ARTICLE

Redundant Amendments: What the Constitution Says When It Repeats Itself

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INTRODUCTION

Amendments amend. It's what they do; it's what they are. They amend literally, fixing and improving the constitutional text and the structures it creates. But they can also amend far more deeply, fixing and improving the American people themselves in the process. And because they amend, they are the means by which we, the American people, make amends for our collective sins.[1] Constitutional amendments are at once apologetic and aspirational, providing both recognition of a constitutional mistake and a commitment to do better going forward. And we the people have used constitutional amendments to atone for a wide variety of sins over the two centuries of our national project. We have made amends for

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1. *Cf.* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 313 (2006) [hereinafter AMERICA'S CONSTITUTION] ("Chapter 9: Making Amends").

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our greatest and darkest national sin.[2] We have made amends for lack of foresight in the design of our chief national office.[3] We have made amends for representative structures no longer up to contemporary democratic standards.[4] We have made amends for our personal vices,[5] and for our hubris in thinking constitutional law could fix our personal vices.[6] Sometimes, though, we have made amends simply for not being clear enough. Amendments are how constitutions change, but a surprising number of America's constitutional amendments have been intended not to change the Constitution but to clarify what was already its true nature. I call these "redundant amendments."[7] Some have been offered to correct an interpretation of the Constitution by the Supreme Court that the American people and their representatives deemed erroneous; others have been offered because such a misinterpretation by the Court was feared. Each time, the amendment was offered not to change the Constitution's true nature but to clarify it and to prevent (possibly willful) misunderstandings.

Thus, the American people responded when the Court ruled, just four years after the Constitution was ratified, that, yes, the plain text of Article III did mean a state could be sued by an out-of-stater in federal court;[8] they responded when it was feared the Court might strike down the Civil Rights Act of 1866[9] as being beyond Congress's authority to enforce the Thirteenth Amendment;[10] they responded when the Court held the federal income tax unconstitutional;[11] and they responded when the Court held that Congress could not impose a voting age of 18 on the states.[12] They also responded when the Court struck down federal laws against child labor[13] and when it turned a blind eye to sex discrimination,[14] though both these

2. U.S. CONST. amend. XIII.

3. U.S. CONST. amends. XII, XXII, XXV.

4. U.S. CONST. amends. XVII, XXIII.

5. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

6. U.S. CONST. amend. XXI, *repealing* U.S. CONST. amend. XVIII.

7. Note that as to most or all of these amendments, their redundancy is debatable, often highly so. It would be tedious, however, to keep saying "arguably redundant amendments," so my definition of this term should be read as including the "arguably" caveat. Interestingly, as we shall see, it is usually the proponents of a redundant amendment who believe that it is redundant and that the Constitution already contains the same principle.

8. U.S. CONST. amend. XI; *see* Chisholm v. Georgia, 2 U.S. 419 (1793).

9. Civil Rights Act of 1866, ch. XXXI, 14 Stat. 27–30 (1866).

10. U.S. CONST. amend. XIV.

11. U.S. CONST. amend. XVI; *see* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

12. U.S. CONST. amend. XXVI; *see* Oregon v. Mitchell, 400 U.S. 112 (1970).

13. H.R.J. Res. 184, 68th Cong. (1924); *see* Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

14. H.R.J. Res. 208, 92nd Cong. (1972); *see, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948).

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efforts were (formally) unsuccessful.[15] There have also been numerous proposals over the centuries to change the Constitution to overturn some Supreme Court decisions, on issues ranging from the scope of the treaty power,[16] to flag burning,[17] abortion,[18] and corporate political rights.[19] Retired Justice John Paul Stevens recently added his voice to the chorus with his book *Six Amendments*,[20] each one targeting a different line of doctrine Justice Stevens considers erroneous on legal as well as philosophical grounds.

In this Article, I examine the phenomenon of these redundant amendments, focusing in particular on how they are received by constitutional interpreters after their adoption. Part I will consider the *theory* of redundant amendments, offering a few thoughts on the puzzle they pose to constitutional interpreters. Part II will examine the *history* of each amendment that can fairly be characterized as redundant, in whole or in part. This will include the Eleventh[21] and Sixteenth Amendments,[22] which are wholly redundant; the Fourteenth[23] and Twenty-Sixth Amendments,[24] which are partially redundant in that they took a rule Congress believed itself empowered to impose by statute and wrote it directly into the Constitution; the original Bill of Rights,[25] which the Federalists famously thought unnecessary; and the various voting rights amendments,[26] which present an interesting puzzle in that they seem to have created their own redundancy. It will also include the two redundant amendments which were passed by Congress but not ratified by the states, the Child Labor[27] and Equal Rights Amendments.[28] Part III will then use this series of case studies to draw *lessons* about the ways in which redundant amendments have tended to operate in practice. These lessons will be used to critique a number of proposed redundant amendments,

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15. As we shall see, subsequent Supreme Court doctrine moved significantly, if not entirely, in the direction these amendments would have forced it in had they been ratified.

16. *E.g.*, S.J. Res. 1, 83rd Cong. (1953); *see* Missouri v. Holland, 252 U.S. 416 (1920).

17. *E.g.*, H.R.J. Res. 79, 104th Cong. (1995); *see* Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

18. *E.g.*, S.J. Res. 3, 98th Cong. (1983); *see* Roe v. Wade, 410 U.S. 113 (1973).

19. *E.g.*, S.J. Res. 33, 112th Cong. (2011); *see* Citizens United v. FEC, 558 U.S. 310 (2010).

20. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

21. U.S. CONST. amend. XI.

22. U.S. CONST. amend. XVI.

23. U.S. CONST. amend. XIV.

24. U.S. CONST. amend. XXVI.

25. U.S. CONST. amends. I–X.

26. U.S. CONST. amends. XV, XIX, XXIV.

27. H.R.J. Res. 184, 68th Cong. (1924).

28. H.R.J. Res. 208, 92nd Cong. (1972).

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including the Bricker Amendment,[29] the Flag Desecration Amendment,[30] and Justice Stevens's six proposed amendments[31] and, through these critiques, to offer advice on draftsmanship and strategy to anyone thinking of sponsoring a redundant amendment of their own.

I. THEORY

To see some of the neat theoretical problems of interpretation posed by redundant amendments, let us consider the quintessential scenario under which such an amendment might be enacted. The Supreme Court has recently rendered some decision which a large majority of the American people believe has sorely misconstrued the Constitution, and with disastrous effect. Rather than wait around for the Court to change its mind, or its membership, the people mobilize to pass a constitutional amendment overturning that decision. Let us suppose, moreover, that the precise terms of the amendment do not cover every possible application of the *principle* behind the Supreme Court's now-repudiated decision. That is to say, the amendment declares that the specific result the Court reached is no longer the case, but it is textually limited to that result only, while the reasoning behind the Court's decision might lead to similar results in other cases not expressly covered. If this were not so, many of the interpretive puzzles would become irrelevant. Having defined our scenario, the question now becomes: what is a good constitutional interpreter to do? Not in interpreting the amendment itself; that will typically present only the usual challenges of any constitutional interpretation. The interesting question is how the original Constitution (meaning here not the Constitution of 1789 unamended but the Constitution as it existed prior to this specific amendment) should be interpreted in light of the amendment.

It is impossible to present any one answer to that question as being the theoretically correct one. However, using Professor Philip Bobbitt's modalities of constitutional argument[32] we can at least see the shape of the problem. This puzzle concerns mainly what Bobbitt calls the textual and historical modalities,[33] and on a naïve view it might even seem to be a simple battle between the two. Let us consider these two perspectives in turn. Historical argument concerns "the intent of the draftsmen of the Constitution and the people who adopted the Constitution,"[34] and also the draftsmen and ratifiers of later amendments. The way amendments interact

29. S.J. Res. 1, 83rd Cong. (1953).

30. *E.g.*, H.R.J. Res. 79, 104th Cong. (1995)

31. *See* STEVENS, *supra* note 20.

32. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter CONSTITUTIONAL FATE]; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter CONSTITUTIONAL INTERPRETATION].

33. CONSTITUTIONAL FATE, *supra* note 32, at 7.

34. *Id.*

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with historical argument is important for our purposes. On one view, each piece of text in the Constitution should be interpreted solely in light of the intentions and understandings of the people who originally ratified it. That is to say, Articles I through VII are interpreted according to the understanding of 1789, the first ten Amendments are interpreted according to the understanding of 1791, the Reconstruction Amendments according to the understanding of the late 1860s, etc.

Another, more compelling view, however, suggests that later amendments can provide an updated understanding of the earlier parts of the Constitution.[35] On this view, when we use historical argument to interpret provisions from the original, unamended Constitution, we must consider not only the understanding of 1789 but also, where relevant, the understanding of 1791 and of 1868 and of every other date when new constitutional text was ratified. This effect is particularly strong when the later amendment has some substantive connection to the original provision; for instance, the understanding of the Reconstruction generation that ratified the Fourteenth Amendment is of particular relevance for interpreting the Bill of Rights.[36] Using this intergenerational historical method, the answer to the puzzle would seem obvious: the people who pushed for and ratified this redundant amendment understood the Constitution they amended a certain way, and future interpreters should view it that same way. The amendment should be viewed as having repudiated the principles behind the Supreme Court's decision in their entirety, and principles that would have led the Court to reaching the opposite result, which is now carved in constitutional stone, should be followed in any relevant case.

The textual modality, however, provides a strong objection to that view of things. Courts are normally reluctant to interpret statutes or the Constitution in a way that would render some portion of their language "surplusage," that is to say, redundant. Chief Justice John Marshall, for instance, used this rule against surplusage to help justify his interpretation of Article III in *Marbury v. Madison*.[37] "If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body," he observed, "it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested."[38] However, he argued, "[i]t cannot be presumed that any clause

35. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000) [hereinafter CREATION AND RECONSTRUCTION].

36. *See id.*

37. 5 U.S. 137 (1803).

38. *Id.* at 174. Of course, there is at least a decent argument that Chief Justice Marshall misapplied the rule here. We could read this part of Article III not as giving Congress unlimited power to allocate original jurisdiction between supreme and inferior courts but rather as allowing Congress to supplement the Supreme Court's original

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in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[39] Applying the rule to our hypothetical, the presence of the amendment seems to indicate that the Court's interpretation of the original constitution was, or at least now must be deemed, *correct*. Otherwise, the entire amendment would be unnecessary: the Constitution would mean the same thing with it as without it. This sets up our naïve confrontation: the historical modality suggests that we should view the whole Constitution according to the understanding of those who passed the new amendment, but the textual modality objects that this would render the amendment itself mere surplusage.

However, things are not that simple, because there are counterarguments within each modality. The rule against surplusage is far from absolute. The Court does not always follow it,[40] and there are good theoretical reasons to doubt its validity, especially as applied to a Constitution written in many stages over multiple centuries. For instance, the original Constitution prohibited religious tests of office,[41] a rule almost certainly contained within the First Amendment's later prohibition on all "laws respecting an establishment of religion."[42] Must we strain our interpretation of the Establishment Clause so that it does not contain within itself the no-religious-tests rule? That would be absurd. Arguably it would not even make sense to draw that inference had the two been composed simultaneously: even if the Establishment Clause should properly be read as prohibiting religious tests anyway, the framers could reasonably have wanted to make that specific part of the rule particularly explicit. Professor Akhil Amar has argued that many provisions that might seem redundant can be "best read as declaratory and clarifying,"[43] such as the Necessary and Proper Clause[44] and the Opinions Clause.[45] These clauses are "redundant" in the sense that, even if they were erased, the Constitution would properly be read as reaching the same result, but because they are "clarity-enhancing and doubt-removing,"[46] they contribute to the document nonetheless.

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jurisdiction, but not to strip that Court of original jurisdiction over cases assigned to it by the text. U.S. CONST. art. III, § 2, cl. 2. On this reading, which Marshall rejects, the language assigning some cases to the high court and others to the inferior courts (by default) would not be surplusage at all.

39. *Marbury*, 5 U.S. at 174.

40. *E.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (holding, *inter alia*, that the Second Amendment's preamble does not affect that amendment's meaning).

41. U.S. CONST. art. VI, cl. 3.

42. U.S. CONST. amend. I.

43. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 7–10 (1998).

44. U.S. CONST. art. I, § 8, cl. 18. *See* Amar, *supra* note 43, at 7–10.

45. U.S. CONST. art. II, § 2, cl. 1. *See* Amar, *supra* note 43, at 10–15.

46. Amar, *supra* note 43, at 10.

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The techniques of structural argument[47] also cast some doubt on the rule against surplusage. In his landmark work outlining that modality,[48] Charles Black plays a game where he pretends that some part of the Constitution, for instance the First Amendment or the Fourteenth Amendment's second sentence, wasn't there, and asks whether, in such a world, it would *really* be constitutional to discriminate against blacks, or to prohibit political speech.[49] He argued that it might not be, that, for instance, "the nature of the federal government, and of the states' relations to it, compels the inference of some federal constitutional protection for free speech, and gives to a wide protection an inferential support quite as strong as the textual support" given by the First and Fourteenth Amendments themselves.[50] Surely it should not be viewed as a problem, as some strange anomaly, if the contents of certain constitutional provisions would be fairly inferable from the general constitutional structure even if those provisions were not there. Indeed, we should expect that many of the Constitution's specific provisions will follow logically from its essential structure. If we accept the validity of structural argument, this would render those provisions a kind of surplusage, but surely there is nothing wrong with that. One important role that text can play is making explicit what was already implicit on a fair view. If nothing else, this can save a lot of trouble arguing about whether the inference is in fact a fair one.

Conversely, there are also good reasons to doubt our historical argument. We were assuming above that the amendment's proponents did in fact understand the Constitution, as a whole, differently from the Supreme Court. But this need not be the case, and the very fact that the amendment they passed was narrower than the principles motivating the Court's decision suggests otherwise. Perhaps that was deliberate; perhaps they only wanted to draw one specific exception to a broader rule of which they nonetheless approved. They may or may not have intended that; either way, the text itself, the simple fact of the amendment's existence, may not be enough to tell us which it was. (It might be, though: as we shall see, the precise wording of these amendments can suggest one or the other view of their framers' intentions.) To settle the question, a court would need to conduct an actual historical investigation.

The ultimate point, then, is that there is real theoretical ambiguity about how to view the effects of a redundant amendment on the Constitution. Within both the textual and historical modalities, there are arguments for and against applying the principle of the amendment beyond

47. *See* CONSTITUTIONAL FATE, *supra* note 32, at 7, 74–92.

48. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press, 1985) (1969) [hereinafter STRUCTURE AND RELATIONSHIP].

49. *Id.* at 33–34.

50. *Id.* at 39. Note that the Fourteenth Amendment is vital to the textual case for free speech, since by its terms the First Amendment applies only to the federal government. *Cf.* Barron v. Baltimore, 32 U.S. 243 (1833).

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its narrow textual confines. This is not only a puzzle for constitutional interpreters faced with such an amendment, it is a danger that the drafters of such an amendment must confront. Presumably they have some actual preference between the two possibilities, and they would therefore be wise to craft their amendment in a way that effectively signals those preferences, or else one that manages to avoid the puzzle entirely. As we shall see, the drafters of previous redundant amendments have not always been so careful.

II. HISTORY

A. Overturning the Court: The Eleventh and Sixteenth Amendments

Two of the twenty-seven enacted amendments match the hypothetical from Part I almost precisely. The first of these is the Eleventh Amendment, and the story of its passage is short and quickly told. The text of Article III provided that "[t]he judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens, or Subjects."[51] This text clearly makes no explicit distinction between a suit brought *by* a state against a foreign (from its perspective) citizen and a suit brought by such a foreigner against the state, and the first Judiciary Act similarly seemed to confer jurisdiction over both.[52] This seemingly symmetrical language aroused fears during the ratification debates that states could be sued by out-of-state creditors in federal court. Alexander Hamilton, writing as Publius, sought to assure the people of New York that this would not be so, because it "is the general sense, and the general practice of mankind" that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[53] Nevertheless, in the 1793 case *Chisholm v. Georgia*,[54] its first significant constitutional case, the Supreme Court held that the plain language of Article III and the Judiciary Act prevailed over this implicit understanding. (In Professor Bobbitt's terms, the Court followed the textual modality rather than the historical one, giving effect to the plain meaning of the text rather than to its well-known purpose and original understanding.) This decision provoked "widespread resentment," and within thirteen months Congress had sent an amendment overturning *Chisholm* to the states, which would be ratified within another year.[55]

A few features of this new amendment, and of the legislative history leading to its adoption, demonstrate that it was viewed by its framers as redundant in nature, but also expose a tension in that very view—one that

51. U.S. CONST. art. III, § 2, cl. 1.
52. AMERICA'S CONSTITUTION, *supra* note 1, at 332–33.
53. THE FEDERALIST NO. 81 (Alexander Hamilton).
54. 2 U.S. 419 (1793).
55. U.S. CONST. amend. XI.

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has been the source of great mischief over the centuries that followed. First, the resolution proposing what would become the Eleventh Amendment was not introduced for nearly a year after *Chisholm* was decided. However, a resolution proposing a nearly-identical amendment *was* introduced on February 20th, 1793, just two days after *Chisholm*. That proposed amendment read:

> The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.[56]

Congress adjourned within a month of this resolution's introduction without acting on it, and did not return for nearly a year, at which point the eventual Eleventh Amendment itself was introduced.[57] The new text featured only two changes. One was trivial, changing the word "suits" from plural to singular.[58] The other was similarly modest but much more meaningful, as the words "be construed to" were added before the word "extend."[59] This change clarified "that the amendment was designed to correct a misconstruction of the state-citizen diversity clause in Chisholm."[60] That is, the text of the Eleventh Amendment itself declared that *Chisholm* had been wrongly decided under the then-current constitutional text, and that therefore the Amendment itself made precisely no substantive change in the proper interpretation of the Constitution.

But there is a problem with this story: the new Amendment was far, far narrower than the abstract principle of sovereign immunity that would have made *Chisholm* wrong.[61] As described by Hamilton, for instance, that principle would render the states immune from suit without their consent by *any* individual under *any* circumstances, and that therefore unless such consent were explicitly found in the federal Constitution the immunity would survive intact. But the language granting diversity jurisdiction to the federal courts gives no more suggestion of an asymmetry between states-as-plaintiffs and states-as-defendants than does the federal question

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56. 3 ANNALS OF CONG. 651–52 (1793).

57. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1270 (1989).

58. U.S. CONST. amend. XI.

59. *Id.*

60. Fletcher, *supra* note 57, at 1270.

61. Wrong as to the jurisdictional issue anyway. As Professor Amar notes, there is a strong argument that *Chisholm* was right on the jurisdictional question but wrong to conclude that it could force Georgia to pay damages for breach of contract, given the long-standing common law principle that sovereigns were not liable for such damages except by their own consent. AMERICA'S CONSTITUTION, *supra* note 1, at 332–33. But the Eleventh Amendment did not overturn the substantive holding, it overturned—and purported to declare originally incorrect—the jurisdictional holding.

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jurisdiction language.[62] Now, this does not mean that Hamilton was wrong, or that Hamilton's position and that of the Court in *Chisholm* are incompatible (if one views the states as having waived their immunity from diversity suits). But if *Chisholm* was wrong when decided, as the Eleventh Amendment seems to declare it, then it is difficult (if not impossible)[63] to argue that a similar principle would not take a bite out of federal question jurisdiction. Except we know that this was *not* the Eleventh Amendment's position, because it represented a compromise position and a rejection of more hard-line states' rights proposals floating around Washington at the same time which would have granted states absolute immunity against suit by a private party in a federal court under any head of jurisdiction.[64] The actual Eleventh Amendment was far more limited. In particular, its last fourteen words strongly suggest that a state could be sued by its own citizen under federal question jurisdiction.[65] Therefore, the Amendment's claim that its own position was the correct understanding of the original constitution is tenuous at best and gibberish at worst.

This tension has asserted itself with a vengeance in the Eleventh Amendment case-law, which—particularly of late—has tended to follow the implied understanding of 1789 rather than the demonstrable intentions of 1795. In 1883, the decision in *Louisiana v. Jumel*[66] broke with long-

62. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1. It is not technically impossible to argue that the language of Article III constituted waiver of state sovereign immunity as to federal question jurisdiction but not as to diversity jurisdiction, if one follows Akhil Amar in focusing on the word "all" in the above quotation. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). On this "two-tiered" theory of federal jurisdiction, one might argue that the grant of federal jurisdiction over "all" federal question cases met Hamilton's standard for explicit waiver of state immunity but that the grant of diversity jurisdiction, lacking such an "all," did not. After all, one could exclude *some* diversity cases without contradicting the text, but you could not exclude some federal question cases without doing so. Even under the two-tiered theory, however, that argument seems like a stretch since the diversity jurisdiction language simply gives no indication that it is anything other than symmetric.

63. *See supra* note 62.

64. AMERICA'S CONSTITUTION, *supra* note 1, at 334. It is unclear whether or not an amendment along these lines was ever actually proposed in Congress; see Fletcher, *supra* note 57, at 1269 n.45, arguing that it was, and John J. Gibbons, *The Eleventh Amendment and State Sovereignty: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926 n.186 (1983) arguing that it was not.

65. *See* Gibbons, *supra* note 64, at 1927 ("Had the draftsman of the resolution intended to provide a rule of absolute sovereign immunity, he would have simply stopped after the words 'United States.' The remaining fourteen words can only be interpreted in one of two ways: either as surplusage, or as intending to limit the amendment in order to eliminate only the specific article III grants of federal jurisdiction to Controversies between . . . a State and Citizens of another State; . . . and between a State . . . and foreign . . . Citizens.'").

66. 107 U.S. 711 (1883).

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standing as well as recent precedent[67] when it extended sovereign immunity to cases against state officials rather than against the state itself. A few years later in *Hans v. Louisiana*,[68] the Court unanimously held that a man could not sue his own state under federal question jurisdiction,[69] an absurd result if one only considers the text of the Eleventh Amendment but which makes considerable sense under unwritten, abstract principles of sovereign immunity. Nearly a century later in *Edelmen v. Jordan*,[70] an opinion by Justice Rehnquist held that sovereign immunity barred the federal courts from forcing a state to pay money owed to private parties under federal law that the state had wrongfully withheld from them. Most recently, in *Alden v. Maine*,[71] the Court held that sovereign immunity principles prevented Congress from authorizing suits against state governments *in state courts* for violations of federal law. If we accept the view that the Eleventh Amendment represented a deliberate compromise between the *Chisholm* position and a full-throated endorsement of sovereign immunity, the Court's jurisprudence seems quite clearly to have thrown that compromise entirely out of balance.

The Sixteenth Amendment was the culmination of a much longer process, with nearly two decades elapsing between *Pollock v. Farmers' Loan & Trust Co.*,[72] the case to which the Amendment responded, and its adoption. In 1894, Congress had passed what by today's standards would be a stunningly modest income tax.[73] The following year the Court held in *Pollock* that the tax was unconstitutional. The reasoning is a bit involved. The Direct Tax Clauses[74] require that when Congress, acting under its broad taxing power,[75] levies a "direct" tax, it must "apportion" that tax among the states according to their populations, much as representatives in Congress were apportioned.[76] The only textually enumerated example of a direct tax was a "Capitation,"[77] but it was well understood that taxes on

67. *See* Cohens v. Virginia, 19 U.S. 264 (1821); Osborn v. Bank of the United States, 22 U.S. 738 (1824); Board of Liquidation v. McComb, 92 U.S. 531 (1876).

68. 134 U.S. 1 (1890).

69. Interestingly, while the decision was unanimous, there were two opinions divided in essence over the question of whether *Chisholm* was correct when decided, with the majority saying it was not and Justice Harlan—a dissenter in *Louisana ex rel. Elliott v. Jumel* (107 U.S. 711 (1883))—saying it was but had been wholly repudiated by the Eleventh Amendment.

70. 415 U.S. 651 (1974).

71. 527 U.S. 706 (1999).

72. 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

73. *Pollock*, 157 U.S. at 429–30.

74. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4.

75. U.S. CONST. art. I, § 8, cl. 1.

76. U.S. CONST. art. I, § 2, cl. 3.

77. U.S. CONST. art. I, § 9, cl. 4.

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land were also in the "direct tax" category.[78] The formal holding of *Pollock*, therefore, was that "taxes on the rents or income of real estate are equally direct taxes"[79] as taxes on the real estate itself, and that "taxes on personal property, or on the income of personal property, are likewise direct taxes."[80] Therefore, the portions of the 1894 tax law that dealt with income from real or personal property had to be apportioned among the states, and as they had not been (and, indeed, could not plausibly be[81]), they were unconstitutional. The result was, of course, that under *Pollock* Congress's power to tax income was limited in the most regressive, pro-wealthy way imaginable: labor income was fair game, but income from property was not. And so while the Court did not formally declare invalid all possible income taxes, its ruling had that political effect, for the populists and progressives who favored income taxes generally would scarcely adopt one which fell exclusively on the working classes while leaving plutocrats untouched.

Though it took until the Administration of President William Howard Taft, Congress eventually responded to *Pollock* by passing what would become the Sixteenth Amendment. The Amendment's text clearly marks it as a very specific response to *Pollock*. When it grants Congress the power to tax income "from whatever source derived,"[82] it takes aim specifically at the perversity of *Pollock*'s focus on the source of the income. Justice Harlan had focused on precisely this element of the decision in his dissent from *Pollock*, arguing that by exempting one class from any possible obligation to "contribute" to "the support of the government,"[83] the Court would provoke a "contest" between different economic classes "from which the American people would have been spared if the court had not overturned its former adjudications, and had adhered to the principles of taxation under which our government, following the repeated adjudications of this court, has always been administered."[84]

The Sixteenth Amendment's focus on the same issue strongly suggests that its framers agreed with Harlan that the *Pollock* decision was not just

78. *See* Hylton v. United States., 3 U.S. 171, 175 (1796) (Chase, J.) ("I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND.").

79. *Pollock*, 158 U.S. at 637.

80. *Id.* Note that while the first holding of *Pollock* is arguably consistent with the dicta of *Hylton*, this second holding is not. "I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax." *Hylton*, 3 U.S. at 175 (Chase, J.).

81. *See Pollock*, 158 U.S. at 671 (Harlan, J., dissenting) ("No such apportionment can possibly be made without doing gross injustice . . . .").

82. U.S. CONST. amend. XVI.

83. *Pollock*, 158 U.S. at 673.

84. *Id.* at 672.

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unfortunate in its consequences but wrong as a matter of existing law. And this claim to redundancy is somewhere between pretty plausible and obviously correct.[85] Certainly it is more internally consistent than the story the Eleventh Amendment told about itself, and accordingly, the subsequent history of the Sixteenth Amendment has been significantly less fraught than that of the Eleventh.

Curiously, the Sixteenth Amendment itself wasn't telling this story. Whereas the Eleventh Amendment had pointedly included the "shall not be construed to extend" language indicating its own redundancy, the text of the Sixteenth Amendment reads like a substantive change in the Constitution. It declares simply that "[t]he Congress shall have power"[86] to levy these taxes, making the obvious textual inference that Congress did not previously possess that power—the opposite of what its proponents, *Pollock*'s detractors, actually believed. One might expect that, just as the Eleventh Amendment's language had led the Court to conclude that *Chisholm v. Georgia* was incorrect when decided because of a broad sovereign immunity principle, the lack of analogous language would lead the Court to conclude that *Pollock* was *correct* when decided, and that its spirit would survive except where specifically nullified by the Amendment.

And, indeed, one would be correct in this expectation. Less than a decade after the adoption of the Sixteenth Amendment and of a new federal income tax, the Court decided *Eisner v. Macomber*,[87] which frames itself as concerning whether a tax on a stock dividend was or was not income within the meaning of the Sixteenth Amendment. The Court rules that it was not. The consequence of that ruling, however, was to *strike down* such a tax as *unconstitutional*.[88] This required holding not just that the tax in question was not an income tax but that it *was* a direct tax, and this required, in essence, reaffirming *Pollock*'s less defensible holding, namely that taxes on personal property were direct taxes. Indeed the Court says as much explicitly, directly relying on *Pollock*'s interpretation of the Direct Tax Clauses[89] and explaining that

> A proper regard for [the Sixteenth Amendment's] genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, so as to repeal or modify, except as

85. The first *Pollock* holding, that taxes on the income from real estate were direct taxes just like a tax directly on the real estate, is both logically defensible and eminently contestable. The second holding, that personal property should be treated the same as real property, seems to have been a totally novel invention in 1895 and is inconsistent with the spirit of *Hylton*.

86. U.S. CONST. amend. XVI.

87. 252 U.S. 189 (1920).

88. The Court had previously held that such dividends were not income within the meaning of the taxing statute, in *Towne v. Eisner*, 245 U.S. 418 (1918), and Congress had responded by passing a new statute which clearly did reach these dividends.

89. *Macomber*, 252 U.S. at 192.

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> applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal.[90]

Therefore, since the tax on stock dividends was not a tax on the income from property but just on the ownership of property itself, and since—under *Pollock* if not under the actual Constitution, as understood in 1789 or in 1913—it was a direct tax, it was unconstitutional. Thus, the Sixteenth Amendment's failure to make explicit its own redundancy lead to mischief in the "near-miss" case which (arguably) falls outside the scope of its language but well within the scope of its animating principle.

We can go further than this, however, in critiquing the drafters of the Sixteenth Amendment. It would seemingly have been better to signal that *Pollock* was being declared to have been wrong, perhaps with some "shall not be construed" language or perhaps through some other textual device. (I confess I cannot easily imagine any neat and eloquent way to include such a signal.) But it is hard to see how it was not a mistake plain and simple to make the amendment about income taxes at all, and to focus so precisely on the most grotesque features of the *Pollock* decision, rather than going for the jugular of the real problem: the direct tax rules. The *Macomber* Court declared that those rules "still ha[ve] an appropriate and important function, and [are] not to be overridden by Congress or disregarded by the courts"[91]—but just what is that function? After all, the original function of the Direct Tax Clauses seems to have been about slavery, as is rather suggested by the inclusion in the original rule of the infamous three-fifths principle.[92] By the Progressive Era, that original purpose was completely moot,[93] and it is difficult to see what other purpose retaining the direct tax rules served, except to throw a bit of sand in the gears of the federal taxing power and to protect landowners in sparsely-populated states.[94]

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90. *Id.* at 193.

91. *Id.*

92. U.S. CONST. art. I, § 2, cl. 3. *See also* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 684 (1895) (Harlan, J., dissenting) ("[The Court] so interprets constitutional provisions, originally designed to protect slave property against oppressive taxation . . . ."); AMERICA'S CONSTITUTION, *supra* note 1, at 613 n.6.

93. U.S. CONST. amend. XIII.

94. Unlike a tax on property, taxes on land can be easily apportioned by population. This is accomplished by setting a different tax rate on each acre of land in every state, using the ratio between a state's total area (or possibly the total area of its taxable land) and its population. But since this ratio is much greater in sparsely-populated states, in order to achieve the interstate equality demanded by the direct tax rules, land in those states would need to be taxed far more lightly than land in densely populated states. Interestingly, this result would make at least a rough kind of economic sense; since the land in densely-populated states is scarcer and hence more valuable, such an apportioned land tax would approximate a land *value* tax.

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Thus, it is difficult to see what would have been lost, particularly from the Progressives' point of view, had the Sixteenth Amendment empowered Congress to impose *direct taxes* "without apportionment among the several States, and without regard to any census or enumeration,"[95] or if it had simply stated that Article I, Section 9, Clause 4 was hereby repealed. Had the Sixteenth Amendment's framers gone that big, *Macomber* could never have happened. Moreover, it would seem far easier for the federal government, in some future progressive moment, to impose taxes on wealth or land.[96] Instead they went small, winning the immediate political battle with the Court but, perhaps accidentally, conceding the broader constitutional principle.[97]

B. Constitutionalizing Congressional Command: The Fourteenth and Twenty-Sixth Amendments

Though only the Eleventh and Sixteenth Amendments precisely fit the mold of redundant amendments, two of the other post-Bill of Rights amendments were what we might call *partially* redundant: their actual operative provisions clearly changed the Constitution, but their passage was largely motivated by a desire to nullify an erroneous Supreme Court decision. The first of these was the Fourteenth Amendment, which both overruled one wrong Court decision, the most notorious and egregious in history, and preempted an anticipated hostile ruling.[98] Both these aspects of the Amendment are examples of this partial redundancy, but though the former aspect is more famous, the latter is more interesting for the present purposes. The more famous and less relevant part lies in the very first sentence of the Amendment, which declares that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[99]

This was a not-so-subtle repudiation of *Dred Scott v. Sandford*,[100] which had absurdly[101] held that African-Americans could never be

95. U.S. CONST. amend. XVI.

96. There is a strong economic argument that land value taxes are the best way to finance a government. *See* HENRY GEORGE, PROGRESS AND POVERTY (1879). I am also inclined to think that a tax specifically on *developed* land would have beneficial effects for the environment.

97. In fairness, the stakes of the immediate battle with the Court were far greater than those in ancillary skirmishes like *Macomber* where the broader war over constitutional principle was seemingly being lost.

98. The Fourteenth Amendment also overruled *Barron v. Baltimore*, 32 U.S. 243 (1833), which had held the Bill of Rights inapplicable to the states. However, this did not represent a judgment that *Barron* had been wrongly decided, but merely that it would be good policy to reverse its rule.

99. U.S. CONST. amend. XIV, § 1.

100. 60 U.S. 393 (1857).

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American citizens. But of course, in repudiating *Dred Scott* the Citizenship Clause did more than merely overturn that decision as an interpretation of the existing Constitution. The most ardent abolitionist could never have claimed in 1857 that all persons born or naturalized in the United States were properly considered American citizens and citizens of the state wherein they resided. Nor could they even have argued as much in 1866, when the Thirteenth Amendment had eradicated the most glaring counterexample—the fact that slave children were by no means citizens. After all, in 1866 as in 1857 and 1789, citizenship was left primarily to the states subject to Congress's authority to "establish a uniform Rule of Naturalization,"[102] and there was nothing to stop Congress from choosing *jus sanguinis* (under which only the children of American citizens would be citizens) over *jus soli* (under which all those born on American soil would be citizens), the Fourteenth Amendment's new rule.[103]

Thus, while the Citizenship Clause did repudiate and was a repudiation of *Dred Scott*, it did nothing that could have been claimed already to have been done. And it is hardly unique among the Amendment's provisions in not being fully redundant, even arguably so: in fact, the Citizenship Clause is one of its *most* redundant aspects. The other major provisions, which established for the first time an effective Bill of Rights against the states[104] and regulated for the first time state decisions on voting rights,[105] were major and transformative constitutional innovations. But there was one aspect that was, sort of, redundant, which can be seen in the literally repetitive language of the Amendment's fifth Section,[106] a nearly-verbatim quotation of Section Two of the Thirteenth Amendment.[107] There's a history behind that parallelism. Earlier in the spring of 1866, the very same Congress had passed a Civil Rights Act requiring equal civil rights between whites and blacks throughout the nation.[108] The purported constitutional authority for this law came from Congress's power to enforce the Thirteenth Amendment, and while of course the Civil Rights Act did not specifically concern slavery, it was aimed at what Senator Lyman Trumbull, its sponsor, called the "incidents of slavery" and the "badges of servitude,"[109] and that was, in his view, close enough.

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101. *See* AMERICA'S CONSTITUTION, *supra* note 1, at 253–54.

102. U.S. CONST. art. I, § 8, cl. 4.

103. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (confirming the *jus soli* view of the Citizenship Clause).

104. U.S. CONST. amend. XIV, § 1.

105. U.S. CONST. amend. XIV, § 2.

106. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

107. "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

108. Civil Rights Act of 1866, 14 Stat. 27–30 (1866).

109. Cong. Globe, 39th Cong., 1st Sess. 322–23 (1866).

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Not everyone agreed. For instance, President Andrew Johnson vetoed the bill on, among other things, the grounds that slavery had already been abolished. Therefore, he thought, the bill was not necessary for enforcing the Thirteenth Amendment.[110] A two-thirds majority of each House voted to override President Johnson's veto, the first time in history Congress had managed that feat, and a few months thereafter very similar two-thirds majorities voted to send the Fourteenth Amendment to the states. That was not a coincidence. As Professor Akhil Amar has noted, "[o]ne of the main purposes of the amendment was to provide an incontrovertible constitutional foundation for the act, which Johnson and his allies persisted in labeling unconstitutional even after its passage in April."[111] And in *that* sense, and *only* that sense, the Fourteenth Amendment was deemed redundant by its supporters, for they already thought that the Civil Rights Act had sufficient constitutional foundations. It is worth exploring that claim a little bit, because not every supporter of the Fourteenth Amendment agreed with Trumbull rather than Johnson about the Civil Rights Act's constitutionality. In fact, Representative John Bingham of Ohio, one of the lead authors of the Amendment, thought Congress had no authority to pass the Civil Rights Act,[112] and therefore voted against its passage[113] and declined to vote on overriding Jackson's veto.[114] But Bingham was far from typical among the Fourteenth Amendment's supporters in Congress: only four of the 120 Representatives who voted for it[115] had not voted "aye" at least once on the Civil Rights Act,[116] and none of the 33 Senators in favor[117] had not done so.[118] If, therefore, we assume that, like Bingham, these Congressmen would not have voted for a law they thought unconstitutional,[119] then it seems to have been a nearly unanimous sentiment among the Fourteenth Amendment's supporters that it was, considered solely as a source of authority for the Civil Rights Act, superfluous.

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110. *Id.* at 1680–81.

111. AMERICA'S CONSTITUTION, *supra* note 1, at 362.

112. Cong. Globe, 39th Cong., 1st Sess. 1290–91 (1866).

113. *Id.* at 1367.

114. *Id.* at 1861.

115. *Id.* at 3149.

116. *Id.* at 1367, 1861.

117. *Id.* at 3042.

118. Cong. Globe, 39th Cong., 1st Sess. 606–07, 1809 (1866).

119. Empirically this is perhaps a somewhat tenuous assumption. However, given that all Senators and Representatives are "bound by Oath or Affirmation, to support this Constitution," U.S. CONST. art. VI, cl. 3, it makes sense to view a Congressman's vote in favor of a bill as an implicit profession of belief in its constitutionality, even if that profession may in some cases be insincere. (So might a statement on the floors of Congress be insincere.) This holds equally true for Congress the entity, which must be presumed to believe that all laws it passes are constitutional (perhaps especially when it overturns a veto made on grounds of unconstitutionality).

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The subsequent history of this aspect of the Fourteenth Amendment is in some ways a curious one. On the one hand, the Supreme Court has formally sided with Trumbull over Johnson and Bingham, holding in *Jones v. Alfred H. Mayer Co.*[120] that the Thirteenth Amendment authorized Congress to prohibit private racial discrimination. This makes sense given that, in this context, one cannot even begin to argue that this broad reading of the Thirteenth Amendment would render the Fourteenth surplusage. However, the Court has also repeatedly refused to extend a similarly broad interpretation to Congress's power to enforce the Fourteenth Amendment itself, from the era immediately subsequent to Reconstruction[121] through the present day.[122] The Court generally focuses on the "no State shall . . ." language in the Fourteenth Amendment's second sentence, inferring from those words that Congress cannot target private rather than state actors using its Section Five powers. This, however, makes particularly little sense, not only because the first sentence, the Citizenship Clause, features no such state-centric language but because, after all, the Fourteenth Amendment did not repeal the Thirteenth. On the broader, Trumbull view of the Thirteenth Amendment enforcement power, Congress had ample authority to target private discrimination *without* the Fourteenth,[123] making any narrowness in the language of the latter wholly irrelevant. It is possible, therefore, that by deciding to provide such specific constitutional footing for the Civil Rights Act rather than simply insisting on their broad view of the Thirteenth Amendment, the Reconstruction Congress accidentally undermined the broad federal civil rights power.

The other constitutional amendment featuring a similar kind of quasi-redundancy is the Twenty-Sixth, though unlike the Fourteenth Amendment, the Twenty-Sixth consists solely of the quasi-redundant provision. In the Voting Rights Act Amendments of 1970,[124] Congress had lowered the voting age from 21 to 18 in both federal and state elections. As to federal elections this was justified as an exercise of Congress's power under Article I, Section 4 to "make or alter" any state regulations of the "Times, Places, and Manner of holding Elections for Senators and Representatives."[125] As to state elections, however, where this justification is obviously inapplicable, Congress's actions were rooted in its authority to enforce the Fourteenth Amendment, and specifically the Equal Protection

120. 392 U.S. 409 (1968).

121. *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

122. *E.g.*, United States v. Morrison, 529 U.S. 598 (2000).

123. Arguably the Thirteenth Amendment enforcement power could only permit Congress to target discrimination against African-Americans, rather than against, say, women, or even against other racial minorities. However, the Thirteenth Amendment is no more textually confined to race than is the Fourteenth, and one could argue that the historical oppression of women has involved a significant degree of "involuntary servitude."

124. Pub. L. 91-285, 84 Stat. 314 (1970).

125. U.S. CONST. art. I, § 4, cl. 1.

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Clause, which by that point had long been held applicable to matters of voting rights.[126] In *Oregon v. Mitchell*,[127] decided later that same year, the Supreme Court accepted the justification for the federal component of the voting age law, but rejected the Equal Protection argument supporting the state component. The Court in essence found that because disenfranchising voters between 18 and 21 years of age was by no means a form of racial discrimination in disguise,[128] prohibiting such disenfranchisement could not be termed an enforcement of the Fourteenth Amendment without stretching the enforcement power so far that it would "strip the States of their power to govern themselves."[129]

Less than seven months later, the Constitution had been amended to set a national voting age of 18 for all time[130]—by far the fastest such response by the American people.[131]

There is not much to say about the subsequent history of the Twenty-Sixth Amendment, as there has been virtually none—aside from, obviously, the fact that from July 1st, 1971 onward eighteen-year-olds throughout the country enjoyed the right to vote. Only two Supreme Court cases have mentioned the Amendment at all, and neither actually concerned its application.[132] However, there has been considerable subsequent history of the Fourteenth Amendment and of Congress's enforcement power, and

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126. *E.g.*, Nixon v. Herndon, 273 U.S. 536 (1927); Baker v. Carr, 369 U.S. 186 (1962). Professor Amar argues that the Court is wrong to view these as Equal Protection cases rather than Fifteenth Amendment or Guarantee Clause ones, and that the Fourteenth Amendment's first section simply does not deal with political rights. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 185–93 (2012) [hereinafter AMERICA'S UNWRITTEN CONSTITUTION]. We shall encounter this puzzle in greater depth shortly; for now, the important thing is that it would have been commonplace in 1970 to believe, rightly or wrongly, that the Equal Protection Clause governed voting rights.

127. 400 U.S. 112 (1970).

128. *Id.* at 130.

129. *Id.* at 128.

130. U.S. CONST. amend. XXVI.

131. The Twenty-Sixth Amendment was ratified just 192 days after the Supreme Court decision it overturned. In contrast, the Eleventh Amendment was ratified 719 days after *Chisholm v. Georgia*, the Fourteenth Amendment was ratified 4143 days (and one Civil War) after *Dred Scott*, and the Sixteenth Amendment was ratified 6510 days after *Pollock*. Indeed, the Child Labor Amendment, which we will meet in the next section and which was never ratified, was proposed by Congress 749 days after *Bailey v. Drexel Furniture Co*.

132. The two cases are *Lubin v. Panish*, 415 U.S. 709 (1974) and *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The former concerned the right of indigents to be exempt from paying ballot access fees they could not afford, and used the Twenty-Sixth Amendment, along with the Twenty-Fifth (for some reason) and the Voting Rights Act of 1965 as examples of the shift from worry about excessive ballot length to a desire to expand political opportunity. *Lubin*, 415 U.S. at 713. The latter held unconstitutional the execution of a murderer who was under 16 years of age at the time of the murder, and used the fact that no state had gone beyond the Twenty-Sixth Amendment's command in lowering its voting age as evidence that the nation did not view younger teenagers as equal in capacities and responsibilities to adults. *Thompson*, 487 U.S. at 839.

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the Court has seemed in essence to confirm the relatively narrow view of that power taken in *Oregon v. Mitchell*.[133] Now, it is far from obvious that this is wrong, because there is a big difference between a world where the Fourteenth Amendment empowers Congress to impose a national voting age and a world where the Fourteenth Amendment would not authorize such a law but the Constitution imposes it separately. In the former, but not the latter, Congress would presumably also have power to pass any number of other laws regulating state political systems. It is therefore quite plausible to view the Twenty-Sixth Amendment as expressing not the view that Justice Black's understanding of the Fourteenth Amendment enforcement power in *Mitchell* was incorrect but rather the view that lowering the voting age, particularly in the context of the Vietnam War, was sufficiently important to justify making an exception to the general rule of state authority over these issues.

Presumably, however, the Congress which passed the Voting Rights Act Amendments in 1970 believed that it was acting within its authority in doing so, and while that was not technically the same Congress as the one which proposed the Twenty-Sixth Amendment, it shared many members in common. Seventy-five Senators and 353 Representatives voted on both, with every Senator and all but 16 Representatives voting for the Amendment. Sixty of those Senators had voted in favor of the Voting Rights Act Amendments, and while all 16 Representatives opposed to the Twenty-Sixth Amendment had also opposed the Voting Rights Act Amendments, those who supported the Twenty-Sixth had supported the earlier legislation 233 to 104.[134] These are not nearly so overwhelming as the analogous margins with the Fourteenth Amendment and the Civil Rights Act of 1870, but it is worth noting that enough Senators and Representatives to constitute a majority of each chamber voted for both efforts to lower the voting age. Most, if not all, of the framers of the Twenty-Sixth Amendment do appear to have thought that Congress already had ample authority to impose the same rule by ordinary legislation.

C. A Couple of Curiosities: The Bill of Rights and the Voting Rights Amendments

There are two other features of the Constitution that deserve mention, though they do not exactly fit the same model as the Eleventh and Sixteenth Amendments, or even of the Fourteenth and Twenty-Sixth. The

133. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

134. *See* 116 Cong. Rec. H20199–20200 (daily ed. Jun. 17, 1970) (Roll No. 176); 116 Cong. Rec. S7336 (daily ed. Mar. 13, 1970) (No. 105 Leg.); 117 Cong. Rec. S5830 (daily ed. Mar. 10, 1971) (No. 18 Leg.); 117 Cong. Rec. H7569–70 (daily ed. Mar. 23, 1971) (Roll No. 27).

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first is the Bill of Rights.[135] The Federalists famously thought that such a provision would be redundant. Consider this, from *Federalist No. 84*:

> Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[136]

This view, in fact, forms the basis for what Professor Bobbitt terms ethical argument, which sees the Bill of Rights not as the source of limitations upon government but rather as an incomplete instantiation of a more general *ethos* of limited government.[137] Now, it is true that on this view the entire Bill of Rights could be seen as redundant. Indeed, certain express prohibitions in the original Constitution like the Ex Post Facto Clause[138] could themselves be viewed as redundant, even though they were painting on a blank constitutional canvas. What differentiates these provisions from the redundant amendments discussed above is that with those amendments, the people most likely to support their passage were also the people who thought they were redundant.

With the Bill of Rights and the Ex Post Facto Clause, however, their alleged redundancy was used as an argument against their inclusion in the Constitution. Here is the language surrounding the above quote from Hamilton:

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . . I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given. . . .[139]

Similarly, at the Constitutional Convention future Supreme Court Justices Oliver Ellsworth and James Wilson argued against including the Ex Post Facto Clause, with Wilson remarking that it would "proclaim that

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135. U.S. CONST. amend. I–X. Interestingly, the package of amendments sent by the First Congress to the states included two amendments which were clearly not redundant, one of which was ratified two centuries later as the Twenty-Seventh Amendment (U.S. CONST. amend. XXVII) and the other of which was the failed Congressional Apportionment Amendment (S. Con. Res. 3, 1st Cong., 1 Stat. 97 (1789)).

136. THE FEDERALIST NO. 84 (Alexander Hamilton).

137. CONSTITUTIONAL FATE, *supra* note 32, at 146–47, 150–51.

138. U.S. CONST. art. I, § 9, cl. 3.

139. THE FEDERALIST NO. 84 (Alexander Hamilton).

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we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."[140] Conversely, the main faction insisting upon a Bill of Rights was the Anti-Federalists in the state ratifying conventions, who did not accept Hamiltonesque arguments against the necessity of a Bill of Rights but rather used those conventions, and the threat of subsequent congressional elections, to demand that one be added immediately after ratification.[141]

James Madison, of course, bridged the divide between these two views through the Ninth Amendment,[142] which—by clarifying that the specific set of rights protected by the first eight amendments (or elsewhere in the Constitution) was not meant to be exhaustive—neutralized Hamilton's concerns about the dangers of a bill of rights. Madison also seems to have worked to ensure that the Bill of Rights did only include principles which "Federalists had claimed were implicit in their plan all along,"[143] further supporting the view that the Bill of Rights was merely making explicit a small subset of rights already implicit in the document. It is difficult to say whether Madison and the Ninth Amendment were successful in communicating all of this to future generations of constitutional interpreters. On the one hand, judges and lawyers have been, for at least the past century and a half, quite reluctant to openly embrace the language of argument from constitutional ethos, preferring instead to find a specific textual hook for every decision to protect an unenumerated right.[144] On the other hand, they have been anything but reluctant to issue such decisions.[145] The verdict, then, must be a mixed one, but while, as Professor Bobbitt suggests, "wrongly deciding" and "wrongly explaining" are both serious problems for a constitutional court,[146] surely the former is the worse sin, and therefore as a net matter history seems to have smiled on the Ninth Amendment.

The second part of the Constitution which bears a curious relationship to the concept of redundancy is the voting rights amendments: the Fifteenth, the Nineteenth, and the Twenty-Fourth, which respectively prohibit denials of the right to vote on the basis of race,[147] sex,[148] and

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140. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 9.

141. AMERICA'S CONSTITUTION, *supra* note 1, at 317–19. Admittedly, it does not appear that anyone at the Convention thought the Ex Post Facto Clause was truly necessary; its supporters merely thought that it wouldn't hurt to make the rule against retroactive legislation explicit in the text. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 9.

142. U.S. CONST. amend. IX.

143. AMERICA'S CONSTITUTION, *supra* note 1, at 319.

144. CONSTITUTIONAL FATE, *supra* note 32, at 95, 103–06.

145. *Id.* at 103–06, 157–67. *See also, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Griswold v. Connecticut, 381 U.S. 479 (1965); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Lawrence v. Texas, 539 U.S. 558 (2003).

146. CONSTITUTIONAL FATE, *supra* note 32, at 106.

147. U.S. CONST. amend. XV.

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failure to pay a poll tax.[149] Under existing Supreme Court doctrine, and arguably under doctrine stretching back to just ten years after the first of those amendments was adopted, all three are totally redundant: the Equal Protection Clause of the Fourteenth Amendment leads to the exact same result in all cases.[150] As the Court has held repeatedly, the Equal Protection Clause applies to questions of voting rights.[151] Surely, if state voting rules are subject to equal protection scrutiny, laws denying the right to vote on the basis of race could not survive such scrutiny.[152] Laws denying women the right to vote would clearly not have survived the revolution in the Court's sex equality jurisprudence that began in the 1970s,[153] and quite possibly would have helped start that revolution earlier by providing an especially egregious form of discrimination for advocates to target. As for the Twenty-Fourth Amendment's ban on poll taxes, its language was explicitly limited to cover only federal elections, but two years after its adoption the Court explicitly used the Equal Protection Clause as the vehicle to extend that ban to state elections as well.[154] Under modern doctrine, therefore, you could erase the words of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments from the text of the Constitution and the public policy of the United States would not change one bit.

There are, however, a number of reasons to think that this massive line of Court cases using the Equal Protection Clause to protect political rights has entirely diverged from the Fourteenth Amendment's original understanding. For one thing, the Amendment's first Section used the language of "privileges or immunities,"[155] which echoed the language of

148. U.S. CONST. amend. XIX.

149. U.S. CONST. amend. XXIV.

150. I exclude the Twenty-Sixth Amendment from this analysis because I think it would be absurd to claim that the Equal Protection Clause could possibly have made it redundant (though, as discussed in Section (b), Congress arguably had the power to pass the same rule by a statute enforcing it). The Equal Protection Clause is taken to prohibit arbitrary legislative distinctions, but any possible voting age will be basically arbitrary, and it is difficult to argue that a voting age of 21 violated the equal protection principle but that a voting age of 18 does not.

151. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Hunter v. Underwood, 471 U.S. 222 (1985); Shaw v. Reno, 509 U.S. 630 (1993). *See also* Bush v. Gore, 531 U.S. 98 (2000).

152. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967). *See also* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, YALE L.J. 421, 421 (1960) [hereinafter *Lawfulness*] ("[T]he equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states.").

153. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

154. *Harper*, 383 U.S. 663.

155. U.S. CONST. amend. XIV, § 1.

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the original Constitution's Privileges and Immunities Clause[156] and "made clear . . . that [the section] applied only to civil rights and not to political rights such as voting, jury service, militia service, and officeholding."[157] The Amendment's second section provided an alternate mechanism for regulating voting rights,[158] and one whose gendered language seemed to suppose that the first section's grant of equal citizenship to women as well as men would not encompass the right to vote. Finally, there is the simple fact of the Fifteenth Amendment itself, passed in such quick succession with the Fourteenth that they can almost be viewed as a coherent whole reasonably subject to the rule against surplusage. The Supreme Court unanimously endorsed the view that the Fourteenth Amendment did not guarantee political rights in *Minor v. Happersett*,[159] an 1875 case which held that voting was not a privilege or immunity of citizenship and that women therefore had no constitutional right to vote—though it should be noted that just five years later the Court did apply the Equal Protection Clause to political rights in *Strauder v. West Virginia*,[160] which struck down laws excluding African-Americans from jury service, rather muddying the waters.[161]

However, if nothing in the Constitution of 1868 protected political rights from arbitrary or invidious state discrimination, we have a problem, because nothing subsequently added to the Constitution has added such protection except on the specific grounds of race,[162] sex,[163] age,[164] and failure to pay a poll tax.[165] For instance, it is unclear what would stop a state from banning gays or lesbians, or illegitimate children, from holding political office. A state could not ban members of these groups from *voting* without incurring the wrath of Section Two of the Fourteenth Amendment, and as Professor Amar suggests, in the absence of any mechanism for enforcing Section Two's representation-diminishing formula it makes sense to view it as an effective ban on disenfranchisement.[166] However, Section Two refers only to voting, and while it makes sense to view later amendments' guarantees of voting rights as encompassing other political

156. U.S. CONST. art. IV, § 2, cl. 1.

157. AMERICA'S CONSTITUTION, *supra* note 1, at 391.

158. U.S. CONST. amend. XIV, § 2.

159. 88 U.S. 162 (1875).

160. 100 U.S. 303 (1880).

161. If we accept the link between voting rights and jury service rights, *Minor* and *Strauder* are almost impossible to reconcile except on the view that the Equal Protection Clause simply says nothing about sex discrimination, or that the plaintiff in *Minor* was an idiot to rely solely on the Privileges or Immunities Clause.

162. U.S. CONST. amend. XV.

163. U.S. CONST. amend. XIX.

164. U.S. CONST. amend. XXVI.

165. U.S. CONST. amend. XXIV.

166. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 188–89.

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rights like jury service and officeholding, a variety of prudential considerations augur for a stricter construction of Section Two.[167] We might say that the Citizenship Clause forbids the state from imposing such a disadvantage on someone purely because they were born gay or born illegitimate,[168] but surely this theory would again render the Fifteenth Amendment unnecessary. Can it really be, therefore, that such laws would be constitutional today? Does a proper view of the original understanding of the Fourteenth Amendment force us to that regrettable position?

I do not believe it does. In essence, I believe that the Fifteenth, Nineteenth, and Twenty-Fourth Amendments have, acting in concert with one another (as well as perhaps with the Twenty-Sixth), retroactively caused their own redundancy. They could have done so through any of a number of theoretical paths, each of which involves their having updated the proper understanding of some earlier piece of constitutional text, such as the Guarantee Clause.[169] At the Founding or in 1868, it would have been quite radical, to say the least, to claim that states had to provide equal political rights to all in order to qualify as a "Republican Form of Government,"[170] given how far short of this ideal every single state fell, and indeed had always fallen. If this were what the Guarantee Clause meant in 1868, then the United States had been severely derelict in its duty with regard to every single state at every point in its existence. However, in 1868 if not in 1789, the only major way in which the states fell short of this ideal was that they did not let women or African-Americans vote. They have subsequently been forced to abandon these limitations, and the Twenty-Fourth Amendment implicitly repudiated basing voting rights on wealth, the other form of disenfranchisement with a lengthy pedigree. Thus, in 1964 it was not so crazy to suggest that in a "Republican Form of Government," all adult citizens would be allowed to vote.[171] The Twenty-

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167. If Section Two covers not merely voting but also other political rights, how are we to count one violation versus another? Do we count every citizen denied any political right? If so, states which enfranchised every single voter within Section Two's target demographic could nonetheless lose representation in Congress. If not, we must find some way to weight different violations against one another, a hopeless task. There may also be certain legitimate reasons why we might wish to keep certain classes of people off of juries or out of the military, and Section Two makes justification no defense. Are states to be pressured into letting invalids into their militias in order to increase their Congressional representation? Any effort to expand Section Two to cover all political rights would simply be a nightmare, and that is before one considers issues like racially-motivated peremptory challenges to potential jurors (which the Court held impermissible under the Equal Protection Clause in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

168. *See* STRUCTURE AND RELATIONSHIP, *supra* note 48, at 53–54. *See also* AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 296.

169. U.S. CONST. art. IV, § 4, cl. 1.

170. *Id.*

171. Arguably this rule would have had to except felons (who are textually excluded from the Fourteenth Amendment's Section Two mechanism), though one could argue to the contrary.

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Third Amendment, ratified three years earlier, which granted voting rights in Presidential elections to residents of the District of Columbia,[172] is further evidence of this ethos of universal suffrage.

If later amendments can revise the correct understanding of earlier pieces of constitutional text, there is every reason to think that the progression of voting rights amendments from 1870 through 1964, could have expanded the true meaning of the Guarantee Clause to include universal suffrage. Alternately, this principle could be retroactively incorporated into the Citizenship Clause, the Privileges or Immunities Clause, and/or the Equal Protection Clause; any of these pathways would lead to essentially the same result. Interestingly, the Supreme Court did not start using the Equal Protection Clause to police political rights in earnest until the 1960s, around the same time that the *ethos* of universal suffrage gained its fullest textual expression in the Constitution. Perhaps without realizing it, the Court was recognizing precisely this timey-wimey[173] process through which the voting rights amendments went back in time and obviated the necessity which brought them into existence in the first place.

D. Rejected Proposals: The Child Labor and Equal Rights Amendments

It is also worth considering two of the six amendments which have been proposed but not ratified which were at least arguably redundant[174]: the Child Labor[175] and Equal Rights Amendments.[176] The first of these, proposed by Congress in 1924, would have given Congress the power to "limit, regulate, and prohibit the labor of persons under eighteen years of age."[177] Interestingly, it would quite specifically *not* have followed the model of the Thirteenth Amendment and directly outlawed child labor altogether; Section 2 of the proposed amendment clarified that no state laws would be preempted except "to the extent necessary to give effect to legislation enacted by the Congress."[178] This came on the heels of a nearly

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172. U.S. CONST. amend. XXIII.

173. *See Doctor Who: Blink* (BBC television broadcast June 9, 2007) ("People assume that time is a strict progression of cause to effect, but actually, from a non-linear, non-subjective viewpoint, it's more like a big ball of wibbly-wobbly, timey-wimey. . . stuff.").

174. None of the four other proposed amendments were redundant in the slightest. The Congressional Apportionment Amendment, part of the Bill of Rights as originally proposed by Congress, would have put limits on the size of Congress. S. Con. Res. 3, 1st Cong., 1 Stat. 97 (1789). The Titles of Nobility Amendment would have stripped American citizenship from anyone who accepted honors or titles of nobility from foreign powers. S. Con. Res. 2, 11th Cong., 2 Stat. 613 (1810). The Corwin Amendment would have protected slavery. H.R.J. Res. 80, 36th Cong. (1861). The District of Columbia Voting Rights Amendment would have given the national capital full representation in the federal government as if it had been a state. H.R.J. Res. 554, 95th Cong. (1978).

175. H.R.J. Res. 184, 68th Cong. (1924).

176. H.R.J. Res. 208, 92nd Cong. (1972).

177. *Id.*

178. H.R.J. Res. 184, 68th Cong. (1924).

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decade-long struggle with the Supreme Court over Congress's power to regulate child labor. In 1916, Congress had passed the Keating-Owen Act,[179] which forbade interstate commerce in goods produced using child labor. In doing so Congress relied on a lengthy and unbroken string of Court precedents upholding laws which plainly acted directly upon interstate commerce and, equally plainly, were intended to have intrastate regulatory effects.[180] Nevertheless, two years later the Court held this law unconstitutional, on the grounds that it impermissibly intruded into matters subject to state authority.[181] Less than nine months later, Congress responded by passing the Child Labor Tax Act, which placed a prohibitive tax on the sale of goods produced using child labor.[182] Here, again, Congress acted well within what the Court had long said was its authority to pass taxes with regulatory purpose and effect,[183] and here, again, the Court departed from its own precedent to strike down the law.[184] Two years later, Congress sent the Child Labor Amendment to the states, most of which passed it but not enough for ratification.

In the end, however, the story was a happy one, and we may well wonder whether it would have been so happy had the amendment's proponents carried the day. The Great Depression served as an impetus for much more vigorous use of federal power over the economy than had ever been seen before, and in 1938 Franklin Roosevelt's New Dealers passed the Fair Labor Standards Act,[185] which used a similar gambit to that of the Keating-Owen Act to impose a much broader class of labor standards on the economy, such as minimum wage[186] and maximum hours[187] rules. Like the act struck down in *Dagenhart*, these rules applied only to employers engaged in "commerce," that is to say, in "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[188] *Dagenhart* could not have been more on point, and yet a Court which still included one of the Justices from the *Dagenhart* majority, Justice James C. McReynolds, *unanimously*

179. H.R. Res. 8234, 64th Cong., 39 Stat. 675 (1916).

180. *E.g.*, Champion v. Ames, 188 U.S. 321 (1903); Hipolite Egg Co. v. United States, 220 U.S. 45 (1910); Weber v. Freed, 239 U.S. 325 (1915); Hoke v. United States, 227 U.S. 308 (1913); Caminetti v. United States, 242 U.S. 470 (1917).

181. Hammer v. Dagenhart, 247 U.S. 251 (1918).

182. Child Labor Tax Act, H.R. 12863, 40 Stat. 1138 (1919).

183. *E.g.*, Veazie Bank v. Fenno, 75 U.S. 533 (1869); McCray v. United States, 195 U.S. 27 (1904); United States v. Doremus, 249 U.S. 86 (1919).

184. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

185. Pub. L. 75–718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

186. 29 U.S.C. § 206 (2012).

187. 29 U.S.C. § 207 (2012).

188. 29 U.S.C. § 203(b) (2012).

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upheld the Act in the 1941 case *United States v. Darby Lumber Co.*[189] Explaining Justice McReynolds's votes would require an act of biography, but it is surely relevant in explaining the Court's shift to note that each of the other eight Justices on the *Darby Lumber* Court had been appointed after the Child Labor Amendment had been sent to the states, five of them[190] by President Franklin D. Roosevelt, the man whose signature adorned the Fair Labor Standards Act. Thus, the anti-child labor movement prevailed not through the amendment process but by electing sympathetic Presidents and Senators, who in turn appointed sympathetic Justices who voted to overturn *Dagenhart* itself.

One must wonder, however, what the result would have been in the *Darby Lumber* case were the Court confronted with a Constitution that featured the Child Labor Amendment among its provisions. The situation would seem almost precisely analogous to that of the *Macomber* case,[191] in which the Court struck down a provision of the federal income tax on a "near-miss" theory. If the Child Labor Amendment had been necessary, then surely Article I did not grant Congress the power to impose labor standards on employers who engaged in interstate commerce, and since the Fair Labor Standards Act imposed such standards not just for child laborers but for all laborers, it must therefore have been *ultra vires*—a result that surely would have displeased the amendment's supporters. As noted in Part I, there are arguments from within both the textual and historical modalities against this reading, but the drafters of the Child Labor Amendment did nothing to discourage the Court from using *Macomber*-style reasoning. It did not use language similar to that of the Eleventh Amendment to indicate that it was only giving a preferred "construction" of the existing Constitution, nor did it follow the Fourteenth and Twenty-Sixth Amendments in going beyond the narrow confines of the cases it sought to repudiate. Now, the New Deal Court would quite likely have upheld FLSA in any event, but perhaps a later Court not so friendly to federal authority under the Commerce Clause[192] might have found in the Child Labor Amendment a useful weapon.

The Equal Rights Amendment (ERA) was proposed by Congress in 1972 and ratified by nearly enough states to become part of the Constitution before its self-appointed expiration date. The ERA's operative provision would declare that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on

189. 312 U.S. 100 (1941).

190. Justices Hugo Black, Stanley B. Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy were the Roosevelt appointees on the Court—and one notes that they comprised a majority.

191. Eisner v. Macomber, 252 U.S. 189 (1920).

192. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

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account of sex."[193] Now, it is debatable whether this language would in fact be redundant. Certainly to the modern student of the Constitution, accustomed to the idea that the Equal Protection Clause applies to sex discrimination with nearly as much force as to racial discrimination,[194] it can easily seem that way. Indeed, Professor Amar suggests that "because the Constitution already featured an amendment (the Fourteenth) explicitly promising equality and committed to equal birth status, the ERA itself was a largely declaratory proposal—a restatement and an elaboration."[195] In 1971, however, when the Supreme Court had never struck down a state or federal law on the grounds of sex discrimination,[196] putting this language into the Constitution would have had enormous and obvious practical effect.[197] Indeed, even in 2017 the ERA would doubtless have a strong effect on the Court's sex equality jurisprudence, under which, currently, registration for the draft may be limited to men[198] and citizenship requirements can be stricter for the illegitimate children born oversees of American men than of American women.[199]

It is worth considering, however, what impact the ERA might have on the prospects for broadening the scope of equal protection doctrine beyond a few specific "suspect classifications." One view of the Equal Protection Clause, favored most notably by Justice (and later Chief Justice) William Rehnquist, argued that the Clause should not be applied "[e]xcept in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin."[200] This view accepts what Charles Black tells us about the Fourteenth Amendment's obvious and overwhelming implications for racial discrimination,[201] but would go no further. In all other areas, the highly deferential standard of *Williamson*

193. H.R.J. Res. 208, 92d Cong. (1972).

194. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

195. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 296. It should be noted, however, that the ERA would clearly have applied to political as well as civil rights—unlike, in Professor Amar's view, the Fourteenth Amendment.

196. It would do so for the first time in *Reed v. Reed*, 404 U.S. 71 (1971), which was argued before the Court precisely one week after the House of Representatives passed the ERA.

197. See Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) for an extensive contemporary argument for the ERA's necessity. Brown et al. argue not only for its practical importance but also for the inadequacy of even the "most progressive" of equal protection doctrines for eradicating sex discrimination, could the Court be persuaded to apply them to that task in the first place. *Id.* at 875.

198. Rostker v. Goldberg, 453 U.S. 57 (1981).

199. Nguyen v. INS, 533 U.S. 53 (2001). Note that this case was decided after *United States v. Virginia*, the Court's strongest statement to date of the sex equality principle.

200. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

201. *See generally Lawfulness*, *supra* note 152.

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v. Lee Optical Co.[202] would apply, and judges would not second-guess legislatures for passing laws they deem "arbitrary," "illogical," or "unreasonable."[203] Another view, however, sees the Equal Protection Clause, and the Fourteenth Amendment more generally, as prohibiting a wide variety of invidious discriminations. This view has been forcefully expressed by Justices Thurgood Marshall[204] and John Paul Stevens.[205] On this view, the equal protection inquiry is not categorically different when applied to discrimination targeting African-Americans, women, illegitimate children, the poor, or the mentally disabled; indeed, the question is fundamentally the same in all equal protection cases. This view typically recognizes, in consonance with the Citizenship Clause, that birth characteristics such as sex, being "something which the individual cannot control . . . should generally be irrelevant in legislative considerations."[206]

Obviously this second view would come close, at least, to viewing the ERA as a redundancy. Equally obvious, the first view would see no redundancy in it whatsoever, since on that view the existing Constitution provides minimal if any protection against sex discrimination. For any jurist inclined to favor the rule against surplusage, then, the passage of the ERA would seem to favor Rehnquist's position over that of Justices Marshall and Stevens, again likely to the dismay of its supporters. However, unlike the Sixteenth Amendment or the Child Labor Amendment, the drafters of the ERA avoided crafting language which would positively invite this inference. By guaranteeing full and absolute equality of rights under the law, the ERA would go far beyond where the text of the Fourteenth Amendment seems to go, even on its broader interpretations. Even on the Marshall/Stevens view of things, that is, the ERA could not be reduced to *mere* surplusage, even if it would be "largely declaratory."[207] This suggests that, even if passing the ERA would be unlikely to do very much to change the true, best reading of the Constitution, it would be unlikely to do any real harm—unlike, perhaps, the Child Labor Amendment.

III. LESSONS

What lessons, ultimately, can we take away from this exploration of redundant constitutional amendments? I think the main lesson is, tread carefully. The theoretical puzzle described in Part I appears to have

202. 348 U.S. 483 (1955).

203. *Trimble*, 430 U.S. at 777 (Rehnquist, J., dissenting).

204. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98–110 (1973) (Marshall, J., dissenting).

205. Cleburne v. Cleburne Living Center, 473 U.S. 432, 451–55 (1985) (Stevens, J., concurring).

206. *Rodriguez*, 411 U.S. at 109 (Marshall, J., dissenting).

207. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 296.

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ensnared the drafters of both the Eleventh and Sixteenth Amendments. The former seems to have been a deliberate compromise that declined to put a broad principle of sovereign immunity into the Constitution, but perhaps because it used the language "shall not be construed" it has led the Court to find just such a principle in the document. The latter, conversely, was passed by a movement that probably would have loved to do away with all limitations on the federal taxing power, but was targeted so precisely at the holding of the *Pollock* case that it allowed the principle behind that case to live on. The framers of both these amendments, and of the Child Labor Amendment, could have benefited from thinking through the implications of their amendments for the rest of the Constitution in more detail.

Conversely, James Madison was careful to make textually explicit the view that the Bill of Rights was redundant, with what seem on balance like positive results. Anyone considering proposing a redundant amendment in the future should follow his lead, and make sure the text of their proposal contains explicit instructions for how its effect on the Constitution as a whole is to be viewed. An alternate approach, which might, if feasible, be preferable in many cases, is to include something in your amendment which is unmistakably not redundant. The framers of the Sixteenth Amendment, for instance, might have been better served just repealing the direct tax rules. The Fourteenth and Twenty-Sixth Amendments, meanwhile, went far beyond what the most ambitious jurist could have done with the preexisting text, and have thus more or less avoided the trap. The failed Equal Rights Amendment seems like it would have done likewise. Those dissatisfied with the constitutional *status quo* should not, therefore, simply jump at an amendment which would directly overturn a notorious Supreme Court case which they see as embodying their grievance. Rather, they should think long and hard about what features of the Constitution are causing, or at least enabling the Court to cause, their problem, and then they should change those features, root and branch.

With these lessons in mind, let us close by examining a number of amendments that have been prominently suggested over the years but never formally proposed by Congress. Having studied the history of redundant amendments, we will be able to say whether it was wisdom or folly for these amendments' proponents to propose them, and whether better draftsmanship could have transmuted folly into wisdom. First, consider the Bricker Amendment of the 1950s, which had its origin in the great case *Missouri v. Holland*.[208] In that case the Court, speaking eloquently through Justice Oliver Wendell Holmes, held that federal laws implementing treaties need not have an independent basis in Article I's enumeration of congressional power. As Professor Bobbitt explains, this case was woefully misunderstood, with "many commentators conclud[ing] that Congress could now pass any statute, indeed even one violating the Bill of

208. 252 U.S. 416 (1920).

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Rights, so long as it could be plausibly maintained as one in aid of a treaty."[209] This led to the Bricker Amendment, which was never even passed by Congress and which therefore lacks an authoritative version, but the version which in 1953 came the closest to passing of any provided—absurdly[210]—that "A provision of a treaty which conflicts with this Constitution shall not be of any force or effect."[211] It is difficult to see how any constitutional language could be more self-evidently redundant than this.[212] A few years later the Court put some very explicit language in one of its cases explaining that treaties cannot violate the Constitution or the Bill of Rights,[213] and that put the Bricker Amendment to bed. Here, unlike with the Child Labor Amendment, there is little question what would have happened had the amendment been ratified: no court in the world could see the language of its primary provision as anything but pure surplusage![214] The Bricker Amendment, then, was pure folly.

Next, consider the Flag Desecration Amendment, passed several times by the House of Representatives[215] but never by the Senate, which would have given Congress the "power to prohibit the physical desecration of the flag of the United States."[216] This amendment would have overturned *Texas v. Johnson*[217] and *United States v. Eichman*,[218] two landmark cases in which the Supreme Court held that flag-burning was protected by the First Amendment. The amendment's supporters presumably thought that

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209. CONSTITUTIONAL INTERPRETATION, *supra* note 32, at 61–62.

210. *Id.* at 62.

211. S.J. Res. 1, 83rd Cong. (1953).

212. Suppose that, prior to the Bricker Amendment, a treaty provision which conflicted with the Constitution could be valid nonetheless. Had the Bricker Amendment been ratified, such a treaty would now violate *two* constitutional provisions, but if the first violation did not invalidate it, it is hard to see how the second one would have done so. Or, to put it another way, once you are determined to violate the Constitution, the fact that the Constitution forbids violating the Constitution is not going to stop you.

213. Reid v. Covert, 354 U.S. 1, 16 (1957) ("The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

214. The Amendment did have two other operative provisions, one of which would have directly overturned *Missouri v. Holland* and the other of which would have given Congress authority to regulate executive agreements with foreign nations. S.J. Res. 1, 83rd Cong. (1953). The latter would likely have had little bite, since Congress could only do so through legislation which the President would have the opportunity to veto (yet another example of the amendment's terrible draftsmanship). As to the former, its supporters doubtless thought it was redundant; in fact it would probably have done some damage to the constitutional system, for the reasons given by Holmes.

215. *See, e.g.*, H.R.J. Res. 79, 104th Cong. (1995); H.R.J. Res. 54, 105th Cong. (1997); H.R.J. Res. 33, 106th Cong. (1999); H.R.J. Res. 36, 107th Cong. (2001); H.R.J. Res. 4, 108th Cong. (2003); H.R.J. Res. 10, 109th Cong. (2005).

216. H.R.J. Res. 10, 109th Cong. (2005).

217. 491 U.S. 397 (1989).

218. 496 U.S. 310 (1990).

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Johnson and *Eichman* had misconstrued the Constitution. Indeed, of the 42 Senators who both voted for the amendment[219] and voted on the Flag Protection Act of 1989,[220] Congress's attempt to overturn *Johnson* by statute (which was in turn struck down in *Eichman*), 39 had supported the earlier legislation,[221] as did 125 of the 135 similarly-situated Representatives.[222] Now, there are many grounds on which to criticize the Flag Desecration Amendment; as Professor Amar has noted, it would "do violence to the trajectory of the American constitutional project"[223] by "diminish[ing] liberty"[224] rather than following the example of every successful amendment and "expand[ing] freedom and egalitarianism."[225]

However, taking its supporters' goals as a given, the amendment seems to have been basically well-drafted to deal with the problems its arguable redundancy might have caused. Its proponents faced a delicate task in attempting to limit a key provision of the Bill of Rights, and had they been careless they could have imperiled important principles of free speech which apply far beyond the narrow context of flag-burning. For instance, suppose the amendment had used language similar to that of the Eleventh Amendment, and declared that "the First Amendment shall not be construed to prohibit Congress or the states from prohibiting the physical desecration of the flag of the United States." This could well have been read as repudiating the symbolic speech doctrine[226] on which *Johnson* and *Eichman* relied,[227] or else simply signaling a narrower tolerance for unpopular dissenting views. As worded, however, the amendment would more likely have been treated like the Sixteenth Amendment, providing a specific exception to a broader rule (though here the exception would be far less significant, relative to the scope of the broader rule, than with the Sixteenth Amendment). Perhaps, given the importance of robust freedom of speech for our constitutional system, the drafters of this amendment would have done well to be even more explicit and include a disclaimer stating that the amendment was not meant to narrow the First Amendment except in the specific context of flag-burning. Broadly speaking, though, it

219. I refer here, for simplicity, only to the first version of the amendment to be proposed, H.R.J. Res. 79, 104th Cong. (1995).

220. 103 Stat. 777, Pub. L. No. 101-131 (1989) (codified at 18 U.S.C. § 700 (2012)).

221. *See* 141 Cong. Rec. S18394-95 (daily ed. Dec. 12, 1995) (Vote No. 600); 135 Cong. Rec. S12655 (daily ed. Oct. 05, 1989) (Vote No. 227).

222. *See* 141 Cong. Rec. H6446 (daily ed. Jun. 28, 1995) (Roll No. 431); 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989) (Roll No. 286).

223. AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 451.

224. *Id.* at 452–53.

225. *Id.* at 453.

226. *See* United States v. O'Brien, 391 U.S. 367 (1968); Spence v. Washington, 418 U.S. 405 (1974).

227. *See* Texas v. Johnson, 491 U.S. 397, 402–04 (1989); United States v. Eichman, 496 U.S. 310, 313–15 (1990).

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seems that they displayed more wisdom than folly—in the details of draftsmanship if not in conceiving the amendment in the first place.

Finally, consider the six amendments proposed by former Justice John Paul Stevens in his book *Six Amendments*.[228] Remarkably, all six of Justice Stevens's proposed amendments would be, in his view, redundant. Indeed, every single one would simply reflect a position he himself expressed in a dissenting opinion. His six amendments would address the "anti-commandeering" rule, political gerrymandering, campaign finance, sovereign immunity, the death penalty, and gun control.[229] They would, respectively, enact the views of his dissents in *Printz v. United States*,[230] *Vieth v. Jubelirer*,[231] *Citizens United v. FEC*,[232] *Seminole Tribe v. Florida*,[233] *Baze v. Rees*,[234] and *District of Columbia v. Heller*.[235] Now, there is much to criticize in Justice Stevens's would-be constitutional draftsmanship. Three of his amendments, on anti-commandeering, the death penalty, and gun control, would depart from the unbroken tradition of adding each amendment to the end of the Constitution as a "postscript"[236] rather than, as James Madison initially proposed, "directly rewrit[ing] the

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228. STEVENS, *supra* note 20.

229. *Id.* at vii.

230. 521 U.S. 898 (1997). Justice Stevens proposes adding the words "and other public officials" to the Supremacy Clause, U.S. CONST. art. VI, cl. 2, following the phrase "the judges in every state." STEVENS, *supra* note 20, at 31.

231. 541 U.S. 267 (2004). Justice Stevens proposes the following amendment:

> Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of continuous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as natural, political, or historic boundaries or demographic changes. The interest in enhancing or preserving the political power of the political party in control of the state government is not such a neutral criterion.

STEVENS, *supra* note 20, at 55.

232. 558 U.S. 310 (2010). Justice Stevens proposes the following amendment: "Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns." STEVENS, *supra* note 20, at 79.

233. 517 U.S. 44 (1996). Justice Stevens proposes the following amendment: "Neither the Tenth Amendment, the Eleventh Amendment, nor any other provision of this Constitution, shall be construed to provide any state, state agency, or state officer with an immunity from liability for violating any act of Congress, or any provision of this Constitution." STEVENS, *supra* note 20, at 106.

234. 553 U.S. 35 (2008). Justice Stevens proposes adding the words "such as the death penalty" to the Eighth Amendment, following the phrase "cruel and unusual punishments." STEVENS, *supra* note 20, at 123.

235. 554 U.S. 570 (2008). Justice Stevens proposes adding the words "when serving in the militia" to the Second Amendment, following the phrase "keep and bear Arms." STEVENS, *supra* note 20, at 132.

236. AMERICA'S CONSTITUTION, *supra* note 1, at 459.

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Philadelphia document so as to generate a new 'uniform and entire' text."[237] The other three, on political gerrymandering, campaign finance, and sovereign immunity, if they would not quite "partake of the prolixity of a legal code,"[238] would at least partake of the doctrinal precision of a Supreme Court holding, again unlike every other constitutional provision.[239] These defects could likely be cured to bring the six proposed amendments within the stylistic ambit of the existing Constitution without much alteration of structure.

I am more interested in Justice Stevens's draftsmanship as concerns the problem of redundancy. And on that score, Justice Stevens receives a mixed grade. His political gerrymandering amendment would not really raise any of the problems typical of redundant amendments. *Vieth* did not declare political gerrymandering constitutionally unproblematic; it merely held that, owing to the "lack of judicially discoverable and manageable standards for resolving it,"[240] the problem presented a "political question" unsuited for judicial resolution. Since, in the Court's current view, there are no general constitutional principles which bear on the issue of political gerrymandering, providing a standard to govern the issue by amendment would not risk damaging any such broader doctrines. It is also difficult to predict what effect Justice Stevens's proposed amendment on the anti-commandeering doctrine would be given,[241] making redundant amendment analysis difficult.

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237. *Id.* at 458.

238. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

239. As Chief Justice Marshall stated, the Constitution's "nature [] requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* Justice Stevens would state some of those "minor ingredients" explicitly.

240. Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

241. Justice Stevens's proposal, which would slightly alter the Supremacy Clause, *see supra* note 230, would hope to exploit the *Printz* majority's reliance on the fact that the Supremacy Clause mentions state judges but not state executive officials. *See* Printz v. United States, 521 U.S. 898, 907 (1997). It is unclear that adding the words "and other public officials," however, would have changed the *Printz* majority's mind; Justice Scalia's opinion for the Court noted that the Supremacy Clause makes only those federal laws "which shall be made in Pursuance" of the Constitution supreme, *id.* at 924–25, and that therefore, if commandeering laws are unconstitutional, they are *not* the supreme law of the land and are *not* binding on state officials. Conversely, if Justice Stevens's proposed amendment *did* succeed in overruling *Printz*, it is unclear whether it would stop there or would also overrule *New York v. United States*, 505 U.S. 144 (1992), the case concerning commandeering of state *legislatures*. After all, legislators are public officials just as much as executive officers. Justice Stevens also dissented from *New York*, *id.* at 210 (Stevens, J., dissenting), but in *Printz* he stated that legislative commandeering raised "more difficult questions" than executive commandeering. *Printz*, 521 U.S. at 939 (Stevens, J., dissenting). His book focuses mainly on the issue of executive commandeering and does not clearly state whether the proposed amendment would also overrule *New York*.

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Justice Stevens's other proposals would rather clearly raise redundancy issues. His campaign finance amendment, which would overrule not only *Citizens United* but also (in part) *Buckley v. Valeo*,[242] would employ language analogous to that of the Eleventh Amendment, directing how an earlier provision, in this case the First Amendment, was to be construed. As noted in the discussion of the Flag Desecration Amendment, however, to use such language in limiting the First Amendment is to play with fire. The *Buckley* Court certainly thought that its holding was mandated by general First Amendment principles of the highest importance, namely that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," and that therefore such discussion should be "afford[ed] the broadest protection."[243] Justice Stevens, presumably, does not disagree with these principles. A supporter of *Buckley* might, however, read his proposed amendment as repudiating them through implication, since in their view the very restrictions on campaign finance regulation which that amendment would obliterate follow directly from these principles. Had Stevens followed the phrasing of the Sixteenth, Flag Desecration, or Child Labor Amendments instead, his amendment might have made clear that political expenditures were to be subjected to regulation *even though* they would otherwise be protected by the First Amendment.

Two of Justice Stevens's other proposed amendments could arguably stand to dream bigger. On sovereign immunity, Justice Stevens proposes to overrule the holding of *Edelman v. Jordan*,[244] which limits the power of federal courts to impose damages on states for violations of federal law. Why not go further, and overrule *Hans v. Louisiana* and *Louisiana v. Jumel*, the cases which first intruded upon federal question jurisdiction in the name of sovereign immunity, themselves? Certainly Justice Stevens thinks those cases wrongly decided.[245] Why not go even further and repeal the Eleventh Amendment altogether? After all, as many have argued, the logic of sovereign immunity simply has no place in a democracy where the people, not the government, are sovereign. And Justice Stevens himself notes that requiring the states to pay their war debts, opposition to which largely motivated the Eleventh Amendment, "might well be entirely just."[246] Perhaps these more radical amendments might be even less politically feasible, but it's not honestly like Justice Stevens thinks any of his proposals stand a chance of actually being adopted. Meanwhile, the

242. 424 U.S. 1 (1976).
243. *Id.* at 14.
244. 415 U.S. 651 (1974).
245. *See* STEVENS, *supra* note 20, at 88–92.
246. *Id.* at 82.

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narrowness of his proposal would surely be seen as entrenching the rule of *Hans v. Louisiana* outside the *Edelman* context.

Justice Stevens's proposal on gun control raises several related but distinct concerns. Why, we might wonder, would he merely limit the right to bear arms to those serving in the militia, rather than repealing the Second Amendment outright? After all, the two would have almost indistinguishable practical effects given that the militia as an institution is more or less defunct.[247] Perhaps this tactic is an attempt to conceal the breadth of the Justice's proposal, to make it appear as though it would protect the core of the Second Amendment when in fact it would be tantamount to repeal, but gun rights groups would not likely be so easily fooled. It is harder to see what legal problems the feigned narrowness of the amendment would create, were it adopted, precisely because its narrowness is so illusory. Certainly it would reaffirm the existence of a right to bear arms when serving in the militia, but it is unclear how important the existence of such a right is in our modern world. Thus far, therefore, Justice Stevens seems to have displayed more folly than wisdom in drafting his proposed amendments, though at least as to his gun control amendment this folly would be unlikely to do any real harm.

Justice Stevens's proposed amendment abolishing the death penalty, however, displays genuine wisdom in its draftsmanship. To see why, consider the following slightly different abolition amendments. One would read, "Capital punishment shall not be imposed by the United States or by any state." The other would read, "Capital punishment, being cruel and unusual, shall not be imposed by the United States or by any state." The operative effect of each on the death penalty would be identical, but they would relate very differently to their own redundant nature: the latter would embrace and positively declare it, identifying its command as simply an implementation of the Eighth Amendment, while the former would take no such overt stance. And these differences would presumably be reflected in the hypothetical amendments' effects on Eighth Amendment jurisprudence more broadly. The second proposal would create a powerful inference that any punishment sufficiently similar to the death penalty was *also* cruel and unusual, and hence violated the Eighth Amendment. This might aid litigation against solitary confinement,[248] or against life imprisonment without the possibility of parole.[249] The first proposal, conversely, would

247. *See* AMERICA'S CONSTITUTION, *supra* note 1, at 325.

248. *Cf.* Davis v. Ayala, 135 S.Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring).

249. For an overview of the arguments that sentences of life imprisonment without the possibility of parole are akin to death sentences and should therefore be considered unconstitutional, see Joseph Tutro, *Eliminating the Effective Death Sentence of Life Without Parole*, 1 THE FORUM: A TENN. STUDENT LEGAL J. 12 (2014). The European Court of Human Rights has used arguments similar to those against the death penalty to strike down life without parole. Vinter v. United Kingdom, App. Nos. 66069/09, 130/10, 3896/10 (Eur.

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create no such inference, and might even create the opposite through a "near-miss" theory akin to that of *Eisner v. Macomber*. Now, Justice Stevens is proposing neither of these hypothetical amendments, but I think it clear that, translated from an edit of the existing Eighth Amendment into a normal, postscript-style amendment, his proposal matches the second hypothetical far more closely than the first. And I have little doubt that Justice Stevens would welcome the effect that such an amendment might have on other Eighth Amendment litigation. Thus, by making textually explicit that the death penalty is to be forbidden precisely because it violates the existing constitutional standard, Justice Stevens's proposal displays wisdom in the way it utilizes the jurisprudence of redundant amendments.

That being said, perhaps one final piece of advice is in order for Justice Stevens, and for anyone else thinking of championing a redundant amendment: don't worry if you lose. As the Child Labor and Equal Rights Amendments show, redundant amendments do not actually need to be ratified in order to change the law. Indeed, the aims of the Child Labor Amendment may ultimately have been better served by a failed campaign to change the Constitution than they would have been by a successful one. This is not to say that these failed amendments were somehow, as Professor Bruce Ackerman would put it, an act of "higher lawmaking" through which the American people can alter the Constitution outside of the Article V amendment process.[250] Rather, these failed amendments changed the law without changing the law: they changed Supreme Court doctrine without changing the Constitution underlying that doctrine. It could hardly be otherwise: the whole *point* is that these amendments expressed a principle already at least arguably present in the Constitution. That is to say, the Constitution did not *need* to be changed in order for the Court to render decisions based on those principles.[251] Given that the Court may, where appropriate, break with its past decisions because it believes those decisions misinterpreted the Constitution, I see no reason why it would be improper for it to do so where a sizeable majority of the American people, if not quite a sizeable enough majority to ratify an amendment, has so enthusiastically expressed its disagreement with the Court's prior holding and thereby placed the issue on the national agenda. Nor do I see any reason why it would be improper for the Presidents and Senators elected by that passionate majority to appoint Justices who disagree with existing

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Ct. H.R. July 9, 2013), http://hudoc.echr.coe.int/webservices/content/pdf/001-122664TID=gpaoqosuso.

250. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

251. *Cf.* AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 126, at 296 ("The failure of the ERA did not repeal or erase any part of the Fourteenth Amendment.").

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case-law, or for those Justices, one appointed, to vote to overrule these precedents.

Thus, while it might seem natural to criticize Justice Stevens, or others like him, for seeking to do through amendment what might be better accomplished through mere judicial reconsideration, I think this is wrong. Redundant amendments can make for powerful, and entirely legitimate, tools to organize and mobilize efforts to change the law, and they can change the law, again with perfect legitimacy, even if, formally, they are rejected. Perhaps the unrealistic nature of Justice Stevens's proposals is not, then, something to be mocked, but applauded. Even in defeat, he may triumph.

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