

THE PRESIDENTIAL ROLE IN THE CONSTITUTIONAL AMENDMENT PROCESS

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ABSTRACT—The President should have the power to veto constitutional amendment proposals. After all, Article I, Section 7 of the Constitution provides that “[e]very Order, Resolution, or Vote” requiring “the Concurrence” of both houses of Congress must be “presented to the President” for approval or veto. Constitutional amendment proposals unmistakably require the concurrence of both houses of Congress (by two-thirds majorities, no less). Yet all three branches of the federal government, with varying degrees of consistency, have decided that constitutional amendment proposals need not be presented to the President. I argue that Article V, which defines the amendment process, is bound by Article I, Section 7’s strictures and the President is thus empowered to veto congressional amendment proposals as both a textual and a normative matter. Recognizing the implications of this conclusion, I propose broad definitions of presentment and approval to rescue the validity of the existing twenty-seven amendments while requiring all future constitutional amendment proposals to be presented to the President for approval or veto.

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INTRODUCTION

During the 2012 Republican presidential primary campaign, an interviewer asked candidate Herman Cain whether he supported a constitutional amendment banning abortion:

- Q: Are you for some sort of pro-life amendment to the Constitution that in essence would trump *Roe v. Wade*?
- CAIN: Yes. Yes, I feel that strongly about it. You know, if we can get the necessary support and it comes to my desk, *I'll sign it*. That's all I can do. *I will sign it*.¹

Commentators were quick to derisively question Cain's "grasp of the Constitution" because the President is presumed to have no official role in the constitutional amendment process.² I contend that the former pizza mogul's "error" was perfectly understandable and his grasp of the Constitution—at least, that of its plain text—is perfectly sound.

Article I, Section 7, Clause 2 of the United States Constitution provides: "Every Bill . . . shall, before it become a Law, be presented to the President" for approval or veto.³ Article I, Section 7, Clause 3 extends the presentment requirement to "[e]very Order, Resolution, or Vote to which

¹ Interview by David Brody with Herman Cain (Oct. 22, 2011) (emphases added), available at http://youtu.be/uy_Kp6uBHQw?hd=1&t=59s (transcription by author); see also David Brody, *Herman Cain Exclusive: Tells Brody File He Will Support Constitutional Amendments on Life and Marriage*, BRODY FILE (Oct. 22, 2011, 10:13 PM), <http://blogs.cbn.com/thebrodyfile/archive/2011/10/22/herman-cain-exclusive-tells-brody-file-he-will-support-constitutional.aspx>.

² E.g., Ben Smith, *Cain Would Autograph Life Amendment*, POLITICO (Oct. 23, 2011, 12:51 PM), http://www.politico.com/blogs/bensmith/1011/Cain_would_autograph_life_amendment.html.

³ U.S. CONST. art. I, § 7, cl. 2.

the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)."⁴

Article V prescribes the method for amending the Constitution: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which . . . shall be valid . . . when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . ." ⁵ Article V is silent on whether amendment proposals must be presented to the President, and in *Hollingsworth v. Virginia*, the Supreme Court—in a footnote—summarily declared that the Presentment Clause does not apply to Article V and the President has no formal role in the constitutional amendment process.⁶ Predictably, Congress has embraced the President's absence from the Article V process, albeit with some inconsistency.⁷ Less predictably, presidents, perhaps following the early example of George Washington,⁸ have acquiesced to this long-standing practice.⁹

I argue that the Presentment Clause does indeed apply to Article V based on the text of the Constitution and the structure of our federal government. Article I, Section 7 is clear that *every* bill, order, resolution, and vote must be presented to the President, and Article V, like other provisions calling for congressional action, makes no explicit exception to this rule, thereby leaving the default presumption in place. And although the Constitution requires Congress to muster a two-thirds majority in each house to pass constitutional amendments (the same supermajority required to override a presidential veto), vote tallies may change once the President formally weighs in on the matter. In both the House and the Senate, motions to override a presidential veto have in fact received different vote tallies than the respective bills received upon initial passage.

I further argue that amendment proposals should be presented to the President as a normative matter. Giving the President the power to veto congressional legislation is an important structural protection that preserves

⁴ *Id.* cl. 3. I refer to Clauses 2 and 3 collectively as "the Presentment Clause."

⁵ *Id.* art. V.

⁶ 3 U.S. (3 Dall.) 378, 381 n.* (1798) (statement at oral argument of Chase, J.).

⁷ *See, e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 629–31 (1865) (Senate debate noting that President Lincoln had signed the Thirteenth Amendment and adopting a resolution stating that presentment was inadvertent and nonprecedential).

⁸ *See* George Washington, First Inaugural Address (Apr. 30, 1789), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. 101-10, at 1, 4 (1989) (stating a desire to stay out of the constitutional amendment process, being "guided by no lights derived from official opportunities" to do so).

⁹ The only exceptions have been James Buchanan, who signed the Corwin Amendment (which would have effectively legalized slavery in the United States), and Abraham Lincoln, who signed the Thirteenth Amendment. *See* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL SOCIETY FOR THE YEAR 1896, at 3, 296 (1897).

the checks and balances inherent in our federal government. Denying the President this power over one of the most important congressional actions, proposing constitutional amendments, undermines these checks and balances. What is more, forcing the President to take an official stand on an amendment can help clarify the debate and engage the nation, thereby benefiting democracy.

Despite these textual and normative reasons why the Presentment Clause must apply to Article V, history has decided the issue to the contrary. I describe this history and show how the doctrine developed from the time of the Framing until Reconstruction, when the issue was definitively settled.

Requiring future amendment proposals to be presented to the President is normatively desirable and would restore adherence to the Constitution's plain text. What makes it unpalatable, though, is the inevitable implication that all of the previous twenty-seven amendments were unconstitutionally adopted and therefore void. That is why I offer an approach to reinterpret the Constitution so as to require presentment for future amendments while saving all of the previously enacted ones. This approach is to broadly construe "presentment" and "approval" to show that all twenty-seven amendments have in fact been presented to and approved by the President.

My argument proceeds in five parts. I first review the history of the amendment process in Part I, showing how all three branches of government have to varying degrees advocated for or acquiesced in the nonpresentment of constitutional amendment proposals. In Part II, I analyze the text of the Constitution to conclude that the presentment requirement of Article I, Section 7 indeed applies to the Article V amendment process. I next argue in Part III that in addition to the textual mandate, presentment of amendments is normatively desirable. In Part IV, I present an interpretive approach in which presidential presentment may be required for future amendments without affecting the constitutionality of the existing twenty-seven.

I. A HISTORY OF NONPRESENTMENT

That the President has no role in the constitutional amendment process is well settled. Perhaps it was settled in 1798 when Justice Chase summarily declared during oral argument in *Hollingsworth v. Virginia* that the President "has nothing to do with the proposition, or adoption, of amendments to the Constitution."¹⁰ Or maybe it was settled when Congress neglected to seek President Washington's signature on the Bill of Rights in 1789,¹¹ or when the Senate explicitly disclaimed Congress's presentment of both the (failed) Corwin Amendment and the (eventually successful)

¹⁰ 3 U.S. (3 Dall.) at 381 n.* (statement at oral argument of Chase, J.).

¹¹ See *infra* note 66 and accompanying text.

Thirteenth Amendment to Presidents Buchanan and Lincoln, respectively.¹² Surely it was settled when President Andrew Johnson, who actively opposed the Fourteenth Amendment, accepted that he had no power to veto it.¹³ In fact, it might have been settled at the very dawn of the Republic, when President George Washington, in his first inaugural address, declined even to recommend possible amendments because he would be “guided by no lights derived from official opportunities” to do so.¹⁴ In short, all three branches of government have advocated for or acquiesced in presidential passivity in the amendment process. The Judicial and Legislative Branches may have been driven by a degree of self-interest in their advocacy or acquiescence; it is a little more difficult to understand what might have motivated the Executive Branch to abdicate its constitutional authority.¹⁵ A history lesson is in order.

A. *The Judicial Branch: Hollingsworth v. Virginia*

*Hollingsworth v. Virginia*¹⁶ was the final resolution of a land dispute that began in the 1760s between a group of speculators and the state of Virginia, which refused to recognize its claims for land in the Ohio Valley.¹⁷ The speculators organized into a corporation (the Indiana Company) in the 1770s¹⁸ and eventually filed suit against Virginia in 1792, seeking \$233,124.66 in damages, plus interest.¹⁹ Virginia’s governor, Henry Lee, and its attorney general, James Innes, did not believe the suit was authorized under Article III, under a theory of state sovereign immunity.²⁰ Indeed, Madison had assured the Virginia ratifying convention that the proposed Constitution did not authorize such suits:

[The federal judiciary’s] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only

¹² See Ames, *supra* note 9, at 296.

¹³ See CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866) (message from President Johnson to the Senate).

¹⁴ Washington, *supra* note 8.

¹⁵ Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass’n 2009) (1881) (“The life of the law has not been logic: it has been experience.”).

¹⁶ 3 U.S. (3 Dall.) 378 (1798).

¹⁷ 5 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: SUITS AGAINST STATES* 274 (Maeva Marcus ed., 1994) [hereinafter *DOCUMENTARY HISTORY*].

¹⁸ *Id.* at 276.

¹⁹ *Id.* at 282.

²⁰ *Id.* at 282–83.

operation it can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court.²¹

Madison was wrong: On February 18, 1793, the Supreme Court held in *Chisholm v. Georgia* that citizens of another state could sue a state in federal court, based on the plain language of Article III.²²

Congress immediately reacted by proposing the Eleventh Amendment, which explicitly forbids federal courts from hearing individual suits against a state.²³ The Amendment passed Congress on March 4, 1794, and the requisite twelve states ratified it in less than a year.²⁴ Curiously, the Amendment's status remained unclear until President John Adams issued a proclamation on January 8, 1798 (nearly three years later) declaring: "This Amendment, having been adopted by three fourths of the Several States, may now be declared to be a Part of the Constitution of the United States."²⁵

Meanwhile, the *Hollingsworth* case languished on the Supreme Court's docket, largely due to Virginia's dilatory tactics.²⁶ But once President Adams made his January 1798 proclamation, Attorney General Charles Lee asked the Supreme Court to rule on *Hollingsworth's* jurisdictional issue in the February 1798 Term.²⁷ The Court heard oral argument on February 10,²⁸ where William Rawle, the attorney for the Indiana Company, and William Tilghman, an attorney in a parallel case, argued:

The [Eleventh] amendment has not been proposed in the form prescribed by the Constitution, and, therefore, it is void. Upon an inspection of the original roll, it appears that the amendment was never submitted to the President for his approbation. . . . The concurrence of the President is required in matters of infinitely less importance; and whether on subjects of ordinary legislation,

²¹ Statement of James Madison at the Virginia Convention (June 20, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1891).

²² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450 (1793) (opinion of Blair, J.) ("A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended" to be covered by the Diversity Clause.).

²³ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²⁴ North Carolina ratified the amendment on February 7, 1795. 5 DOCUMENTARY HISTORY, *supra* note 17, at 600-04 & n.35.

²⁵ *Id.* at 604 & n.35.

²⁶ *See id.* at 282-89.

²⁷ *Id.* at 289.

²⁸ 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 740-41 (Paul A. Freund ed., 1971).

or of constitutional amendments, the expression is the same, and equally applies to the act of both Houses of Congress.²⁹

Justice Chase's response was brief and conclusory:

There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.³⁰

Four days later,³¹ the Court issued a one-sentence opinion:

The Court, on the day succeeding the argument, delivered an unanimous [sic] opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.³²

The Court dismissed the case, along with two others on its docket, all of which involved individual suits against states.³³

The holding of *Hollingsworth* is squarely on point. Yet nowhere does the opinion reveal why the President “has nothing to do” with the amendment process.³⁴ Justice Chase did not even care for Attorney General Lee to respond to the Indiana Company's assertion: there was “no necessity to answer that argument.”³⁵ So although *Hollingsworth* clearly holds that presentment is not required for amendment proposals, it is little more than an *ipse dixit* and thus of questionable precedential value.³⁶

What is more, the *Hollingsworth* Court was undoubtedly motivated at least in part by pure self-interest. The Court's decision in *Chisholm*

²⁹ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 379 (1798) (argument of W. Tilghman & Rawle).

³⁰ *Id.* at 381 n.* (statement at oral argument of Chase, J.).

³¹ GOEBEL, *supra* note 28, at 741 n.87 (“The minutes of the Court indicate that on Feb. 10, 1798, the argument was heard without reference to any pending cause. The entries for Feb. 14, 1798, start with *Hollingsworth* . . .”). Curiously, Alexander Dallas reported that the Court issued its opinion “on the day succeeding the argument.” *Hollingsworth*, 3 U.S. (3 Dall.) at 382. No reason is given for this discrepancy.

³² *Hollingsworth*, 3 U.S. (3 Dall.) at 382.

³³ 5 DOCUMENTARY HISTORY, *supra* note 17, at 604 & n.36.

³⁴ 3 U.S. (3 Dall.) at 381 n.*.

³⁵ *Id.* After rhetorically asking, “But has not the same course been pursued relative to all the other amendments, that have been adopted?,” Attorney General Lee did respond nonetheless: “And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress.” *Id.* at 381.

³⁶ This is not to diminish *Hollingsworth*'s place in history: at least one renowned commentator has argued that it, and not the famous case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was the first instance of judicial review. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 22 (1985) (“*Hollingsworth* may put to flight the conventional wisdom that *Marbury v. Madison* was the first case in which the Supreme Court held an act of Congress unconstitutional.”).

triggered a swift and immediate backlash at a time when the federal judiciary was a fledgling branch of government with far less power than the other two branches.³⁷ The Eleventh Amendment was squarely addressed at overturning the decision in *Chisholm*,³⁸ and for the Court to hold the Amendment unconstitutional would have been politically impossible.³⁹ The issue of presentment simply could not be extricated from the hot-button issue of state sovereign immunity; not surprisingly, political expediency won the day.

Although the Court has never bolstered *Hollingsworth*'s reasoning, it has restated its rule on a few occasions.⁴⁰ From the judicial perspective, the issue is thus settled law.

B. The Legislative Branch: An Inconsistent History

Congress has also concluded that constitutional amendment proposals need not be presented to the President. Although this result is predictable—it aggrandizes Congress by granting it unchecked power to propose amendments without interference from the Executive Branch—not every Congress has reached this conclusion.

Congress did not seek President Washington's explicit approval or signature for the Bill of Rights; instead, the House merely requested that he send all twelve amendments to the states for ratification:

On motion, it was resolved, that the President of the United States be requested to transmit to the Executives of the several States which have ratified the Constitution, copies of the amendments proposed by Congress, to be added thereto, and like copies to the Executives of the States of Rhode Island and North Carolina.⁴¹

Congress followed a similar practice with what became the Eleventh⁴² and Twelfth⁴³ Amendments, as well as with a failed amendment proposal

³⁷ See THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[T]he judiciary is beyond comparison the weakest of the three departments of power . . .”).

³⁸ See MARTIN H. REDISH, SUZANNA SHERRY & JAMES E. PFANDER, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS 368 (7th ed. 2012); see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 334 (2005) (“The *Chisholm* decision provoked widespread resentment, culminating in an amendment designed to overrule the Court.”).

³⁹ See Charles L. Black, Jr., Correspondence, *On Article I, Section 7, Clause 3—and the Amendment of the Constitution*, 87 YALE L.J. 896, 898 n.11 (1978) (“It should be noted that this case was decided literally overnight, and that it is hard to imagine greater pressure on the Supreme Court than existed with respect to validating the Eleventh Amendment, which had been passed to correct its own universally resented decision in *Chisholm* . . .”).

⁴⁰ See, e.g., *INS v. Chadha*, 462 U.S. 919, 955–56 n.21 (1983) (recognizing the holding of *Hollingsworth* as valid and stating that presentment does not apply to the Article V process); *Hawke v. Smith*, 253 U.S. 221, 229–30 (1920) (same).

⁴¹ 1 ANNALS OF CONG. 913–14 (1789) (Joseph Gales ed., 1834) (recording the debate in the House on Sept. 24, 1789).

⁴² See 4 ANNALS OF CONG. 65 (1794).

banning titles of nobility.⁴⁴ In fact, in the case of the Twelfth Amendment, “[a] motion in the Senate to submit the amendment to the President for approval was rejected by the decisive vote of 7 to 23.”⁴⁵

Yet in 1861, Congress presented the Corwin Amendment to the President. The Corwin Amendment would have enshrined slavery in the Constitution⁴⁶:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.⁴⁷

Fearful that President-elect Lincoln would disapprove of this Amendment, President Buchanan signed it in the waning hours of his Administration.⁴⁸ Buchanan’s fears were unfounded; Lincoln endorsed the Amendment’s validity in his inaugural address:

I understand a proposed amendment to the Constitution, which amendment, however, I have not seen, has passed Congress, to the effect that the federal government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments, so far as to say that, holding such a provision to now be implied Constitutional law, I have no objection to its being made express, and irrevocable.⁴⁹

The Corwin Amendment was not ratified by the requisite number of states before the Civil War intervened, mooting the issue.⁵⁰ Four years later, Congress passed what would ultimately become the Thirteenth Amendment

⁴³ See 13 ANNALS OF CONG. 214 (1803).

⁴⁴ See 21 ANNALS OF CONG. 2050–51 (1810) (recording only the passage of the amendment, with no further action before adjournment). The amendment was ratified by twelve states. See DAVID C. HUCKABEE, CONG. RESEARCH SERV., 97-922 GOV, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 5 (1997).

⁴⁵ Ames, *supra* note 9.

⁴⁶ Thomas Corwin was a Republican Congressman and former Whig Senator from Ohio. *Corwin, Thomas*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000791> (last visited Jan. 6, 2013).

⁴⁷ ROBERT BRADY, THE CONSTITUTION OF THE UNITED STATES AS AMENDED, H.R. DOC. NO. 110-50, at 30 (2007). Corwin proposed the amendment in the House on February 27, 1861, but it was defeated 123–71. See CONG. GLOBE, 36th Cong., 2d Sess. 1264 (1861). (Oddly, the House Journal lists the vote as 120–71. See 57 H.R. JOURNAL, 36th Cong., 2d Sess. 416–21 (1861).) The House passed it the next day 133–65, CONG. GLOBE, 36th Cong., 2d Sess. 1284–85 (1861), and the Senate passed it on March 2, 24–12, *id.* at 1402–03. President Buchanan signed it the same day. *Id.* at 1408.

⁴⁸ See ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 2 (2004).

⁴⁹ Abraham Lincoln, First Inaugural Address 7 (Mar. 4, 1861), available at <http://www.loc.gov/exhibits/treasures/tr039.html>.

⁵⁰ See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 150–51 (1996).

and again presented it to the President for his signature.⁵¹ Although President Lincoln signed it, the Senate, on the motion of Senator Trumbull,⁵² immediately adopted a resolution disclaiming the presentment as “inadvertent” and nonprecedential.⁵³

Senator Howe⁵⁴ objected to Trumbull’s characterization, pointing out that the Corwin Amendment already set the precedent for presentment of amendments, even if the amendment was not ultimately ratified by the states.⁵⁵ Howe also forcefully argued in favor of presentment, presaging some of the arguments made in Parts II and III, *infra*. Most significantly, Howe noted that “presentment” occurred by simple virtue of sending copies of amendment proposals to the President for transmittal to the various states. So the precedent that had been set was actually to present amendments to the President, and not to bypass presentment. Nevertheless, the Senate adopted Trumbull’s resolution,⁵⁶ although no record exists of the House adopting a similar resolution.⁵⁷

Oddly, even after this debate, Congress presented the Fifteenth Amendment to the President. The Fifteenth Amendment passed both houses of Congress by the required two-thirds majorities on February 26, 1869.⁵⁸ On that date, the Senate Journal records that the House approved “an enrolled joint resolution (S.8) and an enrolled bill, (H.R. 1812[]).”⁵⁹ S.8 was the “[j]oint resolution proposing an amendment to the Constitution of the United States.”⁶⁰ The next entry in the Journal reads: “The President *pro tempore* signed the enrolled bill (H.R. 1812) and the enrolled joint resolution (S.8) last reported to have been examined, and *they* were delivered to the committee *to be presented* to the President of the United States.”⁶¹

⁵¹ See CONG. GLOBE, 38th Cong., 2d Sess. 629–31 (1865) (Senate debate noting that President Lincoln had signed the Thirteenth Amendment).

⁵² Lyman Trumbull was the senior Senator from Illinois and the author of the Thirteenth Amendment. See HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).

⁵³ See CONG. GLOBE, 38th Cong., 2d Sess. 629–31 (1865).

⁵⁴ Timothy O. Howe was a Radical Republican from Wisconsin. He was on President Grant’s short list to replace Chief Justice Chase but ultimately remained in the Senate and eventually served as Postmaster General under President Arthur. See William H. Russell, *Timothy O. Howe, Stalwart Republican*, 35 WIS. MAG. HIST. 90, 90–99 (1951).

⁵⁵ CONG. GLOBE, 38th Cong., 2d Sess. 630 (1865).

⁵⁶ *Id.* at 631.

⁵⁷ See 62 H.R. JOURNAL, 38th Cong., 2d Sess. 214 (1865) (noting only that the Senate adopted a resolution requesting the President to transmit copies of the Thirteenth Amendment to the states for ratification but making no mention of Trumbull’s resolution disclaiming the presentment requirement).

⁵⁸ See HUCKABEE, *supra* note 44, at 4 (table entry listing the Fifteenth Amendment as having been proposed on February 26, 1869).

⁵⁹ 36 S. JOURNAL, 40th Cong., 3d Sess. 361 (1869).

⁶⁰ *Id.* at 362.

⁶¹ *Id.* (emphases added).

The word “they” clearly means that *both* the bill and the joint resolution—that is, the proposed constitutional amendment—were delivered to be presented to the President. No record exists of President Johnson signing the Fifteenth Amendment before distributing it to the various states for ratification.⁶² But this entry in the Journal of the Senate shows that even after the heated and seemingly decisive debate of February 1865, Congress continued to display inconsistency in its presentment practice.⁶³

C. The Executive Branch: Presidential Acquiescence

As noted above, President Buchanan signed the Corwin Amendment, and President Lincoln signed the Thirteenth. Both Presidents evidently felt they were constitutionally permitted (if not required) to do so. That said, these are the only two exceptions to the general rule that presidents do not play an active role in the amendment process.

Like many presidential practices, this behavior can be traced to George Washington. In his first inaugural address, Washington forswore any involvement with constitutional amendments:

Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them. Instead of undertaking particular recommendations on this subject, in which *I could be guided by no lights derived from official opportunities*, I shall again give way to my entire confidence in your discernment and pursuit of the public good⁶⁴

Believing he had no “official opportunities” to weigh in on constitutional amendments, Washington gave Congress his “entire confidence” in the matter.⁶⁵ Given such *ex ante* deference to Congress, Washington unsurprisingly signed neither the Bill of Rights nor the Eleventh Amendment, which was also proposed during his tenure.⁶⁶

Other presidents followed Washington’s lead. President John Quincy Adams, for example, “refused to recommend an amendment in regard to

⁶² President Johnson must have acted swiftly to distribute the amendment; on March 1, 1869, just three days after Congress passed the joint resolution proposing the amendment, Nevada became the first state to ratify it. ROBERT BRADY, *THE CONSTITUTION OF THE UNITED STATES AS AMENDED*, H.R. DOC. NO. 110-50, at 18 (2007).

⁶³ There is no evidence in the Senate or House Journals to indicate that any future amendments—that is, the Sixteenth through the Twenty-Sixth Amendments—were sent to the President explicitly for the purpose of approval rather than merely for the purpose of transmittal to the states.

⁶⁴ Washington, *supra* note 8 (emphasis added).

⁶⁵ *Id.*

⁶⁶ See KYVIG, *supra* note 50, at 105, 113; see also *supra* note 42.

the election of President” because he did not believe the President had any role to play in the constitutional amendment process.⁶⁷ Adams also advised President Monroe (in whose administration he served as Secretary of State) not to propose an amendment in 1817.⁶⁸ Even here, though, the record is mixed—John Quincy Adams was one of the seven Senators (against the “decisive” majority of twenty-three) who voted in favor of presenting the Twelfth Amendment to the President for his approval in 1803.⁶⁹

But neither George Washington’s nor John Quincy Adams’s belated deference to Congress can explain the actions of Andrew Johnson, whose immediate predecessors (Lincoln and Buchanan) both signed constitutional amendments.⁷⁰ Johnson was no fan of the Fourteenth Amendment and actively worked to defeat its ratification.⁷¹ And yet he did not veto it.⁷² President Johnson assumed he lacked the power to do so, and although he dutifully forwarded the Amendment to the states for ratification, he pointedly denied that he approved of it:

Waiving the question as to the constitutional validity of the proceedings of Congress upon the joint resolution proposing the amendment, or as to the merits of the article which it submits, through the executive department, to the Legislatures of the States, I deem it proper to observe that the steps taken by the Secretary of State, as detailed in the accompanying report, *are to be considered as purely ministerial, and in no sense whatever committing the Executive to an approval or a recommendation of the amendment to the State Legislatures or to the people.*⁷³

President Johnson’s view of the executive role as merely “ministerial” has survived. All subsequent presidents have dutifully performed the ministerial role of forwarding proposed amendments to the states for ratification without officially expressing approval or disapproval.⁷⁴

⁶⁷ See Ames, *supra* note 9.

⁶⁸ *Id.*

⁶⁹ See CONG. GLOBE, 38th Cong., 2d Sess. 630 (1865) (Sen. Howe) (noting John Quincy Adams’s 1803 vote).

⁷⁰ See *supra* Part I.B.

⁷¹ See generally Kurt T. Lash, The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges and Immunities Clause (Aug. 6, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125363 (describing Johnson’s opposition to the Fourteenth Amendment and his efforts to defeat it, including by proposing an alternative).

⁷² Although he did not veto the Fourteenth Amendment, President Johnson vetoed (and Congress overrode his vetoes on) all four Reconstruction Acts. See PRESIDENTIAL VETOES, 1789–1988, S. Pub. 102-12, at 33–34 (1992) (listing vetoes and overrides of H.R. 1143, H.R. 33, H.R. 123, and H.J. Res. 71).

⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866) (emphasis added).

⁷⁴ Interestingly, the first amendment ratified after Reconstruction, the Sixteenth Amendment, was proposed by President Taft himself. William Howard Taft, Message Concerning Tax on Net Income of Corporations, Address Before Congress (June 16, 1909), in 1 PRESIDENTIAL ADDRESSES AND STATE PAPERS OF WILLIAM HOWARD TAFT 166, 167 (1910) (“I therefore recommend to the Congress that both

II. THE CONSTITUTIONAL TEXT MANDATES PRESENTMENT

Despite all three branches of government acquiescing in the exemption of constitutional amendment proposals from presentment, the text of the Constitution admits no such exemption. The Presentment Clause applies to “[e]very Order, Resolution, or Vote,”⁷⁵ and Article V’s silence cannot create an implied exception to this unambiguous rule.

A. *Deconstructing Article I, Section 7*

As with any constitutional issue, the first place to look is the text.⁷⁶ Article I defines the powers and limitations of the Legislative Branch, and Section 7 defines the legislative process.⁷⁷ The relevant part of the second clause reads:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.⁷⁸

Clause 2 defines the process of congressional lawmaking and describes the steps that “[e]very [b]ill” passing both houses of Congress must take before becoming law. First, Clause 2 requires the bill to “be presented to the President of the United States.”⁷⁹ As discussed in Part IV, *infra*, the word “presented” is not defined anywhere in the Constitution. Next, the President must act: “If he approve he shall sign it”⁸⁰ So disregarding the exceptions to be discussed shortly, a bill cannot become a

Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.”).

⁷⁵ U.S. CONST. art. I, § 7, cl. 3 (emphasis added).

⁷⁶ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann ed., 1997) (noting that constitutional interpretation, like statutory interpretation, should rely on “the original meaning of the text”). The text is often the last place to look as well.

⁷⁷ The first clause of Section 7 deals with revenue bills and is inapposite to the presentment issue. It reads: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” U.S. CONST. art. I, § 7, cl. 1.

⁷⁸ *Id.* cl. 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

law unless the President signs it, presumably by scrawling on whatever copy of the bill Congress “presented” to him. Conversely, if the President does not “approve” of the bill, “he shall return it, with his Objections to that House in which it shall have originated.”⁸¹ Clause 2 thus imposes a duty on the President to return his copy of the presented bill, along with a list of his “Objections” to it, if he does not “approve” of the bill. Again, none of these terms—“presented,” “approve,” “sign,” “return”—are explicitly defined in the Constitution.

The rest of Clause 2 describes the two ways in which a bill can become law even absent the President’s signature. First, Congress may override a presidential veto (by a two-thirds vote in each house). Second, if the President neither signs nor returns the bill within ten days of presentment—and Congress remains in session throughout this time—it automatically becomes law. But if Congress adjourns in the interim, the President’s inaction is a “pocket veto” and the bill does not become law (unless Congress overrides it, just as with a traditional veto).⁸² The importance of these procedures will become evident when evaluating previously enacted amendments, as described in Part IV, *infra*.

Clause 3 in its entirety reads:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.⁸³

Clause 3 seems to do no more than extend Clause 2’s requirement for bills to orders, resolutions, and votes (except for motions to adjourn), so that Congress cannot evade the presentment requirement by labeling its actions “resolutions” instead of “bills.” Indeed, this was likely the Framers’ intent in drafting Clause 3. James Madison recorded the following debate during the Philadelphia Convention of 1787:

Mr. MADISON, observing that if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c, proposed that [“]or resolve” should be added after “*bill*” in the beginning of sect 13. with an exception as to votes of adjournment &c.—after a short and rather confused conversation on the subject, the question was put & rejected . . .⁸⁴

⁸¹ *Id.*

⁸² *See id.*; *see also* The Pocket Veto Case, 279 U.S. 655, 676–77 (1929) (defining the term).

⁸³ U.S. CONST. art. I, § 7, cl. 3.

⁸⁴ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 465 (Adrienne Koch ed., 1966) (debate of Aug. 15, 1787).

Madison wanted to modify the language of Clause 2 to ensure that resolutions, votes, and other actions of Congress would also be subject to the same presentment requirement as bills. Interestingly, as Madison noted, “the question was put [and] rejected” 8–3.⁸⁵ That is Madison’s last entry on August 15. His first entry on August 16 reads:

Mr. RANDOLPH having thrown into a new form the motion, putting votes, Resolutions &c. on a footing with *Bills*, renewed it as follows “Every order resolution or vote, to which the concurrence of the Senate & House of Reps. may be necessary (except on a question of adjournment and in the cases hereinafter mentioned) shall be presented to the President for his revision; and before the same shall have force shall be approved by him, or being disapproved by him shall be repassed by the Senate & House of Reps. according to the rules & limitations prescribed in the case of a Bill.”⁸⁶

This time, the motion passed 9–1. No evidence exists to explain why Madison’s proposal was soundly rejected while Randolph’s was easily adopted, or to explain what transpired during the “short and rather confused conversation on the subject” on August 15.⁸⁷ All the same, the plain text (and common sense) reasonably suggests that Clause 3’s intent was to ensure that Congress did not evade Clause 2’s strictures simply by relabeling its actions.⁸⁸ Taken together, Clauses 2 and 3 stand for the clear rule that *all* bicameral actions (except motions to adjourn) require presentment.⁸⁹

Three distinct features of Clause 3 are worth highlighting. First, Clause 3 requires that orders, resolutions, and votes, after being presented, “shall be approved by” the President before they take effect.⁹⁰ But nowhere does Clause 3 require the President to actually *sign* them. So while a bill needs presidential signature to become law, an order, resolution, or vote does not.⁹¹

⁸⁵ *Id.*

⁸⁶ *Id.* at 466 (Aug. 16, 1787).

⁸⁷ *Id.* at 465 (Aug. 15, 1787).

⁸⁸ *But see* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1314 (2005) (arguing that Randolph’s proposal could not have meant the same thing as Madison’s because otherwise seven states would not have changed their votes and because Convention rules did not permit a defeated motion to be reconsidered without one day’s notice).

⁸⁹ *See* Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov./Dec. 1979, at 19, 20 (“The purpose of [Art. I, § 7, cl. 3], as confirmed by accounts of the debate at the Constitutional Convention, is to prevent Congress from evading the President’s legislative role (as some state legislatures before 1789 had evaded gubernatorial veto powers) by simply acting through measures that are not called ‘bills.’ It was meant to ensure presidential participation in *all* lawmaking, under whatever form it might disguise itself.”).

⁹⁰ U.S. CONST. art. I, § 7, cl. 3.

⁹¹ That, at least, is the most straightforward reading of the text. *Cf.* Tillman, *supra* note 88, at 1319, 1321 (rhetorically pointing this out but limiting the scope of Article I, Section 7, Clause 3 to single-house actions). For more detail on Professor Tillman’s interpretation of Clause 3, see *infra* note 114.

Second, if the President disapproves of an order, resolution, or vote, a two-thirds majority in each house is required to override his veto “according to the Rules and Limitations prescribed in the Case of a Bill.”⁹² Here, Clause 3 specifically incorporates the rules from Clause 2—but only for the case of presidential disapproval. So while the President need not actually sign the order, resolution, or vote if he approves of it, the President must actually return it to the house of origin, describing his objections, if he disapproves of it. In addition, the ten-day limit for such a return would apply because this limit is one of the “Rules and Limitations prescribed in the Case of a Bill.”

Third, Clause 3 specifically lists an exception to the presentment requirement: questions of adjournment.⁹³ Why the Framers chose to include this particular exception is beyond the scope here,⁹⁴ but by listing an exception, the Framers must have intended this to be the only exception.⁹⁵

All in all, Clauses 2 and 3 tell us three things. First, all bicameral actions of Congress require presentment; there are no exceptions (other than votes to adjourn), and this was the Framers’ intent. Second, only bills need to be signed to take effect;⁹⁶ orders, resolutions, and votes need only be approved by the President but not necessarily signed. Third, if the President disapproves of a bill, order, resolution, or vote, he must take the active step of returning it to Congress within ten days of presentment (if Congress remains in session); otherwise, it becomes law.

B. *The Deafening Silence of Article V*

Article V specifies the manner in which the Constitution may be amended:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress⁹⁷

Article V offers two methods for amendments to be proposed for adoption and two methods for amendments to be ratified; either method of

⁹² U.S. CONST. art. I, § 7, cl. 3.

⁹³ *See id.*

⁹⁴ For one take on the issue, see Tillman, *supra* note 88, at 1346–49.

⁹⁵ *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 325, at 410 (1st ed. 1891) (describing the interpretative canon *expressio unius est exclusio alterius*).

⁹⁶ Ignoring, for the moment, instances where the President fails to take action within the ten-day window and Congress remains in session. *See infra* note 174 and accompanying text.

⁹⁷ U.S. CONST. art. V.

proposal may be combined with either method of ratification. The first method for proposing amendments is for two-thirds of both houses of Congress to pass the proposed constitutional amendment. The other method is for a constitutional convention to propose amendments. Only Congress can call this convention, and only after the legislatures of two-thirds of the states tell it to do so.⁹⁸ Either way, Congress is involved—it proposes the amendments or it calls a convention for that purpose. All of the Constitution's amendments have traveled the first route: Congress proposed them with two-thirds majorities in each house. The convention option has never been tried.⁹⁹

Article V is silent on presidential involvement in the amendment process. Although Congress features prominently, no mention whatsoever is made of the President. What to make of the silence of Article V? Does its failure to mention presentment mean that amendments need not be presented to the President? Or does its silence imply that the default, background rule—presentment—continues to apply?

C. *Article I, Section 7 Applies to Article V*

Article V's silence cannot create an exception to the clear mandate of the Presentment Clause. Such an argument would, contrary to the text, treat the congressional powers in Article V as different from those in the rest of the Constitution, which are not granted such an exception. That the vote tally required to pass an amendment is the same as that required to override a presidential veto is also not sufficient to create such an implied exception to presentment. Similarly, the fact that amendments proposed by the (unused) convention method need not be presented to the President does not confer the same latitude on amendments proposed by Congress. To be sure, implied exceptions do exist in the Constitution, but the Article V amendment process is normatively different from these cases. Each of these arguments is taken up in detail below.

1. The Plain Text.—Granting Article V an implied exception from the presentment requirement is an argument that proves too much. Presentment is only mentioned in Article I, Section 7; every other congressional power is listed without mention of presentment. If Article V's silence is read to create an implied exception to the presentment

⁹⁸ Note that Congress “shall” call a convention upon application by the requisite number of state legislatures; that is, Congress must call the convention. *Id.*

⁹⁹ See, e.g., Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 709 (2011) (“[A] convention for proposing amendments has never been held . . .”). Nor has the convention option for ratification been used, as expected even early on. See, e.g., ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 1:App. 371–72 (1803), reprinted in 4 THE FOUNDERS' CONSTITUTION 583 (Philip B. Kurland & Ralph Lerner eds., 1987) (“The latter will probably never be resorted to, unless the federal government should betray symptoms of corruption . . .”).

requirement, then by that logic every congressional power granted in the Constitution would also enjoy an implied exception from presentment. That, of course, is nonsense. Congress has always presented to the President bills and resolutions passed pursuant to its powers granted in Article I,¹⁰⁰ Article II,¹⁰¹ Article III,¹⁰² and Article IV.¹⁰³ There is no textual reason why Article V should be any different. Article I, Section 7 functions as a background rule for all bicameral congressional action (except for adjournment), and only an express exception (such as the one for adjournment) can overcome the strong presumption in favor of presentment.

Another textual objection might be that Article V only calls on Congress to “propose” amendments and thus falls outside of the scope of bills, orders, resolutions, or votes.¹⁰⁴ But Congress is also empowered with “dipos[ing] of” territories or property,¹⁰⁵ “declar[ing] the Punishment of Treason,”¹⁰⁶ “[c]onsent[ing]” to various state actions,¹⁰⁷ and “ordain[ing] and establish[ing]” inferior federal courts,¹⁰⁸ among other powers.¹⁰⁹ All of these are textual directives to Congress that have never been understood to fall outside of the legislative process defined by Article I. Congress’s “propos[al]” of amendments must similarly fall under its rubric. At any rate, constitutional amendments are adopted as joint resolutions of the

¹⁰⁰ For example, the Patient Protection and Affordable Care Act, passed pursuant to Congress’s Article I, Section 8 tax power, was presented to and signed by President Obama. See Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make that 20, and It’s Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

¹⁰¹ For example, Congress directs Electoral College members to meet “on the first Monday after the second Wednesday in December” following a presidential election. See 3 U.S.C. § 7 (2006). Congress’s power to do so derives from Article II, Section 1, Clause 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”). 3 U.S.C. § 7 was originally enacted in codified form as H.R. 6412, 80th Cong. (1948). See 62 Stat. 672–73 (1948). It was presented to the President on June 21, 1948, and was signed by him on June 25. See 94 CONG. REC. 9365 (1948) (indicating presentment of H.R. 6412 on June 21); *id.* at 9365, 9367 (message from the President indicating that he signed it on June 25).

¹⁰² For example, the Judiciary Act of 1789 (“An act to regulate processes in the courts of the United States.”), regulating the jurisdiction of the Supreme Court and the lower federal courts pursuant to Article III, Section 2, was presented to the President on September 28, 1789, and recorded as signed by him on September 29. S. JOURNAL, 1st Cong., 1st Sess. 91–93 (1789).

¹⁰³ For example, “[n]ew States may be admitted by the Congress into this Union.” U.S. CONST. art. IV, § 3. On December 3, 1818, Congress presented to the President a “resolution declaring the admission of the state of Illinois into the Union,” and President Monroe signed it that same day. H.R. JOURNAL, 15th Cong., 2d Sess. 60–61 (1818).

¹⁰⁴ U.S. CONST. art. V; see also *id.* art. I, § 7.

¹⁰⁵ *Id.* art. IV, § 3, cl. 2.

¹⁰⁶ *Id.* art. III, § 3, cl. 2.

¹⁰⁷ *Id.* art. I, § 10.

¹⁰⁸ *Id.* art. III, § 1.

¹⁰⁹ See, e.g., *id.* art. I, § 8.

House and Senate,¹¹⁰ squarely placing them within the express language of Clause 3.¹¹¹

The fact that Article V comes after Article I is also not enough to create an implicit exception. This argument again proves too much, for almost all of Congress's powers are listed after Article I, Section 7 (the vast majority are in Section 8). What is more, Article I and Article V were drafted contemporaneously and are thus appropriately read as a unified whole in harmony with each other.¹¹² This is distinguished from the case of a constitutional amendment, which might reasonably be thought to modify all antecedent clauses to the contrary.¹¹³ Therefore, Article V cannot constitute a later modification of, or implied exception to, the requirements of Article I.

A final potential argument against applying the Presentment Clause to Article V is that, despite its clear language, Article I, Section 7, Clause 3 actually refers only to orders, resolutions, and votes of a *single* house of Congress acting pursuant to a *prior* bicameral authorization of the subsequent single-house action.¹¹⁴ While creative and thought provoking,

¹¹⁰ See *The Constitutional Amendment Process*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution> ("The Congress proposes an amendment in the form of a joint resolution.") (last visited Jan. 6, 2013).

¹¹¹ See *Bowsher v. Synar*, 478 U.S. 714, 767 (1986) (White, J., dissenting) ("[A] joint resolution . . . by definition must be passed by both Houses and signed by the President.")

¹¹² By contrast, the First Congress specifically rejected Madison's proposal to interweave the text of subsequent amendments into the body of the Constitution, preferring to append them to the end of the document. See AMAR, *supra* note 38, at 458–59.

¹¹³ For example, the Fifteenth and Nineteenth Amendments are implicitly thought to have broadened the scope of the Fourteenth Amendment's protections, despite the former never explicitly referring to the latter. See U.S. CONST. amends. XV, XIX; *cf. id.* amend. XIV. Similarly, the Fourteenth Amendment is thought to have created an implicit exception to the Eleventh Amendment, allowing Congress to abrogate state sovereign immunity pursuant to its Section 5 powers. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.")

¹¹⁴ See Tillman, *supra* note 88, at 1321. Professor Tillman's complicated thesis requires some explanation. Characterizing the language of Article I, Section 7, Clause 3 as "needlessly syntactically complex and elliptical," Professor Tillman concludes that it must have a meaning other than its plain one. *Id.* at 1318; see also *id.* at 1317–21 (listing five other reasons for seeking a different meaning). After querying parliamentary scholars, Professor Tillman decided that the correct reading of Article I, Section 7, Clause 3 is:

Every [final] Order, Resolution, or Vote [of a single house] to which the [prior] Concurrence of the Senate and House of Representatives may be necessary [as bicameral congressional authorization for subsequent single-house action] . . . shall be presented to the President [so that his veto might act upon the subsequent single-house action just as it acted upon the prior authorizing legislation] . . . and before the same [subsequent single-house action] shall *take Effect* [in conformity with the prior authorizing legislation], shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Id. at 1321 (alterations in original) (quoting U.S. CONST. art. I, § 7, cl. 3). Under this interpretation, Clause 3 does not apply to constitutional amendments at all because amendments proposed by Congress

this argument is wholly unsupported by the Constitution's plain text, Madison's notes, or any other contemporaneous discussion of the Clause. Indeed, the argument amounts to pure speculation, perhaps "the work of an overactive imagination."¹¹⁵

2. *The Two-Thirds Requirement.*—A two-thirds vote in each house is necessary to pass an amendment—the same supermajority required to override a presidential veto.¹¹⁶ Thus, one might argue, a proposed amendment need not be presented to the President because it has already been passed by a vote sufficient to override a potential veto.¹¹⁷ This superficially appealing argument breaks down for two reasons. First, such an argument based on principles of expediency proves too much: by this logic, if a regular piece of legislation happens to pass by a two-thirds majority in each house, would it, too, not be subject to the presentment requirement? Such a conclusion would be patently unconstitutional, despite the gains in efficiency that would come from avoiding a presidential veto (and subsequent votes to override it in both houses).¹¹⁸ Constitutionally mandated steps may not be skipped for expediency's sake.

Second, even though an amendment has already garnered a two-thirds majority in each house, there is no guarantee that it would continue to garner the same majority after a presidential veto.¹¹⁹ Vote tallies often change once the President has officially weighed in on a matter; indeed, vote tallies have almost always changed after a presidential veto. For example, President Obama vetoed H.J. Res. 64 on December 30, 2009, and H.R. 3808 on October 8, 2010.¹²⁰ In the House, the votes to override these bills were 143–245 and 185–235, respectively.¹²¹ Not only did the votes to override President Obama's vetoes for each of these two bills fail to reach the required two-thirds majorities, they failed to command even simple majorities, despite having originally cleared the House by voice votes

pursuant to Article V are not the result of single-house actions taken pursuant to a prior bicameral authorization for such action. Professor Tillman thus believes that *Hollingsworth v. Virginia* was correctly decided, though not for reasons articulated by the Court (or by anyone else). *See id.* at 1364–66.

¹¹⁵ *Id.* at 1331 (conceding the audacity and novelty of this interpretation).

¹¹⁶ Compare U.S. CONST. art. V (providing for the proposal of an amendment through the vote of two-thirds of both houses of Congress), with *id.* art. I, § 7, cl. 2 (requiring the vote of two-thirds of both houses of Congress for a bill vetoed by the President to become law).

¹¹⁷ *See, e.g.,* AMAR, *supra* note 38, at 594–95 n.7.

¹¹⁸ Removing the President's ability to "carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it" violates the separation of powers. The Pocket Veto Case, 279 U.S. 655, 677 (1929).

¹¹⁹ Senator Howe made this very argument in 1865. CONG. GLOBE, 38th Cong., 2d Sess. 631 (1865) (statement of Sen. Howe) (noting that vote tallies can change after a presidential veto).

¹²⁰ *See Vetoes by President Barack H. Obama*, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/ObamaBH.htm> (last visited Jan. 6, 2013).

¹²¹ *See id.*

(generally reserved for bills with little or no opposition) and the Senate by unanimous consent (same).¹²² It is reasonable to conclude that the presidential veto had an impact on the override vote tallies.

For a bill with support at or near the two-thirds threshold, the influence of a presidential veto can be dispositive.¹²³ Presidential vetoes need not always influence the vote tally downwards; political forces may conspire to move the votes in either direction.¹²⁴ An official presidential veto can influence the vote tallies in Congress, upwards or downwards, even when the votes are taken just days apart. In fact, an analysis of every presidential veto from 1993 to the present reveals that the vote tallies before and after the veto are almost never the same.¹²⁵ So just because a

¹²² See *Bill Summary & Status, H.J. Res. 64*, LIBRARY OF CONG. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HJ00064:@@L&summ2=m&> (last visited Jan. 6, 2013); *Bill Summary & Status, H.R. 3808*, LIBRARY OF CONG. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03808:@@L&summ2=m&> (last visited Jan. 6, 2013).

¹²³ For example, on August 31, 2000, President Clinton vetoed H.R. 8, the Death Tax Elimination Act of 2000. Although the bill initially passed the House by a vote of 279–136 (larger than a two-thirds majority), it failed a vote to override in the House by a vote of 274–157 (only a 63.6% majority, less than the required 66.7%). See *PRESIDENTIAL VETOES, 1989–2000*, S. PUB. 107–10, at 22–23 (2001), available at <http://www.senate.gov/reference/resources/pdf/presvetoes.pdf>; *Bill Summary & Status, H.R. 8*, LIBRARY OF CONG. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR00008:@@L&summ2=m&> (last visited Jan. 6, 2013).

Sixteen more congressmen cast votes the second time around, but, curiously, most of them were Republicans who voted *in favor of* overriding the veto. Despite this, the number of votes in support of the bill dropped from 279 to 274, largely because only 53 Democrats voted to override President Clinton's veto (compared to 65 Democrats who originally voted for the bill). See *Final Vote Results for Roll Call 254*, OFFICE OF THE CLERK, <http://clerk.house.gov/evs/2000/roll254.xml> (last visited Jan. 6, 2013) (recording original House vote on H.R. 8); *Final Vote Results for Roll Call 458*, OFFICE OF THE CLERK, <http://clerk.house.gov/evs/2000/roll458.xml> (last visited Jan. 6, 2013) (recording final House vote on H.R. 8 in response to veto). Although President Clinton's veto caused his political opponents to turn out in greater force against him, it simultaneously influenced his political allies to switch their votes and join his camp. Note that H.R. 8 originally passed the Senate by a vote of 59–39 (less than a two-thirds majority), *Bill Summary & Status, H.R. 8, supra*, and so the veto likely would have been sustained even had the House successfully overridden it.

¹²⁴ For example, President Clinton vetoed H.R. 4733, the Energy and Water Development Appropriations Act of 2001, on October 7, 2000. *PRESIDENTIAL VETOES, 1989–2000*, S. PUB. 107–10, at 23 (2001), available at <http://www.senate.gov/reference/resources/pdf/presvetoes.pdf>. The measure had originally passed the House just over a week earlier, on September 28, by a vote of 301–118. *Bill Summary & Status, H.R. 4733*, LIBRARY OF CONG. THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04733:@@L&summ2=m&> (last visited Jan. 6, 2013). On October 11, the House voted to override President Clinton's veto by a vote of 315–98. *Id.* Interestingly, while 44 Republicans voted against the bill initially, 13 days later only 28 Republicans voted to sustain the veto. See *Final Vote Results for Roll Call 501*, OFFICE OF THE CLERK, <http://clerk.house.gov/evs/2000/roll501.xml> (last visited Jan. 6, 2013); *Final Vote Results for Roll Call 523*, OFFICE OF THE CLERK, <http://clerk.house.gov/evs/2000/roll523.xml> (last visited Jan. 6, 2013). President Clinton's veto again caused his political adversaries to abandon his camp, without a comparable countervailing impact on his political allies.

¹²⁵ Presidents Clinton, Bush, and Obama have vetoed a total of fifty-one bills. Of these, the House passed seven by a voice vote and failed to hold override votes on twenty-two more. Of the twenty-two remaining bills, only once did the vote tally to override exactly match the original vote tally—the Partial-Birth Abortion Act of 1997, H.R. 1122, 105th Cong. (enacted over a presidential veto). Thirteen

proposed amendment might have originally passed both houses by two-thirds majorities does not necessarily mean that it would continue to garner that same level of support after a presidential veto. The two-thirds requirement is thus nothing but a counterfactual smokescreen that should not obscure the presentment requirement.

3. *The Convention Method.*—Another objection to the clear textual mandate is that because a constitutional convention would not need to present its amendment proposals to the President, so too should Congress be free from having to present its amendment proposals.¹²⁶ This argument from symmetry is unconvincing because—somewhat tautologically—the amendment methods are dissimilar. First, the Presentment Clause does not apply to the proceedings of a constitutional convention composed of state delegations because the convention’s actions are not bicameral actions of Congress.¹²⁷ So the fact that the convention enjoys immunity from presentment does not imply that Congress does too.

More importantly, this argument from symmetry proves too much. The Constitution explicitly calls for congressionally proposed amendments to pass by a two-thirds supermajority in each house. But Article V is silent on what fraction of convention delegates must vote for amendment proposals before they may be passed along to the state legislatures (or conventions). The argument from symmetry would suggest that a convention, too, must pass amendments by a two-thirds majority. But that

bills saw lower support on their respective override votes, losing an average of roughly seven yea votes and gaining over four nay votes. The votes to override eight other bills, by contrast, gained an average of nearly ten yea votes and lost an average of over five nay votes.

In the Senate, nine of the fifty-one vetoed bills originally passed by voice vote or unanimous consent, and thirty-five more never had an override vote. Of the seven remaining bills, one had exactly the same override vote total as the original vote (the Partial-Birth Abortion Ban Act of 1997). Another bill, the Water Resources Development Act of 2007, H.R. 1495, 110th Cong., lost two yea votes and gained two nay votes. The remaining five bills gained Senate support on the override vote, gaining an average of over one yea vote and losing an average of one-half nay votes.

A spreadsheet containing all of the relevant data above is on file with the *Northwestern University Law Review*. The data were compiled from information available at *Bills, Resolutions*, LIBRARY OF CONG. THOMAS, http://thomas.loc.gov/home/bills_res.html (last visited Jan. 6, 2013) (click on “Browse Bills & Resolutions”; then select the appropriate congressional session; then click on “Bill Number”; then select the appropriate bill number). The list of bills vetoed by the last three presidents was taken from *Summary of Bills Vetoed, 1789–Present*, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (click on the “Barack H. Obama,” “George W. Bush,” and “William J. Clinton” table entries) (last visited Jan. 6, 2013).

¹²⁶ See, e.g., AMAR, *supra* note 38, at 595 n.7 (“On this view, Article V did not envisage any role for a presidential signature or veto in the case of an amendment proposal emerging from a duly called proposing convention; and an amendment proposal made by Congress should stand on the same footing.”).

¹²⁷ See U.S. CONST. art. I, § 7. While amendment proposals passed by Congress are in the form of joint resolutions, see *supra* note 110, amendment proposals passed by a convention could not take such a form.

is plainly wrong.¹²⁸ It is wrong because absent explicit language to the contrary, our constitutional democracy's strong default presumption is one of simple majority rule.¹²⁹ Article V's silence on the vote required in a convention is not nearly enough to overcome this strong default presumption. So too with presentment. Article V's silence is not enough to overcome the strong default presumption that all bicameral actions of Congress (except adjournment) must be presented to the President.¹³⁰ The argument from symmetry thus fails even on its own terms.¹³¹

4. *Other Implied Exceptions in the Constitution.*—The Constitution may well justify some implied exceptions, but Article V and presentment are easily distinguishable from these situations. For example, the President has long been able to make recess appointments of federal judges that “shall expire at the End of [the Senate’s] next session”¹³² even though Article III makes clear that all federal judges shall have life tenure.¹³³ Even Supreme Court Justices have been appointed during Senate recesses: President Washington appointed John Rutledge to serve as Chief Justice during a Senate recess in 1795, and President Eisenhower named Chief Justice Warren, along with Justices Brennan and Stewart, to the Court through recess appointments.¹³⁴ In all cases but Rutledge’s, the Justices

¹²⁸ See Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1633–34 (1972).

¹²⁹ See *United States v. Ballin*, 144 U.S. 1, 6 (1892) (“[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.”); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 141 (Boston, Little, Brown, & Co. 1868) (“A simple majority of a quorum is sufficient, unless the constitution establishes some other rule . . .”).

¹³⁰ Indeed, applying a consistent and reasonable textual approach, one must also conclude that the calling of the convention itself—as a bicameral action of Congress—would require presentment. See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 206 (1972) (“The exclusion of the President from the process of calling a convention is flatly and obviously unconstitutional under Article I, Section 7 . . .”). Similarly, a consistent and reasonable textual approach would also require Congress to *repeal* proposed amendments by a two-thirds majority. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 683 (1993).

¹³¹ The argument from symmetry has been invoked in other situations—for example, to argue against congressional promulgation of amendments. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 399–400 (1983).

¹³² U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

¹³³ See *id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

¹³⁴ See LOUIS FISHER, CONG. RESEARCH SERV., RL31112, RECESS APPOINTMENTS OF FEDERAL JUDGES 14–15 (2001).

were subsequently renominated and confirmed by the Senate, mooted the constitutional dilemma.¹³⁵ At any rate, the implied exception to the life-tenure requirement, unlike the Article V situation, has a plausible textual justification: the clause immediately preceding the Recess Appointment Clause specifically lists “Judges of the supreme Court” among the officials that the President may appoint.¹³⁶ The Recess Appointments Clause and Article III thus squarely conflict, leaving only two possible resolutions: either the Clause is an implicit exception to Article III or “Judges of the supreme Court” are implicit exceptions to the President’s recess appointment power. Either choice requires finding an exception to a rule, making this case closer to an express rather than a purely implied exception.¹³⁷ Article V has no such textual justification.

Applying the Presentment Clause to Article V does not present the normative difficulties that accompany another implied exception in the Constitution: the (in)ability of the Vice President to preside over his own impeachment proceedings. Article I, Section 3 provides that “[t]he Vice President of the United States shall be President of the Senate.”¹³⁸ Section 3 goes on to provide that “[t]he Senate shall have the sole Power to try all Impeachments. . . . When the President of the United States is tried, the Chief Justice shall preside”¹³⁹ Put differently, the Vice President presides over all Senate activities except for presidential impeachment proceedings. And because the Framers explicitly listed this one exception to the general rule, they must have intended this to be the only exception.¹⁴⁰ Indeed, this exception closely mirrors the Presentment Clause’s adjournment exception. Yet nobody could seriously contend that the Vice President should preside over his own impeachment trial.¹⁴¹ Normative concerns dictate this conclusion: the impartiality and fairness of a trial would be compromised if the presiding officer were the one standing accused.¹⁴² Allowing a member of the Executive Branch to preside over his

¹³⁵ *Id.* at 14–16. Washington renominated Rutledge after the Senate reconvened, but the Senate defeated the nomination and Rutledge resigned his recess appointment commission (after a failed suicide attempt). *Id.* at 14–15.

¹³⁶ U.S. CONST. art. II, § 2, cl. 2.

¹³⁷ *See, e.g.*, Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1666–67 (2011). Of course, as Judge Motz argues, the text alone cannot tell us which is the exception and which is the rule. *Id.*

¹³⁸ U.S. CONST. art. I, § 3, cl. 4.

¹³⁹ *Id.* cl. 6.

¹⁴⁰ *See, e.g.*, SUTHERLAND, *supra* note 95.

¹⁴¹ *See, e.g.*, Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000). *But see* Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997) (contending that the Vice President should preside over his own impeachment trial).

¹⁴² These normative concerns are reminiscent of those implicated by the Due Process Clause of the Fifth Amendment, which requires a neutral adjudicator to preside over trials. *See, e.g.*, *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2505 (2011) (Scalia, J., concurring in the judgment in part and

own impeachment proceedings could also arguably violate the constitutionally mandated separation of powers.¹⁴³ That is why an implied exception to the general rule of the Vice President's senatorial powers is warranted in the case of his own impeachment proceedings. But none of these concerns apply to the presentment of amendment proposals. As described in Part III, *infra*, normative and structural concerns actually militate in favor of not finding an exception.

In sum, the plain text of the Constitution requires presentment of amendments passed under Article V because all bicameral congressional action is subject to the presentment requirement. Indeed, at least two other state supreme courts that faced nearly identical textual provisions—those of Wyoming¹⁴⁴ and Montana¹⁴⁵—interpreted their respective constitutions to

dissenting in part) (recognizing “the due process right to a neutral adjudicator”). This is not to say, however, that the Fifth Amendment's Due Process Clause applies to impeachment proceedings. *Cf.* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 454 (1993) (noting that the Sixth Amendment right to a jury trial does not apply to impeachment proceedings).

¹⁴³ Impeachment proceedings are constitutionally committed to the Legislative Branch. *See* U.S. CONST. art. I, § 3, cl. 6. Whether the Vice President could preside over the impeachment trial of a lower federal executive official is an interesting constitutional question that has neither arisen nor been resolved. Only one nonpresidential executive officer has been impeached: War Secretary William Belknap in 1876. *See* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 44, 53 (1999). But the vice presidency was vacant at the time, *Vice President of the United States (President of the Senate)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm (last visited Jan. 6, 2013) (noting that Vice President Henry Wilson “died in office on November 22, 1875; vice presidency remained vacant until 1877”), and so the President pro tempore of the Senate presided over Belknap's impeachment proceedings, *see* EXTRACTS FROM THE JOURNAL OF THE UNITED STATES SENATE IN ALL CASES OF IMPEACHMENT PRESENTED BY THE HOUSE OF REPRESENTATIVES 1798–1904, S. DOC. NO. 62–876, at 329 (1912) (noting that the “President of the Senate pro tempore” was presiding). Belknap's impeachment proceedings are of dubious precedential value for another reason: he had already resigned, causing many Senators to conclude that the Senate lacked jurisdiction over the case. Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479, 488–90 (1998).

¹⁴⁴ *See* *Geringer v. Bebout*, 10 P.3d 514, 521 (Wyo. 2000). Article 20, section 1 of the Wyoming Constitution specifies the procedure for enacting constitutional amendments but, like Article V of the U.S. Constitution, makes no mention of presentment. *Id.* at 520. The Wyoming Supreme Court held that “[t]he language of Art. 3, § 41 [with language nearly identical to that of Art. I, § 7, cl. 3 of the U.S. Constitution] is broad and inclusive, using the words ‘every order, resolution or vote.’ We are confident that this language encompasses a vote to propose a constitutional amendment.” *Id.* at 521.

¹⁴⁵ *See* *State ex rel. Livingstone v. Murray*, 354 P.2d 552, 556 (Mont. 1960). At the time, article XIX, section 9 of the Montana Constitution, like Article V of the U.S. Constitution, specified the procedure for enacting constitutional amendments but made no mention of presentment. *Id.* at 556–57. Article V, section 40 had language nearly identical to that of Article I, Section 7, Clause 3 of the U.S. Constitution, requiring that “[e]very order, resolution or vote, in which the concurrence of both houses may be necessary” must “be presented to the governor.” *Id.* at 556. The Montana Supreme Court held that constitutional amendments must be presented to the governor because article V, section 40 “means just what it says . . . [I]t is clear, certain, direct and unambiguous, and in the English language; it speaks for itself; it needs no interpretation . . .” *Id.* Today, however, Montana's constitution excludes

require gubernatorial presentment of state constitutional amendments.¹⁴⁶ Arguments to the contrary tend to prove too much, for they would eviscerate the presentment requirement for nearly all congressional action if taken to their logical conclusions.

III. PRESENTMENT SHOULD APPLY AS A NORMATIVE MATTER

Normative concerns bolster the textual argument that constitutional amendment proposals must be presented to the President for approval or veto. Presentment would preserve the structural balance and separation of powers, keeping alive the vital checks and balances crucial to our system. It would also ensure that the President, one of two officials elected by a nationwide vote, has an official say in the Republic's most important lawmaking process.

Presentment of amendments is important from a structural perspective. The President is involved in legislation of far less importance¹⁴⁷ than constitutional amendments. This is by design: the Framers did not want Congress to be able to act alone and completely bypass the Executive Branch. Rather, they envisioned the presidential veto as a necessary check on the Legislative Branch:

[T]he power in question . . . furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.¹⁴⁸

Furthermore, the Framers specifically thought that the veto power was necessary for ensuring a proper separation of powers between the branches:

from this requirement "bills proposing amendments to the Montana constitution" and "bills ratifying proposed amendments to the United States constitution." MONT. CONST. art. 6, § 10, cl. 1.

¹⁴⁶ Although not directly on point, it is curious to note that the Confederate States of America (CSA), who largely adopted the U.S. Constitution when drafting their own, chose to modify Article V to eliminate the dilemma altogether:

Upon the demand of any three States, legally assembled in their several conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made: and should any of the proposed amendments to the Constitution be agreed on by the said convention—voting by States—and the same be ratified by the Legislatures of two-thirds of the several States, or by conventions in two-thirds thereof—as the one or the other mode of ratification may be proposed by the general convention, they shall thenceforward form a part of this Constitution.

CONFEDERATE STATES OF AM. CONST. art. V, § 1, cl. 1. That is, the CSA eliminated the congressional-proposal option for amendments and only retained the convention option—an option that the Union had not (and still has not) used.

¹⁴⁷ "[I]ninitely less importance," in the words of Tilghman and Rawle. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 379 (1798) (argument of petitioner Hollingsworth's attorneys).

¹⁴⁸ THE FEDERALIST NO. 73, *supra* note 37, at 495 (Alexander Hamilton).

The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands.¹⁴⁹

The veto power was (and is) the most powerful tool available to the President to defend himself against legislative encroachment and to prevent legislative and executive powers from becoming “blended in the same hands.”¹⁵⁰

All of these arguments apply with equal force to constitutional amendments. If anything, they carry even more force. Normal legislation can always be repealed by simple majorities in subsequent congressional sessions; constitutional amendments cannot.¹⁵¹ So there is an even greater need for the President “to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good.”¹⁵² What is more, the entire notion of separation of powers is constitutional in nature; no statute defines our system of checks and balances.¹⁵³ So the only way to change the balance of power between the branches is to amend the Constitution. How odd, then, if this were the one area in which the President lacks the veto power, rendering him powerless to defend the Executive Branch from the only method capable of permanently disabling it.¹⁵⁴ The entire structure of our federal government thus militates in favor of a presidential role in the amendment process.

It is no answer that constitutional amendments are ultimately ratified by the states, thereby providing the necessary check on Congress. As a structural matter, states are best poised to “focus on the unique impact that

¹⁴⁹ *Id.* at 494 (footnote omitted).

¹⁵⁰ *Id.*

¹⁵¹ *See, e.g.*, U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

¹⁵² THE FEDERALIST NO. 73, *supra* note 37, at 495 (Alexander Hamilton).

¹⁵³ *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 99–102 (1995) (arguing that “[t]he separation-of-powers protections are, in fact, explicitly embodied in the [constitutional] text”).

¹⁵⁴ *But see* Note, *supra* note 128, at 1623 (finding it reasonable to exclude the President from the amendment process because his veto is only meant to protect incursions on the Executive Branch by Congress, not by the states).

a problem may have in a particular geographical or economic area,”¹⁵⁵ not to defend the powers of the President or the federal Executive Branch. “By dividing power on a vertical as well as lateral plane (that is, between the state and federal governments), [the Framers] sought to assure that not all policy decisions would be made at one political level.”¹⁵⁶ In other words, each branch of government (including the states) was expected to be in tension with the others. Indeed, the Framers were likely more concerned with the tensions between the federal government and the states than between the branches of the as-yet undefined federal government.¹⁵⁷ So relying on states—themselves competing “branches” of the federalist constitutional structure—to police the potential aggrandizement of Congress at the expense of the President is akin to having the fox guard the henhouse. State ratification of constitutional amendments is a structural protection that is in addition to, not instead of, a presidential veto power.

Another normative reason supporting presidential involvement in the amendment process is that the President is the only government official who is elected on a nationwide basis, other than the Vice President.¹⁵⁸ Congressmen represent their own districts, Senators their own states.¹⁵⁹ Only the President, accountable to all American citizens, brings a nationwide perspective that rises above the more provincial concerns of individual congressmen.¹⁶⁰ As discussed earlier, a presidential veto of normal legislation induces changes in the vote tallies in Congress.¹⁶¹ This effect would presumably be amplified in the case of a constitutional amendment, where the stakes are much higher. The President’s nationwide voice is an important and valuable contribution to the political dialogue.

One objection may be that the President is perfectly capable of lending his voice to the dialogue even without a formal veto. As the *de facto* leader of his political party, the President is likely to have influence over constitutional amendment proposals as they wend their way through Congress. And later on, the President’s public statements would likely influence the various state legislatures who would have to ratify these amendments. But this objection fails to consider political accountability. An official veto demonstrates a type of transparent “political commitment”

¹⁵⁵ REDISH, *supra* note 153, at 25 (describing the American federalist structure).

¹⁵⁶ *Id.* at 4.

¹⁵⁷ *See, e.g.*, THE FEDERALIST NO. 46, *supra* note 37, at 318–22 (James Madison) (discussing “the disposition, and the faculty” that the federal and state governments have “to resist and frustrate the measures of each other,” and listing ways in which the tension could be minimized).

¹⁵⁸ *Compare* U.S. CONST. art. I, §§ 2–3 (describing the selection of Congressmen and Senators), *with id.* art. II, § 1 (providing for the election of the President). *See also id.* amend. XII (modifying the procedure to elect the Vice President); *id.* amend. XVII (calling for direct election of Senators).

¹⁵⁹ *See id.* art. I, §§ 2–3; *id.* amend. XVII.

¹⁶⁰ *See, e.g.*, THE FEDERALIST NO. 46, *supra* note 37, at 318 (James Madison) (“[T]he members of the Federal Legislature will be likely to attach themselves too much to local objects.”).

¹⁶¹ *See supra* Part II.C.

that is essential to our democracy.¹⁶² Public statements and the bully pulpit are, to be sure, effective weapons in the President's arsenal, but nothing speaks louder than an official endorsement (signature) or rejection (veto) of congressional action. After all, the White House has always made its views on pending legislation known—and yet, as described earlier, congressional vote tallies are almost never the same before and after an official presidential veto.¹⁶³

Another normative objection to presidential involvement is that the Constitution is already devilishly difficult to amend; adding a presidential veto will only make it worse. This is true. But it is of no matter. A constitution that is relatively difficult to amend minimizes the chance that the fleeting whims of a transient supermajority become constitutionalized and thereby bind future generations.¹⁶⁴ That is not to say that all methods of increasing the difficulty of amending the Constitution are desirable. For example, simply increasing the required supermajority in Congress to, say, three-fourths or four-fifths (or nine-tenths) would be one way to protect future generations from such fleeting whims. But such a scheme would allow small congressional minorities or fringe groups to hijack the amendment process, perhaps making the Constitution virtually impossible to amend.¹⁶⁵ That sort of obstacle to the amendment process would be normatively undesirable.

Adding the President to the process is an obstacle of a different kind. Being nationally elected, the President is far less likely to fall captive to parochial interests or to narrow fringe groups than a small group of congressmen or Senators.¹⁶⁶ What is more, the mere possibility of a presidential veto would ensure that Congress would craft its amendment proposals to respect the Executive Branch, which in turn would ensure that

¹⁶² The political commitment principle, in the context of legislative action, is described in REDISH, *supra* note 153, at 137, 157–61. See also Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 451–53 (2006). The colloquial equivalent would be “putting one’s money where one’s mouth is.”

¹⁶³ See *supra* Part II.C.

¹⁶⁴ See AMAR, *supra* note 38, at 287–89 (reviewing various state constitutional amendment procedures rejected by the Framers as models for Article V, including several (such as South Carolina’s) that were more easily amendable). Of course, even Article V is not foolproof against the fleeting whims of transient supermajorities. See U.S. CONST. amend. XVIII (repealed).

¹⁶⁵ The requirement of unanimity to amend the Articles of Confederation was one feature the Framers specifically wished to relax. Madison summarized the view as stated by Hamilton: “It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation.” MADISON, *supra* note 84, at 609 (footnotes omitted).

¹⁶⁶ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 & n.261 (2001) (noting “past Presidents’ relative lack of partisanship” due to “the incentives provided by a national constituency”).

due thought goes into the proposals.¹⁶⁷ In sum, any increased difficulty in amending the Constitution as a result of presidential involvement is a good kind of difficulty, one we should eagerly embrace.

IV. IS THE CONSTITUTION UNCONSTITUTIONAL?

Despite the textual and normative reasons for enforcing a presentment requirement for amendments, in light of clearly settled law, reinstating the presentment requirement for Article V amendments would likely require a new constitutional amendment. This is because there are only two interpretations: either the Constitution requires presentment of amendments or it does not.¹⁶⁸ The latter interpretation (the one adopted to varying degrees by all three branches of government) means that although virtually all congressional action requires presentment, the most important congressional act—proposing constitutional amendments—does not. The former interpretation, which I advocate, potentially means that all previous amendments (except the Thirteenth) were unconstitutionally enacted and are therefore void. This is a disturbing proposition, admittedly at odds with the interpretive technique of allowing long-standing practice to fix the meaning of constitutional text.¹⁶⁹

But a new constitutional amendment would be a curious way to restore Article V's textual, structural, and normatively desirable meaning. Is there any way to require presentment for future amendments without nullifying all of the previous ones? One possible solution is to adopt broad definitions of "presentment" and "approval" such that simple transmittal to the President of a copy of the amendment suffices for the former and the President's failure to return an amendment to Congress with his objections suffices for the latter. Under this approach, all twenty-seven amendments have in fact been presented and approved. We can thus adopt a presentment requirement for future amendments while allowing previously enacted amendments to remain settled and valid law.¹⁷⁰

¹⁶⁷ "Article V sensibly required Congress to get outside approval, a requirement that would deter many self-aggrandizing amendments from even being proposed and would prevent other ill-advised schemes from being adopted." AMAR, *supra* note 38, at 290. Although Professor Amar is referring to the *states* giving "outside approval," his reasoning applies with equal force to the President, in particular when the "self-aggrandizing amendments" come at the expense of the Executive Branch.

¹⁶⁸ See SCALIA, *supra* note 76, at 40 (embracing "the rule that a text does not change" over time because the Constitution's "whole purpose is to prevent change").

¹⁶⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) ("[C]ontemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions."); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.").

¹⁷⁰ Another "solution" is to invoke *stare decisis* to treat the existing twenty-seven amendments as validly enacted and of continued prospective legal force, while simultaneously adopting the textually correct interpretation presented here for any future amendment proposals. See SCALIA, *supra* note 76, at

As discussed in Part II, amendments are passed as joint resolutions,¹⁷¹ and resolutions (along with orders and votes) need only be “approved” by the President, not signed.¹⁷² Conversely, presidential disapproval, even for an order, resolution, or vote, requires an affirmative act—that is, the President must return the parchment or copy to Congress listing the objections.¹⁷³ These two provisions combine to yield a strong default presumption in favor of finding presidential approval, a presumption overcome only by clear evidence to the contrary.

Lending further credence to this default presumption is that the Constitution permits legislation passed by Congress to automatically become law in the face of presidential inaction, as long as Congress remains in session for ten days following its passage.¹⁷⁴ This reinforces the notion that only affirmative steps on the part of the President to return a bill, order, resolution, or vote to Congress can constitute disapproval. Furthermore, the definition of “presented” can be interpreted broadly to simply mean the physical act of transmitting a parchment or copy of the amendment to the President. This was precisely what Senator Howe said in the February 7, 1865 Senate debate:

[T]he resolution now pending declares that it was unnecessary to present [the amendment] to [the President]. I do not think that follows, even if the premises are as stated; for if it had not been presented to the President, I ask you, sir, and I ask the Senate, how would it have been transmitted to the Legislatures of the States? . . . It would not go to the State Department unless presented to the President.¹⁷⁵

Under this definition, all previous amendments have been presented to the President for the simple reason that Congress has always asked the

139 (“The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”).

A principled justification for such an approach is that once a constitutional amendment is ratified by the requisite number of states, all pre-ratification defects are cured. Under this view, the salient feature of constitutional amendments is that they are ratified by the states (either legislatures or conventions therein). So once three-fourths of the states ratify an amendment, it becomes constitutionally valid irrespective of any constitutional defects in the proposal process. This state-centric view of amendment ratification is bolstered by the fact that amendments can also be proposed by the states themselves at a national convention with no federal involvement whatsoever (other than for Congress to perform its mandatory and ministerial duty to call the convention). U.S. CONST. art. V. While undoubtedly problematic as a textual matter, such an approach might be justifiable from a federalist standpoint: if the Constitution is a compact among states, then it would make sense that states are the ultimate arbiters of what is and is not a part of the Constitution. *But see* U.S. CONST. pmb. (stating that “We the People,” and not the states, are the sovereign bodies forming the Constitution).

¹⁷¹ See *Constitutional Amendment Process*, *supra* note 110 (noting that amendments are proposed by joint resolution).

¹⁷² See *supra* Part II.A.

¹⁷³ See *supra* Part II.A.

¹⁷⁴ See U.S. CONST. art. I, § 7, cl. 2.

¹⁷⁵ CONG. GLOBE, 38th Cong., 2d Sess. 630 (1865).

Executive Branch to distribute amendment proposals to the various states.¹⁷⁶

Because no President has ever returned an amendment proposal to Congress, these broad definitions of presentment and approval would save all but two sets of amendments. Table 1 lists for each amendment its proposal date, the last date of the proposing congressional session, and the number of days in between proposal and recess or adjournment.¹⁷⁷

TABLE 1: PROPOSED AMENDMENTS

Amendment	Date Proposed	Last Date of Session	No. Days
1–10; 27	9/25/1789	9/29/1789	4
11	3/4/1794	6/9/1794	97
12	12/9/1803	3/27/1804	109
13	1/31/1865	3/3/1865	31
14	6/13/1866	7/28/1866	45
15	2/26/1869	3/3/1869	5
16	7/12/1909	8/5/1909	24
17	5/13/1912	8/26/1912	105
18	12/18/1917	12/18/1917	0
19	6/4/1919	7/1/1919	27
20	3/2/1932	7/16/1932	136
21	2/20/1933	3/3/1933	11
22	3/21/1947	7/27/1947	128

¹⁷⁶ What is more, all joint resolutions—which include constitutional amendments, *see supra* note 110—that pass both Houses must by law be printed, “signed by the presiding officers of both Houses and sent to the President of the United States.” 1 U.S.C. § 106 (2006). Section 106 was originally enacted in 1947, 61 Stat. 634 (1947), as part of an “ambitious” program to “enact[] into positive law . . . all the titles of the United States Code,” H.R. REP. NO. 80-251, at 2 (1947). But the reenactment into positive law was to be “without any material change” in the substantive law, *id.* (emphasis added), and so the requirement that all joint resolutions be presented to the President must have predated the enactment of § 106. Congress, at least, considered § 106 to be the reenactment—“without any material change”—of a resolution originally passed in 1893 and amended in 1895. *Id.* at 5–6.

¹⁷⁷ Proposal dates are from HUCKABEE, *supra* note 44, at 4 tbl.1. Congressional session dates are from PRESIDENTIAL VETOES, 1789–1988, S. Pub. 102-12, at x–xxvi tbl.2 (1992).

Amendment	Date Proposed	Last Date of Session	No. Days
23	6/17/1960	7/3/1960	16
24	8/27/1962	10/13/1962	47
25	7/6/1965	10/23/1965	109
26	3/23/1971	4/7/1971	15

Only the Bill of Rights (including the Twenty-Seventh Amendment), the Fifteenth Amendment, and the Eighteenth Amendment passed both houses of Congress within ten days of a congressional recess or adjournment, thereby requiring some further evidence of “approv[al]” to legitimize.

The case of the Eighteenth Amendment is obviously moot.¹⁷⁸ As for the Bill of Rights, Congress undoubtedly presented it to President Washington for distribution to the states.¹⁷⁹ Washington had already indicated his approval of whatever amendments Congress chose to propose¹⁸⁰ and did not “disapprove” of them. Indeed, Washington explicitly recognized the urgency and desirability of amending the Constitution:

In his First Inaugural Address, President Washington went out of his way to mention that suitably drafted amendments might answer various “objections which have been urged against” the Constitution and thereby reduce skeptics’ “inquietude.” . . . Washington devoted more than 10 percent of his brief address to the topic of amendments, advising Congress to consider whether the new Constitution might be revised so as to “impregably fortify” the “characteristic rights of freemen” without “endanger[ing] the benefits of an united and effective government.”¹⁸¹

To be sure, Washington delivered these remarks well before Congress passed the amendment proposals. But his post-passage actions were fully consistent with his inaugural address: Washington promptly sent copies of

¹⁷⁸ See U.S. CONST. amend. XXI, § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).

¹⁷⁹ See 1 ANNALS OF CONG. 948 (1789) (Joseph Gales ed., 1834) (“On motion, it was resolved, that the President of the United States be requested to transmit to the Executives of the several States which have ratified the Constitution, copies of the amendments proposed by Congress, to be added thereto, and like copies to the Executives of the States of Rhode Island and North Carolina.”); S. JOURNAL, 1st Cong., 1st Sess. 90 (1789) (Senate concurring in the resolution).

¹⁸⁰ See Washington, *supra* note 8; see also *supra* note 64 and accompanying text.

¹⁸¹ AMAR, *supra* note 38, at 318 (alterations in original). Professor Amar notes in the quoted passage that because of Washington’s role “as president[,] he had no official part to play in the amendment process,” citing *Hollingsworth. Id.* at 318, 594–95 n.7.

the amendments to the states, which strongly suggests that he indeed “approved” of them.¹⁸²

The Fifteenth Amendment was passed just five days before Congress adjourned, and, unlike Washington with the Bill of Rights, President Andrew Johnson may not have fully supported its enactment.¹⁸³ Nevertheless, President Johnson promptly delivered copies of the Fifteenth Amendment (as he did with the Fourteenth) to the states within days of its passage,¹⁸⁴ perhaps waiving any right to a pocket veto.¹⁸⁵

A natural objection to the preceding analysis is that if “presentment” and “approval” can be so loosely defined, then why bother changing the interpretation of Article V? After all, if the path traveled by the first twenty-seven amendment proposals was constitutionally sufficient under these broad definitions, then why change practices now? The answer, of course, lies in the normative justifications for an increased presidential role: a more robust separation of powers, the importance of constitutional amendments vis-à-vis normal legislation, the uniquely nationwide perspective that the President lends to the process, and the importance of a presidential “political commitment.”¹⁸⁶ These reasons do not apply with the same force to previously enacted amendments that are part of settled law. More to the point, none of these normative goals would be furthered by invalidating previously enacted amendments. That is why it makes

¹⁸² Because President Washington so clearly approved of the Bill of Rights, perhaps even the National Archives can be forgiven the error of assuming that “President George Washington *signed this resolution* on October 2, 1789 and forwarded copies to the 11 states that had ratified the U.S. Constitution [and also to] Rhode Island and North Carolina . . .” Press Release, Nat’l Archives, The National Archives Presents the ORIGINAL Bill of Rights—with 12 Amendments! (Dec. 7, 2010) (emphasis added), available at <http://www.preview.archives.gov/press/press-releases/2011/nr11-21.html>.

¹⁸³ Because President Johnson opposed the Fourteenth Amendment and the Reconstruction Acts, it stands to reason that he did not support the Fifteenth Amendment either. See *supra* Part I.C.

¹⁸⁴ President Johnson must have sent the copies immediately, because the first state to ratify the Fifteenth Amendment, Nevada, did so on March 1, just three days after Congress passed the amendment. ROBERT BRADY, THE CONSTITUTION OF THE UNITED STATES AS AMENDED, H.R. DOC. NO. 110-50, at 18 (2007). Furthermore, President Ulysses S. Grant, who took office on March 4—well within the ten-day window—clearly approved of the amendment; after the Fifteenth Amendment was ratified, President Grant took the “unusual” step of “notify[ing] the two Houses of Congress . . . of the ratification of a constitutional amendment,” because “of the vast importance of the fifteenth amendment” whose adoption “completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life.” Ulysses S. Grant, Message to the Senate and House of Representatives (Mar. 30, 1870), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 55, 55–56 (James D. Richardson ed., 1898).

¹⁸⁵ In *The Pocket Veto Case*, 279 U.S. 655, 677 (1929), the Supreme Court emphasized that the reason for a strict ten-day window is to give the President enough time to “carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it.” In this case, because President Johnson examined the joint resolution and promulgated it to the states sometime before March 1, he had already concluded his “due deliberation,” rendering Congress’s March 3 adjournment moot.

¹⁸⁶ See *supra* Part III.

normative sense to apply the presentment requirement prospectively but not retroactively.

CONCLUSION

Despite the clear textual, structural, and normative reasons that dictate presentment of constitutional amendment proposals, all three branches of government have eventually adopted or acquiesced in a practice of sidestepping the President. Given this extensive history, the issue must be treated as settled law. That said, I have offered a theoretical perspective to restore the proper meaning and practice for future amendments without invalidating the existing twenty-seven.

But requiring that future constitutional amendment proposals be presented to the President raises another question: Who will enforce the requirement? In theory, the Supreme Court could enforce the requirement *ex post* if someone challenged an amendment's validity.¹⁸⁷ But given the precedent of *Hollingsworth* (and the reiteration of *Hollingsworth's* holding in *INS v. Chadha*), the Supreme Court is unlikely to do so.

A surer way would be for the President to take the initiative, either by signing or vetoing constitutional amendment proposals that land on the Oval Office's desk. Although a signature is not necessary to denote approval, signing an amendment proposal would be a symbolic way for the President to signal an official role in the process. It is hard to imagine that the Supreme Court would object to a presidential signature on a constitutional amendment (even assuming someone could be found with standing to litigate the issue), especially given the precedent of the Thirteenth Amendment.

More dramatically, the President could veto an amendment proposal. The Court would likely refrain from interfering in this situation as well. Even assuming someone could be found with standing to challenge such a veto, this would seem to present a classic political question: "[T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"—here, the Executive Branch—is self-evident.¹⁸⁸ In this way, the President could act unilaterally to reclaim the Executive's rightful role in the

¹⁸⁷ See Note, *supra* note 128, at 1622 (“[T]he courts, the government branch primarily responsible for constitutional interpretation and protection, will not give effect to amendments which have not satisfied the requirements of article V.” (footnote omitted)); see also *id.* at 1642 (“Once a controversy was within the general jurisdiction of a federal court, it would determine the validity of the amendment involved. Since a court cannot be made to apply a rule of law which it finds to be unconstitutional, congressional attempts to exclude judicial review of an amendment’s validity would be to no avail.” (footnote omitted)).

¹⁸⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962); cf. *Coleman v. Miller*, 307 U.S. 433, 457 (1939) (Black, J., concurring) (“[W]hether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, calls for decisions by a ‘political department’ of questions of a type which this Court has frequently designated ‘political.’”).

constitutional amendment process. Upon reflection, it appears that Herman Cain's "grasp of the Constitution" is quite firm—perhaps even (unwittingly) sophisticated—after all.