

MAKE ME DEMOCRATIC, BUT NOT YET: SUNRISE LAWMAKING AND DEMOCRATIC CONSTITUTIONALISM

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“Sunrise amendments”—constitutional provisions that only take effect after a substantial time delay—could revolutionize American politics. Yet they remain undertheorized and unfamiliar. This Article presents the first comprehensive examination of sunrise lawmaking. It first explores a theoretical puzzle. On the one hand, sunrise lawmaking resuscitates the possibility of using Article V amendments to forge “a more perfect union” by inducing disinterested behavior from legislators. On the other, it exacerbates the “counter-majoritarian difficulty” inherent in all constitutional lawmaking. When one generation passes a law that affects exclusively its successors, it sidesteps the traditional forms of democratic accountability that constrain and legitimate the legislative process. The Article accordingly argues that while sunrise lawmaking holds considerable promise, it should be confined to “democracy-enhancing” reforms that increase future generations’ capacity to govern themselves. With this normative framework in place, the Article turns to the question of how time delays have actually been used in American constitutional history. It identifies six different instances of sunrise lawmaking in the U.S. Constitution. It argues that several of these illustrate how sunrise lawmaking can enhance the democratic character of American government, but at least one offers a cautionary tale of how temporal dislocation in constitutional lawmaking can have pernicious consequences.

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INTRODUCTION: THREE IMPOSSIBLE REFORMS

A striking feature of modern American politics is that the Constitution often appears to stand in the way of democracy. Consider three familiar examples:

Congressional representation for the District of Columbia: Article I provides that only “States” receive representation in the Senate and House of Representatives.¹ As a result, the nearly 650,000 residents of the District of Columbia have no voting representative in Congress.² This despite the fact that the District has a larger population than two fully represented states (Wyoming and Vermont), and contributes more federal tax revenue than fourteen.³ A *Washington Post* poll found that Americans support granting representation to the District by a more than two-to-one margin.⁴ And multiple international organizations have explicitly condemned the United States for failing to provide the District’s citizens with full rights of political participation.⁵

The Electoral College: Pursuant to Article II, Section 1, the United States elects its chief executive through the Electoral College,

¹ U.S. CONST. art. I, §§ 2–3.

² They do have a single nonvoting representative. See CONGRESSWOMAN ELEANOR HOLMES NORTON, <http://norton.house.gov> (last visited Oct. 20, 2015).

³ Louis Jacobson, *D.C. Voting-Rights Post Offers Hit-and-Miss Data*, POLITIFACT (Feb. 6, 2013, 3:54 PM), <http://www.politifact.com/truth-o-meter/statements/2013/feb/06/facebook-posts/dc-voting-rights-post-offers-hit-and-miss-data/>.

⁴ *Washington Post Poll*, WASH. POST (Apr. 23, 2007), http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_042307.html.

⁵ See Press Release, Eleanor Holmes Norton, Congresswoman, District of Columbia, Norton Says Latest UN Human Rights Committee Criticism of U.S. Treaty Violation on D.C. Voting Rights Calls for Urgent Action from the Administration and Congress (Mar. 28, 2014), <http://norton.house.gov/media-center/press-releases/norton-says-latest-un-human-rights-committee-criticism-of-us-treaty>.

a convoluted and idiosyncratic system employed by no other democracy in the world.⁶ On four separate occasions, this electoral system has put presidential candidates who lost the national popular vote into the White House.⁷ The Electoral College once served the interests of southern slaveholders⁸ and currently gives outsize importance to voters lucky enough to live in states that are small or have electorates more or less evenly divided between Democrats and Republicans. But it is unclear that the system serves the country as a whole. In fact, nearly two thirds of Americans now support eliminating the Electoral College,⁹ and the figure has hovered around sixty to eighty percent since World War II.¹⁰

Equal representation in the Senate: Article II, Section 3 mandates that each state receive two senators. This uniform allocation grants the same senatorial representation to political units of dramatically different population. It also stands in stark contrast to the apportionment practices of many other democracies. In highly egalitarian Austria, for instance, no voter has more than 1.5 times the political clout of any of her fellow citizens by virtue of where she lives. In the United States, by contrast, a resident of Wyoming has 66 times more representation in the Senate than a resident of California. This makes the U.S. Senate the fourth-most malapportioned legislative chamber in the entire world.¹¹ According to the Congressional Quarterly, in one out of every ten legislative votes in the Senate between 1990 and 2010, the losing side actually represented more American citizens.¹²

⁶ See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 471 (2012) (“If the federal electoral college is so good, why does no state (or foreign country, for that matter) closely follow it?”).

⁷ The years were 1824, 1876, 1888, and 2000. D’Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG (Mar. 24, 2008), <http://www.factcheck.org/2008/03/presidents-winning-without-popular-vote/>.

⁸ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 97–98 (2006) (discussing the Electoral College’s place in a system of “proslavery malapportionment” that “helps explain the proslavery tilt of antebellum American law and politics”).

⁹ Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), <http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx>.

¹⁰ *Gallup Polls: Consistent Super-Majority Support for a National Popular Vote*, FAIRVOTE, http://archive.fairvote.org/electoral_college/Gallup_Polls.pdf (last visited Oct. 20, 2015) (presenting a summary of Gallup Polls over the past several decades).

¹¹ See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html> (last visited Oct. 28, 2015).

¹² See *id.* Note that each of the above undemocratic features of the Constitution are “hard-wired” into it, to use Sanford Levinson’s term—because they are the product of clear, unambiguous constitutional text, they are relatively immune to change through creative judicial construction. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE*

There is an irony to this state of affairs—at least if viewed from the perspective of “democratic constitutionalism,” which we take as our normative orientation in this Article. Democratic constitutionalism understands the Constitution as the product of an unprecedented experiment in democratic self-government.¹³ In creating a framework of fundamental law, touted by its proponents as “purely democratic”¹⁴ and put to the people collectively for ratification, the founding generation put to the test theories of popular sovereignty developed by generations of radical political philosophers working in the social contract tradition.¹⁵

Nevertheless, many governmental structures established by the Constitution seem to violate the political ideal of “one person, one vote”¹⁶ on which the document’s claim to democratic legitimacy rests—and the supermajority requirements for amendment make these structures difficult to change.¹⁷ In past generations, dramatic political reforms have been achieved through the Article V amendment process—for example, the expansions of the franchise in the Fifteenth and Nineteenth Amendments—but contemporary partisan gridlock seems to preclude such transformative amendments. In its place, scholars and activists now focus on non-Article V amendment processes,¹⁸ or call for new constitutional conventions,¹⁹ and have lost confidence in the textually prescribed mechanism for constitutional change.

This Article explores a promising technique for achieving fundamental political reforms without abandoning the Article V amendment process or the traditions of democratic self-government and popular sovereignty that the Constitution was meant to realize. It rests on an old hope: that no matter how bitterly divisive everyday politics may be, lawmakers—including ordinary citizens approving constitu-

CAN CORRECT IT) 29 (2006) (“I am interested almost exclusively in what I am terming the ‘hard-wired’ parts of the Constitution. These include *bicameralism* and, most important, the *indefensibly apportioned Senate*, which gives equal voting power to Wyoming and California alike.”).

¹³ See AMAR, *supra* note 8, at 5 (describing the creation and ratification of the Constitution in 1787 as “the most democratic deed the world had ever seen”).

¹⁴ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 484 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 2 ELLIOT’S DEBATES].

¹⁵ See *infra* Part II.A.

¹⁶ *Cf. Reynolds v. Sims*, 377 U.S. 533, 563–64 (1964) (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . .” (internal quotation marks omitted)).

¹⁷ See U.S. CONST. art. V.

¹⁸ For a discussion of non-Article V amendment proposals, see *infra* Part II.B.

¹⁹ See, e.g., LEVINSON, *supra* note 12, at 11–13 (calling for a new constitutional convention to address democratic deficiencies in American government).

tional changes—are capable of surmounting parochial interests and promoting the general welfare when planning for the distant future. As Gouverneur Morris eloquently put it at the Philadelphia Convention, when we create constitutional provisions that will last for decades, or even centuries, our perspective should “be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular Spot.”²⁰

In practice, this lofty aspiration is often no match for the immediate need for constitutional lawmakers—who are, after all, usually elected politicians—to satisfy their constituents. But what if, rather than trying to change the Constitution *today*, we instead attempted to amend it for the distant future by imposing time lags between the moment when new constitutional provisions were enacted and when they took effect? Perhaps, when freed from current exigencies, constitutional lawmakers would trade narrow conceptions of present self-interest for the broad-minded perspective that Morris advocated.

Several earlier scholars have, in passing, raised just this possibility. The philosopher Jon Elster has suggested that since implementation delays make it difficult to foresee who will profit from any given reform, they create “a veil of ignorance that forces an agent to put himself in everybody’s place and thus reduces the importance of *interest*.”²¹ He speculates that constitutional drafters whose decisions only go into effect years—or even decades—later may find it easier to “legislate in the interest of all and for the indefinite future” and ignore the “short-term and partisan motives imposed on them by their constituencies.”²² Legal scholar Akhil Amar is even more hopeful and has put the possibility of what he calls “sunrise” lawmaking forcefully on the agenda of constitutional theory. In a recent book, he advocates widespread use of “a different species of rules that should properly go into effect—that should ‘sunrise’—only after a substantial time delay.”²³ He claims that such “sunrise amendments” would transform the character of constitutional debates, allowing “[j]ustice-seeking reformers” to “ultimately prevail in time, using time” to accomplish a variety of important goals.²⁴

²⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 530–31 (Max Farrand ed., 1911) [hereinafter 1 FARRAND’S RECORDS].

²¹ JON ELSTER, ULYSSES UNBOUND 146 (2000).

²² *Id.* at 144.

²³ AMAR, *supra* note 6, at 474; *see also id.* at 474–77 (discussing the promise of sunrise lawmaking further).

²⁴ *Id.* at 474. For a recent article that explores some of the transformative reforms that could be achieved through sunrise lawmaking, see Edward B. Foley, *The Posterity Project: Developing a Method for Long-Term Political Reform*, 66 OKLA. L. REV. 1 (2013).

Yet for all its promise, sunrise lawmaking remains under-explored.²⁵ Scholars have yet to consider in detail the ways in which writing tomorrow's constitution today both ameliorates and exacerbates the internal tensions of democratic constitutionalism. Nor has anyone so far analyzed the many important uses of time lags throughout U.S. constitutional history or the relationship between sunrise lawmaking and longstanding questions of constitutional theory.²⁶ This Article attempts to fill these gaps.

Sunrise lawmaking poses a particular puzzle for democratic constitutionalism. On the one hand, it can be used to enlarge the sphere of democratic participation when short-term vested interests might otherwise stand in the way, thus enabling a fuller realization of democracy *within* the existing constitutional frame. On the other, it amplifies the central tension between the logic of democracy and the logic of constitutionalism—the famous “dead hand” problem that arises when one generation's decisions bind another's. Under a sunrise amendment, the generation that makes constitutional law does not propose to live under the reforms it enacts for the future. This creates an absence of democratic accountability that does not exist with other forms of constitutional (or ordinary) lawmaking, all of which require legislators to live under the laws they pass.

From the perspective of democratic constitutionalism, we argue, there are normatively desirable and undesirable ways to use this tech-

²⁵ Amar is the first to enthusiastically endorse the use of delayed amendments to achieve beneficial constitutional reforms (and Elster seems to have been the first to consider how this could work), but the proposal belongs to a tradition of scholarship that explores the effects of veils of ignorance and time delays in constitutional law. Other scholars have examined how placing lawmakers behind veils of ignorance in ordinary legislative contexts can have salutary effects, *see, e.g.*, Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990), and explored the ways in which the Constitution creates such veils of ignorance, *see* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001). Still more have emphasized how the long time horizon on which constitutions operate keeps constitutional lawmakers from being able to guess reliably what the direct effects of many constitutional provisions will be, which can facilitate the process of drafting. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 78 (1962) (“[U]ncertainty that is required in order for the individual to be led by his own interest to support constitutional provisions that are generally advantageous . . . seems likely to be present at any constitutional stage of discussion.”).

²⁶ While the historical focus of our Article is on the American experience, we hope our analysis of delayed constitutional change and its relationship to democratic constitutionalism will be of general relevance to scholars of comparative law and constitutional theory. For a comparative-constitutional analysis of Article V, *see* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1037–40 (2014). *See also* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014) (performing a comparative analysis of the structure of formal amendment rules across different constitutional regimes).

nique of constitutional lawmaking. Since sunrise lawmakers are not constrained by one of the most important traditional mechanisms of democratic accountability—the requirement that they and their constituents actually live under the laws they authorize—they can only legislate legitimately if they understand themselves as trustees for their successors, who must one day assume autonomy.²⁷ This relationship obligates current decisionmakers to use sunrise lawmaking only when doing so will enhance subsequent generations' ability to govern themselves democratically. Sunrise lawmakers can either fulfill or violate this obligation through what we call “democracy-enhancing” or “democracy-restricting” measures. The latter can result from attempts at open intergenerational exploitation or from benevolent, but misguided, attempts at paternalistic control of the future's political decisions. Either violates the trustee relationship in which the present generation stands to its progeny.

From this normative orientation we are able to review the text and history of the U.S. Constitution, identifying its “sunrise clauses” and classifying them according to our framework. We discuss six provisions in the Constitution that have sunrise features: the Slave Importation Clause of Article I, Section 9, which delayed Congress's power to regulate the slave trade by twenty years; the Natural Born Citizen Clause of Article II, Section 1, which excluded future, but not present, immigrants from running for President; the Eighteenth Amendment, which delayed the start of Prohibition; the Twentieth and Twenty-Second Amendments, which pushed back electoral reforms so that they would not affect incumbent officials; and the Twenty-Seventh Amendment, which required legislators to insert time lags into any congressional pay increases. In most of these instances, drafters used temporal dislocation to enhance the democratic character of the American constitutional order. But in crafting one notable constitutional provision—the Natural Born Citizen Clause—the Framers appear to have engaged in democracy-restricting sunrise lawmaking, probably for reasons of misguided paternalism rather than intergenerational exploitation, but with important and pernicious consequences nonetheless.

With this mixed historical record in mind, we offer a qualified endorsement of sunrise lawmaking. Without it, or some similar innovation, faith in democratic constitutionalism will only wane further, as the political paralysis that blocks most efforts to amend the Constitu-

²⁷ This accords with Kant's conception of a guardian's responsibilities towards its wards. See *infra* note 157.

tion through the Article V process shows no signs of receding.²⁸ Yet sunrise lawmaking also presents the risk that we will betray democracy in our attempts to realize it. Like all double-edged swords, it must be wielded carefully.

I SUNRISE LAWMAKING

A. *Sunrise/Sunset*

Sunrise lawmaking is best understood by comparison to its mirror image: sunset lawmaking. Sunset clauses—provisions that terminate automatically after a fixed period of time unless expressly reauthorized—have played an important role in American politics since the founding.²⁹ Article I of the Constitution itself mandates that all military appropriations must sunset within two years.³⁰ And by the dawn of the twenty-first century, sunset provisions had spread to many other areas of legislative practice as well.³¹ The USA Patriot Act of 2001, for example, established special executive authorities that sunset after four years,³² while the Violent Crime Control and Law Enforcement Act of 1994 imposed a ten-year assault weapons ban, which lawmakers subsequently allowed to lapse.³³ Sunset provisions are especially popular in tax legislation, with the temporary credit for research and development³⁴ and the Bush tax cuts of 2001³⁵ offering notable examples.

²⁸ For an extended discussion of modern congressional gridlock and its implications, see Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013). For a classic analysis of how legislation works in government with divided party control, see DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 1–7 (2d ed. 2005).

²⁹ See *Sunset Law*, BLACK'S LAW DICTIONARY 1665 (10th ed. 2014) (defining a “sunset law” as a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed”). For a discussion of sunset techniques in legislation and regulation, which draws on comparative sources, see SOFIA RANCHORDÁS, *CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION* (2014).

³⁰ U.S. CONST. art. I, § 8 (“[N]o appropriation of money to [raise and support armies] shall be for a longer term than two years . . .”).

³¹ For a review of this history, and a skeptical critique of the virtues of sunset provisions, see Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011).

³² 18 U.S.C. § 2510 (2004) (amended 2001).

³³ Pub. L. No. 103-322, § 110, 108 Stat. 1796, 2000.

³⁴ See *Helping Small Business Innovators Through the Research and Experimentation Tax Credit: Hearing Before the H. Comm. on Small Bus.*, 111th Cong. 2 (2009) (statement of Rep. Nye, Chairman, H. Subcomm. on Contracting & Tech.) (explaining how the credit “has been reauthorized 1 year at a time, often at the last minute, retroactively, and after the credit has expired” for more than three decades).

³⁵ Economic Growth and Tax Relief Reconciliation Act of 2001 § 901(a), 26 U.S.C. § 1 (2006) (amended 2002 & 2012) (repealed 2013).

At first glance, the difference between sunrise and sunset law-making may seem merely formal or semantic. For example, while the 2001 Bush tax cuts instituted rate reductions that sunset after ten years,³⁶ one could easily imagine a functionally similar legislative program of *increased* marginal rates that “sunrised” after the same time period. Both would allow legislators to establish a lower set of marginal rates for the immediate future and a different, higher set of marginal rates for all subsequent years.

Yet there are important distinctions between the two possibilities. To illustrate them, suppose that the legislature of Morningland, which has a flat tax rate of 15%, adopts a “sunrise tax increase” that raises the rate to 20% beginning in ten years. Meanwhile, the lawmakers of Eveningland, which has a flat tax rate of 20%, adopt a “sunset tax cut” that lowers the rate to 15% for the next ten years. From the perspective of a taxpayer, the two legal regimes are indistinguishable.

	Tax Rate in Years 1–10	Tax Rate in Years 11+
<i>Morningland</i>	15%	20%
<i>Eveningland</i>	15%	20%

But something meaningfully different has happened across the two states. The legislators of Morningland have opted to maintain the present status quo for the next ten years before making a change. They have thus chosen a default for the present and a new policy for the future. The lawmakers of Eveningland, by contrast, have adopted a new policy for the present and a reversion to a pre-existing default for the future.

	Policy in Years 1–10	Policy in Years 11+
<i>Morningland</i>	Default	Change
<i>Eveningland</i>	Change	Default

If the choice to stick with a default were just like any other decision, then this distinction would indeed be merely formal. But a great deal of research in political science and psychology suggests that the choice to stick with a default is not like other decisions.³⁷ It is, in many contexts, no choice at all; it is the absence of a choice.³⁸ Our frequently derided “do-nothing Congress,” for example, does not “do

³⁶ *Id.*

³⁷ See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 348 (2011) (summarizing research on how departures from defaults tend to be disfavored because they produce greater levels of regret and blame than inactive decisions do).

³⁸ See, e.g., Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 176–77 (2003) (arguing that agents will often “fail[] to choose” for themselves, in part because “a change from any status quo entails time and effort, and many people seem to prefer to avoid both of these”).

nothing” because it finds the status quo ideal—it does nothing because it is incapable of actively choosing anything.³⁹

While it is possible that the legislatures of Morningland and Eveningland both earnestly believe that economic conditions favor a lower tax rate in the short term and a higher one in the long term, and thus both deliberately choose the lower rate for now and the higher rate for later, it is also possible that each simply surrenders to the forces of inertia for one of those time periods. The difference is that Morningland has come to a consensus on future policy that it could not reach for the present,⁴⁰ while Eveningland has come to a consensus on present policy that it could not agree to impose on the future.⁴¹

Sunrise and sunset lawmakers thus display very different beliefs about how current political choices should affect posterity. Sunset clauses reflect epistemological modesty—they allow the present to conduct an experiment without presuming that future lawmakers should continue it.⁴² They also force deliberation.⁴³ Alexander Hamilton supported the Constitution’s two-year military appropriations limit because it required the legislature “once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter,” rather than allowing military

³⁹ See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2230 (2013) (discussing how an inability to reach proactive decisions can cause “[a]rbitrary inaction” in which a legislature sticks to some default even though it may not reflect the policy preferences of a majority). Obviously there is a distinction between the mechanisms that lead an individual to stick to a default in, say, his retirement portfolio allocation, and a legislature to stick to a policy default. But in both cases we can say that the ultimate selection does not necessarily reflect either the decisionmaker’s (or decisionmakers’) substantive preferences between outcomes so much as a desire to avoid the costs associated with making any active choice.

⁴⁰ Not all time delays reflect present-day dissensus. The “gradual rollout” provisions that often appear in ordinary legislation probably represent a shared view that piecemeal implementation will work best. Many of the central features of the Affordable Care Act, for example, did not come into effect until several years after the law was passed for logistical reasons. See *Key Features of the Affordable Care Act by Year*, DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html> (last visited Aug. 10, 2015). But the most interesting forms of sunrise lawmaking—the ones on which this Article focuses its attention—use time delays as a way to accommodate disagreement about what to do today.

⁴¹ Sunset clauses are particularly popular in tax legislation, for example, because they allow legislators to satisfy “pay as you go” requirements without having to come to long-term consensus about budget balancing. See Kysar, *supra* note 31, at 1011–12.

⁴² See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 248 (2007) (arguing that “temporary legislation” has benefits in “policy contexts dominated by uncertainty” because it “facilitate[s] experimentation and adjustment in public policy”).

⁴³ See Kysar, *supra* note 31, at 1041–43 (laying out and critiquing this position).

expenditures to become entrenched through inaction.⁴⁴ Thomas Jefferson articulated the same principle at a higher level of generality when he famously advocated that all laws, including constitutions, sunset after nineteen years in order to allow each generational majority to construct its own legal regime.⁴⁵

Sunrise lawmakers, by contrast, do wish to impose their choices on the future—and only on the future. That is the sole point of their legislative endeavors. If a sunrise law fails to affect the future—if it is repealed before the end of its implementation lag, for example—then it accomplishes nothing at all. While sunset laws make it easy for future lawmakers to reject a new policy (by requiring them actively to renew it if they want to keep it), sunrise laws will only succeed if reversing a previous legal enactment is *difficult*. If legislation can be effortlessly repealed, then sunrise lawmaking is a pointless—or at least merely hortatory—endeavor. If, on the other hand, inertia or supermajority requirements make it exceedingly difficult to undo what past legislatures have done, sunrise lawmaking will prove highly effective.

Sunset lawmaking thus reflects the spirit of the ordinary democratic process: It enables contemporary majorities to govern themselves without simultaneously making rules for the future. Sunrise lawmaking, by contrast, reflects the spirit of constitutionalism: It enables contemporary majorities to cast their eyes forward and think only of the future.⁴⁶ As we emphasize, this feature gives it the power to reshape constitutional lawmaking—for better or for worse.

B. Sunrise Amendments as Tools of Constitutional Lawmaking

Hamilton and Jefferson lauded sunset clauses for promoting distinctively *democratic* virtues: deliberation and self-determination. Sunrise lawmaking is promising because it can promote a distinctively *constitutionalist* virtue: disinterested consideration of a polity's long-term needs.

The desire for constitutional lawmaking to reflect impartial, forward-looking thinking has a venerable pedigree. At the Philadelphia Convention, James Wilson asked his fellow delegates to “con-

⁴⁴ THE FEDERALIST NO. 26, at 129 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

⁴⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd ed., 1958).

⁴⁶ Constitutional lawmaking is thus particularly amenable to sunrise clauses, whereas much ordinary legislation responds to immediate concerns. Compare ELSTER, *supra* note 21, at 145 (suggesting that sunrise lawmaking “is utopian and probably undesirable” in the many contexts “in which waiting is an unaffordable luxury”), with AMAR, *supra* note 6, at 474 (arguing that constitutions are designed to establish enduring rules for the long term).

sider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment.”⁴⁷ It was clear to him, and to many of his colleagues, that this weighty task required a less parochial approach than everyday politics.⁴⁸ In fact, some delegates assumed that, in the heady atmosphere of a constitutional convention, broad-minded thinking would come about of its own accord. Gouverneur Morris suggested that adopting a disinterested perspective when making law that would last for centuries was not only desirable, but unavoidable. “[A]fter all,” he remarked, “how little can be the motive yielded by selfishness for such a policy” when no one could know for certain what the interests of his children or grandchildren would be?⁴⁹ Speaking in a similar vein, George Mason argued that the long time horizon of constitutional law left delegates no choice but to “attend to the rights of every class of the people” because “however affluent their circumstances, . . . the course of a few years, not only might but certainly would, distribute their posterity throughout the lowest classes of Society.”⁵⁰ As a result of this inevitable reshuffling, “[e]very selfish motive therefore, every family attachment, ought to recommend such a system of policy as would provide no less carefully for the rights—and happiness of the lowest than of the highest orders of Citizens.”⁵¹

Modern scholars often agree that legislators will—or at least should—display less partiality when drafting constitutions than when passing ordinary legislation.⁵² Jack Balkin, for example, argues that the durability of constitutional law forces

majorities to think hard about the consequences of what they want to do, because they and their descendants will have to live with what they put in place for a long time. This keeps majorities from focusing on short-term consequences It also creates a sort of temporal veil of ignorance. It encourages existing majorities to imagine themselves as potential minorities in the future.⁵³

Larry Sager similarly writes that “[d]ecisionmaking about a long-distance Constitution is a special kind of venture, one which reinforces

⁴⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Max Farrand ed., 1911) [hereinafter 2 FARRAND’S RECORDS].

⁴⁸ See, for example, the statements of James Madison and Alexander Hamilton in 1 FARRAND’S RECORDS, *supra* note 20, at 421–24.

⁴⁹ *Id.* at 531.

⁵⁰ *Id.* at 49.

⁵¹ *Id.*

⁵² This premise is a staple of rational choice literature on constitutionalism. See, e.g., GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES 28–31 (1985); BUCHANAN & TULLOCK, *supra* note 25, at 77–80; DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 61–63 (1996).

⁵³ JACK M. BALKIN, LIVING ORIGINALISM 30–31 (2011) (footnote omitted).

the tendency to generalize away from one's own time and circumstances to other times and other circumstances—potential circumstances representing a considerably broader range of values and interests.”⁵⁴

Yet there may be reasons to doubt constitutional lawmaking's power to induce disinterested, universalistic thinking in all cases. Constitutional lawmakers are after all usually politicians who must answer to the immediate demands of their constituents or risk losing their jobs. Jon Elster argues that this produces a constant dilemma: “On the one hand, the very nature of a constitution requires [lawmakers] to legislate in the interest of all and for the indefinite future. On the other hand, they also have short-term and partisan motives imposed on them by their constituencies.”⁵⁵ Since there is no reason to assume that the first pull will always overpower the second, Elster dismisses as mere “cant” the common assumption “that framers and politicians differ not only with regard to their respective tasks, but also with regard to their motives.”⁵⁶

The persistence of the undemocratic electoral idiosyncrasies discussed in the Introduction—the lack of representation for D.C., the Electoral College, and the malapportioned Senate—suggests Elster's skepticism may be warranted. One could offer principled defenses of America's odd elections practices—and some have⁵⁷—but it seems obvious that those who benefit from the current arrangement pose the real obstacle to changing it. Reforming our electoral system would have predictable, immediate, and negative consequences for identifiable groups. The District of Columbia's residents vote overwhelmingly Democratic; granting them congressional representation would be tantamount to adding three new members to the Democratic Caucus.⁵⁸ Switching to a national popular vote would instantly undermine the outsize clout wielded by politically divided states in presi-

⁵⁴ Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 951–52 (1990).

⁵⁵ ELSTER, *supra* note 21, at 144.

⁵⁶ *Id.* at 172.

⁵⁷ See, e.g., Ann Althouse, *Electoral College Reform*, 95 Nw. U. L. REV. 993 (2001) (reviewing ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1971); JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE* (1975); LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* (1972)) (describing several authors' defenses of the Electoral College).

⁵⁸ The District has given more than eighty percent of its vote to the Democratic candidate in each of the past eight presidential elections. See UNIVERSITY OF CALIFORNIA, SANTA BARBARA, AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=2012> (last visited Aug. 12, 2015).

dential elections.⁵⁹ And small states are unlikely to be any more willing to concede a privileged place in the Senate now than they were back in 1787.⁶⁰ Given the supermajority required for an Article V amendment, these opposing forces are more than enough to derail attempts at reform—even those with majority support.⁶¹

Sunrise amendments combat the tendency to prioritize parochial interests over the general welfare by removing many short-term motivations from the political calculus. If a legislator is asked to support a policy that has deleterious short-term effects on his constituents but positive long-run effects on the nation, he faces, as Elster notes, a dilemma. However, if that same policy has no short-run effects on the legislator's constituents—or anyone else for that matter—because it does not go into effect for some long period of time, the dilemma fades away, freeing the lawmaker to focus on the best overall solution.⁶² Sunrise lawmaking's method of building agreement about the future while sidestepping disagreement in the present can thus transform constitutional politics under the plausible assumption that individuals are more responsive to general considerations when making law without immediate interests in mind.

Of course, delayed implementation cannot eradicate all parochial concerns from constitutional lawmaking. Many legislators may believe—correctly or not—that they can reliably identify how particular policies will affect their constituents' descendants in the distant

⁵⁹ See Nate Silver, *Arizona Is (Probably) Not a Swing State*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 27, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/04/27/arizona-is-probably-not-a-swing-state/> (discussing the wide disparity in different states' likelihood of proving decisive in the presidential election).

⁶⁰ The tendency of small-state and large-state representatives to look primarily to the short-term interests of their constituents when debating questions of proportional representation is one of the oldest features of American constitutionalism. The Philadelphia Convention featured considerable division on the question of representation. See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 400–04 (2000). It remains contested whether any change eliminating uniform Senate representation would be constitutionally permissible without unanimous support given the limitations imposed by Article V. Compare AMAR, *supra* note 8, at 292–99 (arguing such a change would be permissible), with John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 182–86 (Leslie Green & Brian Leiter eds., 2011) (suggesting it would not).

⁶¹ The supermajority requirement may have become even more restrictive over time as the number of U.S. states has increased. See Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 653 (2011) (“All else being equal, this change in the denominator for Article V has implied a directly proportionate increase in the difficulty of ratifying proposed amendments.”).

⁶² See ELSTER, *supra* note 21, at 144 (arguing that the power of immediate interests is attenuated when legislation does not take effect for many years).

future.⁶³ Additionally, some lawmakers may be more concerned with a proposed measure's expressive meaning than with its practical effects—more interested, for example, in what eliminating the Electoral College communicates about “New Hampshire” in the abstract than in how it affects the well-being of any flesh-and-blood Granite Staters, now or in the future.⁶⁴

Yet lawmakers are still unlikely to be as politically constrained by distant effects as they are by the immediate need to satisfy their electoral bases. Our pervasive inability to address problems such as climate change, whose effects are primarily felt in the future, suggests that future consequences often count for less in the political calculus.⁶⁵ To the extent this is true, a hypothetical New Hampshire legislator would have far less difficulty explaining to his constituents why he voted to diminish the political power of future generations of Granite Staters through a sunrise amendment abolishing the Electoral College than he would justifying a vote to eliminate the Electoral College today. It is therefore likely that amending the Constitution at a lag would help bring about the world that Gouverneur Morris and George Mason optimistically assumed we were already living in. Lifting many of the pressures of legislating for the present would leave constitutional drafters freer to focus on general principles for the future.

Sunrise amendments could thus open up a range of promising possibilities.⁶⁶ Each of the seemingly impossible reforms described in the Introduction, for example, might be attained through sunrise law-making. While it is easy to identify the immediate winners and losers

⁶³ For example, about half of Americans over seventy-five currently reside in the state of their birth, so a representative of a small state might reliably predict that his descendants will continue to be benefited by Senate malapportionment. See PING REN, U.S. CENSUS BUREAU, *LIFETIME MOBILITY IN THE UNITED STATES: 2010*, at 4 tbl.2 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-07.pdf>.

⁶⁴ Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 417 (1999) (arguing that people seek to see their “own distinctive conception of virtue authoritatively confirmed” in the law, and their “cultural adversaries’ officially repudiated”).

⁶⁵ Empirical research suggests that we dramatically discount the importance of future effects. One study, for example, found that subjects were indifferent between saving one person today and forty-five people in 100 years. Maureen L. Cropper et al., *Preferences for Life Saving Programs: How the Public Discounts Time and Age*, 8 J. RISK & UNCERTAINTY 243, 244 (1994). But see Shane Frederick, *Measuring Intergenerational Time Preference: Are Future Lives Valued Less?*, 26 J. RISK & UNCERTAINTY 39, 40 (2003) (finding that levels of intergenerational time preference vary significantly depending on how the questions are presented).

⁶⁶ See Foley, *supra* note 24, at 10–18 (identifying a variety of reforms that could be accomplished through delayed amendments, including the elimination of the Electoral College, campaign finance reform, and fixed terms for Supreme Court Justices).

from reforming the Electoral College, the Senate, or D.C.'s congressional representation, the vagaries of political realignments and population shifts make it difficult to pin down the future effects of these changes.⁶⁷ It might therefore be possible for reformers to obtain the broad-based support required to alter the constitutional specifications for elections through sunrise lawmaking.

In the process, these reformers might also transform our constitutional discourse, creating a political space in which lawmakers could work towards shared goals for the future rather than squabble over narrow, immediate disputes. Our political culture as a whole—frequently assailed for being too partisan and polarized⁶⁸—could reap the benefits of this newfound common ground.

II

SUNRISE LAWMAKING AND DEMOCRATIC CONSTITUTIONALISM

The use of sunrise lawmaking to break free from political paralysis holds special promise—and presents a particular puzzle—for democratic-constitutionalist accounts that understand the Constitution as the institutional realization of popular sovereignty.⁶⁹ The promise is that sunrise lawmaking could provide a means for

⁶⁷ When California was admitted to the union in 1850, for example, it was the eighth-smallest state in the country; a century later it was the second largest. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 24–39 (1975).

⁶⁸ See, e.g., Jill Lepore, *Long Division: Measuring the Polarization of American Politics*, NEW YORKER, Dec. 2, 2013, at 75 (reviewing empirical metrics and popular sentiments); *House and Senate Polarization 1879–2014*, VOTEVIEW (Dec. 22, 2014), <http://voteviewblog.wordpress.com/2014/12/22/house-and-senate-polarization-1879-2014/> (finding that both houses of Congress are more polarized than ever before).

⁶⁹ There are currently a variety of approaches that go by the name of “democratic” or “popular” constitutionalism. In this Article, we explore sunrise lawmaking from a democratic-constitutionalist perspective that conceives the Constitution as the framework for direct popular rule on matters of fundamental law. Popular constitutionalism emphasizes the ways in which constitutional interpretation takes place outside the judiciary, including by politicians and social movement leaders. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (defining popular constitutionalism); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) (arguing that *Heller* relied on an alleged originalism that reflected “popular constitutionalism” of the late twentieth century); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1328–29 (2006) (examining the role that social movements and nonjudicial conflicts of constitutional vision have in changing constitutional law). We agree with Rebecca Zietlow that *popular* and *democratic* constitutionalism are often left undistinguished in these discussions, though we adopt a different conception of democratic constitutionalism than she does. Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367, 1371 (2011).

achieving fundamental democratic reforms to the present constitutional order that would otherwise be unattainable.⁷⁰ In this regard, sunrise lawmaking might help to realize the implicit democratic potential of the U.S. Constitution. The puzzle concerns the legitimacy of sunrise amendments passed by one generation exclusively for another. The temporal delay that makes sunrise lawmaking work also poses in the starkest terms the longstanding tension between democratic rule and constitutionalism. The counter-majoritarian difficulty⁷¹ that attends constitutionalism is at once the constitutive condition of sunrise lawmaking's efficacy and a threat to the ideal of self-rule emphasized in the democratic-constitutionalist account.

This Part seeks to resolve the paradox of sunrise lawmaking. It argues that, if properly directed, sunrise lawmaking could prove an important technique for constitutional reform that works through, rather than outside, Article V. Sunrise lawmaking thus offers the possibility of renewing the democratic Constitution that many scholars and activists see as lost. Meanwhile, concerns about the intertemporal legitimacy of sunrise lawmaking can be addressed by restricting it to what we call "democracy-enhancing" measures that use this technique only in the furtherance of future generations' capacity for self-government.

In Part II.A, we discuss what it means to have a democratic-constitutionalist understanding of the American political tradition. We examine the background political theory that suggested the revolutionary possibility of popular sovereignty under modern conditions and then how the founding generation operationalized this theory. Part II.B catalogs the current loss of faith in the democratic character of the American constitutional order, and a corresponding increase of interest in informal and even nonconstitutional projects of democratic renewal. Part II.C explores sunrise lawmaking as a technique that might ameliorate the tension between constitutionalism and democracy by reclaiming the formal constitutional amendment process and directing it towards fundamental democratic reform. But it also highlights the way in which sunrise lawmaking may, through its temporal separation of ruler and ruled, violate the principle of self-legislation that is central to democratic-constitutionalist accounts of political autonomy. Part II.D introduces our solution to this problem, devel-

⁷⁰ Akhil Amar, for example, has proposed using sunrise lawmaking to realize more fully the democratic potentiality of U.S. political practice. See AMAR, *supra* note 6, at 474–77.

⁷¹ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962) (offering a canonical presentation of the "counter-majoritarian difficulty").

oping a taxonomy of ways in which sunrise lawmaking may prove “democracy enhancing” or “democracy restricting” according to the principle that when one generation rules for another, it must confer upon the future the possibility of more effective self-rule.

A. *Popular Sovereignty and Democratic Constitutionalism*

In its paradigmatic form, democratic constitutionalism views a constitution as an institutional vehicle for foundational or fundamental legislation by the people directly.⁷² In this framing, the opening declaration of agency in the Preamble—“We the People”—provides, at a high level of abstraction, the beginning and end of modern constitutional theory and practice.⁷³ Constitutionalism in the United States can be understood as the realization of a popular political agency whose purpose—“a more perfect Union”—comes prefigured in the plural noun by whose authority the Constitution was first “ordain[ed] and establish[ed].”⁷⁴

The preeminent exponent of this position, Akhil Amar, has adopted a democratic interpretation of the Constitution as an admittedly imperfect but nevertheless extraordinarily innovative experiment in popular sovereignty.⁷⁵ While conceding that the document fell short of its aspiration to majoritarian democracy in several notable ways—owing largely to its complicated hybrid character as both a treaty *among* (state) sovereigns and the constitution *of* an emergent (national) sovereign⁷⁶—Amar takes the ideal of democratic sover-

⁷² We take this viewpoint to be a plausible interpretive lens through which to view the aim and history of the U.S. Constitution, and we examine its limitations below. We recognize that there are a variety of other approaches to democratic constitutionalism. See, e.g., Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 27–28 (Jack M. Balkin & Reva B. Siegel eds., 2009) (offering a definition of democratic constitutionalism centered on the tension between the legal legitimacy of the constitution as our “fundamental law” and the demand that it be “democratically responsive”).

⁷³ Several important works of constitutional law scholarship have focused on this opening declaration. See, e.g., Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 *YALE L.J.* 2644, 2658, 2664 (2014).

⁷⁴ U.S. CONST. pmbl.

⁷⁵ See AMAR, *supra* note 8, at 5–53 (arguing that the Federal Constitution institutionalized popular sovereignty in the United States); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457 (2004) [hereinafter Amar, *Consent of the Governed*] (same); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*] (same); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987) (same).

⁷⁶ This perspective leads Amar to a position that several Federalist theorists advanced relatively soon after the Founding, which is that the hybrid character of the Federal Constitution—in different respects both a “national” constitution and a “federal” one—

eignty as a normative and interpretive lodestar, and views the history of American constitutionalism as the progressive realization of this implicit orientation and latent potentiality. It might be said, on this view, that the United States is *teleologically* democratic: It is constantly evolving to become the democracy its constitution prefigures and is premised upon.

Amar and other legal scholars expounding this position do not generally turn in detail to the European political-theoretic backdrop that enabled the Founders to engage in such a revolutionary articulation of a constitutionally agential people. However, to develop the theory of democratic constitutionalism, it is helpful to articulate the theoretical problem to which the U.S. Constitution may be understood as a practical solution. The problem was how to achieve popular sovereignty—the political constitution of a people—in a large state with a territorially dispersed population. Up to roughly the time of the English Civil War, the prevailing view was that the conditions of social life in the kingdoms of Europe made democratic self-rule impossible; the politics that medieval and early-modern Europeans read about in chronicles of the ancient city-states reflected a practice no longer attainable.⁷⁷ Central to this understanding was the idea that “the people” would have to be physically present—sembled together—in order to legislate for themselves. The difficulty of performing this maneuver anywhere other than in a few city-states of the Italian Peninsula meant that even the most radical medieval political theorists pursued theories of *representation* of one sort or another.⁷⁸ Direct

took on a resolutely “national” character through its national ratification. Note that a “national” constitution was assumed, as Madison explained in *Federalist* 39, to be the product of a nationwide majoritarian sovereign. THE FEDERALIST NO. 39, at 193, 199 (James Madison) (George W. Carey & James McClellan eds., 2001). While this position remains contentious, it operates to make the Federal Constitution conform more precisely to the sovereignty/government distinction standing behind theories of modern democracy. See AMAR, *supra* note 8, at 292–99; RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 121–80 (forthcoming 2016).

⁷⁷ While it was often suggested that the hereditary monarchy represented the entire nation (including the people), even Aristotelians such as Marsilius of Padua, who were drawn to republican ideals, ultimately proposed legislative assemblies composed of representatives elected by the people. See MARSILIUS OF PADUA, THE DEFENDER OF THE PEACE 79–80 (Annabel Brett ed. & trans., Cambridge Univ. Press 2005) (1324); TUCK, *supra* note 76, at 49–56 (discussing medieval theories of representation).

⁷⁸ That said, these medieval theories of representation may have been thought contingent on an ultimate residuum of popular authority. See HWA-YONG LEE, POLITICAL REPRESENTATION IN THE LATER MIDDLE AGES: MARSILIUS IN CONTEXT 154–56 (2008) (exploring Marsilius’s theory of representation and contrasting it with modern accounts).

democracy of the Athenian or Roman kind⁷⁹ was nowhere seen as logistically possible, whatever its other merits or demerits.

How, then, did popular sovereignty come to be a concept that the revolutionary generation of Americans could hope to operationalize? In a series of lectures and a forthcoming book, Richard Tuck, a historian of political thought, traces the genesis of the revolutionary idea of popular sovereignty back to a crucial distinction between “sovereignty” and “government” that grounded the theoretical justification of the early modern state.⁸⁰ The distinction, ironically enough, first appeared in the work of Jean Bodin, who used it to defend the monarchical sovereignty of late-sixteenth-century France.⁸¹ In articulating the foundational concept of “sovereignty,” Bodin distinguished it from “government” or “administration.” The will of the sovereign was the ultimate source of all law and could be kept functionally distinct from the ongoing administrative operations that the sovereign might authorize.⁸² This sovereignty/government distinction later found a central place in the work of the great English philosopher Thomas Hobbes,⁸³ who inaugurated the social contract tradition out of which modern constitutionalism emerges.⁸⁴

⁷⁹ For an authoritative account of Athenian democracy, see MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* (J.A. Crook trans., Univ. of Okla. Press 1999) (1991). On Rome, see FERGUS MILLAR, *THE CROWD IN ROME IN THE LATE REPUBLIC* 209 (1998) (defining the Roman Republic as a “direct democracy”). For the influence of Rome on later political theory, see FERGUS MILLAR, *THE ROMAN REPUBLIC IN POLITICAL THOUGHT* (2002).

⁸⁰ Richard Tuck’s forthcoming book, *The Sleeping Sovereign*, is based on his Seeley Lectures at Cambridge University in 2012. It is not primarily an intervention in modern constitutional theory, but a history of the political theory of the modern state from its conception in early modern Europe through to the late eighteenth-century revolutions in the United States and France. See TUCK, *supra* note 76.

⁸¹ For Bodin’s foundational account of sovereignty, see JEAN BODIN, *METHOD FOR THE EASY COMPREHENSION OF HISTORY* 172–73, 178 (Beatrice Reynolds trans., W.W. Norton & Co. 1969) (1566), and JEAN BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* 122–61 (Barthelemy Vincent 1593) (1576), translated in JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* 84–113 (Richard Knolles trans., Impensis G. Bishop 1606). See also TUCK, *supra* note 76, at 9–30.

⁸² Although Bodin argued for the sovereignty of the monarch, a major purpose of his theory was to defend a governmental role for the regional *parlements*—with which he was himself associated—as important instruments of government in the large French kingdom. *Id.* at 36–37.

⁸³ The metaphor of the “sleeping sovereign,” which provides the title of Tuck’s lectures and book, is found in Hobbes’s philosophical masterwork, *De Cive*, where he used the Bodinian theory of sovereignty in constructing his theory of the social contract. Indeed, Hobbes explicitly acknowledged his debt to Bodin’s theory of sovereignty in the unpublished English-language version of *De Cive*, *The Elements of Law*. THOMAS HOBBS, *THE ELEMENTS OF LAW NATURAL AND POLITIC* 139–40 (1640).

⁸⁴ This theory was relied on and reworked by a host of later figures, including Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, and Immanuel Kant—and provided the political theory underlying the American and French revolutions. On the relation of

At the base of this tradition is the idea of the sovereign as the ultimate legal authority for a society. While Bodin and Hobbes both gave reasons to favor monarchical sovereignty, they recognized that sovereignty (and government) could take any of the forms familiar from ancient political thought—rule by one (monarchy), rule by a few (aristocracy), or rule by the many (democracy).⁸⁵ Strikingly, Hobbes argued that the initial constitution of sovereignty is necessarily *democratic*: All states must pass through an initial phase of democracy, understood as universal assent to majoritarian decision making, before they can become aristocracies or monarchies through the transfer of sovereignty from the ruling majority to a smaller group.⁸⁶ Precisely how to interpret this important claim remains a point of contention in political theory,⁸⁷ but for our purposes what matters is that the founding theorist of the social contract tradition tied the modern theory of sovereignty to democracy. In so doing, Hobbes inaugurated a line of thinking that ultimately led to the explicitly democratic political theory of Jean-Jacques Rousseau⁸⁸ and the experiments with popular sovereignty proposed by the American and French revolutionaries.⁸⁹

Hobbes to these later figures, see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 140–225 (2001 ed. 1999).

⁸⁵ More precisely, they both avoided typologizing these in “good” and “bad” forms—e.g., monarchy as legitimate rule by one, tyranny as illegitimate rule by “one”—as Aristotle had suggested in his *Politics*, owing, at least in Hobbes’s case, to a refusal to imagine that “good” and “bad” are given by nature outside the political order. This refusal is central to Hobbes’s construction of the state of nature. See THOMAS HOBBS, *ON THE CITIZEN* 55, 70–71 (Richard Tuck & Michael Silverthorne eds. & trans., 1998) (1642); see also David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *YALE L.J.* (forthcoming 2016) (manuscript at 18–22) (on file with authors) (discussing Hobbes’s account of the democratic origins of the “well-ordered commonwealth”).

⁸⁶ See HOBBS, *supra* note 85, at 94–95.

⁸⁷ Compare Kinch Hoekstra, *A Lion in the House: Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 191 (Annabel Brett & James Tully eds., 2006) (arguing against a democratic interpretation of Hobbesian political theory), with Richard Tuck, *Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT*, *supra*, at 172 (arguing that “Hobbes’s contribution to democratic theory . . . [is] perhaps one of his most important legacies”).

⁸⁸ By the time that Rousseau penned his famous *Social Contract*, the sovereignty/government distinction was clear enough that he devoted the central chapter in the book to considering how the people, *as sovereign*, could keep control of the “government” they would need to bring into being, so as to avoid its “usurpation” of their democratic sovereignty. See JEAN-JACQUES ROUSSEAU, *Of the Social Contract or Principles of Political Right*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 82–120 (Victor Gourevitch ed. & trans., 1997).

⁸⁹ See TUCK, *supra* note 76, at 143–61, 189–205 (detailing its use among the American revolutionaries).

Sovereignty, in this account, had to be undivided in order to be capable of lawmaking, but the sovereign need not produce all relevant law itself. Only *fundamental* law had to be issued by the sovereign, who could authorize others (the “government” or “administration”) to make lesser rules on its behalf. The sovereignty/government distinction thus turns on what Tuck describes as “an institutional division between constitutional and other kinds of legislation.”⁹⁰ In spite of its monarchical pedigree, this idea was used to overcome the standard objection to modern democracy—that it would prove impossible for large, territorially dispersed populations to govern themselves.⁹¹ For, if sovereignty need concern itself only with fundamental laws, then “the people” could hold sovereignty, provided that one of their founding acts was to constitute a “government” to manage day-to-day affairs in their place (which would be subject to episodic correction as required). Under this conception, the only reasons to be against democracy were the usual demophobic ones familiar since Plato’s attack on Athenian democracy.⁹² The overriding logistical difficulties that had seemed earlier to settle the question, regardless of one’s view of the people’s moral or intellectual capacity for self-rule, were no longer dispositive.⁹³

This theoretical innovation made democracy in modern times seem newly possible, and questions about its appropriate institutionalization began to be debated in the late-eighteenth century, particularly once the American and French revolutionary regimes wrote constitutions lodging sovereignty in the people.⁹⁴ Broadly, the sover-

⁹⁰ *Id.* at 250. This familiar feature of modern states was arguably unknown in antiquity, when sovereign and governmental functions were undistinguished and usually performed by the same legislator (e.g., a citizen assembly or monarchical regime).

⁹¹ Indeed, some of Bodin’s earliest readers noted that his theory could be used to justify modern democracy. *Id.* at 44. That Hobbes later predicated the social contract on an initial democratic self-constitution made the connection between democracy and modern sovereignty all the clearer. *See id.* at 99–100.

⁹² These include not only conventional demophobic arguments about the ignorance or unruly passions of ordinary people, but also a high-theoretical argument that the determination of justice was necessarily a matter for elite philosophical investigation and thus inaccessible to ordinary citizens. *See Daniela Cammack, Plato and Athenian Justice*, 36 *HIST. POL. THOUGHT* (forthcoming Winter 2015).

⁹³ Demophobic arguments charge ordinary people with fecklessness, insufficient wisdom or expertise, unruly passions, and other debilities. Akhil Amar does an admirable job cataloguing—and rebutting—these standard anti-democratic objections in the context of the modern debate. *See Amar, Philadelphia Revisited*, *supra* note 75, at 1096–1102.

⁹⁴ Written constitutions of the familiar modern kind—enactments of a separate, foundational legislator—first began to be drafted and ratified in the individual states of the United States in the mid-1770s, followed about a decade later by the U.S. Constitution and the various constitutions of revolutionary France. The sovereignty/government distinction was central to these political projects, although realized differently across them. *See TUCK, supra* note 76, at 149–61, 183–84, 189–212.

eignty/government distinction allowed for the conceptualization of the constitution as the direct promulgation by the sovereign people of their fundamental law, including laws framing the foundation and operation of the government, which represents the people but should not be conflated with the sovereign. This institutional division between direct democracy at the level of sovereignty and representation at the level of government means that the source of constitutional authority in a modern democracy—the people—will often be asleep (to use Hobbes’s metaphor)⁹⁵ for long spells punctuated by bouts of constitutional lawmaking when it awakes. Governmental activity authorized by the people proceeds in the interim.⁹⁶

While this institutional division of political labor seems obvious to us now, it was a strange innovation at the time.⁹⁷ What it enabled, however, was nothing less than the project of modern constitutionalism, including *democratic* constitutionalism. For while the possibility of a continuously assembled and self-governing people had indeed vanished with antiquity, popular *sovereignty* was nevertheless still achievable in modern times.⁹⁸ But it required an institutional vehicle for its realization—and the revolutionary regimes in the United States and (soon after) France⁹⁹ made the first attempts to initiate new democracies of this distinctively modern form.

⁹⁵ See HOBBS, *supra* note 85, at 99–100 (describing the original metaphor of the sleeping sovereign).

⁹⁶ As the social contract theorists discussed in this Section clearly recognized, a government constituted by the sovereign people need not be organized democratically. The examples of an elected monarch or a dictator on whom the people devolve emergency powers reveal instances in which democratic sovereignty authorizes monarchical government. Their anxiety was that the (continuously assembled) government would usurp the prerogatives of the (intermittently assembled) sovereign. One difficulty in guarding against such usurpation is distinguishing “fundamental” from routine legislation, given that the spectrum of rulemaking runs the gamut from local traffic ordinances to annual national budgeting. For further discussion of the character of the government in modern constitutional democracies, including our defense of democracy-enhancing reforms at the governmental level, see *infra* Part II.D.

⁹⁷ In spite of the fact that monarchs do, of course, sleep—and that viziers and other administrators must govern in their place during that time—Tuck explains that the idea “that the sovereign legislator has an institutional shape but is usually dormant” was odd enough that it “proved . . . hard to imagine prior to the eighteenth century, and prior to a proper understanding of the distinction” between sovereignty and government. TUCK, *supra* note 76, at 252.

⁹⁸ As Tuck explains, “the appearance of a clear conceptual distinction between *sovereignty* and *government* was a necessary precondition for the emergence of a distinctively modern idea of democracy, in which the mass of the citizens could genuinely participate in politics as long as their participation was limited to a set of fundamental acts of legislation.” *Id.* at 249.

⁹⁹ Tuck notes that “something like a modern plebiscitary system was a natural extension of Rousseau’s ideas, and the implications were duly drawn once the French Revolution began.” *Id.* at 144–45. The recent experience of the United States also loomed

B. *Constitutional Change Outside Article V*

It is not entirely clear how and why the idea of democratic constitutionalism, as outlined above, was gradually lost from American political self-understanding. One major reason may be that using Article V in the twentieth century has proved far more difficult than anyone could have anticipated in 1787, when the country had only thirteen states and an undeveloped party structure.¹⁰⁰ As late as the Progressive Era, major political reforms were carried out through formal amendments to the constitutional text with the passage of the Sixteenth through Nineteenth Amendments.¹⁰¹ After that, however, although the People roused themselves in 1933 to abolish Prohibition¹⁰²—dramatically, the only instance of amendment through state conventions, rather than legislatures¹⁰³—most major political changes of the mid-twentieth century were achieved through the ordinary legislative process. This is not to say that the *results* of these legislative episodes were in any way *ordinary*,¹⁰⁴ but rather that these political reforms did not principally employ Article V procedures to change the constitutional text. The New Deal was an intragovernmental initiative that produced no alterations to the constitutional text.¹⁰⁵ The Civil Rights era did see at least one constitutional amendment—the abolition of the poll tax¹⁰⁶—and, arguably, several related electoral reforms.¹⁰⁷ However, the most significant dismantling of racial apartheid was accomplished outside the formal amendment process, through landmark statutes (such as the Civil

large among the leading Girondins: Jean-Pierre Brissot and the Marquis de Condorcet, for example, were both inspired by the radical state constitutions of revolutionary America, which they viewed as allowing plebiscitary control of fundamental law. *Id.* at 145–51.

¹⁰⁰ For a discussion of the declining use of Article V, and whether it should accordingly be understood as in constitutional desuetude, see Albert, *supra* note 26. For an argument concerning the “irrelevance” of constitutional amendments, given their infrequency, and the priority of informal mechanisms of constitutional change, see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

¹⁰¹ See U.S. CONST. amends. XVI–XIX.

¹⁰² See U.S. CONST. amend. XXI.

¹⁰³ Ratification in the first place was done through state conventions. See AMAR, *supra* note 8, at 308–09. Repeal of prohibition is the only other unmediated act of sovereignty since the Founding.

¹⁰⁴ The results of these extraordinary legislative episodes have been analyzed as “super-statutes.” See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) (distinguishing ordinary legislation from “super-statutes” that “penetrate deeply into American norms or institutional practice”).

¹⁰⁵ See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 314–15 (1998) (explaining the Supreme Court reversal that accommodated Roosevelt’s legislative agenda, thus legitimating the New Deal without any Article V amendments).

¹⁰⁶ U.S. CONST. amend. XXIV.

¹⁰⁷ See AMAR, *supra* note 8, at 438–47 (characterizing other amendments, such as the Twenty-Third and Twenty-Sixth, as stemming from the mobilization of the civil rights era).

Rights Act of 1964) and Supreme Court decisions (from *Shelley v. Kraemer* through *Brown*, *Bailey*, and *Loving*). The cumulative effect has been to push scholars and political activists to focus on democratic change *outside* the formal constitutional amendment process.¹⁰⁸

The leading figure in the legal scholarship on constitutional change outside Article V has been Bruce Ackerman, whose multi-volume *We the People* series proposes a theory of constitutional change that supplements the “classic” route to constitutional amendment (via Article V) with a “modern” route that proceeds through “constitutional moments.”¹⁰⁹ After the founding generation, Ackerman explains, the success of Reconstruction Republicans, New Deal Democrats, and civil rights activists required “adapting the paradigms of popular sovereignty inherited from the eighteenth century”¹¹⁰ by looking outside “the formula for formal amendment laid out by the Founders in Article V—under which Congress proposes, and state legislatures ratify, changes in our higher law.”¹¹¹ Ackerman advances a theory of popular sovereignty expressed outside the Article V process through *governmental* action: A new constitutional settlement is recognized when, “over time, *all three branches* repeatedly endorse the legitimacy of the breakthroughs that initiated the new regime.”¹¹²

¹⁰⁸ The question of what is in or outside the formal process is itself open to scholarly dispute. See Sanford Levinson, *Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) > 26; (D) All of the Above)*, 8 CONST. COMMENT. 409 (1991). For an account sympathetic to informal mechanisms of constitutional change, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). For an account that argues for the exclusivity of the Article V amendment process, see David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990). For a typology of informal amendment, see Albert, *supra* note 26, at 1060–71.

¹⁰⁹ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (beginning his multivolume history of “constitutional moments” and the “modern” route to constitutional change outside Article V); ACKERMAN, *supra* note 105 (continuing this history, including a discussion of constitutional change in the New Deal); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) [hereinafter ACKERMAN, *THE CIVIL RIGHTS REVOLUTION*] (focusing on constitutional change in the Civil Rights era); see also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

¹¹⁰ ACKERMAN, *THE CIVIL RIGHTS REVOLUTION*, *supra* note 109, at 3.

¹¹¹ *Id.* For more on Ackerman’s idea of “higher lawmaking,” see Bruce Ackerman, *Higher Lawmaking, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63 (Sanford Levinson ed., 1995).

¹¹² ACKERMAN, *THE CIVIL RIGHTS REVOLUTION*, *supra* note 109, at 4.

Ackerman is motivated to consider constitutional change outside Article V by the difficulty of using textually indicated mechanisms.¹¹³ And his work has led a generation of like-minded scholars to consider non-Article V routes of constitutional change.¹¹⁴ His influence is visible in recent discussions of democratic¹¹⁵ and popular¹¹⁶ constitutionalism, as well as in the burgeoning interest in both landmark legislative enactments¹¹⁷ and the effects of social movements and popular activism on constitutional law.¹¹⁸ In a similar vein, Akhil Amar has suggested that a national plebiscite could legally ratify a proposed amendment without going through the Article V process.¹¹⁹ Sanford Levinson, a critic of the current constitutional order, agrees, and has also proposed a new constitutional convention to address the Constitution's many undemocratic features.¹²⁰ His calls are echoed by Larry Lessig¹²¹ and certain segments of the political right.¹²²

¹¹³ See *id.* at 3 (“[T]he great political movements of the past have often displayed far more creativity in gaining popular consent to their new constitutional settlements.”).

¹¹⁴ See Levinson, *supra* note 108, at 429 (“The most significant alternative, from the perspective of the traditional lawyer, concerns the relative displacement of Article V as the mechanism by which amendments occur.”). For criticisms, see, for example, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992).

¹¹⁵ For a democratic-constitutionalist discussion and critique of Ackerman’s theory, see Amar, *Philadelphia Revisited*, *supra* note 75, at 1090–96.

¹¹⁶ See KRAMER, *supra* note 69, at 197–98 (discussing and criticizing Ackerman’s idea of “higher” lawmaking from the standpoint of a more populist reading of the constitution).

¹¹⁷ See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 61–65 (2010).

¹¹⁸ For examples of recent work on social movements and legal change, see Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (outlining how political contestation over the meaning of principles and practices alters legal meaning); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (considering affirmative action in the context of social movements and constitutional culture); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) (studying how social movements based on identity claims have changed twentieth-century legal culture); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (same).

¹¹⁹ See Amar, *Consent of the Governed*, *supra* note 75; Amar, *Philadelphia Revisited*, *supra* note 75 (arguing that Article V is a nonexclusive means of constitutional change and that ordinary majoritarian processes supplement it).

¹²⁰ LEVINSON, *supra* note 12, at 177–78 (calling for a new constitutional convention and endorsing Amar’s view of constitutional popular sovereignty).

¹²¹ Larry Lessig is now leading a campaign to address the problem of money in politics through mass political action with the aim of initiating constitutional change. The problem of money in politics would seem the perfect issue for constitutional amendment since the government (including not just the representative branches, but also the judiciary) must otherwise be trusted to police itself. See LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 293–94 (2011) for Lessig’s call for a new constitutional convention; and Evan Osnos, *Embrace the Irony*, NEW YORKER, Oct.

Other scholars have turned away from the constitutional text altogether, emphasizing the ways in which popular movements alter the shared social meanings that underlie constitutional interpretation. For example, Larry Kramer's seminal work on "popular constitutionalism,"¹²³ which promotes the view that constitutional change emerges from popular forces, has spilled over into research on "dialogic" models of constitutionalism¹²⁴ that emphasize how social movements influence constitutional lawmaking.¹²⁵

What unites these otherwise disparate approaches is a desire to escape the confines of Article V. This academic trend is reflected in the efforts of real-world reformers, who have similarly grown exasperated with the difficulty of enacting fundamental change through the formal amendment process. Several of the most promising contemporary movements for constitutional reform seek to employ non-Article V means.¹²⁶ The National Popular Vote initiative, for example, aims to have the President elected by popular vote—but through an interstate contract, rather than a constitutional amendment.¹²⁷ It is thus striking

13, 2014, at 52, 58–63, for a description of Lessig's multi-faceted campaign. On corruption in American politics and its relation to democracy, see ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* (2014); Zephyr Teachout, *Neoliberal Political Law*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014, at 215.

¹²² See *State-Led Push to Force Convention to Amend Constitution Gains Steam, with High-Profile Republican Support*, FOX NEWS (Feb. 15, 2015), <http://www.foxnews.com/politics/2015/02/15/state-effort-to-pass-constitutional-amendments-rein-in-washington-gets/>.

¹²³ KRAMER, *supra* note 69; Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *CALIF. L. REV.* 959 (2004). For a discussion of Kramer's theories and proposal for their expansion, see Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 *WIS. L. REV.* 159. For a critical review, see Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* 118 *HARV. L. REV.* 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

¹²⁴ See Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 *CHI.-KENT L. REV.* 991, 997–1005 (2006) (analyzing popular constitutionalism as a dialogue between courts and popular renderings of constitutional principle).

¹²⁵ See sources cited *supra* note 118.

¹²⁶ Meanwhile, even reform movements that do attempt to utilize Article V mechanisms—like those of Larry Lessig or some right-wing activists, see *supra* notes 121–22—have grown exasperated with the traditional, congressionally initiated process that has produced the existing twenty-seven constitutional amendments.

¹²⁷ The initiative asks states to adopt legislation pledging their electors to the winner of the popular vote, provided that enough other states agree to do likewise. Once states representing 270 electoral votes have opted in, the contract goes into effect, and the winner of the popular vote will effectively become the winner of the Electoral College. So far, eleven jurisdictions together representing 165 electoral votes—61% of the necessary total—have agreed to the plan, making it far more likely to succeed than any of the attempted constitutional reforms of the presidential election mechanism that have foundered in the House and Senate over the years. See *NAT'L POPULAR VOTE*, <http://www.nationalpopularvote.com> (last visited Oct. 20, 2015). For an analysis and defense of the National Popular Vote Compact, see Vikram David Amar, Response, *The Case for*

how far Americans—constitutional scholars and political activists alike—still understand themselves as a *constituted* people, yet have lost confidence in the textually prescribed mechanism for constitutional change.

C. *The Promise and Peril of Sunrise Lawmaking*

Sunrise lawmaking holds out the hope of realizing the vision of democratic constitutionalism by breaking the political paralysis that has caused reformers to abandon Article V. It does so through a new solution to an old problem.

As James Madison observed in *Federalist 10*, democratic politics can be crippled by lawmakers' narrow focus on personal agendas. "[A] body of men are unfit to be both judges and parties at the same time," but in any democratic legislature, "the parties are, and must be, themselves the judges."¹²⁸ Legislators have "interests" affected by the legislation they pass, and those interests will "certainly bias [their] judgment."¹²⁹ Therefore, "[i]t is in vain to say that enlightened statesmen" will pursue the "public good."¹³⁰ Instead, divergent interests will lead to "faction" and self-serving behavior.¹³¹ Madison believed that since the causes of faction were intrinsic to the democratic process, the only thing to do was to control faction's effects by entering into a large, diffuse union in which condensed agglomerations of interest would be difficult to assemble and maintain.¹³²

Today's political stalemate suggests that our modern national republic fails to dampen the effects of faction in this manner. But sunrise lawmaking allows us to revisit Madison's premise about faction's causes. When legislators pass ordinary laws, these laws inevitably affect the legislators' interests, creating the bias of which Madison warned. But when they pass laws for the future, the connection is more attenuated. A legislator making law for the distant future looks through a blurry lens—she cannot reliably know what policies will advance her own interests, or those of her descendants, many years down the road (nor is it obvious that she will care much about the particularized fate of individuals so far away).¹³³ Perhaps, then, it is

Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power, 100 GEO. L.J. 237 (2011).

¹²⁸ THE FEDERALIST NO. 10, at 46–47 (James Madison) (Justin McCarthy et al. eds., 1901).

¹²⁹ *Id.* at 46.

¹³⁰ *Id.* at 47.

¹³¹ *Id.*

¹³² *Id.* at 47.

¹³³ Of course, a legislator might still care about the interests of her descendants or other particular future individuals and act on the basis of these parochial interests when crafting

not “in vain” to hope that “enlightened statesmen” will pursue the “public good” when they engage in sunrise lawmaking—and therefore that sunrise lawmaking could break the political deadlock that otherwise stands in the way of reform.

There is an obvious affinity between this idea and the political theory of John Rawls, who famously attempted to discover the principles of justice by examining the decisions individuals would make when choosing fundamental rules for a society without any knowledge of their place in it.¹³⁴ Rawls argued that the ignorance imposed by this “original position” would ensure that “any principles agreed to will be just.”¹³⁵ Behind what he called a “veil of ignorance,” individuals would not know “how the various alternatives will affect their own particular case . . . [and would thus] evaluate principles solely on the basis of general considerations,” according to a “fair procedure.”¹³⁶ Perhaps, similarly, a legislature passing laws for the future, but not the present, would be able to conceive of itself as “We the People,” rather than a collection of diverse and clashing interests, and behave in an accordingly enlightened manner. Akhil Amar has noted precisely this possibility, expressing hope that legislators crafting sunrise amendments would behave roughly as would individuals in Rawls’s “original position,” engaging in disinterested, broad-minded thinking.¹³⁷ If he is right, then sunrise lawmaking could offer a solution to Madison’s dilemma—and, in so doing, renew the project of democratic constitutionalism through the formal amendment process.

Yet there are important differences between the original position envisioned by Rawls and the real-world circumstances of sunrise lawmakers—differences that threaten to betray, rather than advance, the democratic-constitutionalist vision. The hypothetical denizens of Rawls’s original position do not create rules for *any* society; they create rules for *their* society. This is a crucial feature of the thought experiment: We can have faith in the decisions that emerge from the original position only because its inhabitants “must choose principles

sunrise amendments. But as we argue in Part I.B, concerns for future individuals are likely to be weak compared to concerns for present-day ones. See *supra* notes 62–65 and accompanying text.

¹³⁴ See JOHN RAWLS, A THEORY OF JUSTICE (1971).

¹³⁵ *Id.* at 136.

¹³⁶ *Id.* at 136–37.

¹³⁷ AMAR, *supra* note 6, at 475. Amar is not alone in his desire to cast constitutional lawmaking in Rawlsian terms—several scholars have embraced the idea that constitutional drafters’ inability to know how the law they produce will affect their own interests should place them in something approximating the original position. See, e.g., BALKIN, *supra* note 53, at 30–31; ELSTER, *supra* note 21, at 144.

the consequences of which *they are prepared to live with.*"¹³⁸ The drafters of sunrise amendments, by contrast, never have to accept the consequences of the principles they choose. They legislate for others, not for themselves.

This difference removes one of the most robust safeguards on the legislative process: the requirement that "the democratic majority . . . accept for themselves and their loved ones what they impose on you and me."¹³⁹ In most lawmaking, including constitutional lawmaking, legislators must live under the laws they pass. The American founding generation, for example, created a constitution not just for posterity, but also for itself. Many of the Framers at Philadelphia went on to staff the government they designed in the summer of 1787.¹⁴⁰ Sunrise amendment drafters, by contrast, may experience none of the effects of their handiwork. In fact, given a long enough lag between ratification and implementation, every member of an electorate that adopts a sunrise amendment may be dead before it becomes law.

The democratic deficit that afflicts sunrise lawmaking is thus distinct from—and more worrisome than—the general puzzle concerning the democratic legitimacy of constitutional law.¹⁴¹ Though regular constitutional enactments usually affect future generations that are not present to vote on them, they also affect the current electorate, which provides a kind of virtual representation for the future.¹⁴² For example, almost no women alive today were around to advocate for the Nineteenth Amendment, which guaranteed female suffrage,¹⁴³ but their great-grandmothers were instrumental in securing reform, for both themselves and posterity.¹⁴⁴ And no present-day voter campaigned for the right to directly elect his Senators,¹⁴⁵ but Progressive-

¹³⁸ RAWLS, *supra* note 134, at 137 (emphasis added).

¹³⁹ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

¹⁴⁰ See AMAR, *supra* note 8, at 208 (recounting how Philadelphia Framers held three of the first six Supreme Court seats, eleven of the twenty-two original Senate seats, eight of the initial fifty-nine House seats, two of the first five Cabinet positions, and, of course, the first presidency).

¹⁴¹ For a lucid account of this deficit, and a response that emphasizes the interrelation of freedom and self-constraint across time, see JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

¹⁴² See Bruce A. Ackerman, *Neo-Federalism?*, in *CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE* 153, 187 (Jon Elster & Rune Slagstad eds., 1988) (discussing how constitutional enactments emerge from a process of democratic deliberation in which a contemporary majority decides to adopt them).

¹⁴³ U.S. CONST. amend. XIX.

¹⁴⁴ See AMAR, *supra* note 8, at 424. Several anti-suffrage politicians were ultimately punished by electorates that included women, such as Senator Atlee Pomerene of Ohio and Senator James Wolcott Wadsworth, Jr. of New York. *Id.* at 424 n.45.

¹⁴⁵ U.S. CONST. amend. XVII.

era popular mobilization did.¹⁴⁶ Whether this virtual representation provides an adequate solution to the counter-majoritarian difficulty that attends constitutional law is not our present concern;¹⁴⁷ the point is instead that sunrise amendments often entail the complete absence of even this kind of accountability.

Sunrise lawmaking thus presents in starkest terms the familiar tensions at the heart of democratic constitutionalism, which stem from its two seemingly contradictory purposes.¹⁴⁸ Democratic government, under Alexander Bickel's famous formulation, does not require that the will of the people be instantly reflected in law, but it does require that "a representative majority has the power to accomplish a reversal."¹⁴⁹ Constitutionalism, on the other hand, at least in a dominant twentieth-century framing, deliberately sets out to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities."¹⁵⁰ This counter-majoritarian difficulty quickly metastasizes into an intertemporal one because, while it would be one thing for contemporary majorities to place certain options out of their own reach, in fact, they are foreclosing options for their descendants. "[T]o the extent that [constitutional provisions] ever represented the 'voice of the people,'" John Hart Ely observes, they "represent the voice of people who have been dead for a century or two."¹⁵¹

As David Hume noted two and a half centuries ago, this type of intergenerational lawmaking "supposes the consent of the fathers to bind the children, even to the most remote generations (which repub-

¹⁴⁶ See AMAR, *supra* note 8, at 410–12 (describing the state-by-state effort).

¹⁴⁷ Of course, if constitutional decisionmaking mechanisms were fully democratic, then even this minimal "virtual" representation would not really be needed, since the future could simply reject the rules made by the past.

¹⁴⁸ See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE 195 (Jon Elster & Rune Slagstad eds., 1988) (discussing the tensions between constitutionalism and democratic autonomy); see also THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007) (presenting a collection of essays on the political theory of constitutionalism, including the tension between popular constituent power and constitutional discipline).

¹⁴⁹ BICKEL, *supra* note 71, at 17. The point can and should be extended beyond specifically representative government, which was Bickel's concern, to majorities in plebiscitary democracy or to referenda.

¹⁵⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Note that this is a framing that conceives the constitution as a check on democracy rather than its realization.

¹⁵¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980).

lican writers will never allow).¹⁵² Indeed, some early republican writers, such as Jean-Jacques Rousseau, explicitly dismissed all attempts at intergenerational binding as “absurd.”¹⁵³ This kind of constitutional binding subjects living majorities to “the dead hand of the past,” a possibility against which Thomas Jefferson famously recoiled, arguing that, “the earth belongs to the living, and not to the dead.”¹⁵⁴

The intertemporal challenge facing defenders of sunrise amendments is even more daunting. Insofar as the present generation stands on shaky ground when it tries to bind subsequent generations, its footing appears particularly precarious when it also refuses to bind itself. By doing so, it seems to say to posterity, “This change, which was not good enough for us, we deem to be good enough for you.” The drafters of sunrise amendments may not just be fathers binding their sons, as David Hume argued, but also hypocrites who refuse to live under the arrangements they set up for the future.¹⁵⁵ And even if their intentions are unimpeachable, they are still accountable to no one actually affected by their handiwork. This sits awkwardly with the democratic principle that all interested parties should have the chance to participate in decisions that affect them.¹⁵⁶

¹⁵² DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 452, 457 (Oxford Univ. Press 1963) (1741 & 1742).

¹⁵³ ROUSSEAU, *supra* note 88, at 111–12; *see also id.* at 57 (criticizing intergenerational binding).

¹⁵⁴ Letter from Thomas Jefferson to James Madison, *supra* note 45; *see also* THOMAS PAINE, *The Rights of Man*, in *The Life and Major Writings of Thomas Paine* 243, 254 (Philip S. Foner ed., 1961) (arguing that the only true consent of the governed is “the consent of the living”). Jefferson’s views were influenced by those of the Marquis de Condorcet, who expressed anxiety about intergenerational binding in a pamphlet published a month earlier, during the debates over French constitutional ratification in August of 1789. Condorcet even went so far as to calculate, on the basis of mortality tables, how often law should turn over for there to remain a living majority that had ratified it. MARQUIS DE CONDORCET, *On the Need for Citizens to Ratify the Constitution* (1789), *reprinted in* CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 271, 272 (Iain McLean & Fiona Hewitt eds., 1994).

¹⁵⁵ Sunrise lawmakers are like the ministers (“fathers” of a different kind) in Nathaniel Hawthorne’s *The Scarlet Letter*, or James Baldwin’s *Go Tell It on the Mountain*, who demand fidelity of their followers but practice adultery themselves. And just as these unfaithful men of God lack the moral authority to tell their congregants to stay true to their spouses, so too might the creators of sunrise amendments lack the legitimacy to bind future generations if they cannot abide by the results of their own binding.

¹⁵⁶ *See, e.g.,* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (“In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.”).

D. *Democracy-Enhancing and Democracy-Restricting Sunrises*

The essence of democratic constitutionalism is that the sovereign people author their fundamental law. The promise of sunrise lawmaking is that it may provide an Article V route to reinvigorate democratic constitutionalism in the United States. However, it does so through a technique that may impede the sovereignty of future majorities in a way that is even more pronounced than in regular constitutional lawmaking, since the sunrise legislator is not bound by the laws she passes for posterity. Sunrise lawmaking thus lacks the form of accountability that is embedded in democratic sovereignty understood as a discipline of *self*-rule—that the legislator, too, is bound by the laws.

In this Section, we propose a solution to this dilemma by identifying those forms of sunrise lawmaking that are “democracy enhancing”—and thus compatible with democratic constitutionalism—and those that are “democracy undermining,” and therefore incompatible with it, whatever their other merits may be. Our argument, in brief, is that where one generation legislates exclusively for another, all it can legitimately legislate is the autonomy of the future—that is, the capacity of later generations to live under laws of their own choosing.

Our claim rests on extending to the body politic across generations Kantian and neo-Kantian claims concerning autonomy and the proper limits of guardianship among individuals. In his famous essay, *What Is Enlightenment?*, Kant conceives of “enlightenment” as the gradual attainment of autonomy via the overcoming of “*self-incurred*” immaturity.¹⁵⁷ But when immaturity is not the self-incurred condition of someone who ought to be autonomous, but of someone who cannot be—for example, a child or student—Kant emphasizes the primary responsibility of a guardian or tutor to help the immature individual develop the powers of a mature, autonomous person. In the neo-Kantian analysis offered by John Rawls, these principles justify paternalism towards people who lack control of their rational faculties—children, the injured, and the mentally ill.¹⁵⁸ In such cases, paternalism

¹⁵⁷ IMMANUEL KANT, AN ANSWER TO THE QUESTION: ‘WHAT IS ENLIGHTENMENT?’, 4 *Berlinische Monatsschrift* 481 (1784) (emphasis added), *reprinted in* KANT, *POLITICAL WRITINGS* 54, 54 (Hans Reiss ed., 1991) (1970). “*Immaturity*,” per Kant, “is the inability to use one’s own understanding without the guidance of another.” Enlightenment requires conquering the root causes of this immaturity—the “[l]aziness and cowardice” of those who refuse to use their own reason, as well as the manipulations of the self-appointed “guardians” of the people, who warn of the many dangers of enlightenment. *Id.* at 54.

¹⁵⁸ Rawls explains, “For these cases the parties adopt principles stipulating when others are authorized to act in their behalf and to override their present wishes if necessary; and

may be justified, Rawls notes, “by the evident failure or absence of reason and will,” but “it must be guided by the principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods.”¹⁵⁹ In other words, we may act on behalf of others when their rationality fails them or is undeveloped, but we must do so in their best interest, by pursuing the ends they have (rationally) chosen previously or—absent information on what those are—adopting rational ends that would be suitable for any person, such as pursuing “primary goods” useful for any life.

How would this principle apply, not to persons unable to act autonomously because they lack rational faculties, but to our political posterity? It would require recognizing an analogy between individual and political autonomy, and then attempting to realize the latter through constitutional mechanisms of popular sovereignty. Legislation for the other must respect the other’s autonomy, if only *in potentia*. Thus, all the present can legislate specifically for the future, consistent with respect for the autonomy of future democratic majorities, is the *capacity* to legislate.¹⁶⁰ Where the legislator is intended to be a democratic majority—as the sovereign people are understood to be in democratic constitutionalism—a sunrise amendment is legitimate only when it increases the democratic character of political decision making in the future.¹⁶¹

Defining such a “democracy-enhancing” sunrise amendment requires specifying a theory of democracy. Since we are discussing constitutional lawmaking in a dualist system, it also requires clarifying how democracy may be manifested at the level of sovereignty and at the level of the government. To consider sovereignty first, we follow the line of the democratic constitutionalists surveyed above in emphasizing that what constitutions allow, at least as an ideal, is majoritarian decision making in a plebiscitary (i.e., direct or unmediated) fashion—

this they do recognizing that sometimes their capacity to act rationally for their good may fail, or be lacking altogether.” RAWLS, *supra* note 134, at 249.

¹⁵⁹ *Id.* at 250.

¹⁶⁰ This normative orientation is similar in some respects to Amar’s argument that sunrise amendments should be used to secure “fair decisional procedures” for the future. He writes: “If ever there were a proper role for the ‘dead hand of the past’—the fixing of certain ground rules by Generation 1 for the benefit of Generation 2—it is in the setting of fair decisional procedures, precisely because Generation 2 cannot easily do this for itself.” AMAR, *supra* note 6, at 474.

¹⁶¹ Paradoxically, sunrise lawmaking that enhances democracy can also undermine the conditions of its own efficacy: In a perfectly democratic order, the will of the current majority would determine fundamental issues, and democracy-enhancing sunrise amendments would be unnecessary. Indeed, it is only where democracy *can* be enhanced that sunrise amendments would actually work, since they can only bind a future generation if constitutional authority limits ordinary majoritarian democracy.

as occurred in the American ratification experience and would occur in a new national constitutional convention.¹⁶² Such direct democracy—if instituted properly—rests on the ideal of “one person, one vote,” and any reform that moves the constitutional order in that direction thus proves “democracy enhancing.”

Where the legislation is less fundamental, and can be left to the *government* that the sovereign constitutes, the question of how to judge its democratic character becomes admittedly more difficult, as does the question of whether democracy-enhancing reforms necessarily imply democratic governmental procedures.¹⁶³ At the most basic level, democratic constitutionalism requires the government that the sovereign people constitute to remain their instrument while performing its designated tasks, and not to usurp the powers of the sovereign. Reforms that reinforce governmental accountability to the people as a whole thus enhance democracy. Such reforms may include commitments to governmental transparency and ex post auditing of governmental officials, which allow the sovereign to judge governmental fidelity to the tasks it has authorized.

A more complex matter is whether reforms that bring the government closer to the ideal of “one person, one vote” with respect to the *representation* of citizens across the political branches are also to be deemed “democracy enhancing.” Under a system of perfected democratic sovereignty—that is, where national majorities could straightforwardly authorize any desired constitutional changes, including to the structure and function of the governments they constitute—the democratic character of the government would prove a secondary question. A democratic sovereign might create a variety of nondemocratic governmental structures to serve its purposes.¹⁶⁴ Under some circumstances, it is even possible that a distribution of governmental *representation* that was not democratic—that is, which deviated from the principle of “one person, one vote” in the selection

¹⁶² See Amar, *Philadelphia Revisited*, *supra* note 75.

¹⁶³ The social contract theorists who distinguished sovereignty/government did so with the understanding that the two could take different forms. See *supra* note 89 and accompanying text. Their main concern was to avoid governmental usurpation of sovereign prerogative—which would, via the accepted impossibility of organizing directly democratic government on ancient lines, make democracy impossible once again under modern conditions. The durable separation of sovereignty and government is thus the functional prerequisite of modern democracy.

¹⁶⁴ A temporary executive for emergency conditions, elite deliberative bodies, and courts provide historical examples of nondemocratic governmental bodies authorized by democratic decision making at the sovereign level. For a discussion of the theorization of these bodies in terms of the sovereignty/government distinction, see *supra* notes 89–95 and accompanying text.

of representative bodies—might nevertheless prove “democracy enhancing” at the level of sovereignty.¹⁶⁵

However, given the present difficulties in the United States of using either textually indicated constitutional mechanisms or an extraordinary national convention to reconstitute the government and put it more directly under the control of the sovereign majority, a great deal of the lawmaking performed by Congress, the Executive, and the Courts must substitute for what, under other arrangements, would be sovereign decision making performed by the people collectively. For these reasons, we include as democracy-enhancing reforms not only those that work to recalibrate the sovereign-government relation (so that the latter is more clearly realized as a construction of the former), but also those that democratize the government in its operation.¹⁶⁶ Thus, any reforms that either push the relevant form of constitutional decision making closer to a “one person, one vote” model, or

¹⁶⁵ For example, where entrenched inequalities distort the democratic character of the sovereign by allowing for systematic exclusion of some individuals from decision making based on racial, gender, or class lines, remedies might include overrepresentation of excluded groups at the level of government, in order to redress these inequalities and enable the construction of a properly democratic sovereign. From a democratic-constitutionalist perspective, this argument is perhaps the most persuasive reason to deviate from the straightforward argument that governmental representation should be “one person, one vote,” which is the form we endorse in our definition of democracy-enhancing reforms. Note that any such system of minority overrepresentation would need to be authorized by the national majority if it is to be understood as contributing to, rather than undermining, the underlying institution of popular sovereignty. This basic analysis similarly holds true for alternative electoral systems that aim to instantiate differently the principle of “one person, one vote,” for example, proportional representation and other schemes that promote inclusion of minority political parties.

¹⁶⁶ In this sense, our conception of “democracy” across both government and sovereignty combines, to use a classical lexicon, a *democratic* (i.e., majoritarian) sovereign and an *aristocratic* (i.e., elected) government. It thus corresponds to Rousseau’s recommendation in Book III of *The Social Contract*, and reflects what we take to be a rather widespread view of modern “democracy,” in which sovereignty is exercised by the people directly, if episodically, and representatives, who are meant to be chosen in a manner reflecting the equal right of each member of the electorate to representation, receive ordinary legislative powers. See, ROUSSEAU, *supra* note 88, at 111–12. The obvious puzzle here, which we cannot explore in detail, concerns the character of appointed governmental officials, including the federal judiciary. It is relatively clear what sort of reforms would make the political branches of government more democratic: Most would address the unevenness of representation across the citizen body, in the manner we exemplified in the Introduction. However, the ideal of “one person, one vote” has no obvious purview when it comes to evaluating the democratic character of the judiciary. Cf. BICKEL, *supra* note 71, at 18 (observing that judicial review is a “deviant institution in the American democracy”). We must thus assume for present purposes that the constitutional creation of life-tenured and federally appointed judges satisfies an important, if nondemocratic, *governmental* function, as willed ultimately by the democratic *sovereign*, as noted *supra* notes 154 and 156.

increase the accountability of the constituted government to the sovereign people, enhance democracy in our view.¹⁶⁷

By contrast, there are two ways in which a sunrise amendment might prove democracy restricting. The first occurs when one generation is openly exploitative of another; the second when it pursues a misguided, even if genuine, desire to determine the laws for another (but not for itself). Each has an analogue in the Kantian conception of guardianship. The exploitation of the ward by the guardian obviously undercuts the conditions under which the ward may grow to attain autonomy. Likewise, even well-intentioned but substantive direction of the ward—for example, prescribing a particular direction for the development of the ward’s talents or personality—will favor some paths and foreclose others, undermining the ward’s capacity to become an equal agent in time.

To return to the context of lawmaking by one generation for another, consider one vivid example of open exploitation through sunrise lawmaking. Advocacy groups have tried for decades to pass a “balanced budget amendment” that would constitutionally require the United States government to spend no more than it takes in each year.¹⁶⁸ Various proposals of this sort have garnered considerable support on multiple occasions. Just three years ago, a balanced budget amendment received 261 votes in the House of Representatives and 47 in the Senate.¹⁶⁹ In 1995, a similar measure came within a single vote of securing the required two-thirds majority in both Houses of Congress, obtaining 300 votes in the House and 65 in the Senate.¹⁷⁰ The 1995 initiative ultimately fell short over concerns that it would

¹⁶⁷ As should be obvious, in a great many cases the question as to whether a particular governmental arrangement enhances democratic control will be contentious, perhaps particularly in relation to how elections should be managed in terms of funding, candidate-selection, and access to media. Our argument that sunrise lawmaking should be restricted to democracy-enhancing measures is not meant to downplay the difficulty of identifying them, particularly where there is a genuine disagreement over how best to ensure popular control of the government.

¹⁶⁸ For an example of current balanced budget advocacy, see AMERICANS FOR A BALANCED BUDGET AMENDMENT, <http://www.balanceourbudget.com> (last visited Oct. 20, 2015).

¹⁶⁹ For the Senate vote, see *U.S. Senate Roll Call Votes 112th Congress – 1st Session (2011)*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_112_1.htm (last visited Oct. 20, 2015). For the House, see *Final Vote Results for Roll Call 858*, OFF. OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2011/roll858.xml> (last visited Oct. 20, 2015).

¹⁷⁰ After the amendment fell one vote shy of the required 67 in the Senate, Majority Leader Bob Dole switched his vote in order to enable himself to reintroduce the measure later, bringing the final tally to 65-35. See Edwin Chen & Michael Ross, *Balanced-Budget Amendment Falls Short in Tight Senate Vote*, L.A. TIMES (Mar. 3, 1995), http://articles.latimes.com/1995-03-03/news/mn-38285_1_balanced-budget-amendment.

siphon money away from the Social Security trust fund—a highly salient political issue for the large segment of the electorate in or approaching retirement.¹⁷¹ Suppose, in order to assuage these constituents' fears, the supporters of constitutionalized balanced budgets turned their proposal into a sunrise amendment that would only go into effect in 2115. This might make the idea more palatable to present-day voters, none of whom would have to worry about seeing their Social Security checks vanish as a result of constitutionally mandated belt-tightening.¹⁷² In fact, the sunrise solution would even appeal to spendthrift voters. By promising to be frugal *later*, and embedding that promise in the Constitution, the current generation could reassure lenders of the United States' ability to repay its debts in the future, and thereby guarantee its own ability to engage in rampant borrowing in the present.¹⁷³

Whether or not it is advisable to require balanced budgets in the Constitution, using a sunrise amendment to do so in this manner feels highly questionable. The generation that produces such an amendment does not simply “enable” its descendants to live within their means; it also takes advantage of the frugality it imposes on the future in order to live an extravagant lifestyle in the present.¹⁷⁴ This use of the Constitution to enrich one generation at the expense of another raises many of the intergenerational equity concerns that pepper discussions of the national debt¹⁷⁵ or climate change.¹⁷⁶ Indeed, it magnifies them by ossifying the present generation's self-serving decision to live off the backs of its successors through constitutionalization.

¹⁷¹ See Michael Wines, *Senate Rejects Amendment on Balancing the Budget; Close Vote Is Blow to G.O.P.* (Mar. 3, 1995), <http://www.nytimes.com/1995/03/03/us/104th-congress-balanced-budget-senate-rejects-amendment-balancing-budget-close.html>.

¹⁷² Indeed, some economists have explicitly suggested that this type of delayed implementation provision is the best way to achieve balanced budgets. See Guido Tabellini & Alberto Alesina, *Voting on the Budget Deficit*, 80 AM. ECON. REV. 37 (1990), reprinted in 2 MONETARY AND FISCAL POLICY: POLITICS 157, 171 (Torsten Persson & Guido Tabellini eds., 1994).

¹⁷³ A similar argument is often offered for freeing central banks from political control. A country with an independent central bank makes a credible commitment to sound monetary policy in the future, making lenders more likely to trust it. Otherwise, potential creditors may worry that the government will inflate away its debts in order to satisfy its present political objectives, leaving future generations to deal with the fallout. See ALEX CUKIERMAN, *CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE* 349–50 (1992).

¹⁷⁴ The literary example for this type of “father” would be Mr. Brocklehurst, the stingy schoolmaster in Charlotte Brontë's *Jane Eyre*, who preaches an ethic of poverty and subjects the children in his care to extreme privation, all in order to stuff his own pockets and live a lavish lifestyle.

¹⁷⁵ See, e.g., James C. Clingermayer, *An Intergenerational Transfer Model of State Debt Financing*, 72 PUB. CHOICE 13, 13 (1991) (discussing public debt as an intergenerational transfer of tax obligations).

Sunrise amendments can also be democracy restricting even if they do not openly attempt to exploit future generations in this manner. Suppose well-meaning reformers proposed an amendment that increased the voting age to thirty, and that went into effect thirty years after ratification so that no one currently alive would be affected. That (admittedly unlikely) sunrise amendment would have a much greater chance of success than a comparable amendment that took effect immediately, since it would have no direct adverse impact on the eighteen- to twenty-nine-year-old constituents who would otherwise vote against their own disenfranchisement.¹⁷⁷ Even if the proponents of such a change thought they were acting generously on behalf of the future—delivering it an older, wiser electorate—their behavior could hardly be understood as that of a sovereign constituting *itself* through fundamental law. Instead, these sunrise lawmakers remove future individuals from the sphere of political participation but face no present-day accountability for their actions. They have failed to serve as proper guardians for future majorities by denying them, through a sunrise, their political autonomy.¹⁷⁸

III

SUNRISE LAWMAKING IN THE CONSTITUTION

Our taxonomy of sunrise lawmaking provides a framework in which to examine the use of time delays in the United States Constitution. Several important constitutional provisions kept some, or all, of their effects from being felt at the moment of their adoption. Understanding these provisions as instances of sunrise lawmaking helps us appreciate both the text and history of the Constitution, and the practice of sunrise lawmaking itself. Of course, the identification of these time delays as “sunrise amendments” is a retrospective conceptual classification with normative intent: Our purpose is not simply to record the examples of temporal delays in prior constitutional law-

¹⁷⁶ See, e.g., Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097, 1100 (2011) (arguing that climate change models should place a greater weight on the interests of future generations).

¹⁷⁷ Some younger voters might even *favor* the sunrise proposal, which would have the effect of increasing their power by creating a smaller electorate once they were in it.

¹⁷⁸ The problem of misguided paternalism is obviously most acute when sunrise lawmakers fail to recognize their own limitations and presume to be able to know the needs of future generations. However, even if they were to “get it right” and deliver to a future electorate a precisely desired result, the action would still violate the autonomy of the future—the need for each generation to understand itself as the author of its own law. This violation of autonomy may be understood with reference to Amartya Sen’s distinction between “culmination outcomes,” which specify only an end result, and “comprehensive outcomes,” which also include the way in which that result was achieved (i.e., the decision process as well as the decision). See AMARTYA SEN, *THE IDEA OF JUSTICE* 215 (2009).

making, but to bring these into self-conscious recognition *as examples of a technique* that might be used for future democratic renewal.

This Part both provides an overview of temporal delays in the Constitution and evaluates them from the normative standpoint of the democracy-enhancing analysis we developed above. We find that in several instances, constitutional lawmakers used time delays to achieve otherwise unrealizable reforms that brought political practice closer to the constitutional ideal declared in the Preamble: the unified popular legislator envisioned by the plural, first-personal pronoun “We.” Yet in at least one notable counterexample, sunrise lawmaking enabled constitutional drafters to constrain their progeny in misguided ways inconsistent with the tenets of democratic constitutionalism.

A. *Gradual Rollout: The Eighteenth Amendment*

The Eighteenth Amendment, which brought about the advent of prohibition, is arguably the purest formal example of a sunrise amendment in the Constitution: The Amendment’s first section specifies that its operative provisions will not have the force of law until “one year from the ratification of this article.”¹⁷⁹ Yet the Eighteenth Amendment is functionally distinct from the sunrise amendments on which this Article focuses. Those amendments use time as a tool to change the balance of present interests in favor or against a proposed reform, while the Eighteenth Amendment used time to smooth the transition to prohibition. One could imagine a prohibition amendment that acted as a sunrise amendment by, for example, delaying the alcohol ban for several decades in order to placate powerful brewers who were concerned with immediate profits but indifferent to the fate of the industry after they were gone. However, the actual prohibition amendment adopted such a short implementation lag—just one year—that it seems unlikely that its purpose was to induce long-run thinking. Rather, the Eighteenth Amendment’s one-year delay was merely a means to ensure an orderly logistical transition from one state of affairs to another. Henry Cohn and Ethan Davis report that the lag was inserted to give the brewing industry time to liquidate its operations before the ban went into effect.¹⁸⁰ The Eighteenth Amendment therefore had more in common with the delayed rollouts

¹⁷⁹ U.S. CONST. amend. XVIII, § 1.

¹⁸⁰ Henry S. Cohn & Ethan Davis, *Stopping the Wind That Blows and the Rivers That Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 QUINNIPIAC L. REV. 327, 336 n.55 (2009) (citing THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933* (1998)).

that characterize many new statutory initiatives¹⁸¹ than with the kind of sunrise lawmaking that could reshape constitutional politics.

B. Democracy-Enhancing Sunrise: The Slave Importation Clause and Amendments Twenty, Twenty-Two, and Twenty-Seven

On several other occasions, however, constitutional drafters utilized the power of time to enact democracy-enhancing reforms without provoking immediate interests that might otherwise have mobilized against them. These instances provide prime examples of the promise of sunrise lawmaking.

1. Imposing a Veil of Ignorance on Congress: The Twenty-Seventh Amendment

The Twenty-Seventh Amendment is not itself a sunrise amendment, but it utilizes the principles of sunrise lawmaking to achieve democracy-enhancing ends.¹⁸² The Amendment restricts Congress's ability to vote itself pay raises, providing that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."¹⁸³ It thereby forces legislators to make all congressional pay statutes sunrise laws, just as the Army Clause forces legislators to include sunset provisions in all military appropriations.¹⁸⁴ In so doing, it places congressmen behind a veil of ignorance when they vote on pay measures.¹⁸⁵ Because of the Twenty-Seventh Amendment, a Congressman deciding whether to support a pay increase does not know whether he will still be a Congressman—or just an ordinary taxpayer footing the bill—when the proposed pay hike takes effect. As a result, he is encouraged to adopt a broad perspective on the measure's advisability rather than promote his narrow pecuniary interests. The

¹⁸¹ Many of the central features of the Affordable Care Act, for example, did not come into effect until several years after the law was passed. See *Key Features of the Affordable Care Act by Year*, *supra* note 40. Such "delayed commencement" is a familiar feature of much legislation, and is distinct from sunrise lawmaking because it is part of a present-oriented (not future) initiative in which time delays are imposed for logistical reasons. For an analysis of timing rules in constitutional and statutory provisions, see Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 *HARV. L. REV.* 543 (2007).

¹⁸² For more on the Twenty-Seventh Amendment, and other constitutional provisions that require Congress to operate behind veils of ignorance, see Vermeule, *supra* note 25.

¹⁸³ U.S. CONST. amend. XXVII.

¹⁸⁴ *Id.* art. I, § 8.

¹⁸⁵ Vermeule, *supra* note 25, at 421 ("The delay prevents legislators from benefiting during the interim period, and thus ensures that legislators will not consider the question of appropriate pay under the distorting influence of short-term personal interest.").

overall effect is to increase the public's ability to hold accountable politicians who seek to enrich themselves from the public fisc.¹⁸⁶

2. *Political Reforms that Exempt Incumbents: Amendments Twenty and Twenty-Two*

Several other constitutional provisions provide even clearer examples of the power of sunrise lawmaking to enhance the democratic character of American government. Amendments Twenty and Twenty-Two, for instance, both combat political entrenchment, the former by shortening the period in which politicians rejected at the polls may continue to govern, and the latter by keeping the presidency from taking on the monarchical trappings that so many feared it would.¹⁸⁷ Both also smoothed the path for these reforms by ensuring that they did not affect individuals in office at the time of their ratification. This maneuver helped reorient both Amendments away from considerations of short-run political tactics and towards long-run considerations about the ideal structure of American democracy.

The Twentieth Amendment, which dramatically shortened the "lame duck" period following congressional and presidential elections, delayed the effects of its two most important operative sections to "the 15th day of October following the ratification of this article."¹⁸⁸ This seemingly trivial proviso, which ultimately postponed the Amendment's operation by less than nine months, was in fact quite significant in historical context. In the presidential election of 1932, during the depths of the Great Depression, the Democrat Franklin Roosevelt resoundingly defeated the Republican Herbert Hoover. However, because of the peculiarities of the old constitutional elections calendar, Hoover's administration stayed in power until March 1933. The Twentieth Amendment's ratification in the early days of 1933 moved the inauguration date to January 20 so that no future electorate would have to wait so long to see its President-elect assume office.¹⁸⁹ But since the Amendment stipulated that it would not take effect until October 15, Roosevelt did not enter the White House a minute sooner than he would otherwise have.¹⁹⁰

¹⁸⁶ See 1 ANNALS OF CONG. 440 (1789) (Joseph Gales ed., 1834) (recounting Madison's explanation to the First Congress that the Amendment was designed to avoid the "impropriety" of legislators "put[ting] their hand into the public coffers, to take out money to put in their pockets").

¹⁸⁷ See Donald L. Robinson, *The Inventors of the Presidency*, 13 PRESIDENTIAL STUD. Q. 8, 9–12 (1983) (describing the anxieties many Framers had about a strong executive).

¹⁸⁸ U.S. CONST. amend. XX, § 5.

¹⁸⁹ AMAR, *supra* note 8, at 428.

¹⁹⁰ Seventeen states did ratify the Amendment before October 15, 1932. But a substantial majority of the forty-eight states that ultimately gave their consent did not do

Without Section 5's delay provision, the Amendment could have been read as a gambit to end Hoover's term immediately. The delay's inclusion therefore transformed what might have been, if only in public perception, a partisan maneuver to oust a defeated President—against the wishes of his remaining supporters—into a decision about the long-run benefits of a new election transition mechanism. The Twentieth Amendment's drafters, in other words, ensured a more democratically accountable government for their progeny by delaying the effects of their reforms.

Similarly, the creators of the Twenty-Second Amendment, which established term limits for the presidency, used a grandfather clause to defuse some of the controversy the measure's partisan provenance inspired and to emphasize instead its long-run democracy-enhancing effects. In 1940 and 1944, the Republican Party made presidential term limits a key component of its platform, expressing its outrage over Roosevelt's decision to run for a third, and then a fourth, term.¹⁹¹ Anger translated into action in 1947—several years after Roosevelt's death—when the Republican-controlled House Judiciary Committee reported a proposed amendment limiting the President to two four-year terms.¹⁹² In light of the widespread perception that the measure was intended as a posthumous rebuke to Roosevelt and his party, the House Judiciary Committee's Report went to great lengths to emphasize that this was “not a political question,” arguing that “[t]he importance of the problem to the people transcends all political implications and considerations.”¹⁹³ House Democrats were unconvinced. The resolution ultimately passed the chamber with the support of all 238 of its Republican members, but just 47 of its 168 Democrats.¹⁹⁴

The House's bill was easily characterized as a partisan ploy because it struck not only at dead, but also living, Democrats: It contained no grandfather clause, and therefore would have barred Roosevelt's successor, Harry Truman, from seeking a third term.¹⁹⁵ In the Senate, however, cooler heads prevailed and fashioned a compromise that gave the proposed amendment a more general character. A new draft by Republican Senator Robert Taft and his Democratic col-

so until early 1933, at which point they knew that the Amendment would not take effect until the following fall. See *Ratification of Constitutional Amendments*, U.S. CONSTITUTION, <http://www.usconstitution.net/constamrat.html> (last modified Nov. 11, 2010).

¹⁹¹ AMAR, *supra* note 8, at 437.

¹⁹² Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 66 (1990).

¹⁹³ H.R. REP. NO. 80-17, at 2 (1947).

¹⁹⁴ Stathis, *supra* note 192, at 67.

¹⁹⁵ See H.R.J. Res. 27, 80th Cong. (as passed by House, Feb. 6, 1947).

league Millard Tydings inserted additional language ensuring that the measure would “not apply to any person now holding the office of President.”¹⁹⁶

The change did not succeed in removing all partisan tint from the proposal. The Senate’s vote on the compromise amendment was still largely divided along party lines,¹⁹⁷ and subsequent state ratification votes followed a similar pattern.¹⁹⁸ Yet exempting the sitting Democratic President from the Amendment had significant symbolic meaning.¹⁹⁹ In the midst of partisan debate, it lent credence to the claim that presidential term limits really were an idea that transcended “all political implications and considerations.”²⁰⁰

The Twenty-Second Amendment’s history also provides an interesting example of how time delays require a constitutional change’s proponents to think beyond their short-term interests. As a result of the grandfather clause, the first President actually barred from a third term was the Republican Dwight Eisenhower, who left office with high approval ratings and would have been a viable third-term candidate.²⁰¹ Therefore, regardless of what the predominantly Republican voters who adopted the Twenty-Second Amendment thought they were doing, what they ultimately passed was not, in practice, an effective tactic for short-term political gain. They ensured instead that presidents elected by future electorates—Democratic or Republican—would not start to resemble kings.

3. *The Full (and Wasted) Potential of Sunrise: The Slave Importation Clause*

The Twentieth and Twenty-Second Amendments may appear to be marginal instances of sunrise lawmaking because their time lags were so short. Article I, Section 9’s twenty-year ban on congressional interference with the slave trade, on the other hand, clearly showcases the power of sunrise amendments to effect revolutionary, democracy-enhancing changes in American society in an intergenerational

¹⁹⁶ Paul G. Willis & George L. Willis, *The Politics of the Twenty-Second Amendment*, 5 W. POL. Q. 469, 474 n.24 (1952).

¹⁹⁷ Stathis, *supra* note 192, at 68.

¹⁹⁸ *Id.* at 70.

¹⁹⁹ Truman apparently said little throughout the ratification debates, even though he later expressed public opposition to presidential term limits. *See id.* at 71, 75.

²⁰⁰ H.R. REP. NO. 80-17, at 2 (1947).

²⁰¹ *See Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP, <http://www.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx> (last visited Sept. 19, 2015). The post-WWII President with the second-highest approval rating ever at the end of his second term—Ronald Reagan—was also a Republican, though his age might have prevented him from running for a third term.

fashion.²⁰² As such, it forces us to consider whether a different sunrise amendment could have done even more to combat the evils of slavery.

Article I, Section 9, Clause 1 states: “The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight”²⁰³ This extraordinary protection for the international slave trade appears at first glance to be a sunset, rather than a sunrise, provision. The Clause’s placement in Article I, Section 9, which imposes a variety of checks on congressional authority, suggests that it establishes a limit on Congress’s plenary power to regulate foreign commerce that sunsets in 1808,²⁰⁴ rather than establishing a new power to ban the slave trade that sunrises at that point. But this analysis misunderstands the baseline from which the Framers were operating. The Constitution was adopted as a unified whole, rather than piecemeal. Therefore, the relevant “default” was not a regime in which Congress could wield its Foreign Commerce Clause powers without limits, but the world of the Articles of Confederation, in which no present or future national authority had the power to ban slave importation.²⁰⁵ Taken as a whole, the Constitution created a previously unavailable power—a national legislature that could end the slave trade—but it only allowed that power to “sunrise” twenty years after ratification.

Our characterization of this sunrise as democracy enhancing may not seem obvious for two reasons. First, the abolition of the slave trade is not linked straightforwardly to improving the mechanisms of democratic government for future generations. On its face, the Slave Importation Clause appears instead to impose a substantive policy decision on the future—that the federal government should have expansive powers over foreign commerce—and therefore to engage in misguided paternalism (“misguided” here referring not to the choice to hinder the slave trade, but rather to do so through sunrise instead of ordinary lawmaking). Yet closer inspection reveals that the Slave Importation Clause was indeed democracy enhancing. The institution of chattel slavery stands in dramatic opposition to the “one person,

²⁰² According to Jefferson’s own calculations, using contemporary life tables, each governing majority lasted about nineteen years. See Letter from Thomas Jefferson to James Madison, *supra* note 45, at 394. This means that the effect of the slave importation clause was genuinely intergenerational: The founding generation passed for the future a law it would not itself ever be bound by.

²⁰³ U.S. CONST. art. I, § 9, cl. 1.

²⁰⁴ See *id.* art. I, § 8, cl. 3.

²⁰⁵ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 26–27 (1996) (discussing the Articles of Confederation government’s limited ability to regulate external relations of any kind).

one vote” principle that undergirds the conception of democracy outlined in Part II. Banning the importation into the United States of human beings who would subsequently be denied all access to the political process and instead be treated, in *Dred Scott*’s infamous words, “like an ordinary article of merchandise and property,”²⁰⁶ increased the democratic character of the polity, even if it had no direct bearing on elections.

It is also tempting to view the Slave Importation Clause not as a step towards abolition but rather as an inexcusable accommodation of slavery—an exemplar of William Lloyd Garrison’s famous argument that the Constitution was “a Covenant with Death.”²⁰⁷ After all, the decision to allow the transatlantic trade to continue for at least twenty more years temporarily sanctioned the murderous horrors of the “peculiar institution,”²⁰⁸ an accommodation made doubly damning by the Framers’ choice to give it special status as the only provision in the Constitution exempt from amendment.²⁰⁹ To cap it all off, when paired with the Three-Fifths Clause, the Slave Importation Clause created a perverse system of incentives that encouraged Southern states to import as many slaves as possible in the short run, in order to increase their political clout before the slave trade could come up for a vote in 1808.²¹⁰

But even if the Clause was, at some level, “a Covenant with Death,” the opponents of slavery managed to strike a shrewd bargain. By using the power of time, they achieved a modest victory—the possibility of eventual abolition—that likely could not have been attained by other (peaceful) means. Excising all protections for the slave trade from the Constitution was probably not an option. At the Virginia ratifying conventions, Madison maintained that “[t]he Southern States [Georgia and the Carolinas] would not have entered into the Union of America without the temporary permission of that trade.”²¹¹ The records of the Philadelphia Convention suggest that he was unfortunately right. In the debates over the Slave Importation Clause, South

²⁰⁶ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1856).

²⁰⁷ See LEVINSON, *supra* note 12, at 3 (quoting Garrison).

²⁰⁸ Approximately 15% of slaves died during each Middle Passage trip, and those that survived, of course, faced many more horrors in the New World. James Horn & Philip D. Morgan, *Settlers and Slaves: European and African Migrations to Early Modern British America*, in *THE CREATION OF THE BRITISH ATLANTIC WORLD* 19, 30 (Elizabeth Mancke & Carole Shammas eds., 2005).

²⁰⁹ U.S. CONST. art. V.

²¹⁰ AMAR, *supra* note 8, at 90–91.

²¹¹ 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 453–54 (Jonathan Elliot ed., 1827) (statement of James Madison).

Carolina representative John Rutledge put the matter bluntly, stating that the “true question” presented by slave importation was “whether the [Southern] States shall or shall not be parties to the Union.”²¹² His colleagues reiterated this sentiment several times.²¹³

Without using a sunrise amendment, the alternatives available to the Framers were therefore either to call the Southern states’ bluff and risk the very real possibility that they would leave the Union (potentially leading to violence and leaving the breakaway faction entirely free to continue importing slaves), or to make a permanent concession to the slave trade in the Constitution. By employing sunrise lawmaking, the Framers were instead able to give the proponents of slavery twenty years in return for the possibility of stopping importation for all time. And Congress did ultimately avail itself of this strategic accommodation by banning the slave trade on January 1, 1808—the first day such an action was constitutionally permissible.²¹⁴

The real tragedy, therefore, was not so much that the Framers agreed to a sunrise provision that let the slave trade persist for twenty years, but rather that they failed to use comparable ingenuity to phase out other aspects of slavery.²¹⁵ Many states in the late-eighteenth and early-nineteenth centuries adopted gradual manumission schemes that placated slaveholders by deferring most of their effects to the future.²¹⁶ Pennsylvania, for example, passed a law in 1780 that freed all slave children born after the statute’s enactment on their twenty-eighth birthdays.²¹⁷ This type of reform was easier than immediate emancipation for a slave owner to accept, since it meant that no slaves would be freed for almost thirty years—and that many more would remain in bondage long after that. Indeed, even plantation-centered Virginia was willing to consider similar proposals as late as 1832.²¹⁸ It stands to reason that the Framers might have had success promoting a

²¹² 2 FARRAND’S RECORDS, *supra* note 47, at 364.

²¹³ *See id.* at 371, 373, 559.

²¹⁴ *See* An Act to Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, from and After the First Day of January, in the Year of Our Lord One Thousand Eight Hundred and Eight, ch. 22, 2 Stat. 426 (1807), *available at* AVALON PROJECT, http://avalon.law.yale.edu/19th_century/sl004.asp (last visited Oct. 20, 2015).

²¹⁵ *See* AMAR, *supra* note 6, at 476.

²¹⁶ *See* AMAR, *supra* note 8, at 352–53 (noting that New York, Connecticut, and New Jersey all employed such schemes).

²¹⁷ An Act for the Gradual Abolition of Slavery (1780), *reprinted in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700–1781, at 838–43 (Alexander James Dallas ed., 1797).

²¹⁸ AMAR, *supra* note 8, at 96.

comparable sunrise scheme at the national level if they had bothered to try.²¹⁹

The Slave Importation Clause is therefore more than a concession to slavery. It showcases how the power of time can peacefully accomplish goals that would otherwise require bloodshed to achieve, as ending slavery ultimately did. That a sunrise amendment was employed to eradicate the slave trade—and might plausibly have been used to do away with the evil of slavery altogether—speaks to the promise of the technique.

C. *Democracy-Restricting Sunrise: The Natural Born Citizen Clause*

The Slave Importation Clause and Amendments Twenty, Twenty-Two, and Twenty-Seven present compelling illustrations of how one generation can use the power of time to bequeath a more democratic government to its successors when vested political interests would stand in the way of conventional attempts at reform.²²⁰ But at least one constitutional provision illustrates how sunrise amendments can restrict democracy.

Article II, Section 1, Clause 5, commonly known as the “Natural Born Citizen Clause,” stipulates that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”²²¹ Since all citizens at the time of ratification were exempted from the “natural born citizen” requirement, the provision effectively operated as a “sunrise” disqualification of non-native citizens from eligibility for the presidency.²²² In 1789, all immigrants were allowed to hold the nation’s highest office (assuming they met the

²¹⁹ See *id.* at 352–53. Note that Abraham Lincoln, by contrast, did vigorously advocate for such a plan several generations later, until it became apparent that war was inevitable.

²²⁰ One could argue that the Seventeenth Amendment, which provides for direct election of Senators, should also be included in this group since it provides that “[t]his amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.” U.S. CONST. amend. XVII, cl. 3. Yet this is not really a grandfather clause. It merely establishes that the natural reading of the preceding provisions, which do not seem to imply retroactive application, is the correct one.

²²¹ U.S. CONST. art. II, § 1, cl. 5.

²²² There is some uncertainty over exactly how far this disqualification extends—whether it applies to children of American parents living abroad, for example. The term “natural-born” is never given a precise definition in the Constitution, so its meaning at the Founding, or as modified by subsequent constitutional enactments like the Fourteenth Amendment, remains debated. See Sarah Helene Duggin & Mary Beth Collins, ‘*Natural Born*’ in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 89–108 (2005) (discussing many potential ambiguities in the Natural-Born Citizen Clause’s meaning).

other eligibility requirements); by the mid-nineteenth century, virtually none were. The Clause's full impact was therefore considerably delayed.

The Clause's anti-immigrant stance fits poorly in an otherwise remarkably pro-immigrant Constitution.²²³ Why did the Framers choose to adopt such a nativist restriction on presidential eligibility, even as they moved away from the British practice of requiring legislators, judges, and cabinet officers to be native-born?²²⁴ One piece of the answer may lie in the Natural Born Citizen Clause's sunrise qualities. All of the foreign-born delegates at the Convention—and all foreign-born citizens in the nation at the time of ratification—were expressly exempted from the Clause's nativity requirement, which may have placated an important constituency that otherwise would have opposed the measure.

Ironically, the nativity requirement was partly born of pro-democratic sentiments. At the time of the Convention, many Americans worried that a European noble would attempt to seize control of the newly independent republic.²²⁵ They may have had good reason to be concerned: in the months leading up to the Convention, the President of the Confederation, Nathaniel Gorham, actually sent a letter to Prince Henry of Prussia, brother of Frederick the Great, asking the German potentate whether he would be interested in venturing to the United States to become a constitutional monarch.²²⁶ Whether or not such an outcome was likely to materialize, the possibility grabbed hold of the American imagination. Throughout the summer of 1787, rumors circulated that the delegates at the Philadelphia Convention intended to appoint a foreign noble—the Bishop of Osnaburgh, second son of George III, according to one popular variant—as King of the United States.²²⁷ Indeed, Convention delegates were so concerned about these rumors that some of them leaked an anonymous

²²³ See AMAR, *supra* note 6, at 453–54 (arguing that the natural-born citizen requirement is inconsistent with the pro-immigrant “spirit of the Constitution”); Akhil Reed Amar, *Natural Born Killjoy*, LEGAL AFF. (Mar./Apr. 2004), http://legalaffairs.org/issues/March-April-2004/argument_amar_marpar04.msp (“In a land of immigrants committed to the dream of equality, the Constitution’s natural-born clause seems, well, un-American.”).

²²⁴ AMAR, *supra* note 8, at 164.

²²⁵ *Id.* at 164–65.

²²⁶ See *id.* at 165; see also JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 7 (2011) (describing contemporary rumors of such a letter); Michael Nelson, *Constitutional Qualifications for President*, 17 PRESIDENTIAL STUD. Q. 383, 395 (1987) (same).

²²⁷ See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 173 (1913).

newspaper report in August, reassuring the nation that “tho’ we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing—we never once thought of a king.”²²⁸ The harshness of the natural-born-citizen requirement may have reflected the importance of combatting the threat posed by foreign royalty—and of quashing speculation about the Convention’s own monarchical intentions.²²⁹

But couldn’t these goals have been fulfilled with a less comprehensive exclusion? Surely a very long residency or citizenship requirement—twenty years, say—would have been enough to dissuade most European nobles from making a bid for the American presidency and ensure that any who did would have become effectively Americanized by the time they were eligible to run for the nation’s highest office. In fact, such an approach was explicitly proposed at the Convention. The original draft of the presidential eligibility requirements mandated that the President shall be “a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.”²³⁰ Only in the early days of September 1787 did a new draft from the Committee of Eleven swap this language for the modern formulation requiring natural-born citizenship; the revised text was subsequently adopted without debate.²³¹

The idea for the nativity requirement probably came from John Jay, who sent a letter to George Washington proposing such a policy earlier in the summer.²³² The mystery, then, is why the Framers took up Jay’s suggestion without much resistance when a less restrictive alternative lay right in front of them. One obvious answer is the aforementioned need to demonstrate an emphatic anti-monarchical commitment. But the sunrise nature of the nativity requirement made adoption of the proposal an easier choice than it might have otherwise been. The Committee of Eleven introduced the natural-born citizen restriction and the proviso exempting all citizens at the time of ratification concurrently.²³³ This meant that from the moment debate commenced, the individuals who might have objected most vociferously to a provision barring immigrants from running for President—the seven

²²⁸ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 74 (Max Farrand ed., 1911) [hereinafter 3 FARRAND’S RECORDS].

²²⁹ AMAR, *supra* note 8, at 165 n.97; Nelson, *supra* note 226, at 395.

²³⁰ 2 FARRAND’S RECORDS, *supra* note 47, at 367.

²³¹ MASKELL, *supra* note 226, at 5.

²³² See Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888 (1988) (discussing how Jay’s letter “is generally assumed to be the source” of the Natural-Born Citizen Clause).

²³³ 2 FARRAND’S RECORDS, *supra* note 47, at 494.

foreign-born delegates at the Convention²³⁴—were all exempted from the measure’s restrictions. If the clause had instead taken immediate effect, it is likely that the Caribbean-born Alexander Hamilton, or one of his fellow immigrants, would have stood up to object.²³⁵

This somewhat speculative suggestion finds support in the records of the Convention’s earlier debates over congressional eligibility requirements.²³⁶ In the midst of the discussion over whether and under what conditions immigrants should be allowed to serve in Congress, James Wilson gave a strikingly personal speech on what citizenship restrictions meant to him as a Scottish immigrant:

[H]e rose with feelings which were perhaps peculiar; mentioning the circumstances of his not being a native, and the possibility, if the ideas of some gentlemen should be pursued, of his being incapacitated from holding a place under the very Constitution which he had shared in the trust of making. He remarked the illiberal complexion which the motion would give the System . . . and the discouragement [and] mortification [immigrants] must feel from the degrading discrimination, now proposed. He had himself experienced this mortification. On his removal into Maryland, he found himself, from defect of residence, under certain legal incapacities, which never ceased to produce chagrin²³⁷

Wilson clearly felt the sting of nativity requirements very personally, and made sure that his colleagues understood this. While he was unsuccessful in removing all anti-immigrant restrictions on holding office from the Constitution, his personal appeals did help secure a measure of victory: The congressional citizenship requirements ultimately adopted—seven years for the House and nine for the Senate—were short enough that no delegate at the Convention was affected by them.²³⁸ It is not hard to imagine Wilson, or one of his fellow immigrants, making a similar speech had the Committee of Eleven returned with a natural-born-citizen requirement for the presidency that made no exception for foreigners like them. The Natural Born Citizen Clause’s sunrise-like proviso may have been the price of their silence.

²³⁴ These were Robert Morris (England), Pierce Butler, Thomas Fitzsimons, James McHenry, and William Paterson (Ireland), James Wilson (Scotland), and Alexander Hamilton (Nevis). See AMAR, *supra* note 8, at 164 & n.93.

²³⁵ Instead, Hamilton was actually one of the first to endorse a natural-born-citizen requirement combined with an exemption for current citizens. See 3 FARRAND’S RECORDS, *supra* note 228, at 629.

²³⁶ See Pryor, *supra* note 232, at 890.

²³⁷ 2 FARRAND’S RECORDS, *supra* note 47, at 237.

²³⁸ See Nelson, *supra* note 226, at 394 (noting that no delegate at the Convention had been a resident for fewer than fourteen years).

It also helped mollify the fears of broader immigrant resistance to the Constitution that had tempered some Framers' nativist sentiments earlier in the summer. During the debates over congressional eligibility for foreign-born citizens, Edmund Randolph observed that "[m]any foreigners . . . who would be affected by such a regulation, would enlist themselves under the banners of hostility to the proposed System."²³⁹ Accordingly, he said he could tolerate citizenship requirements of up to seven years, "but no further."²⁴⁰ Madison similarly argued that imposing harsh restrictions on immigrant eligibility for Congress would "expose us to the reproaches of all those who should be affected by it . . . and would unnecessarily enlist among the Adversaries of the reform a very considerable body of Citizens."²⁴¹

The sunrise-like Natural Born Citizen Clause cleverly skirted around these concerns of immigrant opposition by barring no one who was eligible to vote on the Constitution from seeking the presidency. In fact, from the short-term perspective of the delegates at Philadelphia, the final version of the Clause, with its delayed categorical ban, was actually *more* inclusive than the twenty-one-year citizenship requirement it replaced. The earlier measure would have kept three Convention delegates—including Hamilton, who only came to the United States in 1772—from being immediately eligible to run for President.²⁴²

In and of itself, there was nothing wrong with the Framers' decision to recognize the patriotism of their foreign-born colleagues with an exemption from the natural born citizen requirement. As Joseph Story later remarked, the carve-out was duly inserted "out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honours in their adopted country."²⁴³ But as constitutional lawmakers, these foreign-born delegates at the Convention were charged not only with speaking for themselves and all other immigrants living in the United

²³⁹ 2 FARRAND'S RECORDS, *supra* note 47, at 237.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 271.

²⁴² Nelson, *supra* note 226, at 394. An interesting demonstration of the important role that interdelegate comity played in the determination of eligibility requirements is the differential success of the Natural Born Citizen Clause's current-citizen exemption, and Gouverneur Morris's attempt to exempt current citizens from the congressional citizenship requirements, which narrowly failed. 2 FARRAND'S RECORDS, *supra* note 47, at 272. Perhaps the reason that Morris's proposal was not adopted, whereas the presidential eligibility exemption passed without debate, was that the latter freed the delegates from having to disqualify any of their fellows from political office, whereas the former did not, since all delegates already met the congressional citizenship requirements.

²⁴³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473, at 332–33 (1833).

States in 1787, but also for all the future generations of immigrants who might one day “entitle themselves to high honors in their adopted country.”²⁴⁴ They did not do this. Instead, the use of sunrise lawmaking allowed the Framers to avoid the immediate political consequences of the Natural Born Citizen Clause’s inevitable exclusion of all the worthy immigrants who would subsequently arrive at the new nation’s shores.

It is open to debate whether preventing immigrants from running for President is a wise policy. Most of the Framers appear to have believed that it was; many modern commentators are more skeptical.²⁴⁵ Even if we take no position on the substance of the Natural Born Citizen Clause, however, our analysis suggests that there was something wrong with the Framers’ decision to subject only the future, and not the present, to the nativity requirement. By doing so, they were able to avoid opposition from their immigrant contemporaries—in other words, to sidestep the hurdles of democratic accountability by eschewing self-legislation even as they legislated for the future. The resulting democratic deficit was complete: No individual affected by the measure had the opportunity to vote on it. Nor could future immigrants disenfranchised by the Clause rely on a kind of virtual representation by the immigrants of the Revolutionary generation, since these Founding-era immigrants were exempted from the Clause’s effects. By imposing such a substantive policy choice on the future—and only on the future—the authors of the Natural Born Citizen Clause violated the trustee relationship in which sunrise lawmakers must stand to their progeny, denying others an autonomy they claimed for themselves.

CONCLUSION: MORNING IN AMERICA?

George Washington presided over the Constitutional Convention in an intricately carved mahogany chair, adorned, at the top, with a gilded image of a half-observed sun.²⁴⁶ As the Framers affixed their signatures to their final draft in mid-September 1787, ending their work in Philadelphia, Benjamin Franklin famously remarked: “I have . . . often . . . looked at that [image] behind the President without

²⁴⁴ James Wilson should certainly have recognized this failure of virtual representation; he would later remind his fellow delegates at the Pennsylvania ratification convention that they were representatives “not merely of the present age, but of future times . . .” 2 ELLIOT’S DEBATES, *supra* note 14, at 431.

²⁴⁵ See, e.g., Duggin & Collins, *supra* note 222.

²⁴⁶ For an image of the famous chair, see *The Rising Sun Armchair (George Washington’s Chair)*, USHISTORY.ORG (July 4, 1995), <http://www.ushistory.org/more/sun.htm>.

being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun.”²⁴⁷

Sunrise amendments can also take on different, and divergent, meanings. On the one hand, they can vindicate the promise of democratic constitutionalism. By inducing legislators to act on broad-minded considerations rather than parochial interests, they provide a promising way to broaden the sphere of democratic participation through the Article V process, even in the midst of today’s partisan gridlock. Much of the history of sunrise lawmaking in the Constitution showcases this potential.

Yet sunrise amendments can also accomplish less laudable ends. When the present makes law exclusively for the future, it legislates without the normal constraints of democratic accountability. It can use this freedom to facilitate future self-government, but it can also use it to exploit or inappropriately steer its progeny, in violation of its proper role as the future’s trustee.

A sunrise lawmaker is, in this sense, similar to Washington at the pivotal moment when Franklin wondered whether the great general’s sun was rising or falling. Washington likely could have chosen to become a benevolent monarch or dictator, trusting his own seemingly incorruptible judgment over the uncertainty of democratic rule. He could also have erred in the opposite direction by refusing to preside over the Constitutional Convention, thus denying his imprimatur to this unprecedented experiment in popular sovereignty. Fortunately, like his idol Cincinnatus, he forsook the chance to rule alone, but did actively facilitate the growth of a democratic United States.²⁴⁸

Constitutional lawmakers today should show a similar combination of boldness and self-restraint in working toward a more perfect union. Though they must not deny political autonomy to the future—as the drafters of the Natural Born Citizen Clause did—neither can they abdicate their responsibility to promote democratic renewal through constitutional means. In the present circumstances of constitutional stasis, it is perhaps only through amendments passed for the future that we can realize the promise of American democracy.

²⁴⁷ 2 FARRAND’S RECORDS, *supra* note 47, at 648 (letter of James Madison to Thomas Jefferson relating Franklin’s remarks).

²⁴⁸ See David Boaz, *The Man Who Would Not Be King*, CATO INST. (Feb. 20, 2006), <http://www.cato.org/publications/commentary/man-who-would-not-be-king> (recounting how George III, when told that Washington would step down from power to return to his farm, replied, “If he does that, he will be the greatest man in the world”).