

Spring 4-14-2013

# A New Vision for our Constitutional Amendment Process

Jesse M. Feitel  
Syracuse University, [jmfeitel@gmail.com](mailto:jmfeitel@gmail.com)

Follow this and additional works at: <https://surface.syr.edu/distinction>

 Part of the [American Politics Commons](#), [Models and Methods Commons](#), [Other Political Science Commons](#), and the [Political Theory Commons](#)

---

## Recommended Citation

Feitel, Jesse M., "A New Vision for our Constitutional Amendment Process" (2013). *Maxwell School – Distinction Theses (Undergraduate)*. 2.  
<https://surface.syr.edu/distinction/2>

This is brought to you for free and open access by the Maxwell School of Citizenship and Public Affairs at SURFACE. It has been accepted for inclusion in Maxwell School – Distinction Theses (Undergraduate) by an authorized administrator of SURFACE. For more information, please contact [surface@syr.edu](mailto:surface@syr.edu).

Jesse Feitel

Submitted: April 14, 2013

PSC 495/496: Distinction Thesis      Advisor: Professor Keck; Second Reader: Professor Bybee

A New Vision for our Constitutional Amendment ProcessIntroduction

Our Constitution has changed throughout its extensive history. New textual provisions have been added & interpreted by lawmakers; courts have derived rights and liberties from the spirit of the document; and most importantly, the citizens who abide by its words have been continually evolving. However, examining just how malleable our Constitution is in allowing for the adoption of legitimate textual change is vital to its continued implementation. Fundamental to this governing document is the extensive history of the proposed alterations to its words and overall meaning.

Lawmakers past and present have explored constitutional change through the amendment process enumerated in Article V with extremely little success, and it is valuable at the outset of my project to establish perspective on this practice:

The twenty-seven amendments adopted between 1791 and 1992 and the six proposed by Congress but not ratified by the states make up about one-third of one percent of the more than ten thousand proposals introduced in Congress since the beginnings of government under the Constitution (Bernstein with Agel 1993, xii).

While all generations of Americans have utilized this procedure<sup>1</sup> to produce a chance to create constitutional change, we can identify several components of the process that remove

---

<sup>1</sup> Text of Article V of the Constitution: “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

power to amend the Constitution farther away from the people themselves. Article V eliminates the possibility of specifically counting individual voters within each state, and it leaves ratification decisions solely up to the elected representatives of the people on both the federal and state level. This uniform process has produced each of the twenty-seven amendments to our Constitution, and represent exactly how thousands of others have been simply pushed aside, and oftentimes either ridiculed or merely forgotten.

In learning about the vast history of failed amendments to our Constitution, an important question comes to mind: Is the fact that such a small fraction of all of the proposed changes to the document are ever given serious consideration, and that an even smaller amount are actually ratified, necessarily a *negative* consequence of Article V? The divisions amongst spectators of this process identifies three primary groups: one who believes the 27 successful amendments represent a shocking failure of our process whose goal should be to let the people have their say over our nation's history, another that argues 27 may be too large of a number and that our Constitution is already overly-malleable to change, and a third group who is satisfied with how Article V has fared in practice so far. There are also deep-rooted concerns about whether our process awards too much power to the states in general, and where the practice of amending the Constitution stands within our federal legislative process.

I'm deeply interested in this 'business-as-usual' notion of constitutional amendment that has persisted since the introduction of the original document itself. The arguments over whether the Constitution is over-protective and un-malleable to change or whether it is necessarily strict to new amendments is one that is both well recorded and vital to the continued success of our founding document itself. When looking at the small percentage of amendments that even make

---

the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate" (Bernstein with Agel 1993, vii).

it out of both houses of Congress, we see these proposals subsequently proceed through a rigid process that does not directly count individual citizens and gives each state, regardless of location, relationship with the proposed amendment, or total population equal weight in the ratification voting process. Should we admire the Founders for designing such a sound method for textual additions? Or is this system, designed “by a few dozen former colonists in the Pennsylvania State House in 1787” (Bernstein with Agel 1993, xii), in need of a fresh evaluation and critique? I argue that even in the 21<sup>st</sup> century, our constitutional amendment process must remain relevant to the American people. Whenever respect and reverence for the Constitution exists, so will individuals attempting to make a unique historical mark on the document. Therefore, the amendment process enumerated in the document itself deserves continual reexamination.

Going forward, if we gave credence to the arguments made by those who think Article V is too strict and went ahead to create a new process to amend the Constitution awarding one vote to each individual in this nation, could we identify any potential problems or concerns? Certainly, passionate or emotional issues dominating the national agenda, such as widespread racism against the Japanese during and after World War II, or post-Islamic sentiment after the September 11<sup>th</sup> attacks, could quickly, and certainly mistakenly, become a part of our Constitution in a rush of overwhelming popular opinion. Taking into account those who believe Article V is too open to change already, can we imagine a system where it is *even harder* to pass an amendment into the Constitution? Can we, as a democratic nation, tolerate an acceptance rate of even less than our current practice of passing of one-third of one percent of all proposed amendments to our founding document?

This project, while serving as an investigation into our historical experiences with amending the Constitution, makes a recommendation for the future. I argue a middle-ground approach, taking into account our past episodes of amending the Constitution, will leave us with a new process that puts trust in the citizens of our nation to choose and exert democratic power over a new amendment proposal, but allows those weary of the lay citizens of our nation a chance to verify and confirm such monumental additions to the laws and legacies of the United States. I argue this proposal to change our current amendment process, Bruce Ackerman's 'Popular Sovereignty Initiative,' will be at least as equally successful to Article V in preventing the acceptance of unwarranted or extraneous amendments, while substantially more democratic, equal, and fair to the diverse citizens of our nation. It is useful to examine and investigate scholarly discussion and historical context relevant to our history of amending the Constitution to present Ackerman's proposal in the proper context, and to see just how fundamental this procedure is to our democratic identity.

#### Scholarly Discussion & Alternative Proposals for Amending the Constitution

While individual details vary, discussion by constitutional scholars about our amendment procedure is both common and extensively documented. Sanford Levinson describes this type of scholarly discourse regarding our existing amendment process as "helpful goads to a long overdue theoretical exploration that will take us to the very heart of the enterprise of constitutionalism" (Levinson 1995, 11). There is no question that "amending the Constitution is...made purposefully difficult; advocates of amendment are required to muster broad, substantial, and widespread geographic support for their proposals" (Levinson 1995, 122). However, with this notion in mind, has the existing constitutional design been harmful to our

democratic system of creating laws? Again, it remains important to remember that outside of the 27 amendments legitimately adopted into our Constitution's text, there have been "approximately 11,700 others that have been proposed" (Vile 2010, xxii).

Before examining scholarly justification and criticism of the amendment process, justification for the enumerated procedure can be found in the debates leading up to the Constitution's ratification, including in *The Federalist* No. 39, authored by James Madison. In this document, found in "the series of newspaper essays he wrote with Alexander Hamilton and John Jay defending the Constitution" (Bernstein with Agel 1993, 25) under the pseudonym Publius, Madison argues "that the Constitution was neither a national government nor a federal government but combined the virtues of each while avoiding the defects of both" (Bernstein with Agel 1993, 28). He explains, when we "try the Constitution by its last relation to the authority by which amendments are to be made," we discover that the process is "neither wholly national nor wholly federal" (Madison, The Avalon Project). Madison, already anticipating challenges to the precise democratic value of the state ratification process in Article V, explains that the amending process, "by requiring more than a majority, and particularly in computing the proportion by states, not by citizens, it [the amending process] departs from the national and advances towards the federal character" (Madison, The Avalon Project). However, already anticipating the proposed Article V requirement will be seen as too open to malleability, Madison also explains that by making "the concurrence of less than the whole number of States sufficient, it loses again the federal and partakes of the national character" (Madison, The Avalon Project). Additionally, in *The Federalist* No. 43, Madison "defended Article V" by arguing that "it guards equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults" (Bernstein with Agel 1993, 28).

Furthermore, in adding further credence to the two-part component of Article V requiring the involvement of the federal government as well as the individual states, Madison explains the process “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other” (Bernstein with Agel 1993, 28). Madison was writing here in part to “reject the Anti-Federalists’ fears that it would not be possible to amend the Constitution after ratification” (Bernstein with Agel 1993, 28), but also to the merits of Article V as “the only guidance given by the text of the Constitution” (Bernstein with Agel 1993, 29) regarding an alteration of the document itself.

The concern Anti-Federalists had for Article V, and the Constitution more generally, was seen in the “closeness of the Federalists’ margin of victory” in the ratification of the Constitution, including the securing New Hampshire and Virginia’s ratification by only 10 votes, and New York’s by only three votes (Bernstein with Agel 1993, 30). Once the Constitution became the supreme federal law, the losing Anti-Federalists “expected their victorious adversaries to live up to their promises to secure amendments to the Constitution” (Bernstein with Agel 1993, 30). As this paper will examine, the notion of whether Madison’s claims about the equal rigidity and openness of our amendment process have held true have remains the focus of much scholarly discourse on the requirements set forth in Article V.

An additional focus of many contemporary discussions and subsequent criticisms of the amendment process is an examination of the ways in which our Constitution can be amended differently without even altering any of our traditional practices. While scholarly discussion of the amendment process has been a staple of American historical scholarship, the two amendment proposals that failed in the 1970s and early 1980s “caught by surprise reformers who had come to believe that congressional approval was the principal barrier to constitutional change” (Kyvig

1996, 394). As a result, a greater focus was given to the state ratification component of this process, as these two “amending experiences enhanced the image of the Article V process as a formidable obstacle” (Kyvig 1996, 394). Finally, as Kyvig writes, these failures brought questions about the “Article V process” usually reserved for historians and political scientists before a “suddenly attentive mass audience” (Kyvig 1996, 395).

In Levinson’s collection of essays focusing on our amendment process, “A central focus...concerns the *exclusivity* of Article V as a method of bringing about amendment” (Levinson 1995, 7). Levinson introduces constitutional scholar Akhil Reed Amar, who avoids proposing an additionally codified method of change, and “instead...argues the very meaning of popular sovereignty -- captured by the first three words of the Constitution’s preamble, ‘We the People’ -- entails the possibility that a popular majority can amend the Constitution through a national referendum” (Levinson 1995, 9). Subsequently, Levinson explains that scholar Frederick Schauer argues “it is a fundamental category error to look to the Constitution (or *any* constitution) to provide criteria for its own grounding” (Levinson 1995, 9). Furthermore, some scholars ponder whether Article V “set[s] out only procedural hurdles that (at least some) amendments must run” or whether it contains “substantive limits on what can legitimately be viewed as part of the American constitutional system” (Levinson 1995, 10).

Another group of scholars refute the idea there really is any other way to amend the Constitution outside of the traditional process. Levinson introduces David R. Dow, who acknowledges there is a chance for ambiguity when the Founders described the two-thirds rule for amending in the Constitution. Although not likely, Dow points out uncertainty may potentially exist because this rule really “could mean two-thirds of each house, that is, two-thirds of each the House and the Senate, or it could mean two-thirds of the two houses sitting together”

(Dow in Levinson 1995, 118). “Furthermore,” as he describes, “the phrase ‘Intents and Purposes’ [in Article V] seems nearly to invite readers of constitutional amendments to dig beneath the words on the parchment” (Dow in Levinson 1995, 118). Eventually, he rejects these possible refutations by declaring, quite simply: “The meaning of Article V—arguably the single most important procedural provision in the constitution, governing, as it does, how we may alter the Constitution—is an example of yet another text the meaning of which is essentially clear” (Dow in Levinson 1995, 117). Dow emphasizes “the mechanism outlined in Article V clearly and unequivocally sets out an exclusive mode of constitutional amendment” (Dow in Levinson 1995, 118).

Herman Ames, a scholar who studies the details of failed amendments, characterized the amendment process as “excessively difficult and warned of dire consequences” (Ames in Kyvig 1996, xiii). To demonstrate the rigid nature of the Article V process, he creates a distinction that treats the amendments passed in the Reconstruction era as “irregular, forced, and not entirely legitimate,” and separates the Bill of Rights [the first 10 amendments to the Constitution, although oftentimes mistakenly thought of as part of the original text of the document, as we will see later] from the passage of the original 1787 Constitution itself (Ames in Kyvig 1996, xiii). His view leaves only the Eleventh Amendment passed in 1795 and the Twelfth Amendment in 1804 as the only “independently and properly achieved Article V changes” (Ames in Kyvig 1996, xiii).<sup>2</sup>

While my project is concerned with amending within the constraints of Article V, there seems to be agreement that at its face, the enumerated requirement in Article V is quite

---

<sup>2</sup> Ames research on this phenomenon was conducted “shortly after the Constitution’s centennial” (Kygiv 1996, xii) and was published in 1897, so it doesn’t take any subsequent amendments into account. I believe, however, this point is quite important and it is significant that it was raised over 100 years ago.

burdensome and that one is unlikely to expect a viable or timely result from pursuing that avenue of constitutional change. In fact, Levinson posits the following question to give credence to the idea that Article V may not be exclusive: “Everyone concedes that Article V sets out *a* way by which the Constitution can be changed. Is it also *the* way?” (Levinson 1995, 7).

Regardless, the proposals I find most compelling are the ones that discuss an innovative, entirely new, and feasibly tangible way to bring about constitutional change. The following proposal falls within this category, and works to ensure the amending process is closest to the people who will have to, in the end, abide by its words and meaning.

#### ‘Popular Sovereignty Initiative’ Analysis and Discussion

Scholar Bruce Ackerman proposes an entirely new amendment procedure in the form of a “special statute” he names the ‘Popular Sovereignty Initiative’ (Ackerman 1998, 415) in his book *We The People Volume II: Transformations*. This unique proposition differs from its distant Article V relative, and serves as the middle-ground approach referenced earlier. Ackerman’s proposal is unquestionably the primary focus of this project. It is first important to examine the overview of his proposition:

Proposed by (a second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court (Ackerman 1998, 415).

Ackerman’s initial contrast with Article V is the inclusion of mandatory Presidential action on a proposal. He makes clear that in order to “move beyond the present practice” of constitutional amendment, “we must come up with an alternative that also expresses the modern American understanding that We the People of the *United States* can express its constitutional will in a process in which the President plays an important role” (Ackerman 1998, 408). Ackerman’s

proposal concludes with a brief, yet significant note making clear that his Initiative is “one that parallels the structures used by Article Five” to accomplish the goal of “express[ing] the constitutional will of We the People of the United *States*” (Ackerman 1998, 416).

Secondly, he discusses the utilization of a national referenda system for amending the Constitution. Ackerman makes clear that “it is usually too easy to get initiatives on the ballot” (Ackerman 1998, 410), which would lower the standard of propositions being put forward. This is an important distinction when considering altering our federal amendment procedure. Many who propose such alterations look to state constitution practices that utilize a referendum structure for guidance, much like the state of California. However, when it is true that “every state but one now uses a popular referendum for approval” (Levinson 1995, 254) on certain legislative actions, it becomes necessary to imagine the national process conforming to this type of procedure.

This aspect of Article V is similar to the Electoral College system implemented for presidential elections, where individual votes are not counted in a way most Americans would consider fully ‘democratic’ in the sense of every individual receiving an equal vote and equal voice. I argue many lay citizens categorize the Article V state ratification process granting equal representation for each state, along with the Electoral College and the Senate representation requirements, as being one of the more obsolete and out of touch requirements set forth by the Founding Fathers. I believe Ackerman’s proposal addresses this concern by allowing voters a more direct voice in the voting process and providing a more satisfying democratic experience than having a group of distant elected representatives cast a vote on an important national issue at hand. However, when we keep in mind our previous discussion of Madison’s balancing of federal and national influence in the amendment process, this component of the ‘Popular

Sovereignty Initiative' also allows important and competing interests to share a place in the process. Giving the voters an opportunity to vote directly on a proposal at hand, as we mentioned earlier, increases their interest in our system of government and democracy. By requiring two separate, yet consecutive, opportunities to hold this vote, the nation is awarded an additional chance to express its opinion on a potential amendment to our constitution. More importantly, however, taking the vote over a period of eight years significantly decreases the ability for small, secular, or polarizing groups or issues to have a great influence over both of the votes. Much like the earlier examples of post-WWII or 9/11 sentiments in this country, the consecutive election clause of Ackerman's proposal prevents mere topical proposals from entering into the Constitution, and ensures only the most important and widely popular and accepted proposals are ratified. Ultimately, I believe that if a national issue is so vastly important as to merit the attention of an amendment, and this issue holds the attention of a majority of all our citizens over eight years, it deserves a place in the nation's most important document. This, as we will see in the case studies below, is what Ackerman's proposal seeks to re-emphasize.

The 'Popular Sovereignty Initiative' clearly sets forth a unique brand of referendum that makes it quite different from other amending proposals of this sort, as well as from the process currently in place. Ackerman's two-prong proposal goes to the heart of the criticisms surrounding our amendment process, and addresses the concerns of those who think our current process is either too malleable or too rigid. We can describe Ackerman's intention to amend the Constitution in a way that represents the saying 'trust, but verified' (much like the expression used by President Reagan); the power to initiative the proposal is given to the President, greater influence and meaning is placed in the hands of American citizens by giving them two chances to express a vote about an amendment to the Constitution, and power is given to the rigid nature

and importance of the Constitution itself by allowing those decisions to be initiated and verified by both the President of the United States, and the simple yet powerful and effective passage of time.

### Discussion of Research Design

Ackerman's proposal stands as the inspiration for my research design. His proposition is defined by two significant characteristics: (1) granting the President exclusive power to propose an amendment to the Constitution - and not necessarily Congress; and (2) submitting a proposed amendment to a national and popular referendum instead of to each of the fifty state legislatures throughout the country. My project, at its core, examines the implications of invoking the second key element of Ackerman's proposal. The following case studies will highlight both the vast history of failed amendments, as well as the merits of adopting Ackerman's proposal to become the method by which we amend *our* Constitution.

My analysis of the historical practice of constitutional amendment involves designating previous proposals that were the very closest to becoming a part of our national Constitution. These key proposals, spanning nearly the entire length of our Constitution's history and only amounting to a total of six, failed at the final stop before reaching constitutional status: state ratification. Most of these proposals failed to join the text of our Constitution due to a lack of support in individual state legislatures or due to the influence of regional groups with varying power or a simple disinterest in the proposed issue over time; these proposals and subsequent failures are significant. If we can evaluate and discover that while a significant portion of the nation supported a relevant and feasible proposal but a relatively small group of states with comparatively minimal populations were successful in blocking it, we can make a valid case for

at least seriously considering Ackerman's 'Popular Sovereignty Initiative' as a new method we can use to amend the Constitution.

I will introduce each of the failed proposals in the context of a case study, but below I've placed the proposals that have passed through both houses of Congress, but were still defeated at the state ratification level:

- Reapportionment (1789)
- Titles of Nobility (1810)
- Corwin Amendment (1861)
- Child Labor Amendment (1924)
- Equal Rights Amendment (1972)
- D.C. Statehood Amendment (1978) (Bernstein with Agel 1993, 301-303))

By completing a close examination of each individual amendment proposal at its passage on the federal level, and its subsequent failure on the state level, it becomes possible to examine specific states that failed to ratify the amendment, and subsequently evaluate characteristics of these geographic regions, including values such as state-wide population in relation to those areas or groups of states that voted to ratify the specific proposal. Furthermore, relevant information regarding specific social, political, or other types of groups outside the formal process that may have played an important role in the failure to ratify on the state level are critically important to appreciate and understand the context behind these failed amendments. The detailed accounts of such influence on state actors reveal how susceptible our federal amendment process is to imperfection at local levels when thinking about the influence small state legislatures, and the individuals that have influence on these lawmakers, can have on an amendment with national implications. At the same time, these historical experiences can also show us the powerful influence of a timely issue, and how a popular idea can gain rapid momentum and become seriously close to entering into the text of our Constitution.

Regardless, the purpose of this detailed analysis focusing on population data and persuasive quantitative evidence at the state level is to see if some of these proposals could have had the potential to pass a nationwide test similar to Ackerman's national referendum. If a claim could be made that reveals a proposal would have entered the text of our Constitution under Ackerman's Initiative, then it would add credence to the belief that our amendment process may need to be seriously re-examined with the 'Popular Sovereignty Initiative' in mind. Furthermore, if we identify an instance where we are satisfied with the failure or a proposed amendment because it advocates for a belief or right unrepresentative of the American people over a long enough period of time, can we feel confident Ackerman's proposal would have also properly prevented the measure from coming to fruition as well? Looking at these failed proposed amendments to the Constitution will not only attempt to answer these questions, but to also add validity to entertaining Ackerman's alterations to the current process.

### Analysis of the Aforementioned Proposed Amendments to the Constitution

#### Reapportionment (Proposed by Congress: 1789)

While the Bill of Rights is often thought of as part of the Constitutional text, the addition of the first 10 amendments to our constitution was "the single largest granting of new principles and doctrines in the history of the Constitution and its amending process" (Bernstein with Agel 1993, 47). In essence, Madison's proposal to amend various provisions of the nearly brand-new Constitution was a vital factor in securing "the adoption of the Constitution" (Bernstein with Agel 1993, 47). As mentioned above in the brief discussion of Ames research on the matter, some do not even consider the history around the Bill of Rights to be a part of the typical amendment narrative because the addition is so entrenched in our conception of the Constitution;

indeed the rights and positions postured in those ten amendments “confirmed...the conception of the American nation held by the American people between 1789 and 1791” [this time period includes when the Bill of Rights amendments were up for ratification] (Bernstein with Agel 1993, 47). However, what also tends to get lost in the traditional narrative of the several years immediately following the ratification of the Constitution is “the general demand of the country for further limitations upon the powers of the Federal Government” (Ames 1897b, 19).

The “First Period” of constitutional amending, as Ames describes, took place between 1789-1803 (Ames 1897b, 19). In these years, the Congressional record is “marked by a number of amendments intended to correct the minor defects which had become apparent in the working of the Constitution” (Ames 1897b, 19). There were proposals that, among others, sought to “change the date of the inauguration day” and to alter “the time of the sessions of Congress” (Ames 1897b, 36), but there are two measures in that early period of our nation’s history proposed by Congress as part of the Bill of Rights, passed through both houses of Congress, but failed among three-fourths of the states.

Bernstein contends the two proposals that failed state ratification at that time “had nothing to do with rights” (Bernstein with Agel 1993, 45). It is important to note the second of these two amendments, a proposal that was “adopted by six states and rejected by five states between 1789 and 1791 stipulated that no law changing the compensation of members of the House and Senate could go into effect until after an election to the house had taken place” (Bernstein with Agel 1993, 46). In a story that warrants its own scholarly discussion, this proposal laid dormant for nearly a century until it was ratified by Ohio in 1873, and in a narrative that nearly seems nearly fictional, was adopted as the Twenty-seventh Amendment in 1992 (Bernstein with Agel 1993, 46). While this story is compelling, it is not entirely relevant to our

specific task at hand because the Article V process in that instance, while taking a long period of time even on the time scale used to judge amendment proposals, did in fact achieve the desired result of Congressional and state ratification. The process allowed for a gradual shift in public perception over the course of two centuries, and paved a path towards ratification once the enumerated majorities were locked in place and willing to vote to that effect among the states.

The other amendment proposed by Congress, a document that never achieved state ratification in any century, “would have established a rigid formula tying the size of the House of Representatives to increases in population” (Bernstein with Agel 1993, 45). This measure was actually the first one proposed by Congress, making the Bill of Rights the last 10 out of the 12 proposed amendments (Amar 1998, 8). We see that even before the original Constitution was ratified, “one of the most difficult issues the delegates to the Constitutional Convention faced was the issue of representation” (Vile 2010, 98). The fact this proposal would have been the original First Amendment is extremely significant; Amar notes this relationship is vital to understanding the initial concerns with the Constitution, as size and representation in Congress was “perhaps the single most important concern of the Anti-Federalists” (Amar 1998, 9). The original provision enumerated in the Constitution regarding representation was made “in order to insure the adoption of the Constitution by the slaveholding States” and sought to “give to them a partial representation for their slave population” (Ames 1897b, 42). The new proposal was essentially “an explicit modification of the structural rule set out in Article I, section 2” (Amar 1998, 8). Writing in 1897, Ames noted that “dissatisfaction has...been expressed with these provisions at various times, and recourse has been had to numerous attempts to secure their amendment” (Ames 1897b, 43). The Reapportionment Amendment, as proposed by James Madison in the First Congress along with the rest of the body of the Bill of Rights, was a

response to “the ratifying conventions of five of the States<sup>3</sup>” who “were not satisfied with the simple provision in the Constitution, but desired that the ratio should be fixed in the organic law itself rather than left to the discretion or the caprice of Congress” (Ames 1897b, 43). In fact, we will discover that many of the amendments proposed by Madison in this Bill of Rights period “can be seen as a compromise between Federalists and Anti-Federalists” (Amar 1998, 14).

Madison introduced his proposal, which made provision for a fixed ratio, that in effect would leave “the number placing a limit upon the size of the House [to be] left in blank, [and] to be filled in as the united wisdom of Congress should suggest” (Ames 1897b, 43). Bernstein indicates Madison’s proposal “was designed to protect the principles of representation deemed necessary to guard the people against any danger to their liberties from the actions of their elected representatives” (Bernstein with Agel 1993, 45). Madison was answering the deep “structural concerns” shared by many Anti-Federalists with this proposal; many of them “feared that only great men with reputations spanning wide geographic areas could secure election” (Amar 1998, 11) because Congress was so small. They “feared that the aristocrats who would control Congress would have an insufficient sense of sympathy with, and connectedness to ordinary people”; this led to concerns that “Congress would be far *less* trustworthy than state legislatures...because of the attenuated chain of representation” (Amar 1998, 11). Gilbert Livingston pointed out during the New York (one of the five states who voiced legitimate concerns with the representation of Congress in the original Constitution) ratifying debates how the Senate held “extraordinary power,” and during the time where only thirteen states made up our nation, only a total of fourteen men could make quorum and eight would then make a majority” (Amar 1998, 11). Such Anti-Federalist concerns with the representation of Congress

---

<sup>3</sup> Massachusetts, New Hampshire, Virginia, New York, and North Carolina (Ames 1897b, 43n1).

were voiced during the Constitutional Convention; however “nowhere was Anti-Federalist concern with size more evident than in the ratification conventions themselves” (Amar 1998, 14).

Madison’s proposal passed the House after it made “provision for the expected growth in population, and was calculated ‘to prevent a too rapid increase in the number of members’” (Ames 1897b, 44) in the House. After a bit of tinkering with the specifics of the proposal, the “necessary two-thirds majority was obtained, and the amendment went out to the States as one of the set of twelve<sup>4</sup>” (Ames 1897b, 44). Before examining the implications of such a radical change to the size and structure of the House of Representatives, it is important to discover how close this proposal was to becoming a part of our Constitution and the potential eleventh (or first, depending on the order of ratification) amendment among the ten Bill of Rights documents. We will also examine how a potential technical error prevented the ratification of this measure.

After the proposal was passed through both houses of Congress, “ten of the twelve [states] passed the appointed ordeal”; in an example of just how close this proposal was to attaining a valid status within our Constitution, we see “this article only lacked the endorsement of one State to make the requisite three-fourths necessary to secure its incorporation into the Constitution” (Ames 1897b, 44). The proposal itself was ratified by Virginia, home to Federalist James Madison “weeks before approving the rest of the Bill of Rights” and separately from other ten amendments that were eventually adopted (Amar 1998, 15). Virginia’s confidence in the measure was not shared by all states that examined the proposal.

We see it is ironic, and quite curious, that Massachusetts is among the states that refused to ratify the Reapportionment Amendment, as they were one of the five previously highlighted

---

<sup>4</sup> Ames indicates the Reapportionment Amendment was “article 1 of the series” (Ames 1897b, 44n4) sent out to the States that would later be known as the Bill of Rights amendments.

states outspoken against the enumerated apportionment of Congress in the original Constitution, and in its own constitutional convention, “had been the first to propose a series of amendments, one of which was upon this very subject, the apportionment of Representatives” (Ames 1897b, 45). State journals “give no record of the action of the legislature of Massachusetts” in regards to its rejection of the Reapportionment Amendment, as well as the rejections of both Connecticut and Georgia” (Ames 1897b, 320n295). This proposal, ratified by 10 of 14 states, or 71.4%, falling merely 3.6% short of the necessary three-fourths supermajority, is an example of the burdensome requirements of Article V. Simply put, the proposal, also known as “original First Amendment” suffered “a narrow defeat in the 1790s” (Amar 1998, 8). The story behind this proposal, however, becomes even more clear after examining the text of the document; Amar notes that while “the legislative history” behind the proposal is “sparse,” taking “a close analysis of the text itself yields a couple of possible explanations” (Amar 15) behind its failure among the states.

Amar notes that the “amendment’s intricate mathematical formula made little sense” (Amar 1998, 15). Essentially, because of the poor wording of the original proposal, the document “required the population to jump from eight [million] to at least ten million in a single decade” (Amar 1998, 15). Despite the above story detailing the amendment’s failure in one state separating it from becoming a part of our Constitution, the story is far more complicated and even confusing for scholars to untangle. Because of the “mathematical oddness of the text” noted by Amar, there was a difference in the words clarifying the number of seats required by the proposals proposed by both the House and Senate (Amar 1998, 15). A joint committee was commissioned to “harmonize the proposed bills” by substituting the word ‘more’ in for ‘less’ when describing the number of Representatives required by the proposal; the change, according

to Amar, was “hurried” and represented a lack of “deep deliberation” regarding the “substitution’s (poor) fit with the rest of the clause” (Amar 1998, 15). Therefore, perhaps the proposal’s failure among the states in the ratification process was not a result of negative feelings about the overall meaning or goal of the Reapportionment Amendment, but more about the “technical glitches” in the proposal’s formula as passed by Congress (Amar 1998, 15).

Another reason for the failure comes from a substantive criticism of the measure. The proposal sent to the states, promising an increased Congress in the short term, actually set limits to the congressional size in the future by establishing a set maximum number of seats in a measure that “Was more stringent than that in the existing Constitution” (Amar 1998, 15). Therefore, even those wary of a large Congress were not willing to go so far as to set an established maximum number of seats; this is clear when we see “not a single state ratifying convention had proposed a stricter constitutional maximum on the size of the House” (Amar 1998, 16). Madison is seen as the culprit for inserting the maximum language into the proposal; in an earlier Federalist Paper, he “presupposed an absolute maximum on the size of the legislature,” and his appointment to the joint committee in charge of clarifying the language in the potential amendment was an opportunity for Madison “to slip his idea back in” (Amar 1998, 16).

Taking these criticisms, most of which could have been resolved or clarified if there was a greater amount of time to review the language or the spirit of the proposal itself, we see there was still overwhelming support for such an amendment in the states. Among the few states who chose not to ratify, keeping in mind once again only one prevented its ratification and inclusion in the Bill of Rights, Delaware’s story is quite significant. The state was the only one “that ratified the last ten amendments while rejecting the first” (Amar 1998, 16). Of course, the

relatively compact state had reason to “favor as small House as possible” given its “tiny population and limited room for growth” (Amar 1998, 16). Going as far back as the Articles of Confederation, the Delaware state legislature had “issued binding instructions to its delegates to oppose all attempts to modify the one state, one-vote rule” (Amar 1998, 17) of the prior governing document. Amar accurately notes that “whatever Delaware’s reasons for ultimately rejecting Madison’s First Amendment, we do well to remember that only a single state - and a tiny one at that - stood between the ten success stories of Amendments III-XII and the failure of Amendment I” (Amar 1998, 17). A state with a population of only 59,096 in 1790, measuring to be only 1.43% of the total population of the United States at that time<sup>5</sup>, had the political power to block Madison’s proposal from joining the Constitution.

While there is evidence this proposal would have vastly altered the way our House of Representatives appears today, it is striking to see the pervasive influence Delaware had on this proposal’s fate among the states. If nearly a three-fourth’s majority of the states in 1789 approved of the measure even with the confusing textual arraignment and concerns from smaller states, it is easy to imagine this proposal faring well in Ackerman’s system for two clear reasons. First, we see the proposal carried significantly larger states like New York and Pennsylvania, containing 1790 populations of 340,120 and 434,373 respectively (United States Resident Population by State: 1790 - 1850), while comparatively smaller states such as Delaware and Georgia (with a population of 82,548) were the clear reason why the measure failed state ratification. If population were a more prevalent factor in awarding influence in ratification voting, the outcome of this story would unquestionably have ended with the adoption of the Reapportionment Amendment. Secondly, given the confusing aspects surrounding the drafting of

---

<sup>5</sup> Total United States population in 1790 was 3,929,214 (United States Resident Population by State: 1790 - 1850).

the text, if the proposal was given eight years of consideration as Ackerman provides for, there certainly could have been a robust public debate, and even another committee gathered to make corrections and clarifications to its text. These experiences could have given the American people a clearer idea of the effects the amendment would have on the apportionment of our representatives, and a chance to make an informed decision whether this mathematical proposal for Congress would have been worthy of adoption and constitutional status.

#### Titles of Nobility (Proposed by Congress: 1810)

The amendment “that failed the test of ratification by the states” following the Reapportionment proposal was “designed to strengthen and extend a statement of principle already present in the Constitution” (Bernstein with Agel 1993, 177). The proposal, commonly known as the ‘Titles of Nobility Amendment,’ “would have supplemented Article I, section 9, clause 8 of the Constitution,” which states:

“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State” (Bernstein with Agel 1993, 177).

After the ratification of the original constitution, this codified provision still present and active within the document “did not seem sufficiently stringent to some of the State conventions” (Ames 1897b, 186). Despite the comfort of a new and stronger federal constitution as compared to the Articles of Confederation, many “nervous lawmakers” still “believed that ideas of nobility exercised a pernicious, seductive power” (Bernstein with Agel 1993, 177). This group of lawmakers were not confined to a single state legislature in the brand new country; “the ratifying conventions of Massachusetts, New Hampshire, New York, and, later, Rhode Island, proposed amendments either forbidding Congress from ever granting its consent, or for the

accomplishment of the same and proposing eliminating the clause ‘without the Consent of Congress’ ” (Ames 1897b, 186). When the First Congress was debating the Bill of Rights, “attempts to revive these proposals...failed to gather any support” (Bernstein with Agel 1993, 177). Following this debate, there was no existence of “further amendments on this subject...until 1810” (Ames 1897b, 187) in the Congressional record.

Early that year, “Senator Reed of Maryland introduced an amendment relative to the acceptance of titles of nobility by American citizens” (Ames 1897b, 187), and “on May 1<sup>st</sup>, Congress proposed an amendment strengthening the ban on titles of nobility” (Bernstein with Agel 1993, 178). The proposal is included below, as it is useful to examine the language relative to the Article I provision already mentioned:

“If any citizen of the United States shall accept, claim, receive or retain, any title of nobility or honour or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them” (Bernstein with Agel 1993, 178). According to both Ames and Bernstein, the source of this proposal, after previously failed attempts to bring it to fruition before the turn of the century, is “a minor mystery of American constitutional history” (Bernstein with Agel 1993, 178). Ames notes the only mention of the proposal in the official Annals of Congress is by Republican Representative Nathaniel Macon of North Carolina, who is recorded to have said that “he considered the vote on this question as deciding whether or not we were to have members of the Legion of Honor in this country” (Ames 1897b, 187) in May 1810 when the proposal was proposed in Congress. Both Ames and Bernstein consider two other plausible reasons for the successful re-introduction of the Titles of Nobility Amendment.

The first stems from anti-foreign apprehension, a feeling quite “widespread” in “Federalist-dominated New England<sup>6</sup>” stemming from the fear “that the French empire of Napoleon I might exert a dangerously corrupting influence on American life” (Bernstein with Agel 1993, 178). Jerome Bonaparte, one of Napoleon’s brothers, had recently traveled to the United States and impregnated a Baltimore prostitute (Bernstein with Agel 1993, 178). Following this affair, the Federalists “charged that Bonaparte would attempt to seizure the election of his illegitimate son to the Presidency” (Bernstein with Agel 1993, 178). Surprisingly, although “Federalists in Congress offered the amendment to embarrass Republican President James Madison, the Republicans endorsed the proposal by declaring that ‘It can do no wrong’” (Bernstein with Agel 1993, 178). The second reason was simply the time period during which the proposal was submitted. Ames contends “it probably was only another means of expressing that animosity against foreigners and everything foreign, which manifested itself in various ways in the trying period just previous to the war of 1812” (Ames 1897b, 188)<sup>7</sup>. In a statement of profound importance, Ames says that the idea the amendment “was in popular sentiment” can be inferred from its “nearly unanimous vote in Congress and the favorable reception it met with from the States” (Ames 1897b, 188). In fact, when the proposal circulated both houses, in total, “only five Senators and three Representatives voted against the proposal” (Bernstein with Agel 1993, 178). While the reception of the proposal was favorable, we know it was not quite popular enough to afford it full constitutional status, because the only ban on titles of nobility present in our Constitution today remains in Article I, section 9, clause 8.

---

<sup>6</sup> The states mentioned earlier as having proposed measures to strengthen the notion that titles of nobility were banned were all from New England and the Northeastern United States.

<sup>7</sup> Ames makes reference to several state actions that mirror the same type of ‘anti-foreign’ sentiment, including a bill from Kentucky “prohibiting the citation of the decision of any British court or any British treatise on law” (Ames 1897b,188n1). A similar provision was passed in 1810 in Pennsylvania “and remained on the statute books for a generation” (Ames 1897b,188n1).

It cannot be understated how close this proposal was to achieving a place in our Constitution. While “the amendment lacked only the vote of one State of being adopted” (Ames 1897b, 188), the history of this proposal after it so closely failed ratification is striking. Out of the 17 states in the union at the time of its state ratification process, four rejected it, while Virginia’s action “is not recorded in journals or Department of State” (Ames 1897b, 329n399), although “its own legislative journal record [indicates] that the state rejected the proposal on February 14, 1811” (The Missing 13th Amendment). Out of the 17 states in the union, a total of 12 ratified, leaving the total percentage of states that approved the amendment at 70.58%. When we consider that each state in the union, when a total of 17 are present, counts for 5.88% in the ratification vote, it becomes clear the Amendment failed ratification on the state level by *less than the value of one state’s percentage in the union*, or simply the value of one state during that time. Even more unsettling is that South Carolina, one of the 4 states that outright rejected the measure, approved the amendment in its Senate in 1811 (Ames 1897b, 329n399). In 1811, the state’s House postponed the measure, and after reconsideration in 1813, rejected the proposal because a “committee reported unfavorably” (Ames 1897b, 329n399). Ames discovered, however, that according to a “certified copy of the proceedings of the State legislature of South Carolina...the minutes of the House of Representatives of South Carolina do not state the reasons for their opposition” (Ames 1897b, 188n6). Therefore, for reasons unknown today, the influence of a single committee in one house of the South Carolina State Legislature may have very well blocked the proposal from ratification among the states.

While it is useful to examine this failed amendment in the context of how many states voted to ratify it after being passed through Congress, examining the amendment’s failure when taking state populations into account presents an even more compelling story as to how close the

Titles of Nobility proposal was to ratification. The four states that voted against ratification and blocked this amendment's passage were Connecticut, New York, Rhode Island, and South Carolina (Ames 1897b, 188n6). The total population of these states combined, using 1810 Census data, is 1,713,037 people (Historical Data and Reports)<sup>8</sup>. The total population of the United States, taken in 1810, was 7,239,881 (1810 Fast Facts); therefore, the states that voted against ratification represent only 23.66% of the nation's population, falling short of the 25% value Article V is supposed to represent. Quite simply, while the Titles of Nobility barely failed under the existing enumerated amendment process, it would have passed by a margin of 1.34% under Ackerman's proposal using estimations relating to the relevant state ratification data.

For an amendment that received only 8 votes total in favor of rejection from both houses of Congress, the numeric value of less than one state prevented it from joining our Constitution as a proper amendment - and we've seen a sufficient number of the nation's population found in the states that voted to ratify the amendment supported the proposal. It turns out, as we will briefly examine, much of the nation actually believed it received sufficient attention "by the requisite majority of the States" (Ames 1897b, 188) to receive constitutional status.

After the vote went to the individual states, the Titles of Nobility Amendment was included "in the official edition of the Constitution" that was "prepared for the use of the members of the House of Representatives of the Fifteenth Congress," and "appears as the thirteenth amendment to the Constitution" (Ames 1897b, 188). The fact was so significant that it led to a "resolution of inquiry" that uncovered "the House of Representatives of South Carolina

---

<sup>8</sup> Connecticut population: 261,942; New York population: 959,049; Rhode Island Population: 76,931; South Carolina population: 415,115 (Historical Data and Reports).

had not confirmed the action of the Senate, and so the amendment had not been adopted” (Ames 1897b, 188).

The legislative history surrounding the Titles of Nobility Amendment is both frustrating and quite representative of the common complaints of the rigidity of our amendment system. While the aforementioned proposal was sent to the states at a time when each legislature had more significance simply due to the size of our growing nation, it paints a clear picture as to how the actions, as well as the inaction, of a small and unrepresentative group in one state can perversely affect our Constitution’s legacy.

While the content of the proposed amendment doesn’t seem to be of much relevance to us today, the ban on titles of nobility is far less important than the mere fact we were so unbelievably close to adopting a new amendment in the first decades of our nation. Adopting the Titles of Nobility Amendment would perhaps have affected our interests abroad with nations who are in support of such titles, or would have informed future attempts at amending the Constitution. Regardless, this potentially important moment in American Constitutional history now amounts to a small instance in a vast history of failed proposals because of the widespread influence of smaller states on the process. As we’ve seen, Ackerman’s proposal awarding citizens power in the state ratification process over each state could have vastly different consequences on the outcome of this process. If Ackerman’s proposal were in place during the debates around this measure, a required time that could allow for civic activities such as lengthy public debates on the matter would have truly uncovered if this desire to ban titles of nobility was a passing concern due to the then-present fear of foreign influence, or a legitimate and long-lasting concern of the country on a national and not just state level.

Corwin Amendment (Proposed by Congress: 1861)

After a relative “lull” in proposed amendments to the constitution leading up to 1860 after the Titles of Nobility proposal, including two sessions of Congress where not one new amendment was introduced, an “avalanche of propositions fell upon the second session of the Thirty-Sixth Congress (1860-61), nearly all dealing with some phase of the slavery question” (Ames 1897b, 22-23). The introduction and subsequent passage of the Corwin Amendment through Congress represented a moment in our nation’s history where “the time for compromise had passed, and the question was transferred from legislative halls to the field of battle” (Ames 1897b, 23). The proposal sought to amend the Constitution as to prevent “any amendment abolishing or interfering within any State with the institution of slavery” (Ames 1897b, 23), and passed both houses of Congress in March 1861.

The practice of prohibiting any interference with the institution of slavery was not unheard of; in fact “a numerous class of amendments were intended to prevent the abolition of slavery anywhere by national authority” (Ames 1897b, 195). Ames notes at least 21 proposed amendments at that time declared “either that Congress should have no jurisdiction over slavery, or that Congress should not interfere with slavery within the States, or that the regulations of the right to labor or service in any of the States was exclusively the right of each State” (Ames 1897b, 195). Regardless, the Corwin proposal came about at a moment in time where “nearly every southern senator and representative had withdrawn” from Congress, and that the reality of secession as a legitimate possibility had begun to settle into the national mindset (Kyvig 1996, 150). Times were so dire that “a preponderant majority of those who remained in Congress were ready to clutch at whatever device they calculated best able to avert catastrophe” (Kyvig 1996, 150); the fragile and emotional state of both Congress and the Union as a whole pushed

representatives to resort to the most permanent, and the most serious, way to influence national discussion and provide a permanent to the slavery problem: the Article V amendment process. Adding credence to this notion is that Corwin's proposal was truly an "unamendable amendment" (Kyvig 1996, 150), meaning its own legitimacy was grounded in the notion that it could not be undone by any future amendment or alteration to the Constitution.

The House adopted the measure by a vote of 133 to 65, and the Senate followed by voting 24 to 12 in support of ratification; this vote "was the bare-minimum" required for "constitutional majority, but it was, nevertheless, an impressive consensus of two-thirds of the members of Congress who remained in their seats" (Kyvig 1996, 151). Bernstein claims the House approved the Corwin Amendment "because its members realized that nothing else available to them had any chance of success," and saw the Senate approve the measure just "minutes later" (Bernstein with Agel 1993, 91). "As set before Congress, the Corwin Amendment provided:

No amendment shall be made to the Constitution, which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State (Kyvig 1996, 151)".

In another example of how desperate these remaining representatives were to preserve the Union at any and all costs, the Thirty-sixth Congress, "on the very last day of its term," "threw the Article V mechanism into motion in a final attempt to avoid chaos" (Kyvig 1996, 151). Making this point even more clear, Kyvig notes that Congress' "support for an unamendable acceptance of slavery provides a measure of how far a supermajority of the Congress was willing to go at that moment to avoid disunion" (Kyvig 1996, 151).

The Corwin Amendment, proposed by former Whig-turned-Republican Thomas Corwin of Ohio (Kyvig 1996, 150), serves as an example of exercising the first component of

Ackerman's 'Popular Sovereignty Initiative' when we note that after the proposal was "immediately sent to the states," it was "endorsed by Lincoln in his inaugural address" (Kyvig 1996, 151) as he sought to "find a sectional compromise" (Kyvig 1996, 150) in the House of Representatives. Lincoln's support of this proposal serves as an equivalent act to the President proposing the amendment himself in Congress that same session. Regardless, the Corwin story demonstrates how outside events can influence the outcome of a proposed amendment to the Constitution.

Kyvig notes "the Corwin Amendment was nevertheless quickly overtaken by events" including Lincoln's insistence on "asserting a federal presence in places such as Charleston Harbor," as well as the beginning of the Civil War featuring the "shelling of Fort Sumter" (Kyvig 1996, 151) by Confederate troops. Regardless, Ohio's legislature (and the home state of Representative Corwin himself) became the first to ratify the proposal, although its actions "were already irrelevant" (Kyvig 1996, 151) because of the Fort Sumter attack five weeks earlier. In a truthful and sobering point, Kyvig explains that "all possibility that constitutional compromise might avert war was shattered by the roar of those cannons" (Kyvig 1996, 151). The only other states that chose to ratify the Corwin Amendment were Maryland and Illinois, although Illinois' ratification comes along with some controversy. The state voted in favor of the Corwin Amendment through a "constitutional convention" (Ames 1897b, 196), and the state's actions were "the only case of a convention being held to ratify an amendment to the Federal Constitution"<sup>9</sup> (Ames 1897b, 196.8).

The failure on the state level is yet another example of Article V in practice. Many states who either didn't entertain the proposal or voted to reject it, including the New England States,

---

<sup>9</sup> Kyvig also notes the actions of Illinois to ratify the Corwin Amendment were "questionable" (Kyvig 1996, 151).

felt the Corwin Amendment was not “a sufficient concession to hold the Southern States which had not as yet seceded, much less to win back those which had already taken that action” (Ames 1897b, 196-97). The Corwin story provides another example of where the mere passage of time and external factors can have a vast influence on the process; Ames felt comfortable agreeing with the claim that several other “Northern States would have undoubtedly ratified it, if it had promised to stay secession, but the rapid approach of the Civil War put it out of the public mind” (Ames 1897b, 197).

The Corwin Amendment serves as an example of Article V being utilized in a time of national crisis. While the method enumerated in the Constitution relating to the amendment has “always posed difficulty,” the fact that seven of the thirty-four states had voted to secede by early 1861 made the obstacles blocking ratification “unusually formidable” (Kyvig 1996, 152). The question of whether the secession of many Southern States was legal or recognizable was important when considering how poorly this proposal fared in the state ratification process. Unless the Union would have acknowledged “secession as a legal right and an accomplished task,” an action many Representatives from across the nation and across party lines were “fiercely unwilling to do,” the proposal would have needed “twenty-six of the remaining twenty-seven states...to ratify to meet the three-fourths requirement” (Kyvig 1996, 152). With the constitutional mathematics established, it becomes clear that the simple act of “contrary action, or even inaction, by any two states could block amendment” (Kyvig 1996, 152). Ratification scenarios aside, it seems the Corwin Amendment “was offered too late to have any impact,” and, consequently, the proposal “proved no more effective than any other strategy pursued in the futile hope of constitutional reconciliation during the last months before the war commenced” (Kyvig 1996, 152).

While this proposed amendment is a snapshot of our nation in a time of crisis in every sense of the world, it also can serve to arm those both in favor of the existing Article V framework, as well as individuals like Ackerman who believe the process should be updated to reflect our previous experiences with Article V. When considering a way to alter the constitution, “the Founders recognized in 1787 that policy differences had to be resolved one way or another before stable constitutional arrangements could be made”; this is why they insisted on a “supermajority agreement” for issues relating to “the confirmation or alteration of constitutional terms” (Kyvig 1996, 153). With that being said, Kyvig maintains the status of the United States in early 1861 “was not one that the Founders would have anticipated”; furthermore, “it was certainly not one they designed the amendment system to handle” (Kyvig 1996, 153).

Ackerman’s proposal provides an alternative route to adding text to the Constitution. As we saw through Lincoln’s significant act of actually endorsing the Corwin Amendment as a means to preserve the Union<sup>10</sup>, this act could have, under the ‘Popular Sovereignty Initiative,’ been submitted to a popular vote in consecutive presidential elections. Furthermore, even though President Buchanan was likely aware of a Supreme Court decision in 1789<sup>11</sup> that ruled “a proposed amendment does not need a Presidential signature,” he signed it, in an effort “to place what was left of his authority behind it” (Bernstein with Agel 1993, 91). While the outcome likely would have been the same, Ackerman’s proposal would have given the citizens of a very splintered nation a chance to voice an opinion on amending the Constitution in such a drastic fashion. The ‘Popular Sovereignty Initiative’ very well could have served as another tool in Lincoln’s arsenal in imploring United States citizens to support measures to maintain the Union.

---

<sup>10</sup> Rationale for Lincoln’s support for the Amendment stems from his belief that it was “consistent with the 1860 Republican platform,” and that the act “was not a concession to the slaveowning interests” (Bernstein with Agel 1993, 91).

<sup>11</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)

Holding two national votes to decide the fate of the Corwin Amendment may have been a national practice in democracy that could have delayed the start or altered the stakes of the Civil War<sup>12</sup>. Regardless, in this frightening and confusing time in American history, “the individuals who sought a compromise solution in the form of one or more constitutional amendments came up empty” (Kyvig 1996, 153). Indeed, the Corwin Amendment displayed a weakness of Article V as well. The time period during which the proposal came about was “the one time when ever faction agreed on the need to amend the Constitution,” and “resulted in the most catastrophic failure of amendment politics in American history” (Bernstein with Agel 1993, 92). While the acceptance of such an amendment would have lead to the undesirable outcome of a permanent and un-doable placement and endorsement of slavery within our Constitution, in this instance where both the President and Congress were in agreement about the introduction and inclusion of a new amendment, Article V dramatically failed them both.

However, as noted above, implementation of Ackerman’s plan would have at least had the same effect by not ratifying the Corwin Amendment, but with a greater sense of democracy and national unity surrounding the process. As we’ve seen in Congress, as well as on the state and individual levels, this proposal held little popular support among the country in 1861.

Whether it was by state or individual vote, it is likely to have still failed state ratification. With that being said, let us examine what would happen if it did receive popular support in 1861:

---

<sup>12</sup> It is unfortunate that the presidential election took place in November 1860 and the Corwin Amendment came to state ratification very late in Buchanan’s presidency; according to Ackerman’s proposal, the first of two formal popular votes on the Corwin Amendment would have had to wait until the following presidential November 1864 (and the following one in 1868). Perhaps, if Ackerman’s plan were already embedded into constitutional practice at that time, the Corwin Amendment would have been proposed earlier and would have made it on the 1860 and 1864 ballots for a national vote.

Perhaps a supermajority of citizens in this country felt, much like President Lincoln, as though the Corwin Amendment would save the Union. Because the Civil War would clearly end the question of slavery in a mere 4 years, the question would be moot when coming up again in the subsequent presidential election under Ackerman's plan. While the 'Popular Sovereignty Initiative' would still have blocked this ugly proposal from entering into our Constitution, it would have reminded American citizens the value of equal democracy at a time when our nation was tearing apart at the seams.

#### Child Labor Amendment (Proposed by Congress: 1924)

The Child Labor Amendment (CLA) was introduced in 1924 "to deal with a practice that nobody in 1787-1788 would have defined as a pressing national problem" (Bernstein with Agel 1993, 179). This fact is significant: such contemporary problems, even in the early twentieth century, go right to the heart of why an amendment process in itself is necessary in the first place. The purpose of the proposal was to secure a federal law guaranteeing "national, state, and local action to protect the rights of children employed in factories and mines," and protecting against the proponents of this labor practice who "denounced government measures prohibiting the practice as a paternalistic or even socialistic infringement on familial privacy" (Bernstein with Agel 1993, 179). The CLA was proposed formally after the Court's *Hammer v. Dagenhart* 247 U.S. 251 (1918) decision made clear "either Congress must give up its attempts to outlaw or penalize child labor or it must use the amending process to establish an unambiguous power to do so" (Bernstein with Agel 1993, 179). However, it was earlier in the century in 1906 when "the first bills proposing a Federal child-labor law were introduced in Congress"; and "nearly 10 years later in 1916 the first Federal child-labor law was passed" (Musmanno 1929, 137). The

1916 law was an effort to “close the channels of interstate and foreign commerce to the products of child labor” (Musmanno 1929, 137), and was the piece of legislation the Court would go on to later invalidate in its *Hammer* decision. The proposal for the Child Labor Amendment, a Federal law that would sit among other amendments to the Constitution, “was the culmination of six years of agitation within Congress and without, including sixty attempts to introduce amendments to the Constitution to set aside *Hammer*” (Bernstein with Agel 1993, 180).

The proposal received significant attention after Samuel Gompers, who headed the American Federation of Labor, “subsequently called a meeting that organized the Permanent Conference of the Abolition of Child Labor” (Vile 2010, 65). Proponents of the act argued in Congress, after it was proposed in 1924, that there “were over one million children between ten and fifteen years of age working in the United States” (Bernstein with Agel 1993, 180). Even more staggering was that when the Child Labor Amendment was “reported favorably from the House Committee on the Judiciary by a vote of 15 to 6,” the committee’s report indicated the total number of working children in the United States was precisely 1,060,858 (Musmanno 1929, 141). While this number on its face is troubling, perhaps the most persuasive argument made by pro-CLA Representatives in the House was that this number “was approximately one-twelfth of the total number of children of that age in the entire country,” and that the total number of child workers, 10 to 13 years of age, was 378,063” (Musmanno 1929, 141). Also noted in that same report was that if the Census calculation had taken at that present time, “the figure representing the number of child workers would undoubtedly be much greater” (Musmanno 1929, 141). Yet another argument in support of an amendment regulating child labor “was that with different child-labor laws existing in the various States, cost of production varied, thus destroying the possibility of fair competition” (Musmanno 1929, 142).

Claims made against the proposal were split amongst two groups: those who were against all regulation of child labor, and those who did not support the practice of child labor but felt the issue was inappropriate to be proposed in the form of an amendment to the Constitution. Representative Graham of Pennsylvania, who filed the minority report against the proposal, stressed “such regulation [against child labor] is desirous and necessary” but that the “regulation of child labor is primarily a subject for State legislation and not for national enactment” (Musmanno 1929, 141-42). Opponents of the proposal who were dissatisfied with federal child labor regulation more generally claimed the “practice was swiftly dying out,” that it would create “an imperial government at Washington” determined to divide states into “termed Provinces,” and that the Amendment should “be submitted to popularly elected ratifying conventions...[that] would be free from political influence” (Bernstein with Agel 1993, 180).

The proposal, as seen below, passed by a vote of 197 to 69 in the House and 61 to 23 in the Senate:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age. Section 2. The power of the several States is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by this Congress” (Vile 2010, 65). As soon as above the proposal was submitted to the states, “it met the vigorous opposition of a small but intense far-right group called the Sentinels of the Republic, and of a far-right newspaper, the *Woman Patriot* founded by...[the] past leader of the National Association Opposed to Woman Suffrage” (Mansbridge 1986, 31). In another example demonstrating how our amendment process remains quite vulnerable to the manipulation by the few and oftentimes the wealthiest Americans, each of these groups were “well-funded” and “very small,” and were able to distribute “reams of propaganda” (Mansbridge 1986, 31) to fight the CLA. The efforts of other smaller and lesser-known organizations demonstrated “the powerful alliance of otherwise

disparate groups - Southern mill owners, the National Association of Manufacturers, patriotic organizations, and leading members of the Roman Catholic hierarchy - derailed the Child Labor Amendment” (Bernstein with Agel 1993, 180).

In what Mansbridge calls an “instructive, almost eerie parallel with the Equal Rights Amendment,” the CLA represents an example of “the power of intense veto groups to block an amendment” (Mansbridge 1986, 31). The Amendment received the ratification of twenty-eight states, but with “the combination of arguments and the powerful alliance of otherwise disparate groups,” the proposal was derailed and failed ratification in thirteen states (Bernstein with Agel 1993, 180). Musmanno claims the proposed amendment “fared illy” in the states, and by February 1, 1925, could not be ratified because “thirteen States had defeated the measure in one or both houses of their legislatures” (Musmanno 1929, 144). By the end of 1925, merely four of the states ratified the CLA while 19 rejected it (Vile 2010, 65). The New Deal brought about a renewed interest in the Amendment, but even with the reversal of some states that had previously voted against ratification, 28 states ratified the measure falling short of the three-fourth’s majority necessary.

Perhaps the failure of the CLA was a result of the relatively weak status of the American labor movement by 1924, or with “widespread disappointment with the Eighteenth Amendment’s attempt to enact national alcoholic prohibition” (Vile 2010, 65). Regardless, it is clear this proposal, especially after the reversal of states in the decade following the proposal’s introduction in Congress, was ripe for democratic debate on an individual level. While it is difficult to speculate the precise number of individuals who were in support of the Amendment, the fact that Ackerman’s process gives each citizen and lawmaker eight years to ponder and re-vote on the measure is significant. In addition to the fact that several states had decided to change

their minds and vote for the measure, child labor regulation became an important part of the legislative agenda. We see that in the New Deal era, along with the reversal of several states on the ratification status of the CLA, “child labor provisions were incorporated through the National Industrial Recovery Act” and “were subsequently added to the Fair Labor Standards Act of 1938” and later upheld in *United States v. Darby Lumber Co.* (1941) (Vile 2010, 65). Vile notes, “as an amendment issue, child labor has subsequently been moot” (Vile 2010, 65). However, if Ackerman’s initiative were active during this time, would the issue have been solved through various pieces of progressive legislation from President Roosevelt? A case can be made that the CLA was simply proposed by Congress at the wrong time, and that if Ackerman’s proposal was in place, a supermajority of citizens could have reasonably voted to enact this legislation and could have ignored the influence from the small interest groups mentioned above. Regardless, utilizing Ackerman here would have at least rendered the same result as Article V, leaving open the possibility for citizens to have a direct say in enacting legislation banning the (at the time) more widespread practice and use of child labor.

#### Equal Rights Amendment (Proposed by Congress: 1972)

Examining the Equal Rights Amendment (ERA), a proposal endorsed by Congress and sent to state legislatures for ratification in 1972, is useful because of the relatively detailed narrative that exists regarding its failed ratification and the specific nature of its failure among the states. It also is distinguished among the large universe of failed amendment proposals, as “members of Congress have proposed the Equal Rights Amendment more than any other” (Vile 2010, 179).

Before examining the specifics of the ERA story, the general history of the Amendment's passage has some striking similarities to the Twenty-fourth and Twenty-sixth Amendments<sup>13</sup>; the obvious exception, of course, is that the required number of states ratified those two proposals. The Equal Rights Amendment, however, "gained ratification by thirty-five state legislatures, only to fall three shy of Article V's required approval by three-fourths of the states" (Kyvig 1996, 394) after it passed through Congress.

Jane J. Mansbridge, a scholar who places special focus on the amending process of the ERA, describes the two prior-mentioned Amendments to the Constitution (the 24<sup>th</sup> & 26<sup>th</sup>) as having comparable popular support to the Equal Rights Amendment. She claims the limited opinion data suggests the successful amendments received "probably no greater than...43 to 74 percent" (Mansbridge 1986, 31) of the popular vote, which places them on the same footing as the ERA as it was supported "in various polls between 1970 and 1982". The substantial difference between these two successful legislative experiences and the one failure, as she explains, is that "unlike the victorious amendments, the ERA generated intense, tenacious, and politically organized opposition" (Mansbridge 1986, 31).

Historically, equal legal treatment of women as a political issue "first arose during consideration of the Fourteenth Amendment in 1867" (Kyvig 1996, 394), but the issue became increasingly prominent slowly throughout the mid-twentieth century. We see "the upheaval in thinking about women's situation in the early 1970s" (Kyvig 1996, 407) brought significant attention to the amendment and brought about its legal and constitutional status seriously, but the amendment itself was truly "rooted in nineteenth-century women's initiatives [and] made its formal appearance soon after the 1920 adoption of the Nineteenth Amendment enfranchised

---

<sup>13</sup> The Poll Tax Amendment in 1964, and the Right to Vote at Age 18 Amendment in 1971, respectively.

women” (Kyvig 1996, 396). In fact, “from its first introduction in 1923, three years after the ratification of the Nineteenth Amendment, the amendment has been sponsored several hundred times” (Vile 2010, 179-180). The chronological history of this failed amendment demonstrates the significant time restraints in place when looking to amend the constitution.

It is important to provide detail of the legislative history of the ERA before it was even submitted to a vote by each state. Prior to the introduction of the proposal, and in the immediate aftermath of the Nineteenth Amendment’s ratification, “the National Woman’s party in 1921 began objecting to state legislation in Wisconsin and elsewhere that affirmed equality for women but retained protective laws” (Kyvig 1996, 396). The National Woman’s Party started to compose a version of the ERA in September 1921, and “unanimously endorsed it at a convention in Seneca Falls, New York in July 1923” (Kyvig 1996, 396). The Amendment, as it was first introduced in Congress three years after the Nineteenth Amendment passed in 1923, “simply declared:

Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction” (Kyvig 1996, 396).

As will become increasingly common in the history of the ERA, inter-group conflict was a primary source of the stalling of its progress in Congress. Following state court rulings on the Fourteenth Amendment deeming women outside of its protection despite their recent enfranchised status in the United States, many “reformist women and their male supporters devoted their attention to protective measures” including “the Sheppard-Towner maternal and infant health act and the Child Labor Amendment” (Kyvig 1996, 397). A decade after its initial introduction “the ERA had made no progress, and even the National Women’s party, fighting division in its already thin ranks, turned much of its attention to other matters” (Kyvig 1996, 397).

As we have already discovered, the Amendment's history is interwoven amongst the turbulent history of our nation in the early and mid-twentieth century. Undoubtedly, and as we've seen with previous examples, social movements and societal standards of the time can have a clear impact on the status of an amendment proposal. Among the many social and societal movements present in the aftermath of the ERA's first submission in Congress in 1923 was the FDR administration, and Kyvig explains "the New Deal revived interest in the situation of women but primarily from a protectionist viewpoint" (Kygiv 1996, 397). By the late 1930s, even that viewpoint became more progressive, "as encouraged by a shift in the Supreme Court," and allowed the reformers of the New Deal era to "renew efforts to protect all workers, not just women and children" (Kygiv 1996, 397). With this shift in the perception of women, along with the changing role of women in American society during and following World War II, "prospects for the Equal Rights Amendment improved" (Kygiv 1996, 398). In one crucial step before the Amendment could be put to a vote in Congress, "the House Judiciary Committee, over strenuous protectionist objections, endorsed the measure for the first time on July 12, 1945" (Kygiv 1996, 398). Five years later in 1950, "the amendment achieved the needed two-thirds majority with a Senate vote of 65 to 19; in 1953, the Senate proposed it again by a vote of 73 to 11" (Vile 2010, 180).

Once the ERA made it past the lengthy hurdle of Congressional passage, it initially fared quite well in the states. In 1972, out of the 32 legislatures in session, 21 ratified the proposal "with hardly any delays" (Vile 2010, 180). However, the fate of the Equal Rights Amendment represents not only the common negative criticisms of the Article V process, such as a perverse influence from small states, but also a reminder of the potential value of embracing Ackerman's proposal.

The ERA, after its initial wave of 32 state ratifications, suffered a visible and controversial defeat. After passing through Congress, “the anti-ERA forces had effectively mobilized, and some states that had given their approval attempted to rescind their ratifications” (Vile 2010, 180). These forces working against the proposal generally fell into two categories: groups who fought the ERA based on moral opinions about the Amendment, and individuals who opposed it because they felt the work of other government agencies were already successful in advocating for women’s rights.

Phyllis Schlafly, who founded the Eagle Forum and found success with both the ‘Committee to Stop the ERA’ (Vile 2010, 180) and her arguments claiming that “the Amendment would lead to major substantive changes” (Mansbridge 1986, 29) highlights the first group who opposed the ERA. Schlafly’s opposition to the ERA “revolved around women’s continuing need for male protection,” and believed “the powerful male protecting the defenseless female” was “the only alternative to treating women as chattel” (Mansbridge 1986, 69). Along with Senator Sam Ervin Jr. of North Carolina (Vile 2010, 180), the two figures highlighted arguments against the moral value of such an amendment.

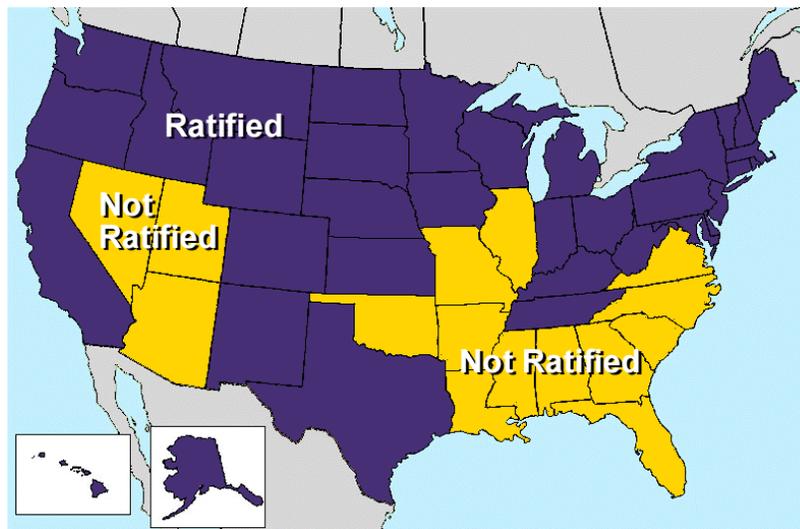
The other group focused on the practical value and potential implementation of the ERA. In the early 1970s, “progressive judicial decisions on behalf of women’s rights may have undercut the impetus for the ERA” (Vile 2010, 180). Vile notes, “at just about the time that Congress proposed the ERA...the Court began to use the equal protection clause of the Fourteenth Amendment to liberalize women’s rights” (Vile 2010, 180-81). In the Supreme Court’s 1971 *Reed v. Reed* case, the justices were unanimous in holding “that a state could not select the administrator of an estate on the basis that one candidate was a man and the other a woman”; in its 1973 *Frontiero v. Richardson* decision, the Court ruled a sexist military law “that

presumed that married women depended on their husbands” for military benefits was unconstitutional, and four justices went so far as to consider gender to be a “suspect class” calling for the most strict scrutiny necessary to uphold any classification made based on gender (Vile 2010, 181). Regardless, these positive victories for women’s rights activists “enabled opponents of the ERA to argue that it was no longer needed” (Vile 2010, 181). Some also claim “the key reason the ERA failed to muster the required congressional majorities in 1983” was from fears claiming the Amendment, if ratified, would compel certain states to fund abortions (Vile 2010, 181). Regardless, the ERA as passed by Congress in 1972 failed state ratification and is not a part of our Constitution today.

Making the ERA’s failure even more notable to both scholars and the general public was the controversy over its extension. After the self-imposed seven-year time limit for state ratification expired, ERA proponents asked for an extension that Congress granted in 1979 for another three years (Vile 2010, 181). Congress obliged, and thus began the controversy “over whether the action was legal and whether the vote should have required a two-thirds majority” (Vile 2010, 181). Before the Supreme Court could have the chance to rule on the constitutionality of the extension, the contentious constitutional issue was “mooted when the ERA failed to be ratified within the extension that Congress had granted” (Vile 2010, 181).

The ERA suffered a long, drawn-out defeat among the states after a decade-long battle over its proposal in Congress. As we’ve previously seen, popular support for the Amendment did exist well over the 50% threshold throughout the ratification debates. Regardless, the ERA contains aspects of some previous proposals we’ve examined. Much like the Reapportionment Amendment, the ERA failed among the states due in large part to the influence of smaller states. The opposition to the ERA had “the advantage of geographical concentration” as “it centered in

the fundamentalist South, including southern Illinois, and in the Mormon states of Utah and Nevada, where the Mormon Church actively fought the ERA” (Mansbridge 1986, 34). The map below demonstrates the geographic split between the states that voted to ratify the ERA, and those who still have yet to through this day.



(ERA: FAQ)

Additionally, it should come as little surprise the states “that have traditionally hesitated to adopt any kind of innovation,” including “those with a conservative, populist tradition” (Mansbridge 1986, 34) were the primary opponents of the ERA on the state level. Did the Founders intend for this category of states, usually not providing any measure of an accurate social or political cross-section of America, to have the ability to block an addition to our Constitution that would guarantee broad rights for women in our nation?

Again, I believe it is helpful to examine the ERA with Ackerman’s proposal in mind. As we’ve seen already, asking each individual American to vote twice on the status of a proposed amendment to the Constitution removes some of the vast influence these small states have on the process. Certainly, the designers of the Constitution “meant to give intense, sizable minorities a near veto on constitutional amendments” (Mansbridge 1986, 34). However, I do not believe the

groups we've highlighted who opposed the ERA on moral grounds amount to the type of minority the Framers had in mind.

Ackerman's proposal also allows for the influence of the opponents of the ERA who thought the proposal was unnecessary after passing through Congress. Because Ackerman gives each citizen the opportunity to vote on a proposal twice over a period of eight years, the public would have been exposed to the early 1970s Supreme Court rulings that further empowered and embraced the rights of women in this country. If these efforts made the ERA unnecessary, the voters very well could have expressed this notion in either the first or second popular vote on the measure under Ackerman's plan.

Additionally, in learning about the history of the ERA, we see that arguments over of the extension of its ratification deadline in Congress and the controversial nature of this amendment's proposal show that "few proposed amendments have been more controversial than the one which would have extended equal rights to women" (Vile 1993, 451). Using the 'Popular Sovereignty Initiative' would have eliminated the ugly and drawn-out legal debate over the proposal's extension that ended up taking focus away from the substance of the ERA itself. While the debates over the Amendment foremost brought attention to granting equal rights to the women of our nation, it also cast a light on the confusion and ineffectiveness of Article V.

By the time its extension had expired, "the degree of state legislative consensus that the designers of Article V felt essential for constitutional amendment simply never existed in the 1970s on the issue of the ERA" (Kyvig 1996, 411). While "the battle over the ERA stirred serious consideration of the symbolic as well as the substantive purpose of constitutional amendments, the degree of consensus appropriate for declarations of constitutional principle, and the manner in which the amending process should function" (Kyvig 1996, 395), it didn't result in

the passage of an amendment that did feature significant and broad support from over 30 states in our nation. Certainly, Ackerman's 'Popular Sovereignty Initiative' may very well have resulted in the failure of the ERA - but it would have confirmed this monumental legislation ensuring equal rights for women was something the American people *truly* rejected, as opposed to their elected representatives in distant state legislatures influenced by small yet powerful political groups. Because the story of the ERA proceeded through the established Article V process, we have no way of knowing for sure.

#### D.C. Statehood Amendment (Proposed by Congress: 1978)

Much like the efforts to alter representation in Congress and the 19<sup>th</sup>-century Titles of Nobility Amendment, campaigns to afford statehood upon the District of Columbia center around an effort to alter or redefine an existing component of the Constitution. Article I, section 8, clause 17 of the Constitution places "the District under the exclusive jurisdiction of Congress," and was included in the text "to remedy the nation's lack of a fixed capital during and after the American Revolution" (Bernstein with Agel 1993, 142-43). The selection of Washington, D.C. as the final choice for the nation's capital was the result of "logrolling," or an example of Southerners obtaining the location "in exchange for their support for Alexander Hamilton's plan to pay off Revolutionary War debts in full" (Vile 2010, 142). Regardless, the current site was perceived as "sleepy" and "hot" and experienced problems early on including the burning of the Capital in 1814 during the War of 1812 (Bernstein with Agel 1993, 145). Bernstein credits both the New Deal and World War II for bringing "a proliferation of government agencies" and subsequently increasing the population of Washington, D.C. to include both government workers and others; he also credits the invention of air-conditioning "which made it possible to have a

year-round federal government on the site of what was once festering swampland” (Bernstein with Agel 1993, 145). Regardless, the population of D.C. exploded to more than 750,000 by 1960, and its citizens grew frustrated, rightfully so, by the fact that none of them “could play any part in their own governance” (Bernstein with Agel 1993, 145). The ratification of the Twenty-third Amendment, ratified in 1961, “granting the district representation in the Electoral College” (Vile 2010, 143) failed to grant any citizen of D.C. a Representative in Congress, and added further agitation to its still-unrepresented population.

While the proposal to grant the District of Columbia direct representation in Congress passed through both the House and Senate in 1978, a similar proposition was made as early as 1825; over 150 similar proposals were introduced into Congress from the 1880s all the way through 1978 (Vile 2010, 143) focusing on the subject. The population of Washington, D.C., especially after the Twenty-third Amendment was passed, was clearly being neglected; by 1960, the city was “under the control of congressional committees” often chaired by conservative Southern Representatives “unsympathetic to the needs of the District’s black majority” (Bernstein with Agel 1993, 145-46) when considering the city’s many issues. Between 1966 and 1971, both the President and Congress worked to afford District citizens a greater role in the legislative process: 1966 saw President Johnson afford himself the power to name the city’s mayor and a council, in 1971, “Congress permitted the District to name a nonvoting delegate to the House of Representatives” and enacted a home rule which permitted “the popular election of the mayor and the council and allowed the government to enact some laws but not others” (Bernstein with Agel 1993, 146). Citizens of the District of Columbia “regarded the limited home rule recognized by Congress as little better than the governance of the American colonies

by Great Britain” (Bernstein with Agel 1993, 146), and began the fight for statehood through the Article V amendment process.

The nonvoting delegate to Congress, mentioned earlier, was imperative in persuading his colleagues in the legislature “to amend the Constitution to permit the District to apply for statehood” (Bernstein with Agel 1993, 146). His efforts were successful, and by August 1978, both the House and Senate voted to send the proposal to the states for ratification. The proposal itself contained four parts:

Section 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

Section 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

Section 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

Section 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission (Bernstein with Agel 1993, 146-47).

The residents who call the District home “responded enthusiastically to the prospect of their enfranchisement,” (Bernstein with Agel 1993, 147) and soon after “held a convention to write a constitution for the state of New Columbia” (Vile 2010, 143). However, the proposal would eventually not fare very well outside of the District of Columbia. Bernstein explains the Amendment “ran into serious trouble when it reached the states”; by 1981, three years into its seven-year time limit for state ratification, merely ten states ratified the measure, while ten others had rejected it and over one dozen others tied the proposal up in committee (Bernstein with Agel 1993, 147). By the 1985 ratification deadline, “only 16 states had ratified” (Vile 2010, 143).

The proposal’s failure was in large part due to politics. Vile notes that supporting this statehood initiative was not politically useful for Republicans because “the District of Columbia was predominantly African American and Democratic” (Vile 2010, 143). Having D.C. become a

state would almost certainly ensure one or two black representatives join the House, as well as the addition of two potentially black Senators who would go on to join “a body that had no black members between Reconstruction and 1966” (Bernstein with Agel 1993, 148). Others felt as though the proposal wasn’t on sound constitutional grounding because it would grant “an entity that was not a state representation in the Senate” thereby “depriving the others of their equal representation therein”; and if this claim were true, the measure “would thus require unanimity (Vile 2010, 143). More generally, some were simply not comfortable “with the notion of treating an entity, still somewhat under congressional control, ‘as though it were a state’” (Vile 2010, 143).

Allowing the D.C. Statehood Amendment to undergo the Ackerman treatment could have lessened or even extinguished the racial and politicized attitudes associated with this proposal. If the feelings against having African Americans in the House and Senate were held by these politicians representing individual states, it is certainly possible the citizens of those states themselves could have different attitudes on the proposal rather than being represented entirely by just one single vote against ratification. Additionally, by allowing for the measure to be decided upon in two consecutive presidential elections instead of placing an arbitrary seven-year expiration date on the proposal, could have most certainly affected the outcome. As I’ve previously maintained, implementing Ackerman here could not have lead to a ‘worse’ outcome for the citizens of our nation. If a supermajority of citizens failed to give D.C. any statehood rights, we’d be in the same position we are today where Washington, D.C. is not a state, and the operations of the city are left in part for Congress to decide. However, if the American people, along with the support of the sitting president, truly believed D.C. citizens deserve equal representation in our federal government over a period of eight years, our legislative branch of

government, as well as the map of our nation, would unquestionably be altered - but with the informed decision of the American people behind such a significant change.

### Conclusion

After examining these six failed amendments to our Constitution, a common theme among the proposals becomes clear. Whether we ever did, or still support the rights, liberties, and ideas proposed in these initiatives, it can be said that *something* was lost in each of these stories after Congress had the confidence to submit them a for state ratification vote. What appears to have gone missing from these instances is a chance to promote our system of democratic government to the people it should matter most to: *the citizens of our nation these very amendments directly affect*. In the ERA story, we find that while a majority of Americans certainly agreed with the merits of the proposal at several points of time, the existence of regional or biased sentiment prevented it from gaining ratification; a similar argument can be made for either the Reapportionment or Titles of Nobility Amendment. Debating the merits of these or any of the proposals mentioned previously isn't what is important here; what becomes clear is that such complicated, sensitive, and controversial additions to our Constitution should at least entertain the votes and opinions of everyday Americans more directly.

We've established that Ackerman's 'Popular Sovereignty Initiative' would have certainly rejected the proposals that clearly represent timely sentiment unrepresentative of our nation's longstanding beliefs. The Corwin Amendment is the clearest example; the proposal never maintained wide popular support outside of Congress, and under Ackerman's proposal requiring an 8-year period of debate and re-voting it most certainly would have failed just as triumphantly as it did in actual practice. It is those proposals that have both garnered significant support and

have been fleshed out by Congress as being legitimate and worthy of a state ratification vote that suffer most from the Article V process. This current practice allows for the following example from Mansbridge that awards pervasive and uneven influence to smaller, non-representative states over the entire practice of amending our Constitution:

“For resistance to an amendment to be successful, it helps if the resistance is concentrated in a relatively small number of states - so long as that number exceeds one quarter of the states in the union” (Mansbridge 1986, 34).

The existence of such a simple method to defeat a potentially sweeping or monumental chapter in our nation’s legislative foundation begs for a fresh evaluation into our practice of amendment.

What truly makes Ackerman’s proposal so valuable and effective, while not dramatically harming the reasoning behind Article V’s inclusion in the Constitution, is that it provides the everyday citizens of our nation the power to overcome pervasive influence from small states, while still maintaining and taking into account the Federalist ideas and concerns of not trusting everyday people with these monumental decisions. In essence, Ackerman’s ‘middle-ground’ approach provides for the best of both worlds of government, and displays a cooperation of federalism at its finest.

As we’ve seen, it is useful to examine our previous experiences with amending the Constitution through the lens of Ackerman’s proposal. Given my recommendation our nation consider his ‘Popular Sovereignty Initiative’ for our future experiences, I believe using a contemporary example will provide additional merit to his proposal.

Debates over legalizing or implementing same-sex marriage on a national scale, much like efforts to provide women equal rights or advocating for restrictions on child labor, have been present throughout many of our traditional civic structures. The difference is that the discussion regarding this type of legislation is present in the forefront of our lives as Americans today. The merits and constitutionality of same-sex marriage itself, much like many of our previously failed

amendments, has been debated most heavily in state legislatures, state and federal courthouses, and recently in the Supreme Court. Much like the previous failed proposals we examined, popular opinion has evolved and changed on the matter over time. The potential implementation of an amendment legalizing same-sex marriage is ripe for analysis with the ‘Popular Sovereignty Initiative’ in mind.

Clearly, one of the attractive components of Ackerman’s plan to those who subscribe to the Federalist-based fears of trusting our citizens is the 8-year period for debate and re-voting to allow for slow-but-steady changes in popular opinion to influence the vote. According to Nate Silver’s analysis, between 1996 and 2003 support for same-sex marriage rose slightly from 27% to 33% (Silver 2013). However, following the Massachusetts State Court decision on the matter in 2003, there has been a clear and steady increase in popular support for same-sex marriage. It is clear that following this case, support for the initiative “began to rise at a rate of about 2 percentage points a year, growing to an average of 37 percent in...2006, and 41 percent in polls conducted in 2008” (Silver 2013). Quite significantly, the rate of support for same-sex marriage “has continued to increase at about the same rate since then” (Silver 2013). Taking into account where public support stands today, it appears now for the first time “that support for same-sex marriage now exceeds opposition to it; on average, the polls have 51 percent saying they approve same-sex marriage” (Silver 2013).

Certainly, Silver acknowledges the generational gap present in these figures and debates, and the fact that each year more young people are continually voicing support for this timely and emotional social movement. However, he also attributes the increase in equal part to a genuine reversal in some individuals, as we see that “some voters have also changed their opinion to favor same-sex marriage while fewer have done the reverse,” and that Silver claims “about half

of the increase in support for same sex-marriage is attributable to generational turnover, while the other half is because of the net change in opinion among Americans who have remained in the electorate” (Silver 2013).

What is most striking about the continual increase in support of same-sex marriage is how this trend will remain dominant in the future. Silver makes clear that “even if the Supreme Court decision [referencing the March 2013 oral arguments - decision still pending] or some other contingency freezes opinion among current voters, support for same-sex marriage would continue to increase based on generational turnover, probably enough that it would narrowly win a national ballot referendum by 2016” (Silver 2013). On the state level, he notes that by “2016...voters in 32 states would be willing to vote in support of same-sex marriage, according to the model” and even more striking is that “by 2020, voters in 44 states would do so, assuming that same-sex marriage continues to gain support at roughly its previous rate” (Silver 2013).

Same-sex marriage falls as a near perfect example of the merits of Ackerman’s proposal. To start, support for same-sex couples to wed has been openly endorsed by our sitting President in his first term. We can presume, given the data above on how the public opinion data is trending along with the recent support for same-sex marriage from some Republicans, that a future President from either of the major parties would be at least open to proposing such an amendment under Ackerman’s system. Even if this individual exhibited a personal bias against supporting same-sex marriage, it would be hard for him or her to ignore the support in place among the various states and their citizens by that time.

Taking the second portion of Ackerman’s proposal in mind, we can assume if President Obama had proposed this amendment in his second term, educated by his earlier announcement in support for same-sex marriage, it would have existed on the ballot in the 2016 election and

had the chance of earning a popular majority. By 2020, it is clear an overwhelming majority of Americans would vote to implement such an amendment on its second vote. Speaking generally, Silver's claims are extremely persuasive regarding the adoption of such a measure if it was put to consecutive popular votes in the future.

This prospective amendment allows Ackerman's proposal to shine as a beacon of compromise and democracy. The sitting President, with enough time to consider a change in personal opinion and the will of a majority of his/her constituents, would make a proposal to amend the Constitution to reflect a change in what Americans desire or value. Following two consecutive Presidential elections and eight years of debate and opportunity for individuals to develop an education and open-mindedness on the matter, it could very well join our Constitution in a manner that was neither rushed, nor open to the pervasive influence of smaller states - while still achieving a result desired by a majority of American citizens across the entire nation. Instead of utilizing an Article V system that "many scholars and politicians [view]...with suspicion and dread" because they are "all too aware of the intimidating practical obstacles posed by the process" (Bernstein with Agel 1993, 248-249), why can't we advocate and examine the implications behind using a new process that empowers our citizens to vote and exercise the most fundamental aspect of our democracy, while still ensuring such a decision be heavily pondered and debated while still weathering the test of time and personal reflection?

Same-sex marriage stands a contemporary example, juxtaposed with the historical cases we have examined, that should inform our thinking for the future and allow us to dig deeper into the merits of adopting Ackerman for the next generation of Americans eager to amend our nation's most vital document. What is clear now, however, is that the 'Popular Sovereignty

Initiative' is worthy of serious further consideration to profoundly influence our nation's long-established practice of amending the Constitution.

## Works Cited

- "1810 Fast Facts." *United States Population Bureau*. N.p., n.d. Web.
- Ackerman, Bruce. *We The People Volume II: Transformations*. Cambridge: Belknap of Harvard UP, 1998. Print.
- Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale UP, 1998. Print.
- Ames, Herman V. *Annual Report of the American Historical Association for The Year 1896*. Vol. 2. Washington, DC: Government Printing Office, 1897. Print.
- Ames, Herman V. *Proposed Amendments to the Constitution of the United States: 1789-1889*. Washington, D.C.: Government Printing Office, 1897. Print.
- Bernstein, Richard B., and Jerome Agel. *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* New York: Times, 1993. Print.
- "ERA: FAQ." *Equal Rights Amendment*. Alice Paul Institute, n.d. Web.
- "Historical Data and Reports." *United States Census Bureau*. N.p., n.d. Web.
- Kyvig, David E. *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*. Lawrence, Kan.: University of Kansas, 1996. Print.
- Levinson, Sanford. *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*. Princeton: Princeton UP, 1995. Print.
- Madison, James. "The Federalist Papers : No. 39 (The Conformity of the Plan to Republican Principles)." *The Avalon Project*. Yale Law School, n.d. Web.
- Mansbridge, Jane J. *Why We Lost the ERA*. Chicago: University of Chicago, 1986. Print.
- "The Missing 13th Amendment." *The Missing 13th Amendment*. American Patriot Network, n.d. Web. 02 Mar. 2013.

Musmanno, Michael A. *Proposed Amendments to the Constitution of the United States: 1889-1928*. Washington, D.C.: Government Printing Office, 1929. Print.

Silver, Nate. "How Opinion on Same-Sex Marriage Is Changing, and What It Means." *New York Times* 26 Mar. 2013: n. pag. Print.

"United States Resident Population by State: 1790 - 1850." *New Jersey Department of Labor and Workforce Development*. N.p., n.d. Web.

"U.S. POPClock Projection." *United States Census Bureau*. N.p., n.d. Web. 27 Feb. 2013.

Vile, John R. *Encyclopedia Of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2010*. 3rd ed. Vol. 1-2. Santa Barbara, CA: ABC-CLIO, 2010. Print.

Vile, John R. *The Theory and Practice of Constitutional Change in America: A Collection of Original Source Materials*. New York: P. Lang, 1993. Print.