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AMENDING WITHOUT AMENDMENTS: A CHALLENGE TO THE AMERICAN CONSTITUTIONALISM

CONTENT

INTRODUCTION

The Constitution of the United States has been greatly adored for its longevity, and asserted to be a symbol of the American nation. The Constitution – *a miracle*[1] performed by the Founding Fathers – is what consti-

[1] In 1829, James Madison writes: "The happy Union of these States is a wonder; their Constitution a miracle; their example the hope of liberty throughout the world." See *The Founders' Constitution*, Vol. 1 (University of Chicago Press, 2000), p. 351.

tutes the very identity of the Country, and what embraces the *patriotic sentiments* of the nation [2]. It is widely argued that the document which established the framework for government in late eighteenth century has acclaimed its success due to its eternity, and turned out to be a secular Bible for *We the People*.

Recent scholarship, however, challenges the acclaimed success of the Constitution's longevity. There are various indicators measuring the success of constitutions but evaluations of the United States Constitution's performance generally focus on views how constitutional change has occurred. If change occurs through constitutionally spelled out unwieldy procedure, the case for its success is invigorated as the original text survives remarkably unchanged until now; But if important constitutional changes take place through other channels than constitutionally determined, claims of its success becomes controversial [3]. The academic discussion on the issue can be reduced to a simple question: How many times has the United States Constitution been amended?[4] The conventional answer having in mind seems to be frivolous.

To draw just as an example: since the end of nineteenth century, when Congress created the first powerful federal administrative agency, the growth in the power of administrative agencies has resulted in the transformation of the country into *administrative state*. Agencies enact substantive law – regulations – that occupy ten times the space of federal statutes. How could it happen when nowhere does the Constitution mention administrative agencies and, more importantly, when it explicitly vests *all* legislative power in Congress? Numerous similar examples can be made to depict how the constitutional order has departed from the constitutional text.

The Purpose of this Essay is to dive into this problematic area of the United States Constitution which operates as binding law to restrain the government but, on the other hand, its broad-term provisions leave a certain leeway to be filled out by either judicial interpretation or political construction of the Constitution. The Essay focuses on informal means of changing the Constitution and the constitutional order. Part I of the Essay introduces the concept of constitutionalism, and discusses how it correlates to the nature of broad constitutional language. The preliminary conclusions drawn in Part I are furthered in Part II which concentrates on how judicial and political branches of government – those who most frequently speak *in the name of* the Constitution – interpret and construct the meaning of constitutional provisions, respectively. Part III, after referring to the concept of informal and formal constitutional amendments, turns on how successful can the Constitution be, if our perception over it constantly changes. In other words, how seriously we can take the Constitution if it fails to curb the government in a vigorous way.

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2 See Stephen M. Griffin, Constitutionalism in the United States: From Theory to Practice in *Responding to imperfection: The Theory and Practice of Constitutional Amendment,* Ed. Sanford Levinson (Princeton University Press, 1995), pp. 37.

3 Ibid., pp. 38

4 This is how Professor Sanford Levinson titles his Article. See Sanford Levinson, How Many Times the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Ed. Sanford Levinson (Princeton University Press, 1995), p. 13.

I. WRITTEN CONSTITUTION AND ITS BROAD PROVISIONS

The first Chapter introduces the concept of constitutionalism as a great attempt to limit the government and discuss the purposes it has. What is essential character of liberal, written Constitution of the United States? What are implications it has? How the constitutional provisions are framed? How does the broad language affect the operation of the Constitution as binding law? This part of my Essay tries to answer these questions in order to further discussion about the scope and modes of constitutional interpretation and construction, and effects such an interpretation/construction has on constitutional amendability.

1. The *Sine Qua Non* of Written Constitution

Various definitions have been given for the concept of liberal constitutionalism but one quintessential element of any definition is the idea of constitutionalism as government limited by the rule of law [5]. According to Carl Schmitt, the purpose and essence of the written constitution is the recognition of basic rights implying the establishment of a general concept of individual's freedom. In this context, the principle of division of powers ensures that this freedom has an organizational guarantee against misuse of the power of the state[6]. "In all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law [7]." The main implication of liberal constitutionalism is that whoever exercises constitutional power and government acts ''on the basis of law" or "in the name of the law" – "principle of legality" of all state life lies ultimately in the fact that there is no longer any government or obedience in general because only impersonal, valid norms are being applied[8]."

In order to achieve the above-mentioned purposes, it has long been established that the constitution – a set of fundamental, founding principles and norms according to which a state is governed – is to be entrenched to ensure stability and permanence at least to some extent. The theory of liberal constitutionalism strongly suggests that the constitution as the supreme law of a state where all other laws have to comply with its provisions should be more difficult to amend than other legislation and, so to say, be isolated from ordinary course of politics, against misuse of the power of the state. An entrenchment may also contribute to the mystical understanding of the constitution. It has been generally presented as a tie between the past and the present: as the constitution "may not be changed by ordinary political means, it is understood to exist as a timeless inheritance from our ancestors[9]."Hence, the Constitution not only restrains the branches of government to overstep the bounds of its proper constitutional role but also limits its ability to alter the constitutional text. In other words,

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5 See Stephen M. Griffin, "Constitutionalism in the United States: From Theory to Politics" in *Responding to Imperfection: The Theory and Practice of Constitutional Amendments*, ed. Sanford Levinson (Princeton University Press, 1995), p. 39.

6 See Rune Slagstad, "Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber" in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge University Press and Unversitetsforlaget, 1988), pp. 104-105.

7 Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornel University Press. 1940), p 24, quoted in Stephen M. Griffin, "Constitutionalism in the United States: From Theory to Politics" in *Responding to Imperfection: The Theory and Practice of Constitutional Amendments*, ed. Sanford Levinson (Princeton University Press, 1995), p. 39.

8 Carl Schmitt, *Legality and Legitimacy* (Duke University Press, 2004), pp. 3ff.

9 Ernest A. Young, The Constitution Outside the Constitution (*Yale Law Journal 117*, 2007-2008), p. 426.

the authority to amend the constitution is restricted not only by the complicated procedure a given constitution prescribes but also by the conceptual implications constitution as such presupposes: changing the constitutive principles is not normal state function but extraordinary[10] which is to be used in the extraordinary situations. When, for example, government initiates the constitutional amendments, it automatically causes greater public uproar and doubts about the hidden, "genuine" reasons behind the articulated ones.

However, it should explicitly be noted that the theory of liberal constitutionalism does not obviate the need for a constitutional amendment. Carl Schmitt discusses Cromwell's "Instrument of Government" from the year 1653 as the first example of a modern written constitution. Cromwell intended the document to be "a lasting, inviolable rule against the shifting majority decisions of parliament, [...] something like a great charter, which is constant and unchanging [...] [in] the sense of something absolutely unbreakable." Schmitt argues that Cromwell's effort remained unsuccessful but he still contends that in liberal constitutionalism the founding rules should be more difficult to alter than other laws of the state[11].

Likewise, when George Mason opened the discussion on constitutional amendment at the constitutional convention in Philadelphia, he emphasized that "the plan now to be formed will be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide them, in an easy, regular and Constitutional way than to trust to chance and violence [12]." Almost three decades later, Thomas Jefferson wrote that "each generation is an independent [...] to choose for itself the form of government it believes most promotive of its own happiness [...] to accommodate to the circumstance in which it finds itself. [T]he dead have no rights [13]." Consequently, Article 5 of the U.S. Constitution, despite the complexity it involves[14], determines the procedure to amend the document. It is worth mentioning that almost every liberal constitution having been adopted since 1789 contains the provisions concerning constitutional amending procedure allowing for "the correction of or improvement upon prior constitutional design choices in light of new information, evolving experiences or political understanding[15]."

[10] Carl Schmitt argues that changing the constitutional laws is not a normal state function like establishing statutes, conducting trials, undertaking administrative acts, etc. As he suggests, it is extraordinary authority and, therefore, it should be used in extraordinary situations. See Carl Schmitt, Constitutional Theory (Duke University Press, 2008), pp. 150-156.

[11] see Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008), pp. 89-93.

[12] See Max Farrand, The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1937), 1:202-3, quoted in Sanford Levinson, "Introduction: Imperfection and Amendability" in *Responding to Imperfection: the Theory and Practice of Constitutional Amendments*, Ed. Sanford Levinson (Princeton University Press, 1995), p. 3.

[13] Letter of Thomas Jefferson to Samuel Kercheval, Monticello, July 12, 1816.

[14] The Constitution of United States, Art. 5 reads as follows: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of several states, or by Convention in three fourths thereof, as the one of the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." See discussion about the complexity of Art. 5 in, e.g., Rosalind Dixon and Richard Holden, Constitutional Amendment Rules: The Denominator Problem, Public Law and Legal Theory Working Paper No: 346, University of Chicago, 2011.

[15] See Brannon P. Denning and John R. Vile, The Relevance of Constitutional Amendments: A Response to David Strauss, *Tulane Law Review 77*, 2002, pp. 247-282 quoted in Rosalind Dixon, Constitutional Amendment Rules: Comparative Perspective, *Constitutional Law Review* , Ed. Tom Ginsburg, University of Chicago, Public Law and Legal Theory Working Paper No: 347, 2011. p. 96;

And it is assumed that every legitimate constitutional amendment occurs through fulfillment of the constitutionally envisioned process for such changes or revisions.

2. The Constitutional Provisions as Broad Normative Principles

Once we define the written constitutionalism as an attempt to control the state through the constitution which operates as the supreme law and restrains the state power to alter the constitutional order, it becomes obvious that the constitutional provisions have to have the force of binding law to influence how government acts with regard to wide range of specific policies [16].

Professor Griffin identifies how different kinds of American constitutional provisions affect the governmental policy. According to him, "policy-structuring or *constitutive* provisions are usually phrased in general terms and have the potential to influence a wide variety of policy outcomes. Policy-determining or *regulative* provisions[17] are generally indistinguishable in form from the rules contained in ordinary legislation and affect only limited set of policy outcomes[18]." According to Griffin, most of the provisions of the U.S. Constitution have some constitutive effect. Examples of parts of the Constitution that mainly function as constitutive provisions include those providing for the manner of representation and election to the House of Representatives and the Senate in Art. I, secs. 2-3; the enumeration of powers of Congress in Art. I, sec. 8; the powers of the president in Art. II, secs. 1-2; the privileges and immunities clause in Art. IV, sec. 2; and most of the Bill of Rights, including the First, Fifth, and Eighth Amendments. On the other hand, examples of parts of the U.S. Constitution that mainly function as regulative provisions include the clause respecting titles of nobility in Art. I, sec. 9, clause 8; the specification of treason in Art. III, sec. 3; the fugitive slave provision in Art. IV, sec. 2, clause 3; and the Third Amendment. What the Professor suggests here is that some constitutional provisions, particularly, regulative ones, do not call for interpretation before they are applied as they are clear and precise rules as the rules of criminal law are[19]. On the other hand, Griffin argues that constitutive provisions enumerated above can hardly function in the same manner as ordinary legal rules do: the formers' wording "is phrased in a general way and so to take the form of broad normative principles" requiring interpretation before they are applied [20]. Although the distinction between *constitutive* and *regulative* provisions sometimes becomes blurry, it definitely helps us to perceive the very nature of constitutional provisions.

Obviously, Professor Griffin bases his arguments on the Ronald Dworkin's dichotomy of rules and principles. In the Dworkinian sense, legal rules are applicable in an all-or-nothing fashion. "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision [...] But this is not the way [...] principles [...] work. Even those which look most like rules do not set our legal consequences that follow automatically

16 See Stephen M. Griffin, Constitutionalism in the United States: From Theory to Practice in *Responding to imperfection: The Theory and Practice of Constitutional Amendment,* Ed. Sanford Levinson (Princeton University Press, 1995), pp. 40-41.

17 In this Chapter, the terms "constitutive provision" and "regulative provision" will be used in the sense of Stephan M. Griffin.

18 Ibid., pp. 40-41.

19 Ibid., p. 40.

20 Ibid., p. 41-42.

when the conditions provided are met [...] Principles have a dimension that rules do not – the dimension of weight or importance[21]."Further, according to Dworkin, the interpretation of legal principles works as an artistic interpretation – critics interpret, e.g., poem with the purpose to defend *their* meaning or point in the artistic work (emphasize added)[22]. The interpreter of artistic work is not as free to make of artistic work anything she would have wanted, but her interpretation is "a matter of interaction"[23] between *her* purposes and the given work of art she is construing. Hence, the general principles the constitution contains need to be interpreted before they are used. In other words, specific content should be assigned to them before applying. And, most importantly, any such an interpretation is strongly influenced by the purpose of the particular interpreter.

It appears that the constitution and, particularly, its constitutive provisions, most frequently, cannot function in a vigorous way as a self-sufficient curb on government. In other words, if these provisions do not carry along the "original" meaning with them, we hardly ever find objective way to assess government's action independent of our way of making the judgments [24], separate from our ideological inclinations[25]."Constitutive rules thus exist in the uncertain boundary territory between law and politics[26]."The text of the Constitution, therefore, can be read as a framework, or as a basic plan for politics. "The ratification of the Constitution begins a constitutional project that spans many generations... [A]mericans fill the project out over time through constitutional politics[27]." Here also remains the threat that when parties with contradictory opinions seize the political power, they are trying to construe and give a concrete content to the concepts of freedom, equality, public order, etc.[28] as long as an interaction between their purposes and the constitutional provisions so affords. The process of constructing the constitutional provisions, particularly, constitutive ones, is a process of deliberation, persuasion, argument, and dialogue between different actors[29].

As we see, an attempt of constitutionalism to limit the government through the text of the Constitution which should consistently operate as a binding force of law is greatly challenged and questioned. An absence of

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21 see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), pp. 24-28.

22 Ronald Dworkin differentiates between conversational, scientific and artistic interpretations. According to him, in the first case, we interpret the sounds and marks another person uses to in order to decide what she meant. In case of Scientific interpretation, a scientists, firstly, collects data and then interprets them. As opposed to the interpretation we are interested in, in conversational interpretation we interpret what people say while in scientific one we interpret events not created by people. In artistic interpretation, we interpret "something created by people as an entity distinct from them." See Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), pp. 49-55.

23 Ibid., p. 52.

24 See Stephen M. Griffin, Constitutionalism in the United States: From Theory to Practice in *Responding to imperfection: The Theory and Practice of Constitutional Amendment,* Ed. Sanford Levinson (Princeton University Press, 1995), pp. 40-42.

25 It is, of course, against to Hans Kelsen's famous project aiming at creating the theory of pure law, free from ideological interpretations. See Hans Kelsen, Pure Theory of law (The Lawbook Exchange, LTD., 2005), pp. 101-107.

26 Stephen M. Griffin, Constitutionalism in the United States: From Theory to Practice in *Responding to imperfection: The Theory and Practice of Constitutional Amendment,* Ed. Sanford Levinson (Princeton University Press, 1995), p. 41

27 Jack M. Balkan, *Living Originalism* (Harvard University Press, 2014), 4ff.

28 See Carl Schmitt, Constitutional Theory (Duke University Press, 2008), pp. 89-90.

29 See, e.g., Louis Fisher, *Constitutional Dialogue: Interpretation as Political Process* (Princeton University Press, 1988). Professor Fisher explains that U.S. constitutional law is not exclusively the Supreme Court's "final word" but rather a richly political convergence of separate interpretations. He argues that constitutional principles emanate from a dialogue among all three branches of government.

the fixed meaning attributed to some constitutional provisions, on the one hand, and an implied prohibition to amend them frequently, on the other, result in changing their content time by time, without bringing a textual amendment to the text. The Constitution of United States which is greatly venerated for its longevity can be an example how constitutional practice can depart from the constitutional text.

II. WHO SPEAKS IN THE NAME OF THE CONSTITUTION?

The first Chapter of this Essay, more or less, demonstrated the challenge to the theory of written constitutionalism: the Constitution tries to limit the government while the language of its provisions leaves broad leeway to interpret or construct their meaning. The constitutional text which exists between the territory of law and politics is most frequently expounded by judicial and political bodies – the institutions which most frequently speak *in the name of* the Constitution, and breathe the constitutional provisions into life. In this Chapter, I will try to analyze the judicial interpretation, on the one hand, and political construction [30], on the other. The analysis provided in this Chapter will be used to determine the results of such interpretation/construction have on the Constitutional text and constitutional order.

1. Judicial Interpretation of the Constitution

The constitutional text of United States have not clearly set out what checks the judicial branch had to have on congressional and presidential power. In the most frequently cited case of *Marbury v. Madison*, the Supreme Court found the basis for judicial review in the nature of a written constitution, in the supremacy and in the Article III's grant of judicial power [31]. Thus, the judiciary's power to say what the Constitution is and to pass on the constitutionality of laws has been determined. Through years, American constitutional law has been widely accepted to be the seven articles of the original Constitution with twenty-seven amendments, and the enormous body of decisions by the judiciary scrutinizing these provisions and enunciating their content, so to speak [32]. The Supreme Court considered that "deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution[33]."

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30 According to Whittington, determining the meaning of the constitutional provisions by political bodies – the process by which constitutional meaning is shaped within politics at the same time that politics is shaped by the Constitution, is characterized to be construction as opposed to interpretation which is the process pursued by the Courts. See Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999).

31 5 U.S. 137 (1803).

32 see John Argesto, *The Supreme Court and Constitutional Democracy* (1984), p.102 cited in Bruce G. Reabody, Coordinate Construction, Constitutional Thickness, and Remembering the Lyre of Orpheus (*University of Pennsylvania Journal of Constitutional Law* 662, 2014), p.622, supra 1. (Argesto notes that "the Common public and academic opinion of judicial review power today firmly supports a rather simple doctrine of judicial finality, a notion that the Court is, in brief, the last word in constitutional government")

33 Baker v. Carr, 369 U.S. 186, 211 (1962).

Despite the fact that the judiciary's power to say what the Constitution is was ascertained by the judiciary itself, it has been widely acknowledged that the *body and blood*[34] of the constitutional provisions is what the Supreme Court says. In other words, some argue, the issue of constitutional law should not be considered to have been settled until the Supreme Court renders the decision about it. It was in 2005, for example, that the Supreme Court interpreted the Eighth Amendment, declared the death penalty as a disproportionate sentence for offenders under 18[35],and, thus, paved the way for a new constitutional reality where the juvenile capital sentence is out-constitutionalized as a cruel and inhuman punishment for minors.

Judicial interpretation of the Constitution takes various forms but one of their characteristics is that they are flexible, at least, to the some extent, depending on the judges' individual approaches to the written document, and the interpretative methods they deploy. The Constitution as the broad normative principles that are to be interpreted before they are applied keeps a certain leeway for the members of the court to say what the Constitution is. The constitutional text, as Justice Holmes exquisitely notes, "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary in color and content according to the circumstances and the time in which it is used[36]."Even the so-called *Originilasts,* who, very roughly speaking, argue that it is illegitimate to "trump" the original intents of the Framers of the Constitution, maintain an ample room to say what these original intents were, *to interpret the original intents*. "Which framers do we select, and during what periods of their lives? Do we reconstruct intentions partly from private letters, memoranda, and diaries? Do we focus on the debates at the Philadelphia Convention or also at the state ratifying conventions? How much British, American colonial and early national history is applicable[37]?"Justice Antonin Scalia, an *originalist* from somewhat different perspective, argues that judiciary should interpret the Constitution according to "the original meaning of the text, not what original draftsmen intended[38]."Notwithstanding whether an individual judge is *originalist* or *living constitutionalist*, it appears that there is no absolute objectivity in the Constitution[39].

Professor Jack M. Balkan's theory of interpretation and construction can be read as an attempt to reconcile the *originalism* and *living constitutionalism*. He discusses the method of *text and principle*, which requires fidelity to the original meaning of the Constitution, particularly, to the rules and standards stated by the document while leaving to each generation the task to built out constitutional constructions that best apply the current circumstances [40]. In this context, judges build up systems of precedent that implement constitutional purposes and give the Constitution's guarantees and structures meaning in practice[41].

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34 Edward S. Corwin, *Court Over the Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Princeton University Press, 1938), p. 68.

35 Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183.

36 Towne v. Eisner, 245 U.S. 418, 425 (1918).

37 Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988), p. 70

38 Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws in *A Matter of Interpretation: Federal Courts and the Law*, Ed. Amy Gutmann (1997), p. 38.

39 George D. Braden, *The Search for objectivity in Constitutional Law* (Yale Law Journal 57, 1948), 571ff. see also Ralph L. Ketcham, *James Madison: A Biography* (University of Virginia Press, 1990) Interestingly, Ketchman writes that Madison desired to have his notes destroyed after his death, because he was concerned that those notes no longer represented the very points of the Convention discussions. In this context, it is worth mentioning that Madison's notes, which is considered to be the main source to dive into the framers original intents, constitute substantially small part of the debates of the Founding Fathers.

40 See Jack M. Balkan, *Living Originalism* (Harvard University Press, 2014), 3ff.

41 Ibid. pp. 4-5.

It is true that judiciary's and, most vigorously, the Supreme Court's power to strike down unconstitutional laws generally has won praise. It is equally true that it has not usually served progressive interests[42].The Court's infamous decision in *Dred Scott v. Sanford*[43] – the second invalidation of a federal law directly after *Marbury v. Madison*[44] – stated that under the Constitution blacks were not citizens who could take the advantage of diversity jurisdiction of the federal courts, and that Congress had no power to abolish slavery. Notwithstanding whether we agree or not the Court's particular opinion, "the ultimate justification for their [judges'] power is public acceptance – acceptance not of every decision, but the role they play. Without popular support, the power of judicial review would have been eviscerated by political forces long ago[45]."It is *We the People* who does give a hand to the judiciary to interpret the Constitution, and to change our understanding of the principles *We the people* live by. The decisions of the Court "are not final because we are infallible, but we are infallible only because we are final[46]."

As we see, the judicial interpretation of the Constitution assumes unquestionably significant role in interpreting the constitutional text. The strength of judiciary is visualized in Tocqueville's well-known note, that "there is hardly a political question in the United States which does not sooner or later turns into a judicial one[47]." Although there were efforts to curb the power of the court[48], it has remained to be a vigorous interpreter of the constitutional provisions. But, as we will see, the "ultimate interpreter" does not equals to exclusive interpreter and judiciary's overestimated role in determining what the constitution is being reexamined.

2. Political Construction of the Constitution

Recent scholarship does demonstrate that *the Supreme Court is not the Constitution*[49]. The body of legal and political science scholars is reconsidering the long established inference that the constitutional law and the Constitution itself primarily consist of the legal opinions of judges. Judicial Supremacy which places the Supreme Court as superior "in the exposition of the law of the Constitution"[50] is being questioned and reexamined. In *Taking the Constitution Away from the Court*, Professor Tushnet argues that judicial constitutional interpretation does not fully represent the most cherished commitments of American Society, and strongly encourages *We the People* to take the responsibility for protecting their liberties[51]. It is argued that

42 William Burnham, *Introduction to the Law and Legal System of the United States* 5th Ed. (West, 2011), 11ff.

43 60 U.S. 393 (1857).

44 5 U.S. 137 (1803).

45 Kaufman, The Founding Fathers, N.Y. Times Magazine, February 23, 1986, at 69 quoted in Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988), p. 84.

46 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

47 Alexis de Tocqueville, *Democracy in America*, translated by George Lawrence (New York: Doubleday, 1969), p. 377.

48 Fisher enumerates the efforts striving to curb the Court's power. See Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988), pp. 200-231.

49 Alpheas Thomas Mason and William M. Beaney begins their book with the Chapter entitled "The Court is the Constitution" to depict the role of the judiciary in the constitutional construction. See Alpheas Thomas Mason and William M. Beaney, *The Supreme Court in a Free Society* (1968).

50 Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that Marbury v. Madison declared supremacy of judicial authority in determining what the law of the Constitution is).

51 Mark Tushnet, Taking the Constitution Away from the Courts (New Jersey: Princeton University Press, 1999).

we should read the Constitution not only as the provisions breathed into life by the judiciary, but also as the document constructed by different political and non-political actors.

The common point among scholars examining the political construction of the Constitution is that legislatures and executives do engage in the process of determining the meaning of constitutional provisions[52]. Louis Fisher has uncovered numerous examples where either Congress or the President has exercised independent judgment on matters of constitutional construction. Under either scenario, the evidence is clear that both branches recognize their coequality with the judiciary in determining the meaning of the constitutional provisions[53].

Under the doctrine of *coordinate construction*, the President and members of Congress have the authority and the power to engage in constitutional construction[54]. It is argued that all branches of government are required by Article VI to support the Constitution[55]. "Oath of Office" clause under Article II explicitly obliges the President to "protect and defend the Constitution of United States[56]." Members of the Congress determine constitutional questions when they draft and discuss the bill; Executive officials undertake the same responsibility when they prepare a bill or when bills are presented to the President for signature or veto[57]. Some provisions of the Constitution directly call Congress to discuss constitutionality issues while preparing a bill. Under Article I, Section 9, "No Bill of Attainder or ex post facto law shall be passed." Besides, the First Amendment directly commands that Congress "*shall make no law*"[58] but consistent with the Constitution. Members of Congress are expected to legislate with sensitivity to constitutional values and issues. "It is irresponsible to legislate blindly, expecting the judiciary to identify and correct constitutional defects[59]."

Constructing the constitutional provisions from the political actors, such as members of Congress and the executives, is to be considered not as a theoretical suggestion but as a necessity. Undertaking the assigned constitutional duties, each branch of Government must initially construe the Constitution, and the construction of its powers by any branch is due great respect from the others[60]."Obligation *to support the Constitution* obliges the political bodies to talk about the constitutionality issues, to consider the constitutionality of every law being prepared – the Constitution does not bestow the function to consider constitutionality solely on the judiciary. Moreover, congressional and executive practices over a number of years have

52 See, e.g., Keith E. Wittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999).

53 Robert J. Spitzer, *Politics and Constitutionalism: the Louis Fisher Connection* (State University of New York Press, 2000), 63ff.

54 Louis Fisher, *Constitutional Dialogue: Interpretation as Political Process* (Princeton University Press, 1988), 231ff.

55 Relevant part of the Art. VI, Clause 3 (Oath of Office) reads as follows:
The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, *to support this Constitution*." (emphasis added)

56 Oath of the President under Art. II, Section 1, Clause 8 reads as follows: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of United States."

57 Fisher, Ibid., p. 234.

58 Ibid., 234.

59 Ibid., 235.

60 United States v. Nixon, 418 U.S. 683, 703 (1974).

been instrumental in fixing the meaning of the Constitution. The Supreme Court, upholding the Presidents removal power in 1903, substantiated its arguments based on the "universal practice of the government for over the century[61]."

The process of adopting the National Labor Relations Acts (Wagner Act)[62] can be a proper example how the political actors – Congress and the President – construed *interstate commerce* clause. In order to have avoided the invalidation of the NLRA, they forthrightly stated that the Act would reduce industrial strife. This argument was undoubtedly framed with an eye to the constitutional hurdle the Act would face before the Supreme Court. As the relationship between business employer and employees was considered to be a realm of state power, the draftsmen had to justify federal action on the basis of the government's right to control interstate commerce. They persuasively stressed that the NLRA would affect a greater economic stability through the creation of a better economic balance. Consequently, the Supreme Court's *nine old men* weigh up the competing interests, and declared the Act to be constitutional, reasoning that "industrial strife would have a most serious affect upon interstate commerce[63]."

Political construction of the Constitution, as we see, takes form of argument, and persuasion. Ambiguities in the constitutional text and changes in the political situation push political actors – Congress and the President – to construct their own understanding of the constitutional principles. Political construction of the constitutional meaning is a necessary part of the political process and can play almost similar role the judiciary does.

III. CHANGING WITHOUT AMENDING

As we determined the main actors defining the meaning of the broad constitutional provisions, it becomes obvious that their interpretations or constructions may result in changing our comprehension of what the Constitution says. This Chapter furthers discussion to explore how the informal constitutional amendment occurs and tries to answer the question: if informal amendment is legitimate, can we still take the Constitution seriously?

1. Informal Constitutional Amendments

The authority to amend the Constitution of the United States is derived from Article V of the Constitution which envisages process for constitutional changes and revisions. Amendment process requires the assent of successively larger supermajorities of the people's representatives for two rounds of voting, at the proposal and ratification stages. It is assumed that constitutional amendment triggers a change in the text of previously valid norms by eliminating individual constitutional provisions, or adopting new constitutional wordings. The formal constitutional amendment, i.e., an amendment occurring through the constitutional-

[61] See Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803) quoted in Fisher, p. 243.
[62] 29 U.S.C. §§ 151-169ბ
[63] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41, 57 (1937)ბ

ly prescribed procedure, implicates that every constitutional change should be explicitly marked by the amendment. Otherwise, the need for determining the concrete procedure would be obviated. The fulfillment of the constitutional procedure for the amendment also ensures that the changes are substantially deliberated, and legitimate, ensuedly.

However, the constitutional provisions are not generally framed as, say, ordinary statutory provisions are, and they leave an ample room for the interpretation and construction. In other words, they have to be construed before they are applied [64].And as the judiciary, Congress and the President are frequently required to determine what the Constitution says, it has been argued that their construction of the constitutional provisions changes our understanding of the constitutional text, and thus results in informal amendment of the Document.

The phenomenon of informal amendment of the Constitution has received profound attention from the outstanding scholars, but there is not, among Ackerman, Wittington, and others, a uniform definition what the informal amendment means[65]. The Common point among these authors is the general emphasis on political actors, such as legislatures, and executives – rather than the traditional singular focus on the courts – as agents that continually engage in the process of determining constitutional meaning through means other than formal amendment [66]. As the purpose of this article is not to denominate what the informal amendment is, I will focus how the Constitution actually changes by any means but Article 5 procedure.

First, the Constitutional text is not considered to be self-sufficient. The Constitution sets out the skeleton of government, describes constitutional bodies, distribute the state power among them, and confer rights to individuals but the constitutional actors are expected to *implement* the Constitution [67]. On the other hand, the broad language of the Constitutional provisions is generally *specified* by judge-made opinion-tests, and statutory and regulatory materials[68] that make the broad constitutional provisions readable. The Constitution is silent whether, e.g., the federal government has a power to establish the Bank of United States, but it has long been ascertained that Congress as the institution exercising the co-called unenumerated powers had an authority to incorporate the Bank.[69] Likewise, John Marshal derived the power of judiciary to pass on constitutionality of laws form the nature and purpose of judicial function[70].

Second, the Constitutional provisions sometimes clearly determine the outcome of the possible policy questions, but still these "absolute" structures or principles are *superseded* by different extra-constitutional rules[71].For Example, Article I, Section 1[72] of the Constitution explicitly vests *all legislative power* in Congress

64 See *Supra* note 15, and accompanying discussion.

65 See Michael Besso, Constitutional Amendment Process and the Informal Political Construction of Constitutions (*Journal of Politics 67*, Issue 1, Feb 2005), pp. 71-75.

66 Ibid., p. 72.

67 see Ernest A. Young, The Constitution Outside the Constitution (*Yale Law Journal 117*, 2007-2008), pp. 443-444.

68 Ibid.,, p. 445.

69 See McCulloch v. Maryland, 17 U.S. 316 (1819).

70 See Marbury v. Madison, 5 U.S. 137, 176-178 (1803).

71 See Ernest A. Young, The Constitution Outside the Constitution (*Yale Law Journal 117*, 2007-2008), pp. 446-448.

72 Art. I, Sec. 1 of the Constitution reads as follows: "All legislative power herein granted shall be vested in a Congress of the United States, which shall consists of a Senate and House of Representatives."

(emphasis added). Nowhere does the Constitution mention administrative agencies. But since 1887, when Congress established the first powerful federal administrative agency, the Interstate Commerce Commission, the growth in the power of administrative agencies has finalized in the transformation of the country into "administrative state [73]." Agencies impact government principally by acting through the delegated power to enact substantive law – regulations, which occupy about ten times the space of federal statutes[74] – despite the explicit constitutional statement that it is Congress that holds all legislative powers. The New Deal period which is characterized by growth of the authority of administrative agencies is one of the most frequently invoked example how the process lead by the charismatic President Franklin D. Roosevelt drive the political actors to resort to the means of informal constitutional amendment.

How did it happen? To answer this question, we should recall Professor Tushnet's concept of *constitutional workarounds*. According to him, when there is significant political pressure to achieve a particular goal, but some of the constitutional provision rejects reaching that goal, there appears some other constitutional provision which allows accomplishing the desired outcome[75]. Constitutional workarounds "occur only if the Constitution is in some sense at war with itself: One part of the text prohibits something, but other parts of the text permit, and the Constitution itself does not appear to give either part priority over other[76]." Although there are some circumstances where *constitutional workaround* as a tool cannot be used[77], working around the competing constitutional texts, we can find solutions – "the routes to the goal."

One question remains here is, if the constitutional meaning is amendable without resorting to constitutionally prescribed amendment procedure, how the Constitution can have the force of binding law to limit the government? Or more generally, can we take the Constitution seriously if the judicial interpretation as well as political construction greatly affects the meaning of the constitutional provisions?

2. Taking Constitution Seriously

The statement that – "Nothing new can be put into the Constitution except through the amendatory process [and] nothing old can be taken out without the same amendatory process"[78] – has been diluted by the practice discussed above. The original text of the Constitution remains relatively unmodified but the constitutional order, or the constitutional regime which is to be determined by the Constitution does gradually change. As discussed above, there are extra-V-Article means inherent to the nature of the Constitution to change the founding order. Court decisions, important legislation, or the gradual accretion of power, as in the Presidency during the twentieth century, are the examples how our understanding of what the Con-

73 See William Burnham, *Introduction to the Law and Legal System of the United States* 5th Ed. (West, 2011), 15ff.

74 Ibid., p.15-16.

75 Mark Tushnet, Constitutional Workarounds (Texas law review 87, 2009; Harvard Public Law Working Paper No: 09-14 Available at SSRN http://ssrn.com/abstract=1338087)

76 Ibid., p.6

77 A proposed workaround would not be constitutional if it, e.g., relies on a general constitutional provision which, in its hand, contradicts with specific one. see Ibid., p.6 *supra* 22.

78 Ullman v. United States, 350 U.S. 422, 428 (1956) quoted in David A. Strauss, The Irrelevance of Constitutional Amendments (*114 Harvard Law Review*, 2001).

stitution says has changed[79]. It is undoubtedly true that our comprehension of current constitutional order in the United States is greatly constituted by judicial interpretation and political construction of the written document. However, it is equally true that these changes happened not by constitutionally prescribed procedure but though informal, non-textual means, without touching the text.

The main argument against the so-called informal constitutional amendments is the assumption that such an approach would place the Constitution in the ordinary political struggles; In other words, the Constitution which is open to be interpreted and constructed by the constitutional bodies cannot function in a sufficiently strong way to curb the government actions. Some critics of informal amendment insist that every change in constitutional practice be explicitly marked by an textual amendment, as every important change in, say, criminal law is integrated in the statute[80]. They say that in order to preserve a clear separation between the constitutional law and an usual course of politics, everyone should have the same understanding of what the Constitution means[81]. If there is a chance to change the polity framework without the formal constitutional procedure, political actors, when they achieve political influence, will be capable of redefining the constitutional principles, and, consequently, encroach on the powers of others – of the people, of other political branches, of judiciary. And the very essence of the Constitution will be undermined, they argue.

In order to respond to these arguments, initially, an all-or-nothing approach should be rejected. Some constitutional provisions, as identified by Professor Griffin, are indistinguishable in form from the rules contained in the ordinary legislation and, thus, they clearly determine the outcome of a given political question[82]. On the other hand, although the language of some constitutional provisions, generally, are broad and phrased so to take the form of broad normative principles, neither judiciary nor political actors are free to make of constitutional text anything they would want. Dworkin clearly demonstrates that, like in case of artistic interpretation, the interpreter of the Constitution cannot depart from the object[83] – the text of the Constitution, in our case. Further, *constitutional workaround* cannot work in every and all cases – Constitutional workarounds "occur only if the Constitution is in some sense at war with itself: One part of the text prohibits something, but other parts of the text permit, and the Constitution itself does not appear to give either part priority over other[84]."

Besides, in this context, we should recall why President Franklin D. Roosevelt rejected the idea to amend the Constitution formally. Roosevelt considered textually amending the Constitution through Article 5 procedure but he eventually rejected this option for various reasons. First, there was no agreement in the executive branch on the language of amendment. Second, he acknowledged that amendments should have been crafted in broad terms – otherwise they would have failed to function in a long-term perspective. The broad language, however, would have increased the risk of unforeseen effects, and new, revised provi-

79 See Strauss, The Irrelevance of Constitutional Amendment, 1458 ff.

80 Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Ed. Sanford Levinson (Princeton University Press, 1995) pp. 42-43.

81 Ibid., p. 42.

82 See *Supra* Note 14, and accompanying discussion.

83 See *Supra* note 19, and accompanying discussion.

84 See *Supra* note 71, and accompanying discussion.

sions would still be subject to judicial interpretation as well as political construction. Third, an amendment drafted in broad terms could be undermined by courts through a narrow interpretation of the not-so-obvious provisions. But if the amendments were drafted narrowly enough to send a clear and precise message to courts, then they would not be applicable to different circumstances raised during governing the country[85].

Thus, the complexity the amendatory procedure entails was not the only reason not to apply formal means of changing constitutional order. Recent scholarship has demonstrated that informal means to change the constitutional order are used in jurisdictions where constitution amendatory process is relatively easy[86]. It is unquestionably true that the difficulty the amendment process involves plays the crucial role in preserving the constitutional text unchanged. However, as the Roosevelt's case depicts, there are some other important reasons not to touch the constitutional text. To generalize and draw the conclusions from Roosevelt's example, first, the constitutional provisions, in order to influence a great number of governmental actions and to survive the time, need to be phrased in broad terms. Second, there is no guarantee that the judiciary will interpret the language of new provisions as its authors intended – courts can potentially apply either a narrow or a broad interpretation. Third, changing the constitutional text sometimes results in changing the balance of power and constitutional roles of different branches. When the old norms are taken out, it is likelihood that judicial precedents and political constructions, which were to accompany them, will be repudiated. Therefore, hardly anyone can predict how new constitutional provisions will be read.

Apart from legal and political arguments identified above, frequent changes in the constitutional text tend to vitiate the respect the Constitution deserves for its longevity. The Constitution, which is venerated for its eternity, and considered to be a thread between the past and the present, would be undermined, if it bore a resemblance to ordinary legislation which is amended time by time. The legitimacy of the Constitution lies, *inter alia*, in the fact that it is distinguishable from the ordinary politics.

CONCLUSION

The Constitution is placed in the center of constitutional order. It sets the skeleton of the state, describe branches of government, spread the power among them, and confer rights to individuals. Acting as a binding force of law, it strives to limit government, and preserve individual freedom of human-being.

But constitutional provisions are not framed as provisions of ordinary legislation are. Their language is broad; they are phrased so to take the form of broad normative principles that are to be interpreted and constructed before they are applied. This is why the political and judicial branches of government, respectively, interpret and construct the meaning of the Constitution, and gradually change our understanding of

85 see Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Ed. Sanford Levinson (Princeton University Press, 1995) pp. 51-55.

86 See, e.g., Michael Besso, Constitutional Amendment Process and the Informal Political Construction of Constitutions (*Journal of Politics 67*, Issue 1, Feb 2005), pp

what the Constitution says. They "amend" the Constitution without making corrections in the text, without touching the text.

It appears that the Constitution can be amended without resorting to Article V procedure which is extremely complex, and burdensome; but it was also demonstrated; it is not true in every and all cases. First, the Constitution itself sets limits – some provisions clearly determine the outcome of any political question. No argument whatsoever can be presented to change, e.g., the form of bicameral legislature of the United States. Second, changing the meaning of the Constitution and its particular provision is not easy, even if the formal procedure is not pursued. Every informal constitutional change takes the form of argument, deliberation, persuasion, and dialogue between different actors. It involves tensions; it requires coordination. Political construction can be invalidated by the judiciary; judicial interpretation can be annulled by new statute, or by amending the Constitution. Overall, changing without amending is not as difficult as the greatly complicated formal procedure entails, but it is not as easy as the adoption of ordinary statute appears to be. Even if we amend the Constitution, new provisions will still be subject to judicial interpretation, and political construction.

Therefore, the Constitution is placed in the center of constitutional order as every argument that is invoked during the attempt to informally change the constitutional order emanates from the text of the Constitution. In other words, every political and legal argument is vindicated by citing the constitutional provision. It could be more precise to say that the Constitution is not only in center of the constitutional order, but around the constitutional order like a perimeter for a circumference. This could be a lesson for countries frequently changing their constitutional documents.