The theme of this series is that the United States Constitution is a good instrument of government, worthy of defense. It is not perfect, of course, but perfection is unattainable in government. To borrow a concept from James Madison, men are not angels and thus are incapable of designing a flawless constitution.1 So, we should appreciate a constitution that works as well as ours does.

But this does not require conservatives to reject any and all alterations to the constitutional regime. Indeed, the Constitution has been amended some 27 times, and most of these amendments have been for the better. That raises the question: When and how should conservatives support amendments to the Constitution? This report will present general rules that can serve as a framework for conservatives to evaluate whether to enact proposed amendments.

The conservative mind places a high value on constitutional stability, viewing it as essential to the social order. Conservatives are sensitive to the considerations discussed in the first report in this series—namely, that humans are not to be trusted to remake society out of whole cloth. Humans are, as Alexander Hamilton once put it, “rather reasoning than reasonable animals for the most part governed by the impulse of passion.”2 The maintenance of society thus depends on not only “necessity” and “natural inclination,” as David Hume argued, but also “habit.”3 Specifically, per Hume:
Habit soon consolidates what other principles of human nature had imperfectly founded; and men, once accustomed to obedience, never think of departing from that path, in which they and their ancestors have constantly trod, and to which they are confined by so many urgent and visible motives.⁴

Put another way, habituation limits the range of options the human mind might contemplate. It thus keeps people from ruining society in a fit of passion, thinly justified by rational arguments.

Accordingly, the longevity of the United States Constitution is a positive good in itself. It cultivates habits of reverence and obedience, which are essential for the social order. As James Madison anticipated in Federalist 49:

The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are ANCIENT as well as NUMEROUS, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side. The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied.⁵

In other words, the age of the Constitution prejudices the public positively toward it, which in turn keeps the citizenry from undoing the project in a flight of fancy and potentially “disturbing the public tranquility,” as Madison so delicately put it.

Conservatives should enter discussions about revising the Constitution with at least a mild skepticism toward such a project.

As such, conservatives should enter discussions about revising the Constitution with at least a mild skepticism toward such a project. American society today is stable and prosperous, blessings that are dependent only partly on reason. Also important are public habits of obedience, and upsetting them is a risky venture. Still, conservatives likewise acknowledge that the Constitution may need revision. The founders themselves recognized as much and left two paths for amendments—a convention of the states (like the Constitutional Convention of 1787) and a process of congressional proposal and state approval. Since the creation of the Bill of Rights, embodied in the first 10 amendments, the Constitution has been amended 17 times.

It is useful to examine those 17 amendments according to how they revised the original charter, for this history indicates that previous generations have likewise had a conservative disposition toward revising the Constitution. The most drastic changes have been in extending the rights of citizenship. Otherwise, changes have tended to be narrowly tailored to address specific problems.

Two of the 17 amendments were manifestations of the original system of checks and balances, whereby the rest of the government responded to adverse Supreme Court decisions. The 11th Amendment overruled Chisholm v. Georgia’s declaration that states do not enjoy sovereign immunity from suits in federal court brought by citizens of other states. The 16th Amendment overturned the Court’s decision in Pollock v. Farmers’ Loan and
Trust that an income tax was unconstitutional. Two others, the 18th and 21st Amendments, effectively negated each other—with the 18th Amendment outlawing alcohol and the 21st Amendment repealing the 18th. That leaves 13 amendments to consider.

Seven of these amendments have expanded the sphere of civil society beyond the narrow scope created in the Constitution of 1787—the great failure of the founding generation. The 13th, 14th, and 15th Amendments freed enslaved people and brought them into the constitutional system with the full rights of citizenship, although this promise would not begin to be realized in a durable way until the 1960s, with the passage of the Civil Rights Act and Voting Rights Act. The 24th Amendment, which outlawed the poll tax, was a way to eliminate one strategy by which racial minorities could be effectively excluded from politics. The 19th Amendment extended the full rights of citizenship to women. The 26th Amendment extended those rights to 18-year-olds. And the 23rd Amendment gave presidential voting rights to those living in the District of Columbia.

Just six amendments have altered the structure of the government itself—but the changes have tended to be narrow.

That means just six amendments have altered the structure of the government itself—but the changes have tended to be narrow. Three of the six responded to manifest flaws in the original design of the government. In response to the contested election of 1800, the 12th Amendment fixed the faulty structure of the Electoral College, particularly the problem of the second-place finisher in the presidential election becoming the vice president. The 20th Amendment reduced the time between the election and inauguration—a response to the lengthy lame-duck presidency of Herbert Hoover during the Great Depression. The 22nd Amendment, passed by Republicans during the 80th Congress (1947-48), enshrined into law the precedent established by George Washington of a two-term limit for the presidency, which had been broken by Franklin Roosevelt. The 25th Amendment clarified the order of succession for the presidency, on which the Constitution was silent. Meanwhile, the 27th Amendment is a true peculiarity. One of James Madison’s original amendments, it regulated congressional pay—but had lain dormant for over 200 years until it was revived for discussion in the 1980s and ratified in 1992.

Of the 17 amendments enacted since the Bill of Rights, just one has amounted to a sweeping structural reform of the constitutional order—an instance when the people rejected some aspect of the original compromise established by the framers. The 17th Amendment is certainly the most dramatic. By instituting the popular election of senators, it did away with the founding skepticism of democratic institutions. This was not a decision taken lightly by the American people but rather a deliberate response to widespread and long-standing political corruption. Following the Civil War, senators became de facto bosses of their state governments and—largely immune from public oversight—were free to act on behalf of corporate interests on the federal and state levels.

The relative scarcity of major reform by amendment suggests two historical features of our constitutional regime. First, its structure has been demonstrated to be reasonably sound. The constitutional relationship among Congress, the president, and the courts has required some tweaks at the margins—but relatively few fundamental reimaginings. Second, the strategic ambiguity of constitutional language has meant that our regime can evolve without recourse to amendments. The Constitution is loaded with phrases and concepts that are not self-effectuating “ Necessary and proper,” “ general welfare,” “ interstate commerce,” “ due process,” “ cruel and unusual punishment”—these phrases must, by necessity, be interpreted, which means generations of Americans could evolve the meaning of our governing compact without necessitating constitutional amendments. This has given the Constitution enormous flexibility; the government has in effect found new ways to address novel public problems without needing to revise the basic bargain of the constitutional order.
With these philosophical and historical considerations in mind, it is possible to develop criteria to evaluate proposed amendments to the Constitution—when and how the conservative “status quo bias” might be overcome. Circumstances will change, of course, but a general set of guidelines could be durably useful. What follows is a six-point rubric to guide conservative thinking about amendments.

1. Constitutional Crises Are Rare, but They Should Not Be Taken Lightly

A common rhetorical trope among political pundits is to take any high-profile political dispute as a constitutional crisis. For instance, many deemed the Donald Trump presidency a constitutional crisis virtually from the moment of the 45th president’s inauguration until the time he left office. But the Trump tenure was rather a political crisis, one that could be resolved by following the ordinary rules of the Constitution or the law. True constitutional crises occur when those rules are too vague to offer clear guidance—or worse, produce a manifestly perverse outcome. These are rare.

The election of 1800 produced a constitutional crisis because the structure of the Electoral College did not anticipate the rise of party-line voting, resulting in a tie between Thomas Jefferson and Aaron Burr. The inauguration of 1933 was likewise a crisis because the founders did not anticipate the need for a rapid transfer of power in the midst of an economic crisis. The absence of a clear plan of presidential succession was a potential crisis that was resolved by the 25th Amendment. While conservatives should hesitate to employ the appellation “constitutional crisis,” when one is admitted, conservatives should sincerely consider proposed amendments to remedy the problem.

2. Clear Misapplications of Judicial Review Need Not Be Tolerated

Implicit in the doctrine of judicial review, as established under Marbury v. Madison, is that the Supreme Court has the authority to decide what the Constitution means as written. The Court is not infallible; it can err in its judgments on the meaning of the Constitution or otherwise render a verdict that is broadly unacceptable. When this happens, there are four recourses. The other branches can ignore the Court; however, this undermines judicial review, which has proved to be a beneficial aspect of the constitutional order. The other branches can change the composition of the Court. But if this is done through expansion (as Franklin Roosevelt proposed in 1937) or by purge (as the Jeffersonian Republicans attempted in the early 1800s), the judiciary might be delegitimized.

Another alternative is to wait for justices to retire or die, then alter the composition of the Court, but this can be a lengthy and unpredictable process, for it assumes that new justices will be willing to undo the mistakes of the old. Another solution is a constitutional amendment, such as the 12th and 16th. In both instances, there was broad opposition to judicial rulings, and in those cases, a constitutional amendment is perfectly advisable.

3. Expanding the Scope of Civil Society Should Always Be a Constitutional Priority

The Founding Fathers’ great failure was not in the design of a governing system by which citizens would rule themselves but rather their too-narrow definition of citizenship. Participation was initially limited to White, male property holders over age 21. A host of amendments—the 13th, 14th, 15th, 19th, 23rd, 24th, and 26th—has addressed these limitations. Insofar as a constitutional amendment would continue that project, it deserves consideration.

4. The Constitution Is Not a Place to Resolve Political or Policy Disputes

Many proposed amendments amount to changes in public policy or partisan opportunity. For instance, some pundits call for the Constitution to mandate universal welfare? Others call for a balanced-budget amendment. But these are policy questions that should be resolved through the normal course of politics and thus subject to revision as public views shift.
An amendment guaranteeing a right to a certain standard of living would enshrine in the Constitution a particular vision of social welfare spending, one that would oblige future generations. But why should future generations not be able to make those decisions for themselves? Similarly, a balanced-budget amendment would mandate a type of fiscal austerity that future generations might reject; why should they be bound by it? Notably, the only purely policy matter ever enshrined via constitutional amendment was Prohibition, which was repealed by a subsequent amendment. Circumstances change and public views evolve, and since we wish for the Constitution to endure for ages, we should endeavor to keep it neutral on policy disputes.

5. Amendments Should Not Undermine the Goal of Consensus

As discussed in this series’ earlier reports, the Constitution’s greatest virtue is its ability to promote consensus among a diverse group of factions. This is the central justification for the Constitution’s deviations from simple majoritarianism. Its goal is not to empower any numerical majority that happens to momentarily cohere but rather one whose aims are benevolent and in the public interest. The broader, larger, and more durable such majorities are, the more likely they are to embody the true spirit of the public. As such, conservatives should view with great skepticism any proposals that would diminish this quality.

For instance, many progressives today propose altering the equality of representation in the Senate to make the government more “democratic.” Democracy, conservatives appreciate, is necessary but hardly sufficient for republican government. The Senate is the forum by which thinly populated places can have their voices fully heard, their views integrated into the political process, and their values reflected in public policy. This kind of participation is necessary to develop consensus and in the long run maintain loyalty to the nation. Altering the Senate may seem like a positive idea because it advances majoritarianism, but it does violence to the constitutional vision of consensus and so should be rejected by conservatives.

6. Amendments Should Be a Resource of Last Resort

Madison’s argument in Federalist 49 suggests that one value of a rarely revised constitution is that it inculcates a sense of reverence for the laws, which in turn promotes the stability of the regime. We today enjoy that blessing with our Constitution. We have revised it so infrequently that this is still essentially the same government we had 200 years ago. The paucity of amendments has also kept the Constitution short and its prose simple; contrast the United States Constitution with the virtually unreadable constitutions of the states, which are frequently revised and often quite long. It is good for the regime that nonexperts can read and understand the Constitution. It follows that if there are two ways to achieve a desirable outcome—one through a constitutional amendment and another through the ordinary course of legislation—the latter is to be strongly preferred. Needless increasing the number of amendments will make the document less approachable and ultimately inspire less awe in the population.

Occasionally, it might be technically possible for the political process to implement a reform—but practically impossible. In those cases, an amendment would be a viable path forward. For instance, it is highly unlikely that the House of Representatives would ever agree to expand its size through law, because that would be bad for incumbent members. Thus, expanding the House through a constitutional amendment would be worth consideration.

But when reform is practically possible through legislation, solutions that do not rise to the level of an amendment should be given priority. For instance, citizens of Washington, DC, do not enjoy the right to choose voting members of Congress—which under the third rubric implies constitutional consideration. However, adding Washington, DC, as a state would likely require a constitutional amendment and probably a confusing one at that (for it is still an imperative to maintain total congressional sovereignty over the Capitol itself). An obvious alternative would be a retrocession of most of the district back to the state of Maryland.

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This report argues that conservatives should accept the necessity of amendments in cases when the Constitution no longer fits the necessities of the moment—but with the caveat that those situations are historically rare and that an unaltered Constitution provides real public benefits. But perhaps the question of amending the Constitution can be turned on its head. When many people are unhappy with the government’s performance, they feel an impulse to revise its structure to conform to their vision. But as previous entries in this series have argued, the Constitution itself embodies a vision of politics—one of compromise, consensus, and ultimately unity. Perhaps when our government fails to conform to our expectations, it is because we ourselves have failed to embody the spirit of the Constitution, and the change that needs to happen is not in our founding charter but in how we ourselves view politics. That will be the subject of the next and final report in this series.

**About the Author**


**Notes**

1. James Madison argues in *Federalist* 51, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controul on government would be necessary.” *Federalist*, no. 51 (James Madison).
5. *Federalist*, no. 49 (James Madison).

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