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Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution

*Sanford Levinson**

What follows are reconstructed remarks initially presented at a symposium that took place at the J. Reuben Clark Law School, Brigham Young University, in February 1996 concerning two amendments then before Congress regarding religion and the state.[1] I will divide my remarks into three sections. The first, the most general, concerns the underlying predicate of a desire to amend the Constitution. In particular, I am interested in whether any such proposals rest on a belief that the Constitution, correctly interpreted, is in fact significantly defective, thus warranting the change, the move toward perfection that amendment implies.[2] Or is the argument that the Constitution is in fact quite all right, but those charged with interpreting the document, including, of course, the United States Supreme Court, are simply "getting it wrong"? From this latter perspective, then, an amendment should be conceptualized not so much as the perfection of what is already a completely acceptable Constitution as

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* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School. I am very grateful to Brigham Young University for hosting the conference at which these remarks were initially delivered and to Frederick Gedicks both for his hospitality on that occasion and his sending me the fascinating information about Mormonism and the United States Constitution discussed in the text. As always, I am grateful to Douglas Laycock for his comments regarding an earlier draft of this essay.

1. The two amendments were in July 1996 combined into one by House Majority Leader Richard Armey, though the author of one of them, Oklahoma Representative Ernest Istook, is apparently dissatisfied with Armey's text. *See* Eric Schmitt, *Church Leaders Split on Plan for School Prayer Amendment*, N.Y. TIMES (National Edition), July 24, 1996, at A8. For ease of exposition, I will discuss the two separate proposals in this essay. The text of the "Armey Amendment" can be found below at note 16.

2. *See generally* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION].

an attempt to provide what might uncharitably be called a "guide for the dimwitted" (or, more ominously, mendacious) as to what the Constitution really means were that meaning not clouded by the interpretive errors of the judiciary.[3]

Under either theory of amendment, there should, presumably, be some "gap" between either the correct meaning of the Constitution (under the first view) or the implications of current doctrine (under the second) that the amendment seeks to correct. Thus the second section asks if the proposed amendments would in fact change "legal reality" to any significant extent by closing the presumed gaps. Answering this question requires, among other things, analysis both of existing doctrine of the First Amendment and of the proposed amendments themselves. In particular, are the amendments "transformative," designed to bring about a radically different sense of legal possibility, or are they, as some other authors in this symposium suggest, relatively moderate, designed only to bring about incremental change in the current constitutional fabric?

In section one, I wear the hat of the constitutional theorist, while in section two I offer my services as a careful lawyer parsing text. In the final section, though, I put on a third hat, derived from my sometime status as a political scientist interested in the political dynamics of constitutional change. Here I speculate about the political consequences of placing these amendments before the "court of public opinion," and I offer what I hope are suggestive analogies between the religion amendments and the Equal Rights Amendment that was proposed but never ratified during the 1970s and early 1980s. Might the proponents of the latter-day amendments learn some lessons from the experiences of supporters of the ERA, even though, I dare say, there is relatively little overlap between these two groups?

I. IMPERFECT CONSTITUTION OR IMPERFECT COURT?

Although the Constitution speaks of one of its purposes as helping us achieve a "more perfect Union,"[4] it takes relatively

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3. On the notion of such "declaratory," rather than "perfecting," amendments, *see* Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (d) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 2, at 26-30.

4. U.S. CONST. pmbl.

little imagination to believe that the original document crafted in 1787 suffered from a variety of imperfections that would, on reflection, require amendatory change. Some of these imperfections may be merely "stupid";[5] others may approach the out-and-out evil. For example, the 1787 Constitution seems blithely indifferent, at best, to the presence of chattel slavery in many of the constituent states of the Union; at worst, as in the so-called Fugitive Slave Clause,[6] it seems altogether protective of the "peculiar" (in fact, dreadful and appalling) institution. Slavery represents a radical imperfection indeed, but it is also important to discern even less terrible imperfections and to decide whether they are sufficiently costly to warrant formal amendment.[7]

So much is presumably uncontroversial, save for one twist that I learned about during my visit to Brigham Young University. Apparently, the Constitution of the United States is accorded at least quasi-divine status by many members of The Church of Jesus Christ of Latter-day Saints inasmuch as it is viewed as having been written under God's inspiration.[8] The first prophet of the Church, Joseph Smith, wrote "that the Constitution of the United States is a glorious standard; it is founded in the wisdom of God. It is a heavenly banner."[9] Lorenzo Snow, a

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5. *See generally* Sanford Levinson & William N. Eskridge, Jr., *Constitutional Stupidities: A Symposium*, 12 CONST. COMMENTARY 139 (1995).

6. U.S. CONST. art. IV, § 2.

7. The word "formal" is important, because, like Bruce Ackerman, I strongly believe that there are non-Article V, "textless" amendments that co-exist along with the more visible (though not necessarily more important) written amendments that fit the Article V paradigm. But the points in this essay do not depend on resolving the important issues raised by Professor Ackerman, and I am satisfied, for present purposes, to limit "amendment" to numbered textual additions generated by Article V procedures. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). Ackerman presents an excellent summary of his views as to the presence of non-Article V amendments within the American constitutional order in Bruce Ackerman, *Higher Lawmaking*, *in* RESPONDING TO IMPERFECTION, *supra* note 2, at 63.

8. *See, e.g.*, Ezra Taft Benson, *Our Divine Constitution*, ENSIGN, Nov. 1987, at 4-7; Ezra Taft Benson, *The Constitution—A Glorious Standard*, ENSIGN, Sept. 1987, at 6-11; Arvo Van Alstyne, *Just and Holy Principles: An Examination of the U.S. Constitution*, ENSIGN, Aug. 1987, at 6-10 (reprinting this article from the June 1976 *Ensign*). This view of the Constitution is based on an interpretation of *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints*, in which God refers to "the laws and constitution of the people, which I have suffered to be established, and should be maintained for the rights and protection of all flesh, according to just and holy principles." THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 101:77.

9. TEACHINGS OF THE PROPHET JOSEPH SMITH 147 (Joseph F. Smith ed., 1938),

president of the Church, wrote: "We trace the hand of the Almighty in framing the constitution of our land, and believe that the Lord raised up men purposely for the accomplishment of this object, raised them up and inspired them to frame the Constitution of the United States."[10] Those who embrace such a view might find it extremely difficult to concede that the "inspired" Constitution contains radical imperfections requiring amendment. Just as Jewish law, at least from an Orthodox perspective, cannot be subject to "amendment" given its divine basis of authority,[11] so one might think that the Constitution ought to be viewed as similarly immune from the criticism and self-conscious reformism that underlies many amendments.

One might well wonder why the framers would have allowed the possibility of amendment in the first place. Why did they not follow the fantasy of John Locke, who in his draft of the Carolina Constitution in 1660 wrote that "[this] fundamental constitution[] shall be and remain the sacred and unalterable form and rule of government . . . forever."[12] But James Madison, one of the most important framers, preached in behalf of "veneration" for the Constitution and was extremely suspicious of those who, like his friend Thomas Jefferson, were quick to suggest popular scrutiny and subsequent amendment of the at least quasi-sacred text.[13] In any event, there ought, presumably, to be an inverse relationship between the sacredness with which one views the Constitution and the propensity to imagine it as sufficiently imperfect to warrant amendment.

One need not, however, view the Constitution as defective in order to support amendment. Instead, one can in effect blame the judges for systematically misinterpreting it. The purpose of amendment in such circumstances is not to perfect an imperfect document, but, rather, to rectify judicial error and to bring legal

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quoted in Jay M. Todd, *A Standard of Freedom for this Dispensation*, ENSIGN, Sept. 1987, at 14.

10. THE TEACHINGS OF LORENZO SNOW 192 (Clyde J. Williams ed., 1984), *quoted in* Todd, *supra* note 9, at 15.

11. *See* Noam Zohar, *Midrash: Amendment Through the Molding of Meaning*, *in* RESPONDING TO IMPERFECTION, *supra* note 2, at 307.

12. Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENTARY 107 (1996).

13. *See* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443 (1990).

doctrine back in line with what the Constitution would presumably have meant had it not been the victim of judicial mistakes. Of course, one might wonder why the remedy for judicial error is not simply the appointment of judges with the right understanding of the Constitution. One might think, as a practical matter, that putting pressure on the President and then mobilizing the Senate to make sure that such judges were appointed would be easier than the considerably greater task of capturing the votes of two-thirds of both houses of Congress and then at least seventy-five state legislatures[14] necessary to attain victory in what I have elsewhere called "the amendment game."[15]

Obviously, an argument based on judicial malfeasance requires demonstration that the judges are in fact committed to what one views as constitutional error. Perhaps there is only a relatively small gap between the views of the current Supreme Court majority and those of the proponents of the amendments—or perhaps not. To find out which is true depends on answering three quite different and complex questions. First, what is the current state of Supreme Court doctrine in the relevant areas? Secondly, what is it, precisely, that proponents of the amendment would view as acceptable doctrine under the current, unamended, Constitution? Finally, what meaning would a careful lawyer assign to the two proposed amendments? Do they clearly achieve the stated goals of their proponents?

II. CURRENT DOCTRINE AND AMENDATORY CHANGE

At this point it is useful to turn to the specifics of the two amendments currently competing for attention before Congress.[16] The first is the so-called Istook amendment, named after

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14. Given the need to gain the assent of 38 states, this assumes that one of the 38 is Nebraska, the one unicameral state.

15. *See* Levinson, *supra* note 12.

16. As I write, in mid-July 1996, newspapers report a strong push by Republicans (and the Christian Coalition) to bring the amendments to a vote before the November elections. *See* Schmitt, *supra* note 1. As noted earlier, what is actually before Congress is an amalgam of the Istook and Hyde-Hatch amendments introduced by Richard Armey. *See* H.R.J. Res. 184, 104th Cong., 2d Sess. (1996). The text of that proposal is as follows:

> In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any State shall deny any person equal access to a benefit, or otherwise discriminate against any person on account of religious belief, expression, or

the Oklahoma Congressman who is its chief sponsor. It reads as follows:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.[17]

I am unaware of any argument by Representative Istook or any adherents of his amendment that the present Constitution, correctly interpreted, would disallow what he wishes to accomplish by his amendment. I assume, therefore, that his animus is directed at the interpreting judiciary rather than at the Constitution itself.

So what, from Representative Istook's perspective, has the Supreme Court been getting wrong? The answer may be, surprisingly little. After all, Istook's concern that student-initiated prayers be legitimate seems to accept, by negative implication, the legitimacy of the Supreme Court's five to four decision in *Lee v. Weisman*[18] that found a violation of the Establishment Clause in the offering of a pre-graduation prayer by a clergyman (in that case a rabbi) selected by the high-school principal. The repudiation of any "official prayer[s]" composed by the State seems to accept as well the propriety of the Court's original school-prayer decision in *Engel v. Vitale*,[19] which concerned just such a prayer. Indeed, it would be no great stretch to see Istook as accepting even the Supreme Court's second school-prayer decision,[20] which

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> exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression, or exercise.

It is surely worth noting that the text of the proposed amendment is preceded by the following caption: "Proposing an amendment to the Constitution of the United States to further protect religious freedom, including the right of students in public schools to pray without government sponsorship or compulsion, by clarifying the proper construction of any prohibition on laws respecting an establishment of religion." *Id.* The connection between this caption and the text is not entirely clear, which presumably accounts for Representative Istook's refusal to support the Armey resolution. *See* Schmitt, *supra* note 1.

17. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995).
18. 505 U.S. 577 (1992).
19. 370 U.S. 421 (1962).
20. School Dist. v. Schempp, 374 U.S. 203 (1963).

invalidated beginning the school day with the Lord's Prayer, inasmuch as it, too, was "compel[led]" by the state rather than initiated by students acting independently of the state's desires.

As a matter of fact, it is hard to point to a Supreme Court decision that Istook might wish to overrule. Consider in this context the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District*,[21] where the court distinguished *Lee* precisely on the basis that the Supreme Court's reasoning extended only to prayers initiated by school officials; according to the Fifth Circuit panel, prayers offered at the behest of students were perfectly all right. Although some of us viewed *Clear Creek* as an "in-your-face" defiance of the Supreme Court's doctrinal mandate in *Lee*, not even four Justices were interested in granting certiorari to the losing party.[22] At the very least, this supports those lawyers who defend the Fifth Circuit's interpretation as a nonfrivolous reading of *Lee*[23] and gives some succor to those who view it as completely correct. Should Bob Dole become our next President and, with the consent of a presumably Republican Senate, appoint a person who agrees with the Fifth Circuit[24] to replace Justice Stevens, who will surely be retiring in the next several years, then perhaps *Clear Creek* will be recognized as the law of the land even without the Court overruling *Lee*.

Perhaps Representative Istook is dissatisfied with the Court's decisions prohibiting "endorsement" of explicit religious views by the state.[25] Maybe this is what is meant by "acknowledgments of the religious heritage, beliefs or traditions of the people."[26] Perhaps Istook believes that this would allow Con-

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21. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (holding that an invocation offered by student volunteer is constitutional if the content of the invocation is student controlled).

22. 508 U.S. 967 (1993).

23. Further confusion has been generated by the Fifth Circuit's recent decision in Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996), which limited *Clear Creek* to the context of high school graduations and otherwise invalidated a Mississippi statute authorizing student-selected prayers in a variety of other contexts as well.

24. Perhaps, for example, former federal appellate judge and ex-Solicitor General of the United States Kenneth Starr will be appointed. Starr indicated during a panel discussion at the 1993 Association of American Law Schools in which I participated that he accepted the distinction proffered by the Circuit (against my own view that *Lee* clearly covered the *Clear Creek* situation).

25. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

26. H.R.J. Res. 127, *supra* note 17.

gress, for example, to declare the United States to be a "Christian Nation" or to place "In Jesus is Our Salvation" on the American flag.[27]

I strongly believe that the state should not be able to make it a condition of attending a public ceremony that one participate, in any way at all, in a prayer, and I believe as well that the distinction between principal- and student-initiated prayer is spurious. And it should go without saying that I would be extremely upset by any declaration of the United States as a "Christian" (or even a "Judeo-Christian") nation. So I in no way endorse the Istook Amendment. That being said, if all it would do would be to authorize student-initiated prayer, it is hard to see, on the surface, what would make its passage disastrous to civil liberties in America. After all, from my own separationist perspective, it is no small matter that the Amendment, by negative implication, accepts *Lee* and the other school prayer cases. It would be far more ominous if the Amendment would license the United States to adopt Christianity as its official religion. I must say that I see no practical likelihood of that happening, but it would certainly be unfortunate if such a desire even became a live issue within American politics.

The second amendment before Congress is that sponsored by Illinois Representative Henry Hyde and Utah Senator Orrin Hatch (among others):

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private persons or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.[28]

As with the Istook Amendment, one wonders what are the specific doctrinal dragons supporters of the Hyde-Hatch Amendment wish to kill. As Walter Dellinger, then head of the Office of Legal Counsel in the Justice Department, now the Acting Solici-

27. I note that no one who has endorsed the Istook amendment has admitted that this is one of its purposes. But, unless the amendment is designed, as a practical matter, to achieve such results, it is difficult if not impossible to see exactly what difference it would make in our current constitutional doctrine—which, after all, allows the presence of "In God We Trust" on the currency and the words of acknowledgment "under God" in the Pledge of Allegiance.

28. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995); S.J. Res. 45, 104th Cong., 1st Sess. (1995).

tor General of the United States (and a distinguished professor of constitutional law at Duke University before assuming either of these offices), pointed out at the Brigham Young University conference, it is certainly possible to read current doctrine as being basically in accordance with the professed aims of Hyde-Hatch Amendment supporters. The most important case is surely *Rosenberger v. Regent & Visitors of the University of Virginia*,[29] in which the Court required the University of Virginia to fund *Wide Awake*, an Evangelical Christian journal, as part of a general program in which the University supported a variety of student journals. The University argued that the religious content attached to *Wide Awake* legitimated—and the Establishment Clause might indeed have required—its refusal to subsidize its publication. Such arguments were resoundingly rejected by the majority.[30] Together with such earlier cases as *Widmar v. Vincent*,[31] *Board of Education v. Mergens*,[32] and *Lamb's Chapel v. Center Moriches Union Free School District*,[33] *Rosenberger* can certainly be cited as supporting the doctrine that a state is not licensed to "deny benefits to or otherwise discriminate against any private persons or group on account of religious expression, belief, or identity."[34]

To be sure, there may be some Supreme Court decisions that Hyde-Hatch Amendment supporters object to. But not only is it unclear which they are, it is also possible that the present majority that decided *Rosenberger* will, when the occasions present themselves, overrule the cases that seemingly license state "discrimination" against religious institutions. Thus, even though such decisions as *School Dist. of Grand Rapids v. Ball*[35] and *Aguilar v. Felton*[36] remain on the books as limitations on ability

29. 115 S. Ct. 2510 (1995).

30. *Id.*

31. 454 U.S. 263 (1981) (public university cannot deny religious groups access to buildings for meetings).

32. 496 U.S. 226 (1990) (the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1994), mandates access by student religious groups to public school facilities during noninstructional times and does not violate Establishment Clause in doing so).

33. 508 U.S. 384 (1993) (public school system cannot deny religious groups use of school facilities otherwise open to public); *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that state cannot deny funds for an interpreter to a student choosing to attend a private Catholic school rather than a public school).

34. H.R.J. Res. 121, *supra* note 28.

35. 473 U.S. 373 (1985).

36. 473 U.S. 402 (1985).

of states to aid church-related schools as part of a general aid-to-private-education law, a majority of the Justices, in various opinions in *Board of Education v. Grumet*[37] indicated a willingness to overrule *Aguilar*. As a practical matter, there is no reason to believe that *Ball* could get five votes if brought before the court today.

Thus, one question directed at supporters of either of the amendments is what precisely makes them necessary at this juncture? What in our doctrinal order is so broken that the heavy ammunition of an Article V amendment is required to fix it? One answer, of course, is that the amendments are far less modest in scope than I have been suggesting. As to the Istook amendment, I have already noted the possibility that it is the camel's nose for the declaration of the United States as a Christian Nation, with appropriate revisions of the currency, flag, etc. The fact that no proponent of the amendment has offered this as one of its selling points is completely irrelevant. After all, states ratify words rather than the speeches of proponents of the amendment, and the words certainly lend themselves to more extensive interpretation. Moreover, one does not have to be unduly cynical to believe that supporters of legislation are sometimes less than candid in admitting to their full agenda in supporting it. Concessions made during debate, unless they are reflected in explicit textual change, are rarely determinative of later interpretation.

As for the Hyde-Hatch Amendment, one might well focus one's attention on the words that no government should "discriminate *against* any private persons or group on account of religious expression, belief, or identity."[38] I spend a great deal of time in my constitutional law class on *Strauder v. West Virginia*,[39] the first case in which the Supreme Court interpreted the Fourteenth Amendment in regard to the state's use of racial classifications. Justice Strong, for the Court, focused on the Amendment's disallowance of "unfriendly action" by states against African-Americans.[40] That is, contrary to those who would read the Amendment as adopting a requirement of "color blindness,"[41] Strong seems to suggest that only hostile action is

37. 114 S. Ct. 2481 (1994).

38. H.R.J. Res. 121, *supra* note 28 (emphasis added).

39. 100 U.S. 303 (1879).

40. *Id.* at 306.

41. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

prohibited, whereas the "friendly" use of racial classification would be permitted.[42]

The relevance for the Hyde-Hatch Amendment should be obvious. If, after all, the Constitution is to be changed to prohibit only discriminations *against* those who are religious, then this would entail that friendly discriminations in their favor would be perfectly acceptable. Consider, for example, an affirmative action program based on diversity considerations that rewards religious belief or practice. Or imagine that governmental administrators adopt the common view (whether or not it is correct) that being religious correlates with behaving morally and therefore seek out religious applicants for governmental positions on the grounds that they will be less likely to engage in corrupt or other criminal conduct. Such policies would, I assume, be flatly unconstitutional under present understandings of the Constitution, including the Establishment Clause of the First Amendment. Would this necessarily be the case in a post-Hyde-Hatch Amendment constitutional regime?

To the extent that the Hyde-Hatch Amendment simply reinforces *Rosenberger*, I can see little objection to it; but in such case I can see no need for it, at least if "need" is defined in terms of that without which the legal situation would be strikingly different. If, on the other hand, the Amendment has the ramifications suggested above, where the state would become licensed to prefer the religious over the non-religious, then I would be vehemently opposed to it. And I strongly suspect that my opposition would be shared with most Americans, if for no other reason than that the state would have to decide who is really religious enough to warrant the preferences in question.[43] Were I advising those who oppose the Hyde-Hatch Amendment, I would encourage them to emphasize the most radical possible readings of its language rather than merely to argue that it truly adds nothing

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See generally ANDREW KULL, THE COLOR BLIND CONSTITUTION (1992).

42. This is at the heart of contemporary debates about affirmative action. As someone who believes that affirmative action programs are constitutionally permissible, it follows that I believe that the distinction between "unfriendly" and "benign" discrimination is crucial.

43. Indeed, these "administrative costs" are increasingly important to the case against racial preferences, as it is clear that the state faces all sorts of difficulties in trying to determine who counts as a member of a given racial or ethnic group. *See, e.g.*, Christopher Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

to the Constitution or changes little in present legal doctrine. In response, its supporters must argue either that I am an incompetent lawyer, that the language just does not carry the meanings I ascribe to it, or, instead, they must claim that they do not intend these meanings and that judges will necessarily be bound by the more limited intent. To put it mildly, anyone familiar with the history of constitutional interpretation would be foolhardy to accept such reassurance about the judicial role.

III. WHAT MIGHT ISTOOK AND HYDE-HATCH PROPONENTS LEARN FROM THE ERA?

At this point, I think it is useful to compare the dilemmas facing Istook and Hyde-Hatch proponents[44] with those presented to an earlier generation of constitutional amenders, the supporters of the Equal Rights Amendment ("ERA"). In 1972, Congress, relatively uncontroversially, proposed what would have become the twenty-seventh amendment: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[45] Quickly ratified by thirty states, it appeared headed for easy addition to the constitutional text.[46] That never happened, in part because its opponents were able to raise a number of embarrassing questions about the reach of the language. For example, opponents questioned whether the amendment would invalidate gender-segregated bathrooms and dormitory facilities or require states to grant marriage licenses to same-sex couples.[47] Similarly, they asked if the exclusion of women from combat positions in the armed forces would now be unconstitutional.

44. It is important to note, however—at least if the Brigham Young University symposium was illustrative—that support for one does not entail support for the other. Indeed, there were no overt supporters of the Istook Amendment at the Provo conference, whereas several participants defended the Hyde-Hatch Amendment. In fact, a number of religious groups have recently denounced the Istook Amendment while leaving the Hyde-Hatch Amendment unremarked upon. *See* Schmitt, *supra* note 1. On the other hand, it is certainly the case that many people (including myself) oppose both amendments.

45. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, 875-76 (3d ed. 1992).

46. *See generally* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986).

47. Racially segregated facilities were certainly seen as barred by the Fourteenth Amendment, which is less unequivocal in its language than the ERA.

One thing worth noting is that almost no proponents of the ERA publicly admitted that the language reasonably authorized such interpretations. Instead, they claimed to admit the propriety of sex classifications in regard to bathrooms, marriage, or combat and asserted that courts would feel bound by these admissions.[48] Indeed, by the end of such concessions, it was almost literally impossible to understand what actual difference the ERA would make in our doctrinal Constitution, given legal developments in the 1970s and early 1980s that had led courts to scrutinize gender classifications with far greater care than in the past.[49] This generated the following dilemma for supporters of the ERA: How could one argue, at one and the same time, (1) that it was vitally important, in order to change legal reality, to ratify the ERA; (2) that it would in fact have none of the radical consequences suggested by the amendment's opponents; and (3) that the present Constitution, correctly interpreted, required the Court to strike down a variety of sexually discriminatory laws? The answer is, with extremely great, and in the actual event, fatal, difficulty. It was, to put it bluntly, impossible to take seriously those who made all three claims. They appeared to be intellectual and political opportunists who were willing to make whatever arguments they thought appealing to the given audience in front of them. Audiences of feminist activists could be assured that the ERA was really important and would bring about great changes in a legal system otherwise repressing women, while those skeptical of the ERA could be reassured that it would not strikingly change the world they were used to. This approach to politics works only so long as one can keep secret what one is telling different audiences.

Istook and Hyde-Hatch supporters are, I think, in the same box as were ERA proponents. To the extent they develop real fervor in behalf of the Amendments, it must be because they be-

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48. Thus Ann Freedman testified:

> The Senate and the House of Representatives control the meaning. . . . You are the legislators . . . . If the amendment is adopted, it is what the proponents say it means and what the majority reports or any report supporting the adoption of the amendment in either House say. And if they are clear about what the amendment means, that will be controlling.

MANSBRIDGE, *supra* note 46, at 127.

49. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973).

lieve that the adoption of these texts would have real consequences in changing legal reality, including the meaning of the unamended Constitution. But, at the very same time, they wish to reassure centrists that opponents like the ACLU are unfair in wildly overestimating what changes would be possible. Moreover, they are busy presenting arguments to courts that the unamended Constitution, correctly understood, supports everything that is publicly linked to the amendments. Here, too, one wonders how one juggles all of these balls without serious mishap.

But something more is at stake than intellectual discomfort or the loss of trust on the part of those who simply do not believe that proponents are acting in entirely good faith.[50] Article V presents immense hurdles to those who seek formal amendment of the constitutional text and surmounting these hurdles takes a great deal of energy and resources. Unless one rejects the economist's insight about the ubiquity of scarcity, any political activist must always ask how these energies and resources can best be invested. Given my own politics, I am not the best person to raise questions about the cost calculus of the Christian Coalition and the like, but one can still wonder what gains mobilization behind the Istook or Hyde-Hatch Amendment are thought to bring relative to their costs. Among these costs, certainly, are the mobilization of one's opponents. These costs turned out to be immense in regard to the ERA. One might well say that partisans of the ERA "created" Phyllis Schlafly and other prominent "New Rightists" who initially entered the political scene through

50. It is clear that a pervasive problem in contemporary American life is the ever-increasing mutual mistrust of those on opposite sides of volatile issues such as religion and public life. Those of us who are suspicious of the Christian Coalition, for example, are not reassured by reading a quotation attributed to Ralph Reed, the current head of that organization: "I do guerilla warfare. I paint my face and travel at night. You don't know it's over until you're in a body bag." *See* Robert Orsi, *Reed's Powerfully Misleading Agenda*, AUSTIN AMERICAN-STATESMAN, July 24, 1996, at A13 (quoting MARK J. ROZELL & CLYDE WILCOT, SECOND COMING: THE NEW CHRISTIAN RIGHT IN VIRGINIA POLITICS (1996)). It is true that Reed has claimed, in his more recent *Active Faith: How Christians Are Changing the Soul of American Politics* (1996), to have left such attitudes behind and to be aware of the need to reach out to those who disagree with him. But, of course, those of us who practice what is sometimes called a "hermeneutics of suspicion" have no reason to believe that the "guerilla" Reed has not simply decided, opportunistically, that he will gain power more easily by presenting a more attractive face. At this point, in good lawyerly fashion, one is far more interested in the worst-case implications of the contract one is being asked to sign than in the claims of the offeror that his verbal assurances take precedence over the written document.

their opposition to the ERA.[51] As Schlafly told the journalist Sidney Blumental:

> I put together the organization that beat the E.R.A. It was a ten-year battle. Everyone was against us—the President, the governors, the political parties, Betty Ford. We invented the pro-family movement. And the other thing we did for the movement is that we taught them we could win. After the Goldwater defeat, conservatives didn't believe we could win. The attitude was that we blew it, the best we could do was Richard Nixon [who supported the E.R.A.]. Other good things wouldn't have happened without beating it, like the conservative dominance within the Republican Party.[52]

On the other hand, I doubt seriously that the campaign in behalf of the ERA recruited sufficient new support for the feminist movement to counterbalance the harm done to their cause over the past two decades by Schlafly and her associates. One wonders if history might repeat itself here?

Also worth mentioning is the cost of potential tension generated within one's own coalition. Not all feminists agreed with one another as to what the ERA really meant or what political tactics ought to be adopted. In the case of the Istook Amendment, especially, what might be termed the "pro-religion" coalition is scarcely unified. Thus Eric Schmitt's story in the *New York Times* begins, "Deeply divided religious leaders clashed today over a House Republican plan to amend the Constitution to permit organized prayer in public schools."[53] Perhaps these divisions are a price worth paying, but one wonders exactly what calculations are behind such a decision.

One further cost of non-ratification of the ERA might also have been the delegitimation of certain ideas—such as the argument that the unamended Constitution indeed requires the state to recognize same-sex marriages.[54] This could be the result ei-

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51. It is true that Schlafly came to public attention because of her 1964 pro-Goldwater paperback *A Choice Not an Echo*. But Goldwater lost, and it was scarcely obvious that any of his more visible supporters would sustain important careers within American politics. Her next venture into national politics was the founding, in 1972, of a group called "Stop E.R.A." *See* Sidney Blumental, *A Doll's House*, NEW YORKER, Aug. 19, 1996, at 31-32.

52. *Id.* at 32.

53. Schmitt, *supra* note 1, at A8.

54. As Andrew Koppelman has argued very well, if the state will grant a

ther of an admission, at least before certain audiences, that the unamended and/or doctrinal Constitution did not justify such a result, or simply the belief by relevant political elites that one meaning of the failure to gain ratification was out-and-out rejection of any such radical idea. I would personally be delighted to use defeat of the Istook Amendment (or its putative successor, the Armey Amendment) as evidence for the proposition that the public is basically satisfied with the legal status quo and resists any further movement toward the agenda of the Christian Coalition.

IV. CONCLUSION

It is clear that the possibility of constitutional amendment is part of our present political reality. Whether the issue be a balanced budget, term limits for legislators, the legal rights of crime victims, or public support of religion, one response is to suggest formal amendment of our basic text. I do not disdain this. I tend to be more Jeffersonian than Madisonian: I believe we have "venerated" the Constitution too much and reflected on its possible weaknesses too little. That being said, I think it is important to be clear about precisely why one believes that formal amendment might be desirable and what political costs may be involved in going the route of seeking such amendment. The purpose of these remarks has been far less to offer a brief against the Istook, Hyde-Hatch, or Armey Amendments (though in fact I do oppose them) than to provide some clarification of their legal and political contexts.

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marriage license to Dick and Jane, but not to Dick and Bob or Jane and Liz, then it appears to be predicating state action solely and exclusively on the sexual composition of the couple seeking the license. He argues that current doctrine interpreting the Fourteenth Amendment in regard to sexual classification makes such action by the state unconstitutional. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).