slavery, and another regarding state representation in the Senate. It also lists only two procedures by which amendments can be proposed and ratified. The first option is a legislative proposal approved by two-thirds of both houses of Congress and then ratified by three-fourths of the states.<sup>64</sup> The alternative is a proposal resulting from a “Convention” convened by Congress “on the Application of the Legislatures of two thirds of the several States,” and whose proposals shall become amendments following approval by three-fourths of the states.<sup>65</sup>

The most striking thing about these two methods is how closely they track the process for ratifying the original Constitution. Considering that amendments effectively change the original Constitution, it is unsurprising that provisions for amendment underwent “significant adjustments” as the ratification procedure evolved.<sup>66</sup> Under either method of constitutional amendment, the approval required—“ratifi[cation] by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”<sup>67</sup>—is essentially identical to the vote requirement for ratification of the Constitution—nine of the thirteen states. This nine-of-thirteen requirement is the nearest possible approximation of three-fourths of the then-existing states to which the Constitution was presented for ratification.<sup>68</sup> And although the convention method of constitutional amendment has never been successfully invoked, it too echoes the conditions under which the Constitution was

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63. See also *infra* notes 290–91 and accompanying text for a discussion of the Civil War-era Corwin Amendment, which would have explicitly amended Article V by further limiting states’ power to abolish slavery.

64. U.S. CONST. art. V.

65. *Id.*

66. David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT, *supra* note 27, at 9, 18.

67. U.S. CONST. art. V.

68. Although nine-thirteenths is actually slightly less than three-fourths, Kyvig notes that the number nine was chosen through a “process of groping toward compromise,” and that Connecticut, New Jersey, Georgia, and Maryland supported a ten-of-thirteen requirement. Kyvig, *supra* note 66, at 21. Incidentally, three-fourths is almost precisely the fraction of the framers who signed the original document in Philadelphia. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 514 (1995) (noting that thirty-nine of the fifty-five delegates—seventy-one percent—signed the convention’s final proposal).

created.<sup>69</sup> By reproducing the requirements for constitutional creation, Article V lends structural, inferential reinforcement to the idea that constitutional amendments have the power to change the original document rather than simply adding to it. In maintaining a high bar for changes to the Constitution, the framers recognized that, by passing constitutional amendments, later generations would essentially engage in a process of constitutional re-creation analogous to their own process of constitutional design.<sup>70</sup>

Of course, one might reasonably object that the similarities between the requirements for the Constitution's creation and the requirements for the amendments' creation simply reflect the fact that amendments are *additions* to the Constitution, not that they change what has come before them. Under this approach, interpreters should read amendments alongside, not on top of, prior constitutional provisions, unless they specifically and clearly identify the text they mean to alter. Another woefully underappreciated part of the Constitution's text—the Preamble to the Amendments—further clarifies this point.

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69. Ackerman, *Discovering the Constitution*, *supra* note 18, at 1059 (“[T]he Article V procedure for calling a ‘Convention’ is obviously modeled upon the process by which the 1787 Convention was called into being.”); *see also* Black, *The Proposed Amendment of Article V*, *supra* note 52, at 963 (suggesting that the Founders were thinking of the Philadelphia Convention when they created the “convention” method of amendment).

70. As George Washington himself would write a few months later, the People (for it is with them to Judge) can as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendments which are necessary . . . . I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us.

Letter from George Washington to Bushrod Washington (Nov. 10, 1878), in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 81, 83 (Michael Kammen ed., 1986).

In *The Federalist No. 85*, however, Hamilton argued that in practical terms amendments would be easier to ratify than the original Constitution:

[E]very amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather 10 states, were united in the desire of a particular amendment, that amendment must infallibly take place. There can therefore be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete constitution.

THE FEDERALIST NO. 85, at 592 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (footnote omitted).

For all the importance that scholars have placed on the words “We the People” in the Preamble to the Constitution,<sup>71</sup> little if any attention has been paid to the words—or even the existence—of the Preamble to the Amendments.<sup>72</sup> But like the Constitution’s Preamble, which many scholars have used to illuminate the meaning of the Constitution, the introduction to the Amendments may cast light on their meaning and their relationship to the rest of the Constitution. In full, the Preamble to the Amendments reads: “Articles in Addition To, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States, Pursuant to the Fifth Article of the Original Constitution.”<sup>73</sup>

Several phrases here are worthy of close examination. First, the word “Articles” echoes the headers separating the seven major sections—“Articles”—in the original Constitution.<sup>74</sup> This suggests that the framers saw amendments as being at least as important as the Articles of the Constitution itself.

The phrases immediately following “Articles” help clarify the relationship of these new “Articles”—the amendments—to the original text: they are “in Addition To, and Amendment of, the Constitution of the United States of America.”<sup>75</sup> The word “and” and the commas setting off the second phrase do a lot of work here. Together they suggest the existence of two kinds of amendments: those that “add” to the Constitution and those that “amend” it.

The next two phrases in the Amendments’ Preamble—“Proposed by Congress, and Ratified by the Legislatures of the Several States”—echo Article V’s ratification requirements, invoking both the congressional proposal and state ratification

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71. See, e.g., ACKERMAN, WE THE PEOPLE, *supra* note 18; see also U.S. CONST. pmb1.

72. A LexisNexis search conducted on March 22, 2008 in the “US Law Reviews and Journals, Combined” database for the phrase “Articles in Addition To, and Amendment of”—the second Preamble’s equivalent of the first’s “We the People”—turns up only thirteen hits, most of them in articles that simply reproduce the Constitution in its entirety. A search for “We the People,” unsurprisingly, results in more hits than LexisNexis is able to report (at least 3000).

73. U.S. CONST. amends. I–X pmb1.

74. See *id.* arts. I–VII.

75. *Id.* amends. I–X pmb1.

procedures.<sup>76</sup> As described above, those procedures in turn mimic the procedures for ratification of the Constitution itself, lending support to the notion that amendments have the power to change the Constitution.<sup>77</sup> Finally, the Preamble's reference to the "Original" Constitution indicates that there is a document *other* than the preamendment Constitution—that the Constitution itself changes and becomes a "new" constitution when it is amended.<sup>78</sup>

Even acknowledging that the Constitution itself changes, several interpretations of an amendment's effect remain possible. One is to simply say that the Constitution becomes longer and more elaborate through the amendment process. This is the "Addition" reading. But another is to say that every time the document is amended, a *new* Constitution emerges, one whose provisions have been altered in light of subsequent amendments which must be synthesized with the original text.<sup>79</sup> This is the "Amendment" reading, and, in analyzing the impact of most amendments, it is the better one, as the following Sections demonstrate.

## 2. Historical Evidence Surrounding Article V and the Amendments

In addition to this textual support for the Amendment reading, at least two kinds of constitutional history support the notion that amendments can and do implicitly change the meaning of the original Constitution: the Founders' (few) statements regarding Article V, and the historical record of the early constitutional amendments.<sup>80</sup>

In a very real sense, the need for amendment is what gave birth to the Constitution.<sup>81</sup> In addition to their notorious sub-

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76. *Id.*; see *id.* art. V.

77. See *supra* notes 66–69.

78. See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1873) (describing the original Constitution and its first twelve amendments as being "historical and of another age" since "three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument").

79. Ackerman describes this as "multigenerational synthesis." Ackerman, *Constitutional Politics*, *supra* note 18, at 517; see also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1793–1809 (2007) [hereinafter Ackerman, *The Living Constitution*] (describing the "Conversation Between Generations").

80. Limitations on space prevent full consideration of all the amendments, but of course the thesis presented here would benefit from such discussion.

81. Some have argued that amendments are necessary for the very legi-

tantive weaknesses—such as the lack of a federal taxing power<sup>82</sup>—the Articles of Confederation were also structurally brittle and inflexible. They could be amended only by unanimous consent of all the states, making reform all but impossible.<sup>83</sup> David Kyvig, perhaps the leading scholar of Article V and the history of constitutional amendment, writes, “The requirement of unanimous state agreement to congressionally initiated proposals to amend the Articles of Confederation was, from the outset, the defining characteristic of the first government of the United States.”<sup>84</sup> The framers were thus forced to “amend” an unamendable document.<sup>85</sup> As Kyvig puts it, “It is reasonable to argue, in fact, that the 1787 Constitution was both the first and the greatest act of U.S. constitutional amendment.”<sup>86</sup>

But despite the importance of amendment to the existence and evolution of the Constitution, the constitutional history of Article V is notoriously sparse.<sup>87</sup> Early in the Philadelphia Convention, the delegates approved—without much discussion<sup>88</sup>—the Virginia Plan, which determined that a “provision

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timacy of the Constitution. Dellinger, *supra* note 33, at 387 (“An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed.”).

82. Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 90 (2001) (“Under the Articles of Confederation, the limited federal government had no taxing power and therefore no revenue to spend.”).

83. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 926 n.40 (1988) (“A fair reading of the Articles of Confederation made it clear that they could be abrogated only by the unanimous consent of all the states.”).

84. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 37 (1996).

85. Kyvig points out that “the drafters of the 1787 Constitution acknowledged its revisionary character as they declared it an attempt to ‘form a *more perfect union*.’” *Id.* at 42.

86. Kyvig, *supra* note 66, at 18.

87. Dow, *The Case of Article V*, *supra* note 60, at 41 (“As was the case with the Federalist Papers, the issue of the article V amendment process received relatively little attention at the convention.”); *see also id.* at 41 n.202 (listing “the entirety of references in the records of the Constitutional Convention to the amendment process”).

88. The only significant discussion was an oft-repeated statement from George Mason:

The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. 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. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such abuse, may be the fault of the Constitution calling for amendmt [sic].

ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”<sup>89</sup> Specific discussion of the mechanism for amendment, however, was left for the final week of the four-month Philadelphia Convention. During that period the delegates proposed a second method of constitutional amendment.<sup>90</sup> Not only would the national legislature have to call a convention for amendment on application of two-thirds of the states’ legislatures; it could also act on its own and propose amendments to the states for approval.<sup>91</sup> The only remaining debate was what level of state approval would be required to ratify these legislative proposals.<sup>92</sup> By a vote of six states to five, the delegates rejected a two-thirds majority, and instead approved a proposal raising the standard to three-fourths.<sup>93</sup> As discussed above, this requirement essentially echoed the requirements for constitutional ratification, placing constitutional amendment on nearly identical procedural grounds with constitutional creation.

But Article V’s ancestry is even more complicated than that, because the Article effectively shared a constitutional womb with its own progeny. Although the Federalists pressed the cause of ratification—frequently referring to the amendment process as a check on centralized power<sup>94</sup>—they were also drafting and proposing the first amendments to the Constitution they had just created. The Founders’ treatment of those proposals, which became the Bill of Rights, reveals much about

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1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (Max Farrand ed., 1911).

89. *Id.* at 22.

90. Carlos E. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1445 (2005) (“Article V was the product of two brief and unreflective sessions during the last week of the Philadelphia drafting convention.”).

91. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 88, at 558–59.

92. *Id.*

93. *Id.* at 559. There was apparently no dissent to this proposal. *Id.*

94. KYVIG, *supra* note 84, at 66 (“Article V, the 1787 U.S. Constitution’s provision for its own amendment, became the hinge upon which swung acceptance of the Philadelphia convention’s proposal.”); *see also id.* at 66–86 (describing Article V’s role in the ratification and adoption of the U.S. Constitution).

their view of the amendments' relation to the "original" Constitution.<sup>95</sup>

James Madison presented the first set of twelve amendments (ten of which would become the Bill of Rights, and another of which would, 202 years later, become the Twenty-seventh Amendment)<sup>96</sup> to the first Congress, whose membership largely overlapped with that of the Philadelphia Convention itself.<sup>97</sup> Madison's amendments echoed language that many states had proposed during their constitutional ratification conventions.<sup>98</sup> But while Congress and the states approved the Bill of Rights by the end of 1791,<sup>99</sup> Congress was not as clear on *where* it wanted to place the amendments, or *what* text they were meant to change.

Madison suggested that the amendments be interwoven with the text of the original Constitution. In his proposal, most of the amendments—including versions of the First, Second, Third, Fourth, Fifth, and Eighth—would have been inserted "in article 1st, section 9, between clauses 3 and 4."<sup>100</sup> An earlier version of the Sixth Amendment's requirement of juries in criminal cases would have been inserted in place of "article 3d,

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95. I owe my understanding of the Bill of Rights' placement to Kyvig's illuminating discussion of this debate. For more detail and better storytelling see Kyvig, *supra* note 66, at 28–30.

96. Brian C. Kalt, *The People's Forest and Levy's Trees: Popular Sovereignty and the Origins of the Bill of Rights*, 17 CONST. COMMENT. 119, 124 n.9 (2000) (reviewing LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999)).

97. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 777 (1994) (listing some of the holdover members and describing the First Congress as a continuation of the Philadelphia Convention).

98. See, e.g., *New York Ratification Convention (July 26, 1788)*, in GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* app. I-2 at 305 (1995) (including the Declaration or Bill of Rights); *Virginia Ratification Convention (June 26–27, 1788)*, in ANASTAPLO, *supra*, app. I-1 at 299 (including the Proposed Declaration or Bill of Rights).

99. Kalt, *supra* note 96, at 124–25.

100. *James Madison's Proposals in the House of Representatives (June 8, 1797)*, in ANASTAPLO, *supra* note 98, app. J-1 at 315, 316–17. Interestingly, the Confederate Constitution of 1861, which adopted wholesale nearly ninety percent of the Federal Constitution, effectuated Madison's plan and rearranged the Bill of Rights, interspersing them throughout the rest of the Constitution. See generally MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* (1991). The first eight amendments were placed in Article I, Section 9, alongside the other restraints on congressional power. *Id.* at 142. The Ninth and Tenth Amendments became part of Article VI. *Id.* at 150.

section 2, the third clause.”<sup>101</sup> At least in terms of their placement, then, Madison treated constitutional amendments the way legislators treat statutory amendments: as strike-outs and changes to the original text.

Roger Sherman objected that “this is not the proper mode of amending the constitution. . . . We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric.”<sup>102</sup> Sherman, who apparently saw the amendments as a kind of state-created appendage to the people’s Constitution, moved to add the amendments to the end of the existing document.<sup>103</sup> To do otherwise, he suggested, would threaten the entire constitutional enterprise:

“The [C]onstitution is the act of the people, and ought to remain entire. But the amendments will be the act of the state governments; again all the authority we possess, is derived from that instrument; if we mean to destroy the whole and establish a new constitution, we remove the basis on which we mean to build.”<sup>104</sup>

Madison responded that placing the amendments at the end of the Constitution could cause “a very considerable embarrassment” because “*it will be difficult to ascertain to what parts of the instrument the amendments particularly refer*; they will create unfavorable comparisons, whereas if they are placed upon the footing here proposed, they will stand upon as good foundation as the original work.”<sup>105</sup>

Michael Jenifer Stone chimed in with a somewhat different concern: Madison’s proposed placement would accord the amendments *too much* respect, altering beyond recognition the Constitution that the framers had just signed.<sup>106</sup> Invoking the already-deified George Washington, Stone argued that inserting amendments into the Constitution itself would suggest that “George Washington, and the other worthy characters who composed the convention, signed an instrument which they

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101. *James Madison’s Proposals in the House of Representatives (June 8, 1797)*, *supra* note 98, app. J-1 at 317–18.

102. *The Congressional Register, 13 August 1789*, in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 112, 117 (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*].

103. *KYVIG*, *supra* note 84, at 100–01.

104. *Id.* at 100 (quoting *The Congressional Register, 13 August 1789*, *supra* note 102, at 117).

105. *The Congressional Register, 13 August 1789*, *supra* note 102, at 118 (emphasis added).

106. *Id.* at 120.



never had in contemplation.”<sup>107</sup> Elbridge Gerry, voicing a view of constitutional amendment similar to that described in Part I.A of this Article, responded that amendments—no matter where they were placed—would be, in accordance with the language of Article V, “valid to all intents and purposes, as part of the [C]onstitution.”<sup>108</sup> In Gerry’s view, Stone’s objection that amending the Constitution meant replacing it proved either too much or too little: “[C]onsequently the objection goes for nothing, or it goes against making any amendments whatever.”<sup>109</sup>

The House originally sided with Madison’s proposal, but less than a week later reversed course and adopted Sherman’s. This decision “set a precedent for all amendments to come: they would follow the original text of the Constitution.”<sup>110</sup> The first Congress’s structural choice has had a major, albeit underappreciated, impact, not just on the appearance of the Constitution, but on its interpretation. A moment’s thought about how different our constitutional law would look today without a separate Bill of Rights should drive the point home. Would the First Amendment be accorded such reverence, and be interpreted so broadly, if it were tucked into the other restrictions on congressional power in Article I, Section 9? Would Section 5 of the Fourteenth Amendment have had such a revolutionary impact if it had been added to Congress’s enumerated powers in Article I, Section 8? Could (or should) future amendments be inserted into the “original” Constitution?

By leaving the impact of amendment unclear, the ratifiers of the Bill of Rights created the risk—feared by Madison—that the amendments would be discarded as a mere appendage. But they also left open the possibility that courts would interpret the amendments’ impact broadly. Rather than being polished away, many of the amendments’ blurry edges were reconceptualized as “penumbras”<sup>111</sup> surrounding their core guarantees, thus enabling some of the Supreme Court’s most rights-

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107. *Id.*

108. *Id.* at 121–22.

109. *Id.* at 122.

110. Kyvig, *supra* note 66, at 29.

111. The most famous example, of course, is Justice Douglas’s opinion in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), in which he found that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Justice Black, in dissent, pointed out that the argument-from-fuzziness can cut both ways, diluting rights just as easily as it can expand them. *Id.* at 509–10 (Black, J., dissenting).

expansive decisions.<sup>112</sup> In that sense, the Anti-Federalists actually won a victory, albeit perhaps unintentionally, by securing the Bill of Rights in the form of freestanding amendments rather than as part of the original text. Since the Founders were primarily concerned with controlling the power of the legislature and the executive—both of which were seen as more powerful than the courts<sup>113</sup>—this court-centered power of interpretation may have vindicated their vision.

Madison's fear that the amendments would not be accorded the same respect as the original text does not seem to have played out in practice, but his concern about the difficulty of interpretation certainly has. Just a week after the debate on the amendments' placement had ended, he wrote, "It is already apparent I think that some ambiguities will be produced by this change, as the question will often arise and sometimes be not easily solved, how far the original text is or is not necessarily superseded, by the supplemental act."<sup>114</sup> Exploring and attempting to ascertain which parts of the Constitution have been changed by which amendments is part of the major project of this Article. The following Section considers a few interpretive methods of identifying amendments' impact.

### C. DETERMINING THE IMPACT OF A CONSTITUTIONAL AMENDMENT

The previous two Sections set out, and then defend, the theory that constitutional amendments can alter the meaning of provisions of the original document, even without specifically referring to them. This Section suggests ways for courts and scholars to better identify the impact of amendments on specific constitutional provisions. For every constitutional amendment with a broad impact on the provisions of the original Constitu-

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112. The right to privacy, which largely traces its lineage to *Griswold*, is perhaps the most prominent example. See *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Griswold* in accepting a right to personal privacy and finding a limited right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 452–54 (1972) (citing *Griswold* for an individual's right to privacy and use of contraceptives).

113. Alexander Hamilton famously referred to the judiciary as the "least dangerous" branch. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 70, at 522–23; see also RAOUL BERGER, CONGRESS V. THE SUPREME COURT 184 (1969) ("Legislative, not judicial, despotism worried the Founders; judges were trusted, legislators were not.").

114. Kyvig, *supra* note 66, at 30 (citing Letter from James Madison to Alexander White (Aug. 24, 1789), in 12 THE PAPERS OF JAMES MADISON 352 (Charles F. Hobson et al. eds., 1979)).

tion—such as the First or the Fourteenth—there are others with a much more limited impact. The Twenty-first Amendment, for example, repeals the Eighteenth’s prohibition on the “manufacture, sale, or transportation of intoxicating liquors.”<sup>115</sup> But the Twenty-first Amendment has no clear impact on the Exceptions Clause,<sup>116</sup> nor on the provisions of Articles I or II, except to the degree that it changed the executive’s power to prosecute violations of the Eighteenth Amendment. It is a narrow and precise amendment whose impact falls squarely and solely on another amendment, which it excises, and does nothing more.

The task for interpreters of the amendments (or of provisions of the amended Constitution) is thus, in part, to determine what parts of the Constitution the amendments mean to amend. Does the First Amendment, which by its terms addresses only “Congress,” apply also to the exercise of power by the executive branch?<sup>117</sup> Does the Fourteenth Amendment “incorporate” the Bill of Rights and make those rights applicable against the states?<sup>118</sup> These are fundamental questions of constitutional law, but they are fundamentally *different* questions from those regarding what specific amendments do or do not allow. That is, the question of whether the First Amendment does or does not permit the regulation of obscene speech is logically and analytically distinct from the question of whether the Amendment restricts the power of Congress (thus “amending” Article I) or the executive (thus “amending” Article II).<sup>119</sup>

It is the second set of questions that the present discussion addresses, because the placement of the amendments at the end of the Constitution inevitably raises them, and because they have generally gone unasked. This is not to say that courts and scholars are entirely without guidance. Legal scholars have devoted extraordinary attention to the processes by which the

115. U.S. CONST. amend. XVIII, § 1.

116. *Id.* art. III, § 2, cl. 2.

117. See Strauss, *supra* note 44, at 907 (explaining that the use of “Congress” in the First Amendment refers to the entire federal government, even though other uses of “Congress” do not).

118. This question received one of its most famous treatments in *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting), with Justice Black playing his usual role as the greatest proponent of the full-incorporation theory, and Justice Frankfurter acting as his foil, *id.* at 59–68 (Frankfurter, J., concurring).

119. See *supra* notes 48–54 and accompanying text.

Constitution is amended<sup>120</sup> and the content of specific constitutional amendments.<sup>121</sup> Some scholars have even made inroads in the difficult project of sorting amendments by type. Sanford Levinson, for example, differentiates between “amendments” and “interpretations,”<sup>122</sup> and Bruce Ackerman draws a line between “transformative amendments”<sup>123</sup> and those that are “rightly interpreted as a superstatute.”<sup>124</sup> But for all of the attention that constitutional amendment receives, surprisingly little has been written about the impact that constitutional amendment has on the original document.<sup>125</sup>

One promising interpretive tool for analyzing the relationship between different constitutional phrases—an analysis an interpreter trying to give meaning to the amendments must do—is Akhil Amar’s “intratextualism.”<sup>126</sup> Amar describes this

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120. See, e.g., ACKERMAN, *WE THE PEOPLE*, *supra* note 18; see also Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION*, *supra* note 51, at 145, 160–61 (“The process of constitutional amendment, therefore, can take place on one of two levels. On the constitutional level, it can take place within the contours of the constitution itself . . . . [But] the process of constitutional amendment may also take place at another level, when these logically and politically antecedent conditions are themselves amended.”).

121. See, e.g., Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment*, in *UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT*, *supra* note 27, at 110, 110 (describing the “substantial—and some might say overwhelming—body of scholarship on the ‘intent,’ ‘meaning,’ and ‘understanding’ of the Fourteenth Amendment”).

122. Levinson, *supra* note 53, at 33.

123. Ackerman, *Constitutional Politics*, *supra* note 18, at 524; see also Ackerman, *Discovering the Constitution*, *supra* note 18, at 1056 (describing “structural” amendments).

124. Ackerman, *Constitutional Politics*, *supra* note 18, at 522 (describing the Twenty-sixth Amendment as such because “[a]ll it did was change the voting age from twenty-one to eighteen. Nobody looked upon it as the culminating expression of a broad-based effort to revise the foundational principles of our higher law”).

125. There is also a lengthy literature addressing the limitations, if any, on the amending power, and whether courts should have any power to consider the validity of amendments. See, e.g., Dellinger, *supra* note 33; Tribe, *supra* note 18.

The debate is long-running indeed. For older examples, see William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 228 (1919) (arguing that amendments may not take away the legislative power of the states), and William L. Frierson, *Amending the Constitution of the United States*, 33 HARV. L. REV. 659, 662–63 (1920) (arguing in response to Marbury that states’ rights are already adequately protected and that the Supreme Court should have no power to approve or disapprove amendments).

126. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

theory as a kind of “holistic” textualism,<sup>127</sup> whose practitioners (among whom Amar counts such luminaries as Chief Justice Marshall<sup>128</sup> and Justice Story<sup>129</sup>) read seemingly isolated constitutional phrases in conjunction as a way to give meaning to both.<sup>130</sup> In Amar’s words, an interpreter employing intratextualism “tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”<sup>131</sup>

Although Amar does not argue as much, intratextualism is most powerful when applied to the relationship between amendments and the text of the original Constitution, rather than to that between phrases in the original Constitution. In fact, the amendments all but beg for an intratextualist reading because they (for the reasons described in the previous Section) exist *only* as appendages to a document.<sup>132</sup> Amar himself has compared the Bill of Rights to a constitution,<sup>133</sup> but it is clear that the amendments presuppose—and rely on—some kind of preexisting document.<sup>134</sup> They create affirmative limits on the enumerated powers laid out in the original Constitution, and the former are incoherent without the latter. To take the first few words of the Bill of Rights as an illustrative example, “Congress shall make no law”<sup>135</sup> makes no sense without a prior Article establishing the existence of Congress and its power to make law in the first place.<sup>136</sup>

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127. *Id.* at 785.

128. *Id.* at 755–58 (describing Marshall’s use of intratextualism in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

129. *Id.* at 758–63 (discussing Story’s use of intratextualism in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816)).

130. *Id.* at 748–49.

131. *Id.* at 748.

132. By pointing to the location of the amendments as well as their wording, I am admittedly blending intertextualism with what Amar calls “[a]nother brand of holistic textualism,” which “squeezes meaning from the Constitution’s organization chart.” *Id.* at 797 n.197.

133. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1205 (1991).

134. In this sense, intratextualism as it applies to the amendments becomes a kind of *intertextualism* that connects the “separate” amendments and Constitution.

135. U.S. CONST. amend. I.

136. See Vermeule & Young, *supra* note 45, at 738 (“It is critical to understand . . . that clause-bound interpretation is itself a component of intratextualism. Standing alone, even a strong version of intratextualism is necessarily incomplete.”).

Assessing the merits of his theory, Amar writes that “[p]erhaps the greatest virtue of intratextualism is this: it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses.”<sup>137</sup> This is undoubtedly a virtue when analyzing the text of the original Constitution. It is a *necessity* when analyzing the amendments. Without the gravitational pull of interpretation tying them to the Constitution, they would spin off into space like so many rogue satellites.<sup>138</sup> Although it is plausible, if debatable, that the framers who drafted and ratified the Article IV Territories Clause (“The Congress shall have Power to . . . make all needful Rules and Regulations”)<sup>139</sup> had in mind the Article I Necessary and Proper Clause (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper”),<sup>140</sup> it is *certain* that they had the original Constitution in mind when they wrote the amendments. Like the drafters of statutory amendments,<sup>141</sup> the authors and ratifiers of constitutional amendments must be presumed to have some fault or omission of the original Constitution in mind.<sup>142</sup> Implicitly applying this theory, Amar argues persuasively that the similarity between “Congress shall make no law”<sup>143</sup> and the words of the Necessary and Proper Clause—“Congress shall have Power . . . To make all Laws”<sup>144</sup>—echo

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137. Amar, *supra* note 126, at 795.

138. I note that my argument here—which requires judges to connect two disparate parts of the Constitution—is, like Amar’s intratextualism, vulnerable to the criticism that it demands too much of judges whose interpretive capacities are limited. See Vermeule & Young, *supra* note 45, at 731. However, I do not think that this objection is fatal, nor do I see a better alternative. The First Amendment must mean *something*, and because the amendments are not included in the Constitution as strike-throughs, some interpreter must determine their relationship to the rest of the Constitution. Cf. *Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).

139. U.S. CONST. art. IV, § 3, cl. 2.

140. *Id.* art. I, § 8, cl. 18. The example, though not the argument, comes from Amar, *supra* note 126, at 794.

141. Despite the comparative length and complexity of statutes *vis-à-vis* the Constitution, Congress is presumed to know the content of the statutes it is amending. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70–78 (1988) (suggesting use of an acquiescence rule in interpreting legislative inaction).

142. For those few amendments which are more properly considered additions—or, in Ackerman’s terms, “superstatutes,” see *supra* note 124 and accompanying text—the drafters may have been more concerned with *omissions* from the Constitution than with problems with its terms.

143. U.S. CONST. amend. I.

144. *Id.* art. I, § 8, cl. 18.

each other, suggesting a “textual interlock.”<sup>145</sup> After consulting the constitutional history for confirmation, he concludes that the First Amendment sought to “reassure all concerned that Congress lacked enumerated power to restrict speech and press (or to regulate religion, for that matter) in the states, notwithstanding the Necessary and Proper Clause.”<sup>146</sup>

But while textual connections may be sufficient to show what part or parts of the Constitution an amendment was meant to alter, they are certainly not necessary, even for interpreters who would otherwise prefer a “textual” approach. If such connections were required, many amendments would be rendered meaningless. The Eleventh Amendment, for example, was clearly a reaction to *Chisholm v. Georgia*,<sup>147</sup> in which the Supreme Court held that Section 2 of Article III permitted suits against a state by citizens of another state.<sup>148</sup> The Eleventh Amendment prohibits those very suits: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>149</sup> Nevertheless, nothing in the language of the Eleventh Amendment names *Chisholm* or Article III as its intended target.<sup>150</sup>

Moreover, in interpreting these amendments, courts have not *limited* the amendments’ reach to simply “overturning” or undermining a single case, even if a single case clearly inspired their passage. Rather, their broad language has given rise to

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145. Amar, *supra* note 126, at 814.

146. *Id.*

147. 2 U.S. (2 Dall.) 419 (1793); *see also* James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 651 (1994) (“Everyone appears to agree that the Eleventh Amendment was passed in response to *Chisholm*.”).

148. *Chisholm*, 2 U.S. (2 Dall.) at 419.

149. U.S. CONST. amend. XI.

150. The Eleventh Amendment is one of four amendments passed to “overrule” specific decisions of the Supreme Court; the other amendments are Section 1 of the Fourteenth, the Sixteenth, and the Twenty-sixth. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE SUPREME COURT* 49 & n.133 (1980). None of them, however, identify the decision they were intended to overturn. Section 1 of the Fourteenth, for example, fails to identify *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), as its intended target. *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 72–74 (1872) (noting that “the first clause of the first section [of the Fourteenth Amendment] was framed” primarily to reverse *Dred Scott*); CHOPER, *supra*, at n.133.

penumbras<sup>151</sup> and interpretations that expanded their impact to include other provisions of the Constitution, including those uninvolved in the decisions they overturned.<sup>152</sup>

Rather than attempting to describe the relationship between constitutional amendments and the text they amend, constitutional theorists have for the most part focused on other thorny amendment-related questions: When is constitutional amendment justified?<sup>153</sup> Are there any inherent limits on the impact of amendments?<sup>154</sup> Is Article V the only way to amend the Constitution?<sup>155</sup> And what of the neglected “convention method” for constitutional amendment?<sup>156</sup> Although all of these questions cast light on the process of constitutional amendment, and may also help illuminate the content of amendments, none addresses the core question tentatively answered in this Part: the impact of constitutional amendment on the original Constitution. The following Part uses this theory—that amendments alter rather than simply add to the original Constitution—to measure the impact of a constitutional amendment on another, particularly problematic provision of the original Constitution: the Exceptions Clause.

## II. AMENDING THE EXCEPTIONS CLAUSE

The previous Part argued that constitutional amendments often implicitly amend prior constitutional provisions even without indicating the text they were meant to target. Interpreters of the Constitution and its amendments thus face a difficult task in identifying, often in the absence of clear textual clues, which provisions have been altered by subsequent amendment. This Part applies that theory of constitutional amendment to the Exceptions Clause, whose apparently unbounded reach has long troubled constitutional and federal

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151. Justice Douglas’ famous invocation of “penumbras” in *Griswold* included the First, Third, Fourth, Fifth, and Ninth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

152. *See supra* notes 111–12 and accompanying text (arguing that the placement of amendments at the end of the Constitution, and the inclusion of non-specific language, allows a rights-expansive jurisprudence that would not be possible if they were simply made as strike-outs to the original text).

153. *See, e.g.*, CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 7 (1999) (suggesting guidelines for constitutional amendments).

154. *See supra* note 51.

155. *See supra* note 60.

156. *See supra* note 52.



courts scholars. It thus offers courts and scholars a new way to respond to the thorny problem of jurisdiction stripping, one that does not rely on internal, unenumerated “essential functions,” but rather uses constitutional text to satisfy scholars’ instinctual belief that there *must* be limits on congressional power to strip federal jurisdiction. “External constraints” theorists have already begun to construct a theory that limits the Exceptions Clause, relying on various other constitutional provisions to articulate those limits. But their arguments too often rest on a simple assertion that the Exceptions Clause is limited by other provisions of the Constitution, and fail to address the inconvenient fact that none of those provisions mention the Exceptions Clause. By exploring the impact of one particularly important kind of external constraint—constitutional amendment—and thickening the understanding of “external constraints” more generally, this Article builds on the external constraints theory and suggests that the First Amendment may have already implicitly amended the Clause. It then argues that future amendments could do the same explicitly.

#### A. WHY IT MATTERS: USING THE EXCEPTIONS CLAUSE TO “AMEND” THE CONSTITUTION

Congress’s power over federal jurisdiction derives from the Exceptions Clause, a grant of congressional power nestled alongside the various jurisdiction-granting provisions of Article III.<sup>157</sup> The Exceptions Clause is the broadest grant of congressional power in the original Constitution<sup>158</sup> *not* found in Article I, and it gives Congress wide authority to alter and abolish federal court jurisdiction.<sup>159</sup> In context, the Clause reads: “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall*

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157. U.S. CONST. art. III, § 2, cl. 2.

158. I thus set aside for now Section 5 of the Fourteenth Amendment and other Congress-empowering amendments. *See id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *see also infra* notes 239–40 and 252–56 and accompanying text.

159. *See* Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 389 (1983) (“Those who argue against Congress’ power to make exceptions to the Court’s appellate jurisdiction . . . are forced to deny an explicit power of Congress, expressly granted by the Constitution . . .”).

make.”<sup>160</sup> Unfortunately, constitutional history does not shed much light on the reasons for the Clause’s placement or meaning of its words. The “exceptions and regulations” language “was adopted by the Convention on August 27 without a ripple of recorded debate, concern, or explication.”<sup>161</sup> In fact, the only substantial debate about the Clause revolved around whether the Supreme Court’s review in admiralty and equity cases would involve both facts and law.<sup>162</sup>

Despite this sparse constitutional history, it is reasonably clear that the Exceptions Clause power applies only to the Supreme Court’s *appellate* jurisdiction. Article III defines the federal courts’ jurisdiction as extending to “all” cases arising under the Constitution, federal laws, treaties, or admiralty and maritime laws.<sup>163</sup> This includes, for example, cases arising under the amendments, such as the First, the Fourteenth, or any future amendments like the ERA. Because Article III places these cases under the appellate (rather than original) jurisdiction of the Supreme Court,<sup>164</sup> they are subject to congressional power under the Exceptions Clause.<sup>165</sup>

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160. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

161. Sager, *supra* note 29, at 51; *see also* Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, in 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 240 (Paul A. Freund ed., 1971) (noting that the Clause “was not debated” by the Convention). For an exhaustive recounting of what drafting history there is, see Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 64, 81–87 (2007) (asserting that the “complaint that the Supreme Court’s appellate jurisdiction would let distant judicial elites substitute their will for the findings of juries” was “[a]lmost fatal to the Constitution’s adoption”).

162. BERGER, *supra* note 113, at 286–89 (arguing that the Exceptions Clause was originally intended to give Congress power over appellate review of fact findings); Claus, *supra* note 161, at 64; Gressman & Gressman, *supra* note 29, at 526–27.

163. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), Chief Justice Marshall paraphrased Article III as stating that “[t]he judicial power of the United States is extended to all cases arising under the constitution.”

164. Congress has never granted federal courts complete jurisdiction over all cases “arising under” the Constitution or federal law. It did, however, extend general federal question jurisdiction to the lower federal courts in 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (2000)).

165. The Exceptions Clause does *not* give Congress power to expand or contract the *original* jurisdiction of the Supreme Court. *Marbury*, 5 U.S. (1 Cranch) at 174–75; Sager, *supra* note 29, at 24.

Theoretically,<sup>166</sup> should it choose to do so, Congress could strip lower federal courts of the power to hear *all* cases arising under a particular amendment, or under the Constitution itself,<sup>167</sup> and could do the same for the Supreme Court's *appellate* jurisdiction over such cases.<sup>168</sup> Congress could, for example, pass a law saying that the Supreme Court shall have no power to hear cases involving the First Amendment, or the Fourteenth. And as the introduction to this Article suggested, the more politicized the subject matter of an amendment, the more likely that amendment is to be the target of a subsequent jurisdiction-stripping proposal.<sup>169</sup> The proposed ERA, to take just one example, would be a prime candidate.

Although it has never directly stripped the Supreme Court of jurisdiction to hear cases arising under a particular amendment, Congress has boldly used its Exceptions Clause power to propose stripping federal jurisdiction (including that of the Supreme Court) over certain disfavored subject matters.<sup>170</sup> Among the recent high-profile examples are congressional attempts to deny the Guantánamo detainees access to federal courts.<sup>171</sup> Other proposals would have done the same for cases involving abortion,<sup>172</sup> school desegregation,<sup>173</sup> or school prayer.<sup>174</sup> As

166. See *infra* Part II.B for a discussion of possible inherent or externally imposed limitations on this power.

167. See *Palmore v. United States*, 411 U.S. 389, 407 (1973) (“It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction.”).

168. One striking illustration of Congress's broad power over appellate jurisdiction, at least to modern readers, is the fact that between the passage of the Judiciary Act of 1789, 1 Stat. 73, and the Act of December 23, 1914, 38 Stat. 790, the Court had no appellate jurisdiction over state court decisions that struck down state laws that conflicted with the Federal Constitution. See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 320–21 (5th ed. 2003).

169. Perhaps the point could be put more finely. Amendments passed as a result of a temporary crest in popularity, or a concerted but fleeting campaign—the Eighteenth Amendment, establishing Prohibition, is the best example—are those most vulnerable to jurisdiction-stripping proposals, because the temporary majorities that created them are likely to dissolve.

170. See, e.g., Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21.

171. See *supra* notes 8–9 (discussing the Military Commissions Act).

172. S. 210, 98th Cong. (1983) (stripping in entirety lower federal court jurisdiction over abortion cases and severely curtailing the Supreme Court's ju-

many scholars have noted, such jurisdiction-stripping proposals tend to come in waves,<sup>175</sup> often in reaction to controversial Supreme Court rulings—or even anticipated rulings—in politically charged areas of constitutional law.<sup>176</sup>

What scholars have generally failed to note, however, and what this Article attempts to make plain, is how the political and legal justifications and impact of jurisdiction-stripping proposals mimic those of constitutional amendments. Most recent amendment proposals are initiated in response to, or anticipation of, unpopular court decisions. Similarly, many jurisdiction-stripping proposals—such as the Marriage Protection Act,<sup>177</sup> which would have eliminated federal jurisdiction to interpret or assess the constitutionality of the Defense of Marriage Act<sup>178</sup>—are patently *designed* to keep amendment-based constitutional claims out of federal court. Whether proposed as amendments or jurisdiction-stripping bills, the effect of these initiatives is to limit federal courts' power over controversial subject matter.

Stripping federal jurisdiction over an amendment, or any other piece of law is, of course, not exactly the same thing as deleting the amendment.<sup>179</sup> Some scholars, for example, have argued that Congress's power to make exceptions to the Supreme Court's appellate jurisdiction carries with it a corre-

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isdiction over the same); *see also* H.R. 3225, 97th Cong. § 4 (1981) (same); S. 158, 97th Cong. § 2 (1981) (limiting lower court jurisdiction over abortion cases).

173. H.R. 521, 98th Cong. (1983).

174. *See infra* Part II.C.

175. Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926 tbl.1 (1965) (demonstrating that jurisdiction-stripping efforts between 1802 and 1957 were concentrated in seven time periods).

176. *See* Shirley M. Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 842–43 (1972) (“[C]ongressional reaction to issues of federal jurisdiction has always been fitful and . . . the fits are usually induced by strong pressures imposed by particular events or by powerful constituencies that seek to influence results in particular causes that concern them.”). Senator Jesse Helms, a strong proponent of many jurisdiction-stripping bills, made the point quite clearly: “[T]here is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own motions [sic] of public policy.” 130 CONG. REG. 5919 (1984) (statement of Sen. Helms).

177. H.R. 3313, 108th Cong. (2004).

178. 28 U.S.C. § 1738C (2000) (providing that no state shall be required to give effect to another state's recognition of same-sex marriage).

179. The latter can be achieved only through another amendment, which has happened only once. *See supra* note 27.

sponding legislative duty to grant equivalent jurisdiction to other federal courts.<sup>180</sup> Perhaps more importantly, Congress has no control over state courts,<sup>181</sup> and state court judges are bound by the Supremacy Clause to apply and enforce federal rights.<sup>182</sup> But even if these safeguards are available to protect constitutional rights that legislation has barred from the Supreme Court's docket, the intent and effect of jurisdiction-stripping proposals is generally to burden the exercise of those rights.<sup>183</sup> For example, although state courts would continue to hear cases involving such rights, scholars have long noted that state courts' enforcement of Court precedent can be imperfect, or even defiantly resistant.<sup>184</sup> In such a situation, stripping the

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180. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 778 (1984).

181. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982).

182. Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 961 (1982); see U.S. CONST. art. IV, §§ 1, 3; see also *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 484 n.16 (1983) ("We have noted the competence of state courts to adjudicate federal constitutional claims."); *N. Pipeline*, 458 U.S. at 64 n.15 ("[V]irtually all matters that might be heard in Art. III courts could also be left by Congress to state courts."); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that state courts cannot discriminate against the enforcement of federal rights).

183. KENNETH R. THOMAS, CONG. RESEARCH SERV., LIMITING COURT JURISDICTION OVER FEDERAL CONSTITUTIONAL ISSUES: "COURT-STRIPPING" 2 (2005), available at [http://assets.opencrs.com/rpts/RL32171\\_20050124.pdf](http://assets.opencrs.com/rpts/RL32171_20050124.pdf) ("[P]roponents of these proposals are generally critical of specific decisions made by the federal courts in the particular substantive area, and the proposals are represented as intended to influence the results or applications of such cases."); see also Tribe, *supra* note 10, at 145 ("Unless Congress is merely replacing one remedial structure with another that is as protective of the constitutional right at stake, withdrawing a basic civil or criminal line of defense from such a right is tantamount to authorizing its deprivation." (footnote omitted)). A jurisdiction-stripping bill could also be used more aggressively, in conjunction with other federal legislation. For example, Congress could pass a law that simultaneously criminalizes certain speech acts that are at the boundary of the First Amendment and also strips federal courts of jurisdiction to hear challenges to the law. The Guantánamo jurisdiction-stripping legislation, in conjunction with the executive's expansion of the military tribunal system, has had substantially this effect.

184. See Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 936-38 (1982) (arguing that stripping the Supreme Court's appellate review would leave lower courts free to ignore existing Court precedent); see also Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=981015](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981015) (describing state courts' defiance of Supreme Court precedent, sometimes with the Court's apparent blessing).

Court's jurisdiction may be a thinly veiled attempt to signal to state courts that they now have the power to undo the Court's constitutional handiwork.<sup>185</sup>

These attempts illustrate a basic but often unrecognized truth: when Congress strips jurisdiction over a particular subject matter, it often does so to protect laws in that subject-matter area from challenges brought under constitutional provisions or other legal bases. It is the grounds for challenge that suffer. So if Congress were to completely strip federal jurisdiction over challenges to the constitutionality of military commissions, for example, the "damage" would be to the Suspension Clause,<sup>186</sup> the Fourth, Fifth, and Sixth Amendments,<sup>187</sup> and the other legal grounds on which plaintiffs might challenge the military commissions. Unlike amendments, however, which can "reverse" the impact of unpopular amendments or Court decisions, jurisdiction-stripping is most effective as a preventative measure, to keep the Court from making such decisions in the first place.<sup>188</sup> A public prayer amendment would effectively alter the Constitution to say that school prayer *does not* violate the Establishment Clause,<sup>189</sup> while a jurisdiction-stripping act

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185. Laurence Sager famously characterized these jurisdiction-stripping proposals as "lewd wink[s]" from Congress to the state courts. Sager, *supra* note 29, at 41.

186. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

187. *Id.* amends. IV–VI (protecting against unreasonable searches and seizures and guaranteeing due process and other criminal prosecution rights).

188. See Fellow, *supra* note 19, at 1121–22 (noting that "the mere possibility of action . . . prompted a congressional response" in the form of "court-curbing bills"). Jurisdiction stripping does not *reverse* Supreme Court precedent and would (at least theoretically) have the perverse effect (from their proponents' perspective) of insulating those cases from federal review. See Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 537 (1983) ("Should the Supreme Court be divested of jurisdiction over a particular area, the Court's last pronouncement on the subject would constitute the definitive, unalterable law, which lower courts would be obliged to follow forever.").

One might argue that this point undermines my argument that amendments and jurisdiction-stripping legislation are closely related, because it suggests that jurisdiction stripping is a proactive measure used (albeit somewhat inartfully) to freeze Court precedent into place, while amendments are a reactive measure to overturn decisions. There is merit to this point, though I believe that the gap it illustrates is small.

189. See, e.g., S.J. Res. 73, 98th Cong. (1983) ("Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or

on the same subject would prevent federal courts from ruling that it *does*.<sup>190</sup> While jurisdiction stripping does not necessarily amend the Constitution, it can have a similar effect by insulating an entire issue from constitutional challenge. The next Section considers possible limits on this congressional power, specifically analyzing whether these jurisdiction-stripping proposals are subject to the First Amendment's Establishment Clause, and, if so, whether they pass.

#### B. INTERNAL AND EXTERNAL CONSTRAINTS ON THE EXCEPTIONS CLAUSE POWER

Federal courts scholars have long sensed, but struggled to find, limits on the Exceptions Clause power, and the Supreme Court has stubbornly refused to give them help. As the discussion in this Section demonstrates, the Court has generally yielded to Congress on specific jurisdiction-stripping legislation while also carefully suggesting that the Exceptions Clause may have some as-yet-undefined restrictions. Congressional power to strip federal jurisdiction is thus generally considered to be nearly, or perhaps completely,<sup>191</sup> limitless.<sup>192</sup>

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by any State to participate in prayer."); H.R.J. Res. 133, 98th Cong. (1983). These amendment proposals have a longer history than many realize. Consider an amendment proposed by Christian fundamentalists in the 1800s, which would have read, "Almighty God [is] the Author of National Existence and the source of all power and authority in Civil Government, Jesus Christ [is] the Rule of Nations, and the Bible [is] the formation of law and supreme rule for the conduct of nations." KYVIG, *supra* note 84, at 189; *see also id.* at 190 ("Between 1894 and 1910 Congress received at least nine proposals to alter the Constitution's preamble to express trust in or acknowledge the authority of a Christian God.").

190. *See infra* Part II.C (discussing acts which would strip federal jurisdiction over school prayer cases).

191. *See, e.g.,* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (Frankfurter, J., dissenting on other grounds) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*."); Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting on other grounds) ("Congress has plenary power to confer or withhold appellate jurisdiction . . ."); *see also* THE FEDERALIST NO. 80, at 481 (Alexander Hamilton) (Clinton Rossier ed., 1961) ("[T]he national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove . . . inconveniences."), *cited in* Glidden Co. v. Zdanok, 370 U.S. 530, 567-68 (1962); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 260 (1973) ("The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation . . .").

192. Sager, *supra* note 29, at 37 (acknowledging, although not endorsing, the "sense that Congress is immune from full constitutional scrutiny when the

In *Ex parte McCardle*, the first of three major post-Civil War jurisdiction-stripping cases, the Supreme Court considered a habeas corpus challenge brought by an individual alleging that he was unlawfully detained by the military in Mississippi following the Civil War.<sup>193</sup> The Court heard oral arguments in the case, but before it could issue a decision, Congress repealed the 1867 Act “affirming the appellate jurisdiction of this [C]ourt in cases of habeas corpus.”<sup>194</sup> Justice Salmon Chase explained that the Court’s appellate jurisdiction “is conferred ‘with such exceptions and under such regulations as Congress shall make,’”<sup>195</sup> and concluded that the repeal of the law validly withdrew that jurisdiction.<sup>196</sup> Justice Chase specifically noted, however, that other avenues for appeal remained open,<sup>197</sup> a reading that the Court reiterated almost immediately in *Ex parte Yeger*,<sup>198</sup> another case involving congressional attempts to limit the Court’s appellate jurisdiction over habeas cases. Acknowledging that its jurisdiction “is given subject to exception and regulation by Congress,”<sup>199</sup> the Court in *Ex parte Yeger* nonetheless endorsed something of a clear-statement rule, and concluded that the asserted jurisdiction-stripping measure was ambiguous and thus insufficient to strip the Court’s jurisdiction over the pending case.<sup>200</sup>

The final case in the post-Civil War jurisdiction-stripping triumvirate was *United States v. Klein*, in which the Court struck down a congressional attempt to withdraw the Court’s jurisdiction over a pending case involving a legislative act that altered the impact of a presidential pardon.<sup>201</sup> The Court ruled that the jurisdiction-stripping statute in *Klein* was impermissi-

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distribution of jurisdiction is at stake”); Harrison Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U. L. REV. 1, 1 (1951) (“There are comparatively few who recognize that under the express words of the Constitution . . . Congress can largely, if not entirely, deprive the Court of this [appellate] jurisdiction.”).

193. 74 U.S. (7 Wall.) 506 (1868).

194. *Id.* at 514.

195. *Id.* at 513.

196. *Id.* at 514.

197. *Id.* at 515 (“The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867.”).

198. 75 U.S. (8 Wall.) 85, 105 (1868).

199. *Id.* at 102; *see also id.* at 98 (“[A]ppellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.”).

200. *Id.* at 103.

201. 80 U.S. (13 Wall.) 128, 128–29 (1871).



ble because it essentially prescribed a rule of decision (favoring the government) in a pending case,<sup>202</sup> and also because it “im-pair[ed] the effect of a pardon, and thus infring[ed] the consti-tutional power of the Executive.”<sup>203</sup>

Looking to this trio of cases and a few others,<sup>204</sup> courts, pol-iticians,<sup>205</sup> and constitutional scholars<sup>206</sup> have long sensed the existence of, but struggled to find, a limit on Congress’s power over federal jurisdiction.<sup>207</sup> Their efforts to ascertain possible restrictions have yielded two main theories: “internal” limita-tions based on the logic and structure of Article III, and “exter-nal” limitations imposed by the rest of the Constitution.

The search for internal constraints has framed the “main battleground for the debate about congressional authority over federal court jurisdiction.”<sup>208</sup> The most famous attempt to arti-culate internal constraints on the Exceptions Clause is undoubt-edly that of Henry Hart, who argued that congressional power over jurisdiction is inherently limited by the nature of the con-stitutional enterprise and the need to preserve the “essential functions” of the judiciary.<sup>209</sup> In Hart’s words, exceptions to the

202. *See id.* at 147.

203. *Id.*

204. *See also* *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001); *Felker v. Tur-pin*, 518 U.S. 651, 654 (1996).

205. Senator Barry Goldwater, troubled by jurisdiction-stripping proposals advanced by fellow Republicans, said in 1982:

What particularly troubles me about trying to override constitu-tional decisions of the Supreme Court by a simple bill is that I see no limit to the practice. There is no clear and coherent standard to define why we shall control the court in one area but not another. . . .

. . . .

Whether or not [C]ongress possesses the power of curbing judicial authority, we should not invoke it.

128 CONG. REC. 2243 (1982).

206. *See* Tribe, *supra* note 10, at 132 (“But surely the proponents of that view [that Congress must have plenary power over federal jurisdiction] have pushed their point too far.”).

207. *See Felker*, 518 U.S. at 667 (Souter, J., concurring) (giving examples of situations where “the question whether the statute exceeded Congress’s Ex-ceptions Clause power would be open”); FALLON ET AL., *supra* note 168, at 341–42 (“[T]he limits of congressional power over Supreme Court appellate jurisdiction have never been completely clarified.”).

208. Gunther, *supra* note 32, at 900.

209. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). Although Hart is rightfully seen as the father of the internal constraints theory, his seminal work also implicitly acknowledges the existence of “exter-nal” constraints. *See id.* at 1372 (“Q. You’re saying, then, that the power to re-

Court's jurisdiction must "not be such as will destroy the essential role of the Supreme Court in the constitutional plan."<sup>210</sup> Variants on this argument are common,<sup>211</sup> with one popular textualist hybrid arguing that the very use of the word "exceptions" suggests that there must be some amount of jurisdiction left over after Congress is done "excepting."<sup>212</sup>

Other scholars have rejected the internal constraints theory<sup>213</sup> and have instead looked outside of Article III for "external" constraints in the rest of the Constitution.<sup>214</sup> The leading light for this search party is Lawrence Sager, who has argued that jurisdiction-stripping legislation must preserve the ability of the federal courts to effectively supervise state conduct.<sup>215</sup> He bolsters this structural claim by noting that only Article III judges receive insulation from political pressure through benefits such as life tenure and nondiminution of sala-

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gulate jurisdiction is subject in part to the other provisions of the Constitution? A. No. It's subject in whole not in part.").

210. *Id.* at 1365. One might rightfully wonder, based on the discussion of amendment in Part I, to which "plan" one is supposed to look. The original plan of the Founders? Or the new "plan" embodied in the amended Constitution? What if the latter contemplates a lessened judicial role?

211. See, e.g., Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1039 (1982) ("A statute depriving the Supreme Court of appellate jurisdiction over . . . [a] category of constitutional litigation would, however, violate the spirit of the Constitution, even if it would not violate its letter. . . . because the structure contemplated by the instrument makes sense . . . only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law."); Ratner, *supra* note 184; Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 168-70 (1960) (arguing that, because an exception is "an exclusion from the application of a general rule or description," by definition "an exception cannot destroy the essential characteristics of the subject to which it applies"); Handman, *supra* note 28, at 206 ("Essential functions scholars . . . have continued to emphasize the Court's primary role as guarantor of uniformity and supremacy of federal law.").

212. See, e.g., Tribe, *supra* note 10, at 134-35; William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1021 (1991).

213. See Redish, *supra* note 29, at 911 ("[T]he 'essential functions' thesis is little more than constitutional wishful thinking . . .").

214. See Handman, *supra* note 28, at 200 ("The doctrine of political accountability, as a generally applicable, external constraint on congressional power, requires Congress to address affirmatively underlying policy concerns when it seeks to revoke Court jurisdiction.").

215. Sager, *supra* note 29, at 43.

ry.<sup>216</sup> Sager also suggests that Congress cannot manipulate jurisdiction as a means to an unconstitutional end,<sup>217</sup> nor deny federal jurisdiction where such jurisdiction is necessary to provide an adequate remedy.<sup>218</sup> Picking up this thread, William Van Alstyne, among others,<sup>219</sup> argues that “broad as the power is in Congress to make exceptions to the appellate jurisdiction of the Supreme Court, it is not exempt from other constitutional provisions, lying outside the ‘exceptions’ clause, that indeed describe limitations that cut across most of the enumerated powers of Congress.”<sup>220</sup> Within theorists’ discussion of possible limits on congressional power to strip jurisdiction, by far the most commonly identified “external constraints” on the Exceptions Clause are the Fourteenth Amendment’s due process and equal protection guarantees.<sup>221</sup> Indeed, along with separation of powers concerns,<sup>222</sup> the Due Process and Equal Protection Clauses are apparently presumed to be the only (or perhaps just the only necessary) external constraints on Congress’s Exceptions Clause power.<sup>223</sup>

The Supreme Court, for its part, has carefully avoided endorsing or disclaiming either the essential functions or external

216. *Id.* at 61–68. Martin Redish characterizes this as a “floating’ essential functions thesis.” Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982).

217. Sager, *supra* note 29, at 68–80.

218. *Id.* at 80–89.

219. See, e.g., Gunther, *supra* note 32, at 898; Redish, *supra* note 216, at 161–66 (suggesting that the Due Process Clause may provide such an external restraint).

220. *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 98, 132 (1981) (statement of William Van Alstyne, Professor of Law, Duke University).

221. See, e.g., THOMAS, *supra* note 183, at 12 (discussing the Equal Protection Clause); Claus, *supra* note 161, at 115 (referring to the Suspension, Due Process, and Petition Clauses); Rossum, *supra* note 159, at 420 (“The due process clause of the fifth amendment plays an especially prominent role in this argument.”); Sager, *supra* note 29, at 78–79; Van Alstyne, *supra* note 191, at 263–66 (pointing to due process constraints on the Exceptions Clause).

222. Hooper, *supra* note 6, at 518 (“Simply, congressional measures regulating jurisdiction must comport with the constitutional requirements of equal protection, due process, and separation of powers.”); Fellow, *supra* note 19, at 1131–32 (identifying separation of powers and due process-based arguments as two of the three leading arguments, with essential functions being the third and “weakest”).

223. *But see* Gressman & Gressman, *supra* note 29, at 523–24 (arguing that jurisdiction-stripping legislation, like all other congressional acts, must be “necessary and proper”).

constraints thesis. Many of its decisions have suggested that Congress's power over the Court's appellate jurisdiction is plenary.<sup>224</sup> But the Court has also taken pains to suggest the existence of yet-unidentified limits, repeatedly ruling that although this or that jurisdiction-stripping act might keep a particular claim out of federal court, the Court still retains jurisdiction through some *other* mechanism,<sup>225</sup> perhaps implicitly suggesting the preservation of some core of essential functions. In other cases, however, the Court has suggested that the Exceptions Clause may be limited by external constraints. *Klein*, for example, lends implicit support to such an approach. In *Klein*, the Court struck down a jurisdiction-stripping law in part because it would have violated the executive's pardon power, as described in Article II, Section 2.<sup>226</sup> At least implicitly, then, *Klein's* holding endorsed a separation of powers limitation on the Exceptions Clause. The Court has never, however, addressed the central question of whether amendments to the Constitution represent a special kind of external constraint. The most notable case—perhaps the only case—addressing that question is the Second Circuit's opinion in *Battaglia v. General Motors Corp.*, which held that

the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of

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224. See The "Francis Wright," 105 U.S. 381, 385 (1881) ("[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.").

225. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (interpreting the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as not completely stripping habeas jurisdiction in immigration cases because doing so would "raise serious constitutional problems"); see also *supra* notes 193–203 and accompanying text (discussing *McCardle*, *Yerger*, and other jurisdiction-stripping cases); *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996) ("[S]ince [the AEDPA] does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.").

226. 80 U.S. (13 Wall.) 128, 147–48 (1871); see also *Tribe*, *supra* note 10, at 140.

life, liberty, or property without due process of law or to take private property without just compensation.<sup>227</sup>

The Second Circuit did not, however, explore the theory of external constraints on which its opinion implicitly rested.

The external constraints line of reasoning, though less popular,<sup>228</sup> is ultimately more promising than the search for internal constraints. Unfortunately, external constraints theorists have not yet engaged in the close textual and structural analysis that their theory demands. To date, no external constraints theorist has given sustained attention to the impact of any particular constitutional provision on the Exceptions Clause, with Sager's lengthy explanation of Article III's tenure requirements being perhaps the closest attempt.<sup>229</sup> As a result, the connection between external constraints and the Exceptions Clause remains undertheorized and in some sense incomplete. This Article attempts to fill that gap by addressing a particular kind of external constraint—constitutional amendment—that demands special treatment.

In addition to filling the gap in external constraints theory, exploring constitutional amendment as an external constraint further illustrates the link between constitutional amendment and Exceptions Clause theory. Just as proposals to amend the Constitution and jurisdiction-stripping bills are closely related, the themes and questions of Exceptions Clause scholarship echo in amendment scholarship. Indeed, amendment scholarship has its own versions of the plenary power thesis,<sup>230</sup> the “essential functions” thesis,<sup>231</sup> and “external constraints” theo-

227. 169 F.2d 254, 257 (2d Cir. 1948) (footnote omitted), *cert. denied*, 335 U.S. 887 (1948); *accord* *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (holding that judicial relief “cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause”). *Lindsey* involved an Oregon law that imposed special burdens on tenants, but not landlords, wishing to appeal adverse decisions. *Id.* at 64. Thus it did not address, or even mention, the Exceptions Clause.

228. Gunther, *supra* note 32, at 900; Handman, *supra* note 28, at 205 (describing the debate about Congress's power over jurisdiction as being “largely between only two schools of thought”: the implicit internal constraints theory and a broad reading of congressional power).

229. See Sager, *supra* note 29, at 61–68.

230. See, e.g., Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 448 (1983) (“Congress is constitutionally free to propose, and the states to ratify, any amendment whatsoever.”); Note, *The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend*, 109 HARV. L. REV. 1747, 1747 (1996) [hereinafter *The Faith to Change*] (“The orthodox understanding of Article V is that it is unlimited . . .” (footnote omitted)).

231. See, e.g., WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION*

ries.<sup>232</sup> In many ways, amendment scholarship and Exceptions Clause scholarship are two troubled families with more in common than either seems to realize. The next Section demonstrates this interconnectivity in exploring whether the First Amendment has amended the Exceptions Clause.

### C. IMPLICITLY AMENDING THE EXCEPTIONS CLAUSE: THE (POSSIBLE) EXAMPLE OF THE FIRST AMENDMENT

Part I of this Article argued that constitutional provisions can be, and often are, altered by constitutional amendments even when not specifically mentioned by the amendments themselves. The first two Sections of Part II described the use of the Exceptions Clause to strip federal court jurisdiction, and the attempts of scholars to find limits on that power. This Section attempts to bring these two lines of inquiry together by considering whether, and how, one particular amendment—the First—has “amended” the Exceptions Clause, imposing the limitations that federal courts scholars have long hoped to find.

The First Amendment says in part that “Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech.”<sup>233</sup> As Part I argued, despite the fact that the First Amendment makes no reference to Article I, the First Amendment nonetheless amends Article I’s grants of congressional power. The lack of textual reference to the targeted provision of the original Constitution does not undermine the First Amendment’s effect on Article I; the two are tied together not by the literal words of the Constitution, but by their shared focus on congressional power.

But as the previous two Sections made clear, Article I is not the sole repository of that power. The Exceptions Clause, though located in Article III instead of Article I, is fundamentally a grant of legislative power. And whether found in Article

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205 (1993) (arguing that the scope of amendment “is bound by the rules of the American constitutional enterprise”); Ackerman, *Constitutional Politics*, *supra* note 18, at 469–71 & n.31 (suggesting that a “Christianity Amendment” would be constitutional, but that an amendment repealing dualist democracy might not be); Murphy, *supra* note 54, at 164; Tribe, *supra* note 18, at 438–39 (suggesting that some amendments would not “fit” with the constitutional plan).

232. See, e.g., Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074 (1991) (arguing that the Flag Burning Amendment would violate the Ninth Amendment); *The Faith to Change*, *supra* note 230 (arguing that Article VII’s oath requirement limits the scope of the amendments that Congress may propose under Article V).

233. U.S. CONST. amend. I.

I or elsewhere, grants of congressional authority in the Constitution are beholden to the limitations imposed by the First Amendment.<sup>234</sup> Consider the one congressional power that is specifically mentioned in Articles I and III: the power to create courts inferior to the Supreme Court, which is referenced both in Article I, Section 8,<sup>235</sup> and in Article III, Section 1.<sup>236</sup> Surely a subsequent constitutional amendment mandating (or prohibiting) the existence of “courts inferior to the Supreme Court” would “amend” congressional power under Article I as well as under Article III.

Just as a shared focus on congressional power creates a tie between Article I and the Exceptions Clause, the First Amendment and the Exceptions Clause are tied together by language as well as logic. Amar’s intertextualist framework—which Part I.D argued is a powerful tool for unraveling the meaning of amendments—reveals a clear textual interlock between the words “with such Exceptions, and under such Regulations as the Congress shall make”<sup>237</sup> and the phrase “Congress shall make no law.”<sup>238</sup> Since exceptions and regulations cannot come about except by law (i.e., congressional action), the Amendment seems to target congressional alteration of jurisdiction just as clearly as it targets, for example, congressional funding measures.<sup>239</sup> Moreover, this reading vindicates the intent of the Amendment’s drafters because it protects courts’ power to give meaning to the Bill of Rights, assuaging Anti-Federalist concerns about an overreaching Congress.<sup>240</sup>

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234. See *supra* notes 44–47 and accompanying text.

235. U.S. CONST. art. I, § 8, cls. 1, 9 (“The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court . . .”).

236. *Id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

237. *Id.* art. III, § 2, cl. 2.

238. *Id.* amend. I.

239. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (noting that the First Amendment’s Establishment Clause means that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion”).

240. See *supra* note 94; see also Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133 (1988) (“What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that *Congress* was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states.” (footnote omitted)).

The First Amendment thus alters congressional power under the Exceptions Clause just as it does congressional power under Article I. Because of this, Congress may not, for example, pass a jurisdiction-stripping law impermissibly “respecting an establishment of religion,” nor one “abridging the freedom of speech.”<sup>241</sup> In other words, Congress has no more (or less) power to favor religion or to limit speech through regulation of federal jurisdiction than it does by controlling the power of the purse: the First Amendment provides an external constraint on the Exceptions Clause. This conclusion does not, of course, absolve courts of determining what kinds of jurisdiction-stripping laws are constitutional. Two examples illustrate the point.

The Public Prayer Protection Act of 2005 was proposed as part of a raft of congressional legislation intended to protect religious practice<sup>242</sup>—specifically, in the case of the Act, “the right of elected and appointed officials to express their religious beliefs through public prayer.”<sup>243</sup> Declaring that “the exercise of this right does not violate the Establishment Clause,”<sup>244</sup> the Act noted that “Article II, Section 2, clause 2 of the United States Constitution [the Exceptions Clause] expressly grants Congress the authority to define the appellate jurisdiction of the Federal court system.”<sup>245</sup> Invoking this power, the Act provided:

“[T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any matter that relates to the alleged establishment of religion involving an entity of the Federal Government or a State or local government, or an officer or agent of the Federal Government or a State or local government, acting in an official capacity, concerning the expression of public prayer by that entity, officer, or agent.”<sup>246</sup>

Similarly, the Pledge Protection Act<sup>247</sup> was proposed in the wake of a well-publicized Ninth Circuit decision holding that a “school district’s policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words ‘under God,’ violates the Establishment Clause.”<sup>248</sup> Section 2 of the Act reads in part as follows:

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241. See U.S. CONST. amend. I.

242. Diana B. Henriques, *In the Congressional Hopper: A Long Wish List of Special Benefits and Exemptions*, N.Y. TIMES, Oct. 11, 2006, at A20.

243. H.R. 4364, 109th Cong. (2005).

244. *Id.* § 2, cl. 3.

245. *Id.* § 2, cl. 5.

246. *Id.* § 3.

247. H.R. 2028, 108th Cong. (2004); see also H.R. 2389, 109th Cong. (2005).

248. *Newdow v. U.S. Congress*, 328 F.3d 466, 490 (9th Cir. 2002), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).



No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation.<sup>249</sup>

Although the Act does not contain language describing its purpose, its supporters made it clear that it was intended to prevent the Supreme Court from striking down the Pledge on First Amendment grounds. Representative Todd Akin said,

Essentially what our bill does, if you want to put it in a simple word picture, we are creating a fence. The fence goes around the Federal judiciary. We do that because we don't trust them. We don't trust them because of previous decisions and because of the simple fact that there are not five votes on the Supreme Court to protect our beloved Pledge of Allegiance.<sup>250</sup>

Representative Tom DeLay added, "I think that [it] would be a very good idea to send a message to the judiciary they ought to keep their hands off the Pledge of Allegiance."<sup>251</sup> As their names and the statements of their supporters indicate, both "Protection Acts" were passed in anticipation of court decisions striking down certain forms of public worship. Rather than amending the Constitution to say that various forms of prayer are constitutional, the Acts would have prevented federal courts from ruling that they are not.

Although these jurisdiction-stripping Acts attempt to limit First Amendment challenges to public prayer, they are themselves legislative acts of Congress subject to the First Amendment. As such, they must not impermissibly "respect[] an establishment of religion" or "abridg[e] the freedom of speech."<sup>252</sup> And in analyzing whether these or any other jurisdiction-stripping laws violate the First Amendment, courts could simp-

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249. H.R. 2028, § 2(a).

250. 152 CONG. REC. H5415 (daily ed. July 19, 2006) (statement of Rep. Akin).

251. Stephen Dinan, *DeLay Threatens to Curb Courts' Jurisdiction; Vents Ire over Pledge of Allegiance*, WASH. TIMES, Mar. 6, 2003, at A04.

252. U.S. CONST. amend. I. The Establishment Clause is a particularly useful example because religiously themed jurisdiction-stripping proposals are among the most common Congress has considered and proposed. In addition to the examples discussed here, see Religious Liberties Restoration Act, S. 1558, 108th Cong. (2003) (limiting jurisdiction of federal courts over cases involving the Pledge of Allegiance, display of the Ten Commandments, and invocation of "In God We Trust"), Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 1 (2005) (stripping the Supreme Court of jurisdiction to determine the constitutionality of government official's "acknowledgement of God as the sovereign source of law, liberty, or government"), and Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005) (same).

ly import existing First Amendment doctrine. Thus, to be valid, a law stripping jurisdiction over Establishment Clause claims should be required to meet the three-pronged test set out in *Lemon v. Kurtzman*<sup>253</sup>: it must advance a secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not result in an excessive entanglement of government and religion.<sup>254</sup> If a court finds that an act stripping jurisdiction over Establishment Clause claims fails any of the three prongs, it is unconstitutional and invalid.

Under the *Lemon* test, both the Public Prayer Protection Act and Pledge Protection Act are of questionable validity. Whether the Acts have a legitimate secular purpose under the first prong is debatable. Their supporters might say (in the face of the legislative history and in the absence of factual support) that the Acts were passed to clear federal courts' crowded dockets of Establishment Clause challenges to public prayer, or simply to make state courts the primary enforcers of the First Amendment in this area.<sup>255</sup> On the other hand, the public statements of the Acts' supporters suggest that the main, if not singular, purpose of the Acts is not strictly secular, but rather an attempt to protect public religious acts from federal court review.<sup>256</sup>

Thus both Acts would at least raise questions under the first prong of *Lemon*. They are on somewhat stronger footing with regard to the second and third prongs. Although the Acts would certainly have the effect of advancing religion—that, after all, is what their supporters designed them to do—it is doubtful that this effect would be “primary” and thus violative of *Lemon*'s second prong.<sup>257</sup> Similarly, both Acts encourage some degree of “entanglement” of government and religion, since they would limit First Amendment challenges to prayers made either by public officials or in public schools. But it is unclear whether the entanglement that would result from barring

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253. 403 U.S. 602 (1971).

254. *Id.* at 612–13.

255. Many thanks to William Van Alstyne for bringing this point—among many others—to my attention. Of course he bears no blame for any shortcomings in my attempt to address them.

256. See *supra* notes 250–51 and accompanying text.

257. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125–26 (1982) (asserting that a statute giving churches and schools the power to effectively veto liquor licenses within a 500-foot radius had a “‘primary’ and ‘principal’ effect of advancing religion”).

such constitutional claims from federal courts would be “excessive” enough to violate *Lemon*’s third prong.<sup>258</sup>

The Public Prayer Protection Act and Pledge Protection Act would thus possibly fail one, and perhaps all three, of the *Lemon* test’s prongs. A defender of the Acts might answer that any argument against their constitutionality presupposes that public prayer, or the “under God” language in the Pledge, violates the Establishment Clause. If they do *not* violate the First Amendment, then a jurisdiction-stripping provision preventing courts from finding that they *do* cannot itself violate the Establishment Clause. But this attempted defense of the Act puts the Establishment Clause cart before the jurisdictional horse. Determining whether the Pledge violates the Establishment Clause in a challenge to a jurisdiction-stripping act would be the equivalent of a court asserting jurisdiction to determine whether it had jurisdiction, a power that courts always possess.<sup>259</sup> If the Pledge passes the *Lemon* test, then so does the act. If it does not, then neither does the act. In this sense, both Acts have an Escher-esque quality: they attempt to strip federal jurisdiction over Establishment Clause challenges, and yet they appear themselves to violate that Clause.

#### D. CAVEATS AND OTHER AMENDMENTS

Drawing together Part I’s discussion of the impact of amendments and Part II’s discussion of the Exceptions Clause, the previous Section argued that the First Amendment imposes the same limitations on Congress’s use of its power under the Exceptions Clause as it does on all other exercises of congressional power. This thickened understanding of the Exceptions Clause’s relationship to the rest of the Constitution provides much-needed support to the external constraints theory embraced by many federal courts scholars. But just as those scholars have generally not yet marshaled all of the support for their position, neither have they considered all of its weaknesses. This Section identifies some of those objections and limitations on the application of an external constraints theory.

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258. *Id.* at 127 (“The challenged statute thus enmeshes churches in the processes of government . . . Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.” (citation omitted)).

259. *Tex. & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co.*, 270 U.S. 266, 274 (1926) (Brandeis, J.) (“Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.”).

One potential objection to the theory of an amended Exceptions Clause is that subsequent amendments, rather than “amending” the Exceptions Clause, amend the first sentence of Article III, Section 2. That sentence reads: “The judicial Power shall extend to all Cases, in Law and Equity, *arising under this Constitution, [and] the Laws of the United States . . .*”<sup>260</sup> That entire phrase, in turn, has been read as being modified by the final sentence of the second paragraph, the Exceptions Clause: “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>261</sup> If a subsequent amendment were to work a change on Article III, one might ask why that change should be to the Exceptions Clause (thus limiting Congress’s power over federal jurisdiction) as opposed to the first phrase of Article III (thus expanding the range of cases over which the Supreme Court has appellate jurisdiction). Under this amendments-as-additions reading, federal courts would have jurisdiction over cases arising under the new amendment, but that jurisdiction would remain subject to Congress’s unchanged Exceptions Clause power.

Another version of the same argument might say that if an amendment’s drafters meant to alter the Exceptions Clause, the text of the amendment would make that intention clear. Such arguments have been advanced against the internal constraints theory of the Exceptions Clause<sup>262</sup> and could reasonably be made against the modified external constraints theory presented in this Article. Continuing to use the First Amendment as an example, an opponent of the theory treating amendments as limitations on Congress’s Exceptions Clause power could argue that since the text of the First Amendment does not mention the Clause, its impact on the Clause is ambiguous. Thus, the more sensible reading would be to simply consider the Amendment as an addition to the Constitution, subject to the Clause.

But as applied to the text of amendments, these lack-of-specificity arguments prove too much. As explained in Part I, constitutional amendments rarely identify the text they mean to alter, but courts and scholars nonetheless interpret their impact broadly.<sup>263</sup> The First Amendment, for example, limits governmental actors besides the national legislature, even though

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260. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

261. *Id.* art. III, § 2, cl. 2.

262. Handman, *supra* note 28, at 207.

263. *See supra* notes 111–14.

Congress is the only entity it specifically mentions.<sup>264</sup> It would be strange indeed if courts required an amendment to contain a more specific statement of intent to amend the Exceptions Clause, especially since courts considering jurisdiction-stripping legislation have often required *Congress* to provide specific statements of its intent to strip jurisdiction.<sup>265</sup> It seems unlikely that the Clause should be given a broad, relatively “unamendable” reading when the powers exercised under the Clause must be specific, and are construed narrowly.

Thus far, this Part has focused on the relationship between the Exceptions Clause and the First Amendment. But other amendments might prove to be even more fertile grounds for finding “amendments” to the Clause. The Fourteenth Amendment is an obvious candidate and has been a favorite reference point for external constraints theorists.<sup>266</sup> This Article has purposefully avoided using the Fourteenth Amendment as a point of departure, partially in an attempt to set aside for now the complications of the incorporation debate. That debate—whether the Fourteenth Amendment incorporated the Bill of Rights as against the states—is perhaps the most recognizable of the impact-of-amendment discussions laid out in Part I.<sup>267</sup> If anything, however, the resolution of the incorporation debate—to the degree that there has been one—supports the general thesis that amendments have impacts on the existing Constitution (including its earlier amendments).

Perhaps more importantly for the thesis that amendments can limit Congress’s Exceptions Clause power, the Fourteenth Amendment was, unlike the First Amendment, fundamentally an *expansion* of congressional power.<sup>268</sup> Relying on the Four-

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264. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (holding that courts had no power to grant the executive’s request for an injunction to prevent the *New York Times* and the *Washington Post* from publishing a classified study regarding U.S. policy in Vietnam); *id.* at 718–19 (Black, J., concurring) (finding that the First Amendment limits the President’s power to create judicially enforceable prior restraints on the publication of newspaper articles); Strauss, *supra* note 44, at 907.

265. *Felker v. Turpin*, 518 U.S. 651, 660 (1996); *Ex parte Yerger*, 75 U.S. 85, 104–05 (1869) (noting that the jurisdiction-stripping statute of 1867 contained “no repealing words” and stating that “[r]epeals by implication are not favored”).

266. See Katyal, *supra* note 35, at 1367.

267. See Ackerman, *Constitutional Politics*, *supra* note 18, at 460 (describing the incorporation debate as “[p]erhaps the most famous modern synthetic problem”).

268. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“Correctly viewed,

teenth Amendment to restrict congressional power, when the text of the Amendment so clearly aims to expand it, requires a deeper and closer reading than “external constraints” theorists have thus far given it, or than this Article can provide.<sup>269</sup> External constraints theorists who rely on the Fourteenth Amendment must measure its broad, general language against the explicit, clear language of the Exceptions Clause.<sup>270</sup> As a result, they are susceptible to arguments that the clear language of the Exceptions Clause must trump penumbras or emanations from elsewhere.<sup>271</sup> The First Amendment, by contrast, is both specific—in that it is directed at Congress—and, unlike the Fourteenth Amendment, clearly *restricts* the government’s power. This does not mean that Congress’s Exceptions Clause power is *not* subject to due process or equal protection limitations; it suggests only that describing these limitations demands more attention than scholars have devoted to it.

Finally, it should be noted that the argument regarding constitutional amendment presented in Part I of this Article is fundamentally one about the U.S. Constitution, not state constitutions or other constitutive documents.<sup>272</sup> State constitu-

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§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”).

269. Interestingly enough, Chief Justice John Roberts, then a Special Assistant to the Attorney General, noted in a memorandum about congressional control over federal jurisdiction that “Congress may derive *additional authority* in regulating Supreme Court appellate jurisdiction over Fourteenth Amendment cases by virtue of §5 of that Amendment.” Memorandum from John Roberts, Special Assistant to the Att’y Gen., *Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments* 25 (n.d.), available at <http://www.archives.gov/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf> [hereinafter Roberts, Memorandum] (emphasis added).

270. Redish, *supra* note 29, at 907–08; Rice, *supra* note 182, at 975 (“[T]he exceptions clause is clear, unambiguous, and unqualified.”).

271. See Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical View and New Synthesis*, 124 U. PA. L. REV. 45, 72 (1975) (“[T]he language and history of article III are so clear that any alteration, even to accomplish the framers’ purposes, must come by amendment and not by interpretation in light of ‘changing circumstances.’”). During a congressional debate on the issue, Senator Sam Ervin noted, “I don’t believe that the Founding Fathers could have found any simpler words or plainer words in the English language to say what they said, which was that the appellate jurisdiction of the Supreme Court is dependent entirely upon the will of Congress.” *Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong. 22 (1968) (statement of Sen. Ervin).

272. For an international approach, see Stephen Holmes & Cass R. Sun-

tions vary in their amendment procedures, but many make amendment a much less difficult—and much less radical—proposition than the U.S. Constitution does. Donald Lutz’s interesting comparative study of federal and state constitutional amendment reports that state constitutions are amended at nearly ten times the rate of the U.S. Constitution.<sup>273</sup> The Alabama constitution, to take the most striking example, was amended 726 times between 1901 and 1991.<sup>274</sup> Statutes, too, generally present a distinct model of amendment; one which differs from both the state constitution model and the Federal Constitution model described here. Unlike their constitutional cousins, statutes are often amended through a specific process of strike-outs that specifically identify the sections or parts of the statute to be replaced. There are structural (not to mention practical) problems preventing courts from applying a nuanced reading to the “amendment” of statutes and state constitutions, many of which contain hundreds or thousands of provisions enacted at hundreds or thousands of different times.<sup>275</sup> But the U.S. Constitution, the interpretation of whose minutiae has occupied courts and scholars for hundreds of years, not only allows for such a close reading, but demands it.

#### E. EXPLICITLY AMENDING THE EXCEPTIONS CLAUSE

The theory of constitutional amendment described in Part I of this Article requires interpreters to consider whether, even in the absence of a specific reference to a target provision, an amendment changes the text of the “Original Constitution.”<sup>276</sup>

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tein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION, *supra* note 51, at 275, 275 (“The procedure for constitutional modification best adapted to Eastern Europe today sets relatively lax conditions for amendment, keeps unamendable provisions to a minimal core of basic rights and institutions, and usually allows the process to be monopolized by parliament, without any obligatory recourse to popular referenda.”).

273. Lutz, *supra* note 51, at 247.

274. *Id.* at 248.

275. See Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 580 (1915) (“Not only are [state constitutions] subject to constant change, but they have long since ceased to be constitutions in a true sense. . . . No one now entertains any particular respect for a state constitution. It has little more dignity than an ordinary act of the legislature.”); Tribe, *supra* note 18, at 442 n.42 (“The cluttered and rapidly changing contents of state constitutions may partially explain why even the most enduring and fundamental provisions of these documents rarely command the respect routinely paid to federal constitutional guarantees.” (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1353–56 (1982))).

276. U.S. CONST. amends. I-X pmbl.

Part II.C argued that the First Amendment may have implicitly amended the Exceptions Clause, thus limiting Congress's power over federal jurisdiction. But the caveats described in the previous Section are themselves weighty, and their resolution remains unclear. If anything, the preceding discussion has illustrated not just the possibilities, but the pitfalls of a constitutional analysis that relies on implicit amendment of the Exceptions Clause.

The better solution for proponents of a vulnerable amendment—that is, one ratified by a temporary supermajority but potentially subject to a jurisdiction-stripping bill passed by a subsequent simple majority—is to insulate it from jurisdiction-stripping legislation by guaranteeing the Supreme Court's jurisdiction over cases arising under the amendment.<sup>277</sup> An amendment could, for example, include a provision stating, "The Supreme Court shall have appellate jurisdiction over all cases arising under this amendment, notwithstanding Congress's power to make exceptions and regulations to that jurisdiction." Another alternative more in line with the "Congress shall have power to enforce" language found in other amendments<sup>278</sup> is, "The Supreme Court shall have appellate jurisdiction over cases arising under this amendment." Such a provision would implicitly but clearly amend Article III, preserving Congress's power to remove *lower* federal courts' jurisdiction over the amendment while protecting the Supreme Court's final, appellate review.

While future amendments may include language guaranteeing Supreme Court review of cases arising under their terms, none of the twenty-seven amendments currently appended to the U.S. Constitution say anything about jurisdiction or courts' responsibility for enforcing them.<sup>279</sup> Some of the amendments—especially the Fifth and the Sixth—are clearly

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277. See CITIZENS FOR THE CONSTITUTION, *supra* note 153, at 21–22 (arguing that supporters of amendments should attempt "to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles").

278. See, e.g., U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

279. In a 1963 *Yale Law Journal* piece, Charles Black excoriated a then-pending amendment which would have directly altered Article V, replacing its current text with new language essentially eliminating Congress's role in the amendment process. Black, *The Proposed Amendment of Article V*, *supra* note 52; Black, *A Letter to a Congressman*, *supra* note 52. The proposed amendment soon died.



directed at courts, and indeed Madison originally proposed that those two amendments be interwoven with the text of Article III.<sup>280</sup> But even so, the amendments by their terms say nothing about federal courts' duty to enforce them.

This deafening silence regarding judicial power contrasts with the increasingly loud expansions of congressional power in constitutional amendments passed since the Civil War.<sup>281</sup> To take just three examples, the Thirteenth, Fifteenth, and Nineteenth Amendments all identically provide that "Congress shall have power to enforce this article by appropriate legislation."<sup>282</sup> Similar phrases adorn most of the amendments passed since the Civil War era,<sup>283</sup> most notably Section 5 of the Fourteenth.<sup>284</sup> These Amendments are *grants* of congressional power, not limitations on it.

Looking back on the amendment process described in Part I, the legislative power-expanding nature of these amendments may be unsurprising, given Congress's powerful role in the amendment process.<sup>285</sup> Indeed, the very structure of Article V seems to create momentum for this legislative-empowering trend in constitutional amendment. After all, every constitutional amendment has originated as a congressional proposal.<sup>286</sup> The simple political reality may be that Congress is unlikely to add a provision limiting its institutional power to control the fate of an amendment it has proposed.

The greatest counterexample to this reading of amendments as legislature-empowering is the Bill of Rights.<sup>287</sup> But while many of the first ten amendments expressly limit congressional power, they also represent something of a special case, having been passed in part to assuage Anti-Federalist

280. See *supra* notes 100–01 and accompanying text.

281. KYVIG, *supra* note 84, at 154–55.

282. U.S. CONST. amends. XIII, XV, XIX.

283. See, e.g., *id.* amends. XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI.

284. *Id.* amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

285. See H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 976 (1993) ("For Congress at least, the legislative role in proposing constitutional amendments often was seen as a special subset of the general legislative duty to interpret the Constitution.").

286. The Twenty-first Amendment, ending Prohibition, was ratified by state conventions, but it was proposed by Congress. See Everett S. Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005, 1005–17 (1935).

287. See Amar, *supra* note 133.

concerns about the power of the federal government.<sup>288</sup> The Eleventh Amendment, which followed in short order, also effectively limited federal power.<sup>289</sup> Moreover, on the eve of the Civil War, Congress proposed an amendment that would have limited federal power by altering Article V itself. The proposal—known as the Corwin Amendment—provided that “[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.”<sup>290</sup> Lincoln endorsed the Amendment (which ironically would have been the thirteenth) and three Union-side states ratified it before the Civil War broke out and the legislators scrapped the effort.<sup>291</sup> Thus, prior to the Civil War, there was a clear pattern of passing amendments that limited congressional power.

In contrast, the clear trend since the Civil War has been for amendments to expand the legislature’s power. A constitutional amendment lessening Congress’s power under the Exceptions Clause may thus have to overcome a fair bit of institutional momentum, but it is not an impossibility. In addition to proposing the Bill of Rights, Congress has occasionally pronounced its fidelity to the ideal of an independent judiciary,<sup>292</sup> and individ-

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288. Akhil Reed Amar, *The Fifty-Seventh Cleveland-Marshall Lecture: “The Bill of Rights and Our Posterity,”* 42 CLEV. ST. L. REV. 573, 575 (1994) (“Though proposed by the Federalist Madison, the original Bill of Rights reflects its Anti-Federalist parentage as well.”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 843 n.308 (1995) (“The movement to secure a bill of rights came from Anti-federalists who wanted to limit the national government’s power.”); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1705 (1991) (“The purpose of the Bill of Rights was to incorporate these Anti-Federalist protections into the predominantly Federalist document.”).

289. U.S. CONST. amend. XI (limiting federal jurisdiction in cases where states are parties).

290. See Mark E. Brandon, *The “Original” Thirteenth Amendment and the Limits to Formal Constitutional Change*, in RESPONDING TO IMPERFECTION, *supra* note 51, at 215, 216–20.

291. *Id.* at 219.

292. Following its rejection of Roosevelt’s court-packing plan, the Senate Committee on the Judiciary declared,

Let us now set a salutatory precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obli-

ual legislators have sometimes willingly foregone politically appealing jurisdiction-stripping measures for such principled reasons as the importance of an independent judiciary.<sup>293</sup> While these attitudes may indicate that an amendment explicitly limiting congressional power under the Exceptions Clause is not impossible, no constitutional amendment has specifically amended the Exceptions Clause. Further, few scholars or legislators seem to have given much thought to the potential for amendments to limit Exceptions Clause power.<sup>294</sup> But in light of Congress's increasing flirtation with jurisdiction-stripping legislation, the possibility can no longer be ignored.

### CONCLUSION

Bruce Ackerman recently noted that “[a] funny thing happened to Americans on the way to the twenty-first century. We have lost our ability to write down our new constitutional commitments in the old-fashioned way.”<sup>295</sup> But perhaps what has really happened is that Congress has abandoned Article V as a method of recording those commitments and has instead

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gation to the appointing power, or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

S. REP. NO. 711, 75th Cong., 1st Sess. 27 (1937).

293. 128 CONG. REC. 2242 (statement of Sen. Goldwater) (expanding on his “concern about proposals that would interfere with Federal court independence”).

294. The one counterexample I have found is a proposal, supported by former Justice Owen Roberts, to excise the Exceptions Clause entirely. Owen J. Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1 (1949). The year after Hart's influential article was published, Senator Butler proposed just such an amendment, a revision he claimed was necessary to protect the Court from congressional interference. See S.J. Res. 44, 83d Cong. (1954); 99 CONG. REC. 1106–07 (1954) (statement of Sen. Butler); see also S. REP. NO. 83-1091, at 2 (1954) (“The purpose of this joint resolution . . . is to fortify the independence of the judiciary by amendments to the Constitution, thereby forestalling efforts by any future President or Congress seeking to nullify or impair the power of the judicial branch of government.”). Although the Senate passed the bill, and the American Bar Association supported it, the House tabled the initiative. Roberts, Memorandum, *supra* note 269, at 21.

Illustrating the political volatility of the constitutional issues described here, Senator Butler also spearheaded an effort three years later to strip the Court's power over congressional attempts to target “subversive activities.” Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1042 (2006) (internal quotation marks omitted).

295. Ackerman, *The Living Constitution*, *supra* note 79, at 1741.

employed its power under the Exceptions Clause to pass jurisdiction-stripping legislation. As the latter increasingly replaces the former as the preferred method of adjusting courts' treatment of constitutional questions, the relationship between the two demands increasing attention.

Unfortunately, scholars of constitutional amendment and of federal jurisdiction have too often wandered in different parts of the same forest, lost in the difficult problems presented by their respective obsessions and failing to appreciate the insights they have to offer each other. This Article describes a path between them. Perhaps a better understanding of amendments' unique status as external constraints will make it easier to find limits on the Exceptions Clause. And perhaps a theory more tied to the text of the Constitution will give the Supreme Court stronger footing from which to begin outlining the limits on Congress's power over federal-court jurisdiction.