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THE PARADOX OF SELF-AMENDMENT

A Study of Law, Logic, Omnipotence, and Change

Peter Suber

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Preface to the Printed Version

Why bother?

Logical paradoxes in the strict sense produce statements like those of the Liar ("This very statement is false") that are false if true, and true if false. They resist rational solution or at least divide logicians for centuries of apparently irreconcilable wrangling. What happens when similar paradoxes arise in law?

That is a difficult question, but part of the answer is that paradoxes come and go without much notice and are dealt with without much ado. This fact makes the question important as well as difficult. How law copes with strict paradox sheds light on the nature of legal reasoning and rationality, the nature of legal practicality, and the sense in which law can be reasonable, even "wise", while being illogical in the technical sense.

I select one principal paradox —the paradox of self-amendment— and explore its variations in several Anglo-American jurisdictions and contexts, but mostly in American constitutional law. If a constitution has an amendment clause (a provision describing or prescribing how to amend that constitution), then can that clause be used to amend itself? The question may be widened to embrace the self-application of any legal rule that authorizes any legal change. Is self-amendment paradoxical? If so, can it be lawful? If so, can the logic of law be logical?

Some legal rules govern the change of other legal rules. But even these "rules of change" (as Hart calls them) are changeable, usually by higher level rules of change. When a rule of change is supreme within its own system (as a constitutional rule of change probably is), then it is changeable, if at all, only under its very own authority. The paradox of self-amendment arises when a rule is used as the authority for its own amendment. It is sharper when the rule of change is supreme, sharper still when it is changed into a form that is inconsistent with its original form, and sharpest of all when the change purports to be irrevocable.

Alf Ross has charged that self-amendment in this sense can be reduced to a formal self-contradiction. After considering some obvious and not so obvious objections and subterfuges, I conclude that this is correct. Moreover, Alf Ross and his followers have decided that this contradiction invalidates self-amendment. In one sense this book is an extended meditation on Ross's confidence that what is logically impossible must be legally impermissible. I conclude that this view is factually incorrect and philosophically arrogant.

One task that earlier scholars have not undertaken is to show that self-amendment has frequently occurred despite all contradiction and paradox. It is commonplace and, in fact, not even controversial in legal circles. By all legal tests of lawfulness, self-amendment in the most illogical sense is lawful. Nor have past explorers of these themes asked what law, legal change, legal reason, and legal rules are such that they can tolerate this kind of contradiction while forbidding many other things in the name of consistency.

The principle that what is logically impossible must be legally impossible may be philosophically arrogant and ignorant of legal history, but it is not a simple mistake. It is a new variation on the theme of natural law. Instead of finding that human law depends for its validity on an eternal moral law, this version makes it depend on an eternal logical law. One of the most persistent and persuasive objections to traditional natural law theory applies as well to the new version. If human law can be immoral without ceasing to be law, it seems it can be illogical without ceasing to be law. Law has its own tests of what is law, and those tests validate much that is immoral and illogical. To decide that a transcendent moral or logical test supersedes the legal tests, and can invalidate what is otherwise law and validate or enact what is otherwise utterly tacit, is to transform law into morality or logic and unduly diminish its historical and social dimensions. It is to assert that law reflects human thought and community only at their best and never also at their worst. It is to assert that somehow this human construction has had an immaculate conception, and is never touched by human unreasonableness, historical contingency, and interest.

The present work is in part a critique of the new natural law theory that replaces the traditional moral test with a logical one. I conclude that logic does not legislate a priori for law any more than morality does, although of course law remains perpetually open to logical and moral criticism. To know what the laws are in a society, and what is lawful there, we must look only at legal evidence and social phenomena. We need not consult any moral or logical doctrine, even any that happen to be affirmed unanimously, except to the extent that they influence the concrete legal practices of that society. In particular, I conclude that self-amendment may well be a strict self-contradiction, but the evidence of legal history suffices to show its lawfulness even in the face of logical doctrine. I argue that the only alegal source of legal authority is social practice, not normative principles from morality or logic.

To philosophers of Alf Ross's persuasion it may appear that I am begging the question. By rejecting the a priori principle that (standard) formal logic is the higher law of law, and undertaking a more empirical investigation of the relations of formal logic and law, I have already erred. I argue, however, on the contrary, that the a priori principle that (standard) formal logic governs law begs the question of the nature of law. Inquiry into legal practice, not presumptions in advance of inquiry, should answer the question. Between these two positions it seems that question begging is mutual and unavoidable. If so, then arguments across the gap of this incommensurability are futile. This suggests that cordial suspension of disbelief is the duty of scholarship, not hasty dismissal. This at least has been my attitude toward Alf Ross. In any case, my lapse from the very common philosophical confidence in the dominion of formal logic is motivated by evidence; it is not just another irrational failure to recognize the sovereignty of formalism that others assume a priori. In short, I invite readers who know more logic than law to attend to the peculiarities of law that fly off like sparks from virtually every case and especially from paradoxes like that of self-amendment.

Moreover, my quarrel with Ross's a priori prejudices about law do not reach the utility or universal application of formal logics. I object only to the view that formal models of law are prior to law in the sense that deviating legal practices can be branded unlawful. Other claims on behalf of the universal application of formal logics are both true and harmless. For example, I think it trivially true to say that law (like any reality) is susceptible to formal representations or abridgments whose varying degrees of accuracy and completeness make them useful for various purposes.

Like polygons inscribed in a circle, whose ragged perimeters approach the continuous curvature of the circle as the number of their sides increases, formal models of realities may be accurate to an arbitrary degree, and may perhaps (outside human history) even reach the limiting case of perfect accuracy. But for us formal models are created precisely to be simplifications that are accurate only for a few salient points. To assume that reality is polygonal because one's model is elegant or intelligible is a natural, but comical fallacy.

The paradox of legal self-amendment is just one variation of the broader paradox of omnipotence: how can a power supposed to be omnipotent irrevocably limit itself? The paradox of omnipotence is usually applied to deities, but it can also be applied to omnipotent legal powers, such as the power to amend a constitution. The U.S. federal amending power can change every rule in the American legal system, with the arguable exception of itself. (It has probably never been used to amend itself, depending on what we count as amendment, but more than one defeated proposal would have required strict self-amendment; see Appendix 1.) In that sense it is legally omnipotent within the American system and its use to limit the amending power irrevocably is logically equivalent to the problem of an omnipotent deity making a stone it could not lift or irrevocably assuming a mortal form.

Because the paradox of self-amendment does not arise in strong forms for changes that are revocable, it raises the question what an irrevocable legal enactment could be. Hence the essay also explores the important question of democratic theory whether any legal rules can be strictly immutable or beyond history. Several jurisdictions within the United States and the former colonies of the British Empire have tried to safeguard democracy or some vision of fair procedure by rules that are self-entrenched. A rule is self-entrenched when it is made immutable to legal change by a declaration within the rule itself that says, in effect, "this rule may not be changed". My solution to the paradox of self-amendment shows why such rules are mutable anyway, or why their change is typically approved by courts. It also explains our sense that truly immutable rules would be undemocratic constraints on liberty, even if their content proposed to protect democratic institutions. I argue that self-entrenchment fails, not because it is an undemocratic means to a (contingently) democratic end, but because the nature of law cannot abide it. But I also argue that the nature of law is not independent of the values of the people who make, respect, and disrespect law.

If legal rules that authorize change can be used to change themselves, then we have paradox and contradiction; but if they cannot be used to change themselves (and if there is no higher rule that could authorize their change), then we have immutable rules. Paradox and immutability should create an uncomfortable dilemma for jurists and citizens in western legal systems. It appears that we must give up either a central element of legal rationality or a central element of democratic theory.

I argue both descriptively and normatively that law can tolerate paradox but cannot tolerate immutability. Accepting this conclusion does not compromise a properly nuanced vision of legal rationality, although it does undermine the simplistic vision, sometimes conveyed (if not taught) in law schools, that law is a formal system cursed with content, the civil correlate of mathematics.

There is an urgent practical problem behind self-amendment as well. Central to many theories of democracy is the view that law is legitimate only when endorsed by the consent of the governed. If this is not to be a hollow slogan, we must have some idea of where to look for the consent, or dissent, of the people to their form of government. One of the most important and indicative manifestations of consent is the people's willingness to use the mechanisms of legal change, especially the supreme power of constitutional amendment. Non-use of the power might reveal a certain contentment with the unamended constitution, and use of it might reveal a certain contentment with the established channels of change and the current form of the constitution. But clearly the inference from use and non-use of the amendment power to consent is only valid if certain conditions are met. For an onerous or unfair procedure could thwart amendment long after desire for change became widespread and intense. An amending procedure that was undemanding for a privileged class might result in frequent use that did not reflect the desires of the larger public. Hence, use and non-use of the amending power will not really indicate consent unless the procedure is fair and neither too difficult nor too easy. But to change the fairness and difficulty of the amending procedure are virtually the only reasons to amend the amendment clause. Hence, self-amendment will almost always affect our ability to assess the people's consent to be governed by their constitution and the people's power to alter legal conditions to meet their consent.

Therefore, the permissibility of self-amendment —the chief topic of this essay— is a vital question for democratic theory for two independent reasons. It determines whether there shall be strictly immutable rules in the system, and it affects the evidentiary value of "working within the system" as a manifestation of consent to be governed by that system. Hence, it determines the extent of the people's power to make law and the fairness of holding them bound to the laws already made.

Finally, the demonstration that self-amendment is lawful in the Anglo-American legal tradition disproves a common theory of legal change: the theory that all valid change of law must be authorized by prior, higher legal rules. (I will call this the formalist or inference model.) Aside from denying the possibility of what is actual (namely, self-amendment), the formalist theory has other absurd consequences. It implies that no new legal system could get started. None could break off from another lawfully, and all that broke off unlawfully would be eternally barred from becoming lawful themselves. Any regime to be called lawful must have an infinite genealogy. Because we want to say that there are some lawful regimes, we must be able to explain how they could get started without at the same time making them mere creatures of prior regimes in an

infinite series. Some power, be it contract or revolution or some other, must make law ex proprio vigore or from its own strength. Only a theory of permissible self-amendment can explain this fully, and therefore only such a theory can explain legality per se.

In short, the study eventually reaches foundational moral, legal, political, even theological questions, as well as important issues in logic and epistemology. The detailed study of a paradox —any paradox, I am convinced— will blossom in this way.

I say this both to reassure and to warn the reader. At first the paradox looks trivial, perhaps especially to lawyers who are accustomed to dealing with such problems, as noted, without much ado. The detailed exploration of the paradox is not triviality squared. On the other hand, the broader issues of the nature of law and the roles of logic and value in it are not reached soon in the exposition or without a period in purgatory. Law and logic are technical subjects. Necessarily, they must be introduced with appropriate rigor and complexity when the inquiry demands it. Fortunately, this never requires arcana.

I have aimed at an audience of educated people who know little or nothing of either law or logic. No special knowledge of these subjects is presupposed, and all that is needed is given in the text. This is an inter-disciplinary inquiry whose results should be brought to workers in law, logic, philosophy, political science, sociology, and history. Readers who happen to know something, or very much, about law or logic must forgive the degree of over-explanation that affects them. No one, I hope, will forgive any degree of under-explanation.

One consequence of the need to introduce the logic and law needed for non-experts is a lengthy introduction. Sections 1 and 2 might be skipped by any reader who judges from their titles that they are unnecessary. Each offers reflections considerably beyond a merely factual preparation, but neither is necessary to the development of the paradox, which begins in Section 3.

Discussion of the paradox is greatly facilitated if I am allowed to speak of legal rules. However, the paradox itself implicates the question whether and in what sense laws are rule-like. If laws are rule-like in the manner of logical rules, then the requirement of consistency will be absolute and the equation of logical and legal validity will be supported. On the other hand if laws are rule-like in the manner of rules of etiquette or custom, then their partial indeterminacy will prevent any rigid application of a consistency test and, in addition, the acceptance of inconsistent rules may be a genuine part of the phenomenon to be explained rather than explained away.

I give myself the license to use the word "rule". But I also alert the reader not to prejudge the question of that rule-like character by my use of words nor to allow me to do so. I have tried not to assume or exaggerate the rule-like character of law in the process of subjecting the paradox of self-amendment to logical analysis. One of my conclusions is that laws lack many of the properties found in the rules of logic, mathematics, and games (see especially Section 21). This conclusion is not subverted by use of the word "rule" to refer to laws, but I would not want the reader to think that this important question was unaddressed or left to be determined by the default of common word usage.

Outline

Section 1 is a brief introduction to paradoxes, why they cause consternation in logic and mathematics, and why they might or might not do so in law.

Section 2 introduces the remarkable clauses in constitutions that authorize amendment, and tries to show why they are important to law and legal change, both in theory and in practice. The importance of amending clauses to sovereignty, justice, democracy, and peaceful evolution will only occasionally be touched in later sections; after Section 2 it will be presupposed. Together Sections 1 and 2 provide the background in logic and law for the rest of the inquiry.

Section 3 poses the question whether amending clauses may authorize their own change. If amending clauses do not apply to themselves, then their lawful change is apparently ruled out (Section 4); if they do apply to themselves, then their lawful self-amendment is arguably paradoxical (Section 5). This dilemma of immutability and paradox is as central to the book as the narrower exploration of the logic of self-amendment.

Section 6 pauses to outline two rival theories of law essential to the controversy surrounding self-amendment. One, which I call the inference model, is a formalist theory that makes the legal validity of an amendment turn on the logical validity of a deduction that models the amendment. The other, which I call the acceptance model, finds an alegal and alogical source for the authority of law, and hence of amendments, in the sociological fact of a complex sort of public acceptance. Section 7 explicates H.L.A. Hart's version of the acceptance theory. This gives us an articulate alternative to Alf Ross's inference model, and shows us some of the issues that will face anyone who embraces an acceptance theory.

Section 8 frames the dilemma of immutability and paradox, and shows where United States courts have constructed their stand. The concept of immutability leads directly to that of omnipotence, for if any legal power is omnipotent (in some sense) then no legal rule is immutable (in a cognate sense), and vice versa. The section examines the attempts by scholars and plaintiffs to identify immutable aspects of the U.S. constitution, hence limitations on the (otherwise) omnipotent power of the amending clause.

Section 9 carries the inquiry in Section 8 a step further. While Section 8 looked at entrenchment clauses whose alleged immutability challenged the omnipotence of the amending clause, Section 9 explores the entrenchment of the amending clause itself and the possibilities of self-disentrenchment. Or, while Section 8 examined the alleged irrevocable limits on the amending power, Section 9 examines the revocability of all alleged limits.

Most people who hear the paradox of self-amendment described respond that the old and new amending clauses need not be valid at the same time, and hence do not "contradict" each other. Section 10 examines this solution in detail and finds it wanting.

Section 11 criticizes the adequacy of two other responses to the paradox, one holding that self-embracing omnipotence in the amending clause would avoid the paradox, and the other holding that specific authorization for self-amendment in the amending clause would avoid the paradox.

The result of Part One (Sections 1-11) is that the paradox of self-amendment is difficult to banish. It is not dissolved for any existing formal logic or for the inference model of law by any of the usual objections or stratagems. In that sense Alf Ross is vindicated. However, if we abandon (the exclusivity of) formal logics in the interpretation of law, or the inference model of legal change and validity, or both, then the paradox does not arise. Appeal to Hart's acceptance model is one way to do this, but not the only way. Insofar as the acceptance model is plausible, or more plausible than the inference model, Alf Ross is repudiated.

Part Two, especially Sections 12-19, turns aside to examine the same issues as Part One with regard to other, "unofficial" methods of amending the U.S. constitution. While Sections 3-11 somewhat single-mindedly focus on the legal and logical problems of using an explicit amending clause against itself, Sections 12-19 are more broadly concerned with unofficial methods of amending the constitution and their reflexive applications.

Section 12 shows why it is important to the discussion to bring in these unofficial methods of amendment. In order to negate some salient assumptions of Part One, it examines cases of self-amendment in which the amending clause is not supreme and when the new form of the clause is not inconsistent with the old form. To do so it introduces several models of negation and contradiction for law, without which the discussion of whether two laws "contradict" one another remains vague and imprecise.

Section 13 explores the effectiveness of using one amending clause against a second, and the second against the first, and so on, until the desired content is reached. This "see-saw" method may or may not be able to reach any desired content from any initial position, but it does manage to avoid strict self-amendment.

Section 14 treats the amendment and repeal of constitutional rules that expire according to a clause stipulating their expiration date. Section 15 covers the kind of amendment that occurs when a provision is interpreted and reinterpreted by courts. Section 16 deals with the implied repeal of old rules by newly enacted rules that contradict them. Section 17 explores the special case of this in which the new law is a treaty and the old law which it contradicts is some provision of the constitution. Section 18 asks how the right to revolt, which is curiously explicit in many state constitutions, differs from the amending power. Section 19 argues that amendment by desuetude, or obsolescence, seems to occur in the United States although it is officially denied.

For each of the unofficial methods of amendment in Sections 13-19, the question of self-application is raised and historical examples (if any) are discussed. As a result, the book is a fairly complete compendium of the constitutional law relating to constitutional amendment, quite apart from its discussion of paradox.

Section 20 is a collection of reflexivities and paradoxes in law apart from self-amendment. It is a haphazard and personal collection that belongs here only to broaden the scope of this, the first book-length study of reflexivity and paradox in law. I know it is not complete because I have had to restrain myself and omit many variations in order to keep the section from swamping the rest of the book.

Section 21 is a conclusion. It looks back over Part One to summarize the argument, and looks ahead to the oddities and difficulties facing the position I have taken. The summary (21.A) can be read before or independently of the rest of the book, or afterwards to bring the many threads together. In the more exploratory sections I offer an "historicized" modal logic for law that can account for the peculiarities revealed in the text while dispensing with immutable rules.

Three appendices round out the inquiry. The first discusses the unavailing attempts at direct self-amendment at the federal level. The second surveys the many successful cases of direct self-amendment among the states. This is the primary documentation for the claim that self-amendment is commonplace even if it is logically "impossible". The third appendix presents a game of self-amendment.

Notes on the text

Citations to cases, statutes, constitutions and other forms of law are in standard legal form. Citations to books and articles, however, are in the clearer and more complete format of the humanities.

Notes are gathered at the end of each section. I am aware of the maxim that nothing important should be relegated to a note. Nevertheless, my notes are sometimes expansive and discursive, and often contain much more than a bibliographic citation. My maxim was to put any matter in a note that would interrupt the continuity of the main exposition and that would not be the topic of the main exposition elsewhere in the book.

The research on which my inquiry and bibliography are based is thorough up to 1982 when the first draft of this book was finished. After 1982 it is sporadic, as I began to live and work far from a large law library.

The only abbreviation I use with regularity is "AC", for "amending clause".

I follow the practice of American philosophers and Britons generally in using exact quotation. Except in bibliographic citations, commas and periods are included inside quotation marks only when they are part of the quoted source.

I would like to use sex-neutral language. But I find "she or he" and "his/her" to be barbaric constructions, and I cannot always arrange to use plurals and hide behind "they" and "them". My solution is to use "she" and "her" as generic pronouns; this is not sex-neutral, but it is compensatory. If we do this for a few centuries, then we can switch back. Or perhaps by then English will have acquired an elegant set of neutral personal pronouns.

I have tried to use legal Latin as little as possible. But when a Latin phrase, once learned, frees one from long, awkward, or imprecise paraphrase, then I use it. Phrases used just once are defined in context. Here is a quick glossary of those used more often:

ab initio
From the beginning. A statute or marriage is void ab initio if some defect in its creation means that it was never legally valid.

de jure
Officially, overtly, legally. A method of amendment is lawful de jure if it is recognized, say, in the constitution or a judicial interpretation of the constitution.

de facto
In fact, in practice. A method of amendment is lawful de facto if it is actually used or accepted, even if it violates the letter of the law.

ex proprio vigore
By its own strength. Contracts or revolutions make law ex proprio vigore if their law-making power need not be recognized by some (other) law to be effective.

lex posterior principle
The "later law" principle. In an irreconcilable conflict between rules of the same legal rank, this principle tells us to favor the most recent rule.

lex specialis principle
The "specific law" principle. Like the lex posterior principle, but favoring the more specific of the conflicting rules.

lex superior principle
The "superior law" principle. In cases of irreconcilable conflict between rules, this principle tells us to favor the rule of superior rank (for example, constitutional rules over statutes) regardless of recency or specificity.

pro tanto
For so much, in part, to that extent. Rule A repeals rule B pro tanto if A repeals B only to the extent of their irreconcilable conflict, and leaves the rest of B intact.

stare decisis
Stand by the decision. Stare decisis is the name of the common law doctrine to follow precedent or to treat like cases alike.

ultra vires
Beyond power or authority. An act or amendment is ultra vires if it is unauthorized or beyond the scope of the power of the body attempting it.

Just to err on the side of completeness: a priori is philosophical, not legal, Latin. It means valid prior to, or independently of, experience. For example, while Aristotle believed that the truths of arithmetic were refined generalizations from experience, Plato thought they were a priori truths.

I gratefully acknowledge a grant from the National Endowment for the Humanities that enabled me to revise this book for publication.

I thank Douglas R. Hofstadter for publishing my game Nomic and other parts of the third Appendix in his column, "Metamagical Themas," in Scientific American in June 1982, and for inviting me to present my work on reflexivity in law in a colloquium at Indiana University in December of that year.

I thank Jean-Pierre Dupuy and Gunther Teubner for inviting me to present the conclusions of this book at a conference in May 1988 on "Paradoxes of Self-Reference in the Humanities, Law, and the Social Sciences" sponsored by the Program of Interdisciplinary Research at Stanford University. I thank the sponsors for permission to use portions of my talk in this Preface and in the Conclusion (Section 21.A). The entire talk is forthcoming in the proceedings of the conference. [It has since appeared and is now available in a web version.]

I thank Anthony Davenport and Bill Polansky for research assistance, and Andrew Roazen and Nathan Treadway for help with laser printing.

I have profited from the comments made on all or part of this manuscript by Robert Bennett, Anthony D'Amato, Howard DeLong, Michael Dorward, Douglas R. Hofstadter, Michael Retter, Harvey Schweitzer, Gunther Teubner, A.L.P. Thorpe, and Subbarao Visweswaraiah.

I gladly repeat my thanks to Frank Lalle, Lee Ann Lowder, Mardell Nereim, Dale Pierson, Cynthia Bowman, and Nancy Vinson for keeping me sane while I studied law.

This book is dedicated to the unemployed members of my profession. The deplorable academic job market that reached its nadir in the mid-1970's destroyed the professional aspirations of thousands of humanists, including hundreds of philosophers. The loss of their voices has seriously weakened the quality of discussion in contemporary philosophy. This book would not exist if the market had not caused me to study law as a hedge against vexatious or exploitive job offers in my primary field. It was an accident that I found law fascinating. I will be happy if the book is good, but I will always think of it as a small contribution next to the good books that we have lost.

Preface to the Online Edition

On the content and conclusions of this book, I have nothing to add to the print edition. However, since it was published in 1990, I have been embarrassed by its large number of typographical errors. I vowed to reprint the book with corrections and I am very happy to fulfill that vow in this web edition.

The typographical errors in the print edition are entirely my responsibility. Peter Lang produced the book from camera-ready copy that I printed myself. I don't have an excuse but I do have a story. The final version of the manuscript was due just as classes were starting for the 1989 academic year. I knew that the preceding summer would be my last chance to polish the prose and correct any errors. I also knew that I'd spend the summer in Maine away from my computer. So I printed the manuscript and took the printout on my vacation. I remember scrutinizing every page with care, marking in pencil a huge number of typographical errors, correcting a large number of inelegant expressions, and deepening the analysis at many points.

The printout was more than 1,000 pages and would not fit in my carry-on luggage. That is, it would not fit easily. Today I would carry it lashed to my torso with rope if I could get through security with it. But at the time I put it in my suitcase. When we landed, USAir told me that it had lost my suitcase.

The manuscript was due in two weeks. I was fairly sure my suitcase would turn up in a day or two and that I could incorporate my summer's worth of corrections into my disk files in plenty of time. That's why I didn't drop everything, make a new printout, and try to duplicate my summer labors.

USAir took six weeks to find my suitcase. Meantime I sent Peter Lang a version of the manuscript hastily skimmed and corrected in the last day or two available to me. When the book appeared in 1990, I wasn't surprised to find surviving typographical errors, but I was embarrassed.

Apart from fixing typographical errors, I have made virtually no changes to the text. I may make more substantive changes in the future, but if I do, I will label them clearly as revisions.

If I thought that the print edition still had readers, I would make two additions to this web site: (1) an enhanced version of the index to the print edition and (2) a list of the known typographical errors in the print edition. But for now I'll skip these.

My essay-length synopsis of the book was delivered as a lecture before the book was published and appeared in print after the book was published. It too is now available on the web, The Paradox of Self-Amendment in American Constitutional Law, Stanford Literature Review, 7, 1-2 (Spring-Fall 1990) pp. 53-78. I wrote it at the invitation of Jean-Pierre Dupuy and Gunther Teubner for a conference at Stanford University on "Paradoxes of Self-Reference in the Humanities, Law, and the Social Sciences." I remain grateful to them for their early confidence in my project.

The research for the book is thorough up to 1982, when I finished the first two drafts and took a job far from a large law library. Between 1982 and the book's appearance in 1990, I did only a small amount of additional research. The book went out of print in 1997, and I put this electronic edition online in May 1998.

This online edition corrects all the typographical errors known to me from the print edition. If you discover any that remain, I hope you will let me know. Thanks, Peter.

peters@earlham.edu

Part One
The Paradox of Self-Amendment

Section 1 Introduction: Logical Paradoxes in Law

A. Paradoxes that perplex, and paradoxes that prove

Paradoxes are statements that look meaningful, and often true, but that justify contradictory conclusions. Therefore they cause consternation among logicians and mathematicians.[Note 1] Should they cause consternation among lawyers? That is the background question of this essay.

Paradoxes are disturbing because we have difficulty denying them status as meaningful statements subject to the normal rules about contradiction and truth, and we are rarely willing to amend our logical rules merely to accommodate a string of words that twists them up. The easy solution, then, is to classify the string out of the danger zone: if it is meaningless, or non-cognitive (neither true nor false), or otherwise disqualified, then it is not subject to the logical rules about propositions and it cannot disturb.

Conversely, paradoxical statements disturb the more they resist these attempts at convenient reclassification, the more they seem meaningful and cognitive. If we accept the application of normal logical rules to these statements, hypothetically or because the statements cannot be distinguished on relevant grounds from the propositions of science and daily life, then we must face the contradictions among the rules that result. We will then have brought the system of rules itself into question.

The classical example of a logical paradox is the Epimenides or the Liar: "This very statement is false."[Note 2] It looks meaningful and subject to the ordinary rules for assigning truth-values. But if we call it false, then we must infer that it is true, and if we call it true, then we must infer that it is false. This result violates our expectations, and if we are logicians, it violates our rules, for we believe the general proposition that a statement cannot be both true and false in the same sense at the same time with reference to the same moment. We normally follow the rule that contradictory predicates can be true of the same substantive only by equivocation or in succession.[Note 3] Without appeal to such a rule about truth-values and their distribution, and a metastatement to the effect that the Liar's statement is subject to the rule, we could not call the Liar a paradox.

Many object to the self-reference of the Liar's statement as the semantic violation creating the paradox; but the self-reference is avoidable. The paradox may be restated as two statements that refer to one another without either referring to itself.

A. Statement B is true.

B. Statement A is false.

The larger or indirect circularity of reference, and the reflexivity of the other paradoxes, may well be ineliminable. However, the paradox may not be solved by the flat ban on direct self-reference that one may think of first.

Two paradoxes other than the Liar, discovered in this century, have become important types. The first is Russell's paradox. Sets can have other sets as members; while we can speak of the set of all cats and the set of all dogs, we can also speak of the set of all sets of animals. The latter is a set whose members are other sets. Since sets can be members of sets, some sets can be members of themselves —for example, the set of all sets described in this paragraph, or the set of all non-cats. But of course many sets of sets will not be members of themselves, such as the set of all sets of animals. Hence we can speak of "the set of all sets that are not members of themselves". Is the last-named set a member of itself? If it is, then it isn't, and if it isn't, then it is.[Note 4]

The second paradox is usually called Grelling's paradox. If an adjective correctly describes itself, call it autological. For example, "short" and "polysyllabic" are autological because they are, respectively, short and polysyllabic. If an adjective does not correctly describe itself, call it heterological. "Wooden" and "monosyllabic" are heterological. The paradox arises when we ask whether "heterological" is heterological. If it is, then it isn't, and if it isn't, then it is.[Note 5]

These three paradoxes all display a common feature apart from their self-reference or self-applicability. In each case a predicate and its negation are made equally applicable to the appropriate sort of substantive. Let us call the predicate which a paradox turns against itself the "paradoxical predicate". For the Liar, the paradoxical predicate, applicable to statements, is "being true". For Russell's paradox, applicable to sets, it is "being a member of" a certain set. For Grelling's paradox, applicable to adjectives, it is "being heterological". If a statement were formulated for each paradox which affirmed the paradoxical predicate of the appropriate substantive, then that statement would imply its own negation, and its negation would imply the statement.

This characterization is still too general to differentiate Russell's paradox from Grelling's and the Liar. Russell's paradox is a different logical type, as we will see, but it displays this type of paradoxical predication. The mutual implication of the paradoxical statement and its negation, at least for Grelling's paradox and the Liar, gives this type of paradox a structure that makes it a member of an important family of propositions: tautologies or necessary truths, contradictions or necessary falsehoods, and contingencies or statements whose truth value is contingent upon which possible universe is actual. Each may be defined in many ways, but the definitions below highlight their unity and lay the foundation for a distinction between types of paradox.

A tautology may be defined as a statement which is implied by its own negation, but which does not imply its own negation. A tautology is a formal truth, e.g. "Either proposition p is true or it is not true." This proposition is true by virtue of its form alone, without regard to its content or the truth

of its component p. A contradiction implies its own negation, but is not implied by its own negation. A contradiction is a formal falsehood, e.g. "Both proposition p and ~p are true." This proposition is false by virtue of its form. A contingency neither implies nor is implied by its own negation. Its truth is not a function of its form, but only of its content, e.g. "Either proposition p is true or proposition q is true." Following this pattern we may define the Grelling and Liar type of paradox as a statement that both implies and is implied by its negation. In the most common notation:

p is a	tautology	if and only if	$\neg(p \supset \neg p) \cdot (\neg p \supset p)$
	contradiction		$(p \supset \neg p) \cdot \neg (\neg p \supset p)$
	contingency		$\neg (p \supset \neg p) \cdot \neg (\neg p \supset p)$
	paradox, Liar type		$(p \supset \neg p) \cdot (\neg p \supset p)$

(This notation is to clarify matters for those who already know it; it will not be used in the body of the book.)

But there is another type of paradox. Logically it is closer to a contradiction, by the definitions above, than a paradox. It includes Russell's paradox, but the type is best illustrated by the popular paradox of the Barber. Suppose a town has a barber who shaves all and only those men in the town who do not shave themselves. If the barber is a shaved man who lives in the town, then does the barber shave himself?[Note 6] At first this looks like the type of paradox already described, for the answer is: if he does, then he doesn't (because he does not shave those who shave themselves), and if he doesn't, then he does (because he shaves all those who do not shave themselves).

But there is an important difference between the Barber and the Liar paradoxes. We can evade all contradiction in the Barber paradox by concluding that the Barber does not exist as defined. The contradictions only arise from the assumption that such a peculiar Barber exists, and we are free to reject that assumption; in fact, the contradictions give us good reason to do so. There is no comparable assumption in the Liar paradox to reject, unless it is the belief that the words say what they seem to say. "Liar-type" paradoxes, then, make contradiction uncomfortably unavoidable; they demand radical remedies. "Barber-type" paradoxes, by contrast, simply prove that something cannot exist as defined on pain of contradiction. They are "paradoxical" only at first sight; in the last analysis they are proofs.

By the definitions set out above, the statement that the Barber shaves himself is a Liar-type paradox; but the statement that the Barber exists is a contradiction, not a paradox. If we knew nothing about the Barber but his ambition to shave all and only those men in a certain town who did not shave themselves, then we could avoid contradiction by concluding that the Barber was a woman, or did not live in the town, or both. But if the Barber is a man in the town, then we can avoid contradiction only by denying his existence. This turns out to be a perfectly consistent proposition, even if we are surprised at the necessity of concluding it.

Russell's paradox is of the Barber-type, not the Liar-type. It proves with finality that there is no such thing as a set of all sets that are not members of themselves. Russell's paradox is more difficult to cope with than the Barber, not because it is logically different, but because so much has depended on the broad notion of a set as any collection of any elements, and so little has depended on belief in the Barber. This shows how a paradox may require revision of our most fundamental concepts.

Paradoxes of the Barber-type are often called "veridical" paradoxes because they establish the truth of a proposition. The opposite of a veridical paradox is not the Liar-type but a "falsidical" paradox which attempts to prove the falsehood of a proposition by deriving contradictions from its affirmation. Zeno's paradoxes of motion are the most common examples. They purport to prove that motion is impossible, or to falsify the belief that motion is real.[Note 7] Some writers distinguish both veridical and falsidical paradoxes from the Liar-type paradoxes by calling the latter "antinomies". However, that usage has not been widely adopted. I shall call the Liar-type paradoxes simply "paradoxes" or "genuine paradoxes" for emphasis, and the Barber-type, "veridical paradoxes", but only when the context requires that the two types be distinguished.

If the Liar-type or genuine paradox is symbolized,

$(p \supset \neg p) \cdot (\neg p \supset p)$

(p implies its negation and its negation implies p), then the veridical paradox should be symbolized,

$\{[p \supset (q \cdot \neg q)] \supset \neg p\} \cdot \neg(\neg p \cdot p)$

(the fact that p implies a contradiction implies that p is false, and it is not the case that the falsehood of p implies the truth of p). But this formulation is equivalent to the definition of a contradiction. Hence, acceptable alternate terminology is that the Liar-type statement is a genuine paradox, and the Barber-type statement is merely a contradiction, although a surprising one, and one which leads to genuine paradox if affirmed.[Note 8]

B. "Solving" paradoxes in logic and law

To "solve" a paradox is to restate our rules about truth-values or about meaning or about some other feature of the proposition or its interpretation so that the statement no longer violates them, and so that the body of truths determined by the rules is saved, as far as possible, from loss of meaning or truth. These attempts break into two broad classes: those that attack the statement as ill-formed, and those that attack the system of rules as inconsistent or incomplete. The former allows the rules of the system to defend themselves by "overruling" the attempt by the paradox to fit comfortably into the system. The latter allows the statement to stand as a meaningful utterance, and uses it as leverage against the system of rules that cannot, so far, accommodate it.[Note 9] The former attempt often seems to beg the question by presupposing the adequacy of the logical system under suspicion. The latter attempt often risks the destruction, or the relegation to logical limbo, of too much meaningful language, useful rules, and good logic and mathematics.

Laws may be paradoxical within the system of legal rules just as propositions may be paradoxical within the system of logical rules. (What is more interesting is that laws as propositions may be paradoxical within the system of logical rules and yet not be paradoxical within the system of legal rules, as we shall see.) The methods of coping with legal paradoxes fall into the same two broad categories. On the one hand, a paradoxical law may be attacked as void or, on the other, the legal rules about validity, authority, and permissibility may be attacked as inconsistent, incomplete, or inadequate in some other way.

In logic we may reformulate and tighten the statement of rules to eliminate vagueness and inconsistency, and we may add others that seem to solve the problem. But in law only certain officials have these powers. In logic we may decide that the paradoxical statement is to blame, and brand it meaningless or non-cognitive, but in law the power to nullify the paradoxical law is vested only in some, although all have the power to disregard the paradox. A logical solution to a logical paradox in law, therefore, will only rarely be a legal solution too. For the same reason, a logical solution that would brand a paradoxical law as a nullity lacks the requisite legal authority to nullify, and therefore we must admit that a law can persist in legal validity despite paradox or contradiction. This conclusion cannot be winked away by the a priori application of logic to law, nor can its importance to legal reasoning be overestimated.

Many jurists, especially those inclined to respect formal logic, deny that any actual contradictions exist in law. Apparent contradictions, they hold, may always in principle be ironed out by the canons of interpretation and priority; that is, in any apparent conflict of legal rules, all but one rule is either inapplicable to the given circumstances or invalid.[Note 10] One canon of interpretation requires that inconsistent rules be read in a way that reconciles them, and if they are irreconcilable, to favor the recent law at the expense of the older one (see Section 16). David Daube complains that we know very little about impossible and contradictory laws because they are typically "construed away" by judges armed with the canons of interpretation and a fear of contradiction.[Note 11] I will regard the question of the existence of actual (as opposed to apparent) contradictions in law as an empirical question, if only for methodological purposes, to allow me to look for them. To assume a priori that they cannot exist would close many doors of my inquiry and, I believe, distort our understanding of law.

Exploration of the possible roots of a paradox may well disclose deeply hidden flaws in our rules of meaning, which make the paradoxical statement seem meaningful, in our rules about truth-values, which seem to support both the truth and the falsehood of the paradoxical statement, or in our legal rules of validity, which give the paradoxical law apparent or actual validity. Or else it may simply stir endless controversy. As Quine put it,[Note 12]

The argument that sustains a paradox may expose the absurdity of a buried premise or of some preconception previously reckoned as central to physical theory, to mathematics or to the thinking process. Catastrophe may lurk, therefore, in the most innocent-seeming paradox. More than once in history the discovery of paradox has been the occasion for major reconstruction at the foundation of thought.

Russell's paradox, for example, showed catastrophe in the form of contradiction lurking in the basic assumptions of set theory, namely, that a set could comprise any collection of any elements or that the same rules applied to all sets of any elements. Doing without either of these broad propositions is difficult and inelegant, but preferable to living with paradox or doing without a consistent set theory.

By far the majority of attempts to solve the logical paradoxes have been undertaken by logicians and mathematicians. One cause and one effect of this concentration is that paradoxes have been studied in comparative isolation as statements that must be contended with, simply qua strings of words which our formal and linguistic rules apparently permit, or qua postulates which common sense finds unobjectionable. The appearance of paradoxes has only rarely been studied in particular domains of human thought where purposes other than clarity and consistency are foremost. This essay is a contribution to the study of logical paradoxes in law.

Statements that are logically similar to the paradoxes studied by logicians, and arguments that are logically similar to those that support paradoxes in mathematics, appear in law. Sometimes they appear to judges, sometimes to legislators, and sometimes to advocates (see Section 20). The tangled complexes of rules, the lack of clarity on the ultimate presuppositions of the system, self-reference and circular inferences, and other conditions that give rise to the various paradoxes frequently occur in legal cases, contracts, statutes, constitutions, and legal systems. The phenomenon of logical paradoxes in law is especially intriguing because lawyers do not share the logical scruples of logicians,[Note 13] do not share the luxury or freedom to let controversies run on endlessly, and yet are constrained by their professionalism and by their roles (judge, legislator, advocate, counselor, administrator) to be principled in all their decisions.

Logicians need not ever decide the correct approach to the paradoxes, whereas lawyers must not only resolve them when they arise, but must frequently do so under a deadline. Logicians who have decided, to their own satisfaction, the correct approach to a paradox may nevertheless be

grateful for the indefinite time and unhurried pace allowed to their predecessors, and the relative freedom from risk if they are wrong. Lawyers under a deadline are normally unaware of the centuries of prior thought on the paradoxes, and in any case might find it irrelevant to the "condensation" of the paradox in their particular case and to the inherited rules under which they must devise a solution.

Logicians would never be satisfied with a provisional solution to a paradox, or with a solution that admittedly took no heed of the consequences for the ultimate principles of the logical system under scrutiny. For logicians are scientists who are studying the very integrity of their systems. If that integrity is in doubt, then a "solution" that preserved the doubt or hid it behind a practical indifference to theory would be the very opposite of a scientific solution. Scientists are fortunate, then, that their calling requires only honest study and progress, not solution. Even negative results and the discovery of new difficulties are praiseworthy in science. Logicians feel urgency to solve the paradoxes because their systems will be less certain than they might be until a solution can free them from suspicion; but no judge will order them to prepare for final arguments within a month. Logicians would wait one thousand years for an adequate solution to the Liar paradox, and would reconstruct their systems from the ground up if necessary. In fact, they have already waited twice as long and have reconstructed their systems radically more than once. Lawyers cannot wait, must employ provisional solutions, and lack the same freedom to reconstruct their systems.

Lawyers work within legal systems, and strive to preserve them, in a way very different from the way in which logicians work with and strive to preserve logical systems. I will argue that a legal system is distinct from a logical system (inter alia) in its capacity to tolerate contradiction.[Note 14] The difference between the two systems, and the results of conceiving a system of legal rules naively to be a logical-type system of logical-type rules, are central topics of this essay.

Lawyers and logicians also have different concepts of solving a problem. If a paradox is compared to a maze, lawyers would be content to "solve" it by knocking down the walls, if the relevant rules did not forbid it. To a logician that would be the height of intellectual dishonesty and self-deception. But we should not think the lawyer's "solution" a cheat, for it is a solution to a different problem; or, from another perspective, it is an optimum defined by different constraints. To the logician the problem is abstract and epistemic: how to understand the paradoxical statement and the system of rules pertaining to meaning and truth in order to bring the two into harmony at the least cost to the bodies of logical and mathematical science. To the lawyer the problem is concrete and practical: how best to adjudicate the interests of these two parties, or how best to achieve a certain state of affairs, in accordance with an inherited system of rules that contains material content, vagueness, ambiguity, and inconsistency.

In what follows I will consider legal solutions to logical paradoxes in part under criteria suited to legal decisions and actions. Legal solutions are not, to me, dishonest or unscientific merely for emphasizing the practical. They may well be illogical in the technical sense. But if they are, then they may merely reveal and symptomize differences between logical and legal systems, not necessarily defects in the latter.

I will resist the temptation to view formal logic as the rightful legislator for all spheres of intellectual labor.[Note 15] Modern formal logic is more like a game, whose rules should not be allowed to govern non-playing behavior, than a sovereign that can establish its own efficacy by punishing dissenters. That legal rules may be bad logic and good jurisprudence at the same time is yet to be established, of course, but I will at least allow myself to proceed as if that conclusion were not foreclosed a priori.

C. Self-amendment

I have chosen one veridical paradox on which to concentrate. A more complete study of logical paradoxes as they arise in law must wait (but see Section 20). The paradox on which I will focus arises from the question whether the clause of a constitution that authorizes amendments may authorize its own amendment or repeal. May a rule that permits the change of other rules also permit its own change, especially its irrevocable change into a form inconsistent with its original form?[Note 16] This paradox does not have a strict counterpart in logic, for it pertains to changing the rules of the system by means of a rule within the system. In logic rules are traditionally thought to be either immutable and eternal, or arbitrary postulates changeable by logicians but not by the postulates' own authority.[Note 17]

This paradox is a form of another paradox, however, which has been studied more frequently —the paradox of omnipotence. In law the paradox is of parliamentary, legislative, or sovereign omnipotence: the power to make any law at any time.[Note 18] In philosophy generally the paradox is of divine or admittedly hypothetical omnipotence: the power to do any act at any time.[Note 19] If an entity has the power to make any law or do any act at any time, then can it limit its own power to act or make law? If it can, then it can't, and if it can't, then it can. If it can do any act at any time, then it can limit or destroy itself, because that is an act; but it cannot do so, because doing it means it cannot and could not do any act at any time. In the legal version we can say that either there is a law that the sovereign cannot make or a law that it cannot repeal.[Note 20]

Like the Barber, if we allow the postulate of the deity or sovereign's existence to stand unchallenged, then it leads to genuine paradox. But also like the Barber, the postulate of its existence implies the affirmation and the negation of a paradoxical predicate (here "can limit its power irrevocably"). Because the postulate implies a contradiction, it is false, and because its falsehood does not also imply its truth, it is not paradoxical like the Liar and we may call it false with finality. Advocates of (non-hypothetical) omnipotent sovereigns or deities may propose distinctions, particularly as to the duration and self-applicability of power, that may save recognizable versions of their entities from paradox, and these will be examined (see Sections 10 and 11). But at first the legally omnipotent sovereign and metaphysically omnipotent deity appear to suffer the fate of the Barber: they cannot exist as defined.

On this view, a clause that authorizes its own amendment or that actually limits itself by self-amendment is, perhaps surprisingly, a contradiction. On this view amendment clauses are immutable except by illegal or extra-legal means such as revolution. Alternately, any act of self-amendment considered valid by legal authorities is simply a case of "peaceful revolution".

The existence of the contradictory Barber was overruled by logical and metaphysical rules that we are not inclined to bend or qualify just to save the Barber. The Barber is doomed because we believe that what is contradictory is impossible or cannot exist. We may be wrong about this, but it is a strongly held belief that we will not give up just to open the doors of existence to the Barber and his ilk. Is the omnipotent sovereign or self-applicable amendment clause doomed by an equally inflexible judge? Do we believe law is governed by the principle of non-contradiction as ardently as we believe that material reality is governed by it? If we are inclined to this belief, we should at least not be dogmatic about it, because we know that judges and legislators often make vague, inconsistent, and incompetent judgments, which are authoritative for all that. Knowing this, might we give up the belief in order to explain the legality of a commonplace procedure accepted in all jurisdictions where it has been tried?

The paradox of self-amendment is one of the best forms in which to study the paradox of omnipotence. The idea of a sovereign or a deity is vague and requires much preliminary specification before the contours of the problem can come into relief. But the preliminary specification often imports unnoticed theoretical commitments. By contrast, an amendment clause is as plain as language (however much that may be), and open to inspection. Moreover, self-amendment is not hypothetical, as questions about deities and sovereigns are for many, and it is not metaphysical, as deities and sovereigns tend to become. To say that an amendment clause applies to the whole constitution of which it is a part, therefore including itself, is intelligible and even plausible. The self-application of an amendment clause leads to a result, an amended clause, that is easily grasped in a way that the state of diminished divine power is not.

Finally, if we like we can try to amend an amendment clause and see what happens (see Appendices 2 and 3). If we limit or repeal the clause through self-amendment, and no court invalidates the act, then we must confront the important fact that the laboratory test apparently showed what is legal without touching the question what is logical.

Even if we ignore the possible self-application of an amendment clause one could argue that there is a paradox in the very presence of an amendment clause in a constitution. It also resembles the paradox of omnipotence. The constitution is apparently supreme and unlimited by higher law, qualities that also define omnipotence. Changing the constitution from below, say, by statute, is impermissible because a derivative authority cannot alter the supreme authority.[Note 21] But can the constitution change itself, or use its supremacy against itself? A change in the text may well be regarded as a limitation or infringement on its supremacy, for each clause partakes of the supremacy of the whole, and is thereby immunized from displacement from the apex of authority, at least by lower level rules.[Note 22] Any significant change will permit what was once forbidden or forbid what was once permitted. In that sense any significant change will contradict earlier rules, perhaps including the rules that authorized the change (see Section 12.C). But if so, then the amendment clause, even applied irreflexively (to provisions other than itself), is a paradoxical authorization of self-limitation. The self-applicability which alone could justify the result may nevertheless, like that of the omnipotent legislature or deity, be a surprising contradiction.

If we are acquainted with the history of inconsistent cases on constitutional law, then we may tend to think of constitutions as non-paradoxical despite inconsistent rules or interpretations. We may even think of constitutions as so fundamental (or supreme) that they undercut (or transcend) the "requirement" to be non-paradoxical and the damage that ordinarily arises from contradiction. This may be so, on the evidence that legal systems, when they assert a contradiction, do not "crash" like computer programs, or blip out of existence like Barbers caught in contradiction. But it does not explain the curious capacity to absorb and tolerate contradiction.

Or we may think of constitutions as containing an implied limitation on their validity or supremacy: "valid and supreme until amended". This qualification may or may not rid us of the paradox (see Section 10). But in any event it leaves us with qualified supremacy, just as comparable tactics leave us with qualified omnipotence and limited sovereignty. We may be content with finite deities and sovereigns, but a finite amendment power may imply the immutability of some legal rules (see Section 8), a conclusion that is much less palatable.

If the supreme clauses of the constitution may be replaced by a method that it provides for itself, then may an amendment clause replace itself by its own method? The question is logically similar to the question whether an omnipotent being could limit or annihilate itself by its own power. For a power, authority, rule, agent, or entity to displace itself from supremacy, or dethrone itself from omnipotence, is prima facie paradoxical like the Barber. The spectacle of such reflexivities in law creates a dilemma for jurists: to admit that, if the self-amendment is impossible, then the system contains immutable rules (the supreme amendment clause), or that, if self-amendment is allowed, then the system contains contradiction (self-amendment).

D. Logical v. legal approaches to self-amendment

To answer the question of self-amendment a logician might lay out all the relevant rules of the system, attempt to make explicit all principles and procedures taken for granted or within the discretion of judges to employ, and then decide whether self-amendment is permissible under the rules. Permissibility would be a function of consistency and deducibility. If self-amendment is either inconsistent or beyond the scope of available premises, then a logician might sketch out a variety of premises that would allow self-amendment and render it self-consistent, preferably without making other common legal procedures thereby impermissible. If the plethora of available rules and principles is internally inconsistent, or if it authorizes inconsistent outcomes, which will almost always be the case, the logician might try to show which consistent subsets, if any, would permit self-amendment and which have the least destructive impact on the rest of law.

A lawyer would approach the problem differently. Amendment clauses to constitutions already exist and take particular forms. Perhaps a state or nation has already amended its amendment clause, or tried (see Appendix 2). If so, perhaps the amendment's validity was challenged in court. If so, then the holding of that court will be more or less persuasive in one's own jurisdiction according to the complex and partially indefinite rules of stare decisis, the doctrine of precedent. If the lawyer does not care to answer the question for a particular jurisdiction, but wants a general answer, then she is already going beyond the limits of her professional role and seeking an answer more qua philosopher or social theorist than qua lawyer. But a general answer, not tied to a particular jurisdiction, may be obtained by legal research nevertheless. A survey of jurisdictions will reveal the dominant rule, which is a vector of historical decisions, not the conclusion of a deductive or even an inductive argument. The historical decisions may all have been wrong by criteria invoked by logicians and wise citizens, even using the lawyer's own premises, but they are authoritative and to that extent not completely wrong by criteria invoked by lawyers.[Note 23] On the other hand, the lawyer may consult the classic texts of jurisprudence and find there a direct answer, a dominant view, or principles that provide an answer. This authority may be set against the case law, not as higher law, but as a more reasonable view. The lawyer then again acts more like a philosopher, accustomed to free inquiry, than a legal practitioner, accustomed to answering questions within the confines of an inherited system, no matter how silent, inconsistent, or unreasonable it may be on the question. If there is no case law on the question, then the views of the writers may be decisive in guiding a judge who faces the question for the first time. Then philosophers may assume the role of indirect legislators.

I will argue in Section 6 that one of Ross's difficulties lies in mistaking the reasonable view for higher law. If the logical or reasonable solution to the paradox requires appeal to a rule of reason or inference, then it would still not follow that such a rule actually exists tacitly in every legal system. The proposition that logical rules are higher laws binding ordinary laws is challenging and important. However, to make it an a priori assertion is to try to legislate for law from the standpoint of logic, not to try to understand the actual relations between law and logic.

I will take both the philosopher's and lawyer's approach, and ask what is the most reasonable answer and what is the legal answer to the question whether an amendment clause may authorize its own amendment, or whether a legal power may limit or eliminate itself, or whether an authority may authorize its own revision or repeal. The ultimate premises from which answers will be sought will include those of our legal system as well as logical principles. If real amendment clauses are mutable only through contradiction or revolution, then that will not automatically mean that such amendment is legally impossible; for contradiction only defines logical, not legal, impossibility. If legal practice allows self-amendment despite its logical impossibility, then honest scholars will revise their opinions of legal possibility —not to mention their concepts of legal reasoning and legal rationality. Even if logical possibility is an a priori, not an empirical, matter[Note 24] then legal possibility is certainly an empirical matter, to be determined by the proper legal agencies within the world of experience and to be discovered by scholars using empirical methods. A priori reasoning about what is legally possible or permissible begs the question whether and to what extent legal systems are (and ought to be) logical. One may regret the lapse of law from abstract logic, appreciate the equitable flexibility it affords, take satisfaction in the pretensions it punctures, or decry the dangers it makes possible. Here my primary concern is simply to show it.

Notes

1. There is an enormous literature on logical paradox; see Peter Suber, "A Bibliography of Works on Reflexivity," in S.J. Bartlett and P. Suber (eds)., Self-Reference: Reflections on Reflexivity, Martinus Nijhoff, 1987, pp. 259-362. For good general discussions of logical paradoxes see Alfred North Whitehead and Bertrand Russell, Principia Mathematica to *56, Cambridge University Press, 1970, pp. 60-65; John van Heijenoort, "Logical Paradoxes," in Paul Edwards (ed.), Encyclopedia of Philosophy, Macmillan, 1967, 5:45-51; Susan Haack, Philosophy of Logics, Cambridge University Press, 1978, pp. 135-51; J.L. Mackie, Truth, Probability, and Paradox: Studies in Philosophical Logic, Oxford University Press, 1973, Ch. 6 and the Appendix; T.S. Champlin, Reflexive Paradoxes, Routledge, 1988.

2. See Robert L. Martin (ed.), The Paradox of the Liar, Yale University Press, 1970, 2d. ed. 1987, which contains an excellent bibliography, and Recent Essays on Truth and the Liar Paradox, Oxford University Press, 1984; Alexander Rüstow, Der Lügner: Theorie, Geschichte und Auflösung, Erlangen: Teubner Verlag, 1910; and Jon Barwise and John Etchemendy, The Liar: An Essay on Truth and Circular Propositions, Oxford University Press, 1987. The Liar paradox is at least as old as St. Paul's Epistle to Titus (1:12-13), and has been studied for centuries. For its history prior to its treatment under modern logic, which is well covered by Martin's 1970 anthology and bibliography, see Alan Paul Anderson's historical essay in Martin (ed.), op. cit., pp. 1-11; Francesco Bottin, Le Antinomie Semantliche nella Logica Medievale, Padua: Editrice Antenore, 1976; and Paul V. Spade, The Medieval Liar: A Catalogue of the Insolubilia Literature, Toronto: Pontifical Institute of Medieval Studies, 1975.

3. By "in succession" I mean in time and after a process of change, as a white piece of paper becomes black after burning. Cf. Immanuel Kant, Critique of Pure Reason, St. Martin's Press, 1968 (original 1781, 1787), B.49; see also B.191 and B.148.

4. Bertrand Russell, The Principles of Mathematics, Cambridge University Press, 1910, Chapter 10.

5. Kurt Grelling and Leonard Nelson, "Bemerkungen zu den Paradoxien von Russell und Burali-Forti," Abhandlungen der Fries'schen Schule, n.s., 2 (1907-08) 300-334.

6. W.V.O. Quine, "Paradox," Scientific American, 206 (1962) 84-96 at p. 84. The paradox was apparently first published in its present form by Bertrand Russell in 1918, although he attributed it to a German whose name he could not recall. An earlier variation occurs in Thomas Aquinas concerning a teacher who teaches all and only those in his town who do not teach themselves. Quaestiones Disputatae de Veritate q.11, a.2 (1256-59). See Pierre H. Conway, "The 'Barber' Paradox," Laval Theologique et Philosophique, 18 (1962) 161-76.

7. The distinction between veridical and falsidical paradoxes is spurious under the law of excluded middle in a standard two-valued logic. This is seen by the by the equivalency in such a logic of describing Zeno's purpose to be the falsification of a common belief and the establishment of its uncommon negation. I will not use the distinction, but neither will I rely on the law of excluded middle. For a selection of modern essays on Zeno's paradoxes, and an excellent bibliography, see Wesley C. Salmon (ed.), Zeno's Paradoxes, Bobbs-Merrill, 1970.

8. Without the characteristic of leading to genuine paradox if affirmed, it must be admitted that the Barber-type paradox would be an ordinary contradiction distinguished from other contradictions only by the plausibility or apparent innocuousness of the "paradoxical" statement.

9. The same alternatives apply to Zeno's paradoxes. We are free to choose between affirming the logic which makes our experience of motion illusory, and affirming the veridicity of our experience, at least of motion, and upsetting the logic that would deny it. Proposed solutions to Zeno's paradoxes have traditionally been variations on the latter theme. The fact that we are apparently free to deny Zeno and revise our logic in the light of experience supports the theories of "mutable" logic cited below in note 17.

10. Hans Kelsen originally took this position in his General Theory of Law and the State, Harvard University Press, 1949, pp. 363, 375, and in his Pure Theory of Law, University of California Press, 1967, pp. 74, 328. Kelsen partially abandoned this position in his essay, "Derogation," in Ralph A. Newman (ed.), Essays in Jurisprudence in Honor of Roscoe Pound, Bobbs-Merrill, 1962, pp. 339-55, at pp. 351ff, holding that conflicting norms do not automatically imply repeal, although he also says (p. 351) that such conflict should not be compared to logical contradiction. See H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law," in his Essays in Jurisprudence and Philosophy, Oxford University Press, 1983, pp. 309-42. See also Eduardo Garcia Maynez, "Some Considerations on the Problem of Antinomies in the Law," Archiv für Rechts- und Sozialphilosophie, 49, 1 (1963) 1-14.

11. David Daube, "Greek and Roman Reflections on Impossible Laws," Natural Law Forum, 12 (1967) 1-84 at p. 4.

12. Quine, op. cit. at p. 84

13. As an example one may cite the 1897 action of the Indiana House of Representatives in voting unanimously to legislate an incorrect value of pi, and to charge non-residents of Indiana a royalty for use of the value. The bill was approved on its first reading in the state Senate, but on the second reading indefinitely postponed. Petr Beckman, A History of Pi, St. Martin's Press, 1971, pp. 174-79.

However, if lawyers often lack the logical scruples of logicians, then as Alf Ross the logician will demonstrate despite Alf Ross the jurist, logicians just as often lack the legal scruples of lawyers.

14. See the remainder of Part One, and Section 21.B.

By "logical system" I will mean a formal, abstract system built on, or around, the principle of non-contradiction, as opposed to dialectical logics which embrace and employ contradiction. Paradigm examples of logical systems are those built by Aristotle, Frege, and by Whitehead and Russell. Philosophers in the dialectical tradition, preeminently Hegel, have developed logical systems that contain and depend on contradiction. None of the primary modern expositions of dialectic in Hegel, Marx, Engels, or Lenin addresses the logical paradoxes specifically. But as a logic that embraces contradiction dialectic should at least appropriate the malevolence of the paradoxes, if not "solve" them. Such an argument is made for modern dialectic by Henri Wald in his Introduction to Dialectical Logic, B.R. Grüner B.V., 1975, pp. 228-30. Ancient or Platonic dialectic differs in many ways from Hegelian and Marxist dialectic. But we know that Zeno of Citium (the founder of Stoicism, not the inventor of the paradoxes of motion) believed that the logical paradoxes could be solved by dialectic. See Plutarch, "On the Contradictions of the Stoics," 8:1034E, Moralia, vol. XIII of the Plutarch series of the Loeb Classical Library, Harvard University Press, 1976.

15. Recognizing the utility of dialectic is only one reason to resist the temptation.

16. The discussion of this paradox has been limited to virtually one man. See Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24; earlier formulations appeared in his On Law and Justice, London, 1958, Section 16, pp. 80-84, his Dansk Statsforfatningsret [Danish Constitutional Law], Copenhagen: Nyt Nordisk Forlag, 2 vols., 1966, Sections 41 and 46, and in his Theorie der Rechtsquellen, F. Deuticke, 1929, Chapter XIV. Danish responses to his earlier formulations, which Ross took into account in his latest formulation, are cited in the Mind article, p. 7.n.1. See also Joseph Raz, "Professor Ross and Some Legal Puzzles," Mind, 81 (1972) 415-21; Norbert Hoerster, "On Alf Ross's Alleged Puzzle in Constitutional Law," Mind, 81 (1972) 422-26; J.M. Finnis, "Revolutions and Continuity of Law," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 44-76 esp. pp. 53ff.

Note that what is often called "Ross's Paradox" is not the paradox of self-amendment, but another paradox discovered by Alf Ross: if "'p' implies 'p or q'", then why do we hesitate to affirm that "'Smith is obligated to do p' implies that 'Smith is obligated to do p or q'"? See Jaakko Hintikka, "The Ross Paradox as Evidence for the Reality of Semantical Games," Monist, 60 (1977) 370-79; Azizah Al-Hibri, "Understanding Ross's Paradox," Southwestern Journal of Philosophy, 10 (1979) 163-70. Ross is as well-known for his contribution to deontic logic as for his jurisprudence.

17. Logical rules may be optional even though immutable or eternal. They are optional in the sense that the choice of initial axioms is either arbitrary or arbitrary within limits, and different initial axioms determine different subsequent rules. They are eternal in the sense that, once options are exercised and a system of valid rules is determined, the validity of the rules is not subject to change over time. Another way to make the same point is to say that experience, or events in time, cannot affect the validity of logical rules. A strong statement of this position is to be found in Wittgenstein:

Our fundamental principle is that whenever a question can be decided by logic at all it must be possible to decide it without more ado.

(And if we get into a position where we have to look at the world for an answer to such a problem, that shows that we are on a completely wrong track.)

Ludwig Wittgenstein, Tractatus Logico-Philosophicus, Routledge & Kegan Paul, 1969 (original 1921), 5.551. Note that several philosophers have argued, on the contrary, that experience can conflict with belief, and that we always have a choice whether to change our beliefs in the face of such experience or to change the logic that defines the conflict as a contradiction. This position asserts that logic is mutable, or at least deniable, in light of experience. See W.V.O. Quine, "The Two Dogmas of Empiricism," in his From a Logical Point of View, Harvard University Press, 1953, pp. xiv and 43, and his Methods of Logic, rev. ed. 1959, p. xiv; Israel Scheffler, Science and Subjectivity, Bobbs-Merrill, 1967, pp. 115-16; Paul K. Feyerabend, "How To Be A Good Empiricist," in P.H. Nidditch (ed.), The Philosophy of Science, Oxford University Press, 1968, pp. 12-39; Hilary Putnam, "Is Logic Empirical?" in R.S. Cohen and M.R. Wartofsky (eds.), Boston Studies in the Philosophy of Science, vol. V, Reidel Pub. Co., 1969, p. 216; Susan Haack, Deviant Logic: Some Philosophical Issues, Cambridge University Press, 1974, pp. 25-46. This position has been criticized by Carl R. Kordig, "Some Statements Are Immune to Revision," The New Scholasticism, 56 (1981) 69-76, and Elliott Sober, "Revisability, A Priori Truth, and Evolution," Australasian Journal of Philosophy, 59 (1981). I might add, for the purposes of this discussion, that the "mutability" thesis may be construed to emphasize the optional character of logical rules without denying their (conditional) eternality. In short, the mutability of logical rules, even in the opinion of those who think logical rules are subject to revision in the light of experience, is not the same as the mutability of legal rules. The paradox of self-amendment cannot arise in logic because no logical rules of any logical system authorize one (logician, critic, dissenter, incendiary, subject of anomalous experiences) to change other rules of the system. Even dialectical logics, which contain changing rules, contain no rules that authorize change on the decision of human agents. No logical system tolerates such license in the logician, or tolerates meddling in real time with valid rules according to alogical standards. Legal systems are fundamentally different in this regard, and this difference must be kept in mind to prevent an oversimplified, logicized concept of law.

18. The best article on legal omnipotence is Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-513, which is immediately followed by a commentary by Jaakko Hintikka, "Remarks on a Paradox," ibid., 514-16. See also Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford University Press, 1957, passim, and his "Parliamentary Sovereignty and the Language of Constitutional Limitation," Juridical Review, 67 (1955) 62. See also Zelman Cowen, "Parliamentary Sovereignty and the Limits of Legal Change," Australian Law Journal, 26 (1952) 237-40; Sir William Ivor Jennings, The Law and the Constitution, University of London Press, 3d. ed., 1943, pp. 142-45, 148-53; and H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, pp. 64-76, 144-50.

See the literature that has grown up around the famous English case, London Street Tramways Co. v. London County Council, (1898) A.C. 375, (discussed in Section 15.B below) in which the House of Lords settled a long unsettled question and limited its own power by declaring that it is bound by its own decisions and can, to that extent, decide to limit itself further in the future. The case presents the paradox of omnipotence sharply, but also the paradox of supporting, through the rules of stare decisis, the principle that stare decisis binds the House of Lords. See e.g. Salmond on Jurisprudence, Sweet & Maxwell, 11th ed. by Glanville Williams, 1957, pp. 186-88, 519-24, and the 12th ed. by P.J. Fitzgerald, 1966, pp. 21-28; A.W.B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in A.G. Guest (ed.), Oxford Essays in Jurisprudence, Oxford University Press, 1961, Chapter VI. On the equally paradoxical overruling of London Tramways see e.g. John H. Langbein, "Modern Jurisprudence and the House of Lords: The Passing of London Tramways," Cornell Law Review, 53 (1968) 806-13.

19. The leading essay is J.L. Mackie, "Evil and Omnipotence," Mind, 64 (1955) 200-12, revised in his "Omnipotence," Sophia, 1 (1962) 13-25. See also, in roughly chronological order, S.A. Grave, "On Evil and Omnipotence," Mind, 65 (1956) 259-62; I.T. Ramsey, "The Paradox of Omnipotence," Mind, 65 (1956) 263-66; P.M. Farrell, "Evil and Omnipotence," Mind, 67 (1958) 399-403; G.B. Keene, "A Simpler Solution to the Paradox of Omnipotence," Mind, 69 (1960) 74-75; Bernard Mayo, "Mr. Keene on Omnipotence," Mind, 70 (1961) 249-50; G.B. Keene, "Capacity-Limiting Statements," Mind, 70 (1961) 251-52; George I. Mavrodes, "Some Puzzles Concerning Omnipotence," Philosophical Review, 72 (1963) 221-23; Harry G. Frankfurt, "The Logic of Omnipotence," Philosophical Review, 73 (1964) 262-63; Armando F. Bonifacio, "On Capacity Limiting Statements," Mind, 74 (1965) 87-88; G. Schlesinger, "Omnipotence and Evil: An Incoherent Problem," Sophia, 4 (1965) 21-24; Sidney Gendin, "Omnidoing", Sophia, 6 (1967) 17-22; L. Wade Savage, "The Paradox of the Stone," Philosophical Review, 76 (1967) 74-79; James Cargile, "On Omnipotence," Nous, 1 (1967) 201-05; George F. Englebretsen, "The Incompatibility of God's Existence and Omnipotence," Sophia, 10 (1971) 28-31, with comments by David Londey, Barry Miller, and John King-Farlow; P.T. Geach, "Omnipotence," Philosophy, 48 (1973) 7-20; Richard Swineburne, "Omnipotence," American Philosophical Quarterly, 10 (1973) 231-37; Jerome Gellman, "The Paradox of Omnipotence and Perfection," Sophia, 14 (1975) 31-39; Paul Helm, "Omnipotence and Change," Philosophy, 51 (1976) 454-61; Edward J. Khamara, "In Defense of Omnipotence," Philosophical Quarterly, 28 (1978) 215-28; Joshua Hoffman, "Mavrodes on Defining Omnipotence," Philosophical Studies, 35 (1979) 311-13; Bruce R. Reichenback, "Mavrodes On Omnipotence," Philosophical Studies, 37 (1980) 211-14; Gary Rosenkrantz and Joshua Hoffman, "What An Omnipotent Agent Can Do," International Journal for Philosophy of Religion, 11 (1980) 1-19; Loren Meierding, "The Impossibility of Necessary Omnitemporal Omnipotence," International Journal for Philosophy of Religion, 11 (1980) 21-26.

20. This formulation of the paradox is probably vulnerable to time-based objections (see Section 10) which a more sophisticated formulation (Section 3) would succeed in evading.

21. Exceptions to this principle, especially unusual and possibly non-supreme methods of amending the federal constitution, are considered in Part Two.

22. Is a constitutional provision allowing "home rule" of cities at their option an example of paradoxical self-limitation? A city that votes to adopt home rule inverts the pyramid of power, in some respects, but under the authority of the apex. In that it differs from an attempt by the apex completely to sever its sovereignty over a former subject (see Section 20).

23. The reflexivity of judicial opinions that base themselves on other judicial opinions and can convert even bad holdings into valid law is carefully discussed by John M. Farago, "Judicial Cybernetics: The Effect of Self-Reference On Dworkin's Rights Thesis," Valparaiso University Law Review, 14 (1980) 371-425. Farago uses the term "self-reference" broadly to cover activities in which referring and reference play no significant part, particularly self-justifying arguments, self-affecting decisions, and what may be called self-reification or the peculiar ontological power of judicial pronouncements to create certain legal realities merely by asserting them to be legal realities. Hence his essay is broader than his title may indicate.

24. See note 17, above.

Section 2 Preliminaries: Amendment Clauses

One of the most important subjects that can engage the attention of the statesmen and people of this country is the extent and the scope of the power to amend the Constitution of the United States.

George Tichnor Curtis[Note 1]

A. Amendment and revolution, lawful and unlawful change of law

Statutes and ordinary enactments cannot change constitutions. Adjudications can settle, even change, the interpretation of constitutions. Some judicial interpretations may take us beyond the limits of the reasonable alternative meanings of the language (see Section 15). But while many "judicial amendments" have vital consequences, the public and the judges themselves would not tolerate implementing certain basic changes by judicial review. Where judges fear to tread, and when change is intended to be fundamental and long-lasting, formal constitutional amendment is necessary.

Constitutions must change, for the societies they govern change constantly and if the constitution lags too far behind, then the rule of law itself is jeopardized. Lester Orfield speculates that the Civil War may have been prevented if the federal constitution had been easier to amend.[Note 2] Adlai Stevenson believed that the difficulty of amending the Illinois constitution before 1950 made evasion of the law a practical necessity in order to avoid "anachronisms" of the Illinois constitution.[Note 3] The constitution must change peacefully and legally, and with roughly the speed and depth of changing circumstances and public dissatisfaction. So long as we are not ready to let courts implement all constitutional change through judicial review and reinterpretation, then only a clause within the constitution itself[Note 4] can provide the authority for most substantive change and the peaceful adaptability within which civilization may flourish. This value was well expressed by John W. Burgess in 1891:[Note 5]

> [The amendment clause] is the most important part of a constitution. Upon its existence and truthfulness, i.e., its correspondence with real and natural conditions, depends the question whether the state shall suffer the alternations of stagnation, retrogression and revolution. A constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected [through an amendment clause; otherwise] error will accumulate until nothing short of revolution can save the life of the state.

The basic design of government in a constitutional state is embodied in the constitution. An amendment clause (hereafter, "AC") not only allows, but also structures, the change of the constitution under the rule of law.[Note 6]

Basic change brought about under the authority of a constitution, through its AC, preserves the continuity of law in three ways. First, evasion and disregard of anachronistic provisions and outright revolutionary breaks with them are made less urgent, and to that extent less admissible legally and less justifiable politically. Second, the same authority or constitution is recognized as valid throughout the change, and loses nothing of its validity by reason of the change except the old provision in its particularity that was modified or repealed. Third, the same state that existed before the change exists after the change.

The continuity of law, its identity through change, is a metaphysical idea with crucial legal significance. It is equally important for each of two opposing schools of jurisprudence that we may call the formalist and the non-formalist. These two schools differ primarily on the relations of law to social, political and other "alegal" circumstances, and on the valid sources of authority for legal change. If we conceive law formally, then new law is authorized only by old law; if we conceive it non-formally, then it may be authorized also by present, extra-legal sources of authority such as the consent of the people, the might of the army, or the will of Jehovah. Therefore, for the formalist all legal change is revolutionary and unlawful if it does not proceed from prior law in an unbroken chain of permission and authority, which presupposes and entails a continuing identity for the legal state.

For the non-formalist the same state may exist before and after basic change if the consent of the people uninterruptedly permitted, supervised, and ratified the change; the same may be said of the vigilant eyes of armies and gods. If this continuity is lacking, both the formalist and the non-formalist will hold that the legal change brought by the discontinuity was unlawful or invalid. The difference is that this invalidity is much harder to repair for the formalist than for the non-formalist. If the new law is not authorized by prior law, then the formalist must resort to legal fiction to validate it, for example, an enactment that declares that the gap never occurred or that the new law was properly authorized by antecedent law.[Note 7] Without resorting to fiction, the formalist theory requires that change be continuous or illegal. The non-formalist may make the same appeal to curative fiction, but may also point to extra-legal conditions that remained continuous while the chain of permission and authority was broken, for example, the consent of the people or the support of the army. Such a move implies that otherwise invalid law can be validated directly by alegal sources, not just by prior law.

In this way both formalist and non-formalist theories of law distinguish between amendment and revolution, although to the formalist the line is rigid and to the non-formalist it is tentative and not a final difference of kind. Both allow revolution to be cured by subsequent ratification, and in that sense converted to lawful amendment, although for the formalist this must be through the sheerest fiction. The non-formalist may allow cure not only by ratification, but also by mere acquiescence or direct consent. For both, discontinuity invalidates, but can be cured retroactively. When cured, a history of legal change is a cumulation of lawful amendments, not a series of new beginnings.[Note 8]

How can an entity (system, rule, power, authority, agent) authorize its own change or destruction? Let us be precise. We are speaking of the modification of a constitution. Such change is authorized, when authorized, first by the AC, and second by whatever it is that authorizes the

constitution itself. But much basic change can occur without any strict self-amendment taking place. The legislative branch may be abolished, the executive absolutized, and cruel punishments permitted by ordinary amendments, without any legal entity authorizing its own change except in the broad sense in which any amendment comprises the use of the constitution's supremacy against itself (see Section 1.C). The articles pertaining to the legislature, executive, and punishments would not have authorized their own change or repeal; the AC would have authorized these changes. The broad view that any amendment is self-amendment blurs the importance of the inner articulation of parts in a constitution. Genuinely reflexive, or circular, self-amendment and self-repeal would not occur unless the AC were used to amend or repeal the AC itself.[Note 9] It is the latter that I wish to explore.

Is self-amendment an inherently discontinuous act, and hence inherently unlawful? When we think about a rule being displaced by a successor, we may imagine a temporal seam or adjacency. If the predecessor is the sole authority for the successor, then there is (or may as well be) no temporal overlap to guarantee continuity. But is overlap necessary? Do the bygone rules have any present power to authorize their successors? (See Section 10.)

We should resist the temptation to cast the problem wholly as a logical problem. The legal version of the paradox of omnipotence is first and foremost a legal problem, just as the theological version is primarily a theological problem. Hasty or exclusive treatment of them as logical problems may overlook the theories, very significant if true, that law-makers and deities may perform contradictions. In this sense, logic is just another metaphor for law. Like the metaphor of seams and overlapping, it should be used to reach clarity and discarded when it prevents us from seeing the reality as it is.

If the rule or power embodied by the words of an AC is abstracted and formalized, and treated solely as a proposition in a logical system rather than a rule in a legal system, then we may judge questions of self-application, limitations on power, and so on, by the false precision of formal logic. That is, we may let formal consistency be the supreme criterion of permissibility, as it is in logic, regardless of its place in the hierarchy of criteria in law. If the resulting view denies legality to acts which are legally commonplace and never challenged, then the model must be wrong, not as logic, of course, but as law.

An AC, then, allows the basic document to change in ways that would be revolutionary but for their permissibility. To speak of an "amendment clause" and of the constitution as a "document" is clearly to engage more than just words. The words of an AC create a power, and simultaneously channel and regulate that power. The reflexivity of an AC amending itself is more than the self-reference of words; it is also the self-application of a power. If legal rules and powers are more than the words defining them, then we are dealing as much with causation as with inference in discussing how they may be affected.

I will limit my discussion to the problem of the authority of an AC to amend itself (Part One) and some variations of this problem, chiefly concerning alternative methods of amendment and self-amendment (Part Two). If an AC can validly amend itself, then the new AC would be authorized, like any other amendment, by the old AC and by the constitution itself from which the authority of the old AC derived. It turns out that the authority of the constitution itself must be addressed in order to explain the legality of self-amendment (see Section 7). Sometimes a constitution is authorized by the AC of its predecessor, but that merely postpones the question of validity to the predecessor. I will generally defend H.L.A. Hart's theory that basic rules of law are made valid by the acceptance and usage of the people and officials, which I take to be a variant of Locke's consent theory. More precisely, I will argue that Hart's acceptance theory can explain the legality of self-amendment, and, while it has theoretical difficulties of its own to overcome, it is more plausible on its merits than the formalist model of law as a quasi-logical system (see Sections 6 and 21.D).

B. Amendment and democracy

The AC of a constitution, and even the technical problem of self-amendment, assume special importance on the classical American or Lockean consent theory that law and government derive their legitimacy from the consent of the governed. If the people's consent wanes and revolution is to be avoided, then a lawful method of basic change must be provided. For supreme, constitutional rules, the procedure of change must be on a par with the constitution itself. The AC provides such a method. The pressure to change the constitution, and hence to use the AC, is admittedly irreflexive most of the time. Slavery must be abolished or alcohol prohibited. Rarely do citizens clamor for a change in the rule that authorizes change of the rules. But it has happened, and most of the clamor has focused on making the amendment process either much more difficult or much less difficult.[Note 10] The difficulty of the amendment process is closely related to the ability of citizens to manifest their consent to the constitution and hence (under a consent theory) to authorize it to govern them.

One might well argue that the citizens who vote to ratify a constitution are bound by it under a consent or contract theory. Those who consented to a ratification election but voted against the constitution, and those who consented to the product of all lawful procedures but voted against every initiative, could be bound under a simple extension of the theory. But what about the future generations that never voted and never consented to put ratification to a vote? Consent theorists must say either (1) that the constitution remains authoritative despite the lack of manifestations of consent by future generations, or (2) that it has continuing authority if and only if the people manifest continuing consent.[Note 11] The former alternative makes the first generation the proxy of all subsequent generations, and justifies the imposition of a system of law on a population whether or not it would have consented and whether or not its members would have appointed their ancestors as proxies. If that is plausible, at least it departs widely from classical consent theory and any authentic sense of consent. It also raises the omnipotence paradox of a sovereign binding its successors or its own future conduct, perhaps irrevocably. The second alternative requires some continuing show of authorizing consent which might well be inferred from the citizens' use and contentment not to use their AC.[Note 12]

One might say that citizens' failure to overthrow their constitution and government in revolution is a sufficient manifestation of consent to give the constitution and constitutional form of government legitimacy. Continuing failure to revolt would be continuing consent. But this view amounts to the proposition that a regime has legitimate authority if, and so long as, it successfully puts down and postpones revolution. The theory is strengthened if it makes legitimacy conditional on the postponement even of attempted revolution. But this does not strengthen it enough —and in other respects over-strengthens it. For of course the prevention of revolution may be accomplished by soul-satisfying justice, or it may be accomplished by midnight break-ins, kidnaping, constant surveillance, indoctrination, intimidation, terror, and torture. The point of a consent theory of legitimacy is gutted if the requisite consent may be coerced.

But if the use and contentment not to use the AC is a measure of popular consent to the constitution, then the fairness and difficulty of the amending process must be brought into the calculation. The weight of the use and non-use of the AC as evidence of consent to be governed by the constitution is (roughly) in inverse proportion to the difficulty of amending the constitution for the general public. Dissatisfaction could rise to a level needed for successful revolution and still not suffice to amend the constitution if the amending process required the unanimous votes of every state and county legislature, or referred the question to an aristocratic elite.

For my purposes here I need not decide the maximal degree of difficulty for an amendment process before it fails to capture the actual consent of the governed. However, I am intrigued by the idea that the manifestation of consent sufficient to adopt a constitution in the first place is the most that can be expected in order to provide continuing authority to that constitution. This means that if amendment is more difficult than the original ratification, then the constitution has lost some degree of authority or legitimacy. The authority of a constitution over generations of citizens who did not ratify it would diminish roughly to the extent that the difficulty they face in amendment exceeds the difficulty of the original ratification. For such citizens, legitimate amendment would be more difficult than a revolution or discontinuity that would establish a new constitution with equal or greater legitimacy than their ancestors had in adopting the old one.[Note 13] If amendment becomes impossible after the first generation, because there is no AC or because courts or tyrants invalidate all attempts under it, then authority under the consent theory would drop to about zero plus any surcharge which citizens accord to rules of law, qua rules of law, before deciding to disobey.[Note 14]

The consent theory of authority is widespread and long-lived. Without endorsing it here I may observe that it is expressly endorsed by the Declaration of Independence[Note 15] and many state constitutions, and that it puts great weight on the AC of a constitution and the difficulty it creates for the amending process. Because most attempts to change ACs are attempts to raise or lower that level of difficulty, the problem of the applicability of an AC to itself is of urgent practical importance. Under the consent theory the self-amendment of the AC may increase or decrease the opportunities for the people to manifest their consent to be governed by that constitution.[Note 16] Self-limiting self-amendments, which most strongly raise the specter of paradox, may enhance or diminish the legitimacy of the constitution.

The consent of the governed as it appears in the amendment process not only requires that difficulty of the process be within certain bounds, but also that the consent meet some minimal standards of cognitive and volitional competency, like any other consent. Detailing the distortions to consent, hence to legitimacy, introduced by ideology and violence is generally beyond the topic here. But we may say that the validity of consent to an amendment may, for evidentiary purposes, be presumed conclusively from the requisite vote, but that does not preclude inquiry into the "actual" consent of the people. In Bedner v. King, 110 N.H. 475, 272 A.2d 616 (1970) the New Hampshire Supreme Court refused to find that the voters' consent to an amendment was invalid merely because publicity about its content and effects was inaccurate. Cognitive incompetency is apparently irrelevant in New Hampshire, or at least not to be inferred from false advertising alone.

Serious questions of volitional competency have been raised about the three Civil War amendments. The validity of the Thirteenth, Fourteenth, and Fifteenth Amendments has long troubled those who perceive them as exactions of the victor not voluntarily endorsed by the southern states whose votes were needed for ratification. Compare the case of Japan, whose constitution of 1946 was imposed on the nation by the Supreme Command for the Allied Powers (SCAP).[Note 17] The constitution was ratified by the Japanese Diet but under pressure from SCAP while Japan was under military occupation. For these reasons some Japanese scholars argue that the 1946 constitution is invalid.[Note 18] John Maki reports that among the most urgently demanded reforms is the self-amendment of the Japanese AC, which Commissioner Kanikawa objected is one of the most difficult to use in the world and "possesses the character of a law of occupation control enacted by the Allied nations."[Note 19]

I am not concerned to justify the consent theory per se or to suggest the optimal level of difficulty which the people should impose on themselves through their AC.[Note 20] I will concentrate hereafter on the theoretical problems of self-amendment, hoping that the reader will see behind the logical problem a very fundamental problem of legitimacy which implicates many of the basic values of our system of law and popular sovereignty.[Note 21]

The self-amendment of ACs has frequently occurred (see Appendix 2). Hence the question of the logical coherence of self-amendment is not merely academic. By exploring its logical and legal characteristics I hope to shed light on our hidden models of legal change and concepts of law itself, rather than to set logic over law as sovereign and retroactively declare the impossibility, or even question the possibility, of the commonplace.

Notes

1. George Tichnor Curtis, Constitutional History of the United States From Their Declaration of Independence to the Close of the Civil War, Harper and Bros., 2 vols., 1889-96, 2:152.

2. Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, p. 210.

3. Stevenson's remarks are quoted in Robert L. Farwell, "Gateway to What?" DePaul Law Review, 10 (1961) 274-85 at p. 278. See also Charles L. Laughlin, "A Study in Constitutional Rigidity," University of Chicago Law Review, Part I, 10 (1943) 142-76, Part II, co-authored with Kenneth G. Sears, 11 (1944) 374-442.

4. Constitutional amendment through means other than amendment clauses is surveyed in Part Two.

5. John William Burgess, Political Science and Comparative Constitutional Law, London: Ginn & Co., 2 vols., 1891, 1:137.

6. As I will use the term, an "amendment clause" or "AC" is any rule authorizing the change of the rules of the constitution. When the constitution is written, then the AC is usually explicit and easy to find, but not always. I intend this broad definition to capture tacit amendment rules of other constitutional systems.

When it is explicit, of course, it is not just a rule but a provision or specimen of language. The difference between an AC qua language and an AC qua rule is considerable, and will be observed whenever it is relevant. "Amendment clause" ("AC") covers both senses.

One reason that the paradox of self-amendment cannot arise in deontic logic (the logic of obligation and permission, often used in analyzing law) is that no equivalent of an AC so defined exists in any such system. Whether an equivalent may be constructed —a fascinating challenge— is beyond my topic here. See Section 12.C and Appendix 3.

7. See H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, pp. 115-16.

8. In subsequent sections I will call the formalist theory the "inference model" and two non-formalist theories the "acceptance model" and "procedural model". See Sections 6, 7, and 10.

9. In Part One I will discuss the general application of the AC of a system to itself. In Sections 4 and 13 I will discuss the application of one section of a complex AC to another section as a method of amending the AC without strict self-application.

10. Orfield, op. cit., Chapter VI.

11. Our Lockean ears resonate with the proposition that the people are sovereign and that they are bound to obey their laws by contract principles. Yet the paradox of omnipotence arises in another form if the first generation of sovereign people can bind its successors (see Section 8). The adoption of a constitution with an AC is a revocable act, because the AC permits piecemeal change and wholesale replacement. As long as the establishment of the constitution is revocable by later generations, and the method of amendment is fair, then the first generation is not oppressively binding its successors. But if the method of amendment is not fair, or is too difficult, then the constitution inherited by future generations does oppress and is partially illegitimate. The Lockean consent theory is strengthened as a normative theory of justice, and protected from the paradox of omnipotence, if we insist that the legitimacy of law requires the continuing consent of the governed, not just the consent of the founding generation.

12. Paul Brest makes the point that failure to amend does not show consent to the constitution in its current form, but only to the current judicial interpretation of the constitution. Paul Brest, "The Misconceived Quest for the Original Understanding," Boston University Law Review, 60 (1980) 204, 236. This point is well taken. To the extent that the constitution is its current judicial interpretation for purposes of application, the point I wish to make survives Brest's qualification. Under the consent theory the changes in the constitution that are necessary to sustain the approval of the people through changing circumstances may arise in any way consistent with that continuing approval, e.g., by judicial review (see Section 15), by international agreements (see Section 17), by desuetude (see Section 19), or by use of the methods of the AC. In fairness to Brest I should note that, while he believes the consent theory must be extended to require continuing consent, he ultimately rejects even the extended theory. Id. at 225ff.

An excellent general discussion of the politics of self-binding may be found in Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality, Cambridge University Press, rev. ed. 1984, esp. pp. 87-103.

13. The reasonableness of this idea is suggested by the simplified situation in which all the parameters of difficulty in the amendment process are focused on the supermajority needed to adopt. If the first generation (G1) needed 70% approval to adopt the constitution, and the second generation (G2) needed 75% to amend, then failure by G2 to amend would not show sufficient consent to the constitution to establish the legitimacy of the constitution for G2. Failure of G2 to amend may conceal a 74% consensus for radical change, in which case G2 dissents from the constitution more widely than G1 consented to it, and yet is supposed to be bound. This is not self-evident injustice, but the unjust element of it cannot be blinked away. With 74% consensus for radical change G2 could ignore the constitution and make another one —could revolt— with more legitimacy than G1 had in making the prior constitution. On the other hand, if G2 amends at 75%, then it may have been delayed longer than is just, which is roughly as long as it had 70% approval, or as long as it had the breadth and depth of support needed to revolt and make its own constitution with the same degree of legitimacy as its predecessor. This is especially true when, not G2, but G10 or G20 finally amends when G2-G19 each mustered at least 70% consensus for change.

For comparison, our constitution was adopted when 9 of the 13 colonies ratified it, which is 69.23% approval. This overlooks the fact that a ratification by 9 established the constitution only for those 9 and could not bind dissenters, and the fact that unanimous consent was eventually received. It also overlooks the fact that 69.23% (9/13) approval of the colonies is not at all equivalent to 69.23% of the national population. If only the least populous 9 states had ratified, then only 56.74% of the population would have approved. Peter Suber, "Population Changes and Constitutional Amendments: Federalism versus Democracy," Michigan Journal of Law Reform, 20, 2 (Winter 1987) 409-90. But if we disregard this, and look at the number of states or colonies needed to ratify, as if their approval rates were roughly proportional to the people's, then we can make the comparison to the simplified situation sketched above. Amendments require 2/3 of each House of Congress and 3/4 of the states. If the higher hurdle is taken for these purposes, then amendment requires 75% consensus. If we try to free this picture of the defects of simplification, and factor in the facts that the original ratification could not bind dissenters and that counting states is not equivalent to counting people, and if we try to blend the 2/3 and 3/4 requirements, then we might well conclude that it is more difficult to amend the federal constitution than it was to adopt it, and hence, by my hypothesis, that its legitimacy has declined.

14. The concept of surcharge is borrowed from Mortimer and Sanford Kadish, Discretion to Disobey: A Study of Lawful Departures From Legal Rules, Stanford University Press, 1973, pp. 27-28. Their source for the concept was W.D. Ross, The Right and the Good, Oxford University Press, 1930. Surcharge is the residual obligation or feeling of obligation to obey the law which remains after a particular legal duty has been neutralized by a conflicting moral duty, by the obsolescence of the rationale for the legal rule, or by a conflict between the legal rule and its rationale —in short, when the normal reasons for obeying the law are inapplicable. It is roughly the sense of obligation to obey the law simply because it is the law, as opposed to the obligation to obey the law because it is good, wise, rational, or beneficial to do so.

15. In order to secure our inalienable rights "governments are instituted among men deriving their just powers from the consent of the governed..." Declaration of Independence, third sentence. The constitution does not declare the source of its authority, in consent or otherwise, except in Article VII by declaring itself established upon ratification in state conventions, which may imply some form of consent theory. Article VII might imply the necessity of state consent alone, not the consent of the people, for only states were required to ratify. But on the other hand, the constitution was ratified by state conventions, not state legislators, which some have taken as proof of the national, as opposed to the merely federal, character of the constitution. Orfield, op. cit., at 53. But note that in Federalist #39 Madison says that the constitution is "neither a national nor a federal Constitution, but a composition of both." For the view that the consent of the people, rather than the states, is expressed in conventions, see Section 16. The most direct method of canvassing the people's consent, popular initiatives in proposing amendments and popular referenda in ratifying them, are not provided in the federal AC, Article V. Nor can states choose to ratify federal amendments by referendum. Hawke v. Smith, 253 U.S. 221, 10 A.L.R. 1504 (1920).

16. I have not seen an argument that ties the consent theory in this way to the difficulty of the amending process, although the connection is implied by those who believe that the true sovereign, a being not limited by any body and limiting all others, is the amending body. See Orfield, op. cit., at 152-67; William P. Potter, "The Method of Amending the Federal Constitution," University of Pennsylvania Law Review, 57 (1909) 589 at p. 592; Bruce Williams, "The Popular Mandate on Constitutional Amendments," Virginia Law Review, 7 (1921) 280 at p. 293; Raymond Uhl, "Sovereignty and the Fifth Article," Southwestern Social Science Quarterly, 16 (1936) 1 at p. 15; State ex rel. McCready v. Hunt, (1834) 2 Hill L. (S.C.) 1, 61, 108, 165-72, 221, 259-63. Also see Section 8, below. Continuing consent through an amending power that is not too difficult to use is also implied by the classical position, which, as stated by Hobbes, asserts that the ultimate law-maker "is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws." Thomas Hobbes, Leviathan, Collier Books, 1962 (original 1651), p. 200. See also Henry Sidgwick, The Elements of Politics, 1891, at p. 602: "I think we must attribute supreme power to any individual or body...which admittedly can withdraw power at will from a government otherwise supreme."

17. See Alfred C. Oppler, Legal Reform in Occupied Japan: A Participant Looks Back, Princeton University Press, 1976, pp. 43-49; John M. Maki (ed.), Japan's Commission On the Constitution: The Final Report, University of Washington Press, 1980, pp. 62-86.

18. Oppler, op. cit., cites Saito Chu, "Invalidation of the Constitution," Japan Times, August 27, 1961.

19. John Maki, op. cit. at p. 347. In general see Sandra B. Burman and Barbara E. Harrell-Bond (eds.), The Imposition of Law, Academic Press, 1977.

For the more difficult question of the validity of the people's consent not to amend, when that "decision" might reflect ignorance or indifference, see Section 7, note 2.

20. For a simplified account of the considerations that might go into determining that optimal level of difficulty, see the introduction to the game Nomic in Appendix 3. Playing the game with greedy, ambitious players with training in law or logic should also give one a lively sense of the importance of reaching that optimum. A more discursive treatment may be found in John Dickinson, "Legal Change and the Rule of Law," Dickinson Law Review, 44 (1940) 149-61. Dickinson argues that mechanisms of legal change should preserve the values of continuity, consistency, reciprocity of rights and duties, individualism, and restraints on power.

21. In Section 8.C the theory of legitimacy sketched in this section will directly bear on an aspect of the paradox of self-amendment. See also Section 21.

Section 3: The Dilemma

A. Self-application v. infinite regress

Any legal philosophy that would explain how laws may lawfully be changed faces a dilemma. The authority to change legal rules is provided by a special group of legal rules which we may call (after Hart) rules of change. Rules of change permit and structure the process of enactment, amendment, and repeal. Can the rules of change permit and structure the process of their own change? More pointedly, can they authorize their own change into forms inconsistent with their original forms?[Note 1] Can they make their self-change irrevocable?

The dilemma is sharp. (1) If the rules of change cannot authorize their own change, then they are either immutable, or they may only be changed by a second set of such rules, which in turn must either be immutable or mutable only by a third set, and so on to an arbitrary halt or an infinite regress. (2) But if the rules of change can permit and structure the process of their own change, then they must permit their own limitation and repeal. But at first sight, at least, paradox attaches to any rule that authorizes the limitation or extinguishment of its own power. For it seems that such rules would supply the premises for a transfer of authority in which the conclusion contradicted at least one premise, or an action much like that of an omnipotent being limiting its own power to act. (The paradox of self-amendment is set out more fully in Section 5.)

So it seems that we must choose among immutable rules, infinite regress, and paradox. To this dilemma, or trilemma, we might add revolution. But we are now considering only the lawful change of law. Extra-legal methods of changing the rules are always available, of course, even though they are not lawful and sometimes inefficient. For example, revolution can clearly change the rule of succession for sovereigns, but can only rarely change certain unwritten constitutional norms. In any case, the present inquiry is devoted to the ways in which a rule-governed system may change all its parts, including the rules that govern change. So for present purposes we can omit revolution as a method of legal change.

Of the options remaining —immutable rules, infinite regress, and paradox— immutable rules are the least objectionable logically, although perhaps the most objectionable legally. But in any event that hypothesis that any legal rules are truly immutable faces both logical and legal problems (see Section 8). Legal history also threatens it, for it seems that all kinds of rules of change have been changed; at least this is true of constitutional amending clauses (see Appendix 2).

The problem is to explain how legal change of the rules of change actually occurs, not how a hypothetical set of rules carefully crafted for the purpose could permit its own alteration.[Note 2] Alf Ross, a Danish jurist and logician, has argued that rules of change, or at least constitutional (supreme) rules of change, cannot authorize their own amendment without paradox, and therefore cannot lawfully authorize their own amendment at all.[Note 3] This essay is in effect an extended reply to Ross. I will argue that Ross's paradox is not easily solved or dissolved, but is easily accommodated in law. A powerful explanation of how law can cope with an unflinching contradiction may be found in the legal philosophy of H.L.A. Hart. Hart has laid out a theory of law that provides useful terms and theoretical tools for attacking this problem but that Hart himself did not use for this purpose.[Note 4]

Every legal system contains rules which permit the change of the other rules. Change can occur through the addition of new rules or the modification and repeal of existing rules. (I will use the term "amendment" to include addition and repeal, as well as piecemeal and wholesale alteration.) Sometimes the rules of change are tacit, and cited as needed in a way that resembles invention, but usually they are explicit.[Note 5] There must be many rules of change to deal with the many types of legal rules that must, over time, be changed —constitutional rules, statutes, decisional rules, treaties, executive agreements, administrative regulations, parliamentary rules of order, judicial rules of procedure and evidence, executive orders, canons of professional responsibility, standards of reasonableness, evidentiary presumptions, principles of the priority among rules, canons of interpretation, and even contractual rules. Each of these can be changed by the power that created it, although that power may be difficult to identify and commonly must be more restricted and channeled when used to amend than when originally used to establish law. Most of these types of legal rule can be changed by other powers as well, such as striking through judicial review, reformation in equity, overruling on appeal, judicial reinterpretation, overruling by subsequent enactment, statutory preemption, and constitutional amendment.

In a hierarchy of rules in which some take precedence over others the immutability of the lower level rules is never a real possibility. Most case law is inferior to statutory law, and the latter provides a rule of change for the former. Even if case law provided no rules for its own change (for the overruling and modification of case law by subsequent cases), then some rules of change at higher echelons could always be found, if only in the amending clause (AC). Indeed, one of the defining characteristics of a "higher level" rule, or a rule which takes precedence over other rules, is that it, or a rule of its type, can alter and limit the rules below it in the hierarchy. Hence, we may assume that in every legal system with a hierarchy of rules, the lower level rules, including the lower level rules of change, are always mutable.

But serious doubt may arise as to the mutability of the supreme rule of change. The supreme rule of change, where there is one,[Note 6] may be found by asking which rule of change may change all other rules of the system, directly or indirectly,[Note 7] and may not be changed by any other. In constitutional systems the supreme rule of change is the AC of the constitution, the rule which permits and structures the process of the change of constitutional rules. No lesser power may amend it, and it allows the amendment of all others.[Note 8] This means, among other things, that if an AC cannot authorize its own amendment, then it is legally immutable and may be changed only by illegal or extra-legal means such as revolution.[Note 9]

The self-amendment of a non-supreme rule of change may or may not escape the apparent paradox of self-amendment (see Section 12.B). But to keep the dilemma as sharp as possible, the problem of self-amendment, unless otherwise indicated, will be limited to the problem of the self-

amendment of a supreme and omnipotent rule of change (see Sections 8 and 12.B). For the same reason I will consider only changes that make the changed rule inconsistent with its original form (see Section 12.C). Whether it matters that the inconsistent new amendment or self-limitation is revocable or irrevocable will be addressed in Sections 8 and 11.

B. Primary and secondary rules

The term "rule of change" is borrowed from Hart (93-94). Hart conceives law to be the union of primary and secondary rules. Primary rules impose duties on people to behave in certain ways, whether they want to or not (78-79). They create obligations (89, 91) and pertain to action, behavior, and physical movement (79). Secondary rules, by contrast, confer powers and pertain to the primary rules (79). They confer public power, such as the power to legislate, and private power, such as the power to enter contracts and dispose of property through will (79). They create (and are created by) a class of officials who execute public power (113). Hence they also aid the legal system of which they are a part by permitting it to solve problems, without unlawful or alegal manipulations, that arise from the use of primary rules.

For example, primary rules do not themselves determine who, if anybody, is to enact, record, enforce, interpret, adjudicate, apply, or alter them, or by what procedures these tasks are to be performed. Primary rules may exist in written or unwritten form, but in either case they do not themselves declare which versions are authoritative, what is to be done in case two or more primary rules conflict, or exactly which utterances or traditions are to count as primary rules that create obligations. Secondary rules that provide conclusive methods for ascertaining what things are primary rules and which primary rules take precedence over others are called rules of recognition (92-93). Rules that permit and structure the process of enacting, altering, and repealing primary rules are called rules of change (93-94). And rules that empower some people to make authoritative determinations of departures and violations are called rules of adjudication (94-95). These three types exhaust the realm of secondary rules for Hart.

Rules of recognition create a system out of an otherwise disunited congeries of rules (90, 91, 93, 106, 113, 118, 228f) and prevent debilitating uncertainty as to what is law and when we are obligated and at risk of sanctions (92). By providing rules of priority, when needed, the rules of recognition also create a hierarchy of rules. Rules of change allow adaptation to changing conditions and prevent all the ills of a static legal system (93).[Note 10] By centralizing the imposition of sanctions, rules of adjudication prevent the violent and inefficient diffusion of energy in self-help (95, 221). Societies may in fact exist without secondary rules, but they would for that very reason be primitive (89). Indeed, the development of secondary rules "is a step forward as important to society as the invention of the wheel" (41).

A peculiarity of Hart's theory that strikes one immediately is that the secondary rules apply only to primary rules and not also to themselves and one another. Yet rules of recognition must occasionally be changed and adjudicated, rules of change recognized and adjudicated, and rules of adjudication recognized and changed. More to the present point, rules of recognition must be recognized, rules of change changed, and rules of adjudication adjudicated. The self-application of the rules of change will concern us exclusively here, although the possibilities of paradox and contradiction in the self-application of rules of recognition and adjudication should not be overlooked. For none of the three types of secondary rule does Hart explicitly affirm or deny the logical or legal possibility of self-application. Hence, whichever path we take will supplement Hart.[Note 11]

The dilemma may be restated partly in Hart's terms. What rules of change, if any, permit and structure the process of the change of the existing rules of change? Especially, what rule of change, if any, can authorize the change of the supreme rule of change to a form inconsistent with its original form? The existing supreme rule of change is either self-applicable or it is not. (1) If it is self-applicable, then it is apparently self-contradictory in the manner of a self-limiting omnipotent being (see Section 5). (2) If it is not self-applicable, then it must either be immutable, or mutable only by "tertiary" rules or by extra-legal means.

By analogy to Hart's distinction between primary and secondary rules, one might postulate rules which apply to the secondaries, called tertiaries, and rules which apply to the tertiaries, called quaternaries, and so on.[Note 12] Immutability and revolution are not the only alternatives to one who denies self-applicability: one may postulate a tertiary rule of change which authorizes the amendment of the secondary rules of change. On this branch of the forking path one must ask whether a tertiary rule of change can exist if the secondary rule is, ex hypothesi, actually supreme. In any case, the tertiary rule of change would replicate the dilemma perfectly, for it itself would either be immutable, or mutable only by self-application, by revolution, or by a quaternary rule, and the quaternary rule likewise, and so on to an arbitrary halt or an infinite regress.

Several horns of the dilemma may be removed for various reasons. But before pruning, the dilemma (tetralemma) breaks into four paths: Supreme secondary rules of change are either (1) immutable or mutable. If they are mutable, then it is by means of (2) higher rules of change, (3) self-application, or (4) extra-legal means such as revolution. If they are mutable by higher rules of change, then those higher rules replicate this tetralemma at their own level, and so on ad infinitum.

The dilemma may be simplified if we eliminate two possibilities. First, we should eliminate the possibility of extra-legal or revolutionary change of the rules of change, if only because we want to explain the phenomenon of their legal change. For the legal change of supreme and inferior rules of change does occur (see Section 5.C and Appendix 2). Even if their extra-legal change occurs as well, the explanation for the latter cannot, and need not, be stretched to cover the former.

Second, we should eliminate the possibility of the immutability of the secondary rules of change as empirically false and question begging. Even supreme rules of change are legally mutable, as evidenced by the history of the amendments to the ACs of the various state constitutions in the United States (see Appendix 2). Lesser rules of change are mutable under the higher rules of change and the ACs. One might argue that the existing (and mutable) ACs are only secondary rules of change, and that there exist rules of change at the tertiary level or above that are genuinely immutable. Alf Ross takes this position (see Section 5). But we are investigating actual ACs, which have historically often been amended. They at least are mutable, and we are only eliminating the assertion of their immutability from the dilemma. The option of affirming the immutability of higher level, but tacit, rules of change is preserved by the denial of the immutability of secondary rules, and will be examined on its merits (see Sections 8 and 9).

It is important to note that to postulate immutable legal rules of any kind is to beg the question of the mutability of the rules of change. For if the rules of change may be changed, then new rules of change might reach all the rules of the system and "transmute" the "immutable" rules. Therefore, Hart's unsupported statements that some rules can lie beyond the amending power of the system, and that the amending power can be limited (71, 72, 76, 103) must be taken as unfortunate obiter dicta that beg the question under investigation. Even if they are taken as indirect denials of the self-applicability of rules of change, which they are, they are not supported by evidence or argument. The proposition that an AC may be limited beyond undoing will be examined in Section 9.

We may eliminate from the dilemma the possibility that the rules of change are immutable, simply on the ground that some supreme rules of change, or actual ACs, are legally mutable. We need not reach the question whether all are mutable. However, we must eventually face the question whether actual ACs have been mutable precisely because they were not actually supreme.

After eliminating the two possibilities of revolution and immutability, the dilemma may be stated very simply. Secondary rules that permit the change of primaries either permit their own change or they do not. If they do permit their own change, then they are self-applicable and prima facie paradoxical. If not, then they are changeable only by tertiary rules, which in turn could be either immutable, or mutable by self-application or by quaternary rules, and so on to an arbitrary halt or an infinite regress.

C. Is law finite?

Perhaps the possibility of infinite regress should also be removed. An infinite regress is objectionable, not because legal systems contain only a finite number of rules, but because obviously no legislator or judge appeals to an infinity of rules to justify any change of law, including self-amendment. Whatever is justified in law, as elsewhere, is justified by a finite number of rules or premises. Conceivably this need not be so, but in fact judges would rather invent rules to justify their holdings, or double the number of cited precedents to hide the fact that their holdings were unjustified, than to appeal to an infinity of rules.[Note 13]

Ronald Dworkin, for one, believes that the number of legal rules and principles is infinite.[Note 14] So does Robert Birmingham.[Note 15] Even if they are not considered to have proved their conclusions, they make it difficult to assume without argument, as Kelsen does, that "the legal order can be composed only by a definite number of rules."[Note 16] Dworkin's thesis is based on the difficulty of individuating legal rules or principles. If it leads us to postulate an infinity of rules, it is because of the innumerable interstices and shades of meaning in any legal system. Birmingham's thesis is based on a concept of rule by which the solution to each distinct legal problem becomes a new rule. Not even Dworkin and Birmingham, however, would recognize an infinity of duplicate rules, each identical to the last except for its place in an infinite regress.

The Dworkin-Birmingham thesis is important to eliminate one possible solution to the paradox of self-amendment. If we could count all the possible laws by some definite method for identifying what was and what was not a possible law, then we could say whether self-amendment was included in the series. Or if we could list all the laws that our theories would like to count as possible laws, ensuring to exclude (or include) self-amendment, then we could define the universe of possible laws as the enumerated series. This looks more absurd for law than for logic, where such methods are sometimes useful.[Note 17] We need not believe the number of laws is actually infinite to reject the utility of this method even in principle; we need only believe that the number of laws cannot be counted or iterated, either because they are always changing, or because they cannot be individuated without distortion and controversy.[Note 18]

D. The paradox of omnipotence, the barber, and the liar

The paradox of omnipotence is widely thought to be of the "Barber-type" (see Section 1), for it seems to prove that omnipotence cannot exist as naively conceived. If we naively assume that a deity can do any act at any time, then can she make a stone so heavy that she cannot lift it? If she can, then she is not omnipotent in the naive sense (because there is something she cannot lift); and if she cannot, then she is not omnipotent in the naive sense (because there is something she cannot create). The natural solution is to deny that there is a deity omnipotent in the naive sense, with the power to do any act at any time.

Similarly, can a constitutional amending clause amend itself —especially, can it do so when it is the only authority for the amendment, when it is the supreme rule of change in that legal system, when the new version of the clause would be inconsistent with the original, when the amendment would diminish the amending power, and when the amendment purports to be irrevocable? If we regard constitutional amending clauses as legally omnipotent, on the evidence that they are the supreme rules of change in their respective systems, then we have replicated the theological version of the paradox of omnipotence. If we do not regard amending clauses as legally omnipotent, then some irrevocable limitation on their power must exist; for if all limitations on it were revocable, some power would be legally omnipotent.

There is no contradiction in assuming that such irrevocable limitations exist. They would imply the existence of immutable rules, which are equally difficult to posit in theory and to find in history. If we insist they are there even though we cannot find them, then no legal power is omnipotent. For even one immutable rule forecloses the possibility of omnipotence, unless we redefine omnipotence. That is a logically permissible solution. If we think immutable rules are not to be found, or if we suppose for the purposes of inquiry that they are not to be found, then we thereby posit at least one omnipotent legal power. For the absence of immutable rules implies that any legal changes can be made, perhaps by a composite of powers working together. If we deny immutability and acknowledge omnipotence, then we have clearly lost the right to reject the assumption of omnipotence —as we reject the assumption of the Barber's existence— when the paradox of omnipotence shows a contradiction in it. So we must apparently choose between the universal absence of legal omnipotence and the permissible presence of legal contradiction. In general I will take the latter path, even though it implies that the paradox of self-amendment is more "Liar-like" than "Barber-like".

Notes

1. On the difficulty of deciding when the new and old rules of change are "inconsistent" see Section 12.C.

2. See Appendix 3 in which a game is presented in which changing the rules is a move. Also see Sections 4 and 13 for some of the logical problems involved in developing such rules.

3. See Section 1, note 17. Ross's argument is summarized in Section 5.

4. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961. Subsequent references to this work in this section will be kept in the text in parentheses. In a later essay Hart explicitly faced the problem of self-amendment and replied to Ross. See Hart, "Self-Referring Laws," Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner, 1964, pp. 307-16. I will argue that Hart's explicit response to Ross in this essay is less adequate than one that can be wrought from the doctrines addressing other questions in The Concept of Law. The virtues of the approach of his book are set out in Section 7, and the defects of the approach of his essay are set out in Section 10. In his essay Hart knew Ross's paradox only through Ross's less complete exposition in On Law and Justice, London, 1958, pp. 80-84. In Ross's full exposition, "On Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24, he shows familiarity with Hart's later essay (at p. 10.n.1). Hence, Ross's best exposition knew both Hart's book and essay, while neither of Hart's works knew Ross's best exposition. Hart reprinted his essay, "Self-Referring Laws," in his collection, Essays in Jurisprudence and Philosophy, Oxford University Press, 1983, pp. 170-178, but does not revise it in light of Ross's fuller essay except to cite it as critical of his own.

5. The constitution of Italy lacks an AC but Italian jurists conclude that it is tacitly understood that amendment may be made either by the ordinary legislative method, or by the same power by which the constitution was originally adopted.

Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, p. 39. For the resolution of similar difficulties in the early American state constitutions that lacked ACs see In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 449-51 (1935), and Walter Farleigh Dodd, The Revision and Amendment of State Constitutions, Johns Hopkins University Press, 1910, pp. 44-45.

6. This qualification is intended to avoid (1) an implied assertion that all legal systems have hierarchies of rules, and (2) an Austin-like inference of the necessary existence of an unlimited and illimitable power or sovereign in every legal system. I do not mean to deny Austin's inference, but I do not, without inquiry, want to endorse his position by my language. For my purposes there may well be in every legal system a rule or power which is not limited by any other power and which limits all others; but I need not take the matter out of the sphere of empirical investigation. See Sections 8 and 9.

7. For example, the AC may change constitutional rules directly, and statutory rules indirectly by changing the standards by which we define permissible statutes.

8. The definition of supremacy used here may imply that a supreme or constitutional rule of change must also be exclusive or the only rule that can change the constitution. The complexity simplified by this usage is discussed in Section 12.A.

9. In Part Two I will examine methods of constitutional amendment that do not use the AC. Each may conceivably amend the AC and thereby prevent the absolute immutability of the AC even if strict self-amendment is not allowed. Because all these methods are either surreptitious, unofficial, de facto rather than legal de jure, or ill-defined in scope or operation, they show how the informality of actual legal systems can save us from logical monsters and political follies. However, in Part One I will assume that (supreme) ACs are lawfully mutable only by self-amendment, if only to tighten the dilemma.

10. The permanent need for change and openness to change was well expressed by Robert W. Goedecke in his Change and the Law, Florida State University Press, 1969, at p. 212:

> [T]he dominance of reason in the rule of law does not mean the sterile maintenance of a mechanical jurisprudence...but rather the ability to change the bases of the law to allow for continued practical determination in new circumstances and, at the same time, allow for continued argument about these bases... [Moreover, we must allow dissenters to persuade us, and permit] the previous dissenters [to] become the new majority....Change is necessary, therefore, to have the rule of law.

11. Hart ignores the question of the self-application of secondary rules in both The Concept of Law and "Self-Referring Laws" (see note 4 above), although the latter does address some of the problems of the self-application of a rule of change. In The Concept of Law he does not ignore all kinds of self-application, however. For example, he addresses the problem of sovereign self-limitation at 117, 145f, 215f, and 219; the self-binding force of law (which, unlike Austinian commands, bind their makers) at 42, 48, 57, and 77; self-reference at 116, 145-146, and 146-147; self-embracing omnipotence at 146; judges ruling on, and occasionally creating, their own competency at 148f; and the impossibility of self-interpretation at 123 and 139.

When C.F.H. Tapper speaks of the "self-application" of Hartian rules he means only that the people bound by a (primary) rule apply it to themselves, as opposed having it applied to them by a separate class of officials who are not bound by it. C.F.H. Tapper, "Powers and Secondary Rules of Change," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 242-77 at pp. 249, 266. See Hart, op. cit. at 38.

12. The need for tertiary rules in Hart's scheme has been argued by D. Gerber, "Levels of Rules and Hart's Concept of Law," Mind, 81 (1972) 102-05, and rejected by Theodore M. Benditt, "On 'Levels of Rules and Hart's Concept of Law,'" (a reply to Gerber), Mind, 83 (1974) 422-23. Gerber points out that secondary rules of adjudication are changed and, because Hart makes no provision for the application of secondary rules to one another, tertiary rules must be used to change secondary rules. Benditt suggests that legislative rules of adjudication (statutes serving the purposes which Hart attributes to rules of adjudication) may be changed by legislatures by means of new rules on the same level as those being changed (i.e., by new statutes); hence, resort to tertiary rules is unnecessary.

Benditt confuses the logical level of rules postulated by Hart with the legal levels of rules illustrated by the hierarchy in which constitutional rules supersede legislative, legislative rules supersede adjudicative, and so on. For Hart, primary and secondary rules may exist at the same legal level (say, at the statutory level); he does not mean that primary rules that are statutes can only be changed by secondary rules that are legally superior to statutes. A new statute may change an old statute in accordance with a rule of recognition which gives new statutes priority over any conflicting pre-existent statutes (see Section 16). The power of one statute to amend another indicates a logical superiority that Hart captures in the term "secondary rule". A secondary rule of adjudication, following Gerber's example, may be changed only by rules of a higher logical order; rules of a higher legal order are not necessary. Neither Gerber nor Benditt examined the problems of permitting self-application, and neither passed beyond exegesis of Hart to face the dilemma of circularity and infinite regress. Hart says his primary and secondary rules exist on different "levels" at 92, 94, and 108.

13. The position that legal rules are authorized or validated only by other legal rules, which is central to a formalist model of law, implies either an infinite regress, a self-validating rule, or an exceptional rule that is authorized, say, by consent or acceptance. No formalist has chosen the infinite regress, and most have ignored the dilemma.

Hans Kelsen asserts that all legal norms are coercive in that they provide sanctions for departures and violations. A judge applies the coercive rule against burglary to a convicted burglar; the judge does so because she is constrained by a coercive rule to decide burglary cases under burglary rules. The coercive rule against burglary is applied by a judge under a coercive rule about adjudication. Do we need a higher coercive rule to ensure that the coercive rule about adjudication is applied? It might appear that we need coercive rules in an infinite regress in order to make each lower rule fully coercive and enforceable. But for Kelsen this series is not infinite because a rule is authoritative merely by providing a sanction and need not be authorized by a higher coercive rule. Hans Kelsen, General Theory of Law and the State, Russell and Russell, 1961, "The Never-Ending Series of Sanctions," pp. 28-29.

14. Ronald Dworkin, Taking Rights Seriously, Harvard University Press, 1977, at p. 44: If "we tried actually to list all the principles in force we would fail. They are controversial...they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle." See also pp. 25, 66, 75, 76.

15. Robert Birmingham, "'Into the Swamp': More on Rules," Archiv für Rechts- und Sozialphilosophie, 64 (1978) 49-61. Birmingham does not rely on Dworkin, but uses an original argument that legal rules are paths from a set of facts to a holding, and therefore are as numberless as distinct cases.

16. Kelsen, op. cit. at 28-29.

17. Jaakko Hintikka believes this method is theoretically possible for the paradox of legal omnipotence, but "inadvisable" for "practical reasons". Hintikka, "Remarks on a Paradox," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 514-16, at 515.

18. For an excellent discussion of the problem of the individuation of laws, with less emphasis on the question of the cardinality of the set of laws, see Joseph Raz, The Concept of a Legal System, second edition, Oxford University Press, 1980, Chapter IV, "On the Individuation of Laws," pp. 70-92.

Section 4: The Denial of Self-Application

A. Four ways to avoid self-amendment

Let us explore the horn of the dilemma that denies that the secondary rules of change are self-applicable. If we concede that at least some actual secondary rules of change are mutable by legal procedures, then it seems that we must choose among four possible options.

1. Secondary rules affect only primary rules, and tertiary rules do not exist. This is Hart's unsupplemented view,[Note 1] and it clearly fails to face the problem or explain the phenomenon of the lawful mutability of the rules of change. It makes self-amendment impermissible because it is ultra vires or beyond the authority of valid law, not impermissible because it is a contradiction or paradox.
2. Secondary rules may affect other secondary rules, but not themselves. A given subset of all the secondary rules of change may affect others not in that subset. For example, rules of change could affect rules of recognition and adjudication without forcing us up to the tertiary level. Within the sphere of rules of change, a constitutional rule of change could affect a legislative rule of change, for example, without forcing us up to the tertiary level. This requires us to separate the legal and logical hierarchies, and allow many legal levels to exist at the same logical level. This is clearly a coherent theory, and Hart says nothing to exclude it.[Note 2] The problem of self-amendment, however, is not fully addressed until we ask how legal change may occur within the same, especially within the supreme, legal level. How can constitutional rules of change be changed without self-application or revolution?

   Suppose an AC has several sections, A, B, and C, each laying out a method of amendment, e.g. by ratification by three-fourths of the states, by convention, and by popular referendum. Then rule A could be used to amend B and C; rule B could be used to amend A and C, and rule C could be used to amend A and B. We may call this the "see-saw" method of amendment (explored more fully in Section 13).

   But it is possible that the individual rules of change at a given legal level will not suffice to amend. Rule A may govern part of the amendment procedure, rule B another part, and C another part, such that no single rule could authorize any change. For example, rule A could regulate methods of proposal, rule B could lay out the methods of ratification, and rule C could specify the official who certifies that ratification has occurred. Under these assumptions change could occur either through the entire set only, or through some subset.

   (i) If all the rules in the set are necessary to change any member, then none could be changed without self-application or the use of tertiaries. However, change through addition could still occur. The entire set a given time could permit the enactment of a new rule of change, even at the same level as the old. The addition of a new rule will necessarily allow a subset, namely, the original set, to suffice to amend. The addition of many new rules will allow more than one subset to suffice to amend, which leads to the next alternative.

   (ii) If a subset may suffice to change rules not in the subset, and especially if more than one subset may suffice, then a subset including rules A and B but not C could authorize the amendment or repeal of rule C.

   Again, the entire set at a given time could permit the enactment of a new rule of change. The set of A and B could enact C; then the set of A and new-C could amend B; then the set of new-B and new-C could amend A, and so on. Now we face the tantalizing possibility that this could continue until the content of the entire set matched the sovereign's desire, or that any content whatsoever could be attained from every initial set. If so, then this theory could accommodate all possible changes of rules of change without resort to self-application or the postulate of immutable rules (see Section 13). But such a see-saw of legislation or amendment does not reflect the actual practice of any sovereign, and hence has little power to explain, even if it could permit, the lawful change of existing rules of change.

   If certain "key" secondary rules of change were enacted in duplicate, then some of the problems with the see-saw method could be solved. The rule to be changed could always be found outside a subset containing rules sufficient to amend it, for that subset could contain "copies" of every rule of change in the system. However, if a duplicated rule were the one to be changed, and if duplication were needed to permit its amendment (it could be changed only with the assistance of its own "copy"), then at least one copy would remain unchanged after any act of amendment or repeal. This would not frustrate the purpose of amendment so much as it would that of repeal. But even in case of ordinary amendment, the duplication of rules would make it difficult or impossible to change all the tokens of the type, and to avoid the apparent paradox of a new rule denying (at least one copy of) a valid and binding rule in the process of coming into being. Nor of course can duplication, any more than the see-saw, explain how actual legal systems structure the change of their rules of change. It is not from ignorance of logical nicety that legislators do not enact rules in duplicate.
1. The third method for amending rules of change without self-application may be called the "theory of types" method.[Note 3] The initial set of secondary rules of change, or the entire set at a given time, could be identified (say) by numbers in the 100s. They may be used to enact, alter, and repeal secondaries in the 200s and above; those in the 200s may only affect those in the 300s and above, and so on. No rule of change may affect rules within its own "century" of numbers (on its own level), or with any lower number (at a higher level). This theory leaves the initial set immutable, but shows how all other secondary rules may be changed without self-application. The immutable set in the 100s might contain only one member, to mitigate the offense of immutability. However, to make it empty would not eliminate

immutability altogether; on the contrary, it would prevent the enactment of any rules of change, which would make every rule in the system immutable. Nor could the immutable set in the 100s be shrunk after the system got started; all its members are immune to amendment from one another and from subsequently enacted rules.

An infinite regress of rules of change need not develop and could not: rules would be added to the top end of the series as needed by society. Because they would be added seriatim in real time, they could not surpass a finite number.

A real legal system which evolved without regard to such a theory of types or levels might nevertheless be explained by it. If the system had a core of apparently immutable secondary rules, of which some might be tacit, then they could be identified as the initial set, which designates logical not temporal priority. Subsequent enactments could be placed on the scale in their logical positions, assuming the theory is sufficiently faithful to the phenomenon to have made positions for all. Mutability is authorized only by logically prior (lower numbered) rules of logically posterior (higher numbered) rules. If in a real system logically prior rules are enacted later in time than logically posterior rules, then we may say that the logically posterior (temporally prior) rules were either enacted unlawfully or enacted on the basis of logically and temporally prior, but unwritten, rules.

Enacting the logically prior, temporally posterior rules might be considered (i) the enactment of explicit forms of previously tacit or unwritten rules that once authorized existing logically posterior rules, or (ii) the enactment of explicit rules that simultaneously made explicit and amended previously tacit rules.

If a logically posterior rule seemed to authorize the amendment of a logically prior rule, or (which is the same thing) if two rules seemed to authorize one another's amendment, then we could say that the system is violating its own rules, perhaps in ignorance or with a winked eye, or that the system actually uses circular applications. In the latter case the system could not be explained by the theory of types. To insist on the former case without more evidence, then, just to make the theory of types applicable, would prematurely deny the possibility of circular applicability and direct self-application, which might be made intelligible by another theory, explanatory of actual legal phenomena, and free of illegality if not of paradox (see Sections 5, 10, 11, and 21).

2. The initial set of secondary rules of change, or the entire set at a given time, could be taken as the explanandum, not the explanans. How could it have come into existence by legal means? If self-applicability is to be avoided, then the present set could only have been enacted by means of a logically (and temporally) prior set —tertiary rules— which was not itself self-applicable and so requires an even prior set —quaternary rules— to explain itself, and so on. But once such antecedents are postulated, the same mechanism by which they produced the present set could be used to produce a successor to the present set and all future successors.

   This fourth theory really does require an infinite regress. Rules are not added by legislators seriatim in real time as needed; they are added by logicians en masse at the speed of inference in order to explain or justify the present set. The infinity required here is not the infinity of Dworkin or Birmingham,[Note 4] but a temporal and logical series of antecedent authorities that, by its nature, cannot end or, more properly, has no beginning. Hence, it requires that every rule of change in the present that is deemed to be lawful have an infinite genealogy. Even if legal systems contain an infinity of rules, none has an infinite genealogy, if only because the world itself has no infinite genealogy. Hence, either this theory is false or no legal system with rules of change has an adequate explanation for its own lawful existence (see Appendix 1.D).

   Either way, this theory shows us that any theory that we accept as explaining how the present rules of change may be amended must also explain how they came into being.

B. Weaknesses of these four methods

All four of these theories are weak, although only Hart's unsupplemented view fails to provide any answer at all. The others are all empirically implausible as explanations of how actual legal systems accomplish the legal change of their rules of change. The fourth theory saves itself only by denying the adequacy of the legal justification of all actual secondary rules of change, and hence of all legal systems built on them. Such a recourse is implausible but, more important, by denying that any application of any rules (including rules of change) is lawful, it begs the question of how the lawful change of secondary rules of change is actually brought about. The see-saw method employs a mechanism which no one would seriously propose has been used by actual sovereigns in most of the attested cases of amendment to rules of change (see e.g. Appendix 2). Whether it depends for its success upon a particular plurality of rules of change which few, if any, actual ACs already possess, or whether it may be made to work for most, if not all, ACs, will be explored in Section 13. But even if it may be made to work for all ACs, it can explain the historical acts of self-amendment of comparatively few ACs. The theory of types method requires immutable rules which, if nothing else, begs the question of the mutability of the rules of change (see Section 3.B).

Hart does not offer reasons for skirting the question of self-applicability of the rules of change, not even the fear of paradox. He does not even explicitly say he denies self- applicability, but displays his rejection of it in his language.[Note 5]

> [T]hese secondary rules are all concerned with the primary rules themselves. They specify ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

Nor does Hart explicitly deny the necessity of tertiary rules, or ever use the term. But his repeated expressions of the adequacy of his theory, without tertiary rules, imply denial. Hart did not apparently see the mutability, justiciability, or recognizability of the secondary rules as a problem.

Because these four theories are unsatisfactory at least as explanations of the actual change of rules of change, let us examine the other horn of the dilemma, the horn affirming self- applicability in the face of apparent paradox. We shall reserve the right to return to these theories if the other horn turns out to be just as implausible.

Notes

1. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, pp. 79, 92.

2. See the discussion of Gerber and Benditt, cited in Section 3, note 12.

3. The theory of types was devised by Bertrand Russell in order to avoid the contradiction in his paradox of set theory (see text at Section 1, note 4) while preserving as much set theory and mathematics as possible. Basically the theory forbids self-reference and structures a substitute method of reference that preserves most of what had formerly been accomplished through self-reference. For example, under the theory it is simply meaningless to speak of a set being or not being a member of itself, although it is quite meaningful and important to speak of a set of level or type 2 being or not being a member of a set of type 1. Under the theory of types there simply is no set corresponding to the description, "the set of all sets that are not members of themselves". The theory adds one more grammatical or syntactic rule to the group of rules that determine whether a string of symbols is well-formed: no reference may refer to any entity of the same or higher level or type. The hierarchy of levels is admittedly metaphysical and cumbersome, but it does eliminate self-reference and most (but not all) the need for self-reference. See Bertrand Russell, "Mathematical Logic as Based on the Theory of Types," American Journal of Mathematics, 30 (1908) 222-62, reprinted in an anthology of Russell's essays, Logic and Knowledge, ed. Robert C. Marsh, Capricorn Books, 1956, pp. 57-102.

The hierarchy of types postulated by Russell should be distinguished from both the logical (Hartian) hierarchy of primary, secondary, tertiary...rules, and the legal hierarchy rising through adjudications and statutes to constitutional rules. I am not denying the legal hierarchy in any sense (but see Section 21.C). I am assuming the Hartian hierarchy throughout the essay to test its coherence and extend it. And I am merely considering the Russellian hierarchy in this part of this section. Hart's hierarchy may well be a two-tier theory of types, but to call it that without inquiry begs the question at issue, whether secondary rules may apply to themselves. No rules in a proper theory of types could apply to themselves.

4. See Section 3, notes 13 and 14.

5. Hart, op. cit. at 92, emphases added; see also 79, 93, 94, 97, and 108.

Section 5: Self-Application

A. Ross's paradox of self-amendment

Let us now explore the horn of the dilemma that affirms the self-applicability of the rules of change. On this horn either an individual rule applies directly to itself and authorizes its own amendment or repeal, or a set of rules applies directly to one of its members. The paradox which Alf Ross believes results from such assumptions may be simplified as follows.[Note 1]

Suppose a constitution has an amending clause, cited as AC.1, which provides that an amendment to the constitution will be valid law if and only if condition K.1 is met. K.1 specifies a procedure such as ratification by three-fourths of the states within seven years.

We want to amend AC.1. Our proposed amendment, call it AC.2, provides that an amendment to the constitution will be valid law if and only if condition K.2 is met. We would not want to amend AC.1 if K.1 and K.2 were the same. Hence, suppose that K.1 and K.2 make valid amendment turn on different conditions. Suppose further that they are inconsistent in the sense that each permits something that the other forbids and forbids something that the other permits.

The essence of Ross's statement of the paradox is his belief that an act of amendment may be set out as a deductive inference such as the following:

1. If condition K.1 is met, then the proposed amendment (AC.2) becomes valid law.
   Reason: Article AC.1
2. The proposed amendment (AC.2) has been passed in accordance with condition K.1.
   Reason: contingent fact, certified by an official
3. Therefore, the proposed amendment is valid law.
   Reason: steps 1 and 2, by modus ponens[Note 2]

But consider the inference when we propose to use AC.1 to amend AC.1, replacing it with AC.2. It is not surprising that AC.1 and AC.2 are inconsistent rules; their inconsistency is a desired byproduct of the original desire to amend AC.1. But their inconsistency raises a problem. If we make AC.2 the proposed amendment in the inference above, then the conclusion contradicts the first premise. The first premise asserts the legal validity of AC.1 and the conclusion asserts the legal validity of AC.2. If the two clauses are inconsistent with each other (by hypothesis), then each excludes the other. Hence, the first premise asserts the exclusivity of condition K.1, and the conclusion asserts the exclusivity of condition K.2; by hypothesis these are inconsistent assertions.

This inconsistency makes the inference invalid. An inference in which the conclusion contradicts a premise, when the premises are consistent with one another, is demonstrably invalid. If logically valid deductive inference is a good model of legally valid amendment, then no amendment can be valid whose corresponding inference cannot be rendered valid.

That is the paradox. Whenever the amended AC will contradict the original AC, which will almost always be the case in self-amendment, then the inference that models the act of self-amendment will be invalid.

The most common objection to make at this point is to observe that AC.1 and AC.2 were never in effect at the same time, and that there is no contradiction in saying AC.1 has a certain period of validity and AC.2 has another distinct from the first. But even if true, that does not suffice to avoid the contradiction. AC.2 receives its authority or status as valid law from AC.1. It is precisely this transference of authority that the deductive inference is intended to model. According to this concept of law, a legal rule is valid if and only if it is validated by prior law through a valid inference. If AC.2 and AC.1 are never in effect at the same time, then they may not contradict one another as simultaneously binding laws. But their inconsistency as propositions outside time and law invalidates the inference by which alone AC.2 is to become valid law. AC.2 would not be valid law if it were not the conclusion of a valid inference; but it cannot be the conclusion of a valid inference as long as AC.1 is the reigning amending clause and must take a place in the premises.

There are many ways to refine the time-based objection to Ross, and many ways to refine the Rossian reply. The family of objections based on time will be explored in more detail in Section 10.

If Ross is right, then an AC that is already valid law cannot amend itself without contradiction. If it is the only lawful means of amending the set of rules of which it is a member, then it cannot be amended by any means whatever. Hence it will be immutable. If the rule of change were not supreme, it could be amended by a higher rule, but still could not amend itself. Self-application for non-supreme rules of change leads to contradiction as clearly as for supreme rules of change.

Ross's analysis stops after he locates this contradiction. But we may easily extend it from contradiction to paradox for any AC thought to be omnipotent. If self-amendment is self-contradictory, then self-limitation of a legally omnipotent AC is as paradoxical as the self-limitation of an omnipotent being. If a constitutional AC cannot limit its own power irrevocably (immutably), because the required self-amendment is self-contradictory, then there is a constitutional amendment it cannot enact; but if it can, then there is a constitutional amendment it cannot amend or repeal. Either way, it cannot be omnipotent in the naive sense (able to enact any law at any time).

The paradox need not be cast in terms of the direct amendment of the AC. If a constitutional AC cannot add an immutable provision to any part of the constitution, then there is is a legal rule that it cannot enact; if can add such a provision, then there is a rule that it cannot amend or repeal. Either way, it fails to be omnipotent in the naive sense.

Finally, Ross would add, if self-amendment is a contradiction logically, then it is impossible legally. The last conclusion depends on the view that legal change is transacted by logical inferences and that no legally valid change can occur through a logically invalid inference. If we deny this model of legal change and allow lawful amendment at least sometimes in the face of logical invalidity in the corresponding inference, then we must still confront the fact that, apparently, self-amendment involves contradiction. If legal change is not prevented by contradiction, then it tolerates contradiction, which must itself be faced squarely and explained.

It appears, then, that self-amendment is contradictory. If it is impermissible for that reason, then we must explain why logic rules so imperiously over this domain of human affairs where inconsistency seems to abound. If self-amendment is permissible anyway, then we must explain how law can tolerate this contradiction while forbidding many other things in the name of consistency.

A third alternative is that there is no real contradiction in self-amendment, only an apparent one that can be explained away. Attempts to make this work are considered, and ultimately rejected, in Sections 10 and 11.

B. Some distinctions

In order to facilitate discussion of the paradox some distinctions must be introduced. First, the paradox arises equally (if at all) from direct and indirect self-amendment. Direct self-amendment is the sort presented above: the application of an AC directly to itself just as to any other clause of the constitution. Indirect self-amendment is the replacement of a valid AC by a different one through an act that replaces the whole constitution of which it is a part. Indirect self-amendment is usually performed by constitutional conventions. It requires not only that the new constitution contain a new and different AC, but also that the new constitution and AC become law under the authority of the old AC (see Section 12.A).

Again, the paradox arises equally (if at all) from immediate and mediate self-amendment. These terms are taken from classical logic where an immediate inference is one that reaches a given conclusion validly in one step, whereas mediate inference requires extra premises or steps to arrive at a given conclusion from a given premise. If an AC is written as a single rule, then its self-amendment would be the direct or indirect application of that rule to itself, sufficing to amend in that one step by that one rule. This is immediate self-amendment. The AC may be written as many sub-rules, however. If each is an entire rule sufficient to authorize amendment, then applying a sub-rule to itself is also immediate self-amendment. If the sub-rules must work together to amend, then self-amendment becomes the application of a set to a member or a subset. That I will call mediate self-amendment.

One of the most important distinctions relating to the paradox of self-amendment and the paradox of omnipotence is borrowed from Hart's discussion of the omnipotent sovereign. An omnipotent parliament, he says, may limit its power to make law, without paradox, if its omnipotence is "self-embracing", and may not do so, at least without paradox, if its omnipotence is "continuing".[Note 3] Self-embracing omnipotence is unlimited power to make law, including power to affect that power. It may be used against itself and lost or limited irremediably. Continuing omnipotence is unlimited power to make law, but not including power to limit that power, thereby insuring that the omnipotence of the entity continues. Self-embracing omnipotence is unlimited but limitable power; continuing omnipotence is limited only to insure that it is (otherwise) illimitable. Self-embracing omnipotence is the power to make law on every subject, and therefore includes laws that diminish this power irremediably, whereas continuing omnipotence is the power to make law at every moment, and therefore excludes laws inconsistent with this very continuity. The self-embracing character of self-embracing omnipotence is mutable and even mutable irrevocably; the continuing character of continuing omnipotence is immutable, or at best mutable only revocably.

Beings of continuing omnipotence are doomed to life, power, and even doomed to freedom, while beings of self-embracing omnipotence are free to resign, abdicate, and self-destruct. Pliny the Elder said mortals were freer than the gods because mortals could commit suicide.[Note 4] He obviously thought that divine freedom was continuing, and that continuing freedom was inferior to self-embracing freedom. By contrast, Jesus is depicted in 1 Corinthians 15:27 as having continuing omnipotence:

> For he hath put all things under his feet. But when he saith all things are put under him, it is manifest that he is excepted, which did put all things under him.

Shakespeare's Richard II views his own sovereignty as self-embracing. Hence, he could not be deposed; he could only abdicate. He emphasizes this to Bolingbroke, who mistakenly thinks of himself as Richard's overthrower:

> Now mark me, how I will undo myself: [...]
> With mine own tears I wash away my balm,
> With mine own hands I give away my crown,
> With mine own tongue deny my sacred state,
> With mine own breath release all duteous oaths.[Note 5]

When John Stuart Mill said, "[i]t is not freedom to be allowed to alienate [one's] freedom,"[Note 6] he was defining freedom to be a continuing power, and his disagreement with those who would permit people to sell themselves into slavery, become drug addicts, or otherwise freely choose unfreedom, is not so much on the desirability of these acts as on the logic of self-application.

The distinction is very useful, and by extension we may speak of self-embracing and continuing powers to amend. Self-embracing amendment power may amend, limit, or repeal itself, irremediably, while continuing amendment power may not apply to itself, at least to diminish itself irrevocably.

Continuing omnipotence and amendment power are not maximally omnipotent, for there is one family of things they cannot do, namely, limit themselves, violate their immutable limitation and continuity, bind themselves for the future, and so on. But this should not lead us to think that continuing omnipotence and amendment power can augment themselves. For the only way to do that is (1) to repeal their limitation and become self-embracing, or (2) to become capable of repealing their limitation, which is already to be self-embracing. But these would contradict their continuing character and are impermissible for them.[Note 7] That is why this is the paradox of self-amendment, not merely the paradox of self-limitation. Because continuing omnipotence and amendment power can only affect themselves in ways that neither limit nor augment themselves irrevocably, they are restricted to relatively trivial acts of self-amendment. For example, an AC of continuing omnipotence could rearrange and renumber the articles of the constitution, including itself, without affecting the extent of its power (see Section 12.C).

While continuing omnipotence cannot become self-embracing, the converse is not true. Self-embracing omnipotence can become continuing omnipotence and may even become "partipotence" or of merely finite power (see Section 11).

It may seem that the distinction between continuing and self-embracing omnipotence solves the paradox of self-amendment (and the paradox of omnipotence generally) straightaway. Either the power of an AC is continuing or self-embracing. If it is continuing, then it simply may not amend itself to limit or augment its power; and if is self-embracing, it simply may. However, I will argue in Section 11 that the paradox reappears on each side of the distinction even when we are careful to avoid equivocation and keep the two senses of omnipotence distinct.

C. Lawfulness of self-amendment

At this point it is well to note that self-amendment is undoubtedly lawful in the United States. The federal AC has never been amended, directly or indirectly (Appendix 1). It may have been amended in more unorthodox and unofficial ways, depending on what is counted as amendment (Part Two). But by contrast, 47 states have histories of unambiguous self-amendment at the constitutional level, and in many cases more than one instance (Appendix 2). In one case (New Mexico) self-amendment was the result of pressure from the federal government.

No state or federal court has explicitly upheld the permissibility of self-amendment, except in unfocused obiter dicta that simply state that any clause of a constitution may be amended, or that there are no implied limits on the amending power. No court faced the question directly because the constitutionality of self-amendment has never been challenged. Not a single act of self-amendment has been called contradictory or paradoxical, not by losing plaintiffs in court nor by scholars in journals (except by Alf Ross[Note 8]), and none has been struck down by any court for any reason. Many scholars have proposed and opposed self-amendment, but none of them has noticed a paradox or contradiction in the idea (Appendix 1). Opponents of certain proposed self-amendments either have not seen the apparently paradoxical nature of it, or have deliberately refrained from using it as a legal objection, despite their incentive to multiply arguments.

I interpret these signs as proof that self-amendment is legal by most tests of legality, and illegal by none; it is commonplace; and if it is also paradoxical, then the paradox is legally irrelevant. To anticipate my conclusion, I will argue that the logical case that self-amendment is paradoxical is strong and resists all obvious solutions; but I will conclude that law can absorb and tolerate even a real (unsolved and undissolved) logical paradox because law is what is accepted as law, not a logical system afflicted with entangling content.

D. Self-reference

Ross objects to self-applicability on a second ground. Self-applicability is impossible without self-reference; and self-reference, he believes, is always meaningless.

His primary argument against self-amendment is that it is self-contradictory. But that argument only applies to amendments that change the AC into a form inconsistent with the original form. Therefore, it does not forbid all self-amendment, but only all substantive or significant self-amendment. However, the argument from self-reference would apparently forbid all self-amendment.

A sentence such as the Liar's, "This very statement is false," appears to be true if false, and false if true. This paradox can be avoided if we can say it is neither true nor false. To call it meaningless is attractive for that reason. But is it meaningless? The words "this very statement" form the subject of the sentence, but Ross argues that they do not denote anything. They refer to the string of words "this very statement is false," but that referent itself refers to the string of words "this very sentence is false," and so on ad infinitum. When we try to fill the subject of the sentence with meaning we find that it is an infinite and incompleteable task.[Note 9]

Even though the string of words is an object of experience, and therefore an existing object fit for thought and, it seems, for meaningful reference, it violates a rule that Ross and others regard as a sine qua non of meaning: that the words describing the subject of the sentence be replaceable without loss by the name of their referent. "The third planet from the sun bears life" is meaningful under this rule because the words describing the

subject of the sentence may be replaced by the name "Earth" without loss of meaning or truth-value. Let us call the sentence "this very statement is false" by the name "TVSIF", its acronym. By substituting the name of the subject for its description we get "TVSIF is false". But within the name "TVSIF" there is a reference to TVSIF that should be replaceable by "TVSIF", giving us "TVSIF-IF is false". But the subject of the latter sentence also contains a description that should be replaceable by a name, giving us "TVSIF-IF-IF is false", and so on ad infinitum. The referent of these sentences is not a thing but an infinite path to a thing which eternally eludes determination. As Ross says, "one is never told what proposition is subject to the qualification of being false."[Note 10] In a miracle of conciseness Hart calls the resulting infinite regress an "asymptotic stutter."[Note 11]

We can certainly cavil with Ross's conclusion here. If "TVSIF" is a name, there is no reason to interpret its first three letters as another description requiring replacement by a name. But if we do, and meaning requires the subject of a sentence to be replaceable by a name (another contestable principle), then TVSIF is meaningless. The reason the very last sentence is meaningful, however, is that it refers irreflexively to meaning and to TVSIF, not directly to itself or solely to something (TVSIF) with no fixed name-replacement.

Hart argues that sentences which say, e.g. "Nothing in this section shall be amended, including this section" are meaningful, even by Ross's standard, because they refer to things other than themselves as well as to themselves.[Note 12] By referring to something other than itself, with respect to which the referential series is finite and terminating, the sentence has made itself something determinate as opposed to an asymptotic stutter; because it is determinate, it can be referred to by an auxiliary self-reference that will therefore have a determinate referent. Hart is clearly right on this. Ross cannot answer him, and when he tries to respond to critics who urge the meaningfulness and harmlessness of sentences such as "this sentence is in English", Ross's response is to modify his flat ban on self-reference until it forbids only those self-referential sentences without additional, completeable references.[Note 13]

Even if the ban on asymptotic stutters should stand, Ross's qualified prohibition no longer affects self-amendment and may be ignored for the purposes of this essay. If an AC explicitly said of itself that it could amend itself, that self-reference would be meaningful because the rest of the AC would consist of irreflexive references that would prevent the asymptotic stutter. This is true a fortiori when the AC is silent on self-applicability, and therefore contains no self-reference and is simply applied to itself. In this respect it is noteworthy that no AC I have ever seen explicitly addresses the permissibility of self-application. The only self-reference in ACs that could affect self-amendment is in entrenchment clauses (see Section 9). Other, harmless self-reference abounds, such as clauses on the lines of "this Constitution may be amended by...", "all amendments shall be parts of this Constitution for all intents and purposes...", "no convention called under this Article may be limited...", "no amendment to this Constitution shall be valid unless adopted pursuant to the procedures of this Article...."

Finally, of course, even if self-reference makes an AC meaningless, it may still be used in the adoption of valid amendments. If the self-reference in an AC made the AC meaningless, then it would prevent self-amendment as well as normal irreflexive amendment. One of the premises in the inference which results in amendment would say something like, "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution..." (Article V). By Ross's standards that may be meaningless, and therefore incapable of grounding the inference that results in amended law. But ACs are used for amendment and self-amendment all the time without regard to any self-reference in them.

Here again Ross is guilty of a priori reasoning about an empirical subject. As long as legislators and judges and citizens can find meaning in an AC, they will have found enough to permit amendment for the purposes of law. If courts never prevent or nullify amendments that rely on self-referential rules of change, which is the case, then the latter are undoubtedly legal, even if they shock the conscience of logicians.

In general, if we let courts determine what is lawful and let scholars and lay users of the language determine what is meaningful, then we should never face a conflict between them. Even when the scholars and folk agree that judicially validated language is meaningless (probably for different reasons), the courts are saying merely "but it is law."

Notes

1. This account is based on Ross's fullest exposition of the paradox, "Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24. See Section 1, note 17.

2. Inferences by modus ponens take the form, [(A B).A] B, or, in English, "if a conditional statement is true, and its antecedent is true, then its consequent is also true." Inferences by modus ponens are demonstrably valid. Therefore, when their premises are true, their conclusions must be true.

3. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, p. 146.

4. Quoted in Montaigne, "Apology for Raymond Sebond," The Complete Essays of Montaigne (Original 1580, 1588), trans. Donald M. Frame, Stanford University Press, 1958, at p. 393.

5. Richard II, Act IV, Scene 1, lines 203-210. David Hume uses a similar view of royal sovereignty as an analogy to the self-subversion of reason:

> Reason first appears in possession of the throne, prescribing laws, and imposing maxims, with an absolute sway and authority. Her enemy, therefore, is oblig'd to take shelter under her protection, and by making use of rational arguments to prove the fallaciousness and imbecility of reason, produces, in a manner, a patent under her hand and seal. This patent has at first an authority, proportion'd to the present and immediate authority of reason, from which it is deriv'd. But as it is suppos'd to be contradictory to reason, it gradually diminishes the force of that governing power, and its own at the same time; till at last they both vanish away into nothing, by a regular and just diminution.

David Hume, A Treatise of Human Nature (original 1739), ed. L.A. Selby-Bigge, Oxford University Press, 1888, pp. 186-87.

6. John Stuart Mill, On Liberty (Original 1859), Hackett Pub. Co., 1978, p. 121.

7. I owe this observation to Jaakko Hintikka, "Remarks on a Paradox," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 514-16 at p. 514.

8. See also John Hicks, "The Liar Paradox in Legal Reasoning," Cambridge Law Journal, 29 (1971) 275-91. Other scholars who argue that an AC cannot be used to limit its own power base arguments on policy grounds, not the specter of paradox. See e.g. Douglas Linder, "What in the Constitution Cannot Be Amended?" Arizona Law Review, 23 (1981) 717-33, passim and esp. at p. 733: "[A]rticle Five cannot be amended so as to create any new limitations on the amending power." Linder does not defend this proposition in its full generality, but only to the extent that "new limitations" take the form of entrenchment clauses (clauses that explicitly protect some legal rules from amendment). Linder assumes without argument (and, I will argue, wrongly) that entrenchment clauses imply self-entrenchment and that self-entrenchment clauses are immutable; from these premises he argues that entrenching the AC through self-amendment would make immutable rules that are undemocratic in a way which courts must act to prevent. See Sections 8 and 9.

9. Ross, op. cit. at pp. 7-17.

10. Ross, ibid., at p. 9.

11. H.L.A. Hart, "Self-Referring Laws," in Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet. P.A. Norstedt & Söner, 1964, pp. 307-16, at p. 310.

12. Hart, ibid., at p. 312.

13. Ross, op. cit., at pp. 13-17.

Section 6: The Inference and Acceptance Models of Legal Change

A. Weaknesses of the inference model cured by the acceptance model

Ross's statement of the paradox of self-amendment assumes that the process of legal change is well represented by logical inference. It is important to see that this inference model is just one model of legal change, perhaps the first that common sense would hit upon but also perhaps the least true to the phenomenon.

I will call Ross's model the inference model of legal change and validity. The inference model envisions legal change as a series of deductive inferences. An existing procedural rule for legal change is expressed as a conditional statement ("If A, then B," or "If a procedure is satisfied, then a rule is amended"). That conditional statement is made the first premise of the required inference. The fact of procedural satisfaction ("A is true," or "The procedure has been followed") is made the second premise. The validity of the new rule ("B is true," or "A rule is amended") follows as the conclusion.

> If A (procedure), then B (amendment).
> A (procedure).
> ---
> Therefore, B (amendment).

The inference model has the virtue of capturing our sense that law is logical, or at least that it ought to be, that procedures produce outcomes through a structure of rules, and that a violation at any stage would either fail to produce the same outcome or would do so improperly, with a wink, despite the rules. The limitation of the inference model is that it makes legal change exclusively a matter of rule-governed inference, and ignores the legal realities of historical accident, retroactive justification, informal custom, pressure, politics, ideology, inconsistency, and winks. One of the most famous statements of American jurisprudence is on point.[Note 1]

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions or public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Ross does not defend the adequacy of the inference model; he presupposes it. Indeed, one might say he regards the right of logic to rule and overrule law as an a priori truth. Of course, if one held such a view, no empirical inquiry into legal practices would change one's mind.

Under the inference model the legal validity of a newly changed rule of law derives its authority from the logical validity of the inference (process) that brought it into being. The inference is demonstrably, necessarily, and eternally invalid if the conclusion contradicts a premise (when the premises are consistent with one another). And it seems this will always be the case when an AC changes itself into a form inconsistent with its original form. If so, then Ross is correct to find necessary contradiction in (substantial) self-amendment under the inference model. Unfortunately, he questioned neither the inference model itself, nor the proposition that logical impossibility implies legal impossibility.

If the paradox is real for the inference model, then it must be recognized by any inquirer or discipline that uses formal logic as a standard. While many philosophers have tried to dissolve the paradox even for the inference model, I would like to put those objections aside for a moment (until Sections 10 and 11) in order to introduce the question of the adequacy of the inference model itself, as a model of legal change.

If the legal validity of a newly amended rule of law depends on the logical validity of the deductive inference that models its adoption, then let us concede to Ross (for the time being) that self-amendment is paradoxical and unlawful. But if the validity of new law arises from another source, then the inconsistency of the new law with the old rule of change would no longer be an obstacle. Similarly, if the source of authority could tolerate contradiction, then self-amendment could occur without obstacle. Hart provides a model of law in which this is the case; I will call it the acceptance model.

The acceptance model is more difficult to state than the inference model because it posits a more complex explanation than a logical form (see Section 7). Essentially the acceptance model locates the authority of all law, including newly changed law, ultimately in the acceptance of the people governed by it, and in the practice and usage of the officials of the system. The acceptance model comes very close to a traditional consent theory of law, but it differs from it in several significant ways. The acceptance model requires a much less explicit form of assent than the consent theory and has fewer contractarian overtones. This is because it requires no mutual advantage for the parties, and because acceptance exists even when people are ignorant or indifferent to the laws that govern them. And at least in Hart's version, the acceptance theory is intended to explain authority descriptively rather than prescriptively, or to explain legality, not legitimacy.

An acceptance theory may appeal to acceptance directly for every rule of the system, or only for a few ultimate rules that in turn validate the rest. Hart is often taken to have said the latter. This view has Hart adopt an inference model for all legal rules except the ultimate rule of recognition.[Note 2] Hart's actual position is not so simple.

The formalist theory that legal rules are validated only by other legal rules requires either an infinite regress, an exceptional rule that is validated either by itself or by an extra-legal source of authority such as acceptance. On the simpler reading of Hart, he has chosen the latter path (validation by an extra-legal source of authority), and to that extent differs from Ross only on the permissibility of exceptions and on the authority of the ultimate rule of recognition. But in fact Hart does not adhere to a one-exception inference model of legal change. First, he denies that the rule of recognition is the only rule authorized directly by acceptance, and he gives other examples. For instance, the holdings, and even the jurisdictional basis, of some cases of first impression, and cases in which judges must exercise discretion are not validated by prior law but only (and contingently) by the acceptance they inspire. On this point Hart says,[Note 3]

> The truth may be that, when courts settle previously unenvisioned questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success....[I]t will often in retrospect be said, and may genuinely appear, that there always was an 'inherent' power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done....Here the power acquires authority ex post facto from success....The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look more tidy than it really is.

If acceptance is an authority for law, and if it is a fact of social practice more than normative ideality, then it may be created in a society in the wake of a judicial ruling; hence it may come on the scene after the law it authorizes and have its effect retroactively.[Note 4]

Similarly, Hart continues, judges in the United States with powers of judicial review accept certain standards limiting their discretion to nullify statutes, but these standards exist only in judicial usage and are validated only by acceptance.[Note 5]

It is vital to an acceptance theory whether acceptance authorizes only one rule (the rule of recognition) or can authorize any rule. Hart holds the latter, although commentators who disregard the quoted passage have read him the other way. To avoid exegetical quarrels, however, I will call the acceptance theory I will most often contrast with Ross's inference model the direct acceptance theory. It holds that acceptance can authorize any rule of law directly, even if it rarely does so. Acceptance does not authorize only some master rule that validates other laws indirectly. Of course, for the purposes of this essay, it does not matter whether we agree or disagree that Hart himself held the direct acceptance theory. However I will use Hart's discussion of acceptance to show what issues must be raised in making such a theory comprehensive and plausible, since no other acceptance theorist has done nearly so thorough or thoughtful a job.

The rule of recognition does not determine law with the certainty and finality of logical rules. That sort of formalism is repugnant to Hart's entire theory.[Note 6] The open texture or partial indeterminacy of legal rules means that "subsumption and the drawing of a syllogistic conclusion no longer characterize the nerve of the reasoning involved in determining what is the right thing [for a court] to do."[Note 7] In his later essay Hart directly addressed Ross's view that legal change is transacted by logical inferences, and replied,[Note 8]

> To this it might be objected that the exercise of legislative powers to introduce new norms is not a deductive inference and it is not clear how this logical principle applies to a legislative act.

However, while Hart clearly intended acceptance to validate more than just the ultimate rule of recognition, he also intended that most rules be validated by conformity to the rules of recognition. The direct acceptance theory allows the acceptance of the people and the practice and usage of the officials to validate any rule not otherwise validated by the rule of recognition, and to invalidate any rule otherwise validated by the rule of recognition. Because acceptance is logically prior to any positive law, in conflicts between informal acceptance and formal recognition acceptance overrules, or at least amends, the rule of recognition. This supplements Hart's position insofar as he did not address the problem of conflicts between actual acceptance and literal recognition.

There are defects in any inference model that admits no exceptions for self-validating rules or some alegal source of authority such as acceptance. The inference model allows formal logic to rule law, and to invalidate whatever fails the criteria of logical validity even while satisfying the courts, the people, and all legal criteria of legal validity. This is one of its most salient weaknesses. By contrast the acceptance model makes the conformity of law to logic contingent for each legal system at each moment; certainly the people and officials can accept a legal act that can only be described with self-contradiction, such as self-amendment, even if they will not accept other types of contradiction such as simultaneously binding inconsistent commands (see Section 21.B).

The inference model conceives legal rules to be, as far as possible, as clean and determinate, and as immune to fading away and shading off as the rules of mathematics. Legal rules do differ from mathematical rules, in their origin at certain moments in time by human will, their mutability according to certain procedures and human will, and the spatial limitations on their validity. Sometimes reading Ross one detects a note of wistful regret that legal rules have material content and sully themselves with the complexities, contingencies, and uncertainties of human life. But once enacted, they have single meanings, even if judges fail to discover them, and they cannot validly contradict any other valid law in any way without one of them giving way according to the canons of interpretation and rules of implied repeal. The formal rules of formal deductive inference apply absolutely to all legal rules; whatever can be validly inferred from a valid law is valid law; whatever cannot be validly inferred from any valid law or laws cannot become valid law.

This leads to one of the most radical absurdities of the exceptionless inference model. All change of law would be unlawful. Assuming we had a body of valid law to begin with, we could make no new law nor amend any existing law except by inference from the premises already embodied in

law. All rules deducible from those premises would already be law, although perhaps tacitly, and no rules not so deducible could be made law. New enactments could only make explicit that which was already law implicitly. If a proposed rule were not a strict implication of existing rules, then it could not be inferred from them and therefore could not be enacted. From any initial position, therefore, all possible law is already actual, even if we do not know it yet, just as "Socrates is mortal" is already implied when we have asserted "All humans are mortal" and "Socrates is human".

But this absurdity will be avoided by a strict inference model —in the name of a greater absurdity. Law is only changeless if there is law. But a strict inference model implies that there is no law. If legal validity requires that a law be the conclusion of a valid inference in which the premises are already existing valid laws, then we may say more briefly that every valid law is derived from prior valid law. We can take what appears to be present law and locate its authorizing antecedents, but those antecedents are only valid if they have their own valid premises, and so on in an infinite regress. If we allow no exceptions in the inference model, then no rule in the history of authority can be self-validating or validated by an alegal source. The only alternative is an infinite regress of authorities; every valid law requires an infinite genealogy. But no law has an infinite genealogy. Therefore there is no valid law.

The exceptionless inference model must say either that there is no law, or if there is, that it is all immutable. It is no accident that this is what systems of formal logic must say about logical theorems, for Ross reduces legal validity to logical validity. If every step of every inference must be concluded from premises in a prior inference, then we cannot begin with axioms because they have no antecedent authority. Hence we fall into an infinite regress. But if we do begin with axioms, then once the rules of inference are specified, all permissible conclusions are instantly determined, even if human beings never finish discovering what they are.

We may avoid these absurdities only by admitting exceptions in the inference model as applied to law. These may take the form of self-validation, which Ross directly opposes, or an alegal and alogical source of authority, such as acceptance, for at least some rules, which he indirectly opposes.

Note that the alegal source of authority can be many things other than acceptance, such as moral law, military might, or divine command. But it cannot be logic. Ross and the legal formalists represent a new form of natural law theory: one that rests the validity of civic or positive law on logical law rather than moral law. But if formal logic is the alegal source of authority for law, then we encounter the dilemma that laws are only as valid as their premises, and these either recede infinitely or toward some exceptional premise that is self-validating or validated outside the logical and legal systems. This dilemma does not confront the moral version of natural law theory, or an acceptance theory, because these do not make legal validity depend on the logical validity of an inference; hence the pedigree of premises may stop at any point. Natural law theorists and others may nevertheless fall into the trap by searching for the authority of fundamental laws as if for premises of conclusions; but they need not do this. They may say that legal validity comes from moral law, period, or from acceptance, period. If they defend this claim with premises, they will confront the age-old epistemological dilemma of circularity versus infinite regress, but this affects only their theory, like any theory, not the phenomenon of legal validity itself.

The acceptance model does not allow logical rules to interfere with processes determined by legal rules and supervised by mortal judges. Whatever legislators and the people make in the way of new law is new law, if it satisfies the mortal judges and the people themselves; whatever is not regarded by anyone as valid law is not valid law even if it follows infallibly from rules that are accepted as valid law.[Note 9] New law must conform to the rules of making new law, but this conformity is not determined in ideality by logicians reducing the rules to some core of univocal purity. It is determined by judges using a complex web of non-formal methods. While judges try to follow both prior law and their own notions of eternal logic, their errors are as authoritative as their other decisions, unless some other judges overturn them or acceptance wanes through neglect or disobedience.

The inference model blurs the distinction between logic and law, while the acceptance model blurs the distinction between law and history. The inference model subtly identifies logical and with legal validity, or contradiction and illegality, while the acceptance model subtly identifies de jure and de facto validity, or legality and acceptance.

B. Ross's solution: the invisible, immutable amendment clause

Ross concludes that the contradiction of self-amendment means that valid amendments to ACs cannot derive their authority from the ACs themselves. Either they are merely accepted, which to Ross is to be legally unauthorized and invalid, or they derive their authority from a tacit rule transcending the constitution posited to validate precisely such changes. Logically Ross has no grounds to choose between these options, but he prefers the second, as if acknowledging that amendments to ACs do occur (which he never explicitly admits) and must be explained. Hence, attempts to amend an AC are not invalid exercises in futility, but neither when they succeed are they cases of self-amendment. Amendments to ACs derive their authority from a tacit rule, transcending the legal system, which states that the AC may be used to create its own successor, but that the successor is made valid only by the tacit, transcendent rule. This is a rudimentary theory of types. The highest positively enacted rule of change in the system is evidently mutable, but logically it cannot change itself or be changed by any other positive rule of change. Hence it cannot really be supreme and must have a tacit superior. The tacit rule of change might be called a tertiary and the constitutional AC a secondary rule, but of course Ross does not use these terms.

The positing of higher levels could go on forever in principle except that Ross sees no need to think of the transcendent rule at the first tacit level (the tertiary rule) as mutable. If it were mutable we would have to go to the second tacit level (to a quaternary rule) to find the authority for changing the tertiary. But if the first tacit rule is immutable, then the tacit series stops with only one transcendent rule, necessarily immutable, and conveniently "discovered" transcending every mutable constitutional AC.

In short, Ross avoids infinite regress by an arbitrary halt at the first tacit level above the constitution, and he avoids self-amendment through the theory of types and an immutable rule. Ross even gives us the content of the tacit, immutable rule:[Note 10]

> Obey the authority instituted by [the express AC], until this authority itself points out a successor; then obey this authority, until itself points out a successor; and so on indefinitely.

It follows that ACs can be amended only if they are not actually supreme, and then they can be amended only by superiors. Therefore, the supreme rule of change will always be immutable. Actual constitutional ACs are not supreme, but inferior to the tacit transcendent rule of change that he has discovered.

Why should we believe that this tacit rule exists as a legal rule in every legal system? The only reason is to make amendments to ACs lawful without resort to self-application, which Ross thinks is resort to self-contradiction. Avoiding contradiction may be a good reason to make a law, but not a good reason to think such a law already exists. It is no more a good reason than, as Bentham said, "hunger is bread".[Note 11] The logician may discover gaps and inconsistencies, but only judges and legislators can cure them, and will only do so if they care to.

Ross's fundamental principle is "that from the validity of a norm it is impossible to derive the validity of any norm in conflict with [it]."[Note 12] This principle is obviously taken from logic, not law. It implies that a norm or rule cannot authorize its own change into a form inconsistent with its original form, for any such substantive self-amendment would comprise the derivation of a conflicting norm from a valid norm. Ross's first principle, then, precludes the possibility of substantial self-amendment a priori.

He does not justify the principle except as a principle of logic, in which guise it is unassailable. If the richness and historical contingency of the world of law does contain rules that permit the derivation of conflicting rules, then Ross has adopted a principle that prevents him from seeing that fact and that actually requires him to deny it. He is guilty of the arrogance of a priori thinking about an empirical subject. There are no errors in his reasoning, only in his choice of premises, and in his presumption that what logic forbids, law must forbid. If the existing legal rules seem to permit what logic forbids, then the philosopher or logician is within her rights to complain and to suggest what seem to her to be improvements. But if she is bent on explanation, then the makeshift of a tacit, transcendent, immutable rule, universal across all systems, authorizing exactly what must be authorized, is comical and unscientific, blind to the legal concept of legal validity.

C. Solutions from the model of direct acceptance

The newly changed AC need not derive its authority from the old AC or a tacit, transcendent, immutable, universal rule. It may, for example, derive its authority from the acceptance and usage of the people. An analogy may clarify this possibility. Contracts often contain the equivalents of ACs, and often contain no-revocation clauses. The parties to a contract may amend the contract's AC or revoke and replace the no-revocation clause, without paradox, because the new clause derives its authority not from the old clause but from the agreement of the parties to supersede the old and abide by the new. This is possible because the agreement of the parties is the source of the contract's authority[Note 13] and supersedes the particular written provisions. Similarly, a constitutional AC may derive its authority from a source outside the legal system such as the acceptance of the people if (under the acceptance theory) that acceptance is a genuinely higher or more encompassing authority. Hart argues that it is and must be. An AC derives its authority from the constitution of which it is a part, which leads us to the ultimate question of the authority of the constitution. Just as parties to a contract supersede the old by appeal to their own will, not to their old words, so the people of a society might supersede their old AC by appeal to their own will, not to their old words.

But note what has happened here. If acceptance is an authority external to the constitution and system of positive law, and if a change of ACs is authorized by acceptance, then the new AC may contradict the old AC but it will not contradict the authority that makes it law. Even according to Ross, the contradiction is only fatal when the authority for the amendment is the old AC, and when the conclusion of the inference that is supposed to make new law is the inconsistent new AC. Ross's inference model would not recognize acceptance as a source of authority; but if we do so, and then apply the most rigorous logical standards, no logical scruple will force us to say that the contradiction in self-amendment prevents its legality. For either acceptance prevents the need for self-amendment and hence contradiction, or else it validates self-amendment, contradiction and all.

The acceptance theory, then, provides two solutions to the paradox of self-amendment:

1. If an AC is changed by self-amendment, then a contradiction in the process (even if Ross is right that it is there) would not invalidate the result if the result is accepted by the people and officials, for acceptance and not formal logic is the final arbiter of legality.
2. If an AC is changed without appeal to itself as a rule of change, then no self-amendment occurs, and no contradiction; such amendment without self-application can be validated directly by acceptance.

Under the former solution, the old AC is the authority for the new AC and under the second solution the new AC is directly authorized by acceptance. In both cases we may admit with Ross that the new AC formally contradicts the old AC. Under the second solution this contradiction is irrelevant, because the new AC does not contradict the authority by which it is law. But under the first solution, the new law does really contradict the authority by which it is law; but this contradiction has no power to nullify the new law because the new law is accepted and the contradiction tolerated or overlooked.

Of these I prefer the first, although there is no need to choose. However, I will argue that strict self-amendment is permissible in any case, even if Ross's contradiction is ineliminable.

The two solutions are compatible, and may be invoked alternately as circumstances require. If an AC is amended by appeal to its own procedures, then even if this creates a contradiction, it may nevertheless create a valid new AC, if the necessary acceptance is obtained. On the other hand, if the AC is amended by procedures that it does not itself specify, the same conclusion follows: if accepted, the product can be valid law, although it would not in that case be self-amendment. If an AC is followed, self-amendment has occurred and the contradiction is overruled by acceptance; if the AC is not followed, self-amendment has not occurred and the new AC would be unauthorized unless directly authorized by acceptance.

As a matter of fact, the people and officials are much less likely to accept an amendment of an AC that did not follow the AC's procedures. This is a fact about law only because it is a fact about acceptance, not because it is a fact about logic. Even Ross admits that an amendment to an AC that did not follow the AC's own procedures would not usually be accepted, although he denies that acceptance can confer validity. Ross admits this because he attributes to ordinary citizens the belief that an AC may be amended by its own procedures and, if the AC is to be amended at all, that it must follow its own procedures. Then he chastises the ordinary citizen for the contradiction latent in this belief.[Note 14] According to Ross, if we want to amend an AC, then applying the AC to itself in self-amendment is a necessary condition of doing so plausibly or acceptably, but it is a sufficient condition of doing so invalidly or illegally.

ACs and other rules of change may as well be thought self-applicable for the acceptance model. The legal validity of self-application is to be judged by the acceptance it inspires, not the contradictions it entails. An indissoluble contradiction is powerless to nullify a legal act in the face of sufficient acceptance. The paradox of self-amendment exists only for the inference model, or some other concept of law that allows logical tests to overcome legal and social tests of legal validity. If the paradox of self-amendment exists only for the inference model, then changing models will dissolve the paradox, at least for law. The paradox of self-amendment has forced us to choose between fundamental philosophies of law.

The acceptance model is just one alternative. A second alternative, developed to a degree in Section 10, may be called the procedural model. The procedural model allows the outcomes of any valid procedure to be valid law even if there is a formal contradiction between the outcome and the antecedents of the procedure. The direct acceptance theory, however, is sufficient to escape Ross's paradox, and in Hart's version of it sufficiently complex to take up our time. But by acknowledging that other models may exist and suffice, we must be careful to avoid affirming the truth of the direct acceptance theory just because it circumvents the conditions of the self-amendment paradox, although we are clearly entitled to deny Ross's inference model because it fails to do so. For the merits of the direct acceptance theory, beyond the demerits of the inference model and the paradox of self-amendment, see Section 21.D. What follows is a slightly more complete account of Hart's acceptance theory, long enough to show its weak points, but short enough to prevent our being diverted from the main track of our discussion.

Notes

1. Oliver Wendell Holmes, Jr., The Common Law, Little, Brown, and Co., 1881, p. 1.

2. There is some support for this view of Hart's theory in his The Concept of Law, Oxford University Press, 1961, pp. 92, 93, 97, l06, 205, and 229. One of the most formalistic statements of Hart's theory is to be found in John M. Farago, "Judicial Cybernetics: The Effect of Self-Reference on Dworkin's Rights Thesis," Valparaiso University Law Review, 14 (1980) 371-425, at p. 377-78.n.3:

> We might view Hart's model as an instrumental application of deductive logic to jurisprudence... Thus, the rule of recognition provides a single undefined assumption, against which we can evaluate the various axioms (rules) of our system. Propositions of law are demonstrably true (or false) by application of the rule of recognition and the primary and secondary rules. The rule of recognition itself provides a recursive rule for determining whether any given proposition is a theorem of the system.

3. Hart, op. cit., at pp. 149-50 (emphases in original).

4. Joseph Raz prevents an infinite regress of authorities with a similar theory. Arguing more against Kelsen than Ross, Raz says,

> The authors of the first constitution [or the constitution without a prior authority] have legislative power, which is not given to them by law, to make the first constitution. The first constitution is law because it belongs to an efficacious legal system (a fact which cannot be determined until some time after the constitution is first issued)....[L]aws can indirectly authorize their own creation.

Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System, Oxford University Press, 1980, at p. 138; emphases added.

5. Hart, ibid., at p. 142. See also Stoliker v. Waite, 101 N.W.2d 299, 305 (1960) in which the Michigan Supreme Court said that the obstacle in the state AC to rapid and easy amendment is "secure from judicial profanation, though its security is measured only by the tradition of the law, our sense of self-restraint."

6. Hart, ibid., at pp. 121-50.

7. Hart, ibid., at p. 124.

8. Hart, "Self-Referring Laws," Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet. P.A. Norstedt & Söner, 1964, pp. 307-16, at p. 315.

9. This claim amounts to saying that inferences by modus tollens are not generally valid in law; it is defended at greater length in Section 21.B.

10. Alf Ross, "Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24, at p. 24.

11. Jeremy Bentham, Anarchical Fallacies, in Bowring ed. of his Works, vol. 2, pp. 501. See also his Pannomial Fragments, vol. 3, p. 221. Quoted by H.L.A. Hart in "1776-1976: Law in the Perspective of Philosophy," in his Essays in Jurisprudence and Philosophy, Oxford University Press, 1983, pp. 145-58 at p. 147.

12. Ross, ibid., at p. 21.

13. We may regard this agreement as a sufficient authority by itself or as an authority only by virtue of a rule of public law that gives agreement this status. Some of the difficulties of the latter position are discussed in Sections 7 and 20.

14. Ross, ibid., at p. 6.

Section 7: Hart's Theory of Acceptance

A. Salient points from Hart's text

Hart's theory of acceptance is complex. He can banish the specter of Ross's paradox only if he succeeds in arguing that acceptance and usage can confer legal status on new rules of change. This is equivalent to arguing that not all legal change occurs through inference-like transfers of authority from prior norms, or that the people and officials of a legal system can accept as law a self-amended AC that contradicts its predecessor. Hart undoubtedly urged his acceptance theory for different programmatic reasons than to make possible the legal change of the rules of change. But that he urged the theory at all allows him, within a systematic philosophy of law, to answer Ross and provide an alternative to immutability and paradox.

This is not the place to assess every aspect of Hart's complex theory. But we should ask exactly what acceptance is. Hart defines acceptance primarily via negativa or by denying its identity with similar phenomena. One of Hart's first concerns in The Concept of Law is to show the inadequacy of John Austin's theory that laws are commands or coercive orders backed by threats given by a person or body whom the populace habitually obeys. Hart rejects almost every element of this theory, and therefore is careful to avoid identifying acceptance with habitual obedience or mere convergence of behavior (54ff, 73).[Note 1]

He is equally concerned to distinguish his theory from the natural law tradition that makes the final validity of positive law depend on its conformity to moral law. Hence acceptance is not normative in the moral sense. It is independent of consent (168). It is normative only in that it reflects an attitude —called the "internal" point of view— that conduct is prescribed by rule rather than accidentally convergent. It avoids the descriptive position that looks only to public force, private feelings of obligation or compulsion (56, 85-86), and psychology (136), as well as the "external" point of view that sees rules as binding only on some other group that accepts them. It is not acceptance of a moral ideal, but only of legal authority (98, 198-99).

Moreover, acceptance must differ from custom because, in Hart's theory, custom has no law-making effect until and unless it is itself recognized or accepted as law (44f, 98). Acceptance may be comprised, at least in part, of social pressure or expectation to conform (56, 84, 85, 165). But social pressure and expectation cannot be the whole story or else the distinction between law and morality would be blurred (165ff). Hart is proud of the fact that acceptance and usage, while they are distinct from habit, convergence of behavior, moral approval, custom, feelings, and mere social pressure, are nevertheless matters of fact, not of metaphysics or mystery (62, 101, 107).

Acceptance validates or authorizes the ultimate rule of recognition (92, 93, 97, 106, 205, 229). The rule of recognition is accepted as common, shared, or communal to all members of the society, even if obedience is "each for his own part" (112-113). Acceptance also validates some other types of law, such as standards of judicial review (142), cases of first impression and other judge-made rules (149-50). These examples show that Hart's acceptance model does not require the authority of a law always to precede the law in time (see Section 6.C). Acceptance can, but need not, catch up with acts that precede or exceed their authority. Even when acceptance bypasses or overrules the rule of recognition, it makes law, not merely an excuse for putting up with illegality or a climate that makes any inquiry into legality futile.

In primitive legal systems without secondary rules acceptance directly validates or authorizes all law (230). In international law, where there are some secondary rules but, Hart says, no general rule of recognition, he is less sure (230-31). However a "transition towards acceptance" is possible in international law today (231). If any rule of international law applies to a nation that does not assent to it (for example, by treaty), then international law must have a rule of recognition that so held; but Hart doubts that any rule binds nations without their assent and therefore doubts that there are any international legal rules that acceptance could validate even in the absence of a rule of recognition (230-31).

However, he says that treaties bind only because rules external to the treaties say they bind (219, 231); he applies the same principle to contracts (42, 220). I will call this the irreflexive view of treaties and contracts, as opposed to the reflexive view that they bind ex proprio vigore or by their own strength. Hart's assertion of the irreflexive view would be vitiated if he believed that the external rule that validated treaties could be brought into effect merely by the agreement of the parties to a treaty. Yet he does not say whether it is validated by acceptance, a rule of recognition, or something else. The problem of reflexive and irreflexive validation will not go away and will be considered at greater length below.

When accepted, the rule of recognition is made law, not merely an assumption, postulate, or hypothesis (105) and not merely a "pre-legal" or "meta-legal" rule, or mere "political fact" (108). Acceptance, therefore, does more than support law by assuring compliance and preventing revolt; it makes or defines law. Legal rules bind if and only if they are accepted as binding (226, 230).

The rule of recognition is "fact" (107, 108) in that it exists only in the actual practice of officials (105, 106). The law made or defined by acceptance is not a brooding omnipresence, a prediction of future judicial behavior, or a formal ideality: it is fact and practice, an observable social reality. The rule of recognition is usually tacit (98) and is ascertainable only by empirical observation of the practice of officials of the system (98).

Incidentally, Hart does not address the question whether the ultimate rule of recognition is law only because it is accepted, or whether it also recognizes itself in self-application (but see 104, 108). But while the rule of recognition is law, it is the only law that cannot be called valid or invalid; it is "simply accepted as appropriate for use" (105, see 106). In context Hart implies that it cannot be valid because it cannot be said to conform in the usual way to the criterion of validity, which is itself, the rule of recognition. To use his analogy, we could say that the standard meter bar in Paris is one meter long by its own standard; nevertheless, we know it is a meter, not from self-application, but from agreement or acceptance to

consider it a meter (106). The rule of recognition, then, is law only by acceptance, it seems, and not also by self-application. Acceptance itself, however, is not law but only the authority for law. Whether acceptance is the proper or "authoritative" authority for law only because it is accepted, in self-application, that is, whether we should take a reflexive or irreflexive view of acceptance itself will be discussed below (Section 7.B).

Sometimes Hart suggests that acceptance in the sense intended is performed only by the officials of the system (106, 107, 108, 111, 113, 114, 118), sometimes by ordinary citizens (114, 121, 142), and sometimes he insists that citizens and officials are both needed (59, 98). Once he says that the practice of a "social group" suffices (106).

To the extent that citizen participation is necessary, we must distinguish citizen acceptance from obedience. Obedience is at least necessary (113, 197), and possibly sufficient (111). Citizens contribute to acceptance primarily through "acquiescence" while officials contribute primarily by explicit acknowledgement of rules as law (59-60), doing their jobs (59-60), appealing to the tacit rule of recognition (99), and by using the law from the "internal" standpoint (99). At the same time, acceptance defines the internal standpoint (86, 99, 135), and the internal standpoint defines acceptance. Both citizens and officials display their internal standpoint or acceptance by accepting not merely individual legal rules, but rules that commit one in advance to accept future rules (229, 230). Citizens display acceptance by "acting in a certain way" (136) and justifying their action by citing rules and criticizing departures (136). Hart sometimes speaks as if acceptance of a rule of recognition can be displayed by "the general operation of the system" (105).

In any event, the acceptance given must be voluntary (197, 198), even if it is induced by attitudes that are indirect products of law itself (172, 196, 199). It is the voluntariness of acceptance that creates authority, not just another social fact (196). Acceptance of law is not morally obligatory (198).

Certainly citizens need not consent to the criterion of legal validity embodied in the rule of recognition, nor need they even agree among themselves on what it is. To require anything as express or deliberate as consent or knowledge is the "opposite error" from Austin's requirement that citizens habitually obey (111). Acceptance by officials presupposes some understanding (59), but citizen acceptance or obedience must be conceived consistently with the "realistic" fact that citizens are normally "passive" participants in the legal system, and frequently do not even know what the law is (47, 60, 110-11, 114).[Note 2] This shows how far Hart's acceptance theory is from a classical consent theory of law, and shows his intent to explain legality, not legitimacy.

Hart leaves somewhat unclear exactly what function he believes acceptance serves in a legal system. It may indicate that rules exist, that they are valid, that they are efficacious, or that they form a system. As noted, acceptance clearly makes the rule of recognition law, but not "valid" law. Acceptance at least indicates a rule's existence (57, 142); widespread disobedience can indicate non-acceptance and hence, non-existence (142). For ordinary rules, existence and validity are probably not to be distinguished under the acceptance theory, at least if the rules exist only in the practice or usage of the people (106). But the efficacy and the validity of rules are distinct, unless the rule of recognition includes a rule of desuetude (100). But normal inefficacy does not suggest lack of acceptance, and therefore does not imply invalidity (100-01). However, "general disregard" may imply invalidity regardless of the presence or absence of a rule of desuetude, because it may imply lack of acceptance (100-01, 142; cf. 114f). Similarly, validity does not imply efficacy, even if it implies general acceptance (100).

Acceptance at least functions to unify a set of rules into a system (59, 90, 91, 93, 106, 113, 118, 228f), but the acceptance need not extend either to consensus among the members of the requisite group of people nor to consensus on all the rules and criteria of validity of the unified system (118-19). Not only is unanimity unnecessary, but the acceptance may be tacit rather than express, inferred from usage and practice (99, 106, 107) and acquiescence (60). Some practices constitute explicit acceptance (59). To achieve its law-making or recognizing effect, practice need only be "general" (98) or "normally concordant" (107), and the standards "unified or shared" (111). However, disunity may reach a point at which the system becomes "pathological" and one may question whether it still exists or is still the same system (100, 114-20, 141).

The fundamental role of acceptance, and the participation of citizens in it, does not imply for Hart that "the people" are sovereign, even in their capacity as electors in a democratic system (70-76). Sovereigns are constituted by rules that are validated by acceptance; they are not the makers of those rules (75, 218). But whether acceptance is the officials' or the people's, active or passive, tacit or express, attitudinal or behavioral, knowing or ignorant, widespread or pathologically scarce, it must be "effective" (113). Effectiveness requires majority acceptance but not unanimity (89, 226). The effectiveness of acceptance is a generally undefined, probably a conclusory, term in Hart's work.

B. Hartian acceptance self-applied

One of the weaknesses of the inference model is that it cannot deal with the circularity and inconsistency of some legal processes. It must declare them invalid even when accepted by the people and the courts. The acceptance theory can cope with the self-contradiction and circularity of self-amendment, but it eventually becomes enmeshed in a circle concerning its own authority to authorize rules and practices. Is acceptance the proper source of authority only because it is accepted as such? Here I will ignore weaknesses of the acceptance theory not relating to the self-application of acceptance (but see Section 21.D).

Hart gets into this circle by his theory that official practice discloses (otherwise tacit) rules that state that such practice is lawful in that system. I will call this view the normative practice doctrine. If officials appeal to acceptance, then by the normative practice doctrine that appeal to acceptance hides a rule authorizing the appeal to acceptance. If officials appeal to acceptance, and not merely to rules authorized by acceptance, then Hart is bound to this circularity. Acceptance, which was supposed to ground the legal system alegally, and sit inertly outside the entanglements of rules, is caught up by the normative practice doctrine in a rule-bound web of self-justification. What was supposed to be social and historical, not rule-like, becomes rule-like under the normative practice doctrine.

As we will see, there is a sense in which officials for Hart do appeal to acceptance, not merely to rules authorized by acceptance; there is also a sense in which Hartian acceptance is circularly justified even if officials do not appeal to acceptance.

Is there a rule holding that what is accepted and used as law thereby is law? (1) If there is such a rule, then its authority may be questioned, and Hart may want to find its authority in acceptance. In that case acceptance would justify the rule that justified acceptance, which might be fatally circular. If there is such a rule but its authority does not lie in acceptance, then the acceptance model does not explain that rule and therefore does not explain the ultimate source of legal authority. (2) But if there were no such rule, then either acceptance is not justified in authorizing law, or else it justifies itself without a mediating rule. Moreover, it would be untrue, Hart notwithstanding, that a genuine rule of recognition could be inferred from the practice of officials in deciding what is law.

If there is a rule to the effect that what is accepted as law is law,[Note 3] then in Hart's terms such a rule would be a secondary rule of recognition —the type of ultimate rule that is only validated or authorized by acceptance. Hart says we can tell what the rule of recognition is in a society by the empirical means of looking and seeing how officials identify valid rules (98, 106, 107).[Note 4] If acceptance in the appropriately complex sense is the criterion of validity in a society, at least for ultimate rules, which Hart believes is the case, then empirical investigation should reveal the fact, and by Hart's terms we must call it a rule of recognition for recognizing the other rules of recognition.

But abandoning the normative practice doctrine would not allow Hart to preserve his empirical approach to law, that wants to identify tacit rules by observing practice. Without it, tacit rules might only be discerned as Ross came upon his tacit, transcendent, immutable, and universal rule: by a priori speculation on what is needed to make sense of what happens, without regard for what people and courts accept as making sense.

Another way to avoid the circularity would be to distinguish two species of acceptance. The first is the complex sort actually articulated by Hart which is used to authorize the rule of recognition. The second, simpler type could authorize the former type through passive toleration and acquiescence. This remedy looks suspiciously like meaningless hairsplitting, inventing a distinction without a difference just to avoid a circularity. It might commit us, as well, to an infinite regress of species of acceptance in which each new one is invoked to rescue its predecessor from circular justification.

Or the circularity might be acknowledged and defended. It is not vicious. Hart's theory is not circular; it is an irreflexive theory of a circular or reflexive phenomenon. As such any charge of fallacy on account of that circularity will beg the question of the nature of the explanandum: for acceptance might truly be authoritative only because it is accepted as authoritative.

The statement that acceptance is the ultimate criterion of legality because it is accepted as such, or because it authorizes a rule that authorizes it, is in content simply an expansion of Hart's statement that the ultimate rule of recognition is the ultimate criterion of validity about which it is irrelevant to speak of validity and invalidity (105). If we accept this formulation, then the circularity is as harmless as that in the statement (also arguably to be found in Hart at 45) that customary law is law because it has customarily been law.

One might object that acceptance is not law, and therefore need not be authorized, at least not by a rule for recognizing law such as a rule of recognition. This objection may be sound jurisprudence, but it ignores the fact that acceptance is the rule of recognition for the other rules of recognition, according to Hart's normative practice doctrine.

We can avoid the self-authorization of acceptance without abandoning the normative practice doctrine by two minor and plausible moves that Hart could well endorse. First, we must explicitly state that acceptance is not law. Second, we must modify the normative practice doctrine to hold that rules of recognition may be inferred from the various practices of officials in deciding what is law except for their practice in deciding what the rule of recognition is (that is, in deciding how to decide what is law). The second move is the important one. Even if plausible, it might well weaken the theory, not strengthen it, for it would leave acceptance unjustified, on a par with a thousand and one social phenomena that neither authorize law nor receive authority from law. Those who are happy that Hart made the ultimate authority of law a matter of observable fact ignore the consequence that Hart has made it impossible to ask whether the admittedly actual, authorized law of a given system is acceptable. If it is accepted, then his inquiry stops.

If acceptance is authoritative only because it is accepted, then its authority is self-justifying. Hart did not explicitly argue to this effect, but one may point out that a self-justifying ultimate authority is preferable to the alternatives: an infinite regress of authorities and an unjustified authority. Moreover, the self-justification of acceptance is preferable, on moral and political grounds, to the self-justification of oligarchy, monarchy, or the ipse dixit of the first aspirant to seize the reins of this logic. In the inference model rules are justified or validated by other rules. If every rule is to be justified, there must be an infinite regress, a self-justified rule, or at some point higher rules must be validated by lower rules. To avoid an infinite regress and a counter-hierarchical "stooping" for justification (which is another form of circular justification), the ultimate rule must be self-justifying or unjustified.[Note 5] The inference model cannot abide self-justification and in strict forms cannot admit exceptions; hence it must rest

with an unjustified or arbitrary ultimate rule. The acceptance model, however, allows lesser rules to be validated by higher rules and allows an escape for the ultimate rule: it is not justified or validated by another rule within the system, but by the acceptance of the people. Such a move anchors the artificial system of rules in empirical, historical actuality, a side effect of the theory that Hart is very concerned to preserve.

Logicians would be horrified to imagine that acceptance could provide anything like validity or authority to a rule, let alone validity or authority to itself. Acceptance provides no logical support, neither deductive nor inductive, and is as irrelevant to a rule's validity as personal opinion. But here is the crucial difference between legal and logical rules. Logical rules cannot be created, changed, or invalidated by counting votes or heeding the expressions of human will. Legal rules can be. The reason is not that legal rules use a different logic, or irrelevantly depend on belief rather than truth, but that legal rules are products of human history and not merely human thought. Whether a logical system should possess a theorem that says this rather than that is a question subject to rigorous methods, all abstract and determinate, even if inconclusive; but whether a legal rule should say this rather than that depends on an indefinite number of factors, some themselves indefinite, and always on acceptance.

Can counting votes, however, make law unless there is a prior law that authorizes it to make law? Ronald Dworkin has argued that[Note 6]

> Some part of any constitutional theory...must stand on its own in political or moral theory; otherwise the theory would be wholly circular....It would be like the theory that majority will is the appropriate technique for social decision because that it what the majority wants.

Dworkin would apparently be content if majority rule were justified by a political morality external to law. If this political morality is superior to other political moralities even in part because it is favored by the majority in that legal system, then circularity returns. But this circularity is different from a circularity within the legal system. A basic legal rule may justify itself (such as majority rule by a majority vote); because it is a legal rule, the circularity is within the system. If a basic rule is justified by something outside the system, such as acceptance or a political morality, and that alegal phenomenon is self-justifying, then the circularity is not within the system.

The difference between these two kinds of circularity would be small and negligible if it were not for the political morality of the people and the limits on what they will accept. For a circularity within the system may justify anything, as tyrants establish tyranny or give themselves the power to give themselves power. We curb that kind of abuse, first of all, only if we dislike it, and second, only by making authority finally depend on a moral doctrine accepted by (or acceptable to) a significant fraction of the public. The accepted morality will be circularly justified outside the system, that is, it will be the final source of legal authority only because it is morally accepted by that same public.

If we wish to avoid circular justifications of ultimate rules within the system, because of their liability to abuse, and if we wish to avoid an infinite regress of authorities and an unjustified authority, then we must locate the final source of legal authority outside the system. If that source is not to be self-justifying, then we are landed in the absurd position of requiring (for example) that the values that justify majority rule disregard the will of the majority or that the values that justify the appeal to acceptance of the people disregard the acceptance of the people. These reflections suggest that a self-justifying alegal source of legal authority is less absurd than the alternatives.

Hart almost certainly did not foresee that the normative practice doctrine and the acceptance theory combine to give acceptance a circular authority, rather than a status beyond authority. But that outcome is not to be dismissed lightly.

Hart does not elaborate his theory sufficiently for us to say whether he believed that acceptance authorizes law because its function as a source of authority is accepted, or whether it authorizes law regardless of the beliefs and widespread dissent of the people and officials. Conceivably, acceptance could authorize law in a society in which the people and officials believed that only a deity could authorize law. This is only apparently denied by the proposition that acceptance is self-justifying. If the people do not accept the proposition that law is authorized by acceptance, and instead accept the view that law is authorized by the deity or the army, then these alternative theories are supported by acceptance and nothing more. Acceptance is not supported by acceptance, but nothing can authorize law unless it is accepted as authorizing law. Whether acceptance is omnipotent and can use its power to limit, change, or end its power is further discussed in Sections 8 and 21; I will argue that it has continuing omnipotence and is the true basis of the people's inalienable sovereignty.

The merit of a self-justifying alegal ultimate source of legal authority may be made clearer by another example. Paul Brest notes that the supremacy clause of the federal constitution (Article VI, §2) declares the whole constitution of which it is a part to be supreme. He adds that "a document cannot achieve the status of law, let alone supreme law, merely by its own assertion."[Note 7] Brest is right. The supremacy clause is made true either by a prior rule to regard the words of the constitution as authoritative (which virtually makes the supremacy clause surplusage), or by direct acceptance of the terms of the clause.

This is more conspicuous with Article VII, the ratification clause, which declared the constitution "established" upon the affirmative votes of any 9 of the original 13 states. Upon the ninth affirmative vote (New Hampshire) the constitution became established by its own test.[Note 8] The words of Article VII did not authorize that establishment, but they tell us that establishment is authorized by the will of the ratifiers. The constitution was established because it was accepted; more particularly, it was established when and because the condition it laid down for establishment was accepted by the ratifiers.

These examples show the acceptance theory in a context where its contractarian elements come to the fore. A legal system which people and officials encounter in media res is accepted or not without contract principles entering the picture in any strong form.[Note 9] But the initial

establishment of a legal system, under the acceptance theory, requires a creative type of acceptance that will always resemble a social contract on many points. Article VII is self-justifying in the sense that it states the acceptance-terms of the federal contract, and is law because it was accepted or ratified by its own terms.[Note 10]

Hart gives contradictory suggestions on the question whether a rule is needed to authorize the ultimate rule of recognition. His general support for what I have called the normative practice doctrine supports the existence of a rule justifying acceptance, insofar as acceptance is used in practice to identify the rule of recognition. On the other hand, Hart just as clearly believes that the rule of recognition is neither valid nor invalid (105), nor justified by a rule (104). When Hart is thinking on these lines we should assume that he would say the same of acceptance a fortiori. His irreflexive theory of treaties and contracts is suggestive in this light. Treaties and contracts do not bind just because the parties agree to be bound; they bind only if made within a legal system containing a rule that states that mutual promises bind (40, 219, 220, 231).

If we take the liberty of applying this contract theory to the establishment of a new regime, either because of the contractual elements in it or on the evidence of Hart's general disinclination to cite reflexive sources of authority, then Hart would not allow a self-justifying act of legal creation. He would not allow a contract-like constitution that decreed that it would be valid if ratified in a certain way, and actually was so ratified, unless the act of ratification could be construed to take place in an already legal context in which a valid rule stated that constitutions so decreeing and so ratified will be valid. He would probably deny the self-justification of the constitution and rest its authority on acceptance which neither needed nor received any further authorization.

By analogy to his contract theory, Hart might say that acceptance would not operate to confer legal status on a rule of recognition or a constitution unless manifested within a system containing a rule that acceptance should so govern. The absurdity of requiring new systems to be made only in larger, preexisting systems is more than just another way of denying a right to revolt; it also denies the legal capacity to recover from discontinuity. It may have its own merits but Hart could not tolerate it, for it implies that a revolutionary regime could never become legal, even after 200 years of acceptance by the officials and the people. Like the strictest inference models, it implies that every lawful regime requires an infinite genealogy. Hence, we should abandon Hart's irreflexive theory of contracts and treaties insofar as it leads to these consequences in conflict with the acceptance theory, which is more central to his work and more defensible on its own merits. If contracts derive their binding force from the parties's agreement, not an external rule that agreement binds, then, as noted earlier, the AC of a contract could be amended without paradox, for the authority of the new rule would derive from the sufficient agreement of the parties, not the old clause or an external rule.

Hart is clearly inconsistent on the question of the existence of a rule authorizing acceptance to authorize law. I believe the acceptance model of authority is separable from both the normative practice doctrine and Hart's irreflexive view of contracts. In fact I believe the most sensible way to render Hart consistent is to abandon his theory of contracts and allow agreements to bind ex proporio vigore, independently of any other legal rules. The self-justification involved is harmless as well as theoretically desirable to explain the initial establishment of legal systems or the "legalization" of a system that broke off from another. The normative practice doctrine does not affect this question significantly. If retained, it leads Hart to a circularity which he did not intend but which is harmless and in any case preferable to the alternatives; if abandoned, acceptance authorizes law as a matter of fact, not because it has a prior or higher justification for doing so.

The views that acceptance is self-authorized and that it is beyond authorizing are equally acceptable as solutions to the paradox of self-amendment. Like agreements to contracts, acceptance of law is sufficient by itself, either because it needs no justification or because it justifies itself, to give authority to legal rules. Like agreements to contracts, acceptance of law is an anchor to legal rules in historical actuality; it avoids the need for an inference model that forbids self-justification and requires incomplete justification or infinite regress.

Notes

1. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961. All subsequent references to this work in this section will be kept in the text in parentheses.

2. My argument in Section 2 that the people's failure to use their AC could show their consent to be governed by their constitution, provided the "consent" not to use the AC was competent by some cognitive and volitional standards, obviously required some citizen understanding of their legal system. Therefore it is consistent with Hart's statement, op. cit., at p. 76:

> Failure to exercise an amending power as complex in its manner of exercise as that in the United States constitution, may be a poor sign of the wishes of the electorate, though often a reliable sign of its ignorance and indifference.

If the people's role in acceptance must be compatible with their ignorance or indifference, much of the validating burden of acceptance is shifted to the role of the officials. But Hart has been criticized on this point for failing to clarify the relation between the contributions of the people and the officials of the system. See e.g. Hugh Williamson, "Some Implications of Acceptance of Law As A Rule-Structure," Adelaide Law Review, 3 (1967) 18-45 at p. 28; and Gabriel Mosonyi, "Legal Obligation, Social Acceptance and the Separation of Law and Morals," Connecticut Law Review 6 (1973) 36-48, at 37.n.14.

If a reflexive theory of legal authority that permits some kinds of self-justification is rejected for its potential to validate tyranny, then the same potential in Hart's irreflexive blessing of ignorance should not be overlooked.

3. Even if this proposition is difficult to find in Hart, it is found in another acceptance theorist. See Conrad Johnson, "The Rule of Law and the Closure of a Legal System," American Journal of Jurisprudence, 18 (1972) 38-56 at p. 39.

4. Hart also says, against this view, that there is no rule of recognition in international law (230-31), even though there is clearly an official practice of identifying what is to count as international law.

5. It is for reasons of this kind that Joseph Raz accepts the self-justification of some legal rules, especially of constitutions made in territories where no prior constitutions exist to authorize them. See his The Concept of a Legal System: An Introduction to the Theory of Legal System, Oxford University Press, 1980, at pp. 138f.

6. Ronald Dworkin, "The Forum of Principle," New York University Law Review, 56 (1981) 469-518 at p. 496.

7. Paul Brest, "The Misconceived Quest for the Original Understanding," Boston University Law Review, 60 (1980) 204 at p. 225.

8. For the view that the constitution did not become established until the 13th state (Rhode Island) ratified, Article VII notwithstanding, see Appendix 1.D and T.R. Powell, "Changing Constitutional Phases," Boston University Law Review, 19 (1939) 509-32. Powell's argument is based on the fact that amendment under the AC of the Articles of Confederation required unanimous concurrence of the states. The AC of the Articles of Confederation was the highest rule of change in effect at the time; to disregard it was to make revolution.

The Supreme Court was never asked to rule on this question directly, but in ruling on when the contracts clause became effective it ruled that the ninth state (New Hampshire) sufficed to ratify the constitution, making the constitution effective on the first Wednesday of March, 1789. Owings v. Sneed, 18 U.S. 420 (1820). It ruled, incidentally, that there was no overlap between the governments of the Articles of Confederation and the government of the new constitution. It ignored both the question of the self-justification of the new Article VII, and the question of the violated AC of the Articles of Confederation. See Appendix 1.D.

9. But see Socrates's argument in the Crito that, by not leaving Athens and benefitting from it, he is bound to obey its laws. Similarly, the argument is sometimes made that one consents to the jurisdiction of a state's courts by benefitting from state services.

10. A persuasive argument that self-justification is unnecessary in establishing a new legal order —the irreflexive view of revolution— is made by J.M. Eekelaar, "Principles of Revolutionary Legality," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 22-43. Eekelaar argues that the sort of principles which Ronald Dworkin distinguished from Hartian rules may survive a revolution and justify a court in declaring that a new regime is the lawful sovereign or that the new leader is the lawful executive. He believes that such court findings in Pakistan (1959), Uganda (1966), and Rhodesia (1968) need not be based on judicial fear or the alleged tautology that by hearing the cases at all the courts must have been reconstituted under a new legal order which is therefore already legal. At p. 24 he argues that there can be legal reasons for accepting a rule of recognition.

Section 8: Omnipotence and Immutability

A. Omnipotence and immutability are inseparable concepts

In Section 3 I outlined the dilemma of paradoxical self-amendment versus an absurd infinite regress of rules of change. The possibility that a supreme rule of change might be immutable was eliminated from the dilemma as empirically false and question begging. The ACs of 47 state constitutions have actually been amended (Appendix 2), showing their mutability and self-mutability. To suppose that any rules are legally immutable begs the question of the mutability of the rules of change: for a changeable rule of change might in some attainable new form reach all the rules of the system, even if its original form could not. Nevertheless the dilemma is at least a trilemma, and the possibility of immutable rules of change is a distinct third option. Now that the development of the dilemma has proceeded without the question begging assumption of immutability, the latter may be examined on its merits.

By "immutability" I will here mean only legal immutability. If a legal rule cannot be changed by any legal means whatsoever, then it is legally immutable. Whether it makes sense to say that a rule is legally immutable at a particular time and mutable at other times, will be explored; it will not be ruled out as self-contradictory. No legal rule is absolutely immutable, of course, for illegal and extra-legal means such as revolution are always available.[Note 1]

A legally immutable rule of any kind is a prima facie proof that the supreme rule of change is not omnipotent. For if the supreme rule of change were omnipotent, it could amend the rule that purports to be immutable. Conceivably a rule that is immutable at one moment may be "transmuted" in the next moment, if the AC can change itself into a form that can transmute immutable rules or convert them to mutable rules (see Appendix 3). This will be explored.

An omnipotent AC is one that can authorize any change of law at the constitutional level. Hart's distinction between self-embracing and continuing omnipotence[Note 2] is a distinction with a difference and should be followed (see Section 5.B). A self-embracing omnipotent AC can authorize any change of law, including changes in itself. A continuing omnipotent AC must continue to have continuing omnipotence; therefore it can authorize any change of law except a change that would limit its omnipotence or the continuity of its omnipotence.[Note 3] Therefore continuing omnipotence is actually limited in its power because it cannot limit or repeal itself; if this is understood, it may still be called continuing "omnipotence".

The argument that the distinction between self-embracing and continuing omnipotence solves or dissolves the paradox of self-amendment is considered and rejected in Section 11.

Immutability and omnipotence are complementary concepts and must be discussed together. The continuing character of continuing omnipotence is immutable. Moreover, continuing omnipotence is incapable of making immutable rules, for an immutable rule is an irrevocable limit to its omnipotence. Self-embracing omnipotence, by contrast, may enact any immutable rule. Such rules will irrevocably limit its power, but that kind of self-limitation is possible for self-embracing omnipotence.

Initially, then, continuing omnipotence is limited by one immutable rule (that it be continuing omnipotence) and can enact none, while self-embracing omnipotence is limited by no immutable rules and can enact any. The existence of any immutable rule other than the continuity of continuing omnipotence is incompatible with both types of omnipotence; but in the case of self-embracing omnipotence, such rules may be made anyway, forsaking omnipotence in the act. Continuing omnipotence may be called immutable omnipotence, without loss of meaning, and self-embracing omnipotence may be called mutable omnipotence.

One conclusion we may draw immediately is that if the AC must have either continuing or self-embracing omnipotence, then the immutability of at least one legal rule is either always possible or always actual. If the supreme rule of change or AC has continuing omnipotence, then its continuing character is actually immutable. If the supreme AC has self-embracing omnipotence, then no rule may initially or presently be immutable, but immutable rules may be enacted or irrepealably entrenched. And of course if no rule of change is omnipotent in either sense, then some actual or possible rules are therefore immutable, namely, those that limit the amending power. Omnipotence either starts qualified by one immutable rule, or is capable of qualifying itself by immutable rules —or omnipotence itself is precluded due to the presence of other immutable rules.

(In Section 21.C I argue for a theory in which no rule is possibly or actually immutable. Hence, it denies that the AC either has continuing or self-embracing omnipotence.)

This analysis applies equally to legal sovereigns, metaphysical deities, and hypothetical powers.[Note 4] Instead of seeing the problem only as a conflict between an amending power and an arguably immutable rule that resists amendment, or between an amending power and its power over itself, it applies as well to the cognate problems of an irresistible force (omnipotent amending power) and an immovable object (immutable rule) and of an omnipotent deity in an immutable cosmic order that resists its power to put mercy before justice, square the circle, become mortal, or limit its own power irrevocably. But this is not the whole story: the intriguing possibility that "immutable" rules may finally be amended if self-amendment is permissible will be explored later in this section.

If an AC can amend any rule of the constitution, and if it can amend itself into any other form, then it has self-embracing omnipotence. If it can amend the rules of the constitution and itself only in ways that do not diminish or augment its power (see Section 5.B), then it has continuing

omnipotence. If it cannot amend itself even in these ways, or if it cannot amend certain provisions of the constitution, then it is not omnipotent at all, unless it can make itself omnipotent, and at least one rule is immutable, unless the AC can transmute it.

B. Entrenchment, self-entrenchment, disentrenchment

Limitations on the amending power may be of two basic types. The first is typified by a clause in the constitution that says of clauses other than itself that they cannot be amended except perhaps in special ways. The federal AC "entrenches" the equal suffrage of the states in the Senate in just this way. The last clause of Article V, the AC of the federal constitution, holds that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This language seems to require a special amendment procedure if any state is to be disenfranchised from the senate, namely, the regular procedure in which the victim happens to vote aye.

The second type of limitation is typified by a clause that says of itself that it is immune to amendment. There is no explicit example of this type in the federal constitution, although there are several among the states and in the English tradition which will be examined (some in Section 9). Let us call the former type "entrenchment clauses", and the latter "self-entrenchment clauses".[Note 5]

There may be cases of implied self-entrenchment. Because an entrenchment clause is less useful for its intended purpose if it is not self-entrenched, there is a temptation to read every entrenchment clause as impliedly self-entrenched. For example, in the case of the entrenchment of the equal suffage of the states in the federal amending process, we seem to have a case of entrenchment without express self-entrenchment. The clause of Article V prohibits amendments of a certain kind. But since no clause protects that clause the way it protects the equal suffrage of the states, may it be repealed by ordinary amendment procedures as the first step toward making the prohibited sort of amendment? If so, it may be repealed without the consent of the states eventually to be disenfranchised from the senate. The language of the clause does not help us much, and good policy grounds could be cited on both sides. If it is read to prohibit its own repeal, then it is impliedly self-entrenched. (More on implied self-entrenchment in Section 8.C below.)

We can interpret entrenchment and self-entrenchment clauses equally well as procedural or substantive limitations on amendment. A procedural limitation bars amendments that do not conform to a certain procedure, while a substantive limitation bars amendments with a certain content. The clause impeding the disenfranchisement of a state from the senate is clearly both. The objectionable content is named in the clause, and a special procedure is laid down for amendments of that kind. Entrenchment and self-entrenchment clauses are often thought to be procedural limitations only; in England they are called "manner and form" limitations as if to highlight their indifference to content.[Note 6] But this overlooks the fact that the clauses always protect certain provisions of law from (ordinary) amendment. The protection they afford consists in making the amendment procedure more difficult, but the object of protection is invariably some specific content or substantive kind of law that the clause-writers did not wish to see enacted except with extraordinarily wide consent.

The very idea of procedural limitations on a legal power deserves a word of clarification. Procedures may be ordinary or extraordinary. For example, amendments to the federal constitution must be ratified by two-thirds of each house of Congress and by three-fourths of the states. These procedural requirements are ordinary; they are the "default" conditions to which any amendment must conform unless some special procedure is required. If a particular state must vote to ratify an amendment, because its consent is required for its own disenfranchisement, then that procedural requirement is extraordinary.

It sounds very odd to say that ordinary requirements are "procedural limitations" on the amending power because they are just as much the constitutive or defining conditions of that power. They do not seem to "limit" the power any more than DNA "limits" the nature of human beings. But a moment's reflection shows that speaking in this way is harmless and even helpful in many contexts. If it were physically impossible to transgress the limitation, then the oddity would remain. But in law it is possible, frequent, and even perilously easy for an intended act of amendment, legislation, adjudication, or divorce to violate the ordinary procedural limitations on acts of that kind and consequently to be a legal nullity. It often takes lawyers who specialize in that area of law to ensure that the ordinary procedure is followed in every particular. Nevertheless, extraordinary requirements feel more like limitations than ordinary requirements, for they restrict the valid application of a power that is already defined more broadly.

Self-entrenchment, like self-amendment, may depend on the stipulated scope of "self". If an AC has many sections and one says of another that it shall not be amended, then that is self-entrenchment broadly conceived. Narrow or strict self-entrenchment, however, must be restricted to the entrenchment of a unit of language by words within that unit.

Entrenchment affects the problem of self-amendment in many ways. When a constitutional rule is entrenched, we must ask whether the AC can repeal the entrenching language and amend the previously protected rule. This aspect of the omnipotence of the AC is the subject of this section. The entrenchment and self-entrenchment of the AC itself, or of parts of the AC, is the subject of the next, Section 9. This is a good place to warn the reader that the topics of Sections 8 and 9, and especially their detailed discussion, can cause dizziness in proportion to one's concentrated attention.

Entrenchment bars amendment, and entrenchment of the AC bars self-amendment. But to the extent that an AC can repeal entrenching language it can reassert its power over the protected provision of law. When it is itself the protected provision we may well wonder whether it can repeal the entrenching language in order to amend itself, an act I will call "self-disentrenchment". It appears to present the challenge of a prisoner who can only escape by opening the outer door of the prison before the inner cell door.

We must also distinguish complete and incomplete entrenchment. Complete entrenchment protects a passage from amendment per se, while incomplete entrenchment only protects it from ordinary or routine amendment. Incomplete entrenchment may suspend the usual amendment procedures for the entrenched passage and require a special, more difficult procedure.

Whether complete entrenchment protects rules from amendment immutably should not be prejudged from the word "complete". If an entrenchment clause said, "rule R can be amended only by convention" or "only by 90% supermajorities in each house and the concurrence of 80% of the states", then it would describe incomplete entrenchment. That, obviously, would do little good unless it entrenched itself to the same or greater degree of difficulty. For this reason entrenchment clauses are often thought to imply self-entrenchment. Hence in corporate charters, much more often than in constitutions, the articles requiring supermajority votes to amend certain basic rules are usually and prudently self-entrenched incompletely at the same supermajorities.

Complete entrenchment, by contrast, would be indicated by a simpler clause, such as, "rule R may not be amended" or, in the case of complete self-entrenchment, "this section may not be amended". The significance of the distinction is shown by Hart who argued (not in these terms) that in a nation whose legislature or parliament has continuing omnipotence, one parliament cannot make laws that its successors cannot repeal, but it could make laws that its successors could repeal only with special, difficult procedures.[Note 7] In the terms we are using here, continuing omnipotence is compatible with incomplete entrenchment and self-entrenchment. It is compatible with complete entrenchment and self-entrenchment only if the completely entrenching language is itself subject to amendment. Complete entrenchment clauses may be mutable if they are not themselves entrenched or if they are only incompletely entrenched. If they are completely self-entrenched, then they seem to be immutable; they may be mutable only if the AC is omnipotent in such a way that it can transmute immutable rules.

Hart argues that the question whether a parliament in a nation of parliamentary supremacy has continuing or self-embracing omnipotence is an empirical question.[Note 8] In England the rule that parliament cannot pass laws that its successors cannot repeal is a venerable legal axiom.[Note 9] It implies continuing power and, if parliament is otherwise omnipotent, then continuing omnipotence.[Note 10] That the federal and state legislatures in the United States are just as firmly barred from making laws that their successors cannot repeal is not as well known or commonplace, but it is the repeated holding of American courts facing the question.[Note 11] This implies continuing power, but because our legislatures are not supreme, it does not imply continuing omnipotence. Similarly, neither the English parliament nor an American legislature can irrevocably limit its own power or the power of its successors to make or unmake law.[Note 12] There are no comparable holdings, at the federal or state levels, that an AC cannot bind its successors. Hence the AC, which is supreme, might be omnipotent without being continually omnipotent.

These empirical tests are decisive when available. An AC is known to be self-embracing if it has actually been used to amend itself or to limit its future power, without interference from courts; it is not, however, thereby known to be omnipotent. An AC that has never amended itself and that has never been prevented from amending itself by a court may have the potential for either self-embracing or continuing power, depending on future history. It may determinately be one or the other, by the intent of the framers, dicta of past courts, or some other test, and become the other as future courts invoke new criteria.

Alf Ross is not content with these empirical tests, however. If an AC has been used to amend itself, and if courts have not struck down the attempt or the product, then Ross still wants to be able to say that the AC cannot have self-embracing power. Self-application of all kinds is logically objectionable, he says, legal history notwithstanding (see Section 5.D). If an AC is omnipotent, we know a priori that it must have continuing rather than self-embracing power, Ross says.

This position, in a word, is preposterous. It applies only to abstract, logical rules whose validity can be a matter of a priori reasoning. Legal rules are legally valid or invalid for legal reasons alone. Legal reasons often include logical reasons, but need not, and in all cases include fewer than all logical reasons and more than merely logical reasons. Ross offers no legal reason whatsoever why an AC could not be self-embracing or self-applicable, but concludes that the illogical is illegal. Any jurisprudence that declares that what is legal by legal tests may be illegal by logical tests is to that extent false and deficient. We might say that just as the laws of the United States make no exception for the conscience of Henry David Thoreau,[Note 13] they make no exception for the principle of non-contradiction or the logical scruples of Alf Ross. Ross's argument can only legitimately conclude that courts that have failed to prevent or nullify acts of self-amendment have erred. He cannot conclude that the correction to that error is already law. Now he is in the absurd position of saying that what the courts uphold as law is not law. For the same reason, as will become important below, logic, politics, and morality may suggest many "implied limitations" on the amending power, and these might become law if courts are persuaded to heed them. But if courts have not yet heeded them, then these limitations cannot be said to exist in law, even if their omission is illogical, immoral, or tragic.

Even the rich history of self-amendment among the states (Appendix 2) is inconclusive on the question of this section. It may show that self-amendment is legally permissible in the United States, but it does not show whether an AC can limit itself irrevocably through self-amendment, and hence whether it can be omnipotent in either of the two senses we have discussed. No attempted act of self-amendment, so far as I know, has ever been enjoined or nullified by an American court on grounds even remotely related to the logic of self-application.[Note 14] Therefore our history of permitted self-amendment cannot reveal whether some conceivable self-amendments would be impermissible, for example, for violating an irrevocable self-entrenchment clause, contradicting the continuity of continuing omnipotence, or transcending the power of a non-omnipotent amending power.

This raises a distinction that applies to all entrenchment clauses. They may be inserted by the framers of the original constitution or they may be inserted by amendment. Let us call the former "original" limitations on the AC, and the latter "self-imposed". The latter are self-imposed even if the AC is not directly amended by them, for the provision that is entrenched against future amendment stands as a limit on the power of the AC, put there by the AC.[Note 15] The distinction is important because original and self-imposed entrenchment clauses may differ in their mutability.

I will assume that all limitations on the AC that could make it less than omnipotent take the form of entrenchment and self-entrenchment clauses, some possibly tacit and implied. An AC could be described in language that clearly suggested limited power, but any such description could be interpreted as immunizing some provision (possibly indeterminate) from amendment, thereby acting as an entrenchment of that provision (to be determined). If no clause of the constitution is immunized or entrenched, by words or tacit rules qualifying the protected clause or the AC, then the AC is clearly unlimited. Whether it has self-embracing or continuing omnipotence, or some strange mix or third type, is a question for courts or philosophers looking at the history of amendment.

Even though all limitations on an AC may be construed as entrenchment clauses, there is still a useful distinction between limitations that make certain amendments inconsistent with protective language, and limitations that make certain amendments void. Amendments of the former kind are sometimes upheld by courts in deference to the people's will in ratifying them, while the latter seem impermissible or void ab initio. The former may overcome the protective language they violate by virtue of the rule of priority favoring the most recent voice of the sovereign in cases of irreconcilable conflicts. I will call these two types limitation through protection and limitation through incompetency.

Limitation through protection prohibits amendments that contradict valid rules of protection; limitation through incompetency prohibits those that are ultra vires, that is, unauthorized or beyond the scope of authority. The two are not always easy to distinguish, as when one argues that the Bill of Rights "cannot" be repealed. The advocates of that idea might mean that a tacit entrenchment clause protects the Bill of Rights, or that the amending power is incompetent to repeal certain basic values of the community or "natural rights".

One might argue that original limitations on the AC are more likely to be limitations through incompetency, and that self-imposed limitations — especially complete self-entrenchment clauses— are more likely to be limitations through protection. This theory might be based on the proposition that an AC cannot limit its own competency, but can protect a rule from amendment, especially from routine amendment. Of course both types would constitute the self-limitation of the competency of the AC.

I will also assume that an entrenchment clause that is not self-entrenched, like any other clause that is not entrenched, may be amended or repealed in the ordinary way. This must be true, regardless whether the entrenchment clause is original or self-imposed. The only questionable case is entrenchment of the AC itself (for which see Section 9), or the implied self-entrenchment of an entrenchment clause (which will be examined below). If Section A entrenches Section B without entrenching itself, then the framers of A may well have intended that it be as difficult to amend as B. But I will treat the problem of self-entrenchment independently, and therefore need not complicate matters by finding it tacit in an indefinite number of cases of mere entrenchment.

Hence, entrenchment clauses are not immutable and do not limit the power of the AC, except possibly when they entrench the AC itself (Section 9). Our present inquiry, then, reduces to the question whether self-entrenchment clauses can be immutable, or whether they can be amended or repealed. Implied limitations on the amending power that have been suggested by writers and plaintiffs will also be examined as possible limitations on the amending power.

First, notice that immutable self-entrenchment clauses are compatible with both self-embracing and continuing omnipotence in small and different ways. Self-embracing omnipotence may limit itself immutably, and therefore may be the source of an immutable self-entrenchment clause. After the self-entrenched amendment is adopted, of course, the self-embracing omnipotence has forsaken its omnipotence. Continuing omnipotence is already limited immutably; this limitation may take the form of a self-entrenchment clause that describes its immutable continuing character. Such a clause could be original or self-imposed by an AC that formerly had self-embracing omnipotence. After the amendment is adopted which immutably gives an AC continuing omnipotence, self-embracing omnipotence may be at an end, but continuing omnipotence is created and protected.[Note 16] In short, an immutable self-entrenchment clause may be the product and termination of self-embracing omnipotence, and the beginning and safeguard of continuing omnipotence. But an immutable self-entrenchment clause that does not entrench the AC excludes both types of omnipotence from the moment it becomes immutable.

Incomplete self-entrenchment is the easiest to cope with. If Section A contains a clause that says, "nothing in Section A, including this provision, may be amended except by a constitutional convention," then the clause can obviously be repealed by convention. One possible difficulty arises when the self-entrenchment clause names a method of amendment not included in the AC. In such a case a stubborn proponent of the inference model might deny that the constitution contains the authority to repeal the clause. But anyone else, not necessarily an acceptance theorist, could use the method outlined in the clause itself as permitted for the use of repealing the clause, either by appeal to the framers' intent, or the reasonably plain meaning of the clause —and of course despite any paradox of self-amendment.

Another possible difficulty arises when the incomplete self-entrenchment clause says it can only be repealed by a special method, and the amending body attempts to amend it by another method, perhaps the usual method. I do not believe this has ever happened in the United States, but it happened in New South Wales, Australia. The N.S.W. constitution created a body called the Legislative Council and provided that it could not be abolished by a simple amending act of parliament, but only by an amendment that was ratified in a popular referendum. Moreover, the

requirement of a referendum could only be repealed by a referendum. Hence, the existence of the Legislative Council was incompletely self-entrenched. The N.S.W. parliament, however, wanted to abolish the Legislative Council without resort to a referendum, and believed that its sovereignty and omnipotence allowed it to do so through an ordinary amendment. The highest court in N.S.W. struck down the attempt, and thereby upheld the validity of "manner and form" limitations on the amending power, or incomplete self-entrenchment, even against a parliament supreme and omnipotent in the English tradition. Attorney General for New South Wales v. Trethowan, (1931) 44 C.L.R. 394; [1932] A.C. 526.[Note 17]

Another case, just as famous and more dramatic, occurred in South Africa in 1952. When the English parliament wrote the South African constitution in 1909 it included one Section (number 35) that prohibited racial discrimination, and one (number 137) that assured the equal status of the English and Dutch languages. A third section (number 152) incompletely entrenched both of these provisions and itself, requiring for their amendment a two-thirds vote of each house of the South African parliament sitting in joint session. In order to institute apartheid, the South African parliament tried to repeal all three of these sections by a statute, using only simple majorities. It knew that the 1909 clauses stood in the way of this plan, but argued that its intervening independence from Britain made it sovereign and capable of amending its constitution without British interference. The South African Supreme Court rejected the attempt, partly on the ground that South Africa was not completely sovereign so long as Britain could repeal the Statute of Westminster that granted former colonies their independence (see Section 20.I). Harris v. Dönges, (1952) 1 T.L.R. 1245. The South African government eventually established apartheid "legally" by packing the parliament until the two-thirds votes could be obtained.[Note 18]

The rule in the United Kingdom and its former colonies and dominions is that incomplete self-entrenchment clauses are binding and can only be amended or repealed by the procedures they lay down for themselves. In other words, a parliament cannot bind its successors irrevocably, but it can make things difficult. Continuing omnipotence, however, is not threatened by mere difficulty or by revocable limitations on power. Unfortunately no case has apparently arisen in which the "manner and form" of permissible amendment set out in the incomplete self-entrenchment clause is so difficult as to amount to virtually complete self-entrenchment. Such a case might reveal that complete and incomplete self-entrenchment differ only in degree, not in kind, and that an extremely difficult amendment procedure will be treated like a prohibition on amendment, not like a manner and form limitation.[Note 19]

If "revocability" is a matter of degree, matching the degrees of difficulty of amendment, then a parliament could approach the irrevocable binding of its successors by increasing the difficulty of the manner and form limitation. If courts strike down would-be irrevocable limitations on future power, should they strike down extremely difficult manner and form limitations? What about manner and form limitations that are not so difficult for some entrenched rules but that would be virtually impossible to overcome for certain popular rules by virtue of their popularity? For example, if an article permitting the institution of slavery and an article asserting the freedom of religion were each to be incompletely self-entrenched so that only 80% supermajorities of the national population in a referendum could repeal them, then the first would still be repealed while the second would become virtually immutable. Should courts take this into account when deciding what constitutes an irrevocable limitation on future generations?

When an incomplete self-entrenchment clause is to be violated by a proposed amendment, as attempted in Australia and South Africa, then the violation may possibly be cured by acceptance. In such cases the perceived fairness and difficulty of the procedures specified in the entrenchment clause would have some bearing on the acceptability of circumventing them. Circumvention would almost always become more acceptable as the limitations on the amending power were perceived as impositions of a foreign power or former imperial sovereign. When the specified procedure is not intolerably difficult, however, or perceived as a remnant of colonial subservience, then the acceptance model will usually agree with the inference model in finding manner and form limitations valid against the amending power. The acceptance model provides, however, that when acceptance in the appropriately complex sense is present, then it suffices to override even the most "reasonable" entrenchment clauses to cure violation or circumvention.

Under the inference model complete self-entrenchment clauses are immutable, providing that we tolerate the self-reference involved. A clause that said, "this section may not be amended," when it is part of the entrenched section, plainly forbids its own amendment. If it is an original limitation, then it supersedes the general language of the AC as specific language customarily supersedes general language (the lex specialis principle). If it is a self-imposed limitation, then it supersedes both as the more specific rule and as the more recent voice of the sovereign (the lex posterior principle) which impliedly repeals all existing portions of the text not reconcilable with it (see Section 16).

However, note that self-imposed complete self-entrenchment will almost always impliedly amend the AC, again both as the more specific and as the more recent language of the constitution. As an act of the AC that impliedly amended (limited) the power of the AC, it would constitute self-amendment, which the inference model could not tolerate. The inference model might solve the problem by dropping the lex posterior principle that gives recent law priority over older law in cases of irreconcilable conflict, since it is by virtue of this principle that the AC "transmutes" the "immutable" and amends the complete self-entrenchment clause. But this solution requires a change of law —for the lex posterior principle is actual law already— that the inference model cannot accomplish from its merely logical standpoint. Nor can it say that because the lex posterior principle has logically regrettable consequences some of the time that it is already repealed or limited in its applicability.

But the mere idea of this solution points up an important ambivalence of the inference model about the status of temporal priority of law in its relation to logical priority. On the one hand, the inference model requires that new law be authorized by temporally and logically prior law. That seems to imply deference to the lex posterior principle. So does the method of avoiding contradiction in law by invalidating (impliedly amending or

repealing) the older rule in cases of conflict. But on the other hand, the lex posterior principle is denied by Ross's preferred method of avoiding contradiction in law, namely, to invalidate every attempt to derive a conflicting norm from an existing one, never allowing a conflicting rule to come into a position to impliedly amend or repeal an older rule. Moreover, if a pre-existing entrenchment clause forbids certain amendments, then the inference model would probably read any attempt to ratify an amendment of the forbidden type as a violation, not a repeal, of the language of the constitution.

Most models of legal change would read such an attempt this way, which suggests that the old AC could neither transmute nor amend a complete self-entrenchment clause. It would be prevented at least by contradiction, if not also by incompetency. The acceptance model is free to read it otherwise, however, if the attempt to ratify a forbidden amendment is allowed to run its course. For the dynamics of acceptance by the people and officials of the system, as opposed to whatever might be happening in ideality according to logicians, may validate the amendment despite its inconsistency with antecedent authority. This would make the amendment what it purports to be, an amendment, not a violation, of the language of the constitution. It is the lex posterior principle in action.

The inference model, then, probably forbids the enactment of complete self-entrenchment clauses on the ground that through them the AC limits its own power and performs self-amendment. But if such a clause is an original limitation on the AC, not self-imposed, then the limitation on the AC is not an amendment and hence not a case of self-amendment. Therefore it may limit the AC immutably for the inference model. For the acceptance model, by contrast, an amendment could repeal, rather than violate, the language of the constitution, since its authority need not rest exclusively on existing provisions of the constitution, but might arise instead from present or future acceptance.

The acceptance of the people is a source of authority that could justify the repeal of a complete self-entrenchment clause by an AC that was general in its language and silent on this special application. Under the acceptance model the violation or contradiction involved in allowing the AC to amend a provision that it is forbidden to amend can be cured if it contingently meets with the approval of the people and officials. The act still violates written law, but under the acceptance model that is not decisive; acceptance overrules written law, both to validate and to invalidate changes of law, even if it does so only rarely. If the people want to repeal a complete self-entrenchment clause, in short, logic will not stop them, and law will not stop them in the name of logic. Law may stop them on other grounds, of course, and as noted, the very provisions of the constitution that the amendment violates will have their effect in determining what is accepted.

Under the inference model an original complete self-entrenchment clause must be immutable, and a self-imposed self-entrenchment clause cannot exist. If, however, a self-imposed self-entrenchment clause could be enacted under the inference model, one might argue that it would be mutable, even if the self-entrenchment were complete. To make the argument work one must appeal to a principle of customary or "natural" law, often found in dicta, that a legal power can unmake anything that it can make. Such a rule is not at all unlikely, for it is a variant of the rule that one generation cannot bind its successors except revocably or in manner and form. If a proponent of the inference model finds this rule available to her, then she might allow some self-imposed complete self-entrenchment clauses to be mutable, if only they could exist to begin with.

Note, however, that this principle that legal powers can unmake anything they can make may give the people a legal right to abolish the constitution (see Section 18). This could result in the repeal of the AC, although not by the procedure of the AC. Proponents of the inference model, if they pick up the principle at all, are likely to qualify it by holding that a legal power can unmake anything it has made, but only by following the procedures then in effect, including any procedures made by the power to be unmade. If this qualification is not to reinstate the immutability of complete self-entrenchment clauses it must give an AC continuing omnipotence, or at least sufficient power to transmute or amend completely self-entrenched rules, even if no other existing procedure would allow it. The qualification could not give the AC self-embracing omnipotence, for then it could make something that it could not unmake, namely, a genuinely immutable limitation on the AC.

Enacting an immutable limitation on the AC would be impossible under the principle that legal powers can unmake what they make. It would also be impossible under the inference model stripped of that principle, since it would amount to self-amendment. Note that the qualified principle directly gives the AC the power that was sought in intermediate rules; it makes complete self-entrenchment clauses mutable by stipulating that the AC can amend them, not by appeal to a rule independent of the AC that could justify the result. If the AC was never limited by an immutable rule, then its repeal of a complete self-entrenchment clause should not count as an augmentation of its power, even if it is self-amendment. However, if even the mutable complete self-entrenchment clause is considered a limitation on the AC, albeit revocable by the AC, then repealing it would take us from a temporary period of limited power to a succeeding period of unlimited power, which is certainly a kind of self-augmentation of the power of the AC. It is like a person unlocking a room in which she had locked herself, or resigning from a game she had agreed to play. That would be a kind of self-amendment, revoking revocable self-limitations, and so would disqualify it under the inference model.

The acceptance model may authorize the repeal of a complete self-entrenchment clause by virtue of the capacity of the people and officials to overlook or tolerate contradiction. But there is a neater way. Suppose the AC amended itself[Note 20] by addition, appending to itself the following clause:

> Through the procedures described in this Article the people may amend or repeal any provision now or ever to be part of this Constitution, without exception, notwithstanding any protective language, any supposed inherent or implied limitations on the amending power, any prohibition against self-application, any conjectured or actual reservations intended by any maker of this Constitution, or any future amendment to this Constitution not made in convention.

Could such a clause empower an AC to repeal a complete self-entrenchment clause? By its words and evident intent, certainly. But those words squarely contradict the words of a complete self-entrenchment clause, which might say, "nothing in this section may be amended by any means whatsoever". (They also contradict themselves, for which see below.) The fact that the AC may be worded to make it an irresistible force does not at all prevent us from wording a subsequent complete self-entrenchment clause to make it an immovable object.

If the amended AC does not suffice by its words to negate the words of the self-entrenchment clause, because it does not conceptually outflank the entrenchment clause, pierce a loophole in it, or supersede it as the more specific, then it may still control by the lex posterior principle if it is the later in time (see Section 16). If the self-entrenchment clause is original or self-imposed, but older than the AC, then it will lose by the rule of change that allows amendments to amend and by the rule of priority that favors recent law.

If a self-entrenchment clause is self-imposed after the AC is amended to include the new provision, then the entrenchment is the most recent voice of the sovereign. But the AC still says of itself that its power cannot be limited even by future amendment, except those made in convention. If the new self-entrenchment clause were not made in convention, then its protective language would probably fail in a court test. The rule that the clause entrenches would be exposed to ordinary amendment. One could say that the self-entrenchment clause, despite its lawfulness or validity, would have only "revocable effectiveness" because it remains subject to repeal. For a self-entrenchment clause that is a much more serious qualification than for other provisions law, almost enough to constitute its ineffectiveness or nullity.

If the self-entrenchment clause were made in convention, however, it could validly shield itself and the rules within its scope from amendment. At least the amended AC could not nullify the protective language. In such a case an acceptance theorist would turn back to the first method of repeal, and allow the AC to repeal the newer self-entrenchment clause if the proper show of acceptance by the people were made.

Conceivably, a "reaffirmation" of the amended AC sometime after the complete self-entrenchment clause would have the effect of giving the AC priority in cases of conflict, thereby giving it the power to repeal the clause. If such a course were to be lawful, it seems that the reaffirmation must receive the same supermajorities from the same bodies as ordinary amendment, which reduces to repetitious self-amendment, or it must receive some less formal show of faith, which reduces to overriding acceptance of the power of the AC to repeal the self-entrenched rule.

If we omitted the words "not made in convention" from the proposed addition to the AC, then it would be self-contradictory. It would give the AC continuing self-embracing omnipotence. It would prevent any new limitation on the amending power from ever taking effect, which is continuing omnipotence, and it would authorize all self-amendments without exception, which is self-embracing omnipotence. This is the contradiction at the heart of the paradox of omnipotence. The contradiction is clear when we think about using the new clause to repeal itself. By its own terms, it could do so, because it is a clause of the constitution and therefore mutable under the AC, but it could not do so, because to repeal it would limit the power of the AC, which the clause prohibits.

There are two ways to prevent this contradiction. First, word the addition so that continuing omnipotence is not created. This was done originally by allowing limitations on the AC to be adopted in convention. Second, word it so that self-embracing omnipotence is not created, for example by preventing some kinds of self-amendment through the use of a complete self-entrenchment clause. Perhaps the whole addition could except itself from the amending power. This path is the most precarious, for as we have seen self-amendment in violation of complete self-entrenchment clauses will be possible in actual legal settings, under the acceptance model. Therefore, if such an addition gives the AC continuing omnipotence, it will probably have self-embracing omnipotence as well, from the force of acceptance in practice, thereby bringing the contradiction back again. Of course, however, the contradiction is tolerable under the acceptance model, if it is actually accepted.

Self-amendment under the acceptance model can prevent, even annul, immutability. The annulment or transmutation of immutability is a contradiction in terms, but also an accurate description of what could legally occur if self-amendment is permitted. If an AC can transmute and amend a complete self-entrenchment clause simply by doing so, with the acceptance of the people and officials, and without first amending itself to give itself the power, then its superiority to legal immutability is plain. Legal immutability still exists only at the level of law, and acceptance transcends law. On the other hand, if self-amendment explicitly increased the power of the AC over complete self-entrenchment, then the new AC would have purchased two "tickets" to priority over a previously "immutable" complete self-entrenchment clause: more recent status and more specific language.

This also illustrates the claim in Section 3 that the postulate of any immutable rules would beg the question of the mutability of the AC. If the AC can amend itself, then perhaps it can arrange to reach and amend any rule of the system. But the self-applicability of an AC is neither necessary nor sufficient to achieve transmutation of immutable rules. If an AC can simply amend a complete self-entrenchment clause with the direct authorization of acceptance, then strict self-amendment does not occur and is unnecessary. Authority from acceptance is necessary and sufficient for the conquest of immutability. It is necessary because, without it, the contradiction in transmuting immutability would forever bar the act.[Note 21] It is sufficient because we need nothing more than the good grace to survive contradiction in order to amend an immutable rule.

Omnipotence of the AC is also necessary and sufficient to conquer immutability. When acceptance directly authorizes transmutation, it is making the AC omnipotent within the sphere of law. When immutability is transmuted, the amending power is accordingly empowered. In short, if acceptance and the omnipotence of the AC are both necessary and sufficient for the same condition, then they are the same. This is not really a new or interesting proposition, however, until we decide what kind of omnipotence in the AC we can mean.

Of the three powers or properties, then, self-applicability is less important than acceptance and omnipotence in conquering immutability. Omnipotence and immutability may collide like an irresistible force and an immovable object, but the object moves when the "authority" behind the force can tolerate contradiction.[Note 22] If the irresistible force can enhance itself by self-application, then it may or may not reach a state where it can move the immovable object. In the legal analogue of these forces and objects, this is an empirical question on which history or experiment have more to say than a priori analysis.

The transmutation of immutable rules is not merely academic. In 1965, citizens of Georgia challenged a state constitutional amendment that would consolidate several school districts and allow the officials of the school district to declare the effective date of the amendment. The delay in the effective date beyond the ratification date and the deference to school administrators in "realizing" constitutional law were not specifically prohibited by any language in the Georgia constitution, although there was general language to the effect that amendments went into effect when ratified. The Georgia Supreme Court held that

> *if there was* [a prohibition of such delay and deference], this amendment is the latest expression of the sovereign will of the people upon the subject and 'will prevail as an implied modification *pro tanto* of the former provision.'

McCullen v. Williamson, 221 Ga. 358, 144 S.E.2d 911, 916 (1965).[Note 23] This suggests that even explicit language prohibiting such delay and deference could be overcome by an ordinary amendment through an AC not specifically self-amended for the job. The lex posterior principle is the universal solvent that helps new law overcome old prohibitions.

Amendments that are prohibited by the constitution, the case seems to say, may be adopted anyway, since the act of amendment is the most recent, and therefore overriding, act of the sovereign. The prohibited amendments are only prohibited until adopted, since adoption occurs under a power that always supersedes the power of the prohibition. The prohibition may as well have been completely self-entrenched, since the sovereign apparently has the power to revoke all past acts and, more than that, to revoke them in the very act of violating them. But of course the outcome might have been different if the court had to face explicit prohibitory language, especially explicit self-entrenchment of the prohibition.

The theory that the lex posterior principle allows certain violations to become valid law, or converts violations to amendments, is further discussed in Section 21.C.

Can self-amendment allow an AC of continuing omnipotence to reach and repeal the continuing character of its omnipotence? Under the inference model, even allowing self-amendment, the answer is certainly not, for if anything is ultra vires for an AC of continuing omnipotence it is to undo its continuing omnipotence. Any attempt would be a nullity, not a valid amendment that might take priority over pre-existing rules under the lex posterior principle.

But under the acceptance model, why not? There are reasons why not, but the final answer must be that the acceptance theory would allow it if properly accepted, which is an empirical question. One reason why this is not an easy question, even for the acceptance theory, is that while one generation may fully accept the abrogation of the continuing omnipotence of the AC and thereby allow itself to bind its successors (to bind them, it thinks, irrevocably), nevertheless future generations may refuse to recognize the abrogation or to recognize that they are irrevocably bound by prior generations in anything. One generation might accept a law which it believes it has made irrepealable, while the next generation might with equal authority accept its repeal. There is no reason not to call the law temporarily immutable, because when made, immutable rules were possible, not ultra vires; continuing omnipotence had been overthrown. All abrogations of continuing omnipotence carry this possibility of future reversal, and under the acceptance theory the abrogation may always be abrogated or the transmutation transmuted. The immutability of continuing omnipotence can only be transmuted by the adoption of a different immutable rule, and if the first can be abrogated by acceptance, then so can the second.

The result is that the only immutable rule in a system of continuing omnipotence may be "repealed" by one generation, and in the next declared simply "violated" —under the acceptance model. Any supposed irrepealable law that one generation uses to abrogate the immutability of continuing omnipotence may be repealed by the next generation, proving to the repealing generation that the law was never immutable and the continuing omnipotence therefore never abrogated, or never abrogated irrevocably. No objective standpoint exists that could allow us to call the act of the second generation a violation or a repeal of an immutable rule; we will always be subject to the relativity of the two generations. What seems to one generation like the transmutation of immutability, may seem to the next like failure, or vice versa.

Finally, it should be obvious that under the acceptance theory, acceptance itself has a kind of continuing omnipotence. Strictly speaking, acceptance is not a rule of change and therefore cannot be omnipotent in any way. But it is a source of authority for legal change that can tolerate or authorize any change of law whatsoever. No exception need be made for itself, for acceptance is not law and cannot be changed by changes of law. It is a social and historical phenomenon, and one of the virtues of Hart's acceptance theory is that it refuses to leave law magically divorced from social experience and grounds it firmly in the dynamic, contingent, historical reality of human decision, acquiescence, and practice.

Acceptance may be considered sufficient to authorize any change of law without considering it to embrace a moral or legal right to revolt. Indeed, once the authority to change law is condensed into a right, all the questions of self-amendment arise. Can a moral or legal right to revolt to used to justify its own repeal? (See Section 18.)

If the immutably continuing omnipotence of acceptance attempts to transmute itself, then it will fail in a sense that acceptance theorists can call objective and non-relative. If one generation attempts to disenfranchise acceptance by establishing a legal order that claims to derive legitimacy from the whim of the new autocrat or the ascertained whim of Jehovah, or anything but acceptance, then it may seem to that generation that acceptance is no longer authorized to define law. We certainly can imagine, or know cases of, shifts from popular sovereignty to more traditional military, religious, or elite foundations of legality. It would then seem that the legitimacy of the regime would not be subverted if acceptance waned or attached to an alternative. But this is just what is denied by the present theory. Even if the new autocracy cannot be said to be established through public and official acceptance, future generations may always overthrow the regime and establish an alternative that becomes law (as opposed to long-lasting, effective hooliganism) through public and official acceptance. The overthrow may be revolutionary in its violence or in its discontinuity with prior law, or it may be a constitutional amendment that replaces autocracy with democracy. For the acceptance theory, no generation can lose its power to define the ultimate premises of law through its acceptance. The people hold this power inalienably, though they may alienate it revocably in times of weakness, panic, or duress. Therefore, while acceptance may acceptably lie dormant for a time, it can always awaken to its own power; it cannot transmute its immutably continuing omnipotence, or irrevocably shift its powers to any other sources of law and authority.

Further wrinkles in the theory of immutably continuing omnipotence and the possibility of revocable self-transmutation are explored in Section 21.C.

C. Supposed limitations on the U.S. federal amending power

The case for the omnipotence of the amending power is usually heedless of the paradox of omnipotence. A case in point is Raymond Uhl's defense of amendatory omnipotence.[Note 24] Uhl follows Austin's theory of sovereignty, which holds that the supreme authority is also omnipotent and autonomous. So when Uhl finds the federal amending power to be the supreme power in the American legal system, he automatically attributes to it all the other attributes of classical sovereignty. "It is legally omnipotent, unlimited, and illimitable....There is no legal restriction on the extent to which this power may go."[Note 25] Uhl ignores the fact that if the omnipotence he attributes to the amending power is continuing (illimitable), then it is already limited, and if self-embracing (unlimited), then it is limitable.[Note 26]

Uhl claims that "express limitations" on the amending power, such as the requirement in the federal AC that no state be deprived of its equal suffrage in the Senate without its consent, "are but formal and at most can remain in force only so long as the sovereign permits them."[Note 27] He does not defend or elaborate this view, or consider difficulties such as entrenchment and self-entrenchment clauses. But his position seems to be that sovereigns cannot bind themselves, not even by their own laws, which suggests continuing omnipotence; but of course continuing omnipotence requires one immutable limitation on sovereignty. Uhl's only real argument for amendatory omnipotence is the following:[Note 28]

> If the power to amend is limited we must assume that there is some authority capable of establishing such limitations. The only power legally able to do this is that power which can change the Constitution of the United States. Any limitations, express or implied, on the exercise of this power are at most self-imposed and can be removed by the authority which created them.

Here Uhl wins this conclusion too easily. First, he does not consider the possibility that self-imposed limitations may be immutable, for example through entrenchment or self-entrenchment. Second, the AC may be limited by original, not self-imposed, limitations. He seems to be saying that the sovereign can always free itself from its own laws (by repeal if not by privilege), which may be the case, but he shifts from regarding the AC as sovereign to regarding the people as sovereign.[Note 29] The people can undoubtedly overthrow a constitution guarded by any number of any kind of limitations on the amending power and even by limitations on the people's power to overthrow it. But whether an AC can do so is not at all an easy question, and not addressed by Uhl. Self-imposed limitations are not equally or obviously repealable. They may be entrenched or self-entrenched, or they may possibly limit or destroy the amending power irrevocably.

While Uhl has a naive sense of the omnipotence of the amending power, this turns out to be rare in the literature. Most scholars have a naive sense of its limitation and non-omnipotence.

The debate among jurists on the existence of implied limitations on the amending power turns for some on the question whether that power is delegated by the people. Delegated powers are often said to be limited or limitable per se.[Note 30] The opposite of a delegated power may be one inherent in government, not delegated by the people, or inherent in and retained by the people, never given up by delegation. This ambiguity plagues much of the discussion. Uhl, for example, denies that the amending power is a delegated power,[Note 31] but, as noted, his arguments shift back and forth between finding the sovereign amending power vested in the people and in the AC and the government. Edward Corwin, by contrast, believes the amending power is delegated and limited:[Note 32]

> Probably the amending power, like all other powers organized in the Constitution, should be regarded as a delegated, and hence a limited power, although this does not necessarily infer [sic] that the Supreme Court is vested with authority to determine its limits.

The problem with most delegation theories is that they are vague or silent on the questions (1) why delegated powers must be limited, (2) whether the limits are revocable, and (3) how "delegation" should be traced back to intelligible social realities.

The arguments in favor of particular implied limitations are easier to evaluate than arguments based on the concept of sovereignty or delegation. One of the most serious arguments, which has led to much scholarly comment and even litigation, is the view that the federal AC has been impliedly amended, and limited, by the Tenth and Fourteenth Amendments. This theory asserts that the federal AC is limited in that proposed amendments that diminish the people's rights must be ratified, if at all, by state conventions rather than state legislatures. Congressional discretion to choose the method of ratification may have been unlimited in 1789, under Article V, but was limited (this theory goes) by the Tenth Amendment in 1791 and again by the Fourteenth Amendment in 1869. This argument is considered and rejected in Section 16 below. The theory that the AC may be limited or amended by judicial review is considered in Section 15.

William Marbury[Note 33] argued in 1919 that the amending power is limited by the intent of the framers. To him it followed that amendments must be improvements. Marbury cites the opinion in Livermore v. Waite, 102 Cal. 113, 119, 36 P. 424 (1894) (emphases in original):

> The term Amendment implied such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purposes for which it was framed.

This is an ingenious way to multiply the implied limitations on the amending power. Unfortunately it founders on the contestability of anyone's notion of what an improvement is. The only test compatible with the spirit of the constitution is whether the alleged improvement was ratified in the way specified for amendments.

Marbury is not daunted by this, and is quite sure that the framers did not intend that the amending power should be used to infringe on state powers or to enfranchise women. He argues by analogy to the taxing power, which is not expressly limited in the constitution but which was "wisely" held to implied limitations by the Supreme Court when it threatened to destroy the states. Marbury cites Collector v. Day, 11 U.S. 117 (1870) and Lane County v. Oregon, 7 U.S. 71 (1868). The taxing and amending powers are equally delegated powers, he argues, and therefore are equally subject to such implied limitations.[Note 34]

Marbury even worries that amendments should not be imposed on states against their will, implying that all ratifications should be unanimous,[Note 35] which contradicts both the explicit language of the constitution and the intent of the framers. He argues that the prohibition against depriving a state of its equal suffrage in the Senate without its consent implies a prohibition against any indirect interference with the functions of a state.[Note 36] He makes clever but sophistical use of the principle that Congress cannot make irrepealable laws by arguing that "legislative" amendments are impermissible because (as provisions of the constitution) they cannot be repealed by Congress.[Note 37] An amendment is "legislative" rather than "constitutional" when it deals so specifically with any subject that it is more appropriate for Congressional action and statutory regulation than constitutional amendment.

Marbury believes that all these arguments invalidate the Nineteenth Amendment (Women's Suffrage), and would invalidate the three Civil War Amendments if they had not been cured by long acquiescence.[Note 38] In short, he believes the implied limitations on the amending power protect state prerogatives and prohibit the amendments that abolished slavery and enfranchised blacks and women.[Note 39]

Aside from the argument against legislative amendments and the analogy to the taxing power, Marbury's arguments are clearly, almost comically, ideological rather than legal. He well illustrates how debates on the amending power raise the principles and passions surrounding our most basic rights and institutions: for an omnipotent amending power can sweep them all away.

One may always read clauses of the constitution in light of the framers' intent, when known. But the AC will always be a special case. To say that the framers never envisioned that the amending power might be used to enfranchise blacks or prohibit the sale of liquor may be true, but to cite such facts as if they limited the amending power is to forget that the clause we are interpreting authorizes change. Despite the framers' own substantive policies and preferences, in the AC they gave future generations the power to make whatever changes the people of those generations liked well enough to garner the wide consent stipulated in the AC. The evidence lies in Article V itself. Aside from the one substantive obstacle preserving the equal suffrage of the states in the Senate, the framers put only procedural obstacles in the way of amendment.

Marbury's analogy of the amending power to the taxing power breaks down and does not prove his point. First, the amending power might not be "delegated" as the taxing power is —although I will not enter the lists on that controversy. Second, the taxing power was not included in the constitution to make possible the peaceful adaptability to changing circumstances, and is not intended to change basic governmental structures. The amending power was and is these things, and to allow it to change some basic structures and not others is an arbitrary division not justified by the language of the constitution or even the intent of the framers. Marbury fails to show why states cannot consent through the amendment procedures to give up traditional prerogatives.[Note 40]

The argument that legislative amendments are prohibited usually rests on the declaration in Article I, Section 1, that "all legislative powers" are vested in Congress. The argument that a legislative amendment is impermissible because Congress cannot repeal it is specious, for the rule against binding one's successors irrevocably is satisfied as long as Congress makes no immutable statutes or contracts, and the amending body makes no immutable amendments. Neither Congress nor the amending body binds itself irrevocably when Congress and three-fourths of the states together adopt a revocable amendment. As for the former argument that all legislative power is in Article I, and none in Article V, the answer is that "legislative" and "constitutional" amendments differ only in degree of specificity. In making an amendment the people can draw the line wherever they please; if the courts accept it, then it it is a valid part of the constitution.[Note 41] The fact that the courts themselves may draw the line wherever they please, or refuse to draw it at all, suggests that we are not dealing with an inherent limitation on the amending power. Prohibition

was probably the most "legislative" amendment in our history, and it survived four challenges to its constitutionality, including arguments that it was impermissibly legislative (see Section 16).

Marbury is also opposed here by a fellow delegation theorist. William Frierson has argued that even amendments that are concededly legislative are permissible and need not be defended as borderline "non-legislative" or "constitutional" amendments. His basic premise is that the constitution delegates legislative power to Congress in the first place, and the delegator of a power must be able to exercise the power it delegates.[Note 42]

The argument against legislative amendments, however, is most often made on policy grounds. One of the most thorough treatments of the policy questions is by Margaret Center Klinglesmith,[Note 43] who argued that the greater difficulty of amending the constitution, as opposed to statutes, made it imprudent to set the "ephemeral and the local" so far above responsive procedures. She was certainly right as a matter of policy. She was also right to note that the question whether there are any implied limitations on the amending power "is a momentous question,"[Note 44] for it will tell us whether our AC is omnipotent and whether our basic rights may in principle be repealed by a valid law (see Section 16).

Such policy arguments at best can show that legislative amendments, or other allegedly ultra vires amendments, are unwise, not illegal. Lester Bernhardt Orfield generally believes that no legal arguments are sound that might establish implied limitations to the federal amending power.[Note 45] Express limitations, however, might be valid.[Note 46] He is unsure and suggests that an express limitation such as that protecting the equal suffrage of the states in the Senate, "could probably be repealed by a unanimous vote of the states."[Note 47] Limitations not so closely tied to individual state consent could probably be repealed by the normal supermajorities. Walter F. Dodd also rejects the idea of implied limitations on the federal amendment power.[Note 48] (State ACs are all impliedly limited by a requirement that state constitutions conform to the federal constitution.) A more radical and confident statement is to be found in McCullen v. Williams, 221 Ga. 358, 144 S.E.2d 911, 916 (1965):

> [A]ny attempt to limit the will of the people with respect to the substantive content of an amendment would amount to a gross infringement upon their sovereign right to establish, modify, and alter their organic law as they see fit....

If an AC is not absolutely valid, supreme, and omnipotent, but only valid, supreme, and omnipotent until amended, then is it limited? The paradox of self-amendment may inspire one to think of the validity of an AC as existing under a time limit (see Sections 10 and 14). Does that time limit comprise a limit on the power of the AC? The answer must be no, for any amendment that is authorized at all is authorized by an AC that is valid until amended, provided it is made while the AC is valid. If the time limit is not set for any particular moment, but is implied by the possibility of an amendment undoing its validity, supremacy, or omnipotence, then only self-amendment could impose the contemplated limitation. An AC that is unlimited but for self-imposed self-limitations has self-embracing omnipotence, and can enact any amendment whatsoever until it takes away its own power to do so. If the time limit is set for a particular time, say 12:01 AM, 2000 A.D., then the AC is under a sunset clause (see Section 14), but could still enact any amendment before the expiration date which an AC not under a sunset clause could enact. Similarly, a time limit contradicts continuing omnipotence, but would not prevent the adoption of any amendment that continuing omnipotence could adopt.

The only possible exception is a repeal of the time limit itself, which might be entrenched, at least impliedly. If the validity of entrenchment is upheld, such self-amendment would be prevented. Alternately, repealing the time limit might be considered a way in which the AC could entrench itself against future amendment. If self-amendment is possible, then self-imposed self-entrenchment of the AC is possible. If the time limit is put into words that forbid extensions of the expiration date, then the question is converted to the permissibility of the self-disentrenchment of the AC. For all these problems, see Section 9.

Some limitations that have been alleged to be implied in the federal AC have been litigated and dismissed by courts. For example, some have argued that all amendments must be "germane" to the existing text, that is, specifically addressed to an existing clause and amending it. Such a limitation would preclude all amendments by addition and, in some versions, all germane amendments that fail to state which clauses they are to amend. This theory was rejected in State of Ohio v. Cox, 257 F. 334, 342 (S.D. Ohio 1919).[Note 49]

Because Article V says that Congress may propose amendment "whenever two thirds of both Houses shall deem it necessary," some have argued that no amendment is valid unless Congress makes a specific finding of "necessity". This argument was levelled against the extremely unpopular Eighteenth Amendment (Prohibition), as was the "germaneness" argument and many others, as part of a series of desperate but clever attempts to invalidate it (see Section 16). The Supreme Court rejected the "necessity" theory, and found a sufficient declaration of necessity implicit in a two-thirds vote. State of Rhode Island v. Palmer, 253 U.S. 350 (1920). Klinglesmith argued that the framers' use of the phrase "whenever two thirds of both Houses shall deem it necessary" is evidence of their intent to prohibit legislative amendments.[Note 50]

One of the most relentlessly ideological arguments for implied limitations is Arthur Machen's against the validity of the Fifteenth Amendment (Black Suffrage).[Note 51] Machen bases his argument on the only express limitation on the federal AC still in effect: "that no State, without its consent, shall be deprived of its equal suffrage in the Senate" (Article V). From this express limitation Machen infers many implicit limitations, including the necessity of preserving the Senate,[Note 52] preserving the states, preserving the states as entities capable of giving consent, and preventing any alteration of "the composition of a state" without its consent.[Note 53] He argues that "a state" is its people, particularly its citizens and voters, which immediately after the Civil War meant the white people of a state. The right of the white people of a state to elect two senators (by way of the state legislature) is taken away by the enfranchisement of blacks, especially in states like South Carolina where blacks outnumbered whites in 1870 when the Fifteenth Amendment was ratified. This would be legally irrelevant if it were not that Machen finds this dilution of white

voice a diminution of their equal suffrage in the Senate. The states, as their white voters, have lost their equal voice in the Senate if their voice is diluted by the enfranchisement of blacks.[Note 54] Machen uses the one-person, one-vote principle, derived from the Fourteenth Amendment, before it was articulated by any court and which partisans of his camp were to oppose bitterly, to challenge the deprivation of equal suffrage, or equally weighted voices in the Senate, of a state considered as its white voters. He compares the sudden enfranchisement of blacks to the annexation of Puerto Rico to Rhode Island, depriving the Anglo Rhode Islanders of their equal voice in the Senate. This argument makes clever use of the Fourteenth Amendment to oppose the Fifteenth Amendment.

In many places Machen reveals the tenacious racism that drives his legal arguments. The annexation to Rhode Island of Puerto Rico, when Vermont would have worked as well, is just one example. He claims that states are their people, but that "[t]he white people and they alone constituted the State of South Carolina,"[Note 55] because they alone could vote. The fact that blacks could vote after the Fifteenth Amendment did not make them part of their states; it violated the rights of whites. "The Fifteenth Amendment amounts to a compulsory annexation to each state that refused to ratify it of a black San Domingo within its borders."[Note 56] He finally falls back on an "abuse of power" argument, and asserts that the greatest abuse of power is "to take a state government out of the hands of its citizens and give it over to a mass of persons who by its laws were mere chattels."[Note 57]

The Supreme Court has never ruled on the existence of Machen's implied limitations within the express limitation of the equal suffrage clause of Article V, nor has it ever directly ruled on the validity of the Fifteenth Amendment. Only once has the Supreme Court ruled on a theory that an implied limitation on the federal AC lay inside the equal suffrage clause. It held that the Senate is not barred by that clause from refusing to seat a newly elected member presenting proper credentials pending investigation of the legality of his election. Barry v. United States, 279 U.S. 597 (1929).

The equal suffrage limitation on the AC is an entrenchment clause protecting the equal suffrage of the states in the Senate. It is incomplete entrenchment because it can be repealed by a difficult procedure —getting the consent of the states to be deprived of their equal suffrage. It is not self-entrenched, at least not expressly. Therefore, it might be repealed by an ordinary amendment, provided the losers by it voted with the majority. To prevent this one might want to find an implied limitation on the AC forbidding repeal of the equal suffrage limitation except by, say, unanimous consent of the states. The rationale is that the consent of each state is necessary because each state might be a victim if the clause were repealed (see Section 9.A). In general one might find in any AC an implied limitation self-entrenching any incomplete entrenchment clause at the same level of difficulty it requires for the amendment of the rule it protects. Such an implied limitation is certainly a reasonable reading of the intent of the framers: this can be said without reference to any particular clause or framers because an incomplete entrenchment clause that is not self-entrenched is virtually pointless.

Such an implied limitation, however, would not interfere with the omnipotence of the AC, for at most a merely incomplete self-entrenchment is read into a clause, which could always be repealed by its own difficult procedure. If a complete entrenchment clause is impliedly self-entrenched, for the same reasons, then a limit on the omnipotence of the AC may be implied with it. If the AC can transmute immutable rules, its omnipotence will survive the implied limitation; otherwise not. Whether an AC can repeal a complete self-entrenchment of itself will be explored in Section 9.

Alf Ross has argued in effect for another implied limitation on an AC, namely, that it never violate the logical rules of inference, such as modus ponens, in the derivation of a new amendment from the old AC. This is to say that no amendment can be adopted that is inconsistent with, or not deducible from, a set of premises that includes the existing AC. This position has, I think, been sufficiently dealt with. It is an application of a priori rules to an empirical subject; it requires outcomes that no court has recognized and forbids outcomes that are commonly, indeed, invariably upheld by courts. It purports to overrule law in the name of logic and thereby betrays its alegal character. The presumption that law must be logical is very strong in many other areas, for example in the rule of priority that prefers the more recent rule when two or more rules conflict irreconcilably (see Section 16). We have such rules because we would rather reconcile or eliminate inconsistent laws than live with them. But of course this is a policy decision that we can reverse or suspend. If there is a contradiction in self-amendment, no legal rule forbids it.[Note 58] (The variable value of consistency in law is further discussed in Section 21.B.)

Because Ross believes that self-amendment is impossible, he allows the amendment of an AC only by means of a tacit rule transcending the constitution which authorizes just such changes. As noted in Section 6.B, Ross must and does regard this rule as immutable. If it were mutable, then the higher rule that authorized its amendment would be immutable, and so on. Such rules stand as limitations to the actual AC in the constitution; because they are tacit or implied, they are implied limitations. Their immutability protects them from the AC, as does as their hierarchical superiority to it. The permissibility of direct self-amendment eliminates the need to posit such rules, but they might nevertheless one day be posited or "discovered" and cited by a judge. If so, they would be judge-made limitations on the AC, which could always, when accepted, undo the omnipotence of the AC (see Section 15). That they would undo it revocably was argued above (Section 8.B, above; see also Sections 9 and 21.C).

This leads to a more interesting problem. If the AC can be amended by rules of change other than itself, it is potentially limited to that extent. In Part Two I present six methods of amending the federal constitution other than direct amendment through the AC. All are "implied" in the sense that the "official" view is that the methods of the AC are exclusive and, for example, that judicial review does not amend but only interprets and applies the constitution. The availability of such methods may limit the omnipotence of the AC, but may also, by the same token, assure its mutability even if self-amendment is one day (revocably) ruled impermissible.

Any immutable rule would be a limitation on the power of the AC, or at least a prima facie limitation until we determined which had to give way, the immutability of the rule or the omnipotence of the AC. One rule that appears to be immutable is the rule that what the constitution says is law, is law.[Note 59] In Hart's terms, that rule is a rule of recognition. It may be changed if acceptance shifts and authorizes a different rule of recognition, such as a rule declaring that only the utterances of a dictator will be considered law. But can the supreme rule of change, the AC of the constitution, change the rule that what the constitution says is law is law? Any amendment that purported to repeal that rule would rely on its validity and thereby fail to repeal it —unless it effectively declared its own validity independently of the rule. An amendment that purported to modify, without repealing, the rule might have better success. The rule could apparently be changed to read, "what the constitution says is law is law and what treaties say is law is law on a par with the constitution" (amendment by addition), or "what the constitution says is law is law except for what it says about the powers of constitutional conventions, which is not binding on such conventions so long as they are lawfully convened under their own rules" (amendment by exception or subtraction). Amendments to the rule that simply reversed the proposition, and declared that what the constitution said is law is henceforth not law, would not only be unlikely in fact, but even if passed they would not comprise limitations on the AC. An AC cannot make a donkey into a horse, but it may be unlimited in power as an AC, that is, as a rule of change for constitutional rules. If we realize that even an omnipotent AC can only make constitutional rules, we see that it is not limited by its inability to make anything else, such as constitutional rules that were not laws.

Similarly, in the theological version of the paradox, James Cargile has argued that the omnipotence of a god is not limited by its inability to make something not made by a god.[Note 60]

Let us now shift from the new theories of "natural law" that make legal validity depend on logic to the older theories that made it depend on morality. One of the most fundamental of the alleged limitations on an AC is an implied prohibition, implied by due process or principles of fairness, against retroactively abrogating vested rights by a change of law. The states agree that no one has a vested right in the law as it is that might preclude its amendment or repeal, that any reliance on existing law may be upset by proper use of the procedures of legal change, and that states make no implied promise to protect their citizens from incidental injury caused by changes in the law. See e.g. Tom & Jerry, Inc. v. Nebraska Liquor Commission, 183 Neb. 410, 160 N.W.2d 232 (1968), Cirelli v. Ohio Cas. Ins. Co., 133 N.J.Super. 492, 337 A.2d 405 (1975). But often the cases limit the states' discretion to change law by a standard of reasonableness, or a duty to avoid arbitrariness and comply with due process. Id. Some cases are more specific in prohibiting unreasonable impairments of contracts by statute or constitutional amendment. City of New York v. Town of Colchester, N.Y.S.2d 156, 66 Misc.2d 83 (1971). And most agree that a retroactive abrogation of vested rights cannot be effected by statute, Rosenberg v. Town of North Bergen, 61 N.J. 190, 213 A.2d 662 (1972), or in some places even by constitutional amendment, Permann v. Knife River Coal Min. Co., 180 N.W.2d 146 (N.Dakota, 1970).

Is the amending power limited by justice, fairness, or equity? Here we reach a fundamental question of legality. An old Virginia statute set out a right of free exercise of religion, and then added:

> And though we well know, that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding generations, constituted with powers equal to our own, and that, therefore, to declare this act irrevocable, would be of no effect of law, yet we are free to declare, that the rights hereby asserted, are of the natural rights of mankind, and that if any act shall be hereafter passed, to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

See Currie's Administrators v. the Mutual Assurance Society, 4 Hen. & M. (14 Va.) 315 (1809). This statute recognizes the continuing omnipotence of the legislature, much like a British parliament. It recognizes that one assembly cannot bind its successors irrevocably, and yet tries to protect its assertion of fundamental rights from amendment or repeal. While it denies the existence of any legal duty on future generations to let the statute stand, it imposes a moral duty to let it stand. While repeal may be lawful, it will violate the fundamental rights outlined in the statute itself. The legislature, reaching the limit of its power, placed a curse on its posterity in place of an injunction.

Can natural rights, insofar as they are expressed in positive law, lawfully be repealed? Is an act that repeals positive law but violates natural rights thereby a violation of positive law? Might it be within the powers of a legislature or amending body and still be a wrong, such as a tort? If the statute adds something to the common law, then repeal seems permissible and effective. If the statute simply restates the common law or customary morality, which was the medieval view of statutes, then perhaps a repeal will be either impermissible, as a violation, or ineffective, leaving intact the unreachable moral environment.

Ronald Dworkin has argued convincingly that principles may legally supersede and qualify legal rules, and therefore that the line between legal and alegal standards cannot be fixed as rigidly as legal positivists would like.[Note 61] If justice limits the amending power, then it seems that an unjust constitution erected by revolution could never be ratified by acceptance or acquiescence, even if other revolutionary constitutions could be so validated.[Note 62] I made a similar argument in Section 2. If government is legitimate only by virtue of the consent of the governed, and if the people's use and contentment not to use the AC is a measure of their consent to be governed by the constitution, then the difficulty and fairness of the amending process must be taken into account. A procedure could be so difficult or unfair that the legitimacy of the constitution would be diminished. Similarly, acceptance could be indefinitely withheld from an unjust amendment or constitution. That would deprive them of legal validity under the acceptance theory, something different from legitimacy under the consent theory.[Note 63]

My use of the acceptance model in this essay, as noted, departs from Hart's in some particulars that are relevant here. I have assumed that the outcomes of procedures validated by the rule of recognition may be invalid if not accepted and, on the other side, may be valid so long as they are accepted even if the rule of recognition was violated, the procedures were defective, or the outcome contradicts its authority. I have assumed that acceptance does not merely validate the rule of recognition, and some otherwise unauthorized judicial decisions, while leaving the rest of the legal system to operate under a Rossian inference model. I have assumed that the curative powers of acceptance may intervene at every stage and provide legal authority for self-contradictory entities and procedures, defective operations, skipped steps, and an infinity of other anomalies that strict compliance with rules would not permit.

From this basic model of law we must conclude that the effect of injustice on the validity of an amendment or new regime is a matter of contingent history. They may be accepted or not depending on a host of variables such as the perceived need for order over justice, the rhetorical effectiveness of those promising to deliver justice, the packaging of the unjust law, false consciousness in the population, the power of the beneficiaries of the unjust law over its victims, the ratio of beneficiaries to victims, and so on. But I insist that, while unjust laws and changes in law may be legal or valid by virtue of both acceptance and preexisting rules of change,[Note 64] legitimacy may be lost or diminished by an unjust change of law that lessens the people's ability to change the law in the future.[Note 65] In this sense the people's acceptance is a source of authority with continuing omnipotence both descriptively and normatively. Descriptively, the people and the laws are powerless to limit irrevocably the power of acceptance to validate law. Normatively, an unjust legal impediment to the people's continuing power to change law weakens the legitimacy of the system of law to that extent.[Note 66]

Notes

1. One might argue that actual legal systems depend on, or inevitably embrace, at least a few principles of "natural law" or morality, and that the latter are absolutely immutable. For example, one might argue that not even revolution can change the rule that the people have a right to revolt (see Section 18), that promises should be kept, that self-defense excuses homicide, and so on. For the view that natural law is absolutely immutable, see Gaius, Digest, 7.5.2.1; Justinian, Constitutio Dedoken 18, Constitutio Tanto 18, Codex 1.17.2.18; Thomas Aquinas, Summa Theologica, I-II, 97, 1 and 1. See also E.K. Williams, "The Unalterable Law," Canadian Bar Review, 17 (1939) 551-57; Giorgio Del Vecchio, "Change and Permanence in Law," The Jurist, 18 (1958) 18-38; Charles E. Whittaker, "Immutable Moral Values," Texas Bar Journal, 27 (1964) 597-604; and David Daube, "Greek and Roman Reflections on Impossible Laws," Natural Law Forum, 12 (1967) 1-84 at p. 23. For the opposite view see Karl Kreilkamp, "Dean Pound and the Immutable Natural Law," Fordham Law Review, 18 (1949) 173-203; and Richard B. Hall, "The Alterability of Natural Law," The New Scholasticism, 55 (1981). For the view that legal principles in Dworkin's sense may survive revolution, see J.M. Eekelaar, "Principles of Revolutionary Legality," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 22-43.

2. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, at p. 146.

3. These formulations are not synonymous with the claim that omnipotence is "infinite" power. The power to authorize an infinity of rules —one plausible reading of "infinite power"— may be incompetent to authorize a particular rule, or even a particular infinity of rules. As Cantor proved, not all infinities are equal, and even among equal infinities some are proper subsets of others. The formulation I prefer is that omnipotence is unlimited rather than infinite power, except that continuing omnipotence is limited in its power of self-limitation. The negation of omnipotence, however, is captured equally well for most purposes by the phrases "finite" and "limited" power.

4. J.L. Mackie, "Evil and Omnipotence," Mind, 64 (1955) 200-12.

5. These terms are somewhat rare in the United States but common in Britain and its other former colonies and dominions. See e.g. Hart, op. cit. at pp. 146ff, and D.V. Cowen, Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, 1951. See also George Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" Federal Law Review, 11 (1980) 167-202.

6. Hart, op. cit. at p. 70; R.D. Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia," Federal Law Review, 9 (1978) 148-84 at p. 180.

7. Hart, op. cit. at pp. 146-47. Hart denies that parliament binds its successors equally in the two cases. "Parliament has not "bound" or "fettered" Parliament or diminished its continuing omnipotence, but has "redefined" Parliament and what must be done to legislate." Ibid. at p. 147. In the passage following this quotation Hart admits that "binding" and "redefining" one's successors cannot be kept rigidly distinct.

8. Hart, ibid. at p. 146.

9. The classical statements and sources of this axiom are well collected by Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-513. See also O. Hood Phillips, "Self-Limitation by the United Kingdom Parliament," Hastings Constitutional Law Quarterly, 2 (1975) 443-78.

10. Note that binding one's successors or oneself implies self-embracing power but not necessarily self-embracing omnipotence. This distinction will become important when we ask whether a self-embracing omnipotent entity can repeal or destroy itself (Section 9) or change itself into any other entity (Section 11).

11. See the many cases collected in Corpus Juris Secundum, "Statutes", Section 279.n.80.

12. Ibid., Section 279.n.81.

13. This was a favorite observation of William Earle, professor of philosophy at Northwestern University.

14. However, for cases of self-amendment invalidated on other grounds, see the comments on self-amendment in Arkansas and Nevada in Appendix 2.

15. Therefore, anyone who objects to self-limiting self-amendment must also object to self-imposed limitations, at least to self-imposed complete self-entrenchment clauses, even if they do not directly entrench or limit the AC. This just one way to say that adding an immutable provision to the constitution would limit the AC irrevocably just as much as a direct attempt at irrevocable self-limitation.

16. While self-embracing omnipotence may be converted into continuing omnipotence by the simple means of adopting a completely self-entrenched self-amendment that protected the continuing character of the AC from subsequent limitation, it turns out to be impossible to convert self-embracing omnipotence into a continuing self-embracing omnipotence, or one that is immutably self-embracing. See Section 11.

17. See W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change," Australian Law Review, 24 (1950) 103-08; Zelman Cowen, "Parliamentary Sovereignty and the Limits of Legal Change," Australian Law Review, 26 (1952) 237-40; H.W.R. Wade, "The Basis of Legal Sovereignty," Cambridge Law Journal, no vol. (1955) 172-97.

18. Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford University Press, 1957, Chapter XI; H.L.A. Hart, "Self-Referring Laws," Festskrift Tillagnäd Karl Olivecrona, Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner, 1964, pp. 307-16, at pp. 311-12, and The Concept of Law, Oxford University Press, 1961, at pp. 70-72; D.V. Cowen, op. cit. note 5 above, passim; H.W.R. Wade, op. cit. note 17 above, passim.

19. An AC that seems to be omnipotent is in practice very seriously limited in its power when incomplete entrenchment clauses require very difficult amendment procedures. But in theory, if I may use an analogy from the theory of computation, continuing omnipotence is no more overthrown by severe difficulties of procedure than the computability of a function is denied by NP-completeness. But this latter fact is of merely theoretical importance. While it might affect the theological version of the paradox of omnipotence, where practical difficulties can never impede the kind of power at the center of the paradox, this theoretical point is as uninteresting in law as the computability of NP-complete functions is to working programmers.

20. Self-amendment in general, and not only the special case of the repeal of complete self-entrenchment clauses, may involve the capacity of the people and officials to overlook and tolerate contradiction. But the method to be outlined relies only on self-amendment, not directly on the repeal of completely self-entrenched rules.

21. Strictly speaking, acceptance is not necessary if some other authority for law, e.g. the might of an army or the will of a deity, can tolerate contradiction as acceptance can.

22. If contradiction can be tolerated, it is just as likely that the "object" will resist the "force". When the authority behind the "force" is acceptance, then the "force" moves the "object" if that is what the people and officials have accepted. Since it is the people and officials who apply the "force" by using the amending procedure, the "object" or old law gives way. If the authority behind the "force" were the will of a deity, for example, and if the deity's priests reported that the old rule had the deity's favor but the new amendment movement did not, then the "object" would resist the "force". This is the question whether temporally posterior rules (the new amendment) have logical priority over temporally prior rules (the old rule to be amended) —or whether the living generation is sovereign and can overrule the sovereign acts of prior generations. The answer is contingent on how the people interpret the source of authority in their legal system. Acceptance understood as acceptance always gives the living generation sovereignty, that is, at least the kind of omnipotence required to amend any law it has inherited.

23. Emphases added; see Corpus Juris Secundum, Constitutional Law, section 39.n.42.

24. Raymond Uhl, "Sovereignty and the Fifth Article," Southwestern Social Science Quarterly, 16 (1936) 1-20.

25. Uhl, ibid. at p. 15. Uhl cites Austin and Dicey at p. 19.n.40. For a good collection of Austinian statements that every legal system must have an unlimited law-maker, see Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at p. 137.n.20. Orfield himself denies this proposition, ibid., p. 138. Orfield's own discussion of the sovereignty of the amending power, ibid., pp. 130ff, is more sophisticated than Uhl's, but also too loose on the question of the omnipotence of the AC and the power of the sovereign to determine the limits of its own competency; see ibid., pp. 130, 133.

26. Orfield falls into the same trap with this formulation, ibid., p. 157:

> Sovereignty, viewed in the broadest sense, may be regarded as the power to make a law on any subject binding for all time in all places. This capacity theoretically exists in the amending body.

27. Uhl, op. cit., at p. 18.

28. Uhl, ibid., at p. 19.

29. Orfield's discussion is superior to Uhl's chiefly in its clarity on this question. Orfield unambiguously believes that the sovereign amending power is the power of the people's elected agents, not that of the people themselves or of the government. See Orfield, op. cit., at pp. 102, 124, 138, 141f, 143, 148.

30. Why this should be so is not often stated clearly. The Tenth Amendment does not assume that the delegated powers are limited or limitable, only that the undelegated powers will not be exercised or usurped. The ultimate rationale is probably that the federal government is limited and has only those powers expressly and impliedly given to it, unlike the state governments which have all the powers not expressly or impliedly denied to them. But even this rationale cannot explain why a power expressly or impliedly delegated to the federal government could not be unlimited or illimitable, unless we imagine that one unlimited power could make all the other powers unlimited. Another possible theory is that the people alegally retain the sources of all legal authority, which prevents any power delegated by them from being unlimited or illimitable, even state power. That is, the acceptance and usage, or the consent, of the people has continuing omnipotence.

31. Uhl, op. cit., at p. 17.

32. Edward Samuel Corwin, The Constitution and What It Means Today, Princeton University Press, third ed., 1924, p. 88.

33. William Marbury, "The Limitations Upon the Amending Power," Harvard Law Review, 33 (1919) 223-35.

34. Marbury, op. cit., at pp. 226-28.

35. Marbury, ibib., at pp. 224, 228. At p. 228:

> Congress has no inherent power to adopt, and the legislatures of three fourths of the States have no inherent power to ratify, any amendment to the Constitution of the United States, and make it binding upon nonassenting States.

Article V is explicit in making unanimity unnecessary for amendment, and makes no provision for dissenting states to be exempted from the effect of amendments ratified by others. Here, then, Marbury is no longer interpreting the constitution, but only complaining from the standpoint of his political philosophy or what he might call natural law. However, even from his own standpoint, one might find that state assent to all properly ratified amendments lies in each state's consent to the constitution upon its admission to the union.

36. Marbury, ibid., at p. 229.

37. Marbury, ibid., at p. 229. This argument is repeated, including the conclusion that the Nineteenth Amendment is "legislative" and therefore void, by George Stewart Brown, "Irresponsible Government by Constitutional Amendment," Virginia Law Review, 8 (1922) 157-66.

38. Marbury, op. cit. at pp. 230f. He particularly notes that if the Civil War Amendments had been challenged closer to the times of their adoption, a right-thinking Supreme Court would have nullified them. Ibid. at p. 231.

39. Marbury does not say why state prerogatives supersede the federal amending power except to cite the framers' intent without documentation. He is probably vulnerable to this objection by Westell Woodbury Willoughby, The Constitutional Law of the United States, Baker, Voorhis and Co., 3 vols., second ed. 1929, I:599:

> To the author of the present treatise, the fundamental error of all those who have sought to place inherent limitations upon the [federal] amending power...is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is surprising to this writer that this theory, which since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought to support a constitutional argument [against the validity of the Eighteenth and Nineteenth Amendments].

Note that the only court to strike down a ratified amendment to the federal constitution appealed to the view of the constitution as a pact or treaty among the states. U.S. v. Sprague, 44 F.2d 967 (1930) (striking down the Eighteenth (Prohibition) Amendment), reversed 282 U.S. 716 (1931). See Section 16 for more discussion of the Sprague case.

40. George B. Skinner also believes that some state powers, particularly the police powers, are inalienable and cannot be abolished or shifted to the federal government even with state consent. George B. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," Michigan Law Review, 18 (1919) 213. Skinner bases his argument on the Ninth and Tenth Amendments, not the intent of the framers of Article V. He concludes that the Eighteenth (Prohibition) Amendment is void. See Section 16.

41. For an example of a state amendment struck down for its specificity and self-mutability, see Section 14 and State ex re. Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910).

42. William L. Frierson, "Amending the Constitution of the United States: A Reply to Mr. Marbury," Harvard Law Review, 33 (1920) 659-66 at p. 664.

43. Margaret Center Klinglesmith, "Amending the Constitution of the United States," University of Pennsylvania Law Review, 73 (1925) 355-79.

44. Klinglesmith, ibid., at p. 373.

45. Orfield, op. cit., at pp. 24, 45, 84ff, 87-88, 92, 96ff, 115-26, 156f.

46. Orfield, ibid., at p. 205.

47. As to the equal suffrage in the Senate limitation, Charles K. Burdick agrees that repeal by unanimous consent of the states would suffice. Charles K. Burdick, Law of the American Constitution: Its Origin and Development, G.P. Putnam's Sons, 1922, at p. 45. However, on this point Uhl is certainly right that the usual three-fourths supermajority could suffice if the states to be deprived of their equal suffrage by the amendment voted with the majority. Uhl, op. cit., at p. 16. This implies that if a state is to receive three senators, then unanimous ratification (possibly minus the state to benefit) would be necessary. On repeal of the limiting clause outright, Uhl would agree with Orfield and Burdick on the need for unanimity.

48. Walter F. Dodd, "Amending the Federal Constitution," Yale Law Journal, 30 (1920) 321-54, at p. 338.

49. Cf. Willoughby, op. cit., at pp. 598-600.

50. Klinglesmith, op. cit., at p. 375.

51. Arthur Machen, Jr., "Is the Fifteenth Amendment Void?" Harvard Law Review, 23 (1910) 169-93.

52. The necessity to preserve the Senate under the equal suffrage limitation is denied by Blewett Lee, "Abolishing the Senate by Amendment," Virginia Law Review, 16 (1930) 354-69. He argues that the equal suffrage limitation is not an impediment to the abolition of the Senate, but would merely be ineffective if the Senate were abolished, ibid. at p. 365. Lee represents a school of democrat that advocated the abolition of the Senate as a vestige of aristocratic rule smacking of the English House of Lords.

The analogous British problem of abolishing the House of Lords is complicated by the legal omnipotence of the parliament of which it is a part. Hence, only self-embracing omnipotence could do the job. See the dispute between George Winterton and Peter Mirfield: George Winterton, "Is the House of Lords Immortal?" Law Quarterly Review, 95 (1979) 386-92; Peter Mirfield, "Can the House of Lords Lawfully Be Abolished?" Law Quarterly Review, 95 (1979) 36-58.

53. Machen, op. cit., at pp. 172-73.

54. A similar argument was made against the Nineteenth (Women's Suffrage) Amendment by William Marbury, "The Nineteenth Amendment and After," Virginia Law Review, 7 (1920) 1-29.

55. Machen, op. cit., at p. 178.

56. Machen, ibid., at p. 178.

57. Machen, ibid., at p. 192.

58. A more detailed discussion of what sorts of inconsistency can and cannot be tolerated in law may be found in Section 21.B.

59. I owe this idea to H.W.R. Wade, "The Legal Basis of Sovereignty," Cambridge Law Journal, [no vol. number] (1955) 172-97, at pp. 187-88, where he argues that the only common law rule that the English parliament cannot repeal is that what parliament enacts is law. He quotes Salmond on Jurisprudence, Sweet & Maxwell, 11th ed. by Glanville Williams, 1957, at p. 155:

> But whence comes this rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal....It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume or act on the very power that is to be conferred.

Wade calls the rule "the ultimate political fact upon which the whole system of legislation depends," op. cit. at 188 (emphasis added). It was this idea of Wade's of which Hart was thinking when he denied that the ultimate rule of recognition was "just 'political fact'". H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, at pp. 108, 247. See Section 7.

Note that Salmond (Glanville Williams) and Wade presuppose that legal authorities cannot become effective by a self-justifying enactment. This is supposed to be as self-evident as the fallaciousness of begging the question in argument. In this sense it is another version of Ross's presumption that what is logically impossible must be legally impossible as well. It is no better supported as a tenet of law than Ross's own version of the presumption.

60. James Cargile, "On Omnipotence," Nous, 1 (1967) 210-05, at pp. 202-03. On other acts beyond the power of a deity that should not count against its omnipotence, see Richard Swineburne, "Omnipotence," American Philosphical Quarterly, 10 (1973) 231-37, passim.

61. Ronald M. Dworkin, "The Model of Rules," University of Chicago Law Review, 35 (1967) 14-46. However I disagree with Dworkin that Hart is one who has tried to draw this line rigidly. See Section 6.A, and Section 7.A. The alegal, social nature of acceptance precludes any complete separation of legal and moral standards. Hart, op. cit., at pp. 165ff.

62. See Orfield, op. cit., at pp. 9, 53, 78f, 156.

63. Indeed, Hart may be criticized for obliterating the distinction between legitimate and illegitimate government to the extent that he allows equal validity to all outcomes of all procedures validated by the rule of recognition. The distinction is restored if acceptance can overrule the rule of recognition at every stage. This is the chief modification of Hart's theory that I employ.

64. Hart argues that unjust laws are not for that reason alone invalid, op. cit., at pp. 201-07.

65. I do not mean to imply that the difficulty and fairness of amendment and the legitimacy of a legal system are inversely proportional all the way up and all the way down each scale, although I deliberately conceive legitimacy as a matter of degree. Nor do I mean to imply that the difficulty and fairness of amendment is the only, or even the primary, determinant of legitimacy. However a more complete account of legitimacy is considerably beyond the present topic.

66. The issues of the continuing omnipotence of acceptance and the contingency of validation will be taken up again and in more detail in Section 21.

Section 9: Entrenchment, Self-Entrenchment, and Disentrenchment of the Amendment Clause Itself

A. Types and distinctions

Because entrenchment purports to limit an amending power, it may be reflexive in two ways. First, self-entrenchment (as defined in Section 8) is the entrenchment of a unit of language by words within that unit or, if the entrenchment clause is implied, then by a rule that is inferred from language within the unit it entrenches. The unit may be as large as the whole constitution (e.g., "Nothing in the constitution shall be amended except as provided..."), or as small as the self-entrenching language plus an irreflexive reference (e.g., "Neither rule R nor this sentence shall be amended").[Note 1]

Note that a clause that completely entrenched the whole constitution would thereby deny any effect to the amending power, and to that extent would be less a limit on the AC than a virtual repeal of it. On the other hand, the incomplete entrenchment of the whole constitution is virtually what obtains today, since the constitution cannot be amended at all except by certain "special" procedures.

Second, the language describing the amending power (the AC) may be entrenched, or even self-entrenched in the sense just described. Entrenchment of the AC is reflexive in the sense that the amending power is prohibited from applying to itself. Some self-reference, express or implied, is necessary, even though the entrenchment clause forbids the AC's self-application. If entrenchment clauses that are not also self-entrenched are called "irreflexive" entrenchment clauses, then irreflexive entrenchment of the AC is reflexive because self-referential, irreflexive because not self-entrenched.

The two senses in which entrenchment may be reflexive —self-entrenchment and entrenchment of the AC— may be combined to yield self-entrenchment of the AC. This self-entrenchment may in turn entrench the AC in whole or in part. Note that the irreflexive entrenchment of the AC can be defined by a clause outside or inside the AC itself. If outside it might say, "Nothing in the AC shall be amended." If that clause were inside the AC, then it would become a self-entrenchment clause. Nevertheless a clause inside the AC might constitute irreflexive entrenchment of the AC if reworded to say, "Nothing in the AC, except this sentence, shall be amended."

The last section was devoted to the irreflexive entrenchment and self-entrenchment of clauses of a constitution other than the AC. This section is devoted to two reflexive types of entrenchment: the irreflexive entrenchment of the AC and the self-entrenchment of the AC. It also covers a few variations on entrenchment itself that did not fit into Section 8.

Entrenchment of clauses other than the AC was discussed at all because it threatens the omnipotence of the AC, which raises in constitutional law all the issues of the paradox of omnipotence as they arise in theology. A well-entrenched constitutional rule is the legal equivalent of a stone made by God that God cannot lift. Moreover, self-amendment (which may be paradoxical independently of the paradox of omnipotence, or even with an AC of finite power) might permit transmutation of immutable rules, and therefore the achievement of omnipotence by a previously finite rule of change. The entrenchment of the AC itself also raises the question of limited or unlimited power: if entrenchment or self-entrenchment of the AC is immutable, then the AC is not omnipotent, unless it can transmute its immutable limitations. But entrenchment and self-entrenchment of the AC also more directly raise questions of self-amendment. Even if ordinary or self-limiting self-amendment is possible, shall we allow self-disentrenchment or self-apotheosis? Or if transmutation of the immutable entrenchment of clauses other than the AC is possible, then would the transmutation through self-amendment of the immutable entrenchment of the AC itself be possible?

If self-amendment is self-contradictory but permissible, can we deny the mantle of permissibility to self-disentrenchment of immutable entrenchment clauses just because it is self-contradictory? Or, if self-amendment is a permissible form of self-reference and self-application, then may it be made impermissible in certain cases by "aggravating" its self-reference and self-application in the form of an immutable self-entrenchment clause entrenching the AC and itself? If so, can the AC self-impose such an immutable limitation in an act of permissible self-amendment?

In order to avoid becoming dizzy and to simplify references to complex, nested puzzles, I must distinguish and assign conventional names to several different phenomena. Suppose that an AC has two sections, §1 and §2, and that §1 contains the entrenching language. If §1 entrenches only itself, call that "immediate" self-entrenchment. If §1 entrenches both itself and §2, call that "mediate" self-entrenchment. These terms may be justified by noting a parallel distinction among types of self-reference: immediate self-references refer directly to themselves, while mediate self-references refer to classes of which they are members.[Note 2] A sentence or reference which is neither mediately nor immediately self-referential will be called "irreflexive". A sentence which refers to itself and to Napoleon ("This sentence and Napoleon are short") refers to more than merely itself, but does not refer to a class of which it is a member. By contrast a sentence which refers to sentences and to Napoleon ("Sentences, unlike Napoleon, are immortal") refers to a class of which it is a member and to something outside that class, but not directly to itself. I will call any mediate or immediate self-reference that is combined with an irreflexive reference, "eccentric", and any immediate or mediate self-reference without any such irreflexive reference, "concentric".[Note 3]

If AC §1 entrenches AC §2 without entrenching itself, then no "self-entrenchment" in the strict sense has occurred. I will call that simply the entrenchment of §2 by §1, or the "irreflexive" entrenchment of §2 by §1, for emphasis. An AC of only one section which included entrenching language could be called immediate or mediate self-entrenchment, but I will call it immediate.[Note 4] I will carry over the distinctions from

Section 8 between complete and incomplete entrenchment, between original and self-imposed entrenchment, and between limitations on amendment by protection (or as contradiction) and limitations by incompetency (or as ultra vires). Each of these distinctions applies within irreflexive entrenchment as well as within self-entrenchment. "Disentrenchment" is the repeal of an entrenchment clause, and "self-disentrenchment" is the repeal of an entrenching clause on a rule of change by that very rule of change. If a clause said that the AC could not be amended at all, then the AC could repeal that clause only by self-disentrenchment.

Complex variations and combinations of entrenching language are not to be expected in actual constitutions, for most drafters are not genuinely worried that their ACs (unlike many substantive provisions) will be amended in haste or carelessness, and most are concerned that the constitution ring with solemnity and elegance, not perplex like a brain-teaser. Another reason is certainly that a sovereign people will not ordinarily want to limit its power to make law, although often the founding generation does want to limit the power of future generations. One may hazard the generalization that entrenchment clauses are less likely to appear in constitutions written and adopted by the people governed by them than in constitutions written and imposed by a foreign or imperial power.[Note 5]

Among the American states the most common type of entrenchment clause ambiguously proscribes "violation" of large sections of the constitution (more on the latter in Section 18). These clauses usually entrench either the whole constitution, the Bill of Rights, or the AC-like right to alter or abolish government. The Delaware constitution of 1776, for example, contains such a clause in its AC. One can only conjecture that the prohibition of "violation" was meant to include the prohibition of amendment as well, for it is superfluous for a constitution to prohibit its violation literally,[Note 6] and it is suspect to prohibit violation of only some sections. This is supported by the Oxford English Dictionary, which lists as 18th century meanings for "to violate": to defile, despoil, treat with violence, disturb, and break in upon. The North Carolina constitution of 1776, similarly, quasi-entrenches its Bill of Rights with the phrase, "ought never to be violated on any pretense whatsoever." Arkansas in its 1836 constitution, and Tennessee and Pennsylvania in their present constitutions, take a step toward explicitness by entrenching their Bills of Rights with the declaration that those Articles are "excepted out of the General Powers of government, and shall forever remain inviolate."[Note 7] The word "inviolate" in this context suggests "pristine and unamended" more than "not transgressed".

The Arkansas clause was held effective as an incomplete entrenchment clause in 1851. The Declaration of Rights entrenched by the clause included a provision prohibiting criminal penalties except for offenses charged by indictment or presentment. An 1846 amendment that would have given justices of the peace jurisdiction over assault and battery cases was held to violate the indictment rule and its entrenchment clause. The court held that only a constitutional convention could amend the Declaration of Rights. Eason v. State, 11 Ark. 481 (1851).[Note 8] The court found the "inviolate" language not only an effective entrenchment clause, but also an impliedly incomplete entrenchment clause that permitted amendments by convention. However, the neat "entrenchment" reading of Eason is complicated by the fact that the court also relied on the rationale that the Declaration of Rights is inherently beyond the ordinary (non-conventional) amending power.

But Arkansas, Tennessee, and Pennsylvania do not say anything nearly as explicit as the present and only (1911) constitution of New Mexico, in which one section of the AC says of another that it "shall not be changed, altered or abrogated in any manner except through a general convention called to revise this constitution as herein provided." As we will see, this entrenchment clause was violated, if not repealed sub silentio, with the approval of the state Attorney General. (See Section 9.B below.)

Of the American states, only New Mexico has a clearly entrenched AC which has been self-disentrenched or held by courts to be capable of self-disentrenchment. No state has a self-entrenched or completely entrenched AC. In New Mexico there is legal authority for the proposition that self-disentrenchment of an AC is lawful, but the authority consists only of a few Attorney General opinions that are contradicted by other Attorney General opinions. This is tenuous evidence of legality, and it is a small sample. Self-amendment per se is undoubtedly lawful in America because it has occurred in 47 states without challenge e.g. for self-contradiction, paradox, violating its authority or principles of natural law (see Appendix 2). But one might say that New Mexico was "wrong" to uphold the permissibility of self-disentrenching self-amendments, in a way in which 47 states cannot be wrong. After all, there is reason to believe that New Mexico's disentrenching self-amendment did violate the state constitution. But in one sense that is just the point. Despite the paradox and the contradiction, these acts are accepted as legal by the tests of legality —in New Mexico. In this Section I will be more concerned with the logical than the legal objections, although I do note the small sample and the dubieties of the New Mexican case.

B. Reflexivity tangles in New Mexico

If the paradox of self-amendment were never raised by Alf Ross, it would be raised by the spectacle of the New Mexican AC. Its legal history is wonderfully complicated. The New Mexican AC contains five sections, the first of which contains a complete description of the non-convention method of amendment. Section 5 explicitly entrenches §1 against all amendment except amendment by convention. This is a clear-cut case of incomplete, irreflexive entrenchment within an AC. But this entrenching language was violated in a fascinating way. The entrenched rule was impliedly self-amended by an explicit amendment to another section of the constitution, with the effect that the amended version of AC §1 is incompletely, mediately self-entrenched. Here's how.

Section 1 of the AC said, inter alia, that "any amendment...to this constitution may be proposed...at any regular session" of the legislature. In 1964 AC §1 was used to amend a provision on legislative power (Article 4, §5.B), limiting the types of action which the legislature could consider in even-numbered years to a short list that did not include constitutional amendments. The amendment impliedly amended AC §1 by reducing the years in which constitutional amendments could be considered from all years to odd-numbered years. This effect on AC §1 was confirmed by Attorney General Opinion No. 65-212 (1965). Therefore, AC §1 was amended without a convention despite its incomplete, irreflexive entrenchment by AC §5. Unlike the Australian and South African attempts to circumvent incomplete entrenchment (see Section 8.B, above), this one succeeded, perhaps because the protected rule was only impliedly, not directly, amended. This would not be a tidy legal justification, but it might mean that few people noticed or cared.

Moreover, this implied amendment was an implied self-amendment, since AC §1 was used to amend the legislative article with the side effect of impliedly amending AC §1.

Moreover, because the amended AC §1 now says that constitutional amendments may be considered by the legislature only in odd-numbered years, it has become incompletely, mediately self-entrenched.

Moreover, the entrenchment clause that was initially violated (AC §5) must be considered still valid, not repealed pro tanto, for the people of New Mexico have tried —and failed— to repeal it in 1965, 1970, and 1971. These attempted repeals, furthermore, have not been by convention. If a certain electoral return would signal a successful repeal (which is undetermined), then the irreflexive entrenchment of AC §1 by AC §5 should not be taken to imply the self-entrenchment of AC §5. That an ordinary amendment could repeal the entrenchment clause was held by Attorney General Opinion No. 70-13 (1970).

Moreover, the new rule to consider amendments only in odd-numbered years has frequently been violated, eight times in 1970 alone. It may be considered no rule at all, either because the implied self-amendment is really invalid, or because the implied self-amendment is ineffective and rapidly losing to desuetude.

The Attorney General Opinion that declared that AC §1 had impliedly amended itself ignored the fact that AC §1 was entrenched by AC §5. Attorney General Opinion No. 65-212 (1965). In this sense, then, the Attorney General was answering a self-amendment question, not a self-disentrenchment question. The narrow ruling was that resolutions and constitutional amendments could be considered by the legislature only in odd-numbered years. This Attorney General was Boston E. Witt, and when he was replaced a few years later by James A. Maloney the validity of the implied self-amendment and self-disentrenchment was again brought to the Attorney General's office. Maloney was asked to reconsider Witt's opinion, and was specifically asked to address the self-disentrenchment question.

Maloney upheld Witt's narrow ruling but on new grounds that must be sketched briefly. Prior to 1964 the New Mexican legislature met only in odd-numbered years. When the constitution was amended to provide for annual sessions, the subjects that could be considered in even-numbered years were simultaneously limited, and did not include constitutional amendments. The language of AC §1 that was apparently amended by implication said that amendments could be considered in any "regular" session. Witt took this to designate the new annual sessions, and therefore held that AC §1 had been amended. Maloney read "regular" in AC §1 in its pre-1964 sense as odd-numbered sessions only. He argued that the framers intended to define "regular session" in the AC by reference to the legislative article, which at that time provided only for regular sessions in odd-numbered years. Maloney ignored the amendment of the legislative article on this very point, or more precisely, he held the amendment irrelevant to the meaning of "regular" in the AC. Hence, AC §1 was not amended at all, and had always allowed amendment proposals only in odd-numbered years. Maloney did not indicate whether this ruling implied retroactive invalidity for any ratified amendments. In sum, then, Maloney affirmed Witt's narrow ruling, but denied that self-amendment had occurred, let alone self-disentrenchment. Attorney General Opinion No. 69-105 (1969).

In 1970 Maloney was asked whether the incomplete, irreflexive entrenchment clause in AC §5 could be repealed. He ruled that it could be, and that it could be repealed without a constitutional convention, even under AC §1. Attorney General Opinion No. 70-13 (1970). This is the closest thing in American legal history to authoritative recognition of permissible self-disentrenchment. New Mexico's AC §5 incompletely entrenched AC §1, but §1 was declared capable of repealing §5 without using the special procedures required by §5 (constitutional convention) —a procedure not contained in §1 anyway. The section describing the power to amend was §2. Maloney, however, did not in his opinion visualize the problem as one of paradoxical self-disentrenchment, but as a problem unique to New Mexican history.

If AC §5 was required by the federal government as a precondition of statehood, then would repeal of §5 jeopardize New Mexico's status as a state? Maloney decided that AC §5 was not actually required by the federal government; instead, Congress merely wanted a vote on an amendment to the AC that would make the amending process less difficult. The self-amendment that Congress wanted to be put to a vote would have lowered the majority needed for ratification from two-thirds to a simple majority. The entrenchment clause was already in the pre-statehood constitution, but Congress included it in the AC-package.

Maloney is opposed on this question by Helene Simpson,[Note 9] who has documented her opinion that an amended AC, not merely a vote, was required by Congress as a precondition of admission to the Union.[Note 10] However, even Simpson agrees that Congress did not require AC §5 as a precondition.[Note 11] Maloney and Simpson both note that Arizona was also required to amend its constitution, although not its AC, prior to admission, and that upon admission repealed the required amendment without losing its statehood or running afoul of the courts.[Note 12]

Maloney contends that, in any event, no present amendment of the New Mexican constitution could endanger New Mexico's status as a state. The statehood issue clearly overwhelmed the self-disentrenchment issue, as well it might under New Mexico's unique circumstances: no other state was required by Congress to change its AC, or even to vote on changes, as a precondition of admission, even though many other states used the same two-thirds supermajority for ratification of state amendments.[Note 13] In Arizona where the required changes were quickly repealed, the changes had not been self-amendments nor the repeals self-disentrenchments.

Later in the same year Maloney finally reached the self-disentrenchment question when he repeated his earlier ruling that AC §1 had not been amended by implication. This time he based his reasoning on the impermissibility of any amendment of AC §1 except by convention. Attorney General Opinion No. 69-151 (1969).

The underlying issue was still not dead, however, and in 1970 Maloney faced a new dimension of the problem: if the earlier opinions agreed that constitutional amendments could not be proposed in even-numbered years, then what is to be done about the eight that were proposed in 1970? Maloney did not directly say that a court could nullify them if ratified, or enjoin their further consideration, or suggest that he would use his prosecutorial discretion toward these ends. Instead he personally doubted that a court "would" nullify them if ratified, if only because the people would have expressed their will and the courts indulge every presumption in favor of the validity of amendments that the people have ratified. Maloney was evidently trying to say, without abdicating his role as the highest law enforcement officer in the state, that acceptance can cure defects in the most fundamental procedures. In Hart's terms, acceptance can validate laws that, through some defect, are not validated by the rule of recognition. Maloney concludes in a most humble mood, saying that while two different Attorneys General have found that constitutional amendments cannot be proposed in even-numbered years, relying upon different interpretations of the constitution, nevertheless they had not exhausted the reasonable interpretations and a court might disagree with them both. While standing by his opinion, he will not deny that a contrary reading of the constitution could be made to appear reasonable, although he can give no hint how. Attorney General Opinion No. 70-81 (1970).

In New Mexico, in sum, a rule that was incompletely entrenched against all amendment except by convention was impliedly amended without a convention, according to one Attorney General. From another angle the same phenomenon may be described as the disregard of a limitation on the amending power in the form of an act of self-amendment. The AC (in §1) did not disentrench itself, or repeal the limitation on its power, except impliedly and pro tanto; it merely "violated" that limitation and got away with it. Moreover, an Attorney General in an advisory opinion held that the limitation may be repealed without any special procedures, even though he held in a prior opinion that it could not be violated by an ordinary amendment. The incomplete, irreflexive entrenchment clause is not impliedly self-entrenched and may be repealed without resort to the special procedure it names. Such repeal would constitute genuine self-disentrenchment, but of a less objectionable sort: repeal of an unentrenched entrenchment clause rather than a self-entrenched entrenchment clause.

This implied self-amendment and self-disentrenchment have not been struck down by the courts and have been upheld by the Attorney General — one ruling that the self-amendment actually occurred, another ruling that the self-disentrenchment actually could.

Another entrenchment clause in the New Mexican AC has not been so fortunate. Within AC §1 itself a clause incompletely entrenches two sections in Article 7 (on voting) and two sections in Article 12 (on education). While ordinary sections may be amended by a simple majority of the electors, these four sections may only be amended by a three-fourths supermajority with the added requirement that there be at least a two-thirds supermajority in each county. The latter requirement makes the New Mexican counties into entities much like the states in the federal Senate; they are represented in these special amendment referenda as units, not by population. For that reason the two-thirds requirement was struck down by the New Mexican Supreme Court for violating the one-person, one-vote principle of the Fourteenth Amendment. State v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143 (1968).[Note 14] It is probably significant that the court struck down the two-thirds requirement after 11 attempts had failed to amend one of the entrenched sections. The three-fourths supermajority requirement was not challenged and still stands. Both the three-fourths and two-thirds requirements were added to AC §1 in the vote demanded by Congress, and were drafted by Congress. The court gave no hint that entrenchment, or at least the incomplete entrenchment before it, was impermissible in itself. One may doubt whether the particular entrenchment clause before the court would have been found to violate the Equal Protection clause if it had not already blocked 11 attempts to amend one section. The normal rule across the country is that the one-person, one-vote principle does not apply to elections that ratify state (or federal) constitutional amendments. See Jackman v. Bodine, 78 N.J. Super. 414, 188 A.2d 642 (1963). To the extent that the history of blocked attempts at amendment influenced the court, the rule of law was covertly bent to accommodate the perceived will of the people, which in Hart's jurisprudence is not only justified, but valid law if subsequently accepted by the people and officials.

The two Attorneys General disagreed in their interpretations of the constitution, but the effect was that one allowed self-amendment in violation of an entrenchment clause, and the other allowed self-disentrenchment of that entrenchment clause. The inference model cannot tolerate either act; but even if it could somehow tolerate self-amendment, it must still balk at self-disentrenchment. If an AC is completely and concentrically self-entrenched, the hardest case (and one that did not arise in New Mexico), and if self-amendment is otherwise permissible, then for self-amendment to be possible in this case the self-entrenching language must be (1) repealed before self-amendment, or (2) repealed simultaneously with the self-amendment of the entrenched AC, or (3) simply violated with impunity. The third is obviously impossible for the inference model. The first is also impossible, for the inference model, because it would require an act of self-amendment to repeal the entrenching language, and therefore could not take place without acting before it acted.

The second is also impossible under the inference model, but for different reasons. If complete entrenchment and self-entrenchment clauses mean anything, they prohibit amendment until they are themselves amended or repealed. If they could be repealed simultaneously with the repeal of the rules they protect, then they would have been no barrier whatsoever to amendment. Even without the exotic logic of self-application, most courts would indulge the presumption that the words in a constitution were not surplusage. The inference model is not committed to preserving the effectiveness of entrenching language as a barrier to amendment, but it is committed to taking rules of change seriously as premises of logical inferences. An explicit entrenchment clause, for the inference model, therefore creates a condition precedent to amendment, namely, the repeal of the entrenchment clause. An AC that could undo its self-entrenching language and amend itself in the same act would be performing the logically prior and the logically posterior simultaneously. This is equivalent to the prisoner opening the outer door simultaneously with the inner door, which is as paradoxical as opening the outer door first. The inference model, then, requires that disentrenchment and self-amendment of the protected rule take place in two steps, not one. The rub is that it cannot allow the step that must come first to occur unless the second has already occurred.

If we put the inference model to one side, then there seems to be no reason why the entrenching language and the rule it protects could not both be repealed in the same act. Douglas Linder rightly notes that "[o]nly a hide-bound formalist would contend that the difference [between one and two amendments] is significant."[Note 15] Linder's view that the right one amendment could do the work of any two is based on the possibility that Congress may intend to repeal both the entrenchment clause and the rule it protects at the same time. That is one non-formalist path out of the problem, but unfortunately Congress is only one of at least 39 legislatures (today) whose intentions would be relevant to one who put stock in the intentions of the law-makers who adopt constitutional amendments. Moreover, intent cannot suffice, for the intent of the framers and adopters of the entrenchment clause was that it should not be repealed, or at least not so easily that it never protected the entrenched rule. Hence, unless the old intent gives way before the new, an irresistible force meets an immovable object —intent v. intent— and the paradox of omnipotence is replicated at the level of the intent of the law-makers.[Note 16]

One type of self-entrenchment of the AC can always be disentrenched by a single amendment; even the inference model would allow it, if it allowed any self-amendment. That is the case of a procedural limitation on the amending process, for example, a limitation on the number of amendments that could be submitted for ratification at the same time. Such limitations are self-entrenchment clauses because (or when) they apply to all amendments and therefore to their own amendment. They are incomplete because they do not forbid all amendment, but only create a hurdle in the path of amendment; yet they specify the same hurdle for "ordinary" amendments and to that extent may not seem "entrenching" at all. Probably the most discussed such limitation, and most discussed self-disentrenching self-amendment that relaxed it, was Illinois' "Gateway Amendment" of 1950.[Note 17] The amendment raised the limit on the number of amendments that could be considered at one time from one to three. It was called the "Gateway Amendment" because it opened up the amending process. Obviously, if self-amendment is permissible, then one amendment suffices to repeal this type of entrenchment clause.

But note that there is no distinction here between the entrenchment clause and the rule that it protects. Only clauses that forbid certain amendments by content create a difference between entrenchment clause and entrenched rule that might lead a formalist to demand two amendments to repeal both. Only the latter type of clause could construe its own repeal as a violation, and thereby purport to establish its own immutability, or its mutability only on the condition of being repealed before it is repealed. Clauses that forbid certain amendments without reference to content, but only to procedure, do not create the same paradox.

Note that the inference model requires two amendments and prevents them from ever achieving their end. The entrenching language must be repealed before the entrenched rule can be repealed, but the entrenching language can never be repealed under the inference model. All attempts are violations, not repeals, because the self-entrenching language forbids its own amendment as well. The inference model requires two amendments in the sense that a prisoner must open two doors before escaping, and they cannot be opened simultaneously; but if the outer door must be opened first, then neither can be opened —by the prisoner— at all. This dilemma pinches a self-entrenched AC even harder, for it is imprisoned within the double doors. But any self-entrenched entrenchment clause creates the double door prison for some rule, and an AC outside the "prison" cannot free it under the inference model because the repeal of the outer protective clause is always a violation.

Finally, note that it does no good under the inference model to suppose that a self-entrenchment clause could be self-disentrenched because its self-reference has rendered it meaningless and ineffective. If the AC is the self-entrenched rule, then disentrenchment must take the form of self-amendment, which equally involves self-reference. Still, if the barrier is a mirage, then the escape may be a fantasy. If the AC is not the self-entrenched rule, and if the self-entrenchment clause were meaningless, then of course it constitutes no barrier to the amendment of the "entrenched" rules. But the use of self-reference in law cannot be considered to create meaninglessness if self-referential rules and procedures are accepted by officials and citizens (logicians excepted, perhaps) as having meaning. The technical —and contestable— theories of meaning published in philosophy and logic journals have never been, and need not be, the standards used in law. The legal standards are equally technical and contestable, but the point is that they are autonomous and self-sufficient. Just as courts decide insanity on legal grounds, using medical and psychiatric testimony in an advisory capacity only, courts can decide meaningfulness on legal grounds and will take the testimony of logicians "for what it is worth".

When the AC is not entrenched reflexively, completely, or concentrically, then the cases are easier to analyze. Incomplete self-entrenchment, whether mediate or immediate, could always be undone if the proper, difficult procedure were used, and if self-application is allowed. For example, the only limitation on Article V that is still valid is an incomplete, irreflexive entrenchment clause: that "no state, without its consent, shall

be deprived of its equal suffrage in the Senate." This may look like complete entrenchment, forbidding a certain type of amendment, but as noted in Section 8 it is actually incomplete. Amendments depriving some states of their equal suffrage in the Senate are not precluded if a particular, difficult procedure is used: getting the consent of each victim state.

It may look self-entrenched as well, but in fact it only (explicitly) entrenches the rule (derived from Article I, §3.1) that the states shall have equal representation in the Senate; it does not entrench itself or forbid its own amendment. However, self-entrenchment is implied for most commentators, and justifiably to the extent that irreflexive entrenchment is pointless without self-entrenchment. The crudest way to infer self-entrenchment is to posit or assume complete self-entrenchment, even though the clause itself is merely an incomplete entrenchment clause. This was the approach of Justice Wayne in Dodge v. Woolsey, 59 U.S. 331, 348 (1855) when he referred to the equal suffrage limitation as one of two "permanent and unalterable exceptions to the power of amendment."[Note 18] It makes more sense to infer incomplete self-entrenchment at the same level of difficulty as the entrenchment of the protected rule. That means that the equal suffrage limitation could be repealed if every potential victim consented, which requires unanimity.[Note 19]

Irreflexive entrenchment can be undone even under the inference model, for the disentrenching act is neither amending itself nor amending an entrenched section nor entrenched against amendment. Under the inference model complete immediate self-entrenchment may be as impossible to undo as complete mediate self-entrenchment. If the section of the AC that describes the power to amend is the power that is immediately self-entrenched, then it must, but cannot, repeal its entrenching language before it can perform any self-amendment. But if the part immediately self-entrenched is not the part describing the power to amend, then the latter part may apply irreflexively to the former and repeal the entrenching language and amend the underlying rule. This of course is not "self-amendment" except that both the amended and amending sections are part of the AC.

If the language that entrenches the AC is outside the AC, then two possibilities arise that require separate treatment. First, if the entrenchment clause is not self-entrenched and not held to be self-entrenched, then it may seem to be repealable by ordinary amendment like any other unentrenched rule. It does not forbid its own amendment (ex hypothesi), but only forbids the amendment of the AC. If one interpreted the repeal of the clause as an amendment to the AC, because the AC will have divested itself of a limitation on its power, then one must consider the clause impliedly self-entrenched; if not, then it may obviously be repealed by ordinary amendment.

Second, if it is self-entrenched or impliedly self-entrenched, then it is more difficult to dispose of. Even if self-entrenchment clauses are repealable by extraordinary procedures like transmutation (see Section 8.A), then a clause entrenching the AC and itself is still in a different class. In a case of "ordinary" transmutation, the rule to be repealed purports to be immutable and to prohibit the amendment that would repeal it. The AC might change itself prior to transmutation to give itself explicit power to repeal protective language as well as to give itself the benefit of recency (a tie-breaker under some canons of interpretation). But if the AC is prohibited to amend itself and if the prohibition also prohibits its own amendment, then the AC cannot acquire new, explicit language by self-amendment prior to self-amendment. Although the logic of this situation is more complex than ordinary entrenchment, and the barriers to repeal are more formidable, the overkill of insurmountable hurdles, the answer is the same as for ordinary disentrenchment: under the inference model the multiplication of impregnable walls simply reinforces the conclusion of irrepealability, while under the acceptance model repeal is permissible if accepted. The theory cited by a judge to uphold such disentrenchment might be more tortured and elliptical, and its implausibility might contribute to a climate in which acceptance fails to grow. In fact, and this is the sharp edge of the theory, the legal rationale might be self-contradictory, or illogical for some other reason, without thereby ceasing to articulate the acceptance of the people that authorizes the amendment.

Moreover, the judge is not wholly without theories to cite, for she may appeal to the continuing omnipotence of the people, the undemocratic consequence of the rule of the living by the dead, the anti-democratic intention to bind future generations irrevocably, the perilous enhancement of revolution as a political option, and so on. She might also cite the precedents of complete entrenchment repealed or declared repealable, such as Opinion of the Justices, 263 Ala. 158, 81 So.2d 881 (1955), and McCullen v. Williamson, 221 Ga. 358, 144 S.E.2d 911 (1965).[Note 20]

C. Self-disentrenchment of the AC

What if a self-entrenched AC forbids not only the amendment of the AC but also the repeal of the entrenchment clause? We should assume that a clause that says anything like "this AC shall not be amended", when the clause is part of the AC, already forbids both. That condition is built into the definition of self-entrenchment. Logically, it may seem that an amendment that would repeal the entrenchment clause violates, not repeals, the language of the constitution. Indeed, that is how the formalist or inference model sees it, and this reading would be shared by even more legally sophisticated models of law that interpreted words of the constitution by their "plain meaning". But disentrenchment is permissible in New Mexico despite plain meaning and the logic of violation. In New Mexico the rule protected by an entrenchment clause was allowed to amend itself in violation of the clause, and the Attorney General gave an advisory opinion that the entrenchment clause could itself be repealed without any special procedure. Both these acts would seem to violate, not repeal, the clause, but they were declared permissible.

A valuable perspective on the slippery and fundamental distinction between violation and repeal exists in the common law. Most cases sit atop a history of precedent that contains inconsistent rulings. No matter how the next court decides a case, it will be "violating" valid law in the form of some living precedent. Even if one denies that this is inevitable or frequent (see Section 21.B), one must acknowledge that it is permissible. Yet the decision that "violates" valid rules of case law is not a simple violation; it makes new law itself. That is part of the reason why it escapes nullification for its violation. (Another part of the reason is that the decision itself argues that the "violated" precedents were distinguishable, or inapplicable to

the case, in light of stronger precedents, and these arguments were persuasive to a good number of people either in fact or pro forma.) The decision might even be taken to repeal the old rule pro tanto.

Similarly, in international customary law there may be a dearth of custom on a certain question, but the little that exists might all point in the same direction. An act that departs from that custom may for that reason be a violation or the beginning of a new custom. When an act with law-making effect in the present violates laws made by similar acts in the past, then it is not a crime, a delict, or nullity; it is an amendment or repeal. It is a repeal because the act that made it is a rule of change for laws of its type, just as common law decisions may repeal rules of common law, custom-making acts and trends may repeal customary law, statutes may repeal statutes, and constitutional amendments may repeal constitutional rules. This is contingent, however, not necessary. It just happens that in our legal system every law-making power is also an amending power or rule of change for the type of law it makes. Conceivably a judge could create common law rules but not amend them; indeed, many who insist upon unwavering adherence to precedent forget that stare decisis permits occasional change and repeal of rules. This rule, then, that all law-making powers are amending powers for the type of law they make, should only be applied where there is a history of application. It should not be used, except by analogy, to conclude that an AC cannot make an immutable self-entrenchment clause, because we just do not have enough case law on the question to know. The principle is not an a priori truth.

Even if a constitutional rule is completely self-entrenched, and even if that rule is the AC, the entrenchment clause may be repealed under the acceptance model. The desire for repeal will itself contribute to the climate of acceptance, even if it is not officially incorporated by rules to indulge all presumptions favoring amendments ratified by the people. If the people want to repeal the language entrenching their AC so that they may amend their AC, they will do so. The only criterion of the legal validity of their act is the procedure outlined in the AC to be disentrenched, although a judge could validly appeal to the language of the entrenchment clause. The entrenchment clause forbidding certain amendments, including its own amendment, can prevent only inference-like legal change, not other types. The verdict of the principle of non-contradiction, without more, is even less relevant than the judgment of a law professor in a journal article. Legislators, judges, and voters may take it into account, but need not, and probably will not. This is especially likely if the judgment of some formal logic is not articulated by a participant but left to frown on history from ideality.

Linder believes that entrenchment clauses that limit the AC, not by entrenching the AC itself but by purporting to make other constitutional rules immutable, may both be repealed and, if not repealed, ignored and left unenforced by courts.[Note 21] He focuses on the strong, traditional policy in the United States against allowing one generation to bind its successors irrevocably, and believes that a court could justifiably cite this policy (or cases that cited it) in upholding amendments that violated or repealed limitations that purported to make themselves immutable. This policy is sufficiently close to "traditional judicial considerations" that it would not undermine judicial legitimacy to the same extent as a direct appeal to acceptance or "purely political considerations."[Note 22] This part of Linder's conclusion is attractive, but is weakened by the fact that he assumes without question that entrenchment implies self-entrenchment, that self-entrenchment clauses must be immutable absent judicial nullification or nonenforcement, and that all self-limiting self-amendments must be prohibited as immutable. Moreover, he is moved to find an implied limitation against immutable amendments on grounds of democratic policy and values, but must make his limitation immutable. He does not consider the question whether democracies are best served by the people's self-embracing or continuing omnipotence. He is right that immutable rules are fundamentally undemocratic, but that proposition must be qualified by how we answer the question whether (one generation of) the people's will should prevail even when it wants an immutable rule.

What if the entrenching language is more explicit and prohibits not only amendment of the entrenchment clause itself and its underlying rule, but specifically prohibits the attempted repeal of the entrenchment clause? Again, under the inference model this would more than suffice to prevent a valid attempt at disentrenchment, but under the acceptance model it matters not. A judge could certainly enjoin the attempted amendment or its vote of ratification, and in that case we would not face the problem of an amended prohibition of an attempted amendment. But if things got as far as a completed amendment, then a court could nullify the amendment or let it stand, under the acceptance model, with equal validity. She could appeal to democratic values as a justification for disentrenching the immutable limitation on the amending power. The same values would justify her in heeding the manifest will of the people who ratified the amendment more recently than they ratified the immutable limitation. Or she could appeal to the same democratic values for the opposite result, and choose to enforce the people's self-paternalism by deferring to their earlier judgment that subsequent generations might adopt bad amendments in a wave of hysteria.

An AC that prohibited even the attempt of amendment may be likened to a will with an in terrorem clause. An in terrorem or forfeiture clause in a will says that any beneficiary who contests the will's validity (say, to cut out another or to invalidate the will and take a bigger cut under the intestacy laws) will get nothing under the will. When enforced, in terrorem clauses only deter those who think they might lose the contest, for if the will is invalidated, the in terrorem clause is invalidated too. When one aims at a king, one must not miss.

In terrorem clauses are incomplete, mediate self-entrenchment devices. They do not totally prohibit contests that might change the will so much as raise the price or risk of trying. They are mediate by applying to the whole will, not merely to themselves. While they purport to penalize all contests, they are almost never read to penalize successful ones. Occasionally they do not even penalize unsuccessful ones; courts in some circumstances allow beneficiaries to challenge wills with in terrorem clauses, lose, and still take their designated share of the testator's estate. The rationale is that the testator's wish in her will to avoid the expense or trauma of a contest, or to avoid posthumous loss of reputation, should not prevent good faith contests designed to reveal fraud, coercion, or undue influence. A person who schemed to make the will in the first place, and

to include the in terrorem clause, would otherwise be free to make her fraud self-insulating. Hence, beneficiaries may circumvent the clause if they proceed with good faith and probable cause to believe the will is invalid.[Note 23]

This rule is a triumph of sound policy over abstract logic. The in terrorem clause would punish all failing attempts to challenge the will of which it is a part, and thereby deter many contests that should succeed; yet not all such contests are punished. The rule violates the testator's apparent intent in order to preserve the possibility of ascertaining her actual intent. It is designed to avoid a vicious circle, or fraudulent self-concealment. Mechanical compliance with rules normally binding is suspended in the name of a sound policy to avoid an unjust result, which is how equity usually works and how the formalist inference model could never work.

Something very basic about legal systems, as distinct from logical systems, is manifest here. Though both are superficially systems of rules, every practicing lawyer can think of dozens of cases in which policy was —wisely or unwisely— put ahead of literalistic compliance with clear rules. Even if they cannot envision the strange circumstances that would make formalist compliance with a given rule unjust or perverse, working lawyers acknowledge from long experience with strangeness that every rule has its nether world of application where exceptions will be recognized, or where finesse, art, judgment, and unabashed consideration of policy are needed. In logic it is difficult to make all rules explicit and to state all the principles that are taken for granted, but it is possible. In law it is impossible (see Section 5.C), and even when principles are articulated, they may require setting a few normally binding rules aside for the given case and looking at the outcome as a value-laden phenomenon, not merely as a product of rules. In law, policies and principles regularly suspend rules, and not because law is hopelessly unsystematic, undecided, or illogical, and not because there is always a rule commanding the suspension, but because it is law, not formal logic.

If a state put an in terrorem clause into its AC, self-entrenching the AC and penalizing any legislator who would propose to amend it, regardless whether the proposal passed, then courts would almost certainly put policy ahead of mechanical compliance (at least in the "right case"), and certainly could permissibly do so.[Note 24] The rule might evolve in much the same way as it did for wills, until an implied exception was recognized for good faith proposals of amendment that arose from a reasonable belief in the deficiency of the present AC, perhaps as evidenced by the widespread public support that resulted in ratification. In the right cases, the exception could also rest on a theory that the framers' intent could be better served by allowing an adjustment in the letter of their law in order to reach the spirit. If the in terrorem clause applied to the whole constitution, and not just to the AC, then the docile compliance of courts is even less likely. As Lester Orfield said in another context, "[t]he courts should be slow to adopt a construction which would permit a new constitution [and a fortiori a mere amendment] only by revolution."[Note 25]

Because an in terrorem clause is just a self-entrenchment clause that forbids both attempted and consummated amendment, it may be repealed on the same terms as other self-entrenchment clauses. A judge would have even firmer grounds to enjoin the first stirrings of a repeal amendment, but need not do so and may be authorized de facto in restraining herself by the acceptance of the people and officials.

In 1939, when Henry Rottschaefer's Handbook of American Constitutional Law appeared, New Mexico had not amended its constitution in violation of an entrenchment clause, nor had it yet discussed the repeal of the entrenchment clause. Hence, Rottschaefer was not at all sure that either could be done, but in this passage he shows the sort of policy considerations that would come into play.[Note 26]

> There has been found no case in which the power to amend has been employed to directly or indirectly modify a constitutional provision expressly excepted from that power. The issues that such an attempt could raise could not be settled by any reasoning derived from logical processes from prevailing conceptions of sovereignty, and those based on considerations of convenience and expediency point to the solution that such attempts to limit the power of amendment should be held futile. The necessities of orderly government do not require that one generation should be permitted to permanently fetter all future generations.

Rottschaefer was also unaware of the Eason case (1851) discussed above (Section 9.A), which fits the description.[Note 27]

Note that if we simply "held futile" all attempts to limit the power of amendment, we would not actually solve the problem. We would make the AC omnipotent, but in which sense? Would it be powerful enough to limit itself irrevocably? If so, we are back to a limited amending power. But if not, then it is not powerful enough to limit itself, and lives from birth under an irrevocable limitation. The paradox of self-amendment is a paradox because it identifies a contradiction whose obvious alternatives are also contradictions.

It is important that most entrenchment and self-entrenchment clauses limit the content of amendments. Either they protect actual rules, and thereby forbid amendments with a content that would amend or repeal them, or they describe the prohibited content, such as any amendment that would deprive a state of its equal suffrage in the Senate without its consent (although the latter could also be said to protect the rule in Article I, §3.1). Rules within an AC itself are mostly rules of procedure. If one rule says that all amendments must receive affirmative votes from three-fourths of those voting in a popular referendum, then in a sense it is incompletely self-entrenched, for it can only be amended by using the procedure it specifies. However, because that procedure is not more difficult than the procedure for ordinary amendments, it probably should not be called "entrenchment" at all, even if the proposed amendment would lower the supermajority needed for ratification.

But note that if such rules could be called self-entrenched in a broader sense, then all law is self-entrenched in that sense. All law is a hurdle to its own amendment or repeal insofar as it must be heeded until changed. The people do not rule themselves directly, but only by means of rules that are somewhat difficult to change. Once legislative will reaches a certain level of intensity or extent, it can make a law, and if that will later subsides, the law stays behind as its relic. Strict positivists and formalists, like Alf Ross, would insist that statutes and constitutional rules persist in validity forever until amended or repealed by a properly channeled act of legislative will. The acceptance theory can more comfortably accommodate a

rule of desuetude (see Section 19), and allow laws to fade away with their waning acceptance and usage, slowly disentrenched by the elanguescence of memory, relevancy, and desire.

D. Entrenchment and time

Entrenchment has an ineliminable temporal element. Entrenchment protects rules against future amendment. Therefore the paradox of omnipotence, as it arises in theology, has been said to fail to "get a grip" if the deity is conceived as eternal, or literally outside of time.[Note 28] Even if this works for deities, it cannot work for ACs or sovereigns.

The temporal element of entrenchment suggests another way to conceive entrenchment itself. "Protecting" and "insulating" a rule from amendment are metaphorical. The reality underlying the metaphor is that entrenchment makes the protected rule logically prior to certain temporally posterior rules of change. When an amendment is adopted that conflicts with an entrenched rule, other than an amendment designed to repeal the entrenching language, then the conflict is resolved in favor of the entrenchment clause, which takes the field to itself or amends the newer rule pro tanto. The ordinary rule of priority favors the recent rule in cases of conflicts, unless the older rule is of a legally or logically prior type. In these cases the rule favoring recency is reversed by the explicit terms of the entrenching language. This makes entrenchment clauses into rules of recognition that determine the priority of rules in conflict. They may be thought to attain that status by virtue of their own self-referential assertions or by virtue of a more traditional rule of priority, the lex specialis principle, which favors specific over general language.

Entrenched clauses are reflexive or tacitly self-referential in their attempt to insure their own priority in future conflicts between themselves and attempts to amend or repeal them. They strive to become what is ordinarily forbidden —judges in their own case. They are not alone in this adjudicative hubris. The supremacy clause of the federal constitution, for example, not only declares the supremacy of the constitution of which it is a part, thus declaring its own supremacy, but it goes further and specifically adds that all state judges are bound by the federal constitution and this clause, "anything in the Constitution or laws of any State to the contrary notwithstanding" (Article VI, §2). We are not suspicious of the supremacy clause, perhaps because it restates the obvious, or more subtly, the obviously necessary, in a federal system; in short, because it is good policy. But we are suspicious of entrenchment and self-entrenchment clauses that share the logic of self-elevation. We might suspect entrenchment clauses because they presumptuously attempt to settle in their own favor all disputes in which they figure as parties. We recall that John Locke located the tyranny of absolute monarchs precisely in their capacity to be judges in their own cases,[Note 29] and that Madison advocated a republic with a system of checks and balances over a pure democracy to avoid the same evil.[Note 30] But the fact is that the supremacy clause is equally presumptuous in settling its conflicts with state law, in advance, by its own terms. I submit that the reason we suspect one and not the other is entirely a difference of the wisdom of the policy that is attempting to prevail by its own terms.

Bound up with this reflexive view of entrenchment is a temporal view, for entrenchment and self-entrenchment clauses, at their humblest and at their most presumptuous, only feign to prevail in future disputes in which they might be implicated. This allows us to see that ordinary implied repeal and implied amendment (see Section 16) are the temporally symmetrical correlates of entrenchment. In conflicts they tell us to prefer the recent rule and to amend all earlier rules in conflict with it pro tanto. Entrenchment and implied repeal are symmetrical temporally, but are not equally weighted legally. Implied repeals or preference for the recent rule is the norm, and entrenchment or preference for the earlier rule is the exception (when the rules are on the same level). Indeed, preference for the new rule is presumed, and is only rebutted (when rebutted) by the affirmative specific act of adopting the entrenching language. In the language of presumptions we may say that, historically, presumptions against entrenchment are rarely rebutted by implication and require explicit language; and on the other side, when there is explicit entrenching language, the presumption in favor of its plain meaning has always been rebuttable, sometimes by explicit language in a repeal amendment, sometimes by inattention or winks, but most often by appeal to public policy.

The temporal perspective on entrenchment allows us to define a new type. Ordinary entrenching language protects a rule from amendment for an indefinite period of time. Most entrenchment clauses do not have "sunset clauses" in them that provide for automatic expiration after a certain date; but they could (see Section 14). Still, an entrenchment clause silent on the duration of its own effectiveness does not impliedly make itself valid forever. Nor on the other hand does it impliedly defer to a rule of desuetude. If the entrenched rule is a constitutional rule, then the entrenching language expires with the constitution or underlying rule. That may wisely be presumed for ordinary entrenchment clauses, just as in terrorem clauses lose their validity if the will in which they appear is successfully overturned. (In part, that is what "successfully overturning" the will means.) But suppose an entrenchment clause said, "this section shall not ever be amended or repealed, and shall not ever lose its validity, not even by or after the replacement of this constitution, by revolution, by complete change of the form of government, or by the extinction of the human race".

Recall that the Arkansas, Pennsylvania, and Tennessee constitutions said that their Bills of Rights shall "forever remain inviolate". That is close, but Rhode Island came closer in its constitution of 1842. After announcing the right to alter or abolish government, the Bill of Rights added that "the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all". This sentence has three remarkable features. First, it is the only language in any American constitution that says of the whole instrument, in effect, "valid and supreme until amended", which suggests self-embracing, not continuing omnipotence. Second, it provides something of a test for the legality of rebellion —"an explicit and authentic act of the whole people" (see Section 18). Third, it imposes a duty, or sacred obligation, upon "all" (which for the present may be restricted to Rhode Islanders) to obey "the Constitution which at any time exists". It not only says that we should obey the rules (see the first rule of Nomic in Appendix 3), but that we should obey whatever rules will be in effect after any number of changes. It anticipates its own eventual obliteration, but tries to imposes a duty that will outlast its own validity. The duty to obey is entrenched beyond the

life of the language of the duty, and even beyond the life of the language of the entrenchment clause. If future Rhode Islanders, living under a new constitution, were moved to another insurrection, then the 1842 rule would (if it could) rise up and remind them of their continuing duty to obey the constitution.

Is this super-entrenchment effective? The Rhode Island clause was probably not meant to protect the duty to obey in anything so fragile as constitutional language. Its framers probably believed that the duty to obey the law was eternally inherent in law. They tried to say so in language that inadvertently but unavoidably left openings for someone like me to take it literally. But let us take it literally here.

Under the inference model, it might not be effective. The logic of parts and wholes may require the expiration of all the parts with the expiration of the whole. But if super-entrenchment is effective, followers of the inference model must sigh in dismay to think of all the ancient obligations imposed on them of which they are unaware, and which cannot be repealed even by revolution. Under the acceptance model, the answer could be that the language is ineffective, if forgotten or regarded as superseded, but this would depend on the empirical facts of what is accepted. Some rules can be accepted as authoritative after their language has expired (see Section 14).

(In Section 10.C I argue that the "binding until changed" language of the clause negates the super-entrenching effect.)

J.M. Finnis has argued that the validity of such super-entrenchment follows from the jurisprudence of Hans Kelsen.[Note 31] Kelsen argued that a constitution may derive its validity from the prior constitution, by having been drafted and adopted under its AC; that constitution may in turn derive its validity from its predecessor, and so on. There will be no infinite regress because human history is finite. Sooner or later we will find a constitution that was not authorized by its predecessor, either because it had no predecessor or because its predecessor was superseded by revolution (or milder types of violation).[Note 32] Finnis asks whether the AC of the first constitution in the series, long since superseded by its own authority, is not actually valid until it is superseded by revolution.

England released its former colonies by means of a statute (the Statute of Westminster) that might in principle be repealed. Would that act revoke the sovereignty of these new nations, despite the establishment of apparently autonomous constitutions in the meantime? (See Section 20.I.) Similarly, the first AC may possibly keep the authority to repeal all the amendments made under it, including the new ACs and new constitutions. Alf Ross himself noted that a sovereign cannot absolutely release a subject, at least not with a legally continuous series of acts, and that self-amendment manifests the same problem.[Note 33] Finnis concludes that,[Note 34]

> if, as the Kelsenian analysis entails, an earlier constitution is the source of the validity of later constitutions, there seems no reason why it should not validate a rule purporting to repeal a later constitution, whether or not the later constitution authorizes such a repeal.

Finnis rightly notes that this problem is not resolved by stating, or assuring, that the two constitutions were never in effect at the same time, for the same reason that this objection does not dissolve the paradox of self-amendment: the earlier authorizes the later regardless whether they overlapped in time or not (see Section 10).

This type of super-entrenchment is disarmed by any theory, such as the acceptance theory, which denies that a constitution can be validated only by its predecessor. For the acceptance theory constitutions might be validated instead by present and continuing acceptance or consent. But Kelsen and Finnis do not deny this. Finnis eventually denies Kelsen's position in favor of a variant of Hart's acceptance theory. But even Kelsen believes that if a constitution is not authorized by its predecessor, because there was none or because it was overthrown, then the present constitution is valid by something very close to acceptance, and the AC of the old constitution cannot be super-entrenched or presently valid. On this view an AC need not amend itself in any special way in order to become super-entrenched against its successors: it is automatically cantilevered over its successors until one of them is superseded by revolution.

In the cognate situation of a sovereign releasing a subject (or former colony), therefore, Finnis notes that[Note 35]

> [g]reat care has, on occasion, been taken to perform some unauthorized act in the course of transfer of authority, so that it may be claimed that, because there has been a revolution, therefore the validity of the new constitution[al] legal order cannot be traced back to the British Imperial Constitution.

In this sense Americans should be relieved that the present American constitution was invalidly established under the AC of the Articles of Confederation (see Appendix 1.D). Thomas Reed Powell once bemoaned the fact, which is a fact only to a formalist, that the American legal system was illegal on account of the defective self-amendment of the Articles of Confederation.[Note 36] But if initial illegality is cured by acceptance or acquiescence, or by the self-justifying terms of the ratification clause of the new constitution (Article VII in the present constitution) (see Section 7.B), then initial illegality is preferable to perpetual subjection to the prior AC, pending a revolution.

Another form of super-entrenchment may be said to occur when a clause attempts to forbid its amendment by appeal to a moral duty which is presumed to be immutable, perhaps thereby acknowledging that a legal duty will not survive a change of regime. One example is the old Virginia statute quoted in Section 8.C which defined a right of free exercise of religion and asserted that repeal, while technically lawful, would infringe the right defined in the statute, which ultimately derived from natural law. Another example is K.W.B. Middleton's contribution to the long-running English debate on the question whether parliament can commit suicide. Dicey said it could, and Hart thinks that "might be conceded."[Note 37] On the other side are those, perhaps a majority, who believe the British Parliament has continuing omnipotence. Middleton takes a different

approach, and decides that the "purpose" of parliament is to convert the "inchoate will of the nation into a set of concrete rules," and therefore that it could not commit suicide,[Note 38]

> legally....For the effect would be to deprive the nation, which can only speak through Parliament, of all legal means of expressing itself, and that would be clearly contrary to the purpose for which it exists.

Middleton suggests that insofar as power is restrained by the purposes of its existence, parliament cannot commit suicide; but he leaves the door wide open for the interpretation that parliamentary suicide would be improper, not illegal, a betrayal of trust more than a violation of law. Using similar reasoning, William Marbury has argued that the "power to 'amend' the Constitution was not intended to include the power to destroy it."[Note 39]

In the theological version of the paradox of omnipotence the parallel argument is that the deity has self-embracing omnipotence, and logically could limit or destroy itself, but will not because some auxiliary blessing, such as infinite goodness, argues in favor of the greater utility of remaining unlimited in power.[Note 40] Like the moral injunction instead of the legal one in the old Virginia statute, this argument is something of a cheat. The deity's goodness is usually described in terms that make its verdicts necessary, not contingent. Hence, the deity whose goodness prevents self-limitation should actually be said to possess continuing, not self-embracing, omnipotence, unless the omnipotence can repeal the goodness: but presumably the goodness itself will prevent that.

One may wonder why the self-destruction of parliament or Jehovah, or the self-repeal (without replacement) of a constitution, might not be even more permissible than the repeal or destruction of lesser entities. Wittgenstein noted, in a different context, that one who doubts that Napoleon existed is not of sound mind; but one who doubts that the world exists is on firmer ground.[Note 41] If one accepts the world but doubts Napoleon, then one is accepting a system of evidence that strongly supports the existence of Napoleon. But if one rejects the whole system of evidence, nothing remains to confute one's doubt. Similarly, if an AC repeals itself, rules are left behind that might suffice to declare the act invalid, such as (for Alf Ross) legal rules incorporating the principle of non-contradiction. But if the constitution is repealed, or better, if the British parliament commits suicide, then at the very least the validity of the act will be injusticiable, if not actually beyond the strictures of the rules and criteria it took with it.[Note 42] Moral and logical rules will remain after every such act, except possibly after nuclear annihilation, and while both may find self-destruction objectionable, they cannot find it unlawful.

E. Self-repeal

Suppose someone were to object that a particular self-entrenched AC could not disentrench itself because it had continuing, not self-embracing, omnipotence. This would be a plausible objection for any AC, for self-disentrenchment presupposes some self-embracing power, although not necessarily self-embracing omnipotence. However, the objection is ill-founded. If the AC is truly characterized by continuing omnipotence, then it must have the capacity to authorize all amendments that are not inconsistent with its continuity or omnipotence. That means it must have the capacity to undo by amendment all limitations on its continuity or on its remaining omnipotence, and that implies the power of self-disentrenchment. All limitations on its power (except the limitation that makes it continuing) are revocable by it.

An AC of continuing omnipotence could not entrench itself in the first place, except revocably. If the self-entrenchment clause were original, not self-imposed, then the AC could still undo it through a self-application that merely revoked the revocable limitation. If the original limitation is irrevocable, then the AC does not have continuing omnipotence. Therefore, the inability of continuing omnipotence to amend itself in significant ways is not a barrier to self-disentrenchment. If the limitations to be disentrenched were self-imposed, then they are necessarily revocable, because continuing omnipotence cannot limit itself irrevocably. If they are original, then either they are revocable, or the AC does not actually have continuing omnipotence.

A subtler problem lurks here. How do we know whether an AC has self-embracing or continuing omnipotence? Hart says the question is empirical. He does not say that the decisive empirical question is whether self-limiting self-amendment has occurred. He says it is "an empirical question concerning the form of rule which is accepted as the ultimate criterion in identifying the law."[Note 43] This suggests that the empirical inquiry seeks to ascertain whether the rule of recognition sees the AC as self-embracing or continuing. This just postpones the question of what evidence is to count either way.

One empirical test that might be the language of the AC. However, no AC that I know of explicitly says whether it is self-applicable. The closest that I have seen is New Mexico's, which implies self-applicability by denying that one section of the AC can be amended except in convention. Many ACs say they apply to "this constitution", which implies self-applicability, but not enough to satisfy Alf Ross, for example. But self-applicability is not really decisive on this question, even if it is suggestive. Self-embracing omnipotence requires self-applicability. But so does continuing omnipotence, in order to repeal the revocable limitations on its continuing power or to add others.

Note that if an AC were reworded so that it explicitly permitted all kinds of self-amendment, including self-repeal, self-entrenchment, and self-disentrenchment, then the paradox of self-amendment would not be any closer to solution or dissolution. The reason is that a self-amendment under the old AC inconsistent with its original form would still make an invalid inference. And of course an amended AC could still become inconsistent with its original form by, say, prohibiting what was once permitted or permitting what was once prohibited (see Section 12.C).

At least a history of self-limiting self-amendment would be a strong empirical indication of self-embracing power. It would not be decisive unless we knew that the limitations were immutable, which is unknowable so long as future generations may find a legal theory, such as acceptance, sufficient to amend them. A history of self-disentrenchment or transmutation would be a strong sign of continuing omnipotence. It would not be decisive unless we knew that all future limitations will be revocable, which is also unknowable. Because self-disentrenchment proves that the repealed limitations were repealable, the former (and therefore, present) existence of the limitation is consistent with both continuing and self-embracing omnipotence.

What if an AC has both histories? What if it has validly limited itself through self-amendment and validly disentrenched its limitations? The present New Mexican AC has amended itself to a form inconsistent with its original form, and by reducing the years in which amendments may be considered by half, has limited itself. One section subject to a valid entrenchment clause has impliedly amended itself before or without expressly disentrenching itself. And the entrenched amending rule has been said to be capable of repealing its entrenchment clause without using the latter's special procedure, which is to disentrench itself. How do we interpret these signs?

Self-embracing and continuing omnipotence are mutually exclusive because the former could limit itself in violation of the latter, and the latter could resist limitation in violation of the former (see Section 10). But self-embracing omnipotence is consistent with a limited power of disentrenchment, and continuing omnipotence is consistent with a limited power of self-amendment. The New Mexican AC may be one or the other of these logically coherent species, or it may actually possess both self-embracing and continuing omnipotence simultaneously and incoherently. Under the acceptance model, that is at least possible. That is, the people and officials could accept an immutable self-limitation, a sign of self-embracing omnipotence, and then accept its repeal, perhaps after transmutation, a sign of the revocability of the limitation and the continuing omnipotence of the AC.

An AC may have continuing omnipotence as evidenced by a history of self-disentrenchment, and also have self-embracing omnipotence as evidenced by a history of revocable, temporary self-entrenchment and self-limitation. Stated this way, there is not even a logical problem. But self-embracing omnipotence could result in total self-repeal, which is clearly inconsistent with continuing omnipotence —if not self-contradictory in itself. And of course it could result in irrevocable, permanent self-entrenchment and self-limitation, which are also inconsistent with continuing omnipotence. These cannot coexist logically, but may they coexist legally?

Self-repeal is cleaner and simpler than irrevocable self-entrenchment or self-limitation. Whether it has ever occurred in the United States depends upon one's definition. The mere replacement of an old constitution by a new one, under the authority of the old AC, when the new constitution has a completely different AC, may or may not be taken to comprise self-repeal. In any case, it is commonplace in American history and clearly lawful (see Appendix 2). If an AC authorizes the making of a new constitution that lacks an AC, then that is a more troublesome kind of self-repeal. It has apparently occurred once in America. The AC of the 1776 Pennsylvania constitution was used to nullify the instrument of which it was a part, and apparently used to make the next (1790) constitution, which lacked an AC. This is particularly ironic because the Pennsylvania constitution of 1776 was apparently the first constitution in history to include an explicit AC.[Note 44] Even if a power of self-repeal is located in the 1776 Pennsylvania AC, there is no history of the same AC disentrenching itself to suggest a coexisting continuing omnipotence.

Perhaps the clearest examples of self-repeal are ACs that have authorized amendments that repealed and replaced themselves with new ACs. This has occurred in Vermont (1870), Oregon (1906), Tennessee (1953), Connecticut (1955), and Rhode Island (1973). None of these states has a history of express disentrenchment. Tennessee, however, has entrenched its Bill of Rights with the "forever...inviolate" language already noted, and yet has amended no fewer than 22 sections of that Bill of Rights, which might be taken as evidence of coexisting continuing omnipotence through implied disentrenchment.

The next closest thing to total self-repeal in American history might lie in the final paragraph of the 1776 New Jersey constitution. That constitution contained no express AC, but announced in its final paragraph the conditional nullification of the whole constitution "if reconciliation between Great Britain and these Colonies should take place." This raises the question whether a reconciliation would have resulted in total self-repeal, or only in the irreflexive repeal of the constitution minus the repealing authority in the last sentence. Would the last sentence remain valid forever to tell us that the repeal was effective? (For problems of this kind, see Section 14.) For one like Alf Ross who believes that self-amendment and self-repeal are illegal, the reconciliation between Britain and the United States would have caused the anomaly in New Jersey of peace triggering revolution.

Notes

1. I defer to Ross's argument, outlined in Section 5.D, that a sentence that refers only to itself, refers to a hall of mirrors rather than to a determinate subject. Even if Ross is wrong on this point, I need not show it for my present purposes. I also defer to Hart's argument that an "asymptotic stutter" can be avoided (at least) if the self-referential sentence refers to something other than itself as well. Hence, "this sentence shall not be amended" is (or may well be) subject to Ross's criticism. But no actual rules of law are so whimsical. A sentence that announced an irreflexive rule and added, "this section, including this sentence, shall not be amended", or more minimally, "neither rule R nor this sentence shall be amended", is perfectly meaningful.

2. These terms are ambiguous on the question whether a self-referential sentence refers to its words or to its meaning. While this ambiguity should be clarified through appropriate terminology, it is unnecessary to clarify it for my purposes here. Hence I will not confuse things by pursuing clarity through another distinction.

3. In these terms, Ross objected to statutes that were self-referential per se, but eventually narrowed his criticism to those that were immediately self-referential. Hart countered by showing that mediate and eccentric self-reference can be meaningful by avoiding the "asymptotic stutter" or incompleteable series of references comprising the subject of the sentence.

4. This choice may be defended by noting that a reference that referred directly and solely to itself is immediately self-referential, even though it may be said to refer to the class of which it is the only member.

5. In support I can cite the entrenched sections in the Australian and South African constitutions, discussed in Section 8, both of which were written by the British parliament. The British North America Act, which served as Canada's constitution until 1982, and which was written mostly in Britain, had no amending power that Canadians themselves could use. The new 1982 constitution, however, was established primarily to transfer the amending power from Britain to Canada, "repatriating" the constitution and completing the sovereignty of Canada. The entrenchment of the equal suffrage of the states in the Senate in the United States constitution was included at the insistence of the states who feared encroachments on their sovereignty. The entrenchment of §1 of the New Mexican AC by §5 was originally imposed by the New Mexicans on themselves, but Congress left it unchanged and even demanded that it remain as a precondition of admission to the Union. The clause within New Mexico's AC §1 that entrenched sections of other articles on voting and education were demanded by Congress. The clearest exception to my generalization is the entrenchment clause in the present (1901) Alabama AC, that explicitly and completely entrenches the rule that representation in the state legislature shall be based on population (see entry on Alabama in Appendix 2).

6. In real legal systems a tacit rule to obey the other rules is either unnecessary or may always be inferred. Hart argues that they are unnecessary; Hart, The Concept of Law, Oxford University Press, 1961, p. 230. The same is probably true of games, but in the spirit of making everything explicit in a game in which the rules are constantly changing, and to offer a tantalizing rule to change, I have made the rule to obey the rules explicit in the game Nomic, in Appendix 3.

7. Each state uses the same language, except that Arkansas inserts "the" before "government."

8. This case was first brought into this context by Douglas Linder, "What In the Constitution Cannot Be Amended?" Arizona Law Review, 23 (1981) 717-33, at 724.n.46. He deserves great credit for discovering it, for Henry Rottschaefer, writing in 1939, believed that no case of an attempted amendment of an entrenchment clause had occurred in America. See text accompanying note 27, below.

9. Helene Simpson, "Procedural Problems in Amending New Mexico's Constitution," Natural Resources Journal, 4 (1964-65) 151-59, at 156ff.

10. I have not been able to discover whether the vote on the AC that Congress demanded was conducted under the terms of the old AC that would be replaced. Certainly it was not proposed under the terms of the old AC.

11. Simpson, op. cit. at 157.

12. Simpson, op. cit. at 158-59. Arizona had originally subjected all public officials to recall by popular vote. Congress demanded an exception for judges, an exception that the voters adopted before submission and then repealed after admission. The Arizona amendment was demanded by a Joint Resolution of Congress, like the New Mexican amendment, not by the federal Enabling Act. The Arizona Supreme Court has ruled, by contrast, that the provisions in the Arizona constitution required by the Enabling Act "cannot be altered, changed, amended, or disregarded without an act of Congress." Murphy v. State, 65 Ariz. 338, 181 P.2d 336, 340 (1947). Wyoming made a similar ruling in Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955). Three New Mexican attempts to circumvent the terms of its Enabling Act were struck down as unconstitutional. Regents of the University of New Mexico v. Graham, 33 N.M. 214, 264 P. 953 (1928), State v. Llewellyn, 23 N.M. 43, 167 P. 414 (1917), cert. den. 245 U.S. 666 (1918), and State v. Marron, 18 N.M. 426, 137 P. 845 (1913). Cf. Ervien v. United States, 251 U.S. 41 (1919). See Simpson, op. cit. at 157. In United States v. Sandoval, 231 U.S. 28 (1913) the Supreme Court rejected a challenge by New Mexico to a provision of its Enabling Act that prohibited liquor in Pueblo Indian land. Congress can make a state assent to such a provision as a precondition to admission so long as Congress has jurisdiction to regulate the subject matter of the provision. New Mexico's Enabling Act is 36 Stat. 557 (1910), which is included in the New Mexico constitution at Article 21, §10. Article 21, by the way, is incompletely entrenched by AC §4. The Enabling Act did not require the amendment of the original AC; that was demanded by a Joint Resolution of Congress, 37 Stat. 39 (1911).

13. One wonders whether New Mexico was alone in this respect because of its large Hispanic —and Catholic— population.

14. See Arthur O'Neal Beach, "Constitutional Revision — Constitutional Amendment Process [in New Mexico]," Natural Resources Journal, 9 (1969) 422-29 at 425f.

15. Linder, op. cit. at 729.

16. Linder gets out of this problem, partially, by denying entrenchment clauses any effect at all, apparently because democratic values take precedence over the intent of the makers: "no principled decision could depend upon whether the amendment [to be repealed] did or did not include a clause expressly declaring the amendment not to be subject to repeal." Linder, op. cit. at 730. Therefore, Linder's single amendment need not and would not repeal both the entrenchment clause and the protected rule. Because the former is a nullity, only the latter need be repealed, and no obstacle stands in the way. Linder gives no reason to think that democratic values should sometimes supersede the intent of the law-makers and sometimes be superseded. Nor does he reconcile his appeal to democratic values with his per se rule invalidating entrenchment

clauses, except to note that it is undemocratic to allow one generation to bind its successors irrevocably. I agree with that. But it is arguably as undemocratic to ignore the manifest will of the people in ratifying an entrenchment clause. In other terms, he does not explain why democracy requires continuing, not self-embracing, omnipotence, nor why democracy can abide the immutable limitation that makes continuing omnipotence continuing. I believe he is right in this normative preference for the continuing omnipotence of the people, but if he had articulated his reasons, then he probably could not, so easily, have justified the total nullification of entrenchment clauses. See Section 21.

17. In chronological order the chief articles are Clarence Norton Goodwin, "How Should the Illinois Constitution be Amended?" Illinois Bar Review, 9 (1915) 601-11; A.L. Powell, "A Plan for Facilitating Constitutional Amendment in Illinois," Illinois Law Review, 30 (1935) 59-67; Special Committee on Constitutional Convention, "The Gateway Amendment," Illinois Bar Journal, 38 (1950) 308; L.A. Kohn, H.I. Green, and T.J. Welds, "Debating the Gateway Amendment," Illinois Bar Journal, 39 (1950) 127-33; Robert L. Farwell, "Gateway to What?" DePaul Law Review, 10 (1961) 274-85; and Samuel W. Witwer, "Workable Amending Clause or Strait-Jacket?" Chicago Bar Record, 50 (1968) 10.

18. The second such limitation is hard to find. Justice Wayne had just summarized the original three limitations on the federal amending power. Two of them expired in 1808: the irreflexive entrenchment of Article I, §9.1 and §9.4. Grammatically he must have meant that the second of these, and the equal suffrage limitation, were immutable. But if so, he is clearly wrong on the entrenchment of I.9.4, since it expired (see Section 14). I believe he was wrong about the equal suffrage limitation as well, for even if it is impliedly self-entrenched, it is incompletely self-entrenched, and therefore mutable by a special procedure.

19. See Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at 84-85. See my Section 8, note 47, above.

20. In the former case the most complete entrenchment clause in any American constitution was declared repealable, although perhaps because it was not self-entrenched; see entry under Alabama in Appendix 2. The latter case was discussed in Section 8.C; an amendment that delegated the decision on its effective date to its beneficiaries was upheld on the assumption that delegation was prohibited and that the prohibition was completely entrenched.

21. Linder, op. cit. passim.

22. Linder, op. cit. at 723-24.

23. See the learned opinion of Hartz' Estate v. Cade, 247 Minn. 362, 77 N.W.2d 169 (1956). See also 26 ALR 755, 52 ALR 83, 125 ALR 1135, and 157 ALR 584; Harold Kertz, "Contesting a Will in the Face of a Forfeiture Clause," Georgia Law Journal, 45 (1956) 200-213; Jack Leavitt, "Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments," Hastings Law Journal, 15 (1963) 45-91; and W. Harvey Jack, "No-Contest or In Terrorem Clauses in Wills— Construction and Enforcement," Southwestern Law Journal, 19 (1965) 722-39. Leavitt says the following (at 91): "The value of laws cannot be determined by their internal consistency or chaos, for legal symmetry is admirable only when its subject matter is equally symmetrical....What if...deserving parties would have been harmed by [a truly logical result]?"

24. But see Demosthenes on the Locrians,

> In that country the people are so strongly of the opinion that it is right to observe old-established laws, to preserve the institutions of their forefathers, and never to legislate for the gratification of whims, or for a compromise with transgression, that if a man wishes to propose a new law, he legislates with a halter round his neck. If the law is accepted as good and beneficial, the proposer departs with his life, but, if not, the halter is drawn tight, and he is a dead man.

Demosthenes, "Against Timocrates," @139, p. 463 of vol. III of the Loeb Classical Library edition of his works, trans. J.H. Vince, Harvard University Press, 1951. See also Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality, Cambridge University Press, rev. ed., 1984, pp. 88f.

25. Orfield, op. cit. at 44.

26. Henry Rottschaefer, Handbook of American Constitutional Law, West Pub. Co., 1939, at 9-10.

27. See note 8, above.

28. Richard Swineburne, "Omnipotence," American Philosophical Quarterly, 10 (1973) 231-37, at 237. This view has been criticized by Edward J. Khamara, "In Defense of Omnipotence," Philosophical Quarterly, 28 (1978) 215-28 at 215-16.

29. John Locke, The Second Treatise of Government, Section 13, in e.g., John Locke, Two Treatises of Government, ed. Peter Laslett, Cambridge University Press, 1963.

30. James Madison, The Federalist #10. For more discussion of the reflexivity of becoming a judge in one's own case, see Section 20.

31. J.M. Finnis, "Revolutions and the Continuity of Law," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 44-76, at 52f.

32. Hans Kelsen, The Pure Theory of Law, University of California Press, 1967, at 200.

33. Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24, at 22-23.

34. Finnis, op. cit. at 53.

35. Finnis, ibid. at 52 (emphases in original).

36. Thomas Reed Powell, "Changing Constitutional Phases," Boston University Law Review, 19 (1939) 509-32, at 511-12. More precisely, Powell argued that the new constitution was not established until it had been ratified unanimously, as required by the Articles of Confederation. Ratification became unanimous two years after the new constitution's own terms for its establishment (ratification by nine states) had been satisfied. For more discussion of this problem, see Appendix 1.D.

37. H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, at 148.

38. K.W.B. Middleton, "New Thoughts on the Union of England and Scotland," Juridical Review, 66 (1954) 37-60 at 48; the quotation to follow appears at 52.

39. William Marbury, "The Limitations Upon the Amending Power," Harvard Law Review, 33 (1919) 223-35, at 225. This idea has some support from the more radical statement by Roger Sherman, delegate to the Constitutional Convention, made in the first session of Congress:

> All that is granted us by the Fifth Article is, that whenever we shall think it necessary we may propose amendments to the Constitution, not that we may propose to repeal the old, and substitute a new one.

Annals of Congress, vol. 1, at 742. Note that Sherman's principle forbids a type of self-amendment that is common in the states, and that arguably (but if so, defectively) established the present federal constitution under the AC of the Articles of Confederation (see Appendix 1.D). For other doctrines of Roger Sherman that, by contrast, may have led to the self-amendment of the federal AC, see Section 16.

40. Swineburne, op. cit. at 236.

41. Ludwig Wittgenstein, On Certainty, Harper and Row, 1969, Section 185, p. 26e.

42. J.M. Eekelaar, "Principles of Revolutionary Legality," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, 22-43. Eekelaar argues that the legality of revolutionary acts is justiciable by the next or new regime, according to principles that survive revolution. But see Wayne B. Wheeler, "The Constitutionality of the Constitution is Not A Justiciable Question," Century Law Review, 90 (1920) 152. The best recent summary of the law of the justiciability of amendments is Judith Elder, "Article V, Justiciability, and the Equal Rights Amendment," Oklahoma Law Review, 31 (1978) 63-109.

Howard Newcomb Morse, "May an Amendment to the U.S. Constitution Be Unconstitutional?" Alabama Lawyer, 10 (1949) 199-200, offers the unusual view that amendments may conflict with the spirit of the constitution and, if so, the conflict should be settled according to the rules of priority used in conveyances of real property. Morse's rationale is that the tests of sovereignty are all property law tests, such as the power to take property by eminent domain, the quality of having property escheat to it, and immunity to claims of adverse possession.

43. Hart, op. cit. at 146.

44. Jacob Tanger, "Amending Procedure of the Federal Constitution," American Political Science Review, 10 (1916) 689-99. For the general proposition that express amendment clauses in the supreme law were the invention of Americans, see Ralph R. Martig, "Amending the Constitution; Article V; The Keystone of the Arch," Michigan Law Review, 35 (1937) 1253-85, and Carl Joachim Friedrich, Constitutional Government and Democracy: Theory and Practice in Europe and America, Blaisdell Pub. Co., 4th ed., 1968, at 138.

Section 10: Attempts to Dissolve the Paradox: Time

A. Ross's answer to the time-based objection

Most people's first response to the paradox of self-amendment is that, even under the inference model, it is spurious and need not arise. One such avenue of attack is an objection based on time. If the validity and supremacy of the old AC exist under a time limit, or if the new and old ACs are never in effect at the same time, then perhaps self-amendment will be permissible under the inference model. Perhaps the old and new ACs are not inconsistent if they never overlap in time, especially if each says that they do not overlap. If the validity of the old AC exists under a time limit, then the limit may be pre-determined, as by a "sunset clause" which brings about the expiration of the whole section at a given time (see Section 14), or it may float and become fixed whenever the AC is amended. Most attempts to solve or dissolve the paradox depend on the fact (if it is a fact) that the old and new ACs were never simultaneously valid. No such objection, however, suffices to validate self-amendment under the inference model, as we will see.

First, it is clear that there is nothing problematic in supposing that an AC's period of validity does not overlap that of its successor. On the contrary, the alternative is difficult to conceive. If an AC and an amended form of itself meant to be its successor did overlap in time, then for the length of the overlap we could not say that the original AC had been amended. The new AC could stipulate that it took effect upon its adoption and that its predecessor would be repealed five minutes later. Even if there is no intolerable contradiction in this idea, it would be legally pointless; during those five minutes two contradictory AC's would enjoy equal validity. Could we use either one we liked, or both, or neither?[Note 1]

Similarly, it is difficult to conceive a gap between the expiration of the old AC and the effective date of the new AC. If there were such a gap, then the usual reasons for the expiration of the old AC would be lacking. Again, the new AC could stipulate that it would take effect upon its adoption and five minutes after the expiration of its predecessor. But it seems that it could only declare the expiration of the prior AC if it were itself already valid; its predecessor would have to be valid at least up to the moment that its successor became valid.

So let us agree that there is nothing problematic about the old AC becoming invalid and the new AC becoming valid at the same dimensionless point of time, with neither gap nor overlap. The core of the time-based objection to Ross's paradox of self-amendment is that, even if there is some kind of contradiction between the new and old AC's, the temporal separation of their periods of validity eliminates it, or tames it, just as two countries on a map can be drawn in the same color if they meet at only one point.

Ross meets this objection directly by distinguishing legal and logical contradiction. Legal contradiction exists between inconsistent laws valid at the same time. If one is repealed or invalid, then the legal contradiction disappears. Logical contradiction is an inconsistency between propositions taken more abstractly. If they contradict one another by their form or content, regardless of the accidents of human history that give some propositions legal effect, then they are logically inconsistent. If two propositions of law contain a logical contradiction, and if they are valid at the same time, then repealing one of them will eliminate the legal contradiction but not the logical contradiction between them.

Ross's first answer to the objection is that temporal separation can only cure legal contradiction, not logical contradiction. It can prevent inconsistent rules (the new and old AC's) from being valid at the same time; but it cannot remove their inconsistency in the logical sense. Indeed, the desire to remove the legal contradiction between them presupposes an acknowledgment of their logical contradiction. Yet it is the logical contradiction that invalidates the inference that models the act of amendment. And if the deduction corresponding to the amendment is logically invalid, then the amendment is legally invalid. (For the possibility that a time-based response could satisfy a formal logic even if it did not satisfy Ross's inference model, see 10.B below.)

The attempt to dissolve the paradox by temporal separation of the old and new ACs misconceives the essence of the inference model. The validity of deductive inference is the criterion of the legal validity of amendments, and the validity of deductive inferences is not a temporal phenomenon. The premises and conclusions are examined for consistency without regard to time, because any inconsistency between them will eternally lie between them. If the premises pass out of effect as the conclusion is established, that legal adjustment does not bear on their logical relations.

This is not only the approach of Ross and the inference model, but also the approach of logicians who must try to address the issue with logical tools only, without the benefit of a legal or divine capacity to tolerate contradiction.

Ross puts it this way: the time-based objection[Note 2]

> confounds legal with logical contradiction. There is no contradiction in law, because [the new AC] supersedes [the old AC]. But why does [the new AC] supersede [the old AC]? Precisely because [the new AC] logically, that is corresponding to its content, contradicts [the old AC]. This follows from the well-known lex posterior principle according to which in case of conflict between two equivalent norms (i.e., norms at the same level in the hierarchy) the later precedes the earlier one.

If we grant Ross the distinction between legal and logical contradiction, then he is certainly right to say that temporal separation can avoid the former but not the latter. (One sense in which the logical contradiction can be removed is discussed in 10.B below.)

But for those who reject the distinction, Ross has another reply to the time-based objection. If a rule of law is authorized by another rule of law, then usually the authorizing rule must be legally valid in order to lend its authority to the authorized rule. For example, if a court is defined by statute and the statute is repealed, the court will usually be dissolved at the same time. If a rule of law remains authorized even after its authority

is repealed, then it possesses what J.M. Finnis called "transtemporal validation". Ross rejects the possibility of transtemporal validation for reasons central to the inference model: it does not work in valid deductive inference, so it cannot work in valid legal change. When in a given inference, a conclusion relies on a certain premise, then if the premise is denied, the conclusion is no longer proved. The conclusion may be inferred anew from other premises, of course, but in any given inference the premises that authorize the conclusion must be affirmed, not denied. So in law, if a rule is repealed, everything it authorized (that is not authorized by something else) must cease to be authorized.

So if an act of amendment requires transtemporal validation, then it violates the inference model. But temporal separation in the case of strict self-amendment requires transtemporal validation. If the new AC is authorized by the old AC so that strict self-amendment occurs, and if the old AC is invalidated just as the new AC is validated, then the new AC is either unauthorized or transtemporally authorized.

The only alternative under the inference model is for the new AC to be validated by something like Ross's tacit, transcendent rule, which remains in effect as long as we like. But this is to deny that strict self-amendment has occurred (which is part of Ross's strategy). In strict self-amendment the authority for the new AC must be the old AC. So if the new AC is not authorized "from the grave" of the repealed old AC, transtemporally, then it is not authorized at all —for the inference model.

In short, temporal separation will not cure strict self-amendment for the inference model. If we accept the distinction between legal and logical contradiction, then temporal separation only prevents a legal contradiction. The logical contradiction survives between the conclusion (new AC) and the premise (old AC) from which it derives its validity. This suffices to invalidate the inference that models self-amendment (when the premises are consistent with one another). On the other hand, if we reject the distinction between legal and logical contradiction, then temporal separation forces us to appeal to transtemporal validation for strict self-amendment. This violates the inference model just as much as contradiction.

B. "Valid until amended", temporal indexing, universal self-entrenchment

What if the old AC says that it is valid only until amended or repealed? Wouldn't that prevent both legal and logical contradiction between the new and old AC's? The old AC need not assert its exclusive and permanent validity; if it does not, then it is compatible with its replacement in the new AC.

This proposal is more complicated than it appears. There are at least four points to make about it. First, it will probably work as advertised, if done with sufficient care. But the inference model requires more than simple care in draftsmanship. It requires a model of deductive inference than can take the proposed nuance into account. So far, temporally indexed deontic logics have only been sketched;[Note 3] they must be fully fleshed out and applied to self-amendment. However, the success of other temporal logics in coping with time-dependent truth values[Note 4] gives me confidence that this project can be fulfilled.

Second, the natural way to fulfill it would be to make the old and new AC's logically consistent with each other (by temporal qualification of their claims to validity), while enforcing their temporal separation. Even if this method succeeds in avoiding both legal and logical contradiction, it will require transtemporal validation. Hence, it will satisfy our carefully constructed formal logic without satisfying the inference model.

Third, there are new paradoxes attaching to "sunset clauses" that declare time-limits on their own validity. In particular, after they expire, if we want to claim that they are really invalid, the only obvious legal authority to which we might appeal for their invalidity is their own statement of a time-limit on their validity. But they are presumably invalid. If they remain perpetually valid in some dormant, low-level way, sufficient to tell us authoritatively that they are invalid, then at the very least they are self-excepting ontological monsters; at worst, they contradict the time limitations they assert either by becoming wholly invalid or by remaining partially valid. (These paradoxes will be explored further in Section 14.)

Fourth, despite first impressions, the logical contradiction between the old and new AC's is not removed simply by rewording the old AC so that it specifically authorizes its replacement or its self-amendment. (More on this in Section 11.)

Ross says that the old AC is invalidated or repealed by an inconsistent new AC, adopted under the tacit, transcendent rule. The old AC is repealed by virtue of the legal rule that favors the most recent rule in conflicts between two rules of the same hierarchical level (see Section 16). This rule is often called the lex posterior principle. Ross anticipated the objection that if the old AC incorporated the lex posterior principle, in effect authorizing its own repeal as its successor is established, then the old and new ACs would no longer be inconsistent. This he denies. An AC that incorporated the principle might say,[Note 5]

> The rules of the constitution are amendable by process P and only by this process, until by this process it is decided otherwise.

If such an AC amended itself by changing P for Q, when P and Q were inconsistent in content, then the inference by which the new AC would have come into being would still contradict one premise, the old AC, which would still create an insurmountable invalidity in the inference.

Would the incorporation of the lex posterior principle still fail to dissolve the paradox if the old AC said it was to expire at time T (a dimensionless point in time), and if the new AC said it was to take effect at T? The question suggests that some sophisticated logical move is to be made, requiring a different answer from the original situation. But that is illusory. To "incorporate the lex posterior principle" is simply to make it explicit within the new and old ACs that their periods of effectiveness do not overlap, or that the new one repeals the old one to the extent of their irreconcilable inconsistency. Clearly, making this rule explicit in the ACs themselves does not change the fact that they are inconsistent with one another. Moreover, as before, it even presupposes their inconsistency. If one's criterion of inconsistency is the prohibition of what was once permitted, or

the permission of what was once prohibited (see Section 12.C), then clearly the new and old ACs could declare different periods of effectiveness without thereby overcoming their inconsistency. If they are inconsistent, then the inference that models the adoption of the new from the old will be invalid, and the formalist model cannot permit it. The old AC is still being asked to authorize a norm inconsistent with itself.

What Ross calls the incorporation of the lex posterior principle may also be called the implied limitation on the AC that it is valid only until amended. As noted in Section 8.C, such a "limitation" does not diminish the amending power in any way, at least not while the AC is still valid. What it does do is insure that the old and new ACs never overlap in time, which might be desirable if one could not rely on the courts to apply the lex posterior principle exogenously. A strong argument could be made that any AC is impliedly valid only until amended, notwithstanding the Kelsenian super-entrenchment of ACs noted in Section 9.D. This is especially so if "valid only until amended" means that an AC in its current form binds only in that form until it is changed to another form. This is nearly a tautology, but not quite: if self-amendment is permitted, it is even closer to tautology, and only becomes a tautology if irrevocable self-amendment is permitted. If an AC has self-embracing omnipotence, then it may limit or repeal itself irrevocably, and therefore invalidate itself. If it has continuing omnipotence, then all self-limitations are revocable; but while they last they genuinely change the AC and bind in another form, even if they cannot totally change the AC. Moreover, the very immutability of the continuing character of continuing omnipotence shows that, if it could be changed irrevocably, then its original form would be invalidated.

Because the "valid until amended" limitation is simply the incorporation of the lex posterior principle, it therefore cannot be read into an entrenchment or self-entrenchment clause, insofar as the latter are temporally symmetrical correlates of implied repeal and the lex posterior principle (Section 9.D). If "valid until amended" means that newer rules impliedly repeal all inconsistent older rules on their own hierarchical level, pro tanto or to the extent of their irreconcilable conflict, and if entrenchment is the reversal of this rule of priority, allowing the existing rule to repeal the newcomer pro tanto, then entrenchment clauses, taken at face value, reverse and do not incorporate the lex posterior principle. If they are mutable and repealable, then it is by special effort, not by the sort of change so routine that its permissibility may automatically or presumptively be read into them.

In one of the few general studies of the logic of rules, Joan Safran Ganz concluded that one of the recurrent features of rules is that they have been adopted and "remain in force until unadopted".[Note 6]

As noted in Section 9.D, the Rhode Island constitution is the only one in the nation that says of itself that it is valid until amended: a clause entrenching the right to alter or abolish government adds that "the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all" (emphases added). Most states are content to presume that their constitutions are valid only "till amended". But Rhode Island is the only state to endure the upheaval of a revolution in which insurgents with strong popular support set up a constitution and government in opposition to the incumbent. After its bitter experience in which the Supreme Court refused to decide which was the legitimate government of the state, and in which President Tyler supported the incumbent with national troops, Rhode Island was understandably careful in its subsequent constitutional convention to assert both the lex posterior principle (to satisfy the insurgents) and a rough test of revolutionary legality (to satisfy the incumbents).[Note 7]

With the memories of the new nation's revolution still bright in his mind, Alexander Hamilton wrote in similar vein in Federalist #78. The most basic laws are mutable, but only by the forms and procedures the people have imposed upon themselves in their constitution.

> Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

This is a strong statement of the "self-entrenched" character of all law, which requires that its own forms be followed. But for the same reason it is a strong statement of the principle that law binds until changed —in some way the opposite principle. Hamilton is asserting the balance between stable old law that demands respect, and the rights of new law to take over when solemn formalities have indicated consent. It is strange and wonderful that this play of opposites should sound nearly tautologous to our ears. It is no accident that this balanced view is made explicit in the turmoil and long memories following revolution, and set up as a warning. It is important at those moments to reassert the unexceptionable rule of law, but equally important to reassert the mutability of law.

C. The procedural model

Under the procedural and acceptance models the paradox need never arise, either because the new AC is validated directly by acceptance, not by the old AC, or because the contradiction between the new and old ACs is tolerable under the procedural and acceptance models. No effort need be made, theoretically or practically, to insure that the new and old ACs are never in effect at the same time, for any overlap and contradiction may be excused or ignored.

We can distinguish several theories of the source of the validity of a newly changed AC. With Ross, the source of legal validity may be the logical validity of a certain inference from a prior, higher rule of change. With Hart, it may be the acceptance of the people and the usage of officials, or conformity to a rule of recognition that traces its own authority to acceptance. These are the inference and acceptance models of authority and validity.

A third model lies between the inference and acceptance models in many ways. It may be called the procedural model. It derives the validity of a newly changed rule from compliance with the demands of a valid procedure. Procedures are legal entities, not logical ones, and may perform whatever valid law permits them to perform, not only those things that can be validated by sound deductive inferences from prior rules.

If the procedure for amendment requires x, y, and z for a valid, final, and complete act of amendment, and if x, y, and z have certifiably been performed, then amendment has occurred and is valid under the procedural model. The importance of the procedural model, and what distinguishes it from the inference model, is that the amendment will be valid even if there is reason to find the outcome inconsistent with x, y, or z, with a rule of change, or with itself. The procedural model envisions outcomes abstractly, as separate and separable from their mode of becoming, and without any "backward-looking" consideration for the procedure itself or its premises in the particular case. Under the procedural model, the outcome of a judicial procedure may deny the jurisdictional basis of the proceeding without undermining the outcome itself.[Note 8] The outcome of a legislative investigation may reveal the total absence of the required basis for a legislative investigation without thereby invalidating the outcome itself.[Note 9] The outcome of a jury deliberation may logically imply the opposite outcome without subverting itself or legally requiring that the opposite outcome be given effect.[Note 10]

Logically the procedural model is anomalous, if not scandalous. But that is just to say that it differs from the inference model. If procedures are pictured as inferences, then the procedural model permits invalid inferences to make valid law. For the procedural model, the validity of the outcome does not depend on the logical validity of any inference, and therefore does not depend on consistency with any antecedents; it depends solely on the legal validity of the procedure itself and the satisfaction of its requirements. In short, under the procedural model to picture procedures as inferences is inaccurate, for it suggests that some permissible procedures are impermissible.

Hart's exposition of the acceptance model does not go into sufficient detail to allow us to determine its exact relations with the procedural model. Both models will allow the outcomes of procedures to contradict indispensable premises, although for different reasons. For the acceptance model, procedures may be defectively applied, or bypassed for invention; for the procedural model, acceptance is irrelevant once the procedure is known to be lawful.

D. Other views

The inadequacy of the time-based objection is the main reason why I prefer Hart's acceptance model to Hart's own explicit answer to Ross. In his later essay, "Self-Referring Laws,"[Note 11] Hart uses the time-based objection and did not notice that a solution wrought from his own acceptance theory applies elegantly to the problem and far surpasses the adequacy of temporal separation. Speaking of the American constitution and its AC, Hart said,[Note 12]

> It may be true, at least in some cases, that a norm cannot be derived from 'a source of derivation' with which it conflicts. But there is no conflict if Article V is amended in accordance with its own provisions. For the original Article V and the amended Article relate to different periods of time: the original procedure is to be used until it is replaced by the new, and the new procedure is to be used thereafter.

This argument is unavailing against the inference model, and unnecessary for other models. Hart seems to sense this, and after quoting Ross on the inferential structure of legal change, replies,[Note 13]

> To this it might be objected that the exercise of legislative power to introduce new norms is not a deductive inference and it is not clear how this logical principle applies to a legislative act.

Hart has suggested an adequate solution, I contend, simply by rejecting the inference model. But this is far different from dissolving the paradox for the inference model or for formal logic generally. Hart continues, saying that an act of self-amendment that led to an inconsistent new AC is in any event perfectly possible and coherent if the old AC had self-embracing omnipotence. This proposal will be considered in Section 11.

Ross's statement of the paradox of self-amendment evoked many responses. The Scandinavian comments all relied on the time-based objection.[Note 14] In English I have found only six responses in addition to Hart's: by Geoffrey Marshall, Joseph Raz, Norbert Hoerster, J.M. Finnis, J.C. Hicks, and William F. Harris II.[Note 15] Of these Marshall, Raz, and Hoerster all urge the time-based objection (with other objections), and Finnis shows its insufficiency; Hicks generally supports Ross. Harris does not decide the adequacy of Ross's case.

Marshall argues that a "phased" rule of amendment that explicitly said that its power will be limited by its successor will avoid the self-referential aspect of the paradox.[Note 16] It will not avoid the logical contradiction between premise and conclusion for the inference model.

Raz believes that at a certain moment, T1, the old AC may be valid and a new AC may be adopted in accordance with it, while at T2 the old AC is invalid and the new AC is valid.[Note 17] This is certainly true, or could be true, but Raz is wrong to say that in that form, "the conclusion does not contradict the assumptions and the argument is both valid and accurately describes the situation."[Note 18] Raz deals only with legal, not logical contradiction, and ignores the problem of transtemporal validation for the inference model. The argument or inference will be invalid so long as one premise asserts the validity of the old AC and the conclusion asserts the validity of the inconsistent new one.[Note 19]

Hoerster argues that the new AC does not contradict any valid law, but only contradicts the old AC and never when both are valid.[Note 20] Here Hoerster also confuses legal and logical contradiction. The contradiction vanishes legally when the old AC passes out of effect, but the logical contradiction endures.

Finnis is the only commentator to appreciate that the time-based objection ignores Ross's insistence that no valid rule can authorize any rule inconsistent with itself.[Note 21] This principle applies (for formalists) regardless of the events that temporally intervene between the rule of change and one of its products, such as the repeal of the rule of change in self-amendment. Ross was worried that the believers in self-amendment not only believed in the valid derivation of norms inconsistent with the source, but also in the transtemporal validation of rules. Finnis coined the term "transtemporal validation" to designate the sense in which the old AC continues in force to validate its successor.[Note 22] Those who believe in it appeal to the validity-bestowing power of a repealed and invalid rule, as if the old AC arose from the grave in rarefied form to support the validity of its successor.

Because Ross believed that no conclusion remains established unless its premises remain true, he ascribed the doctrine of transtemporal validation to all those who believed in self-amendment, overlooking that they might justify self-amendment by a source of authority external to the constitution, such as acceptance, consent, or military power, or a source heedless of the death of the authority, as under the procedural model. Ross denied that transtemporal validation could occur, and accused proponents of self-amendment of presupposing it. Finnis apparently agrees with Ross on both counts, and therefore favors a Hartian (acceptance) solution precisely because "in Hart's analysis...the transtemporal validation of basic rules, relied on by Kelsen and recognized as troublesome by Ross, is simply and silently omitted."[Note 23] Hart avoids the necessity of transtemporal validation by denying that all rules are validated by antecedent rules. Some rules, on the contrary, are validated directly by present acceptance.[Note 24] Hart also rejected transtemporal validation explicitly in his later essay:[Note 25] Ross's argument, he wrote, is "questionable" to the extent that it relies on the statement that a derivation of a new norm presupposes not only the validity of the superior norm but its continued existence after the creation of the new norm.

The solution provided by the acceptance theory does not require the denial of transtemporal validation, although every rule validated by acceptance makes that rule's transtemporal validation unnecessary. I will argue in Section 14 that some rules that authorize their own repeal may be considered to persist afterwards in order to confirm the fact of repeal, and that this sort of transtemporal validation may be accepted. Indeed, in Section 21 I will argue that any absurdity that can be accepted in the rigorous sense can be law. Finnis, in short, did not have to deny transtemporal validation in order to deny Ross, but neither on the other hand did he have to concede that all proponents of permissible self-amendment, except possibly Hart, require transtemporal validation.

Ross avoids transtemporal validation and self-amendment by deriving the authority of the amended AC from a postulated tacit, immutable rule superior to the constitution,[Note 26] not from the old AC. I have argued (in Section 6.B) that this is ad hoc and fictitious. Indeed, Ross only gets into a position from which ad hoc and fictitious remedies will suffice because he has insisted on judging law by the principles of formal logic, a course not justified by any legal principle but only by the pretension of formal logic itself to rule the world.

Raz answers Ross, not through the time-based objection, but by arguing that self-reference is unnecessary in self-amendment, and in any case is not meaningless or problematic. Moreover, if Ross would have us avoid self-reference, then we will face many more difficulties interpreting law than we now face. For the avoidance of self-reference leads to crude paraphrases in which at least two rules are needed to transcribe one, and even then do not capture the original sense perfectly.[Note 27]

Marshall objects, quite rightly, that if some new AC cannot become valid because it cannot be derived from its predecessor, then it is not at all clear how the present AC could have become valid.[Note 28] Ross would answer that the tacit transcendent rule validated the current AC. But in Ross's formulation of the terms of that tacit rule, it applies only to AC's that already exist and point to their successors; it does not apply not to unstructured amending power in constitutional conventions or in the people creating the first AC. We can trace the authority of the current AC back a few constitutions, but then Ross would leave us without an answer. But this is damaging to Ross's position, for if the endpoint AC had no authority, then its offspring have no authority. This is a variation on the argument that Ross commits himself to an infinite genealogy for every valid legal system.

Hoerster has several arguments against Ross other than the time-based argument. First, he argues that there is no contradiction in the Rossian inference because the old and new ACs equivocate on the word "constitution". The old AC authorizes amendment of the constitution that contains it, while the new AC authorizes amendment of the different constitution that omits the old AC and contains the new.[Note 29] This argument is specious and self-defeating. If the equivocation is admitted, then the inference is still fallacious, though now for equivocating. On Ross's inference model, the conclusion is still far from established. But the equivocation may be avoided by implied adjustments to meaning or explicit rewording, even if the appropriate rewording occurs in no actual AC. If the rules in the constitution other than the AC are called set S, then the AC may be read to say, "this AC authorizes amendment of set S and this AC." The new AC could be read to authorize the amendment of set S and the new AC, eliminating all equivocation.

Hoerster also objects to Ross's tacit, transcendent rule because it always authorizes amendment of the AC, when in fact the people may wish to amend it to give it a continuing omnipotence that would resist some amendments.[Note 30] Or, the immutability of the tacit, transcendent rule prevents the immutable self-limitation and self-repeal of the AC, and therefore does not capture the legal possibilities inherent in self-amendment. He also objects that if a nation amended its AC every generation for 100 generations, without reference to such a tacit, transcendent rule, then that nation cannot be said to defer to such a rule, or such a rule cannot be said to govern the amendment of the AC. He rightly notes that Ross would not allow 100 generations of acceptance and usage to cure an original defect. Ross and other formalists must worry that an unknown defect buried in the past makes the present AC and entire legal order illegal.

Hoerster adopts an acceptance theory as his final answer to Ross. There may have been a defect in the adoption of the current AC or the ancient ancestor of the current AC, under the terms of the tacit, transcendent rule:[Note 31]

> But the important thing is, we don't ever care to know, if we want to find out how to settle basic constitutional questions: To this task political history is simply irrelevant. All that is relevant is whether [the current AC] in our community is accepted as basic.

E. One more try at satisfying the inference model

If Ross takes pains to deny transtemporal validation, then it seems he believes that the old AC can authorize nothing after it loses validity, not even the norms consistent with it. But suppose one argued that the old AC authorizes its successors while it is still valid, and that it passes out of validity just as its successor becomes effective. It is true, as Hoerster argued, that the new AC never contradicts valid law, but might it also be the case that it never contradicts the old AC for the same reason that the old AC is unable to authorize any new norms? Are the old and new ACs really inconsistent, logically, as opposed to legally, if they are never thought to bear the status of valid law at the same time? The procedural model denies transtemporal validation, and permits new rules to become and remain valid even though their authorizing rules have been repealed. If the vanishing of the old AC is not likened to the denial of a premise in an inference, as Ross has it, but is likened to the discontinued assertion of a premise, then might the inference work? If the old AC is not positively denied, but simply dropped from the set of asserted premises, before or as the conclusion comes to be asserted, then does the conclusion contradict any premise?

This is like asking whether p and ~p are inconsistent if only one of them is asserted to be true. The answer may be yes or no depending on one's metaphysic of asserted and unasserted meanings. A surer route to an answer is to note that the inference model requires integrity of inference in general, and that consistency is just one element of this. The inference is also unsuccessful in establishing its conclusion if we cease asserting an indispensable premise just before, or just as, we assert the conclusion.

Logic has no name for this defect because logicians evaluate inferences under the assumption that all the premises are true. That all are asserted to be true is thereby also assumed, but tacitly. The consequences for the proof of denying a premise are well known: the conclusion is no longer proved. The consequences of ceasing to assert a premise midway in the inference are novel. Logicians also consider inferences to occur instantaneously. A set of premises implies or determines a set of conclusions without any lapse of time; only the human logician is under the sway of time in discovering (or proving or writing) those conclusions. A set of premises asserted to be true determines a set of conclusions at once; there is literally no time to change the status of a premises after an inference has begun and before it has ended, unless we consider inferences to be psychological processes. But if do that, then the concept of validity used by Ross and other logicians also vanishes.

Logically, the jurist who defends the inference model must choose between (1) asserting all and only the conclusions determined by the joint assertion of all her premises, and forgoing the derivation of all conclusions inconsistent with any premise, and (2) asserting all and only the conclusions determined by the joint assertion of those premises she is willing to leave asserted throughout the inference, and forgoing all the premises inconsistent with the conclusions she desires to derive. (The third option of using inconsistent premises deliberately is omitted because it clearly would not solve Ross's problem.)

In short, the paradox of self-amendment will still arise, even under the inference model, when we assume that the old and new ACs were never in effect at the same time. However, under the procedural model we may accomplish something very similar to the derivation of a conclusion after ceasing to assert an indispensable premise. For procedures do take time, and do not fail merely because the technical rules of inference are not satisfied. The old AC specifies the procedures of change, and ex hypothesi of its own change. Under the procedural model we may rely on the validity of the procedure, and just as we assert the validity of the new AC deny or suspend our assertion of the validity of the procedure. (While this is so, it is also the case that under the procedural model such maneuvers to avoid contradiction are unnecessary.) Because procedures are not instantaneous, there is time between the steps to change the status of a "premise". Moreover, the logical difficulty or impossibility of asserting and ceasing to assert the same premise in the same inference becomes irrelevant. If it seems preposterous and illogical, it may be because one has not fully appreciated the freedom from logic that the procedural model finds in law.

The fact that the old and new ACs are never in effect (valid and supreme) at the same time, does not dissolve the paradox for the inference model. If one thinks it does, one may unconsciously have exchanged the procedural for the inference model, and forgotten that the inference model requires logically valid deductive inferences, not merely well-run, valid procedures. One may also have forgotten that the inference model requires the continuing validity (or "truth") of the premises in order to provide continuing validity (or "truth") to the conclusion.

In sum, under the inference model self-amendment of an AC to a form inconsistent with its original form requires either (1) the inconsistency between a premise and the conclusion, when the premises are consistent with one another, which makes the inference logically invalid and the conclusion legally invalid, or (2) the abstract separation of steps in the inference, as if in time, and the arrest of our assertion of an indispensable premise just as we conclude the conclusion, which is either impossible or a dressed up description of contradictory attitudes toward a premise. The attempt to avoid the former fallacy by keeping the old and new ACs separate in time, while still deriving the new from the old, leads to the latter fallacy.

In law we may freely and fictitiously suppose that the premises survive self-repeal only in the minimal sense needed to continue authorizing their successors without transtemporal validation. Or we may fictitiously suppose that the continuing validity of the premises is unnecessary to the continuing validity of the conclusion. Or we may fictitiously separate the steps of an inference, and start with the assertion of all premises and end with the assertion of only those premises consistent with the conclusion. But the insistence that legal logic shall be identical with formal logic precludes the use of these saving devices.

Hence, whatever the attraction of these or other stratagems, they cannot be used by Ross's inference model, and therefore cannot dissolve the paradox of self-amendment for that model of legal change.

Ross's analysis of self-amendment is the correct logical analysis (but for, perhaps, the fulfillment of the promise of temporally indexed deontic logic). The proposed solutions, even those that dissolve the paradox, invariably introduce a legal, extra-logical element. If Ross is correct on the logic of the problem, and absurd on the law, then that is an argument to look for another, non-formalist, model of legal change.

Notes

1. See the entry for Georgia in Appendix 2 for a possible example of overlapping periods of validity. Several amendments to the Georgia constitution of 1945 were ratified at the same election that established the entirely new constitution of 1968. The amendments were incorporated into the new constitution. This meant that the 1945 AC applied to the 1968 constitution, when the 1968 constitution contained a new AC that was presumably valid from the date of the election and that (otherwise) displaced the 1945 AC. See the entries for North Carolina and New Mexico for similar cases.

2. Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law," Mind, 78 (1969) 1-24, at 20.

3. See e.g. L. Thorne McCarty, "Permissions and Obligations: An Informal Introduction," forthcoming, North-Holland.

4. See e.g. Arthur Prior, Past, Present, and Future, Oxford University Press, 1967, 1978; Nicholas Rescher and Alasdair Urquhart, Temporal Logic, Springer-Verlag, 1971.

5. Ross, op. cit. at 20-21.

6. Joan Safran Ganz, Rules: A Systematic Study, The Hague: Mouton, 1971, at p. 5.

7. See entry under Rhode Island in Appendix 2, and Luther v. Borden, 48 U.S. 1 (1849).

8. For example, if a court's jurisdiction in a case is based only on the supposed domicile of the defendant, and if the court rules that the defendant is not in fact domiciled in the jurisdiction, then the ruling subverts its own jurisdictional basis and validity, but still stands. To one who believes the holding is self-subverting, J.D.I. Hughes replies that no one can believe in the self-subverting effect without presupposing that the defendant is not domiciled in the jurisdiction, which is to presuppose or acknowledge the validity of the holding. J.D.I. Hughes, "Judicial Method and the Problem in Ogden v. Ogden," Law Quarterly Review, 64 (1948) 217-26, at 226.

Another example occurs in ex parte annulments. Because annulments adjudicate the rights of both husband and wife, both should be in court. But a fiction has grown up that marriage is a thing (res) that travels with each spouse. By virtue of this fiction a court may have in rem jurisdiction over an ex parte annulment (one at which only one spouse is present). But because annulments declare that the marriage was void ab initio (from the beginning), the decree removes its own jurisdictional basis, but nevertheless remains valid. See Robert H. Gerdes, "Conflict of Laws: Jurisdiction to Annul a Marriage," California Law Review, 16 (1927) 38-44, at 40; and Herbert F. Goodrich, "Jurisdiction to Annul a Marriage," Harvard Law Review, 32 (1918) 806-24, at 810-11, 814-15.

9. Congressional committees may only investigate areas on which they may legislate. Congress may not legislate on wholly intra-state commerce. But it may investigate a business to determine whether it is wholly intra-state. U.S. v. DiCarlo, 102 F.Supp. 597 (1951). Such an investigation could well discover that the business is wholly intra-state, which would normally mean that Congress could not have investigated it, even to discover this fact. Either the procedure and its outcome are kept apart, unable to form an explosive mixture, as the procedural model demands, or Congress has a second, independent legal basis for investigations. There is no evidence for the latter view.

10. The neatest example is the ancient Greek case of Protagoras v. Euathlus, in which Euathlus asked Protagoras for lessons in argumentation —the Greek education of a lawyer— provided that he could postpone payment until he had won his first legal case. Progatoras agreed. After the lessons were complete and before Euathlus took a case, Protagoras sued for payment. Protagoras argued that he should be paid whether he wins or loses, for if he wins, Euathlus must pay by the judgment of the court, and if he loses, Euathlus must pay under the contract. Euathlus learned his lessons well and replied that he need not pay whether he wins or loses, for if he wins, he need not pay by the judgment of the court, and if he loses, he need not pay under the contract. The court of Areopagus in Athens was said to have been so puzzled that it adjourned for 100 years. The only American case that has cited Protagoras v. Euathlus, according to Lexis (a computer search service) is State v. Jones, 80 Ohio App. 269 (1946). Jones is a fascinating example of a jury verdict that implies its own negation. For the story of Jones, and more on Protagoras v. Euathlus, see Section 20.

11. H.L.A. Hart, "Self-Referring Laws," Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner, 1964, pp. 307-16, passim, but esp. 312-15.

12. Hart, ibid. at 314 (emphasis in original).

13. Hart, ibid. at 315.

14. Ross, op. cit. at 7.n.1, and 20.

15. Geoffrey Marshall, Constitutional Theory, Oxford University Press, 1971, pp. 46-48; Joseph Raz, "Professor A. Ross and Some Legal Puzzles," Mind, 81 (1972) 415-21; Norbert Hoerster, "On Alf Ross's Alleged Puzzle in Constitutional Law," Mind, 81 (1972) 422-26; J.M. Finnis, "Revolutions and Continuity of Law," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 44-76, at 52ff; J.C. Hicks, "The Liar Paradox in Legal Reasoning," Cambridge Law Journal, 29 (1971) 275-91; and William F. Harris II, The Interpretable Constitution, Chapter Four, "Revising the Constitutional Polity: The Limits on Textual Amenability," esp. pp. 238-39, Ph.D. Dissertation, Department of Politics, Princeton University, 1985;. I thank Professor John Vile for bringing Harris's dissertation to my attention.

16. Marshall, op. cit. at p. 48.

17. Raz, op. cit. at 420.

18. Raz, ibid.

19. How the consistency of such inferences is affected by the fact that the old AC in the first premise authorizes amendments in general, and specifically authorizes self-amendment, will be examined in Section 12.C.

20. Hoerster, op. cit. at 423.

21. Ross, op. cit. at 21: "Any attempt at solution must stand by the principle that from the validity of a norm it is impossible to derive the validity of any norm in conflict with [it]."

22. Finnis, op. cit. at 55.

23. Finnis, ibid.

24. Finnis, ibid. cites Hart, The Concept of Law, Oxford University Press, 1961, at 103-04.

25. Hart, "Self-Referring Laws," op. cit. at 314.

26. Ross, op. cit. at 21-22, 23-24.

27. Raz, op. cit., passim.

28. Marshall, op. cit. at p. 47.

29. Hoerster, op cit. at 422-23.

30. Hoerster, ibid. at 424.

31. Hoerster, ibid. at 426.

Section 11: Attempts to Dissolve the Paradox: Self-Embracing Omnipotence and Specific Authorization

A. The authorization fallacy

In one of the first modern accounts of the paradox of omnipotence, J.L. Mackie proposed the following solution as applicable equally to deities and sovereigns.[Note 1] We must distinguish laws governing behavior from laws governing other laws. Mackie calls these first and second order laws; Hart calls them primary and secondary rules. Mackie continues:

> Correspondingly, we should distinguish two orders of sovereignty, first order sovereignty (sovereignty (1)) which is unlimited in its authority to make first order laws, and second order sovereignty (sovereignty (2)) which is unlimited in its authority to make second order laws. If we say that parliament is sovereign we might mean that any parliament at any time has sovereignty (1), or we might mean that parliament has both sovereignty (1) and (2) at present, but we cannot without contradiction mean both that the present parliament has sovereignty (2) and that every parliament at every time has sovereignty (1), for if the present parliament has sovereignty (2) it may use it to take away the sovereignty (1) of later parliaments. What the paradox shows is that we cannot ascribe to any continuing institution legal sovereignty in any inclusive sense....
>
> [O]mnipotence must in any case be restricted in one way or another.

Mackie's distinction between first and second order sovereignty is very similar to Hart's distinction between continuing and self-embracing omnipotence (or sovereignty). In fact, in this passage Mackie has shown a connection that Hart himself failed to draw between Hart's distinction between continuing and self-embracing omnipotence and Hart's distinction between primary and secondary rules. Continuing omnipotence is the unlimited power to make primary rules. It is continuing because primary rules themselves cannot limit the power that makes them; that power continues, therefore, because it cannot diminish itself. Self-embracing omnipotence is the unlimited power to make secondary rules. It is self-embracing because one group of secondary rules (the rules of change) governs the making of rules, and an unlimited power to make rules of change could diminish the power to make them. Mackie is also more explicit than Hart in inferring that the unlimited power to make secondary rules must therefore be self-applicable.

Time must be brought into the picture, because an initially self-embracing omnipotent parliament or deity could limit itself immutably in its first act. Continuing omnipotence by its nature preserves that nature over time. Self-embracing omnipotence may by its nature lose its omnipotence and even its self-embracing character.

There is nevertheless a difference between Hart's and Mackie's distinctions. While Mackie's first order sovereignty can make no second order rules at all, Hart's continuing omnipotence can make any secondary rules consistent with its continuing character. Similarly Mackie's second order sovereignty can make no first order rules at all, while Hart's self-embracing omnipotence can make any primary rules whatsoever until it limits its power to do so. Another difference between Hart's and Mackie's distinctions is that no being can simultaneously possess both continuing and self-embracing omnipotence, without contradiction, but a being could simultaneously possess first and second order sovereignty. Self-embracing and continuing omnipotence are mutually exclusive because some self-limitations within the power of the former would violate the latter. But first and second order sovereignty are not mutually exclusive. A being could have, at a given moment but not continuously, unlimited power to make both primary and secondary rules. In the next moment the unlimited power to make secondaries could be used to limit itself or the power to make primaries. This is why Mackie believes there are only two consistent distributions of these powers: (1) that the being now has and always will have only first order omnipotence, and (2) that the being now has both first and second order omnipotence, but need not keep either power forever. A third theory is contradictory: (3) that the being presently has second order omnipotence and continuously has first order omnipotence.

Mackie and Hart use their distinctions as if they could solve or dissolve the paradox of omnipotence.[Note 2] If "omnipotence" (they would say) is equivocally thought to embrace both species (either both first and second order omnipotence, or both continuing and self-embracing omnipotence), then and only then could we speak of an omnipotent entity limiting itself as a contradiction or paradox. If we keep the two species separate, then we must recognize that an omnipotent being can either limit itself freely and without contradiction, because its power it second order or self-embracing, or that it cannot limit itself at all, because its power is first order or continuing.

Is this solution adequate? It has strong intuitive appeal because both Hart's and Mackie's distinctions are distinctions with a difference that help us classify slippery phenomena; both expose an equivocation on "omnipotence" common to many descriptions of sovereigns and deities, and even to many statements of the paradox of omnipotence; and both show the sense in which self-limitation is and is not self-contradictory, thereby dispelling a cloud of confusion that all too frequently hovers over the paradox. But I believe the solution is inadequate nevertheless. Not only does it fail to dissolve the paradox, but the very idea of self-embracing omnipotence is inadmissible for both the inference and acceptance models of legal change.

First we must bear in mind that the acceptance and procedural models of legal change eliminate, or more precisely, ignore and excuse the paradox of self-amendment. It is only under the inference model or formal logic generally that attempted dissolutions of the paradox are sought, for example by separating the new and old AC's temporally, or by distinguishing the continuing from the self-embracing senses in which they might be omnipotent. Hence, the proposed Hart-Mackie solutions will be tested under the inference model, which is how a logician would test them, free

from any magical propensities of law and theology to absorb and forgive contradiction. Therefore, the question is whether continuing and self-embracing omnipotence can each, when considered separately and without equivocation, give rise to the paradox of self-amendment.

1. If the AC is thought to have continuing omnipotence, then irrevocable self-limitation and self-repeal (but not revocable self-limitation or non-limiting self-amendment) are precluded as ultra vires. However, self-amendment that does not limit either the omnipotence or the continuing character of the omnipotence of the AC would still be possible. We must ask whether such self-amendment can give us a new, amended AC that is inconsistent with the present AC; if so, then under the inference model the paradox will still arise. The answer to the question is yes, if by "inconsistent" we mean that the new AC permits what was impermissible under the old AC, or prohibits what it permitted (see Section 12.C). For example, self-amendment by the addition of a new, complete method of amendment (say, by popular referendum) would not limit the continuing omnipotence of the old AC, yet is "inconsistent" with the old AC for permitting what was once impermissible. In such cases the paradox of self-amendment would still arise under the inference model. In the inference that models that act of amendment, the conclusion (new AC) would still contradict a premise (the old AC). Therefore, if the old AC is univocally considered to have continuing omnipotence, then the paradox is not routed or dissolved.

2. If the old AC is considered to have self-embracing omnipotence, then the paradox is not routed either, although this is more difficult to show. Indeed, self-embracing omnipotence seems by definition able to perform any self-amendment whatsoever without self-contradiction. But we should beware of solving this problem by appeal to a kind of power that is simply defined as able to solve the problem. It turns out that, while self-embracing omnipotence authorizes all self-amendments, it cannot prevent contradiction. That is, we should not hastily infer that what is authorized is thereby freed from contradiction, for we can always posit an authority for bizarre acts or rules. One of the acts authorized by self-embracing omnipotence, apparently, is irrevocable self-limitation. We may be more specific: one act authorized by it is (to use Ross's language) the derivation of norms inconsistent with the source. If this is really a self-contradiction (Sections 5, 10), then self-embracing omnipotence does not remove the contradiction but only "authorizes" it or makes it somehow legitimate, or even acceptable. But if, on the other hand, the authority provided by self-embracing omnipotence is enough to solve the paradox or to remove the inconsistency of what is authorized, then it turns out that self-embracing omnipotence is really the power to override the principle of non-contradiction. Even if we say that it is, we don't understand it any better for defining it that way; instead we impute it, in all its mystery, to selected sovereigns and deities to absolve their contradictions. It is a way of using words to avert our eyes.

One of the defining characteristics of self-embracing omnipotence is the power to limit itself irrevocably. By contrast, continuing omnipotence can only limit itself revocably. The power of self-embracing omnipotence, so long as it is self-embracing omnipotence, is unlimited but limitable. Any self-amendment that immutably limits self-embracing omnipotence is inconsistent with its source, in the sense that it forbids what was once permissible. The inference model cannot tolerate such self-amendment, nor can formal logic generally. So long as our test of inconsistency is whether the new AC forbids what the old AC permitted, or permits what the old AC forbade, then self-embracing omnipotence will be unable to escape self-contradiction in self-amendments that limit it immutably.

One might object that no amendment is inconsistent with the AC that authorized it if it is really authorized; immutable self-limitation is concededly authorized by self-embracing omnipotence, and therefore is consistent with it. This objection confuses the vice of inconsistency with the vice of proceeding ultra vires (beyond authority). If a rule specifically authorized the derivation of norms inconsistent with itself, regardless how we define "inconsistent", then the new norms could actually be inconsistent with the source despite the authorization. Authorization does not remove inconsistency even if it legitimates it. Even for Alf Ross what purports to authorize inconsistency is ipso facto not a valid legal authority. For those who do not hold the inference model, the principle is even clearer: one of the differences between law and logic is that laws may violate logical rules and still be valid laws, even if they are for that reason "bad" laws that should be amended or repealed. Self-embracing omnipotence is not even a law, but merely an hypothetical concept of omnipotence that is experimentally ascribed to an AC. But even if an AC clearly possessed self-embracing omnipotence, it would merely authorize amendments inconsistent with itself, not eliminate the inconsistency from all authorized amendments.

Because "inconsistency" may be defined in any way whatsoever and still not be overcome by specific authorization,[Note 3] this conclusion does not depend upon the particular test of inconsistency that I have used (to forbid what was once permitted or to permit what was once forbidden). Other criteria of inconsistency for normative propositions will be examined in Section 12.C. But whichever we pick, a rule of law, valid by all legal tests, could permit the derivation from itself of norms "inconsistent" with itself by the chosen criterion. This is a flat denial of Ross's most fundamental premise, that forbids all rules of all kinds from permitting the valid derivation from themselves of norms inconsistent with themselves. While Ross's principle is obviously imported from logic, not native to law, and imposed on law as if with a priori title, my counter-proposition is derived from the empirical experience of law of the sort highlighted by the procedural model of legal change, in which procedures often permit outcomes inconsistent with their antecedent authorities.

In Hart's version of the Hart-Mackie thesis, self-embracing omnipotence could be valid law even if it were concededly self-contradictory. In that sense Hart has actually dissolved the paradox with his distinction between continuing and self-embracing omnipotence. But his distinction does not eliminate the inconsistency of self-amendments that would be legally permissible for both species of amendments, and in that sense has failed to dissolve the paradox for the inference model or formal logic generally.

Regardless whether omnipotence is continuing or self-embracing, therefore, legally permissible self-amendment of some type will be paradoxical or self-contradictory under the inference model. The distinction between continuing and self-embracing omnipotence does not dissolve the paradox of self-amendment, but merely directs our attention two distinct species of omnipotence in each of which the paradox is fully replicated.

B. Against self-embracing omnipotence

In short, the Hart-Mackie thesis fails because self-embracing omnipotence, whatever its merits in theology, cannot be made plausible under any coherent concept of law. This applies especially to the half of the Hart-Macke thesis that would allow any self-amendment under self-embracing omnipotence to be consistent with its source. Under the inference model or formal logic it is self-contradictory. It is admittedly and essentially a source of norms inconsistent with itself. Under the acceptance model, the contradiction of deriving immutable self-limitations from an unlimited power could easily be tolerated. But as I argued in Sections 8 and 9, any limitations that are thought by one generation to be immutable could justifiably be thought by the next generation to be mutable. Shifts in acceptance can render mutable even the best entrenched clauses. Therefore, an AC thought to have self-embracing omnipotence may still not enact immutable self-limitations except in the estimation of those believing in its self-embracing omnipotence. It is possible that acceptance will never shift, and that what was once imagined immutable will in fact never change, and will be perceived, accepted, and used as if it were immutable. But whether acceptance shifts is contingent. Because there is no preventing such shifts by law, the contingent possibility of them suffices to make all limitations on the amending power revocable in principle, except the limitation against irrevocable limitations. In short, a supreme AC always has continuing omnipotence and cannot deprive itself of the power to validate and invalidate law. Under the inference model as well, no AC can have self-embracing omnipotence because it is self-contradictory, or formal logic cannot quiet its disposition to forbid contradiction wherever it occurs.

Self-embracing omnipotence, then, and any allegedly immutable self-limitations depend for their defining characteristics on contingent future events, under the acceptance model. The concept of a power able to limit itself immutably becomes incoherent when the effectiveness of its self-limitation, the essence of its unique power, is made contingent upon a future and external force. This is not true of deities or other entities to which omnipotence might be ascribed, for the acceptance model is not as applicable to them. But in law the idea that a supreme amending power may have self-embracing omnipotence, when acceptance is the ultimate source of legal authority, is incoherent, not merely a violation of democratic values. The acceptance model does not permit any legal power to make legally immutable rules, even if it permits "contingent immutability" ratified by each successive generation for its own reasons (see Section 21.C). Self-embracing omnipotence is hardly omnipotent and hardly self-embracing if it cannot, by its own exertions, limit itself immutably.

In short, then, self-embracing omnipotence is self-contradictory for the inference model, and incoherent or unable to live up to its definition under the acceptance model.

The distinction between continuing and self-embracing omnipotence is still meaningful, for self-embracing omnipotence may be a meaningful and coherent concept under a different model of law. Indeed, it appears to be coherent under the procedural model. If a power were postulated with self-embracing omnipotence, under the procedural model, then it could limit itself immutably merely by applying the procedures of self-amendment to a proposal to limit the power and to self-entrench the limitation. The contradiction with its antecedents, fatal under the inference model, is immaterial here; the threat of contingent future events repealing or transmuting the immutable limitation, fatal under the acceptance model, is impossible here. If procedures must be followed, then acceptance cannot override or supersede procedures that make no provision for amending a certain rule or that positively forbid it.

But while self-embracing omnipotence is coherent for the procedural model, the distinction between continuing and self-embracing omnipotence does not resolve the paradox for this model either. If the paradox is that self-amendment (when the new and old AC's are inconsistent with each other) is a contradiction, then the procedural model, like the acceptance model, can permit self-amendment without removing its paradoxical nature or making it free of contradiction. The only rules inconsistent with self-embracing omnipotence are immutable limitations on its power. At least these are inconsistent by the test of forbidding what was once permitted. Immutable self-limitations are permitted under the procedural model, unlike the acceptance model, but the contradiction is not removed, just ignored.

Other models of legal authority and change are undoubtedly possible, but they are much more likely to admit and excuse the paradox than to dissolve it. Dissolution requires the elimination of the contradiction in the self-amendment of an AC to a form inconsistent with its original form. The hope of self-embracing omnipotence was that by authorizing such self-amendments, their inconsistency would disappear. This turned out to be false. In fact, I believe that the attempt to erase inconsistency by appeal to specific authorization is to shift subtly to the procedural model from the inference model, to make authority primary and consistency negligible. In order to make self-amendment legally permissible or legally harmless, it gives up the goal of dissolving the paradox for the inference model or for formal logic generally.

Notes

1. J.L. Mackie, "Evil and Omnipotence," Mind, 64 (1955) 200-21, at pp. 211-12.

2. Mackie is explicit throughout his essay that his distinction is a solution. Hart is explicit only in his later essay, "Self-Referring Laws," Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet. P.A. Norstedt & Söner, 1964, pp. 307-16, at p. 315, where he even cites Mackie.

3. There is an exception, of course, for the definition of "inconsistency" as something eliminable by authorization. But this is to resort to fiction, much as a legislature will declare time stopped in order to finish its business by midnight on a certain day. An inconsistency that can be overcome merely by the say-so of one of the propositions involved is not the kind of inconsistency that underlies serious problems.

Part II
Variations on the Theme

Section 12: Introduction to Part Two

A. The exclusivity of the federal AC

If amendment can occur in many ways, then the possibility of the paradox of self-amendment can occur in many ways. The most direct form of amendment was considered in Part One: the direct application of the AC to the clause to be changed, the AC itself. That method of amendment raises so few extraneous problems that the issues of the paradox could be examined without distraction. Other forms of amendment will be considered in this Part. Those methods that do not take us into new legal or logical territory, or that reverse assumptions made in Part One, are summarized in this section, while methods requiring more discussion and exploration have sections to themselves.

If the constitution can be amended by methods other than those in the AC, then the AC will be mutable even if self-amendment is not recognized. The "official" view in most states and in the federal system is that the AC is exclusive. Even if minor procedural defects in the adoption of a given amendment are curable by ratification or acquiescence, substantial compliance with the terms of the AC is necessary to the validity of any amendment.[Note 1] The exclusivity of the federal AC was strongly stated in Ullmann v. United States, 350 U.S. 422, 53 A.L.R.2d 1008, rehearing denied, 351 U.S. 928 (1956):

> Nothing new can be put into the Constitution except through the amendatory power. Nothing old can be taken out without the same process.

Jameson put the exclusivity principle even more strongly:[Note 2]

> Even were the whole people, by unanimous action, to effect organic changes in modes forbidden by the existing organic law, it would be revolution.

It would be revolution if not authorized, but under the acceptance model unauthorized change may be authorized ex post facto, and under the inference model subsequent fictions may deny the discontinuity. Jameson implies, however, that not even acceptance can overcome the exclusivity of the AC. His principle infringes upon the unqualified postulate of popular sovereignty, a consequence that was recognized and ratified in this context by Henry Rottschaefer:[Note 3]

> The legal assumption that sovereignty is ultimately vested in the people affords not legal basis for the direct exercise by them of any sovereign power whose direct exercise has not been expressly or impliedly reserved.

Most state constitutions have clauses that assert popular sovereignty, and to that extent make it closer to an enforceable principle of law than a bromide of the campaign trail. In Iowa in 1883 a clause declaring that "all political power is inherent in the people" was held incapable of authorizing a constitutional amendment ratified by the requisite popular vote but not agreed to by both Houses of the General Assembly as the AC required. Koehler v. Hill, 60 Iowa 543, 14 N.W. 783, 15 N.W. 609 (1883). This may seem an unnecessary or undemocratic diminution of popular sovereignty, but the same principle can be expressed from the opposite perspective, as when this limitation on the people's power is asserted in the name of self-determination. In Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, 967-68 (1912) the exclusivity principle was expressed as a right to lawful government, not a violation of the right to popular sovereignty, or as a product, not a limitation, of autonomy.[Note 4]

Koehler and Crawford manifest the paradox of omnipotence nicely, by showing that self-limitation is, first, an autonomous act, and second, a limitation of autonomy. They also raise the theme of Section 9, that all law is in a sense incompletely self-entrenched by requiring conformity to its own forms and procedures and forbidding its own change except through its own methods. The official view, that the AC is exclusive, is a good example of the formalist fiction asserting this sort of weak self-entrenchment in the face of contrary evidence. In Sections 14-19 I will explore six ways in which the federal constitution might be (and might have been) amended other than through the "exclusive" methods of Article V, even though two of them (Sections 14, 16) derive indirectly from Article V.

The six methods are: amendment by sunset clause (Section 14), by judicial review and reinterpretation (Section 15), by implication or the lex posterior principle (Section 16), by treaty (Section 17), by an "inalienable right to alter or abolish government" (Section 18), and by desuetude (Section 19). The de facto permissibility of these methods varies. Some are clearly permissible, at least de facto (Sections 14, 15, 16), while others are doubtful (Sections 17, 18, 19). One is clearly permissible de jure (Section 14), and one is probably as fully recognized (Section 16), while the others are either subjects of reasonable disagreement as to their permissibility or "officially" considered beyond the exclusivity of the AC and not genuine rules of change for the constitution. None is expressly forbidden by the AC, bringing them within the diluted, permissible range of Jameson's principle. Three have a constitutional basis outside the AC (Sections 15, 17, 18) and two have a constitutional basis within the AC (Sections 14, 16).

Their de facto permissibility is an argument in favor of the acceptance that recognizes them over the formalism that does not.[Note 5] Because they also represent the victory of covert over overt methods, with the assistance or active participation of the judiciary, they have raised the hackles of conservatives who wish that judges would only "discover" law. While the judicial role in these methods of amendment cannot be denied, it has often been subservient to the executive (Sections 17, 19). In any case, the threat of anti-majoritarian tinkering and usurpation may inhere in these methods, but their history shows them to have served as a check on majority oppression and a facilitator of majority rule when the latter is stymied by difficult amendment procedures.

The "unofficial" methods of amendment affect the problem of self-amendment in two ways. First, they may in principle amend the "exclusive" AC and prevent its immutability even if self-amendment is not allowed. In this sense they decrease the chance that any legal rule will be found immutable. Similarly, they increase the chance that the utter self-repeal of the AC will not entirely extinguish the amending power. Or, from another standpoint, they make it easier for a judge to find an inherent or residual power to amend, if a constitution lacks an AC from inadvertence or self-repeal.

Second, as rules of change in their own right, they may be self-applied. For each of the six methods I will ask how it might be self-applicable, whether our legal history shows anything that might be a case of its self-application, and whether its self-application raises any new issues not seen in the self-application of an offical AC. If the unofficial methods are indeed capable of amending the constitution, then each has a colorable claim to supremacy that conflicts with that of the official AC and the other unofficial methods. If each can amend each, then the "see-saw" method is greatly strengthened in its power to reach any content from our given initial position (see Section 13).

B. Indirect self-amendment

Indirect self-amendment has already been defined as the wholesale revision or replacement of a constitution (usually in convention) under the authority of the old AC. If the new document contains an AC different from the old, then self-amendment has occurred. It is indirect because the AC was not applied directly to itself, but instead authorized a convention that in turn authorized the new AC. Indirect self-amendment is more indirect when constitutional conventions, once convened, possess an authority of their own independent of the AC under which they were established.

The logic of this method is substantially the same as that considered in Part One. If the old AC is thought to describe a continuing, not a self-embracing, power, then irrevocable self-limitation is impermissible. Under the inference model, indirect self-amendment is still self-contradictory, although the inference that models the amendment is a few steps longer.

The ACs of most state constitutions, and Article V of the federal constitution, provide for both direct and indirect amendment, and for no other methods. If one of the "exclusive" methods of amendment authorized another method of constitutional amendment, and hence another method to amend the AC, then another form of indirect self-amendment would be possible. This could take the form of amendment by addition, when the new method is applicable to the original AC. If an AC created a rule of desuetude (see Section 19) and if a section of the AC subsequently lapsed through desuetude, then that would comprise indirect self-amendment.

The states seem to allow any kind of amendment in convention, including the amendment of the Bill of Rights, entrenched rules, and the AC itself. They seem to acknowledge that the amending body (convention) is omnipotent, at least over the old constitution. This concept of amendment by convention comes very close to that of peaceful revolution. The crucial difference, of course, is that conventions are authorized by antecedent rules. Yet their omnipotence almost defies antecedent authority by its capacity to wipe the slate clean. (However, we know of no conventions that have tried to amend or repeal their own authority or jurisdiction.)

Indirect self-amendment, the repeal and replacement of the old AC, is the undoing of the only link to the legal past, and while the self-amendment is antecedently authorized, it seems simultaneously to sever that link. The question whether a convention can be limited to a range of topics is beyond my subject, but the doctrine and holdings that conventions cannot be limited make them seem less authorized by antecedent rules and closer to instruments of peaceful revolution.[Note 6] Indeed, one common formulation of the theological paradox of omnipotence is whether a deity can make a creature it cannot subsequently control.

The alternative to indirect self-amendment is even more intriguing. If a constitution is made in convention that is not authorized by the prior AC, which may be the case with the present constitution of the United States (see Appendix 1.D), then it must be in some sense self-justifying or authorized after the fact (or both). The ratification clause of our present federal constitution, Article VII, gave the terms of ratification that were to supersede the AC of the Articles of Confederation. Article VII bootstrapped the present constitution into validity because it was the only authority at the time for the constitution of which it was a part (see Section 7.B). If a convention violates or exceeds its authority, the prior AC, then revolution has occurred. The product of the convention can then become valid law only by self-justification or ex proprio vigore (by its own strength), much as a contract makes itself binding by its own terms,[Note 7] or by subsequent acceptance and acquiescence. Indirect self-amendment, then, paradoxical as it is, saves new constitutions from being revolutionary. We must choose between indirect self-amendment, self-justification (perhaps joined with the acceptance theory), or the perpetual, incurable illegality of every regime that lacks an infinite, continuous history of piecemeal amendment.

C. Self-amendment without inconsistency

If an AC authorizes its own change into a form not inconsistent with its original form, then even under the inference model there is no paradox. Ross would still object to the extent that self-reference was necessarily involved, but his chief argument would be disarmed. In the inference that models the amendment, the conclusion would not contradict a premise. However, finding an example of such an innocuous self-amendment is more difficult than it may appear.

What if an AC does not provide for amendment by convention and is amended to provide such a procedure? Or what if the AC is silent on how many amendments may be submitted to the people at one time and is amended to impose a limit of two? These are amendments by addition,

which might seem the least troublesome examples; but in fact they create difficulties. If the original AC has been interpreted as the exclusive set of methods of amendment, then is amendment to provide another method a change to a form inconsistent with the original form? The answer must be yes, if we consider the meaning of constitutional language, even for purposes of deciding such "logical" questions as consistency, to be a function of the interpretation of the courts, especially the highest courts. The AC by its exclusivity "preempted the field", making all additions "inconsistent" with the original AC.

However, this is a case in which specific authorization will prevent inconsistency (see Section 11.A and below in this sub-section). A specific authorization to add new methods of amendment will rebut the original presumption or refute the original interpretation of exclusivity. A federal statute that was intended to preempt the field, say, by specifically authorizing state additions or modifications, is not inconsistent with such state modifications, except by other tests of inconsistency. This shows that when an AC really is exclusive, then even self-amendment by addition will create an AC inconsistent with the original AC. And even when the theory of exclusivity has been abandoned, self-amendment by addition might create an AC inconsistent with the original AC by some other test of inconsistency, for example, by permitting what was once forbidden. This also shows that ascertaining the "inconsistency" of laws is not a simple problem, and that various tests might come into play.

Amendments by addition that merely fill voids left by silence, as opposed to providing new methods of amendment to an exclusive AC, may create the same problems. One is not contradicting the exclusivity of the original AC by expansion, but one is in effect doing the opposite, contradicting the openness of the original AC by limitation. But again, one may do it by specific authorization. If an AC is amended to limit the number of proposals that may be submitted to the people at once, when no such limit existed before, then presumably 25 proposals could have been submitted for ratification at once under the original AC. The amendment, then, has the effect of prohibiting what was once permitted, which is one way to define legal inconsistency.

If we look to amendments that modify existing sections or clauses, rather than merely add new ones or fill voids, then the problems are even greater. Obviously most such amendments will have the effect of prohibiting what was once permitted, or of permitting what was once prohibited. That will usually be the point of the amendment, of course. Indeed, the only exceptions appear to be amendments designed to make no difference.

Still, there have been amendments designed to make no substantive difference. The AC may be used to reorder and renumber the sections of the constitution, including the AC, or to reorder and renumber just the sections within the AC. These clearly count as cases of self-amendment, though they do not change the substance of the constitution or AC in any way. As examples one may cite amendments in Pennsylvania in 1967, Minnesota in 1974, Hawaii in 1978, and North Dakota in 1979.[Note 8]

Aside from these restructuring and renumbering amendments, might we find another species of self-amendment without inconsistency in amendments that, for example, lengthen or shorten the minimum period between legislative proposal and popular ratification? These amendments raise the fascinating question whether more of a quantity is "inconsistent" with less of it, or merely cumulative.[Note 9] The question has never been answered in constitutional law for any quantity associated with amendments.[Note 10] The reason may be that nothing turns on the answer, since self-amendment is permissible whether or not the new AC is inconsistent with the old AC.

But the question has been answered in other branches of law. In probate, settled doctrine asserts that a later will "inconsistent" with an earlier will automatically revokes the earlier will. If a later will gives a particular heir $2,000, and an earlier will identical in every other respect gave only $1,000, then are the two wills inconsistent? Is more money inconsistent with less money, or cumulative? The legal answer mostly ignores the logic of consistency and addresses the presumed intent of the decedent. The two amounts are rebuttably presumed to be cumulative or additive, not inconsistent or "substitutional". See Gould v. Chamberlain, 68 N.E. 39 (1903). By analogy, the question in the law of constitutional amendments would most likely address the ultimate policy issues rather than the mere logic of consistency.

In any event, it should be noted, to lengthen or shorten the minimum period between proposal and ratification would certainly permit what had been prohibited or prohibit what had been permitted. If the latter is taken as the operational definition of change to a form inconsistent with the original form, then we are left with the perhaps surprising result that there seem to be no cases of self-amendment without inconsistency except cases of mere restructuring and renumbering.

Before we go on it is worth noting explicitly that these rare and apparently trivial cases of self-amendment without inconsistency are nevertheless important to theory. They show that if one does not object to self-reference per se (as Ross does), then one has no logical objection to all self-amendment. One must limit the logical objection to those cases of self-amendment that create inconsistencies between the old and new ACs.

Now what is the proper legal test of inconsistency? The simplest logical test applies only to declarative statements: that they are inconsistent if and only if their conjunction is a contradiction. It does not carry over into the realm of prescriptive statements, if only because prescriptive statements are either non-cognitive (neither true nor false) or the object of a dispute as to their cognitivity. Some propositions of law are prescriptive; few are declarative or descriptive; but the logic of declarative statements will not apply without modification to the propositions of law. The logic of prescriptive statements, commands, and terms such as "obligatory", "permissible", and "impermissible", is called deontic logic, from "deon", the Greek for "duty".

The test of inconsistency in deontic logic is itself unsettled. Let us adopt the following standard symbols, when "p" stands for some action:

Op	=	p is obligatory
O ~ p	=	refrainment from p is obligatory
Pp	=	p is permissible
P ~ p	=	refrainment from p is permissible

Let us take these equations as fundamental axioms:

Op	=	~ P ~ p
O ~ p	=	~ Pp
Pp	=	~ O ~ p
P ~ p	=	~ Op

This is to suppose that obligation translates into the impermissibility of refrainment, and permissibility translates into the absence of an obligation to refrain. Georg Henrik von Wright believes that the negation of Op is P ~ p.[Note 11] Alf Ross, who is probably better known for his contribution to deontic logic than to jurisprudence, disagrees, believing that the negation of Op is O ~ p.[Note 12] In full prose, the negation of

p is obligatory
is either
refrainment from p is permissible (von Wright)
or
refrainment from p is obligatory (Ross).

Both von Wright and Ross would agree, however, that the two formulas are "inconsistent" with Op.

In addition to the intramural disputes of deontic logic,[Note 13] there is the problem of applying the doctrines of formal logic straightaway to law. As Lon Fuller described the task of discerning inconsistencies in law,[Note 14]

> It is generally assumed that the problem is a simple one of logic. A contradiction is something that violates the law of identity by which A cannot be not-A. This formal principle, however, if it has any value at all, has none whatsoever in dealing with contradictory laws.

The legal tests of inconsistency are the only legally relevant tests, and whether they incorporate any particular logical test is contingent. Like Ross on self-amendment, many logicians who have turned to jurisprudence are unreflective and hasty in assuming the unqualified applicability of formal logic to law, or more precisely, the unqualified adherence of law to formal logic.[Note 15] Of the more sophisticated legal treatments of this problem, special mention should be made of Lon Fuller, Howard Zelling, Ilmar Tammelo, Allan Murray-Jones, Gary R. Rumble, Dennis Lloyd, and A.G. Guest.[Note 16]

Summarizing and paraphrasing Murray-Jones,[Note 17] the chief legal tests of inconsistency appear to be four:

> Whether a superior law purports to preempt the field of its subject matter, or to claim exclusivity, when an inferior law enters that field in any way (I will call this the "preemption" test);
>
> Whether simultaneous compliance with two laws is impossible (the "compliance" test);
>
> Whether one law forbids what another permits, or permits what another forbids (the "deontic" test);[Note 18] and
>
> Whether an inferior law impairs or obstructs the operation of a superior law (the "obstruction" test).

The compliance test seems at first sight the closest to a bare logical test, but Fuller asks whether there is "any violation of logic in asking a man to do something and then punishing him for it?"[Note 19] He argues that such a dilemma only violates policy, not logic, which seems perfectly true. Fuller's ultimate point seems to be that inconsistency in law is a matter of policy, not logic, and is found to exist or not to exist only for certain alogical policies.[Note 20] The obstruction test is always a policy question insofar as it differs from the preemption test. The preemption test involves policy questions when an intent to preempt the field must be inferred or presumed,[Note 21] or when "the field" preempted must be defined.[Note 22]

Depending upon which test we select, the inference that models amendment may or may not be invalid (the conclusion and premises may or may not be inconsistent). I prefer the deontic test because it is the weakest or minimal test of inconsistency. Whatever we mean by inconsistency in law, at least we mean the deontic test. Therefore it imports the fewest assumptions and hidden premises. The other three tests or types of inconsistency are special and limited cases of the deontic test. A preempting or exclusive superior rule only conflicts with an inferior rule if the latter attempts to permit or forbid what the superior rule forbids or permits. Simultaneous obedience to two rules is impossible only if one forbids what the other requires (and therefore permits). And an inferior rule can only obstruct the operation of a superior rule by permitting delay or circuity or by forbidding efficiencies not contemplated by the superior rule.

Of course a narrow concept of inconsistency will allow self-amendment under the inference model when the deontic test would forbid it. If the old AC provides two methods of amendment between which the legislature may choose with unfettered discretion, and if the new AC eliminates one

or allows one only for certain types of amendment, then the deontic test shows inconsistency (the new AC forbids what the old AC permitted), but the compliance test shows consistency (simultaneous obedience is possible by refraining from using the restricted or abolished method). Choosing between these tests is not completely amenable to logical methods. There is some logical support for using that test that makes everything inconsistent that any test makes inconsistent, because inconsistency is so absolutely unacceptable in formal logic and because the minimal sense carries the fewest presuppositions. These criteria favor the deontic test, but not conclusively. For legal purposes, which vary from one context to another, other tests may be desirable. The compliance test is best suited to identifying inconsistency among criminal statutes, where clear notice is a strong policy and attainable compliance is an important goal (see Section 21.B). The preemption and obstruction tests are most suitable for preserving the supremacy of federal law in the face of state encroachments, which is desirable primarily for policy reasons such as uniformity and predictability, or for preserving the supremacy of constitutional rules over inferior rules, which is desirable for the policy reasons of federalism and the shielding of fundamental rules from easy and hasty change. The deontic test has been applied to conflicts between constitutional rules and amendments in In re Interrogatories Propounded by Senate Committee Concerning House Bill 1078, 189 Colo. 11, 536 P.2d 308 (1975).

The policy questions behind the tests of inconsistency prevent the objective tests of formal logic from finding useful application in law and from being decisive grounds for findings of consistency and inconsistency. For the same reason, inconsistency in law is a different type of relationship than in formal logic. As Fuller put it,[Note 23]

> [W]hat we call contradictory laws are laws that fight each other, though without necessarily killing one another off as contradictory statements are assumed to do in logic.

In logic one of the most unquestioned certainties is that both poles of a contradiction cannot be true at once; they "kill one another off". To assert one is demonstrably and unavoidably to deny the other. This is the work of the principle of non-contradiction ("not both p and not-p") conjoined with the principle of excluded middle ("not neither p nor not-p"). The principle of excluded middle was regarded as the natural partner of the principle of non-contradiction for centuries until some paradoxes of logic and difficulties in the mathematics of the infinite seemed best soluble by its separate denial. In law neither the principle of non-contradiction nor the principle of excluded middle holds without qualification. If two rules that are contradictory by one test are interpreted under another test, for policy reasons peculiar to law and inadmissible in logic, then they might be found consistent.[Note 24] Both the "inconsistent" rules of law might remain valid. Their coexistence in validity, or failure to kill one another off, is a sign that in law policy triumphs over logic whenever policy requires it.

As noted in Section 11.A, it is tempting, but incorrect, to believe that if rule P specifically authorizes rule Q, then P and Q cannot be inconsistent (authorization fallacy). If rule P is an AC, then it may authorize an additional method of amendment or the repeal of an existing method, in both cases creating a successor-AC that is inconsistent with the P by the deontic test. If P repeals and replaces itself with completely different methods of amendment, then P and Q could be inconsistent by the compliance test.

Among ACs and their successors, the preemption and obstruction tests do not apply, for an AC and its successors are on the same hierarchical level.[Note 25] However, if rule P authorizes a change Q in a lower level rule, then most likely the preemption and obstruction tests could find no inconsistency, for Q would prove that P did not preempt the field or forbid the type of obstruction represented by Q.

Because authorization does not remove inconsistency, for the deontic and compliance tests, the paradox of self-amendment cannot be resolved be rewording the AC to insure specific authorization of the important varieties of self-amendment. Such rewording would only insure that the legal problems were surmounted, i.e., that self-amendment would be recognized as valid by legal criteria. (But even without such rewording self-amendment has never been legally problematic.) Inconsistencies would remain by logical and legal tests; indeed, the point of specific authorization is to legitimate such inconsistencies and establish new law despite their presence.

However, rewording the AC to provide specific authorization for self-amendment will make even more tempting what I have called the authorization fallacy.[Note 26] One might be tempted to add a proviso to one of the standard tests of inconsistency, saying essentially, "...provided that any rule specifically authorized by a (prior, higher) rule is not inconsistent with the latter." This proviso would make authorization part of a test of inconsistency, in fact, an infallible cure or rectification of inconsistency. It is a fallacy (logically) because it reverses the logical order of investigation, or (legally) because it confuses legal and logical authority. Logically, if a premise and conclusion are inconsistent (when the premises are consistent with one another), then the alleged authorization is denied; the inference is invalid. The validity of the inference depends upon the consistency of its premises and conclusion, not vice versa.

A good example is the concept of self-embracing omnipotence, which is defined so as to authorize any self-amendment. Immutable self-limitation contradicts the authority, which prevents it from occurring under the inference model or formal logic generally. Authorization provides a legally sufficient reason to accept an outcome as valid; if the authority and outcome are inconsistent, then authorization provides a legally valid excuse to ignore the inconsistency. This is significantly different from eliminating or curing inconsistency. Authorization provides no logically sufficient reason to ignore inconsistency.

If an AC limits itself even revocably, then the new AC is inconsistent with the old AC by the deontic test. Until the revocable limitation is repealed, something is impermissible that was once permissible. Specific authorization by an AC for a certain change may rebut a presumption of exclusivity or preemption, but it cannot negate any inconsistency under the deontic or compliance tests. Here we must admit that law is superior to logic because its rules can authorize inconsistencies. Alf Ross's basic principle held that from a valid norm no inconsistent norm may validly be derived; it

is true of logic, false of law. But even Ross does not allow specific authorization to erase inconsistencies; rather, inconsistencies erase the authorization and prove the invalidity of the derivation. The opposite of Ross's principle is true in law precisely because valid legal authorization can make rules legally valid without eliminating inconsistencies under the deontic or compliance tests. In other terms, self-amendment is paradoxical so long as we use the deontic or compliance tests of inconsistency, although the compliance test will find fewer cases of self-amendment to be self-contradictory than the deontic test. Neither the preemption nor obstruction tests are applicable to self-amendment, and specific authorization does not eliminate, but merely domesticates, inconsistencies.

Note that all substantive changes of law involve inconsistencies under the deontic test. We do not normally wish to change any law except to forbid something formerly permissible or to permit something formerly impermissible, or to clarify just what is permissible and impermissible. In this sense all substantive legal change is contradictory in the manner of self-amendment, except that the rule of change that authorizes it is not always the law being changed.

At first it may appear that Ross's principle would not forbid irreflexive legal change, since the new rule may well be consistent with the rule of change that created it and only inconsistent with its predecessor-rule. But Ross's logical method implies that ordinary irreflexive legal change is impermissible too. If a rule of change P authorizes a given rule of present law Q, then a valid inference must have been constructible from P (perhaps with other premises) to Q. If the set of premises was internally consistent, then we know that P and Q are consistent. If P is then to authorize ~Q, then the set of premises that assisted P in justifying Q will necessarily be inconsistent with ~Q and incapable of authorizing it in a valid inference.

Granted, this objection requires the comparison of procedural rules of change, P, with substantive rules of conduct, Q, for consistency, which is difficult for any of the tests so far discussed. Is the federal AC consistent both with Prohibition and the repeal of Prohibition?[Note 27] Legally the answer must be yes, but Ross's presuppositions do not allow him that answer. The burden is on Ross and the logicians to show how the same set of (internally consistent) premises can authorize contradictory conclusions. By their logical criteria this is impossible. Any principle that would make ordinary substantive legal change impermissible is clearly, by legal criteria, a reductio ad absurdum.

D. Self-amendment of a non-supreme rule of change

Supreme rules of change sharpen the dilemma originally enunciated in Section 3 because, if they cannot amend themselves, then it seems that they cannot be amended at all. Alf Ross, we concluded, allows the amendment of constitutional ACs only on the ground that they are not actually supreme. The availability of six methods of constitutional amendment outside the AC allows the AC to be mutable even if it is not self-applicable and even if Ross's tacit, transcendent rule of change is denied. If we believe that one of the unofficial methods has actually amended the AC, then we must decide whether the AC was not actually supreme or whether it was co-supreme with the method that changed it. The importance of supremacy to the paradox of self-amendment is that, in a logical hierarchy of rules in which superior rules can change inferior rules, and possibly themselves, but in which inferior rules can never change superior rules, the supreme rule(s) of change must be self-applicable or immutable.

We start with the principle, then, that a non-supreme rule of change will be mutable whether or not it is self-applicable. It may be changed at least by the supreme rule of change. But from here things quickly get complicated, for even if self-amendment is presumed permissible for all rules of change (even for the sake of argument or exploration), some non-supreme rules of change will be able to amend themselves and some will not.

For example, the power to make statutes can also be used to amend statutes. But that power is partly constitutional and to that extent beyond the reach of statutes. Hence, the power to make statutes cannot change itself, at least not its constitutional basis and not by statute. But on the other side is the power to adjudicate, which is also a power to amend the rules of case law. The rules of stare decisis on the permissibility of overruling past decisions, and of departing from binding precedent, are themselves rules of case law, subject to amendment by adjudication and, more strongly, in accordance with the very rules being modified. It seems that the power to change statutes cannot amend all parts of itself while the power to change case law can.

Non-supreme rules of change that are capable of self-amendment present, when self-applied, the same logic as supreme rules of change. Supremacy does not bar or even complicate self-amendment; it only raises the stakes. But there is another form of self-amendment that non-supreme rules of change render possible. A hierarchy of rules or powers may be irreflexive in the sense that the higher rules take priority over the lower in a strict linear manner, and the lower never, even indirectly, take priority over the higher. Or it may be reflexive in the sense that the lower rules occasionally do take priority over their superiors; or that the powers of the system authorize or at least check one another in a circle. A reflexive hierarchy is "reflexive" because, if inferior rules occasionally supersede superior rules, then mutual change, or indirect self-amendment, can occur.

An example of an irreflexive hierarchy is the Army chain of command in which generals always supersede sergeants, and sergeants never supersede generals. Another example is a card game like bridge in which higher cards always take lower cards and never vice versa. The existence of trumps does not violate this condition; it only "customizes" it on the fly. The Army chain of command may become a reflexive hierarchy if a captain is physician to a general and entitled in that capacity to give orders to his patients. Our legal system may be a reflexive hierarchy in which, for example, legislation is subject to the veto power of the executive, and the executive is subject to the impeachment power of the legislature; or in which the courts can nullify legislation, and the legislature can frequently (but not always) overrule or disband courts; or in which the people authorize the executive and legislature by voting, which in turn authorize the judiciary by appointment, confirmation, and statutory control, which in turn checks executive and legislative action, subject to impeachment by the legislature which is subject to recall by the people.[Note 28]

In some reflexive hierarchies a form of circuitous self-amendment is sometimes possible. Stated broadly, the power to make statutes, for example, has some limited authority to amend the powers that can amend statutes. A legislature can overrule a court's interpretation of one of its statutes. It can actually disband, limit the jurisdiction, or impeach the members of most courts within its jurisdiction. While it cannot reverse a court's interpretation of the constitution or a court's decision to strike down a statute on constitutional grounds, it can avenge and deter such decisions.

Moreover, in the federal and most state systems, the constitutional AC is supplemented by statutes that govern the incidental processes of amendment. These statutes give legislatures slightly more control over the constitutional basis of the power to make statutes, which supplements their control over the statutory and common law rules governing that power. In a similar vein, if an AC requires the legislature to call a constitutional convention when a petition of a certain type is received, then despite the mandatory constitutional language it has an operational discretion to refuse, knowing that courts will not order it to take action. This happened in Iowa in 1920 (see Appendix 2). It may also have happened at the federal level in 1929. The federal AC requires Congress to call a convention "on the application of the legislatures of two thirds of the several states" (Article V). The AC is silent on such questions as whether the applications must call for a particular amendment to the constitution or, if so, whether it must be the same type of amendment in each application (balance the budget, ban abortion, etc.), and whether the applications must occur within a certain span of time. Nor has Congress yet answered these questions with supplementary legislation. Two-thirds of the state legislatures had applied to Congress by 1929, requesting a convention, although not all requested the same type of amendment and three of the applications dated back to 1788 (Virginia), 1789 (New York), and 1833 (Alabama).[Note 29] Congress did nothing, even after Wisconsin, the last state needed for the two-thirds supermajority, summarized the history of applications and reminded Congress of its duty under Article V.[Note 30]

The power to make statutes may attempt to augment itself in a way that is impermissible under the constitution, namely, by statute. The power to adjudicate may strike down the offending statute. And the legislature may deprive the courts of jurisdiction over the question and try again. In that way a genuine change in legislative power would have been brought about by legislation, despite a constitutional obstacle that prevented direct self-amendment (for self-augmentation) of the legislative power. Whether such a change is "actually" illegal is a question that can only be answered if one finds it meaningful. Many jurists, typically just those most likely to affirm Hart's acceptance theory, would find it meaningless to speak of the legality or illegality of an act beyond any court's jurisdiction, especially one acquiesced in by the people and officials of the system. Indeed, the Iowa legislature in 1920 and Congress in 1929 undoubtedly got away with their inaction not only because courts will not order legislatures to act, but also because the people tolerated the inaction. Clear language of the constitution may have been violated or evaded, but illegality is much more than the abstract fact of disagreement between conduct and prescriptive language, just as inconsistency in law is more than the abstract disagreement of two legal rules. Illegality may exist only when determined to exist by an institution under a grant of authority to decide such questions. If a tree is felled in the King's forest and no court has jurisdiction to hear the action, does the King's prosecutor have a sound basis to claim illegality?

Notes

1. See State ex rel. William T. Thompson v. Winnett, 78 Neb. 379, 110 N.W. 1113, 10 L.R.A.(n.s.) 149 (1907), West v. State, 50 Fla. 154, 39 So. 412 (1905), Constitutional Prohibitory Amendment, 24 Kan. 700 (1881), and Green v. Weller, 32 Miss. 650 (1856).

2. John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding, Callaghan and Co., 4th ed., 1887, at p. 559.

3. Henry Rottschaefer, Handbook of American Constitutional Law, West Pub. Co., 1939, at p. 8.

4. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, 967-68 (1912):

> The people have a right to amend their Constitution, and they also have a right to require amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution, which is the fundamental law. If essential mandatory provisions of the organic law are ignored in amending the Constitution of the State, and vital elements of a valid amendment are omitted, it violates the right of the people of the state to government regulated by law.

5. Until 1982 the constitution of Canada had no AC that Canadians could use themselves; they had to petition the British Parliament to act, if it would, on their suggestion. Apart from the question of sovereignty raised by the omission of a "patriated" amendment power, formal amendment for Canadians was simply more difficult than it has ever been for Americans. Hence Canadians relied even more than Americans have on "unofficial" methods of amendment. One such amendment is well-treated by J.R. Mallory, "Amending the Constitution by Stealth," Queen's Quarterly, 82 (1979) 394-401.

6. See 158 A.L.R. 512.

7. In Section 7.B I quoted Hart to the effect that contracts and treaties bind only if made within a system containing a rule which says that they bind. This may be called the irreflexive view of contract: some extrinsic rule is needed to make the intrinsic elements of a contract binding between the parties. On the other hand, the reflexive view of contracts holds that mutual promises (perhaps with consideration, intent to be bound, etc.) bind the parties without any extrinsic rule, not only morally but in law; contracts create law ex proprio vigore or by their own strength. Those who

hold that the very premises of a legal system can be erected by contract must also hold, at least for that primordial covenant, the reflexive view of contract.

8. See Appendix 2. The Pennsylvania and Hawaii amendments merely renumbered the AC. The Minnesota amendment renumbered and reworded the AC but without intending to change it substantively. The North Dakota amendment merely rearranged the articles of the constitution, though with one effect that a court might find significant: the AC was put in the article on legislative power. North Dakota is now the only state in the country that "classifies" its amendment power in effect as a legislative power. The classification could influence future court decisions on the applicability of normal parliamentary procedures to amendment deliberations, the permissibility of "legislative" amendments, and the permissibility of an executive veto, to name just three.

9. More examples of the general problem of "more" of a quantity contradicting and neutralizing the original quantity are collected in Section 20.L.

10. The question arises when federal and state criminal statutes punish the same behavior but provide different maximum penalties. In the United States federal law is "supreme" and takes priority, usually by tests for inconsistency. The Australian federal (or commonwealth) statutes are made supreme by Section 109 of the Australian Constitution, which states,

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency be invalid.

Four excellent discussions of the tests of inconsistency that have developed under Section 109 are Howard Zelling, "Inconsistency Between Commonwealth and State Laws," Australian Law Review, 22 (1948) 45-51; Ilmar Tammelo, "Tests of Inconsistency Between Commonwealth and State Laws," Australian Law Journal, 30 (1957) 496-501; Allan Murray-Jones, "The Tests for Inconsistency Under Section 109 of the Constitution," Federal Law Review, 10 (1979) 25-52; and Gary R. Rumble, "The Nature of Inconsistency Under Section 109 of the Constitution," ibid., 11 (1980) 136-37.

11. Georg Henrik von Wright, Norm and Action, London, 1963, pp. 136-37.

12. Alf Ross, Directives and Norms, London, 1968.

13. For the view that modal logic, which underlies deontic logic, is far too immature and unsettled to solve the paradox of omnipotence, see P.T. Geach, "Omnipotence," Philosophy, 48 (1973) 7-20 at pp. 10-11. For a fragment of non-formal, historicized modal logic specially adapted to the paradox of omnipotence as it arises in law, see Section 21.C.

14. Lon Fuller, The Morality of Law, Yale University Press, 1964 at p. 65.

15. A good example is Ricardo Alberto Carracciolo, "Contradiction in the Legal System," Archiv für Rechts- und Sozialphilosophie, 64 (1979) 457-73. Carracciolo concludes, like Ross, that contradictions between laws prove that at least one of the contradictories is not valid law. See pp. 466ff; also see von Wright, op. cit. at pp. 203ff; Hans Kelsen, General Theory of Law and the State, Russell and Russell, 1961, at pp. 374-75.

16. Fuller, op. cit. Tammelo has probably done the most to apply and adapt modern logic to law. See his Outlines of Modern Legal Logic, Wiesbaden: Franz Steiner Verlag, 1969; Modern Logic in the Service of Law, Vienna: Springer Verlag, 1978; and of course, "The Antinomy of Parliamentary Sovereignty," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-513; see also note 10 above. Dennis Lloyd, "Reason and Logic in the Common Law," Law Quarterly Review, 64 (1948) 468-84. A.G. Guest, "Logic in the Law," in A.G. Guest (ed.), Oxford Essays in Jurisprudence, A Collaborative Work, Oxford University Press, 1961, pp. 176-97.

See also David Daube, "Greek and Roman Reflections on Impossible Laws," Natural Law Forum, 12 (1967) 1-84; Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws, Harvard University Press, 1942; John Dewey, "Logical Method and Law," Cornell Law Quarterly, 10 (1924) 17-27; Max Radin, Law as Logic and Experience, Archon Books, 1971; Edward Levi, Introduction to Legal Reasoning, University of Chicago Press, 1963; Joseph Horovitz, Law and Logic: A Critical Account of Legal Argument, Springer Verlag, 1972; Jovan Brkic, "Consistency, Completeness and Decidability with Respect to the Logic of Law and the Provability of Juristic Arguments," Archiv für Rechts- und Sozialphilosophie, 59 (1973) 473-97; Januchi Aomi, "The Regulative Function of Logic in Legal Decisions," Archiv für Rechts- und Sozialphilosophie, 59 (1973) 193-96.

17. Murray-Jones, op. cit. In almost all cases I have changed the wording used by Murray-Jones.

18. The deontic test may rely on two alternative theories: (1) that whatever is not forbidden is permitted, or (2) that only what is specifically permitted is permitted (or that whatever is not permitted is forbidden). The former view was embodied in the notation and equivalencies introduced in the text early in Section 12.C. For a defense of the latter as the correct legal position, see Ronald Moore, "Legal Permission," Archiv für Rechts- und Sozialphilosophie, 59 (1973) 327-46.

19. Fuller, op. cit. at p. 66. Eduardo Garcia Maynez asks the same question, and is more willing to answer that the situation described amounts to a contradiction, in "Some Considerations on the Problem of Antinomies in the Law," Archiv für Rechts- und Sozialphilosophie, 49, 1 (1963) 1-14, at p. 2.

20. See his illuminating discussion of U.S. v. Cardiff, 344 U.S. 174 (1952) in which a section of the Food, Drug, and Cosmetic Act seemed to give inspectors the right to enter factories without the owner's consent, and to give the owners the right to keep inspectors out by refusing consent. Fuller op. cit. at pp. 67-68. The Supreme Court chose a less "logical" resolution of the problem, but one that better fulfilled legislative purposes and public policy. It also held that the very appearance of inconsistency denied factory owners sufficient notice of what had been criminalized. When two different laws are "inconsistent", Fuller believes that judicial reconciliation stops at a point chosen by policy, for mere logic provides no stopping point short of "the perilous adventure of attempting to remake the entire body of our statutory law into a more coherent whole." Ibid. at p. 69.

21. The best defense of the position that any intent-based interpretation requires appeal to policy or political morality is Ronald Dworkin, "The Forum of Principle," New York Law Review, 56 (1981) 469-518.

22. Murray-Jones, op. cit. at pp. 41-42.

23. Fuller, op. cit. at p. 69.

24. Caracciolo, op. cit. at p. 462, confuses the plurality and discretionary character of legal tests of inconsistency with the proposition that there is no legal test at all, but draws the same conclusion that I do:

> such a criterion [of inconsistency in law] does not exist, so that we cannot exclude the possibility that two rules may be incompatible for a judge, and may not be for another.

While I conclude that the choice among criteria of inconsistency, and the choice whether to allow inconsistent rules simultaneous validity, is a policy question, Caracciolo concludes that such choices "cannot be based on 'law'." Ibid.

25. That is, they are on the same hierarchical level if the change from the old to the new AC was actually authorized by the old AC. Alf Ross believes that only a higher, prior rule can authorize the change of any rule; but even for him self-amendment is ex hypothesi the change of a law in which premises and conclusion lie on the same hierarchical level. This very feature is one of his grounds for claiming that self-amendment is impossible.

26. Hart in "Self-Referring Laws," Festskrift Tillägnad Karl Olivecrona, Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner, 1964, pp. 307-16, at 314, seems to appeal to the authorization fallacy as one of his several arguments that self-amendment is permissible.

27. Hans Kelsen suggests the answer is no in his essay, "Derogation," in Ralph A. Newman (ed.), Essays in Jurisprudence in Honor of Roscoe Pound, Bobbs-Merrill, 1962, pp. 339-55, at 353.

Note that a given proposition may be combined with different co-premises to permit the valid derivation of inconsistent conclusions. If rule P is a general rule of change, it may be supplemented for conclusion Q with the premise stating the motion to adopt Q, and for ~ Q with a motion to adopt ~ Q. "All and only humans are mortal" is consistent with "Socrates is mortal" and "Socrates is immortal" depending on whether we supplement the major premise with "Socrates is a human" or with "Socrates is not human". For this reason we say only that the set of premises that justifies Q, if the set is internally consistent, must be inconsistent with ~ Q.

28. No work that I know of treats the American legal system as a reflexive hierarchy. But the checks and balances system is essentially reflexive, and has of course been the subject of innumerable discussions. For some surprising wrinkles in the circle of powers in the U.S. system, see Walter F. Murphy, "Lower Court Checks on Supreme Court Power," American Political Science Review, 53 (1959) 1017-31. For more on reflexive hierarchies see below, Section 21.D.

29. James R. Murtagh, "Procedure for Amending the Constitution and the Reed-Walter Amendment," Pennsylvania Bar Quarterly, 27 (1955) 90-101, at p. 93.n.4. See also Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at p. 43.

30. Murtagh, op. cit. The insufficiency of Wisconsin's arguments are anticipated by Walter K. Tuller, "A Convention to Amend the Constitution — Why Needed— How It May Be Obtained," North American Review, 193 (1911) 369-87.

Section 13: The See-Saw Method

Self-amendment may loosely be said to occur whenever an AC has been applied to itself. As suggested in Section 2, for some purposes it would not be illegitimate to speak of self-amendment when an AC was applied to any section of the constitution, for any amendment might be thought to use the constitution's supremacy against itself. But the paradox is sharpest, and by properly rigorous standards perhaps only exists, when the very same section or clause or method is used to change itself, directly or indirectly. If AC §1 describes a complete method of amendment and AC §2 describes another, then no paradox arises when AC §1 is used to amend AC §2 or vice versa. Because both rules belong to an article called "the amendment clause", we might say that "self-amendment" has occurred, but that would mistake form for substance.

The application of one section of an AC to another section does not interest us as a form of self-amendment. However, as as a method of amending the AC without strict self-application, it is very interesting indeed. As we left things in Section 4.A.2, the application of one method of amendment to another, and then vice versa, is the "see-saw" method of amendment. Clearly it can change an AC that originally contains at least two methods of amendments to a form in which all original methods have been changed, without any strict self-amendment, for the application of AC §1 to AC §2 is irreflexive. The tantalizing possibility, left unexplored in Section 4, is whether any AC with any original content could become an AC of any other content, simply by means of the see-saw method. If so, then self-application will never be necessary, even for radical change of a genuinely exclusive AC. As noted in Section 4, the see-saw method, at best, can permit change of the AC without explaining how most actual ACs have been changed. So let us consciously leave realistic explanation behind and seek the limits of the see-saw method of amending the AC.

If an AC originally has only one method of amendment, then it cannot employ the see-saw method until it uses its one method to add another. Apart from objections to self-amendment, only two obstacles might exist to the addition of a new method of amendment. The first is a general prohibition of amendment by addition, derived from a supposed implied limitation on the AC that all amendments must be "germane" —i.e. must address existing sections and alter them. Such claims have actually been made, based on an overly literalistic reading of the word "amendment" that excludes both addition and repeal. These claims have uniformly been rejected by courts. See e.g. State of Ohio v. Cox, 257 F. 334, 342 (S.D. Ohio 1919).

The second obstacle is that amendment by addition, or the specific addition sought, might be barred by an express limitation in the form of an entrenchment or self-entrenchment clause. In Sections 8 and 9 I laid the groundwork for the conclusion in Section 11.B that an AC cannot irrevocably be limited by entrenchment, except for the (perhaps tacit) entrenchment of its immutable character as a continuing omnipotence. All limitations that purport to be irrevocable or immutable are, under the acceptance model, subject to future contingencies such as the next generation's attempted repeal of the limitation, which might be accepted as valid by the people and officials of that generation.

I will assume in this section that an AC can add any clause to the constitution of which it is a part, including new and exotic methods of amendment. I will also assume that whatever power an AC possesses to repeal limitations on its power is held, a fortiori, by the AC attempting self-change by the see-saw method. If the most difficult case is the self-entrenchment of the AC itself, then the see-saw method might even succeed where ordinary self-amendment might fail. If AC §1 concentrically and completely entrenches the AC, forbidding all amendment of it, then ordinary disentrenchment requires the prisoner to open the outer door first. But disentrenchment by the see-saw method allows the methods of the AC to operate on one another from within the prison, and open the inner door first. Disentrenchment by the see-saw method, however, might be easier for the people and officials of a system actually to accept.

I will refer to the methods of amendment within the AC as A, B, C, and so on. Each method might be the product of several different rules and sections of the AC. For example, method A and method B might share a procedure of proposal and differ in the procedure of ratification. The various methods, then, are subject to piecemeal amendment as their component procedures are altered by other procedures. There might, then, be see-saws within see-saws. But the inner articulation of each method of amendment may be ignored here; considering them may be essential to fine-tune the process from one AC to another, but it only complicates the question whether any content whatsoever can be attained from every initial set of amendment methods.

If a given AC only contains method A, then it may add method B or any set of extra methods. The inquiry would apparently be at an end, and the answer be affirmative, if A is itself an omnipotent method of amendment or could add one. If B is a method of continuing omnipotence, then by our assumptions nothing bars A from adding it by amendment to the AC. Then, of course, B could make any change in A. While this is a short-cut to a very wide range of possible ACs, it may not suffice to attain every content. If the AC contains a method of continuing omnipotence, then one content it might find out of reach is that of an AC of merely finite power or the limiting case of "null content" —utter self-repeal.

By my general arguments in Sections 8 and 9, an AC of continuing omnipotence contains an "immutable" self-limitation against further limitations. If B is that method, then there are great difficulties in the path if B is to disentrench itself and then make itself finite in power or repeal itself. But all limitations that purport to be immutable can be repealed, contingently, if acceptance subsequently shifts in the right direction. Method B could in principle, that is, contingently, disentrench and repeal itself. But that is self-application, not the see-saw method. If A were not itself omnipotent, then it might not be able to disentrench and repeal B (though this will be examined). But it could add C, also of continuing omnipotence and containing explicit, specific language giving it priority over B. Then C may disentrench and repeal B. This works to eliminate B (again, only under the acceptance model) but an "immutably" entrenched, omnipotent method remains in C.

Adding a method with self-embracing omnipotence would solve all problems if it were a coherent idea. However I stand by my arguments in Section 11.B that it is not, at least for the inference and acceptance models of legal change and validity. In any case the possibility may be eliminated for sport, since it would undoubtedly allow any AC to reach any content.

If one has taken the short-cut of adding a method of continuing omnipotence, B, and then used it to put the other methods into desired shape, then one is stuck if one then desires to leave the entire AC finite in power. The method of adding an omnipotent, specially armed assassin will never accomplish its goal without an infinite regress of assassins of assassins. Still, there are a few paths out. If one is willing to await and risk future contingencies, then B might repeal itself, Alf Ross and formal logic notwithstanding. Or it might institute a rule of desuetude and later fall to it. But no strategy that requires future contingencies can guarantee the desired result.

One possibility is that B could be repealed by C when C is not itself omnipotent. If A adds C carefully, and C has the ordinary competence to repeal clauses of the constitution, then C could repeal B without itself being omnipotent; even under the inference model, there is no requirement that the rule of change be "more powerful" than its prey, insofar as power is distinct from hierarchical priority. Under the acceptance theory, there is no requirement that a rule of change be prior to, or higher than, its prey. If finite A can add omnipotent B, the apotheosis of the AC, then finite C could repeal B, the Götterdämmerung.

Method B has continuing omnipotence; therefore its continuing character purports to be immutable. Under the acceptance model, if any rule of change can disentrench and amend an immutable rule, or transmute an immutable rule into a mutable one, then a finite rule of change can do so. Omnipotence need not be arrayed against immutability, for the outcome does not require the infinite power of formal validity, only the actual acceptance of the people and officials. To put it another way, the omnipotence needed to undo immutability need not lie in the legal power as formally described in legal terms if it lies in the acceptance of the people and officials who intend to use that power to undo immutability.

Another reason is that some immutable rules are made immutable by entrenchment, not self-entrenchment; and even if an entrenchment clause is complete, it is itself mutable and repealable so long as it is not itself entrenched. There is nothing inherent in the idea of continuing omnipotence that requires us to think that its continuing character is self-entrenched rather than irreflexively entrenched. The continuing character must be entrenched against the continuing power, but that can be accomplished by irreflexive entrenchment. If continuing omnipotence is made continuing by irreflexive entrenchment, then it cannot directly limit itself, but it can repeal the (perhaps tacit) entrenchment of its continuing character and then limit itself. However, as noted in Section 11.B, even without an immutable continuing character, no AC can be thought to limit itself irrevocably. But if B, a method of continuing omnipotence, is made continuing by irreflexive entrenchment, then A, B, C, or any other method can repeal B's entrenchment clause and then repeal B.

Any strategy that requires transmutation or the repeal of a limitation that purports to be immutable is to that extent impossible under the inference model. If such a strategy depends on the acceptance model, then it relies on future contingencies. If it relies on the procedural model, then it need not rely on future contingencies, shifts of acceptance, or invalid inferences. Therefore, if one is uncomfortable pinning the success of the see-saw method on contingencies, then the procedural model may save the technique.

There are other ways to save the technique without resorting to the procedural model or relying on contingencies. Note, however, that one of the purposes of developing the see-saw method was to enable a people to change its AC without self-amendment, and therefore consistently with the inference model. The inference model, it turns out, can be satisfied only if the short-cut through continuing omnipotence is not taken, for the inference model does not tolerate the repeal of immutable rules such as the immutable character of continuing omnipotence. But the acceptance model can tolerate this, and can do so without resort to future contingencies. (However, if we will appeal to the acceptance, we need not resort to the clumsy see-saw method, but may turn straightaway to self-amendment.)

For example, method A may add B with a sunset clause that asserts that B will expire after a certain time. Then B could not be said to possess "continuing omnipotence", strictly speaking, for ab initio its character is mutable and temporary. But there is nothing to prevent B from having omnipotence for a finite time. If it is limited during that time only in its power to repeal or limit itself before its expiration date, then we could even say that B had "continuing omnipotence" for a finite time. Its continuing character would be defined after, and relative to, its expiration date, so that even for the inference model there is no "creation of Frankenstein" with a power to overwhelm its creator. Use of B under these circumstances would resemble algebraic manipulation with the square root of negative one, which is an impossible quantity that drops out before the final product is determined, facilitating a process that might otherwise be impossible.

Similarly, the sunset clause governing B need not repeal B but merely change it into a finite, mutable amending power at the expiration date. Then the sunset clause would resemble an incomplete more than a complete entrenchment clause.

If A is not capable of apotheosis, or of adding an omnipotent B, or if the short-cut through omnipotence is simply avoided, for sport or logic, then the possibility that any AC could reach any content is probably indemonstrable and irrefutable. If the limitation on A is "hereditary" and applies to every method added by A, then some limitations might never be overcome by the see-saw method except through future contingent shifts of acceptance. One important hereditary characteristic for the inference model is consistency with the premises or axioms (provided they are consistent with one another). This "genotype" would prevent any amendment or repeal of any immutable rule, or possibly (as noted in Section 12.C) any substantial change at all. The acceptance and procedural models allow valid "mutation" at every generation, in principle, affecting every limitation on the rule of change and thereby every limitation on every rule of law.

Because the short-cut through omnipotence can be made to work, through the procedural model or through sunset clauses and the acceptance model, we may feel free to take up the promise of Section 4 and use irreflexive methods of transforming an AC if self-amendment is found to be impermissible or impossible. However, the use of such irreflexive methods should not be taken to be permissible under the inference model just because they are not reflexive; the inference model forbids both types. Here's why.

The methods of amendment used in the see-saw method, because (or when) they are all parts of the AC, are co-supreme. The inference model in one of its stricter forms would not tolerate the amendment of A by B, even if no immutable rules were thereby transmuted or amended, for a change can only be authorized by a prior, higher rule. This might be avoided if B were put below A by the terms of its addition to the AC. But then, of course, it could not amend A and the see-saw could never get rocking. The incorporation of the theory of types into the inference model is optional. But Ross incorporates it and therefore cannot permit any type of see-saw. Any see-saw must either work with equals or with superiors and inferiors; but the theory of types forbids both.

This general criticism would also apply to the six "unofficial" methods of amendment. Whether or not they are co-supreme with one another or with the AC, they could only amend rules below themselves in a theory of types (irreflexive hierarchy). Therefore, the AC is only saved from immutability by the unofficial methods if they are superior to it in an irreflexive hierarchy (as Ross's tacit, transcendent rule is), or if the theory of types is not incorporated into the inference model, or of course if the inference model itself is denied.

Section 14: Amendment by Sunset Clause

A. Sunset clauses in American constitutions

A constitutional provision could say of itself that it automatically expires at a certain date. Because repeal is a form of amendment, such "sunset clauses" are effective rules of amendment. If an AC is used to adopt a new rule with a sunset clause, then the subsequent expiration (repeal) of the rule may be said to have been authorized by the AC. But I prefer to say that it was directly authorized by the sunset clause, a valid constitutional rule in its own right, and indirectly authorized by the AC. This usage is consistent with present practice, for we say that an existing constitutional amendment, for example, is authorized by the AC, not (except indirectly) by the authority that authorized the AC.

The AC of the federal constitution, Article V, came into being with three limitations on its power, two of which were subject to sunset clauses. Those two limitations provided that no amendments to Article I, Section 9, clauses 1 and 4, could be made until 1808. Substantively these limitations protected the importation of slaves and prohibited some capitation taxes for about 20 years. When the sunset clauses protecting these clauses expired in 1808, a form of self-amendment occurred. Amendment by sunset clause had affected the AC itself, removing two limitations on its powers.

The expiration of the two limitations on Article V was authorized directly by the language of Article V, and indirectly by the power that made the federal constitution. The latter point is not trivial. The sunset clauses were written into the original constitution, not added by amendment. Hence only through direct authority in the AC do the expirations represent self-amendment; through their indirect or ultimate authority, they represent irreflexive amendment of the AC.

Because the sunset clauses were written into the original constitution, they share the status of the AC itself as original, official rules of change applicable to constitutional rules. They have only one subject apiece, unlike the AC. Unlike most sunset clauses, which merely declare the expiration date of some rule of law, the two in the federal AC served a second, equally important function during the period before their expiration: they entrenched constitutional rules against amendment. Also unlike most sunset clauses, they are not part of the rules they govern, and therefore may operate as intended without paradoxical self-repeal. Because the federal sunset clauses are rules of change independent of the AC, the appearance of self-amendment in their application to the AC may be reinterpreted as one step of an irreflexive see-saw method.

The federal sunset clauses have another important difference from most: instead of dictating the repeal of a rule at the expiration date, they dictate the change of status of rules from entrenched to disentrenched. Once disentrenched, the rules are still valid; they are merely rendered liable to amendment. This distinction may be blurred if change of status is considered a repeal of the rule defining the difference of status. But the distinction, even if provisional, highlights the flexibility of sunset clauses. They may doom experimental regulations, ensure that a privilege is temporary, protect a rule for a time without repealing it at the end of the protected period, or conversely leave a rule subject to amendment for a time after which it automatically becomes entrenched, perhaps for another finite time. Sunset clauses may therefore contain "sunrise" clauses, and require change of a status more than once, or the change of a status and back again, before finishing their jobs. They could require an oscillation of status without end. But most interestingly, they may dictate changes, including the repeal, of the very provisions in which they lie, thereby repealing or suspending, reviving, or amending themselves.

A clause that required the complete repeal of the statute of which it was a part, and then its complete revival one year later, presents a paradox of continuing validity (the further paradox of) self-repeal. If some kind of continuing validity is possible between periods of self-governed repeal, then an indefinitely long and complex series of changes could be "programmed" into a statute or constitution, some requiring the temporary, but absolute, suspension of the most fundamental premises of law, or of law itself. One thinks of the annual Roman festival on which all law was, by popular understanding, suspended for three days. If a rule of law defined this aspect of the festival, then either it was suspended during the festival like all other law, and there was no law to summon law back again, or it was the exceptional law that was not suspended. In the former case, the resumption of law would be revolutionary; in the latter case the festival would merely be a regulated party, a much less interesting affair. The equivalent on a computer would be a program that alternately turned the entire machine on and off and on again, without, like remote control televisions, leaving the machine partially on at every moment. Truly, law can transcend "mechanical jurisprudence"!

Nothing like this has yet been programmed into an actual constitution. But the Alabama constitution of 1901 was interpreted by the Alabama Supreme Court to have invested its AC with the power to "suspend" parts of the constitution and "to take [a] feature out of the constitution during [a] period and to put it back at the end of the period". Downs v. City of Birmingham, 240 Ala. 177, 198 So. 231 (1940).

The most comprehensive sort of reflexive sunset clause might be a clause of the New Jersey constitution of 1776 (discussed in Section 9 above) which conditionally nullified the entire constitution of which it was a part, if and when the colonies reconciled with England. Can we imagine an even more comprehensive clause —one that conditionally nullified all law in a given legal system if a certain condition came to pass?

The constitutionality of the sunset clauses in the federal AC was never questioned, although the proponents of slavery concocted many other ingenious theories to forestall abolition. Nevertheless, the Supreme Court of Missouri has found a constitutional defect in the device of amendment by sunset clause. In 1910 a group of Missouri citizens submitted a proposed constitutional amendment to the Secretary of State for his ultimate submission to the voters at the general election of 1910. They were using a method of amendment by popular initiative (which had earlier been added by self-amendment). Their proposed amendment was a new map of state senatorial districts. It contained a sunset clause directing that the map expire when replaced by a revised map using the 1920 census. The Secretary of State refused to submit the proposal to the voters. In

a mandamus action brought by the citizens to force the Secretary of State to put the proposal on the ballot, the Supreme Court held for the Secretary, declaring the proposal to be "legislative" rather than "constitutional" on account of its "very temporary" provisions. State ex rel. Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910).[Note 1]

The Halliburton court did not apparently disapprove sunset clauses in constitutions per se, but only those providing too short a life for a constitutional rule. Indeed the proposal in this case would have amended a provision that was itself subject to a sunset clause, and that had expired in 1881. The court voiced no regret that the framers had used the device. If the court had declared sunset clauses nullities per se, then the 19th century rule to be amended would have been resurrected, rendering it liable to the 1910 amendment proposal, removing one defect from that proposal. But as soon as the 1910 proposal was rehabilitated from this direction it would have to be quashed from another on account of its sunset clause.

The narrow ruling in Halliburton seems to be that amendment proposals whose content is very particular and by nature subject to periodic change, smelling legislative from two causes, cannot also be made subject to sunset clauses of comparatively short duration, for to add this third cause would definitely push the proposal over the line separating constitutional rules from legislation.[Note 2]

B. Self-repealing sunset clauses

If a sunset clause is included in the rule to expire, call it "reflexive". Call a sunset clause outside the rule it governs "irreflexive". If the two sunset clauses in the federal AC are interpreted to govern the importation of slaves and capitation taxes, then they are irreflexive; but if they are interpreted to govern the scope of the amending power, then they are reflexive, for they are located in Article V. Most statutory sunset clauses are reflexive, for there is no single amendment rule for statutes in which they might be put. Moreover, because statutes are drafted and adopted one after another, if one is to be subject to a sunset clause it must usually contain the clause itself.

Note a peculiar feature of any reflexive sunset clause, for example, clause C in statute S, saying "statute S will expire at time T". If one were to ask, some time after T, whether S were valid, the answer would clearly be no. But how do we know that? We know by reference to the wording of C. These words bind us even after they expire. Those who act as if S were still valid may be opposed in court on the ground that present law recognizes that S has expired. The sunset clause itself may be cited as authoritative on the past effectiveness of the repeal of S. But to do so means that we believe the sunset clause did not completely swallow itself. Statute S, including sunset clause C, did expire, but somehow a meta-statement about this expiration did not expire. But there was no such meta-statement in S. If the meta-statement is law, then it appears that it expired; and if did not expire it appears that it is not law. But if we insist after time T that valid legal authority can be cited for the invalidity of S, then we are appealing to such a metaphysical mystery. The cat is gone but the grin lingers on.

This raises the most interesting question whether a properly reworded reflexive sunset clause could utterly repeal itself, cat, grin, and all, leaving no legal authority behind on which to assert the invalidity (expiration) of the laws it took with it. Suppose the following sentence appeared after the substantive portion of a statute or constitutional rule, but in the same section:

> This section shall be utterly null and void, for all intents and purposes whatsoever, at 12:01 A.M., January 1, 2000 A.D., and forever thereafter.

After the expiration date, how will we know that the section has expired? Has the expiration-directive expired too? If it has, then the section is paradoxically valid and invalid at once: valid because the expiration-directive is ineffective (having expired), invalid because the whole section is valid, including the expiration-directive (because the expiration-directive is self-nugatory). In fact, the validity of the section would imply its invalidity, and its invalidity (at least its invalidity solely on account of the expiration-directive) would imply its validity. After the expiration date the section becomes a genuine paradox of the Liar-type as defined in Section 1 —true if false and false if true.

In the hypothetical case of the self-repeal of an entire legal system, we would worry less, for we are less likely to want to cite a currently valid legal authority for the occurrence of legicide after it had supposedly occurred. But a court would be enwrapped in paradox if a citizen challenged the validity of the total self-destruction of law. The court could decide that it had jurisdiction only if it had already decided the question at issue against the plaintiff. The court could not hold for the validity of the legicide without subverting itself, nor against its validity without at least a suspicion of illegitimate bootstrapping, nor could it even authoritatively dismiss the case without presupposing a position on the merits.[Note 3]

If utter self-repeal leads to the paradox of the liar, what about partial self-repeal? If the substantive portion of a statute expires but the expiration-directive survives, then this clearly gives effect to the intent of the framers, but at the expense of the "plain meaning" of the language and the appearance of a logically arbitrary preference for the expiration-directive over the substance. In law, the evident intent of the framers might well supersede the logic of the situation, especially when the latter leads to paradox. The expiration-directive could be read as self-excepting. The appeal to the framer's intent lessens the arbitrariness of the interpretation; but even if arbitrary, avoidance of paradox may comprise a legally sufficient reason to read the statute and sunset clause in this way. Of course, under the acceptance model, partial self-repeal and arbitrariness may be accepted, and avoidance of paradox is not urgent. Even total, paradoxical self-repeal may be accepted, as we will see.

The appeal to the intent of the framers loses its force as the intent shifts (as in our hypothetical) from those common to actual sunset clauses to the mischievous purpose of complete self-repeal. For the latter purpose the language of the clause should be tightened:

> This section, including this very sentence, shall be utterly null and void...

Similar issues arise in philosophy where the magical elements of law cannot support an answer. The ancient Greek skeptics faced the dilemma of speaking or not speaking. If they remained silent, they would persuade no one; if they spoke, others might construe their statements as assertions of knowledge and accuse them of self-refutation. The Greek skeptics chose to speak and, among the things they chose to say, to argue that skepticism and speech are compatible. If they said that they did not know something, and an opponent retorted, "Do you know that you do not know?" then the skeptics replied that their expressions of ignorance and uncertainty were "self-canceling".[Note 4] The expressions announced the speaker's uncertainty on the irreflexive topic, and then reflexively announced their own uncertainty, and so "canceled themselves". Sextus Empiricus compared such expressions to "aperient" drugs; Montaigne compared them to rhubarb:[Note 5] they washed out the system and then washed themselves out. A fair summary of the philosophical learning on the rhubarb theory of complete self-repeal is that non-skeptics ignore it, skeptics don't know, and logic and grammar are still far from the sophistication needed to rule on the question.

But law is not limited to logic. A Rossian inference model that hews closely to the forms and procedures of formal logic would declare the rhubarb theory as paradoxical as self-amendment. Indeed, the rhubarb method of speaking and all other forms of self-repeal are but species of self-amendment.

However a theory grounding legal authority in acceptance and usage can tolerate the phenomenon of a clause repealing the section of which it is a part, and thereby repealing itself. The section may be known to be repealed by virtue of an inconsistent appeal to the repealed expiration-directive, as if it were a valid rule after it became invalid. Or the section may be known to be repealed without any doctrinal justification in the face of paradox. These are the boldest ways in which the acceptance theory could domesticate the paradox.

More sophisticated justifications could be contrived if needed. The inference model requires that a rule's superior, authorizing rule be in effect as long as the inferior rule is to be authorized. When the authorizing rule is repealed, either the authorized rule is repealed or it receives "transtemporal validation" (see Section 10). Ross denies that a repealed rule can validate anything, but we might find that a rule survives repeal in a limited sense, the sense needed to tell us that it is gone, for example, if it departed through self-repeal. This is not completely arbitrary, for our actual practice suggests that we appeal to the "repealed" expiration-directive as authority or evidence for the validity of self-repeal. That represents a form of transtemporal validation. On the other hand, for this sort of self-repeal or transtemporal validation we might even be comfortable with a Rossian tacit, transcendent rule that could tell us that the repeal had been effective. Alternately, the procedural model could justify the outcome (complete self-repeal) if the terms of the procedure (sunset clause) were valid and obeyed. Any contradiction between outcome and process is ignored by the procedural model. This avenue could justify self-repeal but would leave no sign for us to cite as authority for the effectiveness of the repeal.

Or, most simply, the repeal could be authorized directly by acceptance, not the sunset clause, eliminating the contradiction and the strictly reflexive self-repeal as well. The best explanation of what actually happens, however, may be that genuine self-repeal occurs, and subsequently the repealed expiration-directive is cited as authority for the fact of repeal, with no thought given to the presupposed present validity of that language and its effect on self-resurrecting the repealed clause. Difficulties, especially if they are genuinely paradoxical, are simply ignored.[Note 6]

The acceptance theory, in short, could tolerate partial self-repeal, and live with the idea of a grin outliving its cat even if the idea is inconsistent, metaphysically incoherent, or exegetically arbitrary. The acceptance model can also permit complete self-repeal, and live with the notion of an expiration-directive valid enough to cite after it invalidates itself, or perennially effective despite its expiration or invalidity, or totally invalid but not subjected to doctrinal scrutiny. If this is messy, self-contradictory, paradoxical, or even magical, nevertheless it may be law.

C. Effective-date clauses

Before leaving this section we should note the temporally symmetrical problem. If sunset clauses seem to require a validity after invalidation, then effective date clauses seem to require a validity before validation. A clause that says,

> This section shall become effective to all intents and purposes at 12:01 A.M., January 1, 2000 A.D.

is known to be yet invalid in 1990, and that knowledge derives from the clause as if it were effective before it were effective. It must take effect — in some sense— sooner than it says if it is to tell us, authoritatively, that it is not yet effective. It is impermissible under the inference model either way, however, for it is either effective before it is effective, which is a contradiction, or it is self-applicable, which violates the theory of types.

The effective date puzzle is a time-based or temporal paradox, but it has a spatial variant. If a clause of a contract said, "this contract shall be construed under Illinois law", then in one sense it applies before it applies, that is, before we know the content of Illinois law and independently of what that content turns out to be. If the contract was made in Arizona, and Illinois law said to use the law of the state where the contract was made, then the contract's clause would have led us on a circuitous route to Arizona law. But it authoritatively led us to Illinois law, and to Illinois' "pointer" to Arizona law, even before we knew whether Illinois law would in turn send us somewhere else.[Note 7]

One may object that there is a slight but significant difference between the effective date and the sunset clauses. Effective date clauses belong to statutes already passed by legislatures (or other types of law already adopted in the proper way) and may be considered valid from the moment of approval and as governing only the rest of the statute. This is a makeshift, however. It is available to judges, certainly, and attractive because it actually does provide logical coherence, but it is a judicial response to paradox, not a solution latent in the language. Its inadequacy lies in the fact

that, like totally self-repealing sunset clauses, effective date clauses frequently occur in the very sections they control. And as with sunset clauses, we can tighten this language in order to examine the logic of the problem:

> This section, including this very sentence, shall become effective to all intents and purposes only at...

But even if the solution can be made applicable to statutes, it cannot apply to effective date clauses, or ratification clauses, in constitutions.[Note 8] Article VII of the federal constitution states that the document of which it is a part shall become effective when ratified in a certain way. In the two years between its drafting in 1787 and its ratification in 1789, Article VII authoritatively told courts and all interested parties that the new constitution was not yet effective. One cannot argue that Article VII had already been approved in the proper way and governed only the rest of the constitution.

An even stronger example may be found in Article 13, Section 1, of the Missouri constitution of 1865:

> The preceding parts of this instrument shall not take effect unless this constitution be adopted by the people, at the election to be held as hereinafter directed...

The Article then proceeds to direct an election as if already binding law.[Note 9] The Article clearly excepts itself as if it could be valid before the rest of the constitution, but of course that is the sheerest fiction. If the fiction is taken at face value, then we have a very clear case of constitutional self-justification (see Section 7.B). The federal ratification clause, Article VII, left the ratification elections in each state to the initiative of proponents and did not presume to order them as if it were already binding law. One may ask whether a Missouri court in 1864 would have heard a writ of mandamus ordering the election required by the ratification clause of the unratified constitution.

Approved statutes and unratified constitutions awaiting effectiveness are clearly different. The statutes may be assigned some provisional validity, or their effective date clauses assigned some exceptional validity, while this cannot be done with constitutions. The reason is that the statutes have already been approved in the manner appropriate for statutes, and need only the condition stipulated in the effective date clause in order to become effective. Falling in between statutes and constitutions in this regard are treaties that have been signed by representatives but not yet ratified by the signatory states. Article III of the Kellogg-Briand Pact of 1928 required its signatories to ratify the pact in accordance with their various domestic procedures for ratification. This "requirement" suggests that the Pact was already binding law; but if it was, then ratification would be unnecessary. If a signatory state failed to ratify, would it violate the treaty, or would it for that very reason exempt itself from the treaty's provisions?

Finally we may observe that effective date clauses may do some of the work of sunset clauses and cause self-repeal. The Seventeenth Amendment, which provided for the direct election of senators, contains the following clause:

> This amendment shall not be construed as to affect the election or term or any Senator before it becomes valid as part of the Constitution.

When the amendment was ratified in 1913, this clause became generally inapplicable. Only senators who had a grievance arising from the pre-ratification period, or bodies intending to interfere with senatorial elections or terms in the pre-ratification period, would ever have to appeal to the clause prior to ratification. If they did appeal to the clause prior to ratification, however, they would find an unratified proposal, not law. The unratified proposal would still have some use as a reliable guide to how courts would act after ratification. But if a senator did have a grievance under the clause, she would have to wait for the amendment to be ratified for this clause to be authoritative. And of course some remedy would be available even if the amendment were never ratified, since even without the clause it remains the case that unadopted proposals are not law and should not affect the elections or terms of senators. So by becoming explicit in an amendment proposal, the clause is generally useful only upon ratification (so that it is lawful) and is generally useless upon ratification (because the period of its intended application is over). By the time of its effective date, it has canceled itself.

Notes

1. The amendment proposal had two other, more substantial defects that led to the Court's judgment: (1) it violated the procedures of amendment by initiative by failing to give the full text of the proposed amendment, and (2) it purported to amend Article 4, Section 11, which was itself subject to a sunset clause and had expired in 1881, while the existing procedures on redistricting were contained in Article 4, Section 7. People v. Potter, 47 N.Y. 375 (1872) asserted a commonly held view of temporary provisions of constitutions: they are not favored, they cannot be interpreted to clash with the "general design" of the constitutions, and in conflicts with other provisions they must yield.

2. On the issue of particularity the court said at id. 694 that a proper constitutional rule on redistricting

> simply points out a plan or method for such redistricting, and prescribes permanent rules and principles for carrying out such method or plan. On the other hand, the matter of actually redistricting is a matter of very temporary character.

On the need for changing the provision the court said at id. 694 that senatorial districts depend on population, which changes, and that

> it was never contemplated under our present constitutional scheme to incorporate as a part of the permanent and fundamental law of the state a provision which must of necessity demand frequent alterations and changes.

The holding of Halliburton was criticized by Henry Rottschaefer, Handbook of American Constitutional Law, West Pub. Co., 1939, at 398. For some surprising data on very frequent constitutional amendment, see note 6 to Section 15, below.

3. These paradoxes are similar to the question, which has actually arisen, whether the constitution that establishes a certain court may be declared invalid by that court. Some courts have held it logically impossible to declare such invalidity. Luther v. Borden, 48 U.S. 1, 39-40 (1849), Coleman v. Miller, 307 U.S. 433, 455, 457 (1939), Carpenter v. Cornish, 83 N.J.Law. 254, 83 A. 31 (1912), State v. Starling, 15 Rich.Law. (South Carolina, 1867). Other courts have held that a judgment of invalidity could be competent. Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921).

4. Sextus Empiricus, Works, vol. 1, Outlines of Pyrrhonism, trans. R.G. Bury, Loeb Classical Library, Harvard University Press, 1933, at i.14-15, i.206-07, ii.187-88.

5. Michel Eyqem de Montaigne, The Complete Works of Montaigne [the Essais], trans. Donald Frame, Stanford University Press, 1948, "The Apology for Raymond Sebond," II:12.392-93.

6. Self-repeal could be avoided if, seeing the expiration date imminent, an irreflexive repeal (or extension) were passed by the appropriate body. If the sunset clause in the federal AC protecting the importation of slaves, which expired in 1808, had been preempted in this way, say, by adopting the Thirteenth Amendment in 1807 instead of 1865, then a new problem would arise: the irreflexive repeal of the provision protecting slave trade would directly violate the entrenchment function of the sunset clause. The slavery sunset-entrenchment clause was not self-entrenched, except perhaps impliedly, and therefore probably could have been repealed (see Section 8). But to violate the clause without repealing it is much less acceptable; and this seems to be the effect of supposing that the Thirteenth Amendment had been adopted in 1807. If that had happened, we would exchange the paradox of self-repeal of a sunset clause for the paradox of the self-disentrenchment of the AC.

7. More on the reflexivity of renvoi (the circuitous quest for applicable law) and a larger family of "know before we know" paradoxes in law may be found in Section 20.H.

8. Constitutions that are already ratified but not to become effective for a certain time fall into the same category as the statutes mentioned in the original objection. Such constitutions, incidentally, were common in states anticipating admission to the Union.

9. Compare McCullen v. Williamson, 221 Ga. 358, 144 S.E. 2d 911 (1965), discussed above in Section 8.B, in which an amendment said of itself that its effective date was to be determined by the school boards that it would consolidate. In all the controversy over the permissibility of deferring a constitutional question to local government, and permitting contingent delay of effectiveness after ratification, no one seems to have noticed that the problematic effective date clause was being considered effective before it was effective. Even its opponents found it defeasible only by general constitutional principles, not by paradox.

Section 15: Amendment by Interpretation

A. Judicial amendments

"Nay, whoever hath an absolute authority to interpret any written or spoken laws", Bishop Hoadly remarked, "it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them."[Note 1] That interpretation has a law-making effect is indisputable, although many would not take the principle as far as Hoadly did, denying the name of Law Giver even to the legislator. Even more than making law, however, interpretation can amend law, insofar as we distinguish these. Interpretation amends law whenever it qualifies unqualified language by finding an "implied" exception or limitation of scope, whenever it softens or limits qualifications in qualified language, and arguably whenever it departs from the original understanding of the legislators and public at the time the law was adopted. Filling gaps and silences may be distinguished from amendment if it is important to do so, although any law so "filled" is thereby changed from vague, general, inapplicable, or quiescent to specific on the point in question.

An inescapable consequence of the amending power of interpretation is that the supreme law, the constitution, is not utterly supreme so long as it is subject to authoritative interpretation.[Note 2] The United States Supreme Court has often acted in this super-supreme role,[Note 3] which may of course be wholly legitimate under the constitution itself. This opens the possibility that the supremacy of the constitution may underlie the constitution's liability to authoritative interpretation: that supremacy is self-amending.

It also opens the possibility that the supreme rule of change, the AC, could be changed by interpretation. That would obviously not constitute strict "self-amendment", but it could satisfy the need to avoid immutability by a method that does not require self-application of the AC.

One need not be a cynic to assert that courts, occasionally, apply statutes where legislators did not intend or foresee application, and that they refuse to apply statutes where legislators intended that they should be applied, that they fill gaps and silences with policy-making effect, and that they stretch, shrink, or directly abandon the "plain meaning" of statutes. Cynicism and partisan politics do not usually enter the picture until we ask whether these practices are inevitable or legitimate.

I will call these practices "judicial amendments" despite their very wide variety. This term avoids the broad connotation of unqualified "amendments" and the timidity of "quasi-" or "virtual" amendments. By this usage I do not mean to imply that the freedom to interpret, in whatever degree it actually exists for various courts, always results in amendment. I also mean to include whatever amendment can result from interpretation per se, not merely the obvious sort that can result from reinterpretation, overruling, gap filling, and policy-making.

Judicial amendments have many functions. Those most often cited are the need to apply general rules to particular facts and old rules to novel facts, to avoid unjust results by excluding a particular type of person or action from the scope of unqualified language, to reconcile inconsistent rules or provisions, to give effect to legislative intent over plain meaning or vice versa, to flesh out vagueness deliberately left by a divided legislature, to do the will of the people when the legislature will not, to adapt old rules to evolving standards of decency and new technologies and styles of life, to assuage popular dissatisfaction with existing law and hence to prevent disrespect for government, and to forestall violence and revolution.

The last few reasons may be summarized as the "safety valve" function of judicial amendments. Clearly if we read these functions as rationales, then they differ in their sufficiency, and one might add that their sufficiency just as clearly depends on historical circumstances. For example, Orfield suspects that the civil war might have been averted if the constitution had been easier to amend.[Note 4]

The safety valve rationale has an important effect on the method by which we measure the people's consent to be governed by the existing constitution. If there were no judicial amendments, then all dissatisfaction would be channeled into legislative lobbying, attempts to amend the constitution, and very likely, violence. Hence the introduction of a (or another) safety valve or unofficial method of amendment reduces the pressure on other channels of change. One may note this functional side of judicial amendment independently of one's theory of the necessity or legitimacy of judicial amendment. The presence of judicial amendments, then, distorts our picture of the people's consent to be governed by the existing constitution, when that consent is measured primarily by their use and contentment not to use their AC (see Section 2).

Another chief justification of judicial amendment may be called the "equitable" rationale. As long as equity is recognized as relief from the oppressive application of laws, it will permit what practically amounts to judicial amendment. Equity in its strict historical sense does not enter the adjudication of constitutional questions, but the need to provide relief from the unjust results of mechanical application does arise.[Note 5] If courts at all levels have any responsibility to assure justice, then that obligation may conflict with their other obligation to apply and interpret the law.

The longest period in United States history in which no amendment was adopted through the federal AC was 61 years: from 1804 to 1865, between the Twelfth and Thirteenth Amendments. The second longest period was 43 years: from 1870 to 1913, between the Fifteenth and Sixteenth Amendments. These two periods alone comprise over half our history under the constitution, and in 1913 comprised nearly 85% of that history.[Note 6] This may show that contentment with the constitution has been high, that the amendment process has been too difficult, or that various safety valves including judicial amendments have made constitutional amendment comparatively unnecessary. Speaking of the longer of these two periods, McMaster has said,[Note 7]

> It is almost incorrect to say that throughout this period [1804-65] the Constitution was unamended, for it was so expanded by the decisions of Marshall that they amounted to virtual amendments to its text.

Despite what may have been Marshall's —and Warren's— alterations of the constitution, the judiciary still enjoys sufficient confidence to operate effectively. It has not even seen its power of amendment by interpretation attacked by legislatures, except rhetorically, although serious reductions in that power have long been advocated by the right wing.

Lester Orfield believes that judicial amendments do ease the pressure for use of the AC. They "may be made to cover most problems that arise", but if the procedure under the AC is too difficult, then judicial amendments may too easily become "strained interpretations causing loss of confidence in the judiciary."[Note 8] Edward Corwin goes further and declares that the "main business of constitutional interpretation...is to keep the constitution adjusted to the advancing needs of the time."[Note 9] Orfield and Corwin tell us in effect that judicial amendments are effective and obligatory methods of adaptation to changing circumstances. The appeal to effectiveness is much more common than the appeal to obligation. Most of those who argue that judicial amendments are effective at keeping the constitution up to date are glad that the method exists; few regret it, and few will say that it is obligatory. Frederick Davenport typifies the proponents who stop short of finding judicial amendment obligatory:[Note 10]

> [The constitution] has thus far adapted itself remarkably well to the exigencies of our national life. It has proved to be a living, flexible constitution, and its flexibility has been determined more than anything else by the flexibility of mind of the Federal Supreme Court, by the changing philosophy, background, and human nature of the members of the Court.

A stronger statement, almost disclaiming the question of legitimacy, is that of Francis H. Heller:[Note 11]

> Have the really important changes been accomplished by the article V amendment process or have they come about by judicial review? It would be idle to argue the point: the landmark decisions of the Supreme Court have done more to adapt the nation to change than has any amendment.

Frederic Coudert argues that the danger of an unwritten constitution is abuse of power by an ineffectively limited government, that the dangers of a written constitution are rigidity and violence triggered by slow and difficult change, and that our system of judicial amendment allows us to escape both dangers.[Note 12] C.P. Patterson believes the power of judicial amendment does not provide the best of both worlds, as Coudert argued, but gives the Supreme Court "the same relation to our Constitution that the English Parliament has to the English Constitution."[Note 13]

On the other hand many will admit the reality of judicial amendment only to criticize its wisdom or legitimacy. Writing in 1953, John C. Scatterfield remarked,[Note 14]

> Watching the judicial trends of the last quarter century has caused many of us to feel that the Constitution of the United States, 'like an old soldier, will never die, it only fades away.'

Scatterfield represents a conservative school of jurisprudence that upholds the exclusivity of the AC, a limited role for courts, and the weak self-entrenchment of all law (binding until properly changed, changeable only by its own procedures). Scholars, by and large, have left this view behind. The authority of the original understanding of the text of the constitution, and even the coherence of the idea, has received less and less respect over the years, until now Paul Brest can argue that[Note 15]

> the practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition.

Courts need not avail themselves of the power of judicial amendment that has accrued to them, principally, in the last half-century. Often they do not. They may decline as calmly as the court in Maffie v. U.S., 209 F.2d 225, 227 (1954): If the Fifth Amendment privilege against self-incrimination is thought

> outmoded in the conditions of the modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.

Or it may wind up and reaffirm exclusivity in the name of the people, as the West Virginia Circuit Court of Appeals did in In Re Assessment of Kanawha Valley Bank, 144 W.V. 346, 109 S.E.2d 649, 673 (1959):[Note 16]

> This court does not have the power to amend, alter, or repeal any provision of the Constitution of this State. That is a prerogative that the people have reserved to themselves alone. It is within our power, though, and our paramount duty, to prevent others from amending or repealing any part of the organic law of this State except in the manner provided in the document itself.

The modern agreement that judicial review can have an amendatory effect hides some difficult questions of theory. Does judicial amendment presuppose a violation of binding precedent or legislation?[Note 17] Is it logically possible for a Supreme Court ruling to be unconstitutional?[Note 18]

If even formal amendments are powerless to divest citizens of vested rights, then can an interpretation do so on the ground that the right was never "actually" vested?[Note 19] If so, then perhaps judicial amendments possess even more power than the AC.

B. Judicial self-amendment

The reason that judicial amendment of the AC is not self-amendment is simply that no power is used to modify itself. But conceivably the power of judicial amendment may modify itself. The most splendid example is undoubtedly London Street Tramways Co. Ltd. v. The London City Council (1898) A.C. 375.[Note 20] For centuries the English parliament had followed its own precedents. It therefore had abundant precedent to follow precedent, which was a good reason to continue, but it had no explicit rule of law that said it must follow precedent. In London Street Tramways Parliament was asked, in essence, to reverse an earlier opinion. In ruling that it should not reverse itself, Parliament articulated for the first time as holding (not merely dictum) that as a judicial body it is bound by its own precedents.

The self-amendment has not yet occurred, although something else of reflexive importance has occurred. The new rule of law that Parliament is bound by its own precedents is merely a decision of case law. Hence the only force it can exert on future decisions is that of a precedent. Hence, the rule to follow precedents was self-justifying. As long as precedents were respected, London Street Tramways would require us to respect precedents. If a court ever decided to reject precedents, London Street Tramways would not stand in its path, for it is only a precedent. If you believe that witches always lie,[Note 21] then you will not believe a witch who tells you that you are wrong. In that sense, the holding was logically superfluous even if it articulated an important rule of law.

Self-amendment occurred when London Street Tramways was overruled! In the Hansard Report (July 26, 1966), Lord Gardiner announced the self-amendment of the power of judicial amendment or the reversing of precedent in order to permit the reversing of precedent. The rationale was to preserve the omnipotence of Parliament. If Parliament could not "depart from a previous decision when it appears right to do so" then an accumulation of bad judgments could seriously limit the power of Parliament and consequently undermine its sovereignty. The overruling of London Street Tramways asserted in effect that Parliament had continuing omnipotence, for it had rendered a limitation on its power revocable. The proof is stronger because the limitation on its power was by its original nature irrevocable —that is, in its own terms, London Street Tramways could not be overruled without violating the law. The effectiveness of the overruling shows that Parliament really had continuing omnipotence, not merely that it strove to have it. The most interesting point is that it might not have had it until it reached for it, acquiring it by self-amendment.

There are no American cases of the self-amendment of the power of judicial amendment that are nearly so dramatic. But there are many ways in which judicial self-amendment can arise in the United States.

For example a Supreme Court composed of new, conservative appointees may exercise its customary power of judicial amendment to limit its future use. It might do so by using the power of judicial amendment to set precedents adverse to its future use (adverse in their holding or dicta, not in their method) and by selectively overruling the decisions that support its use. Such self-amendment could not become strongly paradoxical unless the self-limiting exercises of the power could plausibly be seen to affect their own validity, not merely the validity of bygone instances and future lapses. But the right and duty to interpret, which is inseparable from adjudication, seems to give all otherwise valid judicial pronouncements a modicum of license that preserves them from self-invalidation. That is, judicial use of judicial amendment could limit its future use, but could probably not destroy itself utterly, and could not in any case prevent its use so completely that the preventive judgment was itself prevented. Of course this view of the matter presupposes that, to some extent (which may be tiny indeed) judicial amendment is inevitable as long as interpretation itself is permitted.

The self-amendment of the power of judicial amendment might occur in another way. A recent strategy of the radical right in the United States is to attempt to limit the jurisdiction of federal courts over issues, such as school prayer and homosexual rights. If Congress passed such a bill, it would attempt to repeal a rule of change for the constitution which, if permitted, would show a reflexive wrinkle in the hierarchy of the federal government. If the limitation was challenged in federal court, then the forum would be put to the choice of (1) upholding a limitation on its power, which implies either a measure of superiority to the limitation or self-amendment, (2) modifying or nullifying the limitation, which in the right circumstances could be the self-amendment of the power of judicial amendment, or (3) refusing to hear the case as injusticiable, a political question, beyond its jurisdiction, or something else. We may assume that the Supreme Court could not take the third option except in cowardice. If the statute limiting federal court jurisdiction were self-entrenched, denying the jurisdiction of federal courts even to review its constitutionality,[Note 22] then the Supreme Court could still take jurisdiction. Taking and not taking jurisdiction in such a case would both amount to a partial decision on the merits prior to a full hearing on the merits. Seeing itself obliged to "know before it knows" (see Section 20) in either case, it could take jurisdiction in order to be able to decide more of the issues on their merits than otherwise, and even in principle to undo its original "error" by dismissing for lack of jurisdiction.

If Congress has the power to limit federal court jurisdiction, then a federal court nullification of the limitation would be a case of judicial power rendering its limitations revocable, a feature of continuing omnipotence. If the power of judicial amendment had continuing omnipotence, then Congress would not have the power to limit it. So if Congress did have the power and courts nevertheless did nullify the limitation, then the power of judicial amendment would have increased itself by self-amendment, much like Parliament in reversing London Street Tramways.

If the limitation was of dubious constitutionality, then a federal court nullification might be construed as a much weaker type of judicial amendment —merely the settling of a previously unsettled question.

A final sense in which the power of judicial amendment may amend itself derives from the finality of Supreme Court decisions, subject only to overruling by formal amendment, subsequent overruling by the Court itself, or another of the unofficial methods of amendment. Against a movement to abolish the power of judicial amendment, courts would have the power to protect themselves up to a point. If courts precipitate a

crisis, then their self-serving decision will not have the desired effect. But we should not underestimate the ability of judges to make their acts of judicial amendment sound like inevitable consequences of universally acknowledged principles of existing law.

This type of self-amendment may be clarified by a distinction. Judicial review may make the final decision of the highest court "legal" per se; but on the other hand, the rules that constitute the judiciary and the rules it interprets may allow us to consider some final decisions of the highest court "illegal". In the formal case, courts may always protect their prerogatives by throwing up legally valid rules superior to any that might repeal them, including formal amendments. In the latter case, courts might in some cases be protecting their prerogatives only by revolutionary acts that are subsequently accepted. Courts that have enjoyed respect in the past will not find it difficult to make their revolutionary decisions look as valid as their lawful decisions,[Note 23] which will contribute greatly to their subsequent acceptability. But under the acceptance theory, the best reasons may fail to win actual acceptance, while the flimsiest succeed. The distinction between legal and illegal decisions is blurred by the power of acceptance contingently to validate or invalidate any decision regardless of its conformity to prior law. The distinction retains some firmness only because conformity to prior law is a major influence on actual, contingent acceptance.

Less dramatic, but logically similar, types of self-amendment of the power of judicial amendment occur whenever a court overrules or modifies rules pertaining to its jurisdiction, especially when the old or new rule of jurisdiction might have affected the case in which the new rule was announced. One might even argue that judicial review itself, hence also judicial amendment, was seized by federal courts in Marbury v. Madison in an act of judicial amendment (hence, self-amendment). In all these cases, self-amendment may be objectionable as usurpation, opportunism, or political grasping, but not as paradox or the self-application of a rule of change.

Note, however, that judicial amendment cannot always be explained as usurpation or its variants. Even if one disbelieves that a power of judicial amendment is inherent in judicial powers of interpretation, application, and review, one may point to "innocent" causes such as good faith error of law, good faith disagreement between courts over time, circular majorities within single courts, and the changing membership of courts. The latter is a favorite theme of the legal realists who believe that the decisions of a court are the products of the personal moral and political preference of judges, disguised by legalistic rationalization. Even if one denies legal realism in general, impressive empirical evidence exists that the social and economic background of judges correlates with their opinions on a wide range of controversial cases.[Note 24]

If one wishes to minimize the risk of abuse and usurpation in judicial amendment, one may insist that it be kept unofficial and surreptitious, forcing judges to disguise it with legalistic rationalization —which one hopes will not always be easy. Similarly, the power of a jury to nullify the law is lawful, even venerable, but is kept infrequent in practice by the device of jury instructions that, in effect, declare their own exclusivity. This raises serious doubts about the rigidity of the distinction between official and unofficial rules of change.[Note 25]

Judicial amendment of the AC may not be strict self-amendment, but has it ever occurred? Every time part of a state AC is struck down for violating the federal constitution, judicial amendment of an AC may have occurred. However, such nullification would only comprise judicial amendment in any significant sense if the violation of the federal constitution were doubtful or clearly invented. Filling gaps and silences in ACs is also common, but not a strong type of judicial amendment.

One of the few cases in which a court seems to have changed the terms of an AC by interpretation was In Re Todd, 208 Ind. 168, 193 N.E. 865 (1935). The Indiana constitution stated that amendments are adopted when they receive the affirmative votes of a "majority of the electors". For 83 years this phrase was interpreted by mean the majority of the electors eligible to vote. The Todd court changed the interpretation to the majority of those voting on the amendment. A subsequent case, Swank v. Tyndall, 266 Ind. 204, 221, 78 N.W.2d 535, 542 (1948) declared that the holding of Todd "in substance amounted to a change in the Constitution itself", and refused to apply the Todd rule retroactively.

Notes

1. Benjamin Hoadly, Bishop of Bangor, "Sermon Preached Before the King," 1717, p. 12. I have not been able to find a more complete citation for this famous remark. This form is taken from John Chipman Gray, The Nature and Sources of Law, Macmillan, 2d ed., 1921, at p. 125.

2. The power of judges to change rules of law is unquestioned for the rules of common law, although specifying just when modification or overruling is permitted by stare decisis is difficult. See Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification, Stanford University Press, 1961, Chapters 3 and 4; and Peter Suber, "Analogy Exercises for Teaching Legal Reasoning," Journal of Law and Education, 17, 1 (Winter 1988) 91-98. However, even if stare decisis is not fully applicable to constitutional adjudication, which is often heard, judges have similar powers to interpret, apply to concrete circumstances, and in a broader sense, to qualify and modify to whatever extent is acceptable or accepted. A theory of constitutional adjudication may limit these powers, but the legality of the powers is not found in theories but in the history of what has been held lawful. Also like common law judges, judges who interpret the constitution can obviously change the law by reinterpretation to the extent that, as Edward Corwin put it, "the constitution is the judicial version of it —constitutional law." Edward Corwin, "Constitution v. Constitutional Theory: The Question of the States v. the Nation," American Political Science Review, 19 (1925) 290-304, at p. 303.

3. See e.g. Frederic R. Coudert, "Judicial Constitutional Amendment, as Illustrated by the Devolution of the Institution of the Jury from a Fundamental Right to a Mere Method of Procedure," Yale Law Journal, 13 (1904) 331-65. The theme was very common during the New Deal era. See e.g. Thomas M. Steele, "Re-Making the Constitution," Connecticut Bar Journal, 7 (1933) 102-28; Frederick M. Davenport, "The Supreme Court Makes the Constitution March," Boston University Law Review, 14 (1934) 752-65; Charles S. Collier, "The Expanding Meaning of the Constitution," Wisconsin Law Review, 11 (1936) 323-45; D.R. Richberg, "Need for Constitutional Growth by Construction or Amendment," Kentucky State Bar

Association, [no vol. no.] (1936) 165-84, with a commend by R.E. Desverine, ibid. 185-205; Roscoe Pound, "The Constitution: Its Development, Adaptability, and Future," American Bar Association Journal, 23 (1937) 739-45; H.W. Anderson, "The Constitution: An Expanding Chart of Government," Boston University Law Review, 18 (1938) 491-510; K.J. Hogan, "Important Shifts in Constitutional Doctrine," John Marshall Law Quarterly, 4 (1939) 554-79; Thomas Reed Powell, "A Constitution for an Indefinite and Expanding Future," Washington Law Review, 14 (1939) 99-117; H.W. Willis, "The Part of the United States Constitution Made By the Supreme Court," Iowa Law Review, 23 (1938) 165-214; H.W. Willis, "Constitution Making by the Supreme Court Since March 29, 1937," Indiana Law Journal, 15 (1940) 179-201; and C.P. Patterson, "The Supreme Court: Declarer or Amender: The Adaptation of the Constitution by the Supreme Court," Brooklyn Law Review, 10 (1940) 48-75. Since the New Deal era the fact of judicial amendment has become commonplace, and the debate has shifted from its occurrence to its desirability and legitimacy. A recent work arguing against its use is Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment, Harvard University Press, 1977. A casebook has been assembled to illustrate the operation of judicial amendment: Joel B. Grossman and Richard S. Wells, Constitutional Law and Judicial Policy-Making, John Wiley and Sons, 1972.

4. Lester Bernhardt Orfield, Amending the Federal Constitution, University of Michigan Press, 1942, p. 210. See similar views quoted near the beginning of Section 2.A above.

5. A strong argument that rigorous adherence to rules must always be superseded by justice is Noel Dermot O'Donoghue, "The Law Beyond the Law," American Journal of Jurisprudence, 18 (1973) 151-64. In the same volume of the same journal, Conrad Johnson argued, similarly, that judges must choose between acting like legislators and perpetuating injustice. "The Rule of Law and the Closure of the Legal System," 18 (1973) 35-56.

6. See Robert G. Dixon Jr., "Article V: The Comatose Article of our Living Constitution," Michigan Law Review, 66 (1968) 931-48. The record among the states is very different, if only because amendment is generally easier in the states. Francis Heller observes that before 1971, California had amended its constitution 375 times, South Carolina 398 times, Louisiana 496 times, and Georgia 691 times. Francis H. Heller, "Article V: Changing Dimensions in Constitutional Change," University of Michigan Journal of Law Reform, 7 (1973) 71-89. T.C. Chadick has calculated that, on average, Texas has amended its constitution once every six months and five days. T.C. Chadick, "Check-Up on Constitutional Revision," Texas Bar Journal, 31 (1968) 205-08.

7. "Report of a Committee of the New York State Bar Association, 1890," Reports of the NYBA, vol. 13, p. 140. Quoted in Shalers, United States, vol. II, p. 500.

8. Lester Bernhardt Orfield, Amending the Federal Constitution, University of Michigan Press, 1942, at pp. 214-15. On Orfield's latter point, see Coudert, op. cit. at pp. 364-65: if the procedure of the AC becomes too difficult, judicial amendment will become more prominent; but if judicial amendment becomes too prominent or too easy, "the foundation of our government, —respect for the constitution— will be sapped."

9. Corwin, op. cit. at p. 303.

10. Davenport, op. cit. at p. 752.

11. Heller, op. cit. at p. 75. See Paul G. Kauper, "The Alternative Amendment Process: Some Observations," Michigan Law Review, 66 (1969) 903-20, at p. 917.

12. Courdert, op. cit. at p. 335.

13. Patterson, op. cit. at p. 54.

14. John C. Scatterfield, "Constitutional Amendment by Treaty and Executive Agreement," Mississippi Law Journal, 24 (1953) 280-94, at pp. 293-94. Scatterfield's work will be discussed more thoroughly in Section 17, below.

15. Paul Brest, "The Misconceived Quest for the Original Understanding," Boston University Law Review, 60 (1980) 204, at p. 225.

16. Cf. Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299, 305 (1964), and Knapp v. O'Brien, 288 Minn. 103, 179 N.W.2d 88, 90 (1970).

17. To this question Oliver Wendell Holmes seems to have given a negative answer in The Common Law, Little, Brown, and Co., 1881, at p. 36:

> [A]s the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at least a new form, from the grounds to which they have been transplanted.

Holmes then calls for a "more conscious recognition of the legislative function of the courts." Ibid.

18. See Patterson, op. cit. at p. 54:

> [T]here is such a thing as an unconstitutional decision of the Supreme Court, but it should be considered that it, like an unconstitutional act of the Congress, before it has been declared unconstitutional, has the force of law until it is reversed by the court or repealed by a constitutional amendment.

One may ask how this principle differs from the apparently simpler statement that Supreme Court decisions, like other laws, are valid until amended or repealed. See Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921, at p. 129:

> Judges have, of course, the power, though not the right, to ignore the mandate of a statute [or constitutional rule]....None the less, by that abuse of power, they violate law. If they violate it willfully...they commit a legal wrong...even though the judgment which they have rendered stand.

19. This issue is addressed in Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576, 591 (1975) by the Louisiana Supreme Court using the rules of Louisiana (French) Civil Law.

> Moreover, interpretive legislation cannot properly be said to divest vested rights, because, under civilian theory, such legislation does not violate the principle of non-retroactivity of laws. The interpretive legislation does not create new rules but merely establishes the meaning that the interpreted statute had from the time of its enactment. It is the original statute, not the interpretive one, that establishes rights and duties.

This principle begs the question by assuming that the rights were not actually vested at the time of the later, interpretive act. So it does not answer the question whether reinterpretation can divest vested rights, except possibly by saying, "yes, but under another name."

20. See Salmond on Jurisprudence, 11th ed. by Glanville Williams, Sweet and Maxwell, 1957, at pp. 187f, and 12th ed. by P.J. Fitzgerald, Sweet and MAxwell, 1966, at pp. 118f; A.W.B. Simpson, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent," in G.G. Guest (ed.), Oxford Essays in Jurisprudence, Oxford University Press, 1961, Chapter VI; Roy L. Stone-de Montpensier, "Logic and Law: The Precedence of Precedents," Minnesota Law Review, 51 (1967) 655-74; John H. Langbein, "Modern Jurisprudence in the House of Lords: The Passing of London Street Tramways," Cornell Law Review, 53 (1968) 806-813.

21. I deliberately use witches rather than Epimenides or more classical liars familiar to philosophers and logicians. The reason is that the theory that witches always lie caused serious paradox and consternation during the 17th witch trials, and particularly in the trial of Urbain Grandier in 1634. These cases brought the liar paradox into law. Richard Popkin believes that the paradoxes of taking the testimony of accused witches led Descartes to formulate the famous Demon argument in the Meditations. Richard H. Popkin, The History of Scepticism from Erasmus to Spinoza, University of California Press, 1979, at pp. 180-81.

22. A self-entrenchment clause need not forbid its own amendment; it may forbid its own review instead. A troublesome example is Section 3 of the (English) Parliament Act of 1911, which permits some bills to be adopted by the Queen and House of Commons without the consent of the House of Lords, and which bars judicial review of all such acts. Whether the entrenched character of such bills helps them overcome paradox in the (proposed and debated) task of abolishing the House of Lords is considered by Peter Mirfield, "Can the House of Lords Lawfully Be Abolished?" Law Quarterly Review, 95 (1979) 36-58, esp. 49. Mirfield concludes that the House of Lords cannot lawfully be abolished. His arguments are challenged by George Winterton, "Is the House of Lords Immortal?" Law Quarterly Review, 95 (1979) 386-92.

23. Similarly, a jury may depart from a judge's instructions and still make its verdict appear consistent with them. As Harry Kalven and Hans Zeisel put it, "The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact." The American Jury, Little, Brown, and Co., 1966, at p. 165.

24. See e.g. Joel B. Grossman, "Social Backgrounds and Judicial Decision-Making," Harvard Law Review, 79 (1966) 1551-64, who cites many earlier studies. Among cases where the correlation was statistically significant, a 1961 study found that Republican judges were more likely than Democrat judges to oppose

> the defense in criminal cases...administrative agencies in business regulation cases...the claimant in unemployment compensation cases...the finding of constitutional violation in criminal cases...the government in tax cases...the tenant in landlord-tenant disputes...the consumer in sales of goods cases...the injured party in motor vehicle accident cases, and the employee in employee injury cases.

Ibid. at p. 1556-57. Note that Grossman is co-editor with Richard S. Wells of a casebook focusing on judicial amendment, op. cit.

25. Kalven and Zeisel, op. cit. at p. 498:

Perhaps one reason why the jury exercises its very real power [to depart from binding law] so sparingly is because it is officially told that it has none.

See Mortimer R. Kadish and Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures From Legal Rules, Stanford University Press, 1973, at p. 65:

> [A]n explicit statement that the jury may invoke their own values, even if put in terms of the highly exceptional case, would reduce the impact of the judge's instructions on the law and invite jury nullification on a greater scale.

One is reminded of similar reasoning in the Reagan administration by which pregnant women should not be informed of their constitutional right to an abortion in clinics receiving federal funds.

Section 16: Amendment by Implication

A. The lex posterior principle v. self-entrenchment

When a new statute is passed that is inconsistent with an earlier statute, courts first try to reconcile them. But if the statutes cannot be reconciled without resort to absurd or violent interpretations, then the most recent statute is given priority. The earlier statute is impliedly repealed, not in its entirety but pro tanto or to the extent of the irreconcilable conflict.

Two reasons are usually cited for the priority of recent law. First, it is the most recent voice of the people, the sovereign. They are undoubtedly able to repeal any existing law. They presumably know the provisions of existing law and intend to give effect to all their recent words. The weakness of this presumption is shown by the universal dissatisfaction with implied repeal, and the universal injunction to attempt reconciliation first. (This practice betrays the often conflicting presumption that the people intended that their act be compatible with their earlier acts.)

Second, statutes may amend or repeal other statutes, and the newer is more likely an amendment of the older than vice versa.[Note 1] Why this should be so is unclear. If the newer statute is taken to be the amending, not the amended, statute, then it may be by appeal to "legislative intent", which collapses into the first reason, or by some appeal to the nature of statutes as a rule of change for statutes. Statutes unquestionably are rules of change for statutes, but this fact alone cannot explain why only newer statutes possess the power of implied repeal, or why it is so difficult for a statute to amend or repeal inconsistent future statutes through self-entrenchment.[Note 2] Following common usage I will use the term "lex posterior principle" for the priority of new rules over old rules of the same type.

In a conflict between rules of different types, the superior rule in the legal hierarchy takes priority, even if it is older. For example, constitutional provisions always take priority over statutes. This is the lex superior principle. Any legal system displaying what I have called a reflexive hierarchy will also display many exceptions to the lex superior principle, or cases in which superiority is measured on a circular scale (see Section 21.D).[Note 3]

The third major rule of priority is the lex specialis principle, which favors the specific over the general in conflicts at the same hierarchical level. While the lex superior principle (normally) takes priority over both the other two rules, the relative priority of the lex posterior and lex specialis principles among themselves is unsettled. When a new rule is less specific than an older rule of the same hierarchical type, and when they are irreconcilable, then it is apparently permissible to favor either rule, according to independent considerations. For example, one court has held that when two amendments adopted at the same time are irreconcilable, the one receiving the greater number of votes takes priority over the other. In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 11, 536 P.2d 308 (1975).

If the question only arose more often of the relative priority of these rules of priority, we might see steps taken down an indefinite regress or toward a theory of types.

The law of implied repeals is relatively well developed for statutes and cases, if only because there are so many of each and the question frequently arises. But the law of implied repeal for constitutional amendments is relatively undeveloped. Even at the state level where constitutional amendment is much more frequent than at the federal level, the theory of implied repeals is surprisingly inarticulate.

When an amendment says of itself that it is to amend or repeal Article A, then there is no question of its effect on A. But it if is inconsistent with certain provisions or judicial interpretations of Article B as well, then does it impliedly repeal the latter? The amendment more than satisfies the two criteria used for statutes: it is the most recent voice of the sovereign, and it is enacted under a power sufficient to amend any portion of existing law. Whether a new amendment impliedly repeals every portion of the antecedently existing text irreconcilable with it may turn on a court's judgment of intent,[Note 4] or on deference to the inherent power of constitutional amendments to plow under all obstacles in their path.[Note 5] The only ways, apparently, to allow preexisting portions of the text to preserve themselves against implied repeal[Note 6] is to deny the omnipotence of the AC, which has been done of course (see Section 8), to find such denial implied in the doctrine of the homogeneity of the constitution,[Note 7] or to permit effective or immutable self-entrenchment (Sections 8, 9).

If amendment by implication is possible, then amendment of the AC by implication is possible. Many scholars, but only losing plaintiffs, have argued that this has in fact happened to the federal AC —that Article V has been impliedly amended by the Tenth and Fourteenth Amendments. Since both these amendments were adopted under the AC they allegedly alter, we are dealing with arguments for genuine, although mediate and implied, self-amendment at the federal level.

No clauses of the original constitution have been construed by courts to limit the power of Article V. Of the amendments, only the Tenth and Fourteenth have been argued to have such an effect.[Note 8]

Although no one has argued that amendments other than the Tenth and Fourteenth have impliedly amended the AC, one might plausibly argue that each has necessarily done so. Take the Fifteenth Amendment (Black Suffrage) as an example. It established the right of blacks to vote and was adopted after Article V. Did it therefore limit the power of Article V to destroy their right to vote? If an amendment impliedly repeals all preexisting provisions inconsistent with itself, and if inconsistency in this context is measured by the deontic test (whether one rule permits what another forbids or vice versa), then it seems that any amendment that expressly permitted something previously impermissible (voting by blacks, women, or 18-year-olds) or forbade something previously permissible (unreasonable searches, legislative appointment of Senators, sale of liquor) thereby

limits Article V by impliedly repealing its power to do otherwise in the future. Prohibition (the Eighteenth Amendment) would limit the power of the AC so that the repeal of prohibition (the Twenty-First amendment) would be impermissible.

Here is a more reflexive form of the same problem. Article IV, §4 guarantees a republican form of government. Would we violate that guarantee if the AC were used to enact the complete self-repeal of the AC, leaving behind no official power to amend? A strong case could be made that such self-repeal would compromise our republican form of government. But just as strong a case could be made that the self-repeal of the AC would impliedly repeal Article IV, §4 pro tanto.

One may conclude that amendments either do not impliedly repeal all preexisting provisions irreconcilable with themselves, or that if they do, such repeals (especially those of the amending power) are ignored in practice. A simpler solution is that, while an amendment and the AC may be "inconsistent" by the deontic test, their conflict is nevertheless "reconcilable" by allowing the amendment to stand until repealed and by giving the AC the power of repeal. What seems undeniable, however, is that any significant amendment will be inconsistent with the AC by the deontic test. Indeed, if "significant" means permitting what was once forbidden or vice versa, then this is a tautology. Not only would this bar repeal of valid amendments under the inference model, but even the enactment of valid amendments. Any interpretation of the lex posterior principle is empirically false if it makes every significant amendment into (1) an immutable limitation on the AC, (2) an implied repeal pro tanto of the AC, (3) impliedly self-entrenched as a consequence of its implied powers of repeal, or (4) an impossibility ab initio. Again, this is proved empirically by the acceptance of the Twenty-First amendment, adopted under the AC. This is another area in which doctrinal difficulties, normally ignored, require us to reject the inference model.

B. Was the adoption of the Tenth Amendment a case of self-amendment?

The argument that the Tenth Amendment amended the AC pro tanto is much more plausible and historically important than that for the Fourteenth Amendment (see Section 16.C below).[Note 9] Outside the courts the debate is best summarized by Selden Bacon,[Note 10] arguing that the Tenth Amendment must be understood to have amended Article V, and by Henry W. Taft,[Note 11] arguing against. The debate was stimulated by the adoption of the Eighteenth Amendment (Prohibition) in 1919. Prohibition was arguably the first constitutional amendment that deprived the people of rights they had previously enjoyed. But there is some disagreement about this. Bacon argues that the Eighteenth Amendment uniquely violates the "reserved powers" of the people and states guaranteed by the Tenth Amendment, but some courts have wondered why the same cannot be said of the Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Nineteenth Amendments.[Note 12] In any event Bacon maintains that an amendment that deprives the people of any of their rights must be ratified in state conventions, not state legislatures. Ratification by convention would manifest the consent of the people, supposedly required by the Tenth Amendment, whereas ratification by legislature would merely provide the consent of the states.

Article V gives Congress the power, and apparently the unfettered discretion, to decide whether ratification of a proposed amendment shall be done by convention or by legislature ("as one or the other mode of ratification may be proposed by the Congress"). Bacon argues that however unlimited this discretion was in 1789, the Tenth Amendment limited that discretion in 1791 and required ratification by convention for every amendment that would limit the people's rights. Bacon insists that[Note 13]

> if the power to be conferred by the [proposed] amendment is one that the people alone could grant (before Article V was adopted), then the people reserve that power for themselves, and take it away from the legislatures.

It followed that ratification of such amendment must be by the convention method, not by legislatures.[Note 14] He summarizes his position as follows:[Note 15]

> The Tenth Amendment, in short, said: If the Federal Government wants added direct powers over the people or the individual rights of the people, it must go to the people to get them; ...the right, at the option of Congress, to get such added powers from any other source [such as state legislatures] is wiped out.

Because the Eighteenth Amendment was ratified by state legislatures, not state conventions, Bacon believes it was adopted defectively and was therefore void.[Note 16]

After the adoption of the Eighteenth Amendment in 1919 the Supreme Court heard four separate challenges to its validity, and upheld it each time. Hawke v. Smith, No. 1,253 U.S. 221 (1920); National Prohibition Cases, 253 U.S.350 (1920); Dillon v. Gloss, 256 U.S. 368 (1921); and Coleman v. Miller, 307 U.S. 433 (1939). Each of these cases said in dictum that the Tenth Amendment did not amend Article V. That question was addressed directly in U.S. v. Sprague, 282 U.S. 716 (1931), and decided in favor of the validity of Prohibition and the absence of any implied amendment of the amending clause.[Note 17]

If the Eighteenth Amendment and the cases upholding its validity raised Selden Bacon's ire, he was plunged in despair by the holding of Leser v. Garnet, 258 U.S. 130 (1922), which upheld the validity of the Nineteenth Amendment (Women's Suffrage). Several states had tried to rescind their ratifications of the Nineteenth Amendment by stating in their constitutions that their regrettable votes were utterly inoperative and void. The Supreme Court disallowed the rescissions, stating,[Note 18]

> [T]he function of a State legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.

So, the people of the states cannot control the amendment process. Bacon wondered whether ours was still a government of the people. He calculated that the number of federal and state legislators needed (in 1930) to propose and adopt an amendment to the federal constitution was 1300.[Note 19] To Bacon, Leser in effect put all the rights of the people in the hands of 1300 officials beyond the control of the people of the states. Our boasted limited government and inalienable rights were shams so long as 1300 tyrants could amend them away without any check from the people. If the elite 1300 truly hold the reigns of an omnipotent AC, then "we citizens have no rights in the proper sense of that term, but only privileges extended at the pleasure of this oligarchy."[Note 20] Bacon had discovered a monstrous threat to fundamental liberties —the sovereign power of amendment. The only possible check on infinite abuse and tyranny was the Tenth Amendment, which reserved some power to the states and the people, and which arguably took the power to diminish our rights out of the hands of the 1300 and gave it to the people in convention.

Bacon did notice a real contingency ominously underlying our "inalienable" rights and "limited" government. But the foundation of the system was not rotten just because it was subject to amendment. If Bacon preferred an alternative, then we cannot say that he preferred a more democratic system, for the only way to put fundamental liberties beyond the amendment power is through an immutable rule, which gives one generation despotic and paternalistic power over its successors, or through continuing enlightened despotism, which forsakes democracy even more directly.

Unlike Selden Bacon, the American lawyer, Kurt Gödel the Austrian logician understood that an omnipotent AC contained the risk of tyranny. Gödel studied the U.S. constitution in preparation for his oral citizenship examination in 1948. He noticed that the AC had procedural limitations but no substantive limitations; hence it could be used to overturn the democratic institutions described in the rest of the constitution. Albert Einstein and Oskar Morgenstern urged Gödel not to mention this fact to the examiner. In fact, they decided to accompany Gödel to his examination in Trenton in order to keep him out of trouble. At the government offices, the examiner congratulated Gödel for leaving Germany, which was under an "evil dictatorship" of a kind that could never occur in the United States. "On the contrary," Gödel shouted, "I know how that can happen!" Einstein and Morgenstern had to restrain Gödel long enough for him to finish the examination and take the oath of citizenship.[Note 21]

The Tenth Amendment reserves to the states and people "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States." The phrase "to the United States" was added on the suggestion of Roger Sherman. Bacon believed that Sherman's addition was intended to point the Tenth Amendment "directly" at Article V, and that the resulting language "expressly" targeted Article V.[Note 22]

Certainly the reference is not an express one. Bacon must rely on intent, if anything, not the text of the Tenth Amendment. Bacon's idea was that the amending power was the only power in the constitution not delegated to the United States nor prohibited to the States. That points the reference to Article V. Without Sherman's phrase "to the United States" the Tenth Amendment would have reserved all undelegated powers. Moreover, the rights of the people were reserved or entrenched by the Ninth Amendment.[Note 23] The Tenth Amendment speaks of "powers", not "rights", and hence does not duplicate the Ninth Amendment. "Unless that unlimited power of amendment by a handful of Congressmen and legislators was taken away by the Tenth Amendment, what was it that was reserved to the people?"[Note 24]

This argument has some strength. Henry Taft rebuts it directly. "[T]he power to propose amendments has been delegated to the United States by Article V."[Note 25] Taft draws comfort from the Supreme Court in Hawke v. Smith, No. 1, 253 U.S. 221, 226, 228 (1920):

> The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress... Dodge v. Woolsey, 18 How. 331, 348....When [the framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose [than they were in Article V in giving the power to determine the method of ratification to Congress].

This, however, cannot suffice, for the case that directly addressed the question of the effect of the Tenth Amendment on the power of Congress to select the mode of ratification held that Article V

> does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, as pointed out in Hawke v. Smith (No.1)...that Article is a grant of authority by the people to Congress, and not to the United States.

U.S. v. Sprague, 282 U.S. 716, 733 (1931). Sprague, then, agreed with Bacon that Article V did not delegate any power to the United States, yet it denied that the Tenth Amendment therefore reserved the power to deprive the people of their rights or powers to the people. How this was done was something of a cheat on Bacon and the others who relied on the historical analysis of Roger Sherman's intention. The Sprague court, in an opinion by Justice Roberts, did not care about Roger Sherman's intention, and did not even bother to rebut the claim that the language of the Tenth Amendment may actually have been intended by one of its writers to reach the amending power. Instead Justice Roberts relied on the "plain meaning" of Article V, which says that a proposed amendment may be ratified by state legislatures or conventions "as the one or other mode of ratification may be proposed by Congress." This language "clearly" gives Congress the discretion to select either mode. A contrary intention is not, at least, revealed by the language. Moreover, three prior cases asserted the same thing, if only in dictum. In a succinct conclusion, which not incidentally implies the permissibility of self-amendment, Justice Roberts wrote,[Note 26]

> Unless and until [Article V] be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

Undeniably we are left with a clear statement of law but no solution to the problem of 1300 tyrants on a long leash, capable of erasing all that we hold dear. The Sprague court did not address the threat to our liberties inherent in an omnipotent AC. Possibly it refrained because the difficulty of amendment means that the monster is partially under control, or because, in fact, the monster is ourselves. A desire to limit the amending power, or to make it more difficult —not the same thing— shows a distrust for democracy or a denial that in general the people deserve what they get.

The clear statement of law in Sprague is that the Tenth Amendment has not impliedly amended Article V. It follows that no self-amendment has occurred from that direction. Sprague also says that, apart from the explicit limitations stated in Article V itself, two of which have expired (repealed by sunset clause), the federal amending power is omnipotent. The law in the United States is that roughly 2000 people can, legally, repeal all the constitutional limitations on government and guarantees of liberty.[Note 27]

Note that Prohibition was finally repealed by the Twenty-First amendment (1933), for which Congress stipulated the convention method of ratification. It is the only amendment to the federal constitution ratified in state conventions. The convention method was chosen to prove that the people actually disapproved Prohibition, to satisfy many of the wounded interests left over from the controversial ratification of Prohibition itself, and to demonstrate the widespread conviction that the amendment process had been craftily manipulated for Prohibition by a small minority of religious zealots alienated from the popular will.[Note 28]

Before leaving this topic I must remark on the boldness of U.S. v. Sprague, 44 F.2d 967 (1930), the New Jersey District Court case that was overturned by the Supreme Court. The District Court in Sprague actually held the Eighteenth Amendment void, and to do so it disregarded or even "reversed" three recent Supreme Court decisions. It finds an amendment of the constitution to violate the constitution, which is much rarer than to find a violation to amend (see Sections 8.B, 21.C). It is the only case ever to hold a federal constitutional amendment unconstitutional, either before or after ratification. The audacious and erudite opinion by Judge Clark[Note 29] does not agree with the plaintiff that the Tenth Amendment has amended Article V,[Note 30] but instead relies on "principles of political science"[Note 31] that require representative decision-making in a democracy. Judge Clark virtually admits that he is inventing law.[Note 32]

An alternative ground of his holding is that, even if Congress had discretion under the principles of political science to select the method of ratification, it abused its discretion by choosing legislative ratification for the Eighteenth Amendment.[Note 33]

Judge Clark closes with the hope that one day someone will challenge the Eighteenth Amendment under the Due Process clause of the Fourteenth Amendment. For if vaccinations do not violate due process because they are actually effective against an actually undesirable disease like smallpox, Jacobson v. Massachusetts, 197 U.S. 11 (1905), then the Prohibition amendment must be tested both for its actual effectiveness and for the actual undesirability of intemperance. His opinion, he says, is based on a "tired eye scrutiny" of the constitution.[Note 34]

C. Was the adoption of the Fourteenth Amendment a case of self-amendment?

The Eighteenth Amendment had already been challenged under the Fourteenth Amendment by the time Sprague was heard in the District Court. In Peter Hand v. U.S., 2 F.2d 449 (CA.7 1924) an opponent of Prohibition challenged the validity of the Eighteenth Amendment on the ground that the Due Process clause required ratification by convention. The court held that the Due Process clause required no such thing, and felt no need to elaborate. The plaintiff had also argued that the Fourteenth Amendment impliedly amended Article V,[Note 35] first by limiting Congress' discretion to call for ratification in state legislatures, and second, by "nationalizing the people" and putting aside the federation of states and state rights. The latter argument is not elaborated in the opinion, but it may have concluded that some form of national referendum is a method of ratification required by the Due Process clause. Again, the court spends little time and few words rejecting the plaintiff's theories. Unfortunately we know no more about the alleged amendment of Article V by the Fourteenth Amendment.[Note 36]

D. The lex posterior principle self-applied

The lex posterior principle allows newer rules to amend or repeal older rules in case of irreconcilable conflict, when both are on the same hierarchical level. It may be considered a rule of construction,[Note 37] but it operates as a rule of change. That is why it is disfavored: it results in the repeal of a rule not directly intended to be repealed. As a rule of change, could it be applied to itself?

The answer is yes. For example, suppose that the lex posterior principle were made a positive statute directing courts in the interpretation of a criminal code, and that subsequently the legislature adopted a statute saying, in effect, "in cases of irreconcilable conflicts between criminal statutes, preference shall be given to that which favors the defendant." The new rule could offer any different rule of priority, provided that it were silent on its effect on the lex posterior statute and conflicted irreconcilably with it. If we follow the new rule of priority, the lex posterior statute will be followed when it favors the defendant, abandoned otherwise. If we follow the lex posterior statute, we favor the new rule of priority, thereby causing the self-repeal pro tanto of the lex posterior statute.

Notes

1. Note that while statutes are a rule of change for statutes, this power can normally be exercised only by later statutes over earlier ones. A statute cannot in general amend or repeal future statutes, for example, by stipulating its own priority in case of conflict with subsequent legislation. For a

rare of example of the latter, see the Canadian Bill of Rights, discussed in Appendix 3, note 2. Other examples will occur whenever a statute has a provision prefaced by words such as "notwithstanding any other paragraph of this section", or "nothing in this section shall be construed to deny...." If other parts of the statute are later amended, the older "notwithstanding" clause will presumably still control. However, this may be due less to the self-elevating character of the clause than to the legislative intent revealed by the self-elevating language.

When a constitutional rule stipulates its own immunity to future amendment, or its own priority over future amendments, it is self-entrenched. For the effect of self-entrenchment on the paradox of self-amendment, see Sections 8, 9. For the view that entrenchment is the temporally symmetrical correlate of the lex posterior principle, see Section 9.D.

2. See the previous note and Sections 8 and 9 above.

3. The relation between the lex posterior and the lex superior principles is well laid out by Alexander Hamilton in Federalist #78.

4. For example, Carman v. Hare, 26 Mich.App. 403, 182 N.W. 2d 563 (1970), vacated 384 Mich. 443, 185 N.W.2d 1. Carman held that an amendment is presumed to be intended to amend only those provisions of the text that it explicitly cites. The court is here applying a requirement of "germaneness" as a condition of amendment, found in the constitutional law of many states. Its effect is to make amendment by implication either impossible or a question of intent.

5. A good example of the latter is Lester Bernhardt Orfield, Amending the Federal Constitution, University of Michigan Press, 1942, at p. 12:

> [A]n amendment is of even greater import than the original provisions of the constitution since it automatically repeals all clauses inconsistent with it.

Orfield cites the following authorities for his proposition: Johnson v. Tompkins (C.C.Pa. 1883), Baldwin Fed.Case No.7416; Osborne v. Nicholson (C.C.Ark. 1870) I Dill. 219, Fed.Case No. 10595; University v. McIver, 72 N.C. 76 (1875); and Grant v. Hardage, 106 Ark. 506, 153 S.W. 826 (1913).

6. I presume that no provision is exempt from explicit repeal, except possibly (1) self-entrenched provisions, for which see Sections 8 and 9, and (2) the AC itself, for which see Part One.

7. For example, Prout v. Starr, 188 U.S. 537, 543 (1903) (the Eleventh Amendment does not bar inquiry into violations of the Fourteenth Amendment even when the inquiry takes the form of a suit against a state Attorney General):

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.

Prout relies on what I have called the homogeneity of the constitution, the theory that new amendments and conflicting preexisting sections coexist in the manner of inconsistent sections of the original text, none amending any other, and none hierarchically privileged because it is newer.

For a recent case that might be interpreted to deny the homogeneity of the Eleventh and Fourteenth Amendments, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1975). The Supreme Court allowed an award of attorney's fees pursuant to a statute adopted under Section 5 of the Fourteenth Amendment, a statute that otherwise would have been barred by the Eleventh Amendment. Hence Bitzer might be read for the radical proposition that even statutes adopted under newer amendments partake of the lex posterior principle and impliedly repeal or at least supersede inconsistent earlier constitutional amendments. This would extend the lex posterior principle in a way that overturned the lex superior principle.

8. Lester Orfield, op. cit. at p. 100.

9. The Tenth Amendment in its entirety reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

10. Selden Bacon, "How the Tenth Amendment Affected the Fifth Article of the Constitution," Virginia Law Review, 16 (1930) 771-79.

11. Henry W. Taft, "Amendment of the Federal Constitution: Is the Power Conferred by Article V Limited by the Tenth Amendment?" Virginia Law Review, 16 (1930) 647-58.

12. U.S. v. Sprague, 282 U.S. 716, 734 (1931).

13. Bacon op. cit. at p. 781 (emphases in original).

14. Ironically, the same principles and fears that motivated Bacon led to the proposed Reed-Walter amendment to Article V, which would (inter alia) have abolished the convention method of ratification. See James P. Murtagh, "Procedure for Amending the Constitution and the Reed-Walter Amendment," Pennsylvania Bar Association Quarterly, 27 (1955) 90-101.

15. Bacon, op. cit. at p. 782.

16. Other writers who challenged the validity of the Eighteenth Amendment, either for its content or its defective adoption, included George B. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," Michigan Law Review, 18 (1919) 213; Everett V. Abbott, "Inalienable Rights and the Eighteenth Amendment, "Columbia Law Review, 20 (1920) 183-95; Charles K. Burdick, "Is Prohibition Lawful?" New Republic, April 21, 1920, pp. 245-48; D.O. McGovney, "Is the Eighteenth Amendment Void Because of its Contents?" Columbia Law Review, 20 (1920) 499-518; Justin DuPratt White, "Is There An Eighteenth Amendment?" Cornell Law Quarterly, 5 (1920) 113-27; G.W. Hoadly, "Was the Eighteenth Amendment Legally Adopted?" Virginia Law Register, n.s. 13 (1927) 381-83; E.P. Buford, "The So-Called Eighteenth Amendment to the Constitution of the United States," Virginia Law Review, 14 (1928) 432-40; Anon.,"The Eighteenth Amendment —Its Validity— Public Opinion,"Dickenson Law Review, 32 (1928) 223-45; and Howard Lee McBain, Prohibition, Legal and Illegal, Macmillan, 1928.

The proposition that some amendments require ratification by convention was supported by no less an authority than William Howard Taft, in an article published one year before he became Chief Justice of the United States, "Can Ratification of an Amendment to the Constitution be Made to Depend On a Referendum?" Yale Law Journal, 29 (1920) 821. Also see note 28, below.

17. Sprague was a test case brought by the Association Against the Prohibition Amendment, using a pamphlet written by Selden Bacon and distributed by the Association, THE X AMENDMENT, ITS SUPREME IMPORTANCE AND ITS EFFECT ON THE XVIII AMENDMENT, New York, 1930. See David E. Kvig, "Amending the U.S. Constitution: Ratification Controversies, 1917-1971," Ohio History, 83 (1974) 156-69, at pp. 162-63. Generally, see C.W. Fornoff, "Ratification of Constitutional Amendments," [on the Sprague case] Illinois Law Review, 27 (1932) 72-75; Anon., "Validity of the Eighteenth Amendment," [on the Sprague case] University of Pennsylvania Law Review, 79 (1931) 807-09; and Clement E. Vose, Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900, Lexington Books,1972, at p. 98.

18. Leser v. Garnet, 258U.S. 130, 136 (1922).

19. Finis J. Garrett, writing only one year earlier, could not reduce this number much below 4,000. "Amending the Federal Constitution," Tennessee Law Review, 7 (1929) 286-309 at pp.304f. Speaking 10 years before Garrett, Senator Ashurst of Arizona found the number even higher:

> We set ourselves up as the leader among the nations in thought and as responsive to the people's will, and yet 4,500 men, if they saw fit, could Prussianize the Republic.

Cong.Rec. 58 (1919) 5697, quoted in Ralph R. Martig, "Amending the Constitution; Article V; the Keystone of the Arch," Michigan Law Review, 35 (1937) 1253-85 at p. 1282. Even if the entire populations of the ratifying states is taken into account, a constitutional amendment may be adopted by a minority of the people, despite the requirement of Article V that three-fourths of the states ratify every amendment. The reason is simply that the population of the least populous three-fourths is less then half of the national population. Joseph R. Long, "Tinkering With The Constitution," Yale Law Journal, 24 (1915) 573-89 (using 1910 census data); Charles L. Black, Jr., "Proposed Amendment to Article V: A Threatened Disaster," Yale Law Journal, 72 (1963) 957-66 (using 1960 census data); Peter Suber, "Population Changes and Constitutional Amendments: Federalism versus Democracy," University of Michigan Journal of Law Reform, 20, 2 (Winter 1987) 409-90 (using all 200 years of census data, 1790-1980).

20. Bacon, op. cit. at p. 772.

21. The story is told by Solomon Feferman in his biographical essay, "Gödel's Life and Work," in Solomon Feferman et al. (eds.), Kurt Gödel: Collected Works, Vol. 1: Publications 1929-1936, Oxford University Press, 1986, p. 12, and retold by Ed Regis in his Who Got Einstein's Office?, Addison-Wesley, 1987, pp. 57-58. Feferman traces the story to Oskar Morgenstern's reminiscences as told in Heinz Zemanek, "Oskar Morgenstern (1902-1977) - Kurt Gödel (1906-1978)," Elektronische Rechenanlagen, 20 (1978) 209-11, p. 210.

22. Bacon, op. cit. at pp. 778, 787.

23. The Ninth Amendment in its entirety reads:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

24. Bacon, op. cit. at p. 783.

25. Henry W. Taft, op. cit. at p. 652 (emphasis added).

26. Sprague, op. cit. at p.733. Cf. Orfield, op. cit. at p. 24: "[T]he Bill of Rights and the amending clause are themselves subject to alteration unless expressly forbidden to be altered."

27. A good list of horrors that might arise from the abuse of this absolute power may be found in the Appellants' Brief in the National Prohibition Cases. One horror is the amendment of the AC itself!

28. The exciting story is told by David E. Kyvig, Repealing National Prohibition, University of Chicago Press, 1980. See also Everett S. Brown, Ratification of the Twenty-First Amendment, U.S. Department of State, Publication No. 573 (1934), summarized in an article of the same title, American Political Science Review, 29 (1935) 1005-17; D.H. McLucas, "Some Legal Aspects of the Repeal of the Eighteenth Amendment," Illinois Law Review, 28 (1934) 950-58; G.J. Schaefer, "Amendments to the Constitution: Ratification by State Convention," St. John's Law Review, 7 (1933) 375-58; A. Lincoln, "Ratification by Conventions; A Discussion of the Question by What Authority Conventions in the States to Consider Ratifications

of Proposed Amendments to the Federal Constitution Should Be Called and Constituted," Massachusetts Law Quarterly, 18 (1933) 287-98; Anon., "Conventions to Ratify Constitutional Amendments," Law Notes, 37 (1933) 121-22 [41-42]; D. Smith, "Has Congress the Power to Call Conventions in the States to Consider Constitutional Amendments?" Journal of the Bar Association of Kansas, 21 (1933) 1-7; R.H. Anderson, "A Proposal to Create Conventions for Ratifying Amendments to the United States Constitution," Florida State Bar Association Law Journal, 6 (1933) 508-10; H.S. Phillips, "Has Congress the Power Under Article V of the Constitution to Call and Regulate the Holding of Ratifying Conventions Independent of State Legislatures?" ibid. 6 (1933) 573-78; R.H.A., "Ratification by Convention or Legislature, A Constitutional Enigma," Georgia Law Journal, 21 (1933) 333-39; N.T. Ball, "Ratification of Constitutional Amendments by State Conventions," George Washington Law Review, 2 (1934) 216-21; and Clement E. Vose, Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900, op. cit., Chapter 5 (pp. 101-37).

29. Clark was reportedly advised on the issues of the case by the noted constitutional scholar Edward S. Corwin of Princeton University. See Kyvig, op. cit. (1974) at p. 163, and Vose op. cit. at 98.

30. This proposition was rejected by the Supreme Court in four cases, three times in dictum and once in Sprague, and here even Judge Clark rejects it. A sustained critique of the idea is Walter F. Dodd, "Amending the Constitution," Yale Law Journal, 30 (1920) 321-54.

31. U.S. v. Sprague, 44 F.2d 967, 981, 984 (1930).

32. "Even if this opinion meets with a cold reception in the appellate courts, we hope that it will at least have the effect of focusing the country's thought upon the neglected method of considering constitutional amendments in conventions." Ibid. at 967.

33. Ibid. at 985.

34. Ibid. at 974.

35. The important part of the Fourteenth Amendment for this discussion is the application of the "due process clause" to the states. The Fifth Amendment had applied the clause to the federal government.

36. A New Jersey plaintiff once argued that the Fourteenth Amendment nullified the New Jersey state AC. Jackman v. Bodine, 78 N.J.Super. 414, 188 A.2d 642 (1063). He claimed that the absence of any provision for citizen initiative or popular referendum violated the Due Process clause. Because New Jersey state senators were not elected on a one-person, one-vote basis, he also claimed that the role of the state senate in the amendment process violated the Equal Protection clause. The court held against him on both counts, in conclusory language. Of course, even if the plaintiff's theories had been vindicated, they did not imply that self-amendment had occurred.

Note that a section of the New Mexican AC has been struck down for violating the one-person, one-vote principle. State v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143 (1968). See Arthur O'Neal Beach, "Constitutional Revision —Constitutional Amendment Process [in New Mexico]," Natural Resources Journal, 9 (1969) 422-29.

37. Alexander Hamilton, Federalist #78: "But this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing."

Section 17: Amendment by Treaty

A. The treaty power v. the amending power

The supremacy clause of the constitution, Article VI, §2, makes the federal constitution, federal statutes, and "all treaties made, or which shall be made, under the authority of the United States," the "supreme law of the land...anything in the constitution of laws of any State to the contrary notwithstanding." The clause clearly makes treaties superior to state statutes, even to state constitutions. Baldwin v. Franks, 120 U.S. 678 (1887), Wyers v. Arnold, 347 Mo. 413, 147 S.W. 2d 644, 134 A.L.R. 876 (1941), cert. den. 313 U.S. 589.

But despite the supremacy clause there are exceptions, e.g. for state laws in exercise of the state police power, Lukich v. Dept. of Labor and Industries, 176 Wash. 221, 29 P.2d 388 (1934), state laws granting the right to administer an estate, Re Chaoussis' Estate, 139 Wash. 479, 247 P. 732 (1926), and generally for state laws that do not discriminate against aliens and whose reasonable requirements demand priority to treaties, Todok v. Union State Bank, 281 U.S. 499 (1930). The relation of treaties to state law is regulated by the supremacy clause; if it is complex, then we will not be surprised to discover that the relations of treaties to their co-supreme rules, federal statutory and constitutional rules, is even more complex.

In one sense treaties and federal statutes are on a par, for when they conflict, the most recent prevails, whether it is a treaty or a statute. Cook v. U.S., 288 U.S. 102 (1933). This implies that Congress can nullify a treaty by making a statute. Lem Moon Sing v. U.S., 158 U.S. 538 (1895). But whether courts can nullify treaties as they nullify statutes, for conflicting with the constitution, is not as clear (see below). Although federal statutes and regulations are on a par for many purposes, treaties always prevail over regulations. Shizuko Kumanomido v. Nagle, 40 F.2d 42 (CA.9 1930).[Note 1]

But it is the relation of treaties to constitutional rules that is most intriguing. The supremacy clause was almost certainly intended to make the federal constitution, statutes, and treaties superior to state law without asserting either their equality or subordination to one another. Hence it is not clear from the constitution alone whether treaties are higher, lower, or co-supreme with the constitution. Because federal statutes are clearly lower than the constitution, literal co-supremacy for all three types of law has not been read into the clause. The courts are left, then, to decide whether in a standoff between a provision and a conflicting treaty, the constitution is impliedly amended pro tanto by the treaty, or the treaty is impliedly amended (or suspended) pro tanto by the constitution.

We may see the situation as a special case of an attempted amendment of an entrenched rule. Does the attempted amendment amend or violate the entrenched rule? In the present case, the federal constitution is "self-entrenched" by the supremacy clause and custom, but in neither case so clearly that treaties are put in an inferior class from which attempted amendments must be interpreted as violations.[Note 2]

If treaties can amend the constitution, then the federal AC can be amended by treaty. Whether that has occurred would be worth knowing, certainly, but at best it could not be genuine self-amendment. For treaties are not made under the AC, but under the treaty-making clause (Article II, §2). However, an amendment of the AC by treaty could represent a limitation on internal sovereignty by external sovereignty, or of the rules constituting supremacy within the legal system by the rules constituting autonomy among the systems of the world.[Note 3]

Strict self-amendment could occur if the rule of change represented by the power of treaties to amend the constitution (supposing it exists in our legal system) were self-applied. Almost certainly, this has never happened. But it is not impossible to imagine a treaty that limited the effect of future treaties on domestic law, especially on the federal constitution. Indeed, in different degrees this is not at all unusual. Article II of the Charter of the United Nations prevents the Charter's application to a nation's domestic law (but does not bar such application by other treaties). Article 46 of the Vienna Convention on the Law of Treaties (the "treaty of treaties") governs all treaties made after its own ratification (excepting only those that except themselves) and does not allow a violation of domestic law to prevent the effectiveness of an act of treaty ratification unless the violation is a "manifest" violation of a domestic "law of fundamental importance". If treaties could amend our constitution at all, then Article 46 of the Vienna Convention would limit that power for certain small class of treaties —those conflicting with the constitution that were ratified in violation of the constitution. But even that small limitation would not constitute the strict self-amendment of the power of treaties to amend the constitution unless the Vienna Convention were itself ratified under that power rather than, say, under the ordinary treaty-making power.

More likely than a treaty that bars the effect of treaties on domestic constitutions is a domestic constitutional barrier to such effects. We have a good example from American history in the proposed Bricker amendment to the constitution. The Bricker amendment would have prevented treaties and executive agreements from amending the constitution, at least in a few basic ways. Because it would have limited the means by which the constitution could be amended, although not the means specified in the AC, it may arguably itself, if adopted, have been an example of self-amendment.[Note 4] More precisely, however, it would have been the amendment of an unofficial method of amendment by an official method.

There is no clear-cut case in American history of a treaty amending the constitution. Treaties that might be read to conflict with the constitution might be "reconciled" with it by a judicial opinion that could amount to amendment by reinterpretation.[Note 5] This may have happened with the Migratory Birds Treaty with Great Britain (discussed below). Or treaties that might be read to conflict with the constitution might be enforced domestically without the question of amendment arising or without the question reaching adjudication on the merits. For example, a 1924 treaty with Great Britain allowed British Cunard Lines to bring liquor into American ports. The treaty was challenged for violating Prohibition, but the suit was dismissed because the plaintiff lacked standing. Milliken v. Stone, 16 F.2d 981 (CA.2 1927).[Note 6]

But while there is no clear-cut case, there are many rumblings that the power may exist. When President Truman ordered his Secretary of Commerce to seize many of the nation's steel mills in World War II, the Supreme Court held his act to be an unconstitutional extension of executive authority. Three dissenters, however, led by Chief Justice Vinson, found Truman's order not only justified, but constitutional, under the Charter of the United Nations and the North Atlantic Treaty. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 668, 669 (1952).

Truman did not, as far as we know, act under the belief that international agreements authorized him to seize private property in the United States in a way that otherwise violated the constitution. But in the area of civil rights he deliberately tried to use the U.N. Charter to affect domestic law. When Congress proved reluctant to pass his civil rights program, Truman's Committee on Civil Rights tried to bypass Congress by having Truman's program incorporated into the U.N. Charter. In 1952 his Committee made such a proposal to the U.N.'s Human Rights Committee.[Note 7] At least this episode reflects the belief of the Truman administration that the U.N. Charter could establish civil liberties at the level of federal statutes, if not at the level of the constitution.

Others believed this too, from conservatives who feared that the United States could be turned socialist by the U.N.[Note 8] to liberals who hoped with Truman's Committee on Civil Rights that the U.N. could adopt meaningful (and self-executing) civil rights legislation faster than our dawdling Congress.[Note 9] Article II of the U.N. Charter (as noted) said that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." But as Moses Moskowitz has pointed out,[Note 10]

> Perhaps the correct position would be that once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, that subject ceases to be a matter 'essentially within the domestic jurisdiction of the Member States.'

Such views gave ample grounds for the hope and fear that the constitution could be amended by international agreements.

In February of 1952 the Section of International and Comparative Law of the American Bar Association reported to the House of Delegates that treaties could, under certain circumstances, deprive Americans of rights guaranteed by the constitution.[Note 11]

> So far as the requirement of indictment by grand jury and trial by jury are concerned, these apply only to trials in the federal courts, and can have no application to an international court set up by a group of nations in the exercise of their treaty-making power....[T]here is no reason why such courts may not be created in the exercise of the treaty-making power.

Supreme Court pronouncements have been ambiguous and inconsistent on the relative ranks of the constitution and treaties. In Doe v. Braden, 57 U.S. 635 (1853) the Court clearly said that the constitution was superior to treaties. When a treaty is properly adopted, then "the courts of justice have no right to annul or disregard any of its provisions, unless [the terms of the treaty] violate the Constitution of the United States." But only four years later it held that courts could not nullify treaties, even if they were inconsistent with the constitution. Fellow v. Blacksmith, 60 U.S. 366 (1857). By 1890 the treaty power was again under control:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of government or of its departments, and those arising from the nature of government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids....

Geofroy v. Riggs, 133 U.S. 258, 267 (1890); cf. Downes v. Bidwell, 182 U.S. 244 (1901), Reid v. Covert, 354 U.S. 1, 16 (1957). The continuing uncertainty of the relation between treaties and the constitution is well illustrated by U.S. v. Minnesota, 270 U.S. 181, 208 (1926) in which Justice Van Devanter summarized the history of the Supreme Court's position as that treaties are "generally...regarded as on much the same plane as acts of Congress, and are usually subject to the general limitations of the Constitution."[Note 12]

In Milliken a treaty seemed to authorize what the Eighteenth Amendment (Prohibition) forbade, and in Fellow an apparent conflict between treaty and constitution was decided de facto in favor of the treaty. In both cases the treaty survived because judicial review failed or withdrew, not because any court positively affirmed the priority of the treaty. The most striking case of a treaty seeming to violate or amend the constitution, followed by an affirmative pronouncement of the Supreme Court, is Missouri v. Holland, 252 U.S. 416 (1920). In an earlier case a federal statute protecting migratory birds was struck down as unconstitutional for not falling under any of Congress's enumerated powers. U.S. v. Shauver, 214 F. 154 (E.D. Ark. 1914). The United States then (1918) entered into a treaty with Great Britain to protect migratory birds in substantially the same way as the recently voided federal statute. Congress enacted legislation that implemented the treaty domestically.[Note 13] Not surprisingly, this implementing legislation was soon attacked for attempting to do what a court had recently declared it unconstitutional for Congress to do. The precise complaint was that the enabling legislation violated the reserved powers of the State of Missouri under the Tenth Amendment. In Missouri the Supreme Court upheld the federal implementing legislation.

This certainly looks like, and was widely perceived as, a case of an unconstitutional statute becoming constitutional solely because a treaty intervened to authorize it. As such it appeared to be a case of a treaty overriding or superseding the constitution, and amending it to the extent necessary to validate the implementing legislation.

But Justice Holmes did not find the implementing legislation to be constitutional solely because it was authorized by the treaty. Primarily, he held, the implementing legislation was authorized by the "necessary and proper" clause (Article I, §8.18). This implies that the lower court erred in

striking down the original statute, which Holmes never asserts. On the contrary, he suggests that the original legislation did exceed the enumerated powers of Congress, but that a treaty on the same subject may be valid under the treaty-making clause (Article II, §2), which could then justify implementing legislation.

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.

Id. at 433. That is an accurate paraphrase of the supremacy clause (Article VI, §2), but in context Holmes made it suggest that treaties need not be consistent with the constitution provided they are "made under the authority of the United States" —which under Article II, §2, means to be made by the President with the concurrence of two-thirds of the Senate. It was this hint of the possibility of constitutional amendment or supersession by unilateral action of the President and the Senate that prompted the Bricker amendment 30 years later in 1953, to overturn Missouri, and to limit the effects of treaties and executive agreements.

B. The Bricker amendment

Executive agreements were even more worrisome than treaties in this respect, for they are unilateral acts of the President, without even the concurrence of the Senate. The constitution makes no provision for them, yet they have been held to supersede state law. U.S. v. Pink, 315 U.S. 203 (1942). In practice, executive agreements have virtually the same full range of contents as treaties. They have multiplied as both a cause and effect of the growing ambitions of the Executive over the last half century.

Bricker's actual language prohibited the abridgment of the rights of American citizens by treaty (Sec. 1), prohibited the vesting of governmental powers in foreign or international bodies (Sec. 2), and prohibited the alteration or abridgment of federal laws, or of state laws and constitutions (suggesting a deliberate omission of the federal constitution) by treaty without the express action of Congress (Sec. 3). The other sections provided similar restrictions on executive agreements, provided Congress with power to enforce the amendment by appropriate legislation, and set a ratification deadline of seven years.[Note 14] Nothing in the amendment explicitly made the federal constitution superior to treaties or immune to amendment by treaty, except for those provisions of the constitution that allocate governmental powers and protect fundamental rights. Whether this omission should be blamed on poor draftsmanship or Senate bargaining is uncertain, for Bricker had more explicit and comprehensive language at his disposal that he chose not to use. The American Bar Association Committee on Peace and Law Through the United Nations drafted the following language, which the House of Delegates approved and which Bricker is known to have studied:[Note 15]

> Section 1. A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

Language remarkably similar to this A.B.A. draft was proposed by North Carolina 165 years earlier. When other states were demanding a Bill of Rights in the federal constitution, North Carolina demanded an amendment that would say[Note 16]

> ...nor shall any treaty be valid which is contradictory to the Constitution of the United States.

Scatterfield reports that Bricker was joined by 61 Senators in sponsoring his amendment; Chafee puts the number at "about 55".[Note 17] In any event a majority of Senators supported it, yet it did not pass the Congress to be submitted to the states. The strongest arguments against it were that it was unnecessary because treaties were already inferior to the constitution, a proposition many had reason to doubt, and that it would delay implementation and even ratification of treaties while Congress and the courts deliberated their merits.[Note 18] The Bricker amendment was, then, not only a potential example of self-amendment, but a case of Congress refusing to make determinate the indeterminate edges of one of the co-supreme powers of our legal system.

Notes

1. Virtually all these rules are modified by the temporary suspension of a treaty while the United States is at war with the other signatories. Meier v. Schmidt, 150 Neb. 383, 34 N.W.2d 400 (1948).

2. These topics were discussed more thoroughly in Section 9.C. My final resolution of the problem lies in the concept of a completely, but contingently, reflexive hierarchy, for which see Section 21.D.

3. See Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-513, at pp. 509-10; W.J. Rees, "The Theory of Sovereignty Restated," Mind, 59 (1950) 495-521, at pp. 519f; Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at p. 141. The relation between our supreme law and the external world order is well presented by George Grafton Wilson, "International Law and the Constitution," Boston University Law Review, 13 (1923) 234-60, 462-99.

4. This presupposes that at the time the Bricker amendment was proposed, treaties clearly could amend the constitution. John C. Scatterfield argued that treaties could do so, "Constitutional Amendment by Treaty and Executive Agreement," Mississippi Law Journal, 24 (1953) 280-94. Zechariah Chafee argued that treaties could not do so, "Amending the Constitution to Cripple Treaties," Louisiana Law Review, 12 (1952) 345-82. For other voices pro and con see note 18 below. It is possible that both sides were wrong, and that the effect of treaties on the constitution falls

into what Hart would call "open texture" —the uncertain fringe of determinate rules, where alternatives are left open by the generality of language or the paucity and ambiguity of preexisting authority. See H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, at pp. 124ff.

5. On amendment by reinterpretation, see Section 13. See also Note, "Judicial Review and the Growth of the Treaty Power," Syracuse Law Review, 3 (1952) 315-33.

6. Chafee does not believe this is a case of a treaty violating or amending the constitution, but he says it is the closest case he has seen. Chafee, op. cit., at p. 354.

7. See Scatterfield, op. cit., at pp. 283-287.

8. See the testimony of Frank E. Holman, one-time President of the American Bar Association, before a Senate subcommittee of the Judiciary Committee, considering the Bricker Amendment, February 18, 1953, quoted in Scatterfield, op. cit., at p. 287. Holman testified that a treaty could "change our form of government from a republic to a socialistic and completely centralized state;...put us in to a World Government...[and] increase the power of the Federal Government at the expense of the States." For some of Holman's voluminous writings in defense of the Bricker amendment, see note 18, below.

9. These hopes and fears were temporarily confirmed when the California Court of Appeals held that the U.N. Charter was self-executing (not in need of implementing legislation to apply domestically) and required the nullification of the California Alien Land Law. Fujii v. California, 217 P.2d 481, 218 P.2d 595 (Cal.App. 1950). Fujii was later overruled by the California Supreme Court, 38 Cal. 718, 242 P.2d 617 (1952), but the California Alien Land Law was held void under the Fourteenth Amendment. See Note, "United Nations Charter —Its Application As A Treaty to State Law," Boston University Law Review, 30 (1950) 555-61.

Also see Arthur Hobson Dean, Amending the Treaty Power, Chicago: American Bar Association, 1954 (pamphlet), at Appendix 1, p. ii, where he tells his southern audience, without the certainty he would like, that no treaty could abolish segregation in the United States. The dismal uncertainty of this for Dean, however, is offset by the unlikelihood that the United States would ever sign the Genocide Convention, circulated since the end of World War II, a treaty that would constitute a "threat to our liberties".

10. Moses Moskowitz, "Is the U.N.'s Bill of Human Rights Dangerous?" American Bar Association Journal, 38 (1949) 283, at 285; quoted in Scatterfield, op. cit. at p. 282.

11. Scatterfield, op. cit., at p. 287.

12. Emphases added.

13. The original, unconstitutional statute was 37 Stat. 847 (1913). The implementing legislation was the Migratory Bird Treaty Act of July 3, 1918, 16 U.S.C. §§703-711.

14. S.J.R. 1, 83rd Congress, 1st Session; 99 Cong. Rec. 6777 (1953).

15. Scatterfield, op. cit., at p. 288; Chafee, op. cit., at p. 350. Section 2 of the A.B.A. proposal is omitted in the text; it merely subjected executive agreements to regulation by Congress and to the same limitations that Section 1 provided for treaties.

16. See Dean, op. cit., at p. 9.

17. Scatterfield, op. cit., at p. 288; Chafee, op. cit., at p. 350.

18. See Chafee, op. cit. passim, but esp. pp. 354ff. Some of the other leading essays in opposition to the Bricker amendment include (in roughly chronological order) Zechariah Chafee, "Stop Being Terrified of Treaties; Stop Being Scared of the Constitution," American Bar Association Journal, 38 (1952) 731-34; Note, "Danger in the Treaty-Making Power —A Mirage," Temple University Law Quarterly, 25 (1952) 463-71; S.W. Jackson, "Treaty Powers Amendment Unnecessary," Journal of the Bar Association of Kansas, 22 (1953) 74-77, another article of same title, by M.G. Boss, ibid. 108-11; M.H. Merrill, "Treaty-Law —What is Bad About It?" Oklahoma Bar Association Journal, 24 (1953) 454-85; T. Pearson and D.C. Backus, "Save the Peace Power: Don't Strait-Jacket Treaties," American Bar Association Journal, 39 (1953) 804-08; B. MacChesney, "The Fallacies in the Case for the Bricker Amendment," Notre Dame Lawyer, 29 (1954) 529-82; Note, "Treaty-Making Power Is Not A Peril," Clev-Mar Law Review, 3 (1954) 74-84; Note, "Continued Defense of the Constitution Against the Bricker Proposals," Record of the Ass. of the Bar of New York City, 10 (1955) 114-42; and J.B. White and J.E. Fowler, "Bricker Amendment —Fallacies and Dangers," American Journal of International Law, 48 (1954) 23-56.

Some of the leading essays in support of the Bricker amendment include (in roughly chronological order) F.E. Holman, "Treaty Law-Making," American Bar Association Journal, 36 (1950) 707-10, 787; E.P. Deutsch, "The Peril in the Treaty-Making Clause," American Bar Association Journal, 37 (1951) 659; J.W. Bricker, "Amending the Treaty-Making Power: Pro and Con. Safeguarding the Treaty Power," Federal Bar Journal, 13 (1952) 77-98; F.E. Holman, "Treaty Law —A Threat to American Rights," Journal of the Bar Ass. of Kansas, 20 (1952) 253-63; E.P. Deutsch, "Legislation By Treaty," Michigan State Bar Journal, 31 (1952) 19-25; G.A. Finch, "Treaty-Clause Amendment: The Case for the Association," American Bar Association Journal, 38 (1952) 467-70, 527-30; E.P. Deutsch, "Need for a Treaty Amendment, Restatement and Reply," American Bar Association

Journal, 38 (1952) 735-38, 793-96; E.P. Deutsch, "Proposed Changes in the United States Treaty-Making Power," Louisiana Bar Journal, 1 (1953) 3-11; E.P. Deutsch, G.A. Finch, J.L. Call, H.C. Dillard, and Q. Wright, "Should the Constitution Be Amended to Limit the Treaty-Making Power?" Southern California Law Review, 26 (1953) 347-95; V. Hatch, "Treaty-Making Power: 'An Extraordinary Power Liable to Abuse'," American Bar Association Journal, 39 (1953) 853-55; F.E. Holman, "Greatest Threat to American Freedom," Wyoming Law Journal, 8 (1953) 24-38; F.E. Holman, "Treaty Law and the Constitution," Oklahoma Bar Association Journal, 24 (1953) 1333-48; Note, "Case for the Bricker Amendment," Georgia Law Journal, 42 (1954) 262-89; Arthur Hobson Dean, "Amending the Treaty Power," Stanford Law Review, 6 (1954) 589-612; G.A. Finch, "Need to Restrain the Treaty-Making power of the United States Within Constitutional Limits," American Journal of International Law, 48 (1954) 57-82; O.L. Phillips, "Treaty-Making Power —A Real and Present Danger," Montana Law Review, 15 (1954) 1-14; and J.W. Bricker and C.A. Welch, "Bricker Amendment: Pro and Con. Treaty Law v. Domestic Constitutional Law," Notre Dame Lawyer, 29 (1954) 529-82.

Section 18: Amendment by "Inalienable Right to Alter or Abolish Government"

A. Amending v. altering or abolishing

The third sentence of the Declaration of Independence reads:

> That to secure these rights [to life, liberty, and the pursuit of happiness], governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This paragraph continues, counseling against use of this right "for light and transient causes". However, a "long train of abuses and usurpations", especially one "evincing a design to reduce [the people] under absolute despotism" suffices to trigger not only the right, but also the duty, "to throw off such government and to provide new guards for their future security".

No comparable language is to be found in the federal constitution; the only right to alter or abolish government found expressed there is the AC. We almost had such language in the constitution, however. James Madison proposed to insert the following language,[Note 1] strongly asserting

> That the people have an indubitable, inalienable, and indefeasible right to reform or change their Government, whenever it may be found adverse or inadequate to the purposes of its institution.

Note that in Federalist #39 Madison wrote that "a majority of every national society" is "competent at all times....to alter or abolish its established government." Alexander Hamilton repeated the principle in Federalist #78, referring to

> that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness.

Hamilton, like Jefferson, says the right should not be exercised under a mere "momentary inclination". But he departs from both Madison and Jefferson, apparently, by linking the right closely to an AC, and denying that the right authorizes an act "incompatible with the provisions in the existing Constitution" or could make any act "justifiable in a violation of those provisions". In this way Madison and Hamilton reflect the basic divisions on the right to alter or abolish government that we will find in the state constitutions. Madison finds it a real power stated in plain language, while Hamilton finds it a grandiloquent statement of principle that legally adds nothing to an express AC.

However, comparable language obviously derived from the Declaration of Independence may be found in many state constitutions side by side with the ACs. What is the relation between an express AC and an express right to alter or abolish government? Is the latter surplusage, a mere rhetorical flourish? That is unlikely in view of the fact that most state constitutions put the right to alter or abolish government, not in a grand preamble, but in an otherwise enforceable Bill of Rights along with rights to free expression, freedom from unreasonable searches, and so on.

No litigant that I know of has contended in court that the Declaration of Independence provides a right to amend the federal constitution independently of the federal AC. However, a "peace convention" called by Virginia after the Civil War proposed several amendments to the constitution, one of which would have recognized the

> reserved power of the people in three-fourths of the states to call a national convention to alter, amend, or abolish this constitution....

The proposal also specified that such power shall be independent of Article V, and shall "never be questioned."[Note 2] The proposed amendment was submitted to Congress for consideration under Article V, but was not officially proposed by Congress to the states. It is unclear whether the "peace convention" believed that there was already a right to alter and abolish government independently of Article V, which it intended to solidify through textual recognition, or whether it believed there was no such right, which it intended to add by amendment.

One commentator believes the Declaration of Independence already provides a right to alter the federal constitution independently of Article V. William MacDonald proposes wholesale revision of the federal constitution in his book, A New Constitution for a New America.[Note 3] He believes Article V does not suffice for such broad change, and finds an adequate power in the Declaration. But he offers no legal reason to suppose either that Article V does not suffice or that amendment through the Declaration of Independence would be anything other than revolution sanctioned by the same moral principles that sanctioned our first revolution.

The question of the relation of an AC to a right to alter or abolish government is raised most pointedly for state constitutions, which often contain both rights in equally explicit language in equally enforceable sections of the constitution.

One difference should be noted at the outset. In the absence of entrenchment clauses, the power to amend through an AC is limited only by procedures —such as supermajority votes, limits on the number of amendments that may be submitted at one time, minimum time intervals between amendments, and so on. Clauses containing a right to alter and abolish government, on the other hand, are usually silent or extremely vague on procedure, but do not hesitate to outline substantive conditions that would justify exercising the right.

The Declaration of Independence, for example, allows a right to alter or abolish government only when government has become "destructive" of the rights to life, liberty, and the pursuit of happiness, and only when a "long train of abuses and usurpations" reveals a "design" to put the people under "absolute despotism". After government is abolished it must be rebuilt in such form as "shall seem [to the people] most likely to effect their safety and happiness." This language provides no bright lines, but that does not make it legally useless. It is at least as clear and determinate as "high crimes and misdemeanors", "commerce...among the several states", "all laws which shall be necessary and proper", "due process", or "equal protection of the laws".

The language of most state clauses is less specific. The people are sometimes given the right to alter or abolish government whenever "the public good may require it" (Iowa, Nevada, North Dakota), whenever "the public welfare may require it" (Utah), or whenever the people "deem it necessary" (Colorado, Ohio). Other states recognize the right only "when [the people's] safety and happiness require it" (Maine), or "when their safety, prosperity, and happiness require it" (Massachusetts). The most specific language recognizes the right "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual" (New Hampshire). Two states leave the right unlimited and unqualified (Indiana, South Carolina). Many of the other states limit the right with language suggesting procedural restraints, although of the weakest kind, for example, saying that the people may alter or abolish their government "in such manner as they deem proper" (Kentucky, Oregon, Pennsylvania, South Dakota, Tennessee, Wyoming) or "in such manner as they may deem expedient" (Maryland, Texas) or "in such manner as shall be judged most conducive to the public weal" (West Virginia). South Dakota limits the right to alter or abolish government to "lawful and constitutional methods", Rhode Island limits it to "an explicit and authentic act of the whole people",[Note 4] and West Virginia vests it not in "the people" but in a "majority of the community".

Just what a state could intend by including such a right when procedures for amendment are already provided is far from clear. The language of the Declaration of Independence, imitated by most of the states at least in the phrase "alter or abolish", was in its historical context seeking a justification for revolution, or for severance from one's erstwhile sovereign without its consent. Thomas Jefferson may have chosen the words "alter or abolish" in part for their euphemistic effect, suggesting something closer to amendment than revolt. But clearly a right to revolt was sought by Jefferson and clearly one was read into his language.[Note 5] Leaving aside the questions whether Jefferson sought a legal or moral right to revolt, and whether a legal right to revolt is a contradiction in terms, we may still ask whether the states that took over the "alter or abolish" language meant to incorporate into their constitutions a right to revolt of any kind, or merely a strange sort of amendment power, or just a grandiloquent statement of principle. Put this way the question is historical and the answer undoubtedly varies among the states.

The theory that the right to alter or abolish is just a rhetorical gesture, though a very solemn one, may be true of some states, but not all. The South Dakota clause that limits the right to "lawful and constitutional methods" evidently adds nothing to the law beyond the AC, unless it is a symbolic statement of principle. But most states put the right in their Bill of Rights with other rights that are unquestionably propositions of living law routinely enforced by courts, and do not qualify them with words that limit them, in effect, to the AC. Even New Hampshire, however, which has the most specific language (noted above), and which places the right in its Bill of Rights, has added to the statement of the right what must be called a rhetorical embellishment. After announcing the right, the clause continues, "The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." The flourish, ironically, casts doubt on the legal validity of the preceding right —and the possibility that New Hampshire's specific language may be symbolic casts doubt on the more formulaic clauses of other states.

But we know that at least two of the state clauses have been taken as propositions of law announcing an operative right. The present constitution of Tennessee (1870) is the only one in the nation's history, I believe, that names as its enabling authority the right to alter or abolish government found in its predecessor (1834),[Note 6] rather than the prior AC, or federal enabling legislation, or something else. Similarly, the Rhode Island Supreme Court declared in 1935 that a constitutional convention could be called by the legislature under the authority of the right to alter or abolish (which in Rhode Island is actually a right to "make and alter") when the AC was silent on the permissibility of conventions. In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935).[Note 7] The Rhode Island right to "make and alter" required "an explicit and authentic act of the whole people", which the court held was to be had by a simple statewide majority vote, not on the permissibility of calling the convention, but to ratify the product of any convention called unilaterally by the legislature. Id. at 437.

This suggests another possible theory. Many states distinguish "amendment", which is piecemeal, from "revision", which is wholesale. Of the states drawing this distinction some do and some do not have an AC capable of both powers. Conceivably the right to alter or abolish is the only way some states have found to justify wholesale revision in the absence of explicit accommodating language in their AC, or in the case of some early constitutions, in the absence of an AC itself.[Note 8] This theory may also explain why California, for example, which lacked a right to alter or abolish in its constitution of 1849, had to resort to self-amendment so that its AC would provide for the replacement of the whole constitution. Some state language supports this theory more than others. The Massachusetts clause, for example, recognizes the "right to institute government, and to reform, alter, or totally change the same" (emphasis added) which suggests that the drafters did not believe that "reform" or "alter" sufficed.

Similarly, the right to alter or abolish could differ from an ordinary AC by including the right to "abolish". The power to amend might reasonably be restricted to exchanging one form of government for another, but never for exchanging government for non-government. Of course, some state clauses speak of abolishing the form of government, not government per se, and might be as limited as ACs in this regard. But insofar as revolt includes the abolition of government per se, then a true right to revolt probably could not be read into an AC, even if most revolutionary goals

could be accomplished in principle through an AC. Against this theory is the reflection that neither Thomas Jefferson nor the framers of the state clauses valued anarchy enough to recognize a right to create it.

Every right to alter or abolish clause without exception declares that the right is "inalienable" or "indefeasible". That suggests that this particular type of amendment power is continuing, not self-embracing. It also suggests an appeal to higher law. Although inalienable rights may be guaranteed by ordinary positive law, the clauses may intend to secure positive law by moral law. They may be guarantees of the liberties by which the nation and its states came into being, including the right to revolt, without intending to be guarantees "in law". They may exist, even in otherwise enforceable sections of the constitution, as symbols of the state's principles and willingness to declare them in august form. That would make them more than rhetorical adornment and in different ways both more and less than a legal right to amend. They would be legally unenforceable declarations of a right underlying and transcending law.

Very few states have settled the relationship of their AC to their right to alter or abolish, even in part. Maryland is one of the few states with a "Declaration of Rights" in its constitution that is less authoritative than the other sections. It is much more than a long rhetorical ornament, however, for its language does control when the main text is unclear. That was the holding of Anderson v. Baker, 23 Md. 531 (1865). For more than a century after Anderson, the AC and the right to alter or abolish coexisted in an unsettled state. But in 1970 Bourbon v. Governor of Maryland, 258 Md. 252, 265 A.2d 477 held that the AC in the main text was "clear, explicit, and unambiguous."[Note 9] That in effect reduced the right to alter or abolish to a merely symbolic statement.

Iowa is one of the few other states to address even partially or indirectly the relationship of the AC to the right to alter or abolish government. In Iowa an amendment defectively passed by the legislature but properly ratified by the people, under the ordinary AC, was held invalid and not cured by a clause in the constitution declaring that "all political power [lies] in the people." Koehler v. Hill, 60 Iowa 543, 14 N.W. 783, 15 N.W. 609 (1883).

The theory that the right to alter or abolish is an appeal to higher law is supported by the difficulty of conceiving a positive law right to revolt or overthrow positive law.[Note 10] Moreover, only the Colorado clause extends the right to the alteration or abolition of the state constitution. All other states speak only of altering or abolishing "government" or the "form of government". This suggests a right to revolt or act, rather than a legalistic right to amend language. But at the same time it forces us to ask whether a right to revolt, in a constitution, is a legal or moral right, and whether a legal right to revolt is a contradiction in terms. If it is a moral ("higher law") right, then is its placement in the constitution merely for emphasis, or for the symbolic effect of gravely treating it as if it were law? If it is a legal right, then we must either give up the idea that revolution is inherently illegal, or admit that a contradiction has been elevated to constitutional law. The former is a question which I could contentedly answer either way,[Note 11] and the latter is an acceptable consequence of the acceptance theory.

B. The right to alter or abolish government self-applied

Finally we must ask whether the right to alter or abolish government can give rise to the paradox of self-amendment. Can the rule of change represented by the right be self-applied? If the typical language of "inalienability" and "indefeasibility" makes the right continuing, not self-embracing, then most self-application is precluded. More precisely, all self-imposed limitations will be revocable. But if the right is continuing, then it is limited and cannot amend itself in ways that would diminish its power or scope irrevocably —and this may be inconsistent with the broad language of some of the clauses. But the whole question of self-application is avoided if the right is read to apply to governments only, not to documents or to powers of the people. Then the right is beyond its own application, and is immune to itself, and self-diminution would be impossible.

The interpretation I prefer, however, is that the acceptance of the people possesses contingent, continuing omnipotence and cannot irrevocably deprive itself of the power to validate the ultimate premises of the legal system (see Section 8.B). This amounts to an alegal right to revolt that cannot irrevocably be amended, repealed, or limited by any legal process. It need not be stated in a right to alter or abolish clause, nor should stating it be taken to render it repealable or limited, as if confined to the mutability and specificity of the language expressing it. But on the other hand the unfailing rights of acceptance are well expressed by the right to alter or abolish clauses, not in every particular, but as strong, general statements of the superiority of the will of the people to their government and form of government, even if the rules of the latter make it supreme, exclusive, incompletely self-entrenched and mutable only by its own procedures.

All this is to say, however, that the clauses are somewhat confused. They may express well the serious convictions of their framers, in a place somewhat germane to those convictions. But it is like inserting into the rulebook for Monopoly the proposition that no one has to play if they don't want to, and that if they begin, then they can quit, and that if everyone playing agrees, then they can start with less money or make other rule changes. It may not go without saying to some players, so the insertion may be an effective communication to some of its audience. But inserting it into the rulebook creates an unnecessary air of paradox, since it is not a rule but a meta-level reflection on the rules. But this paradox is more amusing than calamitous. For players who modify the rules of monopoly cannot modify this meta-level reflection, even though it is stated as a rule. They may introduce new rules to limit their freedom to change the rules, but they are still free to change the new rules. Even when they feel bound, they can quit.[Note 12]

Notes

1. Herbert Vandenberg Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History, Washington, D.C.: Government Printing Office, 1897, at p. 185.

2. This proposal is discussed in Appendix 1.C.6.

3. New York: B.W. Huebsch, 1921. MacDonald's views are discussed in Appendix 1.E.

4. This language is the result of Rhode Island's hard experience with the legality of the Dorr Rebellion. See the entry under Rhode Island in Appendix 2.

5. On the attempt by Jefferson and others to find a legal justification for the revolution, see R.A. Humphreys, "Rule of Law and the American Revolution," Law Quarterly Review, 53 (1937) 80-98, and Edward Dumbauld, "The Sound Principles of the Revolution," Pennsylvania Bar Association Quarterly, 47 (1976) 554-66. Focusing specifically on Jefferson's language in the "right to alter or abolish" clause is Raymond E. Hayes, "Revolution as a Constitutional Right," Temple University Law Quarterly, 13(1938) 18-29, at pp. 19-20.

6. The current Tennessee constitution (1870) declares in the preamble that it was made in convention called by the legislature under the authority of the right to alter or abolish government found in the prior constitution (1834). The AC of the 1834 constitution did not explicitly provide for amendment by convention, although it permitted any number of amendments to be proposed and ratified at once. The preamble to the 1834 constitution, by contrast, names the AC of the prior constitution (1796) as its authority. See the entry on Tennessee in Appendix 2.

7. Some of the controversy in the background of this decision is recounted by Clifford C. Hubbard, "The Issue of Constitutional Amendment in Rhode Island," American Political Science Review, 30 (1936) 537-40, at pp. 539-40.

8. The following state constitutions contained no AC at all: Connecticut (1776), New Hampshire (1776), New Jersey (1776), New York (1777), North Carolina (1776), Ohio (1802) (?), Pennsylvania (1790) (?), South Carolina (1778, 1776), Virginia (1864, 1851, 1829, 1776), and a proposed but rejected Massachusetts constitution (1778). The law and scholarly opinion on the permissibility of amendment under such constitutions is well summarized in In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 449-51 (1935). Note that the Connecticut "constitution" of 1776 and the two South Carolina "constitutions" of 1776 and 1778 were found by courts to be mere statutes. Hence they were amendable by all the rules of change valid for statutes, including other statutes. On amendment without express authority, see also Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at pp. 39, 138, 157.

9. The Bourbon case did not arise because a party proposed to amend the constitution through the right to alter or abolish; hence, unfortunately, the case did not address the relation of the AC to the right to alter or abolish government.

10. Kelsen's view that revolution can be justified by positive international law is criticized by A.M. Honore, "Reflections on Revolutions," The Irish Jurist, n.s. 2 (1967) 268-78, at p. 272. Other positive law justifications, such as necessity, are considered by Honore at pp. 274-75, and by S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations," Western Ontario Law Review, 7 (1968) 93-110, at p. 100. Both Honore and de Smith consider non-positivistic justifications as well; for more on these, see J.M. Eekelaar, "Principles of Revolutionary Legality," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 22-43.

11. Nevertheless I have assumed throughout this essay that revolution is unlawful by definition, and that acts that exceed their authority or new regimes that are not authorized by their predecessor's AC or equivalent are revolutionary. I was led to this usage primarily for convenience, in order to have a word ("revolution") for amendments that violate the AC. But the question should not be thought closed by making these conventions of word usage explicit. Revolutionary acts may be thought illegal by definition at the time and place where they occurred, but they are frequently cured by retroactive legislation or acquiescence in the regimes they establish, and are cheered as lawful in other places. And of course many "revolutionary acts" are often arguably legal, some even unarguably legal, at the time and place where they occurred, and are interpreted as revolutionary only by custodians of law unwilling to respect provisions of law against their interest. These phenomena of legal history cannot be blinked away by dictionary definitions.

12. Those interested in this line of thought may wish to look at the first rule of the game Nomic, in Appendix 3 (enjoining players to obey the rules of the game), and then try to play a game in which that rule is amended or repealed.

Section 19: Amendment by Desuetude

Desuetude is the doctrine that long and continued non-use of a law renders it invalid, at least in the sense that courts will no longer tolerate punishing its transgressors.[Note 1] U.S. v. Elliott, 266 F.Supp. 318, 325 (D.C.N.Y. 1967). It is common in the Roman, civil law nations of Europe, but not in England or the United States. The only Anglo-American system to recognize desuetude is Scotland.[Note 2] Desuetude was formerly recognized in this country, O'Hanlon v. Myers, 10 Rich. 128 (S.C. 1856); but the present "official" view rejects it, at least for statutes. "There can be no repeal of a criminal statute by the failure of authorities to prosecute or convict for its violation." Callahan v. State, 156 Md. 459, 144 A. 350 (1929).

Despite the "official" view, some vestiges still remain, for example, in the American Bar Association Standards Relating to the Prosecutorial Function. The A.B.A. lists eight factors that should influence prosecutorial discretion, one of which is "prolonged non-enforcement of a statute, with community acquiescence." This is mere prosecutorial policy, not a rule that might bind a court.[Note 3] But a trace of desuetude in the latter sense still exists as well. In the Elliott case, above, the defendant was charged with violating a statute enacted half a century earlier and never used.[Note 4] After reviewing cases and scholars asserting the "official" view, and some arguing against it, the court left the door ajar by ruling that there is

> little analytical aid in merely applying, or refusing to apply, the rubric of desuetude. The problem must be approached in terms of that fundamental fairness owed to the particular defendant that is the heart of due process.

Elliott, id. at 326. Although finding the old law valid and convicting the defendant, the court in effect resurrected or recognized the doctrine of desuetude by translating it into the modern doctrines of fairness, notice, vagueness, and due process.

Where desuetude still exists it is a rule of change for the types of law to which it applies. If desuetude could apply to American constitutional rules, which has been debated,[Note 5] then parts of the AC could be repealed through desuetude. That, of course, would not constitute self-amendment, for desuetude is not authorized by the AC itself. It would constitute amendment of the AC by an "unofficial" method of amendment outside the AC, just as it would be if amended by judicial review or treaty.

One provision of the federal AC has never been used in the history of the clause: the provision for states to petition Congress to call a national convention.[Note 6] By "not used" I mean that while many states have petitioned Congress to call a convention, they have never triggered action by Congress under Article V to call such a convention. Could this provision fall into such neglect that it may no longer be used?

That is doubtful, even though the history of its neglect may constitute a practical (not legal) impediment to its use. The uncertainty of its operation combined with the gravity of its potential consequences is today probably the single greatest obstacle to its use; and much of the uncertainty about the clause is undoubtedly due to its non-use.

Genuine self-amendment of the AC through desuetude could occur only if the AC already allowed repeal by desuetude (say, by a prior act of self-amendment) and if that provision lapsed through desuetude. Leaving the AC aside, the same form of self-amendment could occur to the common law or customary rule of desuetude (if there is one). Indeed, this may have happened in the United States: our earlier recognition of desuetude may have waned through desuetude. More likely, though, it was reversed by more or less deliberate policy choices or evolving concepts of law itself, such as a growing formalism, positivism, deference to legislatures, and increased codification of the common law. But if the doctrine of desuetude had been repealed by desuetude in the United States, then we would face the same sort of problem faced in the case of self-repeal by sunset clause (Section 12). Desuetude could undo desuetude only by the continuing, present validity of desuetude. The cat could be made to vanish only if a grin remained.

Desuetude may not have been repealed by desuetude, but a closely related doctrine may have governed its own demise. Sir C.K. Allen believes that desuetude has never been recognized in England. However, he says,[Note 7]

> There was...at one time a theory, which, under the name of 'non-observance', came very near to a doctrine of desuetude, that if a statute had been in existence for any considerable period without ever having been put into operation, it might be treated as null....[I]t may now be considered to be wholly discarded.

How does non-observance differ from desuetude and why is it now discarded? Non-observance, it seems, treats a rule as if it were null by refusing to enforce it after a long period of non-enforcement, while desuetude (when applicable) would declare a rule actually null by obsolescence. The distinction may be accepted, but clearly the doctrine of non-observance, now "discarded" and not repealed by statute, did not fall by desuetude. If it applied only to statutes, or to rules that were themselves never applied, then it cannot apply to itself. But if it describes the quasi-nullity of any rule that will not be enforced due to long non-enforcement, then it truly describes its own current status —or would do so but for the present or continuing validity it would need to do so.

Repeal by desuetude is much like repeal by sunset clause. Indeed, we could call the doctrine of desuetude an implied and indefinite sunset clause. This highlights a significant difference between the two. A sunset clause may be part of the legal rule being repealed, and typically is. Therefore we must ask how it tells us with authority, after self-repeal, that repeal has occurred. But the doctrine of desuetude is external to the rule being repealed (but for the extraordinary, reflexive application to repeal the doctrine of desuetude). Therefore, its normal operation is irreflexive and raises no question of partial or total self-repeal. While sunset clauses resemble the skeptics' statements of uncertainty, which "cancelled

themselves" the way rhubarb washes out the digestive system and itself, the doctrine of desuetude resembles the skeptics' "proof that proofs are impossible" —even when it succeeds, it displays the continuing possibility of what it aimed to undo.

Amendment by frequent, successful violation is a variant of desuetude. Desuetude is classically triggered by neglect or non-enforcement, both of which may be responses to frequent violation. Desuetude without violation is possible for rules whose original purpose or sphere of application fades away, making violation as obsolete as compliance. But where desuetude is recognized, a custom or practice contrary to the rule of law must usually have arisen,[Note 8] a custom that is itself a function of frequent violation. In this sense violation may become repeal even though the acts of violation do not and ordinarily must not have law-making effect.[Note 9] Amendment by violation is officially rejected at the constitutional level in the United States. State ex. inf. Barrett ex rel. Bradshaw v. Hedrick, 241 S.W. 402, 421 (Mo.Sup.Ct. 1922) (the legislature cannot amend the constitution merely by violating it frequently).

Does desuetude apply in any way to the American state and federal constitutions? The negative answer of Hedrick is common. In Walz v. Tax Commission of the City of New York, 397 U.S. 664, 678 (1970) the Supreme Court asserted that

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.

In Walz the "custom" was tax exemption for churches, which the court upheld after so dramatically declaring it open to question. Softening its bold position on desuetude, it cited the statement of Justice Holmes in Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922):

> If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.

The Holmsean qualification almost reintroduces desuetude, like the Elliott case, in the guise of fairness or due process. However it is the bold, unqualified rejection of desuetude that has been most quoted from Walz.[Note 10] A similar principle often found is that "[c]hanged economic conditions or developments do not amend the Constitution." Burns v. Alderson, 51 Wash.2d 810, 322 P.2d 359, 361 (1958) (contains many citations to other cases).

One may suspect that these unqualified rejections of desuetude are, like the exclusivity of the AC that they support, merely an official view repeated for form's sake and compromised in practice as needed. Desuetude may be conceived as the repeal of law through custom. One may expect to find it, at least unofficially, wherever custom is recognized as a source of law. Custom becomes a rule of change for constitutions primarily through the agency of judicial interpretation and reinterpretation, a quasi-official rule of change for constitutions with a strong claim to de facto validity (Section 15). Changes in practice, usage, custom, or popular values commonly affect the interpretation of the constitution, sometimes through judicial "activism" that incorporates such changes, and sometimes by judicial "restraint" that defers to legislative, executive, or administrative departures from firm rules or prior interpretations of the constitution.[Note 11]

An example from our own discussion in Section 17 is the rise of executive agreements as alternatives to treaties that dispense with the consent of the Senate. The constitution does not recognize them, but they have become customary. An anonymous English scholar observes that[Note 12]

> By such and kindred devices our kin beyond the sea have ingeniously contrived to modify in various directions their much venerated Constitution which was fondly imagined by its authors to be immutable save by the orthodox method of formal amendment as prescribed in Article V.

When we look for something more direct we face many difficulties. Is the convention method of amendment desuetudinal just because long non-use has created uncertainties that form practical and political barriers to its use? Until 1933 the same might have been said of the method of ratifying amendments in state conventions. Provided by the constitution from the beginning, it had never been used. But that method was dusted off and used for the first time, one might say with relish, in ratifying the Twenty-First Amendment, the repeal of Prohibition (see Section 16).

There are other sections of the constitution to which we might look as clauses that may have lapsed through desuetude. One lies in §2 of the Fourteenth Amendment. It says that if a state improperly restricts the right to vote, then its basis of representation "shall" be reduced in the proportion which the number of victims bears to the number of eligible voters. Despite the strong language and frequent violations, this mandatory penalty has never been imposed.

By one estimate, the British North America Act of 1867, which functions as the constitution of Canada, contains 50 sections that have "no remaining constitutional force although they have formal validity."[Note 13]

One of the most litigated examples in our constitution is Article I, §9.7, which requires that "expenditures of all public money shall be published from time to time." This clause still lives for most public money, but the budget of the Central Intelligence Agency is notoriously, and officially, secret. Repeated attempts to compel publication of its budget under Article I, §9.7 have failed, not through any express appeal to desuetude, but through an impenetrable web of objections based (for the most part) on standing.[Note 14] Of course the official reasons for the secrecy of the C.I.A. budget do not include the desuetude of Article I, §9.7. They are all appeals in some way to national security. But there is no official national security exception to Article I, §9.7 (or to virtually any clause of the constitution, either), which is one reason why lack of standing must be invoked by a government anxious to preserve secrecy. Hence, while it appears that national security and standing problems protect the C.I.A. budget from

disclosure, we might say instead that Article I, §9.7 has been amended by custom to permit an exception for national security. The only obstacle to this reading of the facts, however, is that the C.I.A. budget has repeatedly been the target of civil action seeking disclosure. The rule forcing disclosure has not been beyond the reach of plaintiffs on account of obsolescence so much as, on the contrary, vigilant maneuvering.

One more possible application of desuetude to constitutions may be noted. If a constitution or amendment is adopted in violation of a minor but clear rule of procedure, then many states and nations will allow it to become valid by acquiescence.[Note 15] But cure by acquiescence is a form of desuetude applied to the rule that had been violated. If the rule does not completely lose its validity as time passes and as a contrary custom arises, at least it loses its authority over a major violation.[Note 16] One may interpret cure by acquiescence in other ways, but the similarity to desuetude will not be erased. For example, my own preferred interpretation is that cure by acquiescence represents the triumph of social acceptance over the formal rules that would invalidate the constitution or amendment. Insofar as the violated rule is valid by the rule of recognition, acceptance overrules (or amends) the latter in order to invalidate the former. But any time acceptance overrules (or amends) the rule of recognition in order to invalidate a law, the "unacceptable" has lapsed according to a process with an ineradicable resemblance to desuetude.

Nothing could be more foreign to legal formalism, or a Rossian inference model, than to suppose that either neglect or violation could amend any legal rule. By their favorite analogies, formalists would find desuetude as sensible as supposing that habitual bad reasoning could amend the principle of non-contradiction.[Note 17] Acceptance theorists like Hart, on the contrary, offer the readiest explanation for desuetude and amendment by violation. No rule is of present legal validity, under the acceptance theory, if it is not presently accepted as legally valid, either directly or through an accepted rule of recognition.

A sophisticated acceptance theory must account for the validity of laws that have not been used for some time and which are therefore out of the actual consciousness of most citizens and officials of the system. No acceptance theory, however, need make this task more difficult than it is by equating acceptance with the contents of the actual consciousness of a bloc of citizens or of the constructive fiction of the collective consciousness. The presently accepted rule of recognition, not overruled on this particular by acceptance, may even deny desuetude by ascribing continuing validity to any statute or constitutional rule enacted in the proper way but not yet repealed in any of the official or non-desuetudinal ways.

I suggest that the transition in America from an era in which desuetude was recognized to the present era in which it is not is due, not to desuetude itself, but to a transformation in our legal thinking from a variant of the acceptance theory in which popular sovereignty was a more concrete and compelling idea, to a more rigid formalism in which law became official, "scientific", "professional", and abstractly conceived as self-entrenched or amendable only by its own official means.[Note 18]

Notes

1. Linda and William Rogers, "Desuetude as a Defense," Iowa Law Review, 52 (1966) 1-30; Arthur E. Bonfield, "The Abrogation of Penal Statutes by Nonenforcement," Iowa Law Review, 49 (1964) 389-440; John Chipman Gray, "Desuetude of Statutes in the United States," in his The Nature and Sources of Law, Macmillan, 2d. ed., 1921, pp. 329-34.

2. See J.R. Philip, "Some Reflections on Desuetude," Juridical Review, 43 (1931) 260-67.

3. For a detailed comparison of desuetude to different types of prosecutorial policies of non-enforcement, and a persuasive argument that each may justify an act of "violation" or rule-departure by citizens, see Mortimer and Sanford Kadish, Discretion to Disobey: A Study of Lawful Departures From Legal Rules, Stanford University Press, 1973, pp. 127-40.

4. The statute, 18 U.S.C. 956, was enacted in 1917. It prohibited conspiracies within the United States to destroy property in foreign nations with which the United States is at peace.

5. Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at p. 81. Orfield asks whether the Fifteenth Amendment has lapsed through desuetude and non-enforcement, but eventually rejects the idea. Without using the word "desuetude", Arthur Machen believes that the Fifteenth Amendment is void (inter alia) because it has never been enforced. Arthur Machen Jr., "Is the Fifteenth Amendment Void?" Harvard Law Review, 23 (1910) 169-93, at p. 169. When Machen was writing, 40 years had elapsed since the amendment's adoption, including the reconstruction following the Civil War; and the Fifteenth Amendment had never once been used to invalidate a state or federal statute. However, as Orfield notes, two Supreme Court cases enforcing the Fifteenth Amendment occurred shortly after Machen wrote, viz. Guinn v. U.S., 238 U.S. 347 (1915), and Myers v. Anderson, 238 U.S. 368 (1915). Other aspects of Machen's thesis are discussed in Section 8.C.

In addition, one may well decide that a constitutional provision is "used" and even "enforced" in many other situations than when it is used to invalidate a conflicting statute.

6. But see Section 12.C and accompanying notes 29 and 30.

7. Sir Carleton Kemp Allen, Law in the Making, Oxford University Press, 7th ed. 1964, at p. 478.n.2 (emphasis in original).

8. Philip, op. cit., at p. 261.

9. See Section 9.C. I explore the logic of amendment through violation in more detail, and in a different domain, in "The Reflexivity of Change: The Case of Language Norms," Journal of Speculative Philosophy, 3, 2 (1989) 100-129.

10. See e.g. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973), and In Re Lamb, 34 Ohio App.2d 85, 296 N.E.2d 280, 289 (1973).

11. An example of the latter from 19th century Arkansas is offered by David Y. Thomas, "Amending A State Constitution By Custom," American Political Science Review, 23 (1929) 920-21.

12. Anon., "Usage as Modifying the American Constitution," Solicitors' Journal, 70 (July 10, 1926) 785-86, at p. 786.

13. Bora Laskin, "Amendment of the Constitution: Applying the Fulton-Favreau Formula," McGill Law Journal, 11 (1965) 2-18, at pp. 5-7. Like the United States, Canada officially rejects desuetude.

14. See Douglas P. Elliott, "Cloak and Ledger: Is C.I.A. Funding Unconstitutional?" Hastings Constitutional Law Quarterly, 2 (1975) 717-55. For a general study of such difficulties, see Walter F. Dodd, "Judicially Non-Enforceable Provisions of Constitutions," University of Pennsylvania Law Review, 80 (1931) 54-93.

15. See Orfield, op. cit., at pp. 9, 53, 78ff, 80.n.134, 156.

16. Arthur Machen, who believes the Fifteenth Amendment is void in part because it has never been enforced (see note 5 above), also believes it is void in part because it was defectively adopted and never the subject of acquiescence by a major region of the country, the South. Op. cit. at p. 191, he says,

> [The Fifteenth Amendment has] never been acquiesced in unreservedly throughout the country. Indeed, it has never been loyally observed in places where its effect was small. In large portions of the country it has been persistently evaded and overridden, now by force and now in other ways.

17. Of course bad reasoning usually finds itself justified, just as mediocrity rates itself above excellence. Formalists stumble a bit when confronted with the fact that illogic can be self-justified, that is, justified by illogic, at least as well as sound logic can be self-justified, and even better insofar as self-justification is prohibited to sound logic as a kind of question-begging.

18. Without discussing desuetude, Morton J. Horwitz superbly charts "The Rise of Legal Formalism" in America in Chapter VIII of his The Transformation of American Law, 1780-1860, Harvard University Press, 1977.

Section 20: Other Selected Paradoxes and Reflexivities in Law

This section is a brief introduction to the abundance of reflexivities and paradoxes in law. The lessons learned under the paradox of self-amendment do not necessarily apply to these, which is one reason to include them now. But all raise the question whether a strictly logical legal system could tolerate them and, if not, whether our legal system ought to continue to tolerate them. And oughts aside, as long as our legal system does tolerate them, empirically-minded legal theorists must take this toleration into account when describing legal reasoning and the respective roles of policy and formal logic in legal decision-making. Reflexivities and paradoxes that present "insoluble" problems to logicians reveal much about legal reasoning when they are "solved" without more ado by courts or legislatures, or imperturbably left unsolved.

I do not have as precise a definition of "reflexivity" as I gave of "paradox" in Section 1. "Reflexivity" is the generic term for all types of logical circularity: the self-reference of signs, the self-application of principles, the self-justification and self-refutation of propositions and inferences, the self-creation and self-destruction of legal and logical entities, the self-limitation and self-augmentation of powers, circular reasoning, circular causation, vicious and benign circles, and feedback systems.[Note 1] The common practice of using "self-reference" to cover all this territory is inaccurate and unfortunate.

Some legal terms use the language of reflexivity to denote what are plainly irreflexive phenomena. For example, "self-authenticating documents" in the law of evidence, and "self-proving wills" in probate, are not documents that, by their own lights, supply all the premises needed to conclude that they are what they purport to be. They are documents that, if they meet some externally stipulated requirements, are presumed to be what they purport to be. "Self-defense" and "self-incrimination" in criminal law emphasize the personal self more than the circularity of the process, while "self-dealing" comes much closer to a reflexive application.

Reflexivities are not necessarily paradoxical. "This very sentence is false" is a classical reflexive paradox (see Section 1); it is true if false, and false if true. But "This very sentence is true" is equally reflexive but not at all paradoxical.

The following is simply a list of some reflexivities that arise in other domains of law. The heads under which they are collected are crude; many of the examples could fit under more than one of them. With a few exceptions, too important to omit, I have tried to avoid examples that have been noted in the literature before. I omit redundant examples that would not present new logical features. For the most part I have also omitted hypothetical statutes, contracts, etc., invented solely to create reflexivity problems.

In order to present a wide range of examples, I have had to limit my commentary and analysis. I am confident, however, that each of these examples, no matter how innocuous it may seem, could sustain the kind of in-depth study that the larger work has given to self-amendment.

A. Protagoras v. Euathlus

This case deserves separate, special treatment as a classical illustration of the reflexive use of the "counter-dilemma" to respond to a "dilemma".

Protagoras taught rhetoric and argumentation, which in ancient Greece comprised the education of a lawyer. Euathlus wished to learn these arts and asked Protagoras to teach him. He said he could not pay right away but promised to pay in full after he won his first case. Protagoras agreed, and taught Euathlus rhetoric and argumentation. Some accounts say Protagoras sued Euathlus for payment immediately upon the completion of the lessons; other accounts say he waited until it was evident that Euathlus was not taking on any cases. The case was heard in the court of Areopagus in Athens.

The judge asked Protagoras why he thought he had a claim against Euathlus. Protagoras argued, "I will either win this case or lose it. If I win it, then Euathlus must pay me, by the judgment of the court. If I lose it, then he must pay me, under our contract. So he must pay me either way."

The judge was impressed, and asked Euathlus to reply. Euathlus had learned his lessons well, and replied, "I too will either win this case or lose it. If I win it, then I need not pay Protagoras, by the judgment of the court. If I lose it, then I need not pay him, under our contract. So I need not pay him either way."[Note 2]

It is said that the court was so puzzled that it adjourned for 100 years. Aulus Gellius reports that Protagoras had a "wily scheme" in bringing the suit in the first place (probably to win in a second suit if he lost the first), and that Euathlus knew he'd escape paradox if he hired another advocate to argue his case but that he wanted to show off his cleverness. Euathlus would be better off hiring a lawyer because, if he won with a lawyer, his victory would be non-paradoxical, and if he lost with a lawyer, he would not yet have won his first case. By adjourning, the court in effect waits for Euathlus to take another case, which is equivalent to a judgment for Euathlus.

There is a small literature on the case, all of it suggesting that Euathlus should have won.[Note 3] Most commentators then observe that Protagoras could have sued a second time and won. A few observe that Euathlus might then sue for malicious prosecution, but they divide on who should win that suit.[Note 4] None deals deeply with Protagoras' "wily scheme", assuming it was to win in either the first or second suit.[Note 5] By bringing the first suit, even if he is certain to lose it, Protagoras guarantees his victory in the second suit. If equity wants to thwart Protagoras' scheme, then holding for Euathlus in the first case does not suffice; it plays into Protagoras' hands.

Many solutions are available to law that are unavailable to logic. For example, the judge could thwart Protagoras' wily scheme by ordering Euathlus to hire a lawyer in the first case. The contract could be reinterpreted, reading its terms in light of the situation or "trade usage". For example, the

judge could easily decide that this case will not count as Euathlus's first case, except possibly in future cases looking back. Or the judge could decide that no "meeting of minds" occurred if Euathlus meant his first case with someone other than Protagoras and if Protagoras did not. The contract could be positively reformed in equity. Euathlus could be ordered to pay earnest money while making a reasonable effort to take on another case, or to pay quantum meruit for the time Protagoras had already devoted to his instruction. If Euathlus unduly delayed in taking cases, that might be considered a breach; or if Protagoras was unduly hasty in bringing suit, he might be ordered to wait for a reasonable period. The logical difficulties could be sent to a jury, and no questions need be asked about how the jury arrived at its solution. (This is how the judge in State v. Jones hoped to deal with a similar problem; see Section 20.B below.) The judge could make a forthright appeal to some relevant policy, such as the benefit to future legal education of deciding for Protagoras (or for Euathlus). Without bringing in policies or principles of this kind, in fact, it is difficult to see how the case could be decided, since Protagoras and Euathlus do not give reasons why they ought to win other than the contradiction in the alternative position. If the two arguments are truly equal in weight, then the one with the burden of proof loses; this works against the plaintiff Protagoras.

B. State v. Jones

State v. Jones, 80 Ohio App. 269 (1946) is the only American case that has cited Protagoras v. Euathlus, according to the computer search service, Lexis. It presents a similar paradox and shows that the logic of the Euathlus case can arise in modern law. Jones was a physician charged with performing illegal abortions on each of six women. For at least one of the women, Jacquelin Harris, the only evidence of the abortion was her uncorroborated testimony. The judge instructed the jury (1) that women who voluntarily procured abortions were accomplices of the criminal abortionist, (2) that if Jones is found guilty, then Harris must be found guilty as an accomplice, and (3) that the testimony of accomplices against principals is suspect and cannot ground a conviction without corroboration. These jury instructions were correct statements of Ohio law in 1946.

Jones wanted the second instruction replaced by one to the effect that Harris should, by her own admissions, be found an accomplice as a matter of law. This would have the consequence that her testimony against him would become legally insufficient; hence he could not be convicted of performing that abortion. Jones' motion was denied and the original instruction went to the jury.

Jones clearly wanted Harris' testimony against him to become legally insufficient, and this occurs as soon as Harris is found to be his accomplice. But if she is his accomplice, then he must be the guilty principal. But if he is guilty, then the only evidence against him is the uncorroborated testimony of his accomplice, which is legally insufficient. So should he be convicted?

We can restate the issues as a dilemma and counter-dilemma to highlight their similarity to the Euathlus case. The prosecutor argues that Jones will be found either guilty or not guilty. If guilty, then the state wins. If not guilty, then Harris is not his accomplice and her testimony against him can suffice to convict him, and the state wins. So either way, the state should win. Alternately, Jones should be found guilty. For if Harris is his accomplice, then he is the principal; and if she is not his accomplice, then her evidence against him suffices to convict him. So either way he should be convicted.

Jones also argues that he will be found guilty or not guilty. If not guilty, then he should walk; if guilty, then Harris is his accomplice and her testimony against him is legally insufficient, and he should walk. So either way, he should walk. Alternately, Jones argues that he should be acquitted. If Harris is his accomplice, then her evidence against him is legally insufficient to convict him; and if she is not his accomplice, then he is not the principal. So either way he should not be convicted.

On the prosecutor's argument, it should not matter whether Harris was ruled to be Jones' accomplice or not. On Jones' argument, it should not matter either. But the judge did not instruct the jury that Harris simply was, or that she simply was not Jones' accomplice. The judge told the jury to find Harris to be Jones' accomplice if it found Jones to be guilty of performing the abortion. This puts the jury in a position of returning a self-annulling verdict. If they find Jones guilty, then they must find that Harris was his accomplice, then they must find her evidence against Jones insufficient, then they must acquit Jones. But if they find Jones innocent, then they must (at least may) find Harris' evidence legally sufficient, then they must (at least may) convict Jones.[Note 6]

By hearing and denying Jones objection, the trial judge was certainly made aware of the paradox latent in the instructions, but he felt no compunction about passing it along unchanged to the jury.

The jury found Jones guilty, not guilty-hence-innocent, and not guilty-hence-innocent-hence-guilty.... Jones appealed on the ground that the second instruction was erroneous. The Appellate Court also rejected his claim. It observed that Jones' preferred alternative (that Harris was an accomplice by her own admissions) presupposed Jones' guilt and, accordingly, would violate the presumption of innocence the trial judge was obligated to accord him. Jones' instruction would then lead to a paradox of its own: it would require that he be convicted while at the same time it invalidated the only evidence on which his conviction depended. In a way the higher court found Jones guilty either way, using the dilemma propounded by the state: if Harris is declared an accomplice by the court, then in the same breath Jones is convicted as the principal; if Harris is not declared an accomplice, then her evidence suffices to convict Jones.

Jones is guilty if innocent, and innocent if guilty,[Note 7] just as the Liar's statement ("This very statement is false") is false if true, and true if false. Any judgment of Jones' guilt, or of the truth-value of the Liar's statement, will be subject to reversal. In logic, the reversals oscillate ad infinitum unless some steps are taken to pretermit them entirely, e.g. by changing the usual notions of truth-value, proposition, or other parameters of the

Liar's lie. But in law, the reversals only go as far as the human judges and jurors care to take them. The jury's verdict is stable, and appellate court's judgment is stable and, after a point, appeals come to an end.

Jones has never been cited by another case or by commentators, as far as I or Lexis knows.[Note 8]

C. Self-referring laws

Self-reference is common in statutes and legal instruments such as contracts, wills, and treaties. Here is a small list of perfectly harmless examples to show that self-reference per se does not create paradox, incoherence, or meaninglessness.

C.1. Statutes, constitutions, and legal instruments may contain language that explicitly refers to the section or whole of which it is a part, e.g. "Nothing herein shall be construed to prohibit...", "This statute shall be prominently displayed in every hotel room...", " Violation of this treaty shall be referred to arbitration..."

C.2. Laws may apply to themselves without necessarily referring to themselves, e.g. the provisions in a state code on how the code is to be interpreted, any constitutional or contractual amending clause, and the entire Vienna Convention on the Law of Treaties (the "Treaty on Treaties").

C.3. Legal powers may apply to themselves to limit or augment themselves or their users, e.g. a parliament's power to bind itself and future parliaments by a present decision, a sovereign state's power to bind itself by a treaty or contract, a President's power to pardon himself, a legislature's power to delegate legislative power, a contract's power to declare its own integration, a majority's power to establish majority rule, a court's jurisdiction to declare the boundaries of its own jurisdiction.

C.4. Statutes or sections of statutes may be caught in a circle of mutual reference, e.g. A refers to B and B to A, but neither refers to itself. This may lead the human researcher on a circuitous path, but an irreflexive rule of conduct or procedure may be articulated by the rules. The references may form a circle of any size: A refers to B, B to C, ..., Z to n, and n to A. Albert Einstein was probably referring to this phenomenon when he said that the United States Internal Revenue Code was more difficult to understand than the universe.

Many complex statutes contain sections that do nothing but define terms. These sections implicitly refer the reader to dictionaries for the undefined terms used in the definitions, thus putting one indirectly on a very large circuitous path.[Note 9]

C.5. Statutes may as a group inadvertently create vicious circles, e.g. circular liens (see Section 20.E, below)

C.6. Self-reference in language outside law may lead to legal difficulties, e.g. Abbie Hoffman's book, Steal This Book, which was frequently stolen.

D. The liar

The best known reflexivity paradox is the Liar: "This statement is false." The statement is true if false, and false if true. Some variations occur in legal settings.[Note 10] The most direct is the "imperative liar": "Do not obey this law". Alf Ross discusses this variation briefly.[Note 11] In Section 14 I showed the sense in which sunset clauses in statutes and constitutions might be construed to say, after the expiration of the clause, "this law is no longer valid".

The 16th century French courts had to decide how to interpret the testimony of women accused of being witches. According to the prevailing theology, witches were under the control of the devil, and consequently they either always lied or frequently lied. If they always lied, clever interrogation could disclose the truth. If they only lied sometimes, but with devilish ingenuity, then the truth could be hidden forever.[Note 12]

When Urbain Grandier was on trial for invoking the receiving the aid of the devil, his judges had to obtain a ruling from Sorbonne theologians on the reliability of testimony given under oath by one who might be possessed by the devil.[Note 13]

More recently, Melvin Weinberg, the swindler hired by the F.B.I. to devise the "Abscam" sting of members of Congress who accepted bribes, testified under oath that, yes, he did once say that he was the world's biggest liar, but at the time he had been lying.[Note 14]

E. Circular liens and liabilities

Cases often arise in which an estate or fund must be distributed among claimants when A's claim takes priority over B's, B's takes priority over C's, and C's takes priority over A's. The problem takes several, subtly different forms that have received inconsistent treatment from courts. This type of circularity has a surprisingly large literature.[Note 15]

A similar problem arises when an insurance policy declares itself inapplicable to injuries or losses that are covered by other policies. If an injured person has two or more policies that each contain such provisions, then each would become inapplicable. But as soon as they were inapplicable, they would each trigger the other's applicability again, and so on. The policy-holder would either be entitled to nothing or to benefits from at least one policy, to be determined by an unending and indeterminable oscillation of liability.

F. The bootstrap doctrine

Although "bootstrap" is a term used by lawyers to indicate many types of reflexivity, as a term of art "the bootstrap doctrine" designates a court's jurisdiction to determine its own jurisdiction. This means that if in some objective sense a court lacks jurisdiction over someone, the court may acquire jurisdiction over that person by ruling that it has jurisdiction.[Note 16]

The bootstrap doctrine is a prudential and logical necessity. It deters frivolous appeals, disarms otherwise unanswerable objections, saves time and money, and prevents an infinite regress.[Note 17] As such the bootstrap doctrine is a good example of a benign circle, a form of self-justification that is not fallacious or unintelligible and that (while creating some dangers) is clearly preferable to the alternative.

The de jure existence of the bootstrap doctrine also reveals that there is no "theory of types" in our legal system, at least in a court's judgments on its own capacities.

G. Inferences drawn from the fact of the dispute

Parties in disagreement usually debate irreflexively by proposing their own views and arguments and attempting to subvert those of the other side. Rarely do they cite the fact that a disagreement exists as a premise from which to infer a conclusion designed to settle the dispute. If sound, such arguments bypass the merits of the irreflexive reasoning in contention, and settle the dispute dialectically: the dispute, by virtue of being a dispute, ceases to be a dispute and becomes a conclusion.

Divorce cases often hold that the fact that the parties are seeking divorce (or seeking it so vehemently) indicates that the marriage is dead, thus at least partly justifying the decree of divorce. In fault jurisdictions the same inference is more difficult to make, but is still often made: one of the spouses does not want a divorce and is contesting the proposition that the marriage is dead. In Zavin v. Zavin, 366 P.2d 733 (1961) an interesting twist occurs. The husband and wife each alleged outrageous fault by the other, but neither proved any fault. Their heated allegations unmistakably displayed a dead marriage. The court inferred that the marriage was truly dead, from which it inferred that some fault must have existed; but because no fault was proved, the court presumed equal fault. Under the doctrine of recrimination, equal fault prevents divorce, so the court denied the divorce.

In the case of The S.S. Lotus (France v. Turkey), P.C.I.J. Ser.A., No. 10 (1927), the French steamship Lotus collided at sea with the Turkish collier Box-Kourt. In the dispute on liability that followed, France pointed to what it claimed was international customary law favoring its claim. But the Permanent Court of International Justice found that the national courts of the world were divided on the question at issue, and it inferred from this disagreement that there was no customary law at all on the issue. In short, France is wrong because the courts of the world disagree on whether France is wrong. Here the disagreement from which a conclusion is drawn is not that between the parties but between others on the same issue that divides the parties.

In Nassoiy v. Tomlinson, 42 N.E. 715 (1896) the parties disputed whether Nassoiy's commission on a sale of land was 5% or 1%. Tomlinson had already paid 1% and didn't want to pay more. If Nassoiy's claim to 5% was "unliquidated", then his acceptance of the 1% would operate as a settlement of the entire claim. A claim is liquidated (roughly speaking) if the parties agree on its amount. The trial court gave the jury the question whether the claim was liquidated or unliquidated. The Court of Appeals reversed, holding that the question should not have gone to the jury at all, since the very dispute shows that the claim was unliquidated. It held in effect that a disputed question of fact should not go to the jury precisely for being a disputed question of fact of a certain type, namely, a dispute as to whether a claim was disputed.

An activity sponsored by the state is "excessively entangled" with religion, and so violates the "establishment clause" of the First Amendment, if it causes some potential for political divisiveness by creating hostility in the excluded religious groups or encouraging them to compete for government favors. Lemon v. Kurtzmann, 403 U.S. 602 (1971). Can this potential for divisiveness be symptomized by a lawsuit against the state to cease some activity that touches religion? If it can, then plaintiffs win just by complaining; if it cannot, then the criterion is a bit misleading. In Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979) a group of citizens and taxpayers of St. Louis County, Minnesota, sought to stop the city board from opening its meetings with a prayer. The court said, "[t]he present litigation and the earlier attempts to seek rescission of the practice demonstrates the political divisiveness of the invocations....However, we do not see this divisive potential as being of the same caliber as...[that] forbidden in Lemon v. Kurtzmann."

Sometimes it is even clearer that courts should draw conclusions from the fact of disagreement when they presently fail to do so. If a judge finds that no reasonable juror could have found for the prevailing party, she may overturn the jury verdict. If the original winner appeals the judge's action, an appellate court will decide whether the jury verdict was or was not so contrary to common reason that no reasonable juror could have held it. Sometimes appeals courts split on this question. When they do, it may seem reasonable for such judges to infer from their own disagreement that a reasonable jury could have found as it did find, but this is not the current rule. Moreover, this change would be difficult to implement. If the appellate judges polled themselves and found disagreement, then they could still only vote to uphold the jury if a majority of them voted to uphold it; sometimes this would require judges voting at the meta-level for an outcome they reject at the object level. But this happens even today when judges who dislike a rule of law nevertheless vote to uphold it on grounds like stare decisis.

What if the appellate judges were unanimous that the jury should be upheld and thus disagreed only with the trial judge? If the judges disagree on their first vote and then vote to uphold the jury on the ground of their own disagreement, then what happened to the "reasonableness" of their

first vote? If the second vote also splits, will there be a third on whether the disagreement of the second justifies upholding the jury? Will there be an infinite regress of votes? Is there a method of voting that will assure us that the series of votes will eventually converge on a unanimous holding? Is the disagreement of one vote with the prior votes as significant for these purposes as the disagreement of one judge with another?

In State v. Robbins, 189 N.E.2d 641 (1963) an Ohio Appeals Court ruled that three judge panels must be unanimous in bench trials; a vote of two to one to convict would indicate a reasonable doubt that would overturn the majority's vote to convict. The state appealed this ruling however, and this Ohio Appeals Court was reversed by the Ohio Supreme Court in 199 N.E.2d 742 (1974).

The same disagreement about the standing of disagreement exists for juries. Some states permit less-than-unanimous jury verdicts in criminal cases. If a person is convicted of a crime in such a state by a jury that splits, say, nine to three, then has the defendant's guilt been proved beyond a reasonable doubt? Does the mere existence of outvoted jurors (and their doubts) establish a reasonable doubt that should overturn the majority's vote to convict? In Johnson v. Louisiana, 406 U.S. 356 (1972) the Supreme Court faced this question and held that it does not; even a split jury can convict a person beyond a reasonable doubt. But in Johnson, the Supreme Court was itself split as much as it could be, five to four. Is there a reasonable doubt as to what constitutes reasonable doubt?

In Hibdon v. United States, 204 F.2d 834 (6th Cir. 1963) the court held the opposite —that split juries indicate the presence of a reasonable doubt— so firmly that even the defendant's consent to abide by a less-than-unanimous verdict did not suffice to bind the defendant to a less-than-unanimous verdict to convict.

H. Reflexivities of sovereignty

The concept of sovereignty, even the question whether such a concept is necessary, leads to reflexivities of many types.

H.1. Sovereign or parliamentary omnipotence is, from one perspective, the main topic of this book. Can a parliament by any procedure irrevocably limit its future ability to act? Can it abolish itself? Can the Reichstag turn over all sovereign power to Hitler? Are law-makers above the law? Most modern sovereigns decide that they cannot irrevocably bind their successors, as if they had a kind of continuing omnipotence. As the author of 1 Corinthians 15:27 described the sovereignty of Jesus Christ: he shall put all under his feet, but he cannot put himself under his feet. (See Section 5.B, above.)

Can a sovereign bind itself for the present and future in the decision of a case, the enactment of a statute, or the agreement to a contract or treaty? As W.J. Rees summarizes the literature on this question, "All political theorists have found it logically necessary, therefore, either to deny the existence of legal duties on the part of the government so as to be able to maintain its legal sovereignty...or else to deny its legal sovereignty in order to assert its legal duties...."[Note 18]

Many of these issues are beautifully encapsulated in London Street Tramways Co. Ltd. v. The London City Council, (1898) A.C. 375, in which Parliament ruled that it is bound by its own precedents. The self-justification of this rule (precedent) is only part of the reflexivity tangle in which it became involved, for in 1966 Parliament reversed the rule of London Street Tramways. For a more detailed discussion, see Section 15.B above.

H.2. Can a sovereign bind itself? Nations have a greater liberty to renounce contracts and treaties than private parties, a liberty that seems to derive from their sovereignty. This liberty is ironically an incapacity: an incapacity to be bound by anything, whether the acts of others or of itself.

Under some concepts of human beings, each of us is a sovereign in this sense. Epictetus and Sartre probably agree on nothing else than that we are condemned to be free. Can one validly consent to be unfree? Is a contract to make oneself a slave ipso facto void for incompetence? John Stuart Mill says yes,[Note 19] just as U.S. constitutional law says in effect that legislatures cannot use their legislative power to delegate their legislative power (unduly or excessively). One is "doomed to be free" if one's voluntary binges of irresponsibility are not defenses to liability for acts committed while drunk. The "irresponsibility defense" seems to apply only to cases of involuntary irresponsibility (insanity) and not to voluntary irresponsibility or consensual unfreedom.

H.3. Sovereignty and legitimacy. Is a sovereign legitimate because it is sovereign, or is it sovereign because it is legitimate? On a practical level, should foreign governments be recognized because they are legitimate or are they legitimated by recognition? Must sovereignty by its nature jumble our notions of cause and effect, ground and consequence, this way? Can dictators validly declare the legitimacy of dictatorship? Can the people speaking through their democratically elected leaders validly declare the legitimacy of democracy? If so, then anything can be legitimate, and the concept of legitimacy becomes trivial; but if not, or if no kind of regime or practice can legitimate itself, then nothing seems capable of becoming legitimate.

H.4. Circle of sovereignty. If we accept the model of lawful power that holds power to be lawful only if it is granted or authorized by a lawful power, then it seems that we have only three choices for explaining lawful power: (1) powers are authorized by higher powers in an infinite regress, (2) powers are authorized by higher powers in a series that eventually comes to a halt with a power that is self-granted and self-authorized, and (3) a plurality of powers authorize one another in a circle.

The first of these is plainly false; the second and third appeal to circular concepts. The second may posit a halt to the series in an arbitrary monarch, an unreviewable legislature, or a God whose will is wholly inscrutable except for the certitude that She authorized the sovereign to reign.

Moreover, if we reject the model of lawful power that requires it to be authorized or dispensed by another lawful power, it seems we are equally driven to postulate a self-legitimating power. Hence, some circularity in our concept of sovereignty seems unavoidable, just as metaphysicians have never been able to avoid concepts of self-caused causes and self-justifying first principles as the price of avoiding causal and logical infinite regresses.

I believe the United States embodies the third type of sovereignty above, unless "the consent of the people" is taken as a nonfictitious source of power and legitimacy. Sovereignty in the United States is not monolithic, but plural and systematically divided. While the parts may not positively "grant" power to the others, the parts do negatively "review" or "check" and limit the power of the others. To follow the chain of reviewing bodies, starting anywhere, one will be led either in a circle (of greater or smaller size depending on where one began) or to "the people".

H.5. Sovereignty by default. The persistent, self-positing nature of sovereignty is seen in cases of what might be called sovereignty by default. In the sphere of international law, "monists" argue that when there is apparently no international law on a certain subject, then there really is an international law, namely, "leave it to the domestic law of the individual nations." That is, national sovereignty is itself a dispensation of the international legal system. The idea that every visible form of government is subordinate to an invisible higher sovereign, whether it is logic, morality, natural law, the kingdom of heaven, or international law, explains problematic national sovereignty by referring it to a higher sovereign that holds its authority by self-justification. The alternative is an infinite regress of sovereigns, like the gods behind the gods.

The instinct to posit ever higher levels of sovereignty reminds one of Adam Weishaupt who infiltrated the Freemasons in the late 18th century and became its leader. His "weapon" was the hoax that there was a secret, higher body of Freemansons, called the Illuminati, which he supposedly represented. The love of hierarchy and secrecy were both strong among the Freemasons, and Weishaupt's hoax enabled him to win sovereign power as an invader.

A few American cases defer to various species of "higher" law, including international law. A recent case from the Second Circuit, (Filartiga v. Pena-Irala, 1980) asserts that the international law of human rights is, and always has been, incorporated into the "federal common law". (This ruling enabled a U.S. federal court to obtain jurisdiction over an alleged Paraguayan torturer sued in tort by a relative of a victim when both happened to be in the United States, when the alleged tort did not occur in the U.S., and when neither party was a U.S. citizen.) Article 25 of the constitution of West Germany, written by the allies, defers to international law as superior to domestic German law. The supremacy clause of our constitution (Article VI, §2) gives supremacy to the constitution itself but also to treaties made under the authority of the United States. In Missouri v. Holland, 252 U.S. 416 (1920), domestic legislation implementing a treaty was held constitutional although substantially the same legislation was held unconstitutional before the treaty was signed. There is much literature on this case raising the reflexivity questions whether the constitution can declare its own supersession, whether the supremacy of treaties is an indirect method of amending the constitution, and whether supremacy can be shared. A proposed constitutional amendment to overrule Holland and straighten out some reflexivities in the supremacy clause was defeated (see Section 17.B).

H.6. Self-Created Authority. Some authoritative instruments have a self-created authority. This is slightly different from the self-created sovereignty that may or may not be required to halt the infinite regress of sovereigns. A sign at an airport security point warning passengers that they may be searched is backed by the federal common law on permissible consent searches. But it is the sign itself —its existence, intelligibility, and conspicuousness— that gives the notice that makes the search permissible, and thus that makes the sign's text true. Similarly, a conspicuous copyright notice validates itself.

In the law of evidence, excited utterances are admissible hearsay only because the excitement of the speaker is an assurance of reliability. The showing of an exciting event is a prerequisite, but in most jurisdictions the existence of the alleged exciting event may be inferred from the utterance. Hence the warrant for the reliability is self-established.

Nine states have had, at one time in their history, a constitution without an amending clause.[Note 20] Yet each has been enabled to amend its constitution. The authority to do so has been recognized on various grounds, as inherent in the people or the legislature or a constitutional convention. The law and scholarly opinion on the self-creation or validation of such amending power is well-summarized in In Re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 449-51 (1935).

H.7. Self-Destroying Authority. Some authority is self-destroying. My favorite example is the ex parte annulment of marriage. A proceeding is ex parte if it is "one-sided" in the sense that only one of the parties whose rights is being adjudicated is present in court. The permissibility of ex parte divorce is an exception to the normal rule that courts must have personal jurisdiction over a party before it may adjudicate her substantive rights. The fiction that marriage is a thing (res) that travels with each spouse is used to justify the ex parte divorce. The court granting the divorce has jurisdiction in rem over the thing, marriage, not jurisdiction in personam over the spouses. But while this might make some sense for divorce, it makes no sense at all for annulment. While divorce simply terminates an existing marriage, annulment declares that there was never a marriage or that it was void from the beginning. In our system ex parte annulments are permissible under a theory of in rem jurisdiction. So when a person goes to court for an ex parte annulment, the court adjudicates the rights of the absent party by virtue of its in rem jurisdiction over the "marriage" which is in the courtroom. If the annulment petition is granted, then the marriage never existed; the court's decree subverts and eradicates the jurisdictional basis of the petition. The ground of standing is self-destroying. Decrees of ex parte annulment should be self-overruling, but they are not.

Article 38(1)(d) of the statute creating the International Court of Justice acknowledges the law-making significance of scholarly writings (for international law). What if a scholar wrote an essay deploring this provision, arguing that only the acts of states, not those of private individuals, should affect international law? What if the issue became controversial, and scholarly opinion divided on the wisdom of the provision? What if this paradox of self-repeal became controversial?

The presumption of death that arises from a seven year absence is rebuttable by the person's reappearance. As a presumptively dead person, does the returnee lack standing to prove her reappearance, say, in the face of a charge of fraudulent impersonation? (The dead usually lack standing.) Or is legal life dispensed in order to prove legal life, the presumption held rebutted in order to permit the rebuttal?

H.8. Renvoi. Some statutes and contract terms tell us which law should govern injuries or breaches. For example, if a defective tire explodes and causes a car to hit a pedestrian, we turn to these statutes to ascertain whether a suit by the pedestrian against the tire manufacturer should be decided under the law of the state where the accident occurred, the state where the tire was manufactured, the state where the manufacturer is incorporated, or some other place. If a contract is violated, a term in the contract usually tells us whether to decide rights and remedies under the law of the state where the contract was made, where one of the parties is incorporated, where the violation occurred, or some other place. Since the laws of different states and nations can differ significantly, these choice-of-law rules can be decisive.

Suppose we are citizens of nation A, and file suit against a foreign corporation in one of our own courts. The local choice-of-law rules tell us to apply the law of nation B. We consult B's law and find that its choice-of-law rules direct us to apply the law of nation A. A conflict or circle in these "pointers" to applicable law is called renvoi. Because it occurs frequently, renvoi has a more specialized vocabulary. If nation B sends us back to nation A, that is remission; if it sends us on to nation C, that is transmission.

Renvoi can be prevented if, when we are directed by A's law to look at B's law, we look only at B's substantive law, not B's choice-of-law rules as well. This is the solution adopted by a majority of courts today. Another solution, called "partial renvoi", is to accept the renvoi from B back to A, but once back in A to look only at A's substantive law, not A's choice-of-law rules again. The "non-solution" of looking always at both the substantive and choice-of-law rules of a jurisdiction is called "whole renvoi". In theory whole renvoi can lead to an infinite (that is, unending) loop. But because we are dealing with law, not software, it never does so in practice. Some court always changes the rule from whole renvoi to partial renvoi, at some point in the burgeoning regress, and terminates the renvoi.[Note 21]

The general practice today is to adopt different solutions for different kinds of cases. For example, whole renvoi is usually used in cases of divorce and title to land, and must be used in tort claims against the federal government. This means that the exact injury or complaint, in its full historical context, must be subsumed under traditional legal categories before we know which kind of solution to renvoi to use, and hence before we know which state or nation's law applies to the case. But many concrete injuries are borderline cases that are put into different categories by the laws of different places. Hence we have a meta-renvoi paradox: sometimes we must classify a wrong in order to know what law applies, and we must know what law applies in order to classify it.[Note 22]

Because renvoi problems are actually solved without incurring a genuine infinite regress, they are especially good examples of problems that are paradoxical for formal logic but not for law. Something important about the nature of law is shown merely by the fact that they are soluble in law, like the paradox of self-amendment. Fiori Rinaldi concludes his discussion renvoi by saying[Note 23]

> These clashes arise from adherence to formal logic and can generally be resolved only by 'breaking out' of logic itself.

Laurence Goldstein follows J.C. Hicks in comparing the logic of renvoi to the logic of the irreflexive liar:

> A. Statement B is false.
> B. Statement A is true.

But Goldstein uses the legal solubility of renvoi problems to explain how it is that law can solve paradoxes that logic cannot.[Note 24]

> [T]he crucial difference is that in the case of [statements A and B] as in the case of any statement, it makes no sense to stipulate that one of them is true, since to say that a statement is true is to say that it corresponds in some way to some state of affairs in the world, and we cannot stipulate how things are in the world. But we can stipulate what laws are to prevail and this is in fact just what we do do.

I. Self-amendment

Self-amendment appears in many contexts other than constitutional amending clauses. If a written contract stipulates that only written modifications will be effective, may that provision be modified orally? It is reflexive either way: if it is orally modifiable, then self-excepting, and if not, then self-applicable. Can a contract's no-waiver clause be waived? Why can a will's no-revocation clause be revoked? Why can a will's no-contest (in terrorem) clause be contested? (See Section 9.C above.)

In American states that allow home rule, the "pyramid of power" may be inverted by a vote of a lower level. Is the lower level thereby made an apex power, or an apex power only subject to the power of the apex of the original pyramid?

How can a sovereign release a subject from subjection? If a parent tells a child, "you are now completely free of my commands," then there is a sense in which the child owes its liberty to that parental dispensation; if the parental fiat is revocable, then freedom cannot be conferred by

another.[Note 25] This problem can become very real and troublesome. As England's former colonies and dominions won their independence, by war or negotiation, England wanted a way to seal their independence by law. In 1931 it adopted the Statute of Westminster, solemnizing its intention never to legislate for former colonies again without their express consent and request. That was direct and thorough; the problem is that the Statute of Westminster is a statute and can be repealed, which could mean that the independence of the former colonies and dominions is revocable by England.[Note 26] This was quickly noticed by courts in the former colonies. It appeared that one generation of English people had done its best to surrender this right to legislate, but had done so with frustrating incompleteness, since any later generation could restore it. This was a world-class cartoon of the child with flypaper on its fingers trying to shake it off. Nothing that England could do, it seems, could give the colonies full legal independence, for if it were done in law, then it could be undone; and if were not done in law, it would not be lawful. England was learning that it is paradoxical to command another to be free or even to offer another their freedom as a gift.

One tempting solution was to interpret the Statute of Westminster as irrevocable. That would guarantee that the emancipated countries would stay emancipated. But it would also contradict the independence of the English people, their sovereignty in their own country, and deny them the power to change their own laws. More succinctly, the English Parliament for these reasons cannot bind its successors irrevocably. Following this line of reasoning Parliament ruled in 1935 that the Statute of Westminster could in principle be repealed. British Coal Corporation v. The King, A.C. 520. So the paradox of liberation remains.

To avoid the problems of revocable independence, many former colonies have deliberately inserted some irregularity or procedural defect into the ritual of liberation so that they could say they owe their independence to peaceful revolution, not to the Statute of Westminster.[Note 27]

The equivalent problem arises in U.S. law in the Philippine Independence Act of March 24, 1934, in which the United States agrees to give the Philippines independence in exchange for making a constitution for themselves according to U.S. specifications. In Section 10 (a), the United States promises that, when a suitable Philippine constitution is ratified, "the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands...." The Philippine Independence Act, like the Statute of Westminster, is merely a statute; if Congress cannot bind itself irrevocably, then the statute can be repealed by the United States at any time. If after a certain time repeal would have no effect on the independence of the former dependent, which is almost certainly the case, then legal formalism cannot explain it.

J. Permissible disobedience

The phenomenon of de jure toleration or justification for acts that depart from requirements of valid law presents a neat contradiction. Reflexivities enter in different ways. Disobedience of certain kinds may be permitted because the legal system as a whole is perceived as self-limiting, because a statute is self-excepting, because the disobedient act is self-justifying, because the act is self-concealing and unreviewable, or because the act itself, while disobedient to existing law, has law-making power and so amends or repeals rather than merely violates.

The decisions of a common law judge inconsistent with relevant precedent (consciously overruling it, or simply disregarding it) are in an important sense departures from valid law, but they become law themselves. The precedents they violate are amended or overruled pro tanto or to the extent of the conflict. In international customary law, a dearth of custom may exist on a certain issue but all of it may point in the same direction. An act departing from that custom may be a delict or the beginning of a new custom —a violation or an amendment.

Some laws may mischievously be interpreted to mean, in effect, that certain acts are forbidden only until committed. Suicide is the classic example, but there are many more interesting examples. The current international law on the minerals of the deep seabed arguably says that the minerals extracted are the property of the taker while the minerals in place are the common heritage of mankind and not to be taken. Some commentators have suggested that it would be illegal for an oil company to drill for oil in the deep seabed, but that any oil so taken would legally belong to the oil company. The situation is similar to drug laws that penalize sale and purchase, and perhaps possession, but not use.

Much law and commentary exists on the problem of "implied repeals" of old statutes by new statutes, old statutes by new cases, old cases by new cases, and old law of all kinds by new interpretations. These cases show the importance of distinguishing the type of law-making act employed in the earlier and the later laws in conflict. Otherwise we will never clearly answer the question whether new acts inconsistent with existing law are violations or repeals.

Laws may be self-excepting when they require their own publication in order to take effect and then are not published on account of some intrinsic feature. This happens occasionally with administrative regulations or state statutes on obscenity. In order to avoid the vagueness problems that might invalidate them under the First amendment, they must be graphic and explicit. But that makes them obscene to many people. In one case a publisher refused to print the statute because he thought he was prevented by the very statute to be published. The paradox is tightened when we realize that, for reasons of notice and due process, the statute is of no force until it is published.

International law forbids intervention in the internal affairs of another state (with some exceptions) about as clearly as it forbids anything. The value promoted by this prohibition is the self-determination of the people of the state. Currently international law is very much unsettled on the question whether intervention is permissible to further self-determination, e.g. by aiding democratically minded insurgents against a dictator's army.

K. Contract reflexivities

Contract law contains many types of reflexivity, several of which have already been mentioned under other rubrics.

K.1. Reflexive v. irreflexive theories of contract. In the text (Section 7.A) I call the view that contracts bind ex proprio vigore or by their own strength, the "reflexive theory" of contracts. The alternative is an irreflexive view that contracts bind only if a rule of public law external to the contract states that contracts bind. Only the reflexive view can be used in social contract theories of government and their variations. The irreflexive view is supported for ordinary contracts, but not decisively, by the fact most nations do have rules of public law describing when contracts bind.

K.2. Overweening contract terms. On the irreflexive view of contract, contract terms may create a reflexive hierarchy by purporting to jump out of their low level of subordination and control action at higher levels. If contracts are private agreements regulated by public law, then the private agreement cannot, without paradox, pretend to overrule, circumvent, or supersede the public law that regulates it. Insofar as contract terms succeed at this overweening, they create reflexivities in the hierarchy of legal types.

The relation of treaties to the environing international law is slightly different from that of contracts to the public that regulates them. Treaties create public law between the parties and are frequently taken as evidence of the international law that regulates them.

Sample contract terms raising this problem: "This contract will bind the two companies even if the signing representatives had not the authority to bind their respective companies." "This contract is integrated."[Note 28] "The signatories of this contract are competent to bind themselves and so bind themselves." "If this contract is rescinded, the other party may demand arbitration." "No conditions precedent apply to this contract." "This contract will be deemed accepted by the offeree through any language to the effect that the offer is refused."

Can a treaty require nations to become signatories? Probably not. But can a treaty require its signatories to ratify the treaty in accordance with their domestic procedures for treaty ratification? Article III of the Kellogg-Briand Pact of 1928 requires just that. Does a disobedient nation violate the treaty or, precisely because it hadn't yet ratified, escape its strictures?

A logical analogue of this problem occurs in games with rules that feign to regulate non-playing and meta-playing behavior, e.g. that impose a game penalty for refusing an invitation to play or that refuse to recognize forfeits.

Many contracts and treaties contain provisions defining what shall constitute a breach, repudiation, and rescission. May one breach or repudiate these terms even in principle? If one repudiates these terms (in a way included or not included in the repudiation definition), can one claim that one may then breach the breach provision without penalty? Can the contract's repudiation provision always outflank attempts to repudiate it?

K.3. A Classical Problem. A popular medieval puzzle can be analyzed as a contract. Socrates stands in the market and publically offers to pay one drachma to the first person to approach him and tell him a true statement. Plato approaches before anyone else and says, "You will not give me the drachma." Result?[Note 29]

An interesting variation occurs in Don Quixote.[Note 30] Sancho Panza became governor of Barataria and had to judge its hardest cases. A Baratarian bridge had a gallows at one end; those crossing it had to state their business and liars were hanged immediately. A mischievous traveler once said that his sole business was to be hanged. Sancho Panza decided the case by use of legal devices that entitled him to ignore all the logical difficulties. He appeals to a presumption in favor of mercy when the judge is confused. Note that while Sancho tried to avoid the reflexivity of the problem, his solution is itself reflexive; he draws a conclusion settling the dispute from the undecidability of the dispute.

K.4. Circular Contracts. Some tripartite contracts take this form: A promises to do something for B, B for C, and C for A. This circle of duties is the first reflexivity, though it is not logically different from the two-step circle of reciprocity in an ordinary bilateral contract. A stalemate breach may occur: each is willing to perform but none wants to go first. Stripped to its logical bones, mutual promises of "I will do x if you will" create a contract, but the circle of conditions makes it undetermined and perhaps undeterminable whether the parties are actually bound to do x. Finally, the closing of the circle is apparently not a condition of the duty to perform: if A breaches with regard to B, then B must still perform for C, and C for A.

K.5. A Vicious Circle. Scholars have frequently noted the circularity of the 19th century rule that a promise is not binding unless given in exchange for a binding promise. The decline of the doctrine is a rare example of legal change inspired by the desire to avoid paradox. If the doctrine is taken seriously, then a vicious circle would prevent the creation of any contracts. Similarly, if a person must give some valuable "consideration" to make a contract, then what consideration is given in a contract to do what one is already obligated to do? One theory was that to give the other party the contract right to compel one is itself consideration. But if so, then the contract creates the consideration and the consideration creates the contract.[Note 31]

L. "More of the same"

In contemporary English, double negation is equivalent to affirmation, but in Chaucer's time it expressed emphatic negation. Is capital punishment a cancellation of the initial wrong or a doubling of it? When a wrong is repeated, especially in the reflexive manner of victimizing the offender, is the original wrong negated or doubled? Is "an eye for an eye" the model of simple justice or simple barbarism? For Kelsen, acts of violence are

either crimes or punishments; hence, repetition can neutralize. For Bentham, it depends on the circumstances; crimes and punishments are both evil and the question is whether the good produced by the punishment outweighs its evil.

Some courts have held that the independent negligence of each of two defendants in one accident is the equivalent of no negligence and no liability by either. For example, if A negligently supplies B with a car lacking brakes, but B negligently fails even to apply the brakes and hits C, then neither A nor B is liable to C. Sanders Systems Birmingham v. Adams, 117 So. 72 (1928). If A negligently fails to signal for a left turn, and if B negligently fails to look but wouldn't have seen A's signal even if she did look, and hits C, then neither A nor B is liable to C. Rouleau v. Blotner, 152 A. 916 (1931).

If sexual harassment of female employees is unlawful sex discrimination under Title VII of the Civil Rights Act, then is the equal harassment of male and female employees a double violation or no violation at all? Courts have not yet faced these facts, apparently, but dicta in earlier cases suggest that it would be a double violation.

The old doctrine of recrimination in divorce law, now generally abandoned, insured that doubly broken marriages in which both spouses were at fault were less likely, not more likely, to be legally dissolved than marriages in which only one spouse was at fault.

A later will inconsistent with an earlier will revokes the earlier will. If A is given money in an earlier will, and is given a different amount in a later will, then does the second gift supplement or supplant the first? Is more money "inconsistent" with less money? See Gould v. Chamberlain, 68 N.E. 39 (1903).

In international law the absence of any analogue of centralized police power has given rise to a "common law" of retorsion: a violation of international law may be answered by the victim state with a retaliatory act that would otherwise be unlawful. The doctrine is unclear on the question whether retorsions are lawful acts of reprisal or unlawful acts that are tolerated for prudential reasons. Can two wrongs make a right, or only satisfaction?

If incompetents can only make voidable contracts, why are they considered sufficiently competent to exercise their option to void? Is the second decision competent as a matter of law? Has the law created a fictitious competency in order to avoid a self-negating method of protecting the incompetent?

Federal courts have used new quotas to remedy the harms of invidious quotas, and new gerrymandering to remedy the harms of invidious gerrymandering. This may be called a legal theory of inoculation. Why is the altered repetition of the offense a remedy in these cases, when no form of battery is thought a good remedy for mugging, beating, or rape? Is affirmative action a doubling of unlawful discrimination on sex and race lines or a justifiable remedy for earlier instances of that discrimination? To conservatives, the replication is additive (two wrongs); to liberals subtractive (a right). If the point is to treat people equally, affirmative action will be additive, a new offense; if the point is to undo the effects of past discrimination, affirmative action will be subtractive, compensation. Do conservatives and liberals differ in their logic or only in their political principles?

In states with anti-gambling statutes, prosecutors frequently try to apply the statutes to those pin-ball machines that reward good scores with free replays. These prosecutors evidently believe that free replays either encourage or constitute gambling. But if pin-ball is legal at all, then only the gift of replays is allegedly illegal. The prosecutors, then, believe that "more of the same" can be too much of a good thing, and rather than multiply legal acts, actual cross the line of legality. See 89 A.L.R.2d 815. Like many other "more of the same" cases, a quantitative change becomes at some point a qualitative change, just as lowering the temperature of water by degrees gives us nothing but cold water for a while, and then suddenly gives us ice.

Should a free society tolerate intolerance? The First Amendment has been interpreted to require tolerance even of those who oppose its values. But many have advocated that we draw a line at opposition to that underlying value, and cease tolerating the intolerant. Do the two camps disagree on the meaning of freedom, the strategies of preserving or maximizing it, or the logic of self-application?[Note 32]

Is ordinary compliance with law an offense? What if the laws are unjust? A commonly heard justification for nonviolent civil disobedience is that it is the most just response to unjust law. This position sees violent disobedience and compliance to unjust law as additive, not subtractive, in the cumulation of evil.

M. Breaking vicious circles

From a normative standpoint, circular causal chains may be self-bettering or self-worsening situations. The latter are usually called vicious circles (but that term applies equally to causal and logical circles). Agents within the causal vortex are usually helpless to break or reverse the circle; on the contrary, the viciousness of vicious circles lies in the fact that those caught in them have reason or cause to contribute to their perpetuation. In a wage-price spiral, the employer and employee equally seek their interests in the self-worsening trap.

Courts have frequently acted as if they were uniquely situated to break such vicious circles, as agents outside the circle with strong equity powers able to act quickly and in conformity to the needs of the special situation. Residential segregation leads to school segregation and vice versa until a vicious circle spins of itself. This circle was broken in Swann v. Charlotte-Mecklenberg Bd. of Education, 402 U.S. 1 (1971). Inadequate education for blacks leads to poor performance on job application tests, which leads to worse jobs, lower incomes and less adequate education. This circle was

broken in Griggs v. Duke Power Co., 401 U.S. 424 (1971). District lines that deprive voters of equally weighted votes lead to unrepresentative legislatures, which lead in turn to the perpetuation of such lines. This circle was broken in Wesberry v. Sims, 376 U.S. 1 (1964). Indigent criminal defendants who could not pay their fines formerly had to stay in jail until they could do so or else "work them out" in jail at a miserly rate. This not only prevented such defendants from earning the money to pay their fines, but also kept them poor. This circle was broken in Williams v. Illinois, 399 U.S. 235 (1970).

The state of Idaho formerly favored men over women as administrators of estates. It argued that this decision was not arbitrary because it reduced the workload on probate courts in deciding who is most fit to serve as administrator, i.e. it is not arbitrary because there are some advantages to arbitrary preferences. This vicious circle would justify any kind of discrimination. (It saves court time to decide contract cases in favor of the richer party, and police time to arrest only black people.) This circle was broken when Idaho's preference was struck down in Reed v. Reed, 404 U.S. 71 (1971).

Before the Social Security Act was passed, states did not want to tax the employers in their jurisdictions to provide a relief fund, for that would have driven them out; or they did not want to be the first or only state to tax employers. In upholding the constitutionality of the Social Security Act, Justice Cardozo recognized the need to break this vicious circle with federal action. Stewart Machine Co. v. Davis, 301 U.S. 548 (1937).

A good example of a court creating a vicious circle when it had an opportunity to break one is Warth v. Seldin, 422 U.S. 490 (1975). In that case the plaintiffs claimed that they were too poor to buy housing in Penfield, New York, on account of that town's zoning ordinances; hence they claimed to be victims of unlawful discrimination. The Supreme Court held, in effect, that the plaintiffs were too poor to have standing to complain of their poverty. Because they were so poor, they would be unable to buy housing in Penfield even if the zoning ordinances were changed; hence they were not actually injured and lacked standing to complain.

N. To know before we know

A recurring type of vicious circle occurs when an inquiry designed to yield knowledge of x is triggered, or can only be triggered, by knowledge of x. If we could not know before we knew, then the mere logic of the situation would prevent us from ever starting the inquiry. Another form of the same circle occurs when we must make a decision based on knowledge to be gained from the inquiry triggered by our decision.

Normally Congress has the power to investigate any matter on which it may legislate. It cannot legislate on wholly intra-state commerce, so it cannot investigate wholly intra-state businesses. But it may investigate a business to determine whether it is wholly intra-state. This investigation seeks its own justification. Either it will be a permissible investigation in any event, or it may in principle discover that it had no right to discover anything. Either Congress knows before it knows (perhaps corrigibly) that it may investigate that business, or it possesses a second type of valid investigative power. U.S. v. DiCarlo, 102 F.Supp. 597 (1951).

Again, the investigative power of a legislative committee is normally limited to the scope of the committee's legitimate legislative interest. If a witness refuses to answer a question she considers irrelevant to that legitimate interest, then the committee could formerly hold her in contempt, as if the committee alone could decide such relevancy and as if it knew before it knew that it was legitimate to compel the answering of the question. Bart v. U.S., 203 F.2d 45 (1953), rev'd 349 U.S. 219 (1955). The dissent in Gibson v. Florida Legislation Committee, 371 U.S. 539 (1963) explicitly recognizes the "know before we know" nature of the problem: the witness' answer may be compelled only by a claim of relevancy that "requires an investigating agency to prove in advance the very thing it is trying to find out."

The court was just as explicit in Douglas v. California, 372 U.S. 353 (1963) when it said of a California rule giving indigents the right to counsel on appeal only if the appellate court thought the indigent's case had merit, that "[t]he appellate court is forced to prejudge the merits before it can even determine whether counsel must be provided."

Injunctions are normally given as remedies only if the plaintiff can show that irreparable harm would otherwise result to her. When the injunction halts an action that the plaintiff could sue about if it occurred, which is usually the case, then the granting court is really deciding the merits of the plaintiff's future case before the future case materializes.

In judicial investigations problems arise that are similar to those created by legislative investigations, e.g., when a witness testifies to the grounds of her own competence, such as possession of personal knowledge, or testifies to the existence of her own privilege. In criminal trials witnesses may invoke the Fifth Amendment privilege against self-incrimination without triggering any inquiry into the merits of the invocation. Obviously if witnesses could be compelled to give evidence that certain testimony would incriminate them, to justify invoking the privilege against self-incrimination, then the privilege would be pointless. So the privilege in effect makes certain claims self-warranting, or self-insulating and unreviewable. This does not stop courts from denying a witness' claim of self-incrimination occasionally, e.g. if immunity has already been granted. But normally the privilege is the witness' virtually for the asking, as if we knew before we knew that it was due —or as if we had decided that it is better all in all to err on the side of indulgence than stringency. The normal rule is that the claim of privilege is sustained unless it is "perfectly clear" that answering the question "cannot possibly" incriminate the witness. Hoffman v. U.S., 341 U.S. 479, 488 (1951), quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881).

Despite what Hoffman and Temple make perfectly clear, this rule about self-incrimination does not extend to a president's claim of "executive privilege". Richard Nixon lost his argument that executive privilege was his for the asking, and that no court could inquire into its propriety or use compulsory process to investigate its justification. Nixon v. Sirica, 487 F.2d 700, 708-16 (D.C.Cir. 1973).

Witnesses may be required to testify to enough contextual information for the court to decide whether the invocation of the privilege against self-incrimination is justified. Judge Learned Hand noted the paradox of this in U.S. v. Weisman, 111 F.2d 260, 261-62 (2d Cir. 1940): "Logically, indeed, [the witness] is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to protect because it it criminatory."[Note 33]

In principle courts can limit the privilege to those questions which, if answered truthfully, could yield self-incriminating testimony. But in practice they rarely do so, for to make this a regular practice would encourage prosecutors and jurors to infer criminality from the invocation of the privilege against self-incrimination, which would defeat the purpose of the privilege. It is difficult to prevent the inference of criminality; at least counsel cannot argue to the jury that the witness has incriminated herself by invoking the privilege against self-incrimination.[Note 34] Griffin v. California, 380 U.S. 609 (1965). But if a man made a contract with his employer not to disgrace the company, and then invoked the privilege against self-incrimination in a court, a jury can decide whether the invocation was a breach of the contract. Loew's Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950), cert. den. 340 U.S. 954 (1950).

Similarly, a statement to a doctor or lawyer is privileged only if made to the doctor or lawyer in her professional capacity. But this can often not be determined without actually hearing the statement. Nevertheless, the determination is made without hearing the statement.

A stark "know before we know" paradox occurred in Matz v. U.S., 158 F.2d 190 (1946). A man prosecuted for bigamy argued in defense that he was only married to one woman; his first marriage was defective, hence void, and only his second marriage was valid. The state offered the second "wife" as a witness against him, but the man objected under a statute disqualifying a wife to testify against her husband. The man's objection would have to be sustained if the woman were really his wife, but that was precisely the question at issue in the trial. For if his first marriage had been valid, then his second would have been defective. Hence the admissibility of evidence on a certain question could not be decided until that very question was answered, requiring the judge to know before he knew. His ruling evaded the vicious circle by substituting a less vicious circle that still required him to know the man's guilt before the trial determined it: he ruled that he, rather than the jury, had to decide the validity of the first marriage.[Note 35]

The Supreme Court has original jurisdiction over ambassadors and cases in which states are parties (Article III, §2.2). Suppose a borderline example of such a case came before the Court as if entitled to original jurisdiction, e.g. an allegedly discharged ambassador, or a suit between state administrative agencies. The Court must decide whether it has jurisdiction before it decides the merits, but it can't decide jurisdiction without, in effect, conceding original jurisdiction. Logically similar but less politically dramatic problems can arise for any court, since every court's jurisdiction has boundaries.

This "know before we know" problem is solved by the device of "special appearance" in which a court can hear arguments for and against its jurisdiction. Only if the court decides that it does have jurisdiction will the parties be required to make "general appearance" for the adjudication of their rights. This does not prevent all reflexive paradoxes, however. In the case of the Supreme Court's original jurisdiction again, if the borderline case raised the question whether a certain woman was an ambassador, then the question of original jurisdiction could not be decided until the merits had been decided.

One reason why the bootstrap doctrine (Section 20.F above) is controversial is that if a person comes to court under special appearance solely to deny the court's jurisdiction over her, the court may convert the special to general appearance and assert general jurisdiction over her. York v. Texas, 137 U.S. 15 (1890); Chicago Life Ins. Co. v. Cherry, 244 U.S.25, 30 (1917). In short, to prevent the reflexivity problem of deciding the merits of a case before deciding jurisdiction, and knowing before it knows, courts use the device of special appearance. But use of it in conjunction with the reflexive bootstrap doctrine creates the alternative reflexivity problem of self-validating judgments of jurisdiction by courts that can, in effect, use dissent as consent to a court's jurisdiction.

Bail is excessive under the Eighth Amendment if it is greater than necessary to assure that the defendant will appear for trial. The risk of flight is the major factor in setting bail, and that risk may not be inferred from the indictment, even if it specifies an offense (e.g. conspiracy) that suggests that the defendant is able and likely to flee. Stack v. Boyle, 342 U.S. 1 (1951).

An interesting example of a reflexivity that was obviously enacted to avoid a "know before we know" paradox is Federal Rule of Evidence 104 (a). It provides that none of the Federal Rules of Evidence applies to the judge's determination whether offered evidence is sufficiently relevant to be admitted, or whether a witness is qualified or privileged. Without Rule 104 (a), evidence inadmissible under law would have to be admitted so that the judge could decide its admissibility —or else the judge would have to know before she knew in each case.

Effective-date clauses raise "know before we know" paradoxes insofar as they tell us authoritatively, before they are effective, when they and the statutes to which they attach will become effective. (See Section 14.C for more discussion.)

O. Tax reflexivities

O.1. Pyramiding Taxes. If an employer pays an employee's income tax as an extra benefit, then the amount of the tax paid is considered to be extra income to the employee. Because it is income, it is taxable. If the employer pays the tax due on that extra increment of income, and then on the next increment due on her second payment, and so on, then an infinite series is created. However, the series converges and the exact amount of tax due can be calculated, which is always more than the employee would have to pay if she paid her own taxes directly. Hence this perquisite is rarely used.

Whether taxes pyramid in this way is a matter of policy. They are allowed to do so in the case of employers and employees. But to encourage leases in which the lessee pays the lessor's taxes on the leased property, §110 of the Internal Revenue Code (IRC) stops the pyramiding by stipulating that payment of the lessor's taxes is not considered income to the lessor.

Pyramiding down and up in oscillation would be possible if the late-filing charge or other penalties could be deducted in an amended return. The larger deduction than originally taken would decrease the tax due, decreasing the penalty, decreasing the allowable deduction, increasing the tax due, and so on in a series that would probably always converge. IRC §162 (f) prevents the deduction of such penalties.[Note 36]

O.2. Mutually Deferring Provisions. Under IRC §1015 (a) the taxpayer's basis on the sale of a gift, if a gain, is the donor's basis, and if a loss, is either the donor's basis or the fair market value at the time of the gift, whichever is lower. Suppose the donor buys something for $200 (donor's basis), gives it to the donee when it is worth $100 (fair market value), and the donee sells it for $150. Then the sale is both a gain and a loss. If the sale is considered a gain, then we use the donor's basis ($200), yielding a $50 loss. If the sale is considered a loss, then we use the lower of the two bases ($100), which yields a $50 gain. If the sale is a gain, then it is a loss; and if it is a loss, then it is a gain. The Code does not solve this problem, but Treasury Department Regulations do. Regulation §1.1015-1 (a) cuts the Gordian knot by allowing no deduction and imposing no tax on such transactions, making it immaterial whether they were gains or losses.

O.3. Imputed Income. If one performs a service with a market value for oneself, one may be said to have "earned" the value of the service as income. Such "earnings" are called imputed income, and are traditionally not taxed. For example, a housepainter who paints her own house is not taxed on the value of her work, nor is the homeowner who lives in her own house taxed on the imputed rent. But an insurance agent was once taxed on "commissions" that he "earned" on policies that he bought from his company for himself. Commissioner v. Minzer, 179 F.2d 338 (1960). Minzer claimed that the "commissions" were subtracted from the purchase price, giving him a discount and no income. The IRS claimed that he performed a service for compensation. Minzer paid the price of his policies without the commission, whereas other buyers pay both the price and the commission. Because no commission was paid, none could have been received as income in the normal sense. But just because none was paid, one was "earned" as imputed income —a benefit with a cash value in the market place was received in exchange for labor. Because Minzer was dealing with himself, he earned a commission because he paid none, and he was taxed on it.

Other questions about self-dealing from outside tax law: Why are contracts with oneself void? In a slave-state where slaves were chattels, could a slave take title to herself?

P. Circular reasoning

Judges and lawyers are not immune to the fallacies of circular reasoning, and many types frequently occur. But what is more interesting is circular reasoning that is permitted or required by law, without regard to its logical validity. We've seen many cases under other heads above; here are some others.

P.1. Mutual Corroboration. In order to minimize the risk of collusion in divorce cases in fault jurisdictions, many states have statutes that require that a spouse's fault be shown with evidence other than her admission of fault. In Husband v. Wife, 253 A.2d 63 (1966) the wife denied committing adultery or confessing to adultery to her husband, but he presented circumstantial evidence that she had both committed adultery and confessed it to him. The circumstantial evidence of the wife's alleged confession was legally insufficient taken alone, but the court reasoned that the circumstantial evidence corroborated the husband's in-court testimony, which in turn corroborated the circumstantial evidence. Together these mutually corroborating stories showed (the court held) that the wife's denial was perjured, and hence that she was guilty by a sufficiency of evidence. The court unabashedly concluded, after a string of citations, that the wife's "perjury impels acceptance of the husband's testimony concerning her admissions. We accordingly have a situation in which the indisputable circumstantial evidence corroborates the husband's testimony, which in turn corroborates the circumstantial evidence." Whether the statute designed to minimize collusion required this result is one question; another is whether the court should have inferred something from the fact of the dispute, namely, that a contested divorce does not present a large risk of collusion.

A generalized version of the problem above occurs whenever a mass of evidence is found sufficient when the bits comprising the mass are separately insufficient as a matter of law. The support that each bit provides for and receives from the others, by completing a coherent picture, is commonly and probably harmlessly found to be persuasive. But logically it is difficult to distinguish from the mutual proof of two uncertain propositions. See Peters v. U.S., 408 F.2d 719 (1969), dissent: "Adding hearsay to hearsay [even in administrative hearings where hearsay is admissible] is like adding zero to zero which still equals zero."

In 1967 the Supreme Court struck down a Texas statute that barred partners in crime from testifying for one another, and thus permitted mutual corroboration "for what it is worth". Washington v. Texas, 388 U.S. 14 (1967). The statute, and many like it in other states, was evidently designed to prevent the simple mutual proof of two false or uncertain propositions, an evil to be feared because it is made attractive by the self-interest of the witnesses. But the Supreme Court held, in effect, that the circle does not prove falsehoods without the help of a jury, and that juries are not likely to be fooled and in any event are entitled to believe.

P.2. Arguments for Which Winning is Losing. Occasionally a party argues in such a way that winning, ironically, means that she loses or should lose. Sometimes this is due to counsel's short-sightedness in constructing arguments, but sometimes it is due to a logically perverse set of circumstances from which counsel must try to escape. The best examples of the latter are Protagoras v. Euathlus and State v. Jones. Here are some examples of the former.

The Court of Appeals of New York once held, in a case of first impression, that infants had no cause of action when born maimed for injuries sustained while a fetus. Dobner v. Peters, 133 N.E. 567 (1921). Thirty years later the same court wanted to reverse itself. It argued that Dobner was no longer good law because the "chief basis" of its holding —the lack of precedent— no longer existed. Woods v. Lancet, 102 N.E.2d 691 (1951). The precedent that then existed was Dobner!

Many cases present roughly the following situation. When a parent dies, a child contests the validity of her parents' marriage in order to cut out the surviving spouse and increase her own share of the decedent's estate. The argument succeeds, the marriage is found void, but the child is thereby found illegitimate and (in some jurisdictions) ineligible to inherit. Beamish v. Beamish, 9 H.L.C. 274, 11 Eng. Rep. 735 (1861).[Note 37] This situation is more common when the dead parent is the father, since it is more common for states to bar illegitimate children from inheriting from their fathers (absent an acknowledgment of paternity or a posthumous paternity action) than from their mothers.

The film, The Amazing Dr. Clitterhouse, presents an argument for which losing, apparently, is winning. Edward G. Robinson plays a doctor who leads a criminal band in order to study their physiology before, during, and after criminal actions. He eventually kills his rival, Humphrey Bogart, in order to avoid exposure and to test his own reaction to the ultimate crime. When caught he resists his lawyer's attempt to establish an insanity defense. After his lawyer argued insanity anyway, he took the stand and boldly asserted his sanity. The jury acquitted, saying that only an insane man would claim sanity in a murder case.

The combat flyer, Orr, in Joseph Heller's Catch-22 lost by the same logic. Driven insane by combat, he was eligible for non-combat duty on the grounds of insanity. But he had to ask for it. Those who ask, however, encounter the legalistic "catch" that "anyone who wants to get out of combat duty isn't really crazy."[Note 38]

Notes

1. I proposed this broad definition, and used it to govern the selections, in my "A Bibliography of Works on Reflexivity," in S.J. Bartlett and P. Suber (eds.), Self-Reference: Reflections on Reflexivity, Martinus Nijhoff, 1987, pp. 259-362.

2. The earliest version of this case is reported in Aulus Gellius, The Attic Nights of Aulus Gellius (c. 150 C.E.), trans. John C. Rolfe, 3 vols., Loeb Classical Library, Harvard University Press, rev. ed., 1946, vol. I, Book V, x, pp. 405-09. If the story is true, then this account was written roughly 600 after the events. (Nothing is known of Euathlus; Protagoras of Abdera lived from 480 to 410 B.C.E.) Diogenes Laertius repeats the story about a century later in his Lives of the Eminent Philosophers, trans. R.D. Hicks, Loeb Classical Library, G.P. Putnam's Sons, 1925, Book 9, Chapter 56, pp. 468-69.

Different accounts of the case change the facts in small ways. The most salient changes to the logic and law of the verdict are the following.

In Aulus Gellius, Euathlus paid half his fee before the lessons began, and made the contract to pay the other half. The contract stipulated that Euathlus would pay the other half "on the day when he first pleaded before jurors and won his case", which is much less ambiguous than "when Euathlus won his first case". After making the contract, Euathlus delayed in taking any cases and Protagoras sued from impatience. Euathlus knew he'd be better off hiring a lawer, but wanted the satisfaction of winning the suit and the argument. The case went to a jury, whose members postponed their verdict to "a distant day" fearing that any verdict would "annul itself".

In "Dilemmas and Circles in the Law," Archiv für Rechts- und Sozialphilosophie, 51 (1965) 319-335, Fiori Rinaldi says that Protagoras initiated the contract, not Euathlus. Protagoras saw that Euathlus needed training but could not pay, and "came to his rescue by offering to give the necessary tuition...." Protagoras proposed that the contract turn on Eualuthus' first victory, making it difficult for Protagoras to decry the hardness or ambiguity of the terms. Rinaldi suggests (at p. 324) that the original Greek judge held for Euathlus.

In Ilmar Tammelo's Outlines of Modern Legal Logic, Franz Steiner Verlag, 1969, p. 122, Euathlus "abstains from going into legal practice" after the completion of his lessons.

In "Protagoras versus Euathlus: Reflections on a So-Called Paradox," Ratio, 19 (Dec. 1977) 176-80, Wolfgang Lenzen says that Euathlus contracted to pay "if and only if" he wins his first legal case. Although Lenzen's source of the paradox is J.L. Mackie, Truth, Probability and Paradox, Oxford University Press, 1973, p. 296, Mackie uses "when", not "if and only if". Lenzen says that after making the contract, Euathlus "does not dream of taking part in any court-case".

Judge Putnam in State v. Jones (see Section 20.B) said that Protagoras stopped teaching Euathlus when he decided Euathlus was proficient. Euathlus protested that he was not finished; Protagoras then sued. The case did not go to a jury, but to a panel of judges who were so perplexed that they adjourned for 100 years.

3. See Aulus Gellius, Rinaldi, and Lenzen from note 2 above. See also E. Schneider, Logik für Juristen, Berlin, 1965, at p. 152; Ilmar Tammelo, Outlines of Modern Legal Logic, Franz Steiner Verlag, 1969, at pp. 122-23; John Bryant, "The Paradox of the Lawyers," Midwest Journal of Philosophy, 4 (1976) 1-2; W.K. Goossens, "Euathlus and Protagoras," Logique et Analyse, 20 (1977) 67-75; Raymond Smullyan, What is the Name of This Book? Prentice-Hall, 1978, pp. 213-14; Lennart Aqvist, "The Protagoras Case: An Exercise in Elementary Logic for Lawyers," in Wlodzimierz Rabinowicz (ed.) Tankar Och Tankefel, Uppsala, 1981, pp. 211-24.

4. Lenzen, op. cit., thinks Euathlus should win the third suit. Schneider, op. cit. thinks he should lose it.

5. The only other wily scheme that occurs to me is a design to make vivid a proposition for which he was famous and, indeed, that brought him pupils and income. In Seneca's words,

Protagoras declares that one can take either side on any question and debate it with equal success —even on this very question, whether every subject can be debated from either point of view.

Seneca ad Lucilium Epistulae Morales, vol. II, trans. Richard M. Gummere, Loeb Classical Library, Harvard University Press, 1953, Epistle 88.43, p. 375. Since this proposition would only become vivid in the lawsuit if Euathlus had been sufficiently well-trained to pose the counter-dilemma to Protagoras' dilemma, the wily scheme might have included the demonstration that Protagoras is a good teacher, a claim on which he often boasted (see e.g. Plato, Protagoras, 328.a-b). If anyone thinks this scheme is a bit too wily to attribute even to Protagoras, then I will acquiesce.

6. One might well have solved this problem by giving Jones a directed verdict, that is, taking the issue from the jury and ruling as a matter of law that that Harris was Jones' accomplice and hence that there is no legally sufficient evidence to sustain the charge that he performed Harris' abortion. Many judges, however, will wait to see what the jury says before directing a verdict, preferring that acquittal come from the jury than from the bench. To a lawyer, then, Jones may seem less a problem in logic or self-annulling verdicts, than a problem in the timeliness of granting a directed verdict.

7. More precisely, it is being found guilty that implies that Jones should be found innocent, although this does not affect the paradox. However, in going the other direction, being found innocent does not strictly imply that Jones should be found guilty, only that he may be found guilty. Being found innocent means that Harris's testimony could suffice if the jurors found it credible, not that it must suffice. Hence, one might say that only Jones' conviction leads to self-annulment, while his acquittal is self-consistent. To logicians that would usually suffice to acquit Jones. The only problem with this solution in law is that (under 1946 Ohio law) Jones is guilty!

8. However, when abortion was illegal and women who voluntarily procured abortions were considered accomplices of the abortionist, many accused abortionists found themselves in Jones' position and wanted jury instructions to the effect that the woman who requested the abortion was an accomplice as a matter of law. These requests were usually denied, as they were in Jones. The jury is to decide who is an accomplice, and the burden is on the defendant to show that the woman was an accomplice. See Wigmore On Evidence, footnote 12 to §2060 (vol. 7, p. 444) for cases.

9. C.I. Lewis said all dictionaries are circular in this sense, by defining the words with other words that are defined in the same work. The series ultimately closes in a circle, and one criterion of merit for dictionaries is that the circle be as large as possible. Clarence Irving Lewis, Mind and the World Order: Outline of a Theory of Knowledge, Charles Scribner's Sons, 1929, p. 82.

10. J.C. Hicks, "The Liar Paradox in Legal Reasoning," Cambridge Law Journal, 29, 2 (November 1971) 275-291. This article is more on logical paradoxes in law than on paradoxes of lying in law.

11. Alf Ross, "On Self-Reference and a Puzzle of Constitutional Law," Mind, 78 (1969) 1-24 at p. 19.n.

12. See the advice for witch-prosecutors in Heinrich Kramer and James Sprenger, Malleus Maleficarum (original 1486), Dover Publications, 1971, Third Part.

13. Richard Popkin, History of Skepticism from Erasmus to Spinoza, University of California Press, 1979, at pp. 181, 287.n.38.

14. "The FBI's Show of Shows," Time Magazine, 116, 9 (September 1, 1980) 14ff, at p. 19.

15. In chronological order the main articles are: Anon., "The Three-Cornered Priorities Puzzle," Virginia Law Review, 8 (1922) 550; White, "A Problem in Priorities," Ohio Law Reporter, 25 (1926) 116; Anon., "Priorities Between Mortgages and Mechanics Liens," Yale Law Journal, 36 (1926) 129; Orlo Kellogg, "Priorities Puzzle Under the Ship Mortgage Act," Washington Law Review, 2 (1927) 117-21; Anon., [Note on circular liens], Virginia Law Review, 15 (1928) 90; A. Kocourek, "A First Rate Legal Puzzle: A Problem in Priorities," Illinois Law Review, 29 (1935) 852; Benson, "Circuity of Lien —A Problem in Priorities," Minnesota Law Review, 19 (1935) 139; Anon., "Circuity of Liens —A Proposed Solution," Columbia Law Review, 38 (1938) 1267-78; Anon., [Note on circular liens], Harvard Law Review, 67 (1953) 358; Anon., "Circuity of Priority and Liens under Section

67(c)(1) of the Bankruptcy Act," Yale Law Journal, 66 (1957) 784; Richard Peck, "Federal Tax Liens —Their Removal or Foreclosure, Priority Thereof, and the Problem of Circuity of Priorities," Nebraska Law Review, 38 (1959) 163-72; Grant Gilmore, "Circular Priority Systems," Yale Law Journal, 71 (1961) 53-74; R.H. Stern, "Priority Paradoxes in Patent Law," Vanderbilt Law Review, 16 (1962) 131; Alan L. Tyree, "Circular Priorities in Secured Transactions," American Mathematical Monthly, 87 (1980) 186-93. The best review of the literature and summary of approaches for dealing with circular priorities is Grant Gilmore's 1961 article.

16. Technically, the jurisdiction of a court to determine its own jurisdiction is subject to res judicata and direct review, but not collateral attack. See Anon., "Res Judicata and Jurisdiction: The Bootstrap Doctrine," Harvard Law Review, 53 (1940) 652-660. See Peri v. Groves, 50 NYS 2d. 300, 308 (1944); Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522; 118 ALR 1518; Charles S. Collier, "Judicial Bootstraps and the General Welfare Clause," George Washington Law Review, 4 (1936) 211-242.

17. The infinite regress is as follows. If a defendant challenged the jurisdiction of court #1 over her, and court #1 could not itself decide the issue of jurisdiction, then the question would have to go to an appeals court #2. If the defendant challenges the jurisdiction of court #2 over her, then the question passes to court #3, and so on. To avoid this it is necessary that some court in the series have the jurisdiction to decide its own jurisdiction; in our system this power is given to virtually every court.

18. W.J. Rees, "The Theory of Sovereignty Restated," Mind, 59 (October 1950) 495-521, at p. 518.

19. John Stuart Mill, On Liberty (Original 1859), Hackett Publishing Co., 1978, pp. 101f.

20. See Section 18, note 8, above, and Appendix 2, below.

21. For more discussion of renvoi from a logical point of view, see Fiori Rinaldi, "Dilemmas and Circles in the Law," Archiv für Rechts- und Sozialphilosophie, 51 (1965) 319-335 at 330f; J.C. Hicks, "The Liar Paradox in Legal Reasoning," Cambridge Law Journal, 29, 2 (November 1971) 275-291, at 284-286 and citations at his footnote 47; and Laurence Goldstein, "Four Alleged Paradoxes in Legal Reasoning," Cambridge Law Journal, 38 (1979) 373-91, at 380f.

22. See Rinaldi, op. cit. at 321 and 321.n.8.

23. Rinaldi, op. cit. at 333.

24. Goldstein, op. cit. at 380-81, emphases in original.

25. Ross, op. cit. at pp. 21ff.

26. There is a very large literature on this problem. See e.g. W.N. Harrison, "The Statute of Westminster and Dominion Sovereignty (II)," Australian Law Journal, 17 (1944) 314; Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford University Press, 1957, Chapter VI; Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty," Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-516, at pp. 510-12; Geoffrey Marshall, Constitutional Theory, Oxford University Press, 1971, at pp. 61ff.

27. J.M. Finnis, "Revolutions and the Continuity of Law," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp. 44-76, at 52.

28. A contract is integrated when it is the complete agreement of the parties and is not, for example, subject to oral qualifications not written into the contract.

29. The medieval literature on this and similar paradoxes is well covered in Paul Vincent Spade, The Mediaeval Liar: A Catalogue of the Insolubilia-Literature, Pontifical Institute of Mediaeval Studies, 1975; and E.J. Ashworth, "Will Socrates Cross the Bridge? A Problem in Medieval Logic," Franciscan Studies, 36 (1976) 75-84.

30. Part 2, Chapter 51. This paradox is discussed in Max Black, Language and Philosophy, Cornell University Press, 1949, pp. 91ff.

31. See George P. Fletcher, "Paradoxes in Legal Thought," Columbia Law Review, 85 (1985) 1263-1292 at p. 1269, and his cited sources.

32. For further discussion of these issues, see my "Logical Rudeness," in S.J. Bartlett and P. Suber (eds.), Self-Reference: Reflections on Reflexivity, Martinus Nijhoff, 1987, pp. 41-67, esp. pp. 62f.

33. Some witnesses may be caught in a further reflexive dilemma, although it is not related to knowing before we know. If the judge asks contextual questions to determine whether the witness is justified in invoking the privilege against self-incrimination, the witness is bound to answer these contextual questions under oath. It may be that one kind of self-incrimination she wishes to avoid is the exposure of earlier perjury. Truthful answers to the judge's contextual questions may expose her perjury by contradicting her earlier testimony. Hence, to the witness, the privilege would have to be invoked again at the meta-level, against the judge's contextual questions. Courts facing this situation compel answers to the contextual questions, as if there were no privilege, but protect the answers from future criminal prosecution. In re Boiardo, 34 N.J. 599, 170 A.2d 816 (1961).

34. The same logic arises in Fourth Amendment (search) cases. When police search a car on the basis of the driver's consent, as opposed to probable cause or a search warrant, then the driver can terminate the search at any time by revoking her consent. The state of Maine once argued that the revocation of consent in the middle of a search, just as the police approach the glove compartment or a parcel, is itself a suspicious act creating probable cause to continue the search without the driver's consent. This argument was rejected in State v. Walker, 341 A.2d 700, 704 (1975). Preserving the legally "formal" understanding of consent against psychologically more "realistic" interpretations of it is analogous to preserving the formal against the realistic understanding of the invocation of the Fifth Amendment privilege.

35. For other cases in which the admissibility of evidence turned on the factum probandum or fact to be proved, see Stowe v. Querner, L.R. Exch. 155 (1870), and State v. Lee, 127 La.1077, 54 So. 356 (1911).

36. For an analysis of tort liability so that it oscillates and pyramids like tax liability, see George P. Fletcher, op. cit. at pp. 1285ff.

37. See Richard Wasserstrom discusses the Beamish case in his The Judicial Decision: Toward a Theory of Legal Justification, Stanford University Press, 1961, at pp. 58-60.

38. Joseph Heller, Catch-22, Dell Publishing Co., 1962, at p. 47.

Section 21: Conclusions and Explorations

A. Summary

Restating my theses with their supporting arguments would, I hope, nearly double the size of this book. But a restatement of my chief theses with their chief supporting propositions may be done far more briefly, and with the effect of bringing all the various strands of the problem together. This summary covers Part One only. Sections 21.B-E, below, go beyond summary to explore some of the consequences of my position.

Summary of analysis and argument

Because the paradox of self-amendment is a special case of the paradox of omnipotence, our central question is whether a deity or AC can irrevocably limit its own power. Logicians using strictly logical criteria offer the answer that such self-limitation is self-contradictory; the same answer is given by lawyers and theologians who adopt the criteria of formal logic for their disciplines. No one using strictly legal criteria has ever said that self-limitation is self-contradictory, let alone impermissible.

The logical or formalist view of law as it affects this problem I am calling the inference model of legal change and validity. Under the inference model, legal change is modeled by deductive inference. The authorizing rule of change (for example, the old AC) is one premise, the fact of enactment under the authorizing rule or procedure is another, and the validity of the new rule (new AC) is the conclusion.

> Rule: If act A is done, then rule B is valid.
> Fact: Act A is done.
> ---
> Conclusion: Therefore, rule B is valid.

The theory is that the amendment is lawful if and only if this deduction is valid and its premises are true.

Self-amendment occurs when the rule affirmed in the conclusion is meant to replace the rule in the premises, that is, when the rule in the premises refers to itself. Irrevocable self-limitation is self-contradictory on this model because it requires an inconsistency between a premise and the conclusion of the inference, when the premises themselves are (or may as well be) internally consistent. The rule of change that sits in the premise is inconsistent with its own invalidation, or with the exclusive validity of its successor asserted in the conclusion. Alf Ross, the Danish logician and jurist, has argued in detail[Note 1] that by formal criteria such an inference must be invalid. The esteem of Alf Ross in both logic and law forces us to take his arguments and his model of legal change seriously. Apart from this, we are led to take the inference model seriously by virtue of the widespread, usually unreflective belief that law is logical. Under the inference model what is logically impossible is therefore legally impermissible, and any legal practice or tradition to the contrary is itself a violation of both law and logic.

There may well be a way to dissolve the paradox for the inference model or for formal logic generally. (We will see that satisfying the inference model is more difficult than satisfying formal logic alone.) Such dissolution would take the form of removing the inconsistency between premise and conclusion in the inference that models the act of amendment. A dissolution of this kind would satisfy logicians even if it had absurd consequences for law; but I have not been able to find even one dissolution of this kind that stands up to analysis.[Note 2]

We may distinguish two ways to "solve" a paradox. Paradoxes are not mere contradictions; they are not nearly as tame. But their bite lies in their way of making contradiction appear inescapable. One kind of solution is to escape contradiction by a path not seen by others. I am calling this a dissolution of the paradox. Another way is to explain why contradiction is harmless, whether it is escapable or not. This will only work when contradiction is harmless, of course, and most of the argument in support of solutions of this kind will be spent in that cause. This will not dissolve the paradox, but will excuse and domesticate it, removing its sting and threat. It is much like what lawyers call an "affirmative defense": admit that you did it, but claim some excuse like insanity. The second kind of solution is more radical than it seems and requires, in effect, an insanity defense for law itself.

In short, my thesis is that no dissolution satisfies the terms of the inference model, but that when we reject that model we find a number of plausible domesticating strategies. First I will consider various attempts to dissolve the paradox.

Attempted dissolutions

In standard logic all propositions follow validly from a contradiction. Therefore, one solution might be deliberately to make the premises of the inference that models the change internally inconsistent. This would certainly work to make the new AC a logically valid consequence of the old one. But it would work only at the cost of assuring that every AC is internally inconsistent. This result is inadmissible for the inference model, which cannot allow inconsistent rules simultaneous validity. However, if one likes, one may consider the total invalidation of the AC a solution satisfactory to logic that is repugnant only to law. My aim, however, is to explain how actual change of ACs has been possible, or how far it is logical. The actuality of self-amendment is a fact that is part of the explanandum (see Appendix 2). Even a logical dissolution must deal with it, much as approaches to the Liar cannot pretend that the lying words do not exist or cannot form the paradoxical statement.

Most philosophers who have approached the problem (primarily through the theological paradox of omnipotence) evidently hope that a solution can be found that does not violate or require the inapplicability of formal logic. I have not argued for any conclusion that should dampen that hope.

I have argued that formal logic has very limited application in law, but not that a dissolution of the legal form of the paradox is strictly impossible by logical criteria. Hence I admit —without the same earnestness of hope— that there may well be a dissolution of the paradox satisfactory to formal logic. All I have argued is (1) that the obvious attempts at such dissolution fail, and (2) that in any case law can dispense with such a dissolution. The second point is the more important thesis, and stands (if it stands at all) even if a satisfactory logical dissolution should be discovered tomorrow.

In this sense the state of self-amendment today is analogous to the state of calculus between Leibniz and Weierstrass. There may be a way to render it coherent and consistent, but so far we lack the theory to do so. Meantime we use it with good results. The difference is that a coherent theory of self-amendment is unnecessary for law, while a coherent theory of the calculus was vitally necessary for mathematics.

If self-amendment would be logically impeccable if only certain niceties were observed in rewording the clause and in transacting its self-change, then a legal system may still ignore those niceties utterly. This remains the case whether the required changes are ingeniously simple or hideously complex. Today lawmakers listen to what logicians say they should do only to the extent that logicians form a weighty voting bloc in their constituencies. There is no reason to think that their lawmaking acts will cease to be valid if the logicians should one day become correct, any more than those lawmaking acts are invalidated when the weightier loyal opposition is correct. Legal validity is a matter of power and social practice, not abstract correctness.

There will be no solution satisfactory to formal logic if formal logic bars all self-reference, say, by incorporating a theory of types, and if self-amendment unavoidably requires self-reference. Ross believes this is the case, but has been followed in this by only one commentator,[Note 3] and then only with reservations. Hart[Note 4] leads the opponents of this view in arguing that at least some self-reference is logically and legally unobjectionable. Raz[Note 5] even argues that self-reference is unnecessary in self-amendment. I argue that examples of self-reference and self-application can be legally acceptable, even if meaningless to some formal logicians, so long as legislators, voters, and judges find some meaning in them. Moreover, if all self-reference is meaningless, then a self-referential AC would be unavailable even for ordinary, irreflexive amendment, which proves far more than Ross intended or desired.

Ross distinguishes between logical and legal contradictions. A logical contradiction exists between any statement and its negation. We don't have to assert one or both of the statements for the contradiction to exist. A legal contradiction exists between any two inconsistent laws that are both valid at the same time. If they are not both valid at the same time, they will be logically but not legally contradictory. Armed with this distinction, Ross has an answer to the most common attempt to dissolve the paradox of self-amendment.

The most common attempt to dissolve the paradox has been to insure, or assume, that the old and new ACs are never valid and supreme at the same time. Temporal overlap can be prevented; but preventing it merely avoids a legal contradiction, not a logical contradiction. It keeps inconsistent rules from enjoying simultaneous legal validity, but thereby presupposes their logical inconsistency. That inconsistency invalidates the inference that models self-amendment because a logical contradiction between premise and conclusion (when the premises are internally consistent) suffices to invalidate a deduction. As Ross often puts it, the invalidity consists in our attempt to derive from one norm a second norm inconsistent with the first.

If one rejects the distinction between logical and legal contradiction, but still holds the inference model of legal change, then one is no better situated to overcome the invalidity of the inference that models the self-amendment. If the contradiction is supposed to disappear because the old AC loses validity at the moment the new one acquires validity, then in the inference that models this process the assertion of a key premise must be suspended in mid-inference. Even if this successfully removes the inconsistency in the inference that models the self-amendment, it replaces it with a new fallacy. Logicians do not have a name for this fallacy because it cannot be performed in ordinary argument where the inference (conceived logically, as opposed to psychologically) is instantaneous or non-temporal.

In discussing Ross's thesis, John Finnis[Note 6] introduces a term that helps here. If some legal rules are valid only as long as the laws that authorize them are themselves valid, then we can say that those legal rules are routinely validated; if some rules are valid even after their authorities are repealed, then they are "transtemporally" validated. For example, if a court holds its jurisdiction under a statute, and if the statute is repealed, then the court loses its jurisdiction (ceases to be a court) if it is routinely validated, but continues unaffected if it is transtemporally validated. In general we will be tempted to recognize cases of transtemporal validation wherever self-amendment seems to occur, e.g. when a new AC is validated by the old AC that lost its validity when it was superseded by the new one.

I take no position the transtemporal validation of law, although superficial observation suggests that some laws are transtemporally validated and others are not. Ross argues that transtemporal validation is illogical, hence impossible, and yet is logically required for strict self-amendment. His reason for rejecting transtemporal validation is essentially that nothing analogous to it can occur in valid deductions. Inferences in which premises are "dis-asserted" just as the conclusion is asserted violate canons of deduction, including the metaphysical one that premises determine their conclusions instantaneously. Any conclusion whose derivation depends on certain premises is no longer validly concluded if we deny one of those premises, whether we deny it before the inference, after, or (supposing it is even possible) in mid-inference, after affirming the premises and before affirming the conclusion.

In this sense the inference model of legal change requires that all validation be routine, or that none be transtemporal. Accordingly, if we reject the distinction between logical and legal contradiction, and assume that temporal separation of the old and new ACs suffices to avoid the paradox, then we violate the terms of transtemporal validation.

In short, temporal separation does not solve the paradox for the inference model whether we recognize the distinction between logical and legal contradiction or not. If we accept the distinction, then temporal separation only prevents legal contradiction; the logical contradiction remains and suffices to invalidate the deduction that models the legal change. If we reject the distinction, then temporal separation will mean that the new AC is valid only by some magical intervention (like Ross's tacit transcendent rule) or by the old AC through transtemporal separation, which violates the inference model.[Note 7]

So if we are to conclude that self-amendment is lawful without ad hoc or magical makeshifts, then we must abandon the inference model or find another way to dissolve the paradox. I now explore both.

Two non-formalist models of legal authority and change important to this problem are the acceptance and procedural models. (1) The acceptance model makes the validity of new rules depend on a complex of social practice, or on rules that in turn depend on a complex of social practice. This social practice is the joint, cumulative result of the ordinary activity of the people and the officials of the system in enacting, amending, recognizing, respecting, interpreting, following, and disrespecting law. (2) The procedural model holds that, if a procedure (such as that to amend the constitution) is independently known to be lawful, then the products of its correct application are lawful even there is an inconsistency between them and some defining condition of the procedure itself. I will appeal to these two models shortly.

A very attractive attempt to dissolve the paradox appeals to a distinction derived from J.L. Mackie and stated by Hart.[Note 8] The distinction is between continuing and self-embracing omnipotence. Continuing omnipotence is the power to perform any act compatible with the continuation of this power, i.e. any act except irrevocable self-limitation. Self-embracing omnipotence is the power to perform any act as one's first act, including irrevocable self-limitation. Subsequent acts are limited only by the consequences of earlier acts for the extent of one's power. Recalling the naive notion of omnipotence as the power to do any act at any time, this distinction separates "any act" from "any time" in order to make two coherent species of omnipotence from one incoherent one. Continuing omnipotence cannot perform every possible act; preeminently, it cannot "discontinue" itself by some abdication or diminution that cannot be undone. But of those acts that it can perform, it can perform any of them at any time. Self-embracing omnipotence can perform literally any act, but not necessarily at any time. If one act is irrevocable self-limitation, then thereafter the range of power is limited accordingly.

Using this distinction, it is natural and compelling to argue that irrevocable self-limitation is either (1) non-paradoxically impossible, because the AC has continuing omnipotence, or (2) non-paradoxically possible, because the AC has self-embracing omnipotence.

The distinction is not only a plausible solution to the paradox, but it is rooted in real-world legal disputes. Every few years someone in England's Labor Party proposes to abolish the House of Lords. Apart from the politics of the question, many have argued that it is legally impossible to abolish the House of Lords.[Note 9] The House of Lords is one House of Parliament and would therefore have to assent to its own abolition. If the abolition is to be irrevocable, then we are asking whether the House of Lords can limit itself irrevocably. One short answer is that it can, if it has self-embracing omnipotence, and cannot, if it has continuing omnipotence. Similarly, on this line of argument, an AC could limit its power irrevocably if it had self-embracing omnipotence, and could not if it had continuing omnipotence.

Unfortunately, this approach fails under both the acceptance and inference models, although it may succeed under the procedural model. First note that a power of self-embracing omnipotence is a very different thing when exercised by a deity and when embodied in a constitutional AC. If a deity has such a power then it magically creates what it wills; but if an AC has such a power, it only authorizes what others will. Keeping this distinction in mind we can see why irrevocable self-limitation is not made any less self-contradictory by self-embracing omnipotence. The theory of self-embracing omnipotence offers no reason to believe that the inconsistency in self-amendment has been eliminated other than the reason that the inconsistent outcome is authorized. It is tempting at first to believe that what is specifically authorized by a rule cannot be inconsistent with that rule; but this principle is ultimately untenable. I call it the authorization fallacy.

The fallacy in the authorization fallacy is to confuse legal and logical validity, and to assume that what is legally permitted must be logically unobjectionable —i.e. free of contradiction. But if a norm specifically authorized the derivation of a norm inconsistent with itself, and if it was used to derive such a norm, then clearly (that is, ex hypothesi), despite the authorization, an inconsistency would exist. Authorization, then, does not remove inconsistencies between the authority and the authorized, but only legitimates them. (See Section 11.A.)

Under the inference model, authorization does not dissolve the paradox. If we accept the distinction between logical and legal contradiction, then authorization goes only to the legal contradiction. If we reject that distinction, then a rule authorizing its own replacement violates transtemporal validation.

The acceptance model cannot accept the theory of self-embracing omnipotence either, but for a very different kind of reason. Under the acceptance model, any self-limitation of an AC that purports to be irrevocable can be repealed if future generations decide (as our generation has decided) that no generation can bind its successors irrevocably. If the people and officials accept a view of law that permits the repeal of "immutable" limitations on the AC, then the AC may be restored to its unlimited power. This means that ACs have a kind of continuing omnipotence. Even if they also have a kind of self-embracing omnipotence, it is not the kind that permits irrevocable self-limitation. (See Section 12.C above, and Sections 21.A, 21.C below.)

Ross's attempted solution was to derive the new AC from a tacit rule superior to the constitution that authorizes exactly such changes. I argue that such a rule is ad hoc, fictitious, and unnecessary for the amendment of the AC, although a judge who could find no other way to permit a changed

AC to become valid could permissibly appeal to, or invent, such a rule. Ross's tacit rule, however, does not dissolve the paradox even if taken at face value. It neither removes the contradiction of self-amendment, nor admits and domesticates it. His strategy avoids self-amendment altogether and finds another way to effect the change of constitutional ACs. The price for making strict self-amendment unnecessary is to admit an absolutely immutable rule —namely, the tacit, transcendent rule authorizing the change of the AC. For Ross all rules of change but one can be changed; the exception, by the nature of the case, is the supreme rule of change. Because self-amendment is ruled out, the supreme rule of change cannot change itself and, because it is supreme, there is no higher rule to authorize its change.[Note 10] This particular result reflects his more general principle that all legal change is authorized only by prior, higher rules of change. This principle in effect incorporates a theory of types into his version of the inference model.

The requirements of the inference model that every new rule be authorized by a prior, superior rule, and that none be self-authorized, quickly proves its inapplicability to real legal systems. This view entails that no legal rule could validly come into being without an infinite genealogy. The inference model cannot explain the legal origins of any legal system, or permit any revolutionary regime to become lawful. It could explain and permit these things if it allowed an exceptional self-authorizing rule, an unauthorized rule, or validation by subsequent acquiescence; but each of these is inadmissible under its rigorous, irreflexive formal criteria. Therefore, proponents of the inference model may not explain self-amendment as peaceful revolution. They can explain the breach that makes revolution, but not the reestablishment of legality after the breach. They cannot even explain how the regime before the breach was lawful.

If the impossibility of validating any law after revolution or without an infinite genealogy causes actual jurists to despair that they live under an illegal regime (no matter where they live), incurable by any device, then they have found a nook of legal absurdity that makes them irrefutable. And there are scholars with such views.[Note 11]

A lesser attempt to dissolve the paradox by rewording the old and new ACs reduces to one of the major types. If the rewording aims at explicit temporal separation, then it reduces to the unsuccessful time-based attempt at dissolution. If the rewording aims at specific authorization of all sorts of self-amendment, then it may put to rest most doubts of the legal permissibility of self-amendment but cannot erase logical inconsistency except through the authorization fallacy.

The see-saw method is one method of changing an AC without appeal to a superior rule of change, and without violating or denying the inference model (Section 13). The see-saw method uses one method of amendment, A, irreflexively to amend another, B, and then B to amend A, back and forth until the desired content is reached. It is not at all clear at first that any desired content can be reached from any initial position. A short-cut to any desired content is possible if an omnipotent rule of change can be added. If the desired content is not to be omnipotent, then the added omnipotent AC must be repealed, which raises all the issues of irrevocable self-limitation. In this sense, the see-saw method (which avoids strict self-amendment) can take us anywhere if strict self-amendment is possible, i.e. if an omnipotent rule of change can be added temporarily and then irrevocably removed. At least self-amendment would be sufficient; whether it is necessary is a difficult question. The theory of contingent omnipotence (summarized below) shows one way by which the see-saw method can take us anywhere. The same theory will be used to vindicate the legality and coherence of strict self-amendment.

The see-saw method, however, should not be understood to explain how (most) actual ACs have been changed, nor as a dissolution of the paradox. Like Ross's tacit, transcendent rule, it allows change of the AC without resort to self-amendment, and therefore shows nothing about the logical or legal permissibility of genuine self-amendment. Unlike Ross's solution, it allows rules of the same level to apply to one another. The see-saw method is ultimately impossible under the inference model if the latter is interpreted to incorporate a theory of types.

Insofar as the paradox depends on an inconsistency between premises and conclusion, it may be defined away by adopting a definition of inconsistency that does not cover most instances of self-amendment. This method is not as artificial and evasive as it might at first appear. The definition of negation (hence, inconsistency) for prescriptive statements is disputed by rival deontic logics. And if any formal logic comes close to fitting law, it is deontic logic —the logic of permission and obligation. (It turns out that Alf Ross is also a major player in the development of deontic logic and in the controversy about how it should define negation.)

In law there appear to be at least four tests of inconsistency, two of which might apply to self-amendment (Section 12.C). The minimal "deontic" test finds inconsistency whenever one rule permits what another forbids or vice versa. The broader "compliance" test finds inconsistency whenever simultaneous compliance with two rules is impossible. The deontic test makes all self-amendment paradoxical except trivial renumbering, rearranging, and rewording designed to leave the substance intact.[Note 12] The compliance test allows some substantial self-amendment to escape contradiction and paradox, but not most irrevocable self-limitation. Neither test, therefore, lifts the paradox from the substantive cases of self-amendment we find in legal history. (See Part One and Appendix 2).

Solutions from the acceptance model

Two solutions may be derived from the acceptance model of legal change and validity. One of them doesn't care whether self-amendment is contradictory; if it is, the contradiction can be admitted and excused. The other appears to be a dissolution that eliminates the contradiction from self-amendment, but on closer inspection it eliminates genuine self-amendment along with the contradiction. One shows how genuine self-amendment can be lawful whether or not it is self-contradictory; the other shows how ACs can be amended lawfully and logically even if the method is not strictly reflexive.

The acceptance model holds that the ultimate rule of recognition is authorized by the acceptance and usage of the people and officials of the system. My exposition of the acceptance model is derived from the work of H.L.A. Hart. For many commentators on Hart, acceptance authorizes only one master rule, which Hart calls the "rule of recognition", which in turn authorizes every other rule of the system. For these commentators the relationship between the rule of recognition and the other rules of the system is strongly hierarchical and formal; if it weren't for the ultimate role of acceptance, this might well be called an inference model. I do not read Hart this way. In particular I read him as asserting that acceptance can operate on particular rules and rulings directly, without being logically or legally funneled through the rule of recognition.

However, to avoid purely exegetical squabbles I am happy to call my view a "modified acceptance theory". The key modification for my purposes is that some rules other than the ultimate rule of recognition are authorized directly by acceptance, and that in principle acceptance can always overrule the rule of recognition to invalidate what the rule authorized or to validate what it did not authorize. The modified theory may be made tidier if the overruling of the rule of recognition is considered ipso facto to amend it. That way the rule of recognition preserves its role as universal arbiter (but not, for Hart, self-arbiter). I have no objection to such a move, provided it does not tidy things beyond recognition, and lead to the denial of the power and legitimacy of acceptance as an alegal source of legal authority to interfere at any time for or against any rule.

Now that the modification is clear, I'd like to call the position the "direct" acceptance theory. The name of the position emphasizes, not that I differ from some other readers of Hart, but that acceptance works directly on all fronts of a legal system at once, not indirectly through one master rule, and that its authorizing effect arises from social practice rather than inferentially trickling down from the pinnacle of a pyramid of rules. The direct acceptance theory does not deny that there is a hierarchy of rules in which superiors authorize inferiors; it only insists that this is contingent on what is accepted, not necessary for legality as such. It may be that most rules most of the time are authorized by other, higher rules, and that acceptance only rarely "intervenes" to do its work directly. The direct acceptance theory requires only that we admit that this can happen in principle —namely, when it is accepted as happening.

The two solutions provided by the direct acceptance theory are as follows. First, self-amendment may be accepted as valid despite the contradiction inherent in it, which may be conceded to exist. If the contradiction can really be dissolved, we need not do so; if it cannot, we need not resort to legal fictions that allow us to act as if it were dissolved. This is possible because acceptance is not bound by any formal logic. If the people and officials in the appropriately complex sense accept self-amendment, despite its contradiction, then their acceptance validates it.

The second solution is that the new AC may derive its authority directly from acceptance (or from a rule of recognition amended by acceptance), rather from the old AC, even if the procedures of the old AC were used to propose and ratify the new one. By shifting the authority for the new AC from the old one to direct acceptance, we deny that real self-amendment has occurred. If there is a contradiction in strict self-amendment, this method bypasses it.

If we assume that Hart's rule of recognition would not recognize a contradictory procedure, then both these solutions require the modified or direct, as opposed to the "inferential" acceptance theory.

The first method allows genuine self-amendment to occur, and disregards or forgives any contradiction in the process. The second holds in effect that the appearance of self-amendment is illusory, and that while the procedures of the old AC may have been followed, the authority of the new AC derives from another source.

The first solution works as well with any model of law that can explain legal tolerance for contradiction, such as the procedural model, which I mentioned, and many others that I have not discussed, such as an ideological model that identifies valid law by its content only and never by its form; theological and militaristic models that replace social acceptance with the will of a deity or junta; or a drunken judge model that exonerates all official error and allows it to live the normal life of law —which is not logic but experience.

The second solution works as well with any posited source of authority for the new AC other than the old AC. Ross's tacit, transcendent rule is in this category, as is (for many) a "social contract". Principles in Ronald Dworkin's sense of the term are also candidates for the source of the authority of the new AC; such principles might pertain to popular sovereignty, justice across generations, or deference to the action of a constitutional convention.

The first solution not only forgives the contradiction that Ross found in the inference modeling self-amendment, but also the absurdities (if that is what they are) in transtemporal validation. In strict self-amendment when the new AC is authorized by the old AC, the authority for the new clause is either repealed by the act of amendment, requiring transtemporal validation, or it persists despite its replacement, like the grin of the Cheshire cat. Nevertheless, all these difficulties are merely theoretical; lawmakers may heed them or not, as they wish.

The second solution can be made more venerable, if not more plausible, by putting it in more classical terms. Just as a contract's equivalent of an AC may be amended by the parties without paradox, because the validity of the new clause derives (on one reading) from their agreement, not from the old clause, so the constitutional AC might be changed if the amendment process were interpreted as the act of parties to a contract. The acceptance theory, in fact, is a variant of a classical consent or contract theory of legality. It captures the sense in which the decisions of the people are superior to all law, by their capacity to change and supersede all law, while escaping the less plausible, historical or hypothetical presuppositions of an actual contract theory. The acceptance theory locates legal authority not in a contract but in the less explicit, less rule-like, less reciprocal, more ambiguous, more mutable, and more responsive "instrument" of social practice.[Note 13]

Of the two solutions made possible by the direct acceptance theory I prefer the first —that there really is self-amendment and that any contradiction in it is forgivable— although there is no need to choose. I believe that the first solution comes closer to explaining how actual ACs actually change, namely, through literal self-amendment, disregarding and plowing under any self-contradiction. The alegal sources of legal authority emphasized in the second solution still exist; they are consequences of the direct acceptance theory. But they need not be invoked to bypass self-amendment when they can be invoked to explain self-amendment.

While the self-limitation of deities remains mysterious, we should remember that the self-amendment of constitutional ACs is transacted and reviewed by human beings. If they don't notice the contradiction within self-amendment, or if they don't care, then they have made law anyway — as they always do, in their own image. Eternal, formal criteria of consistency have no standing to complain unless their cause is taken up by some human being.

Because self-application of a rule of change is legally permissible, and because it explains self-amendment, I prefer to supplement Hart by making his secondary rules self-applicable. The alternative is that the rules of recognition, change, and adjudication will be unrecognizable, immutable, and injusticiable. He could have made his secondary rules self-applicable without jeopardizing any part of his theory of law. Indeed he would have strengthened both his theory of law in general and his response to the paradox of self-amendment in particular, which depends now on the common but inadequate objection that the old and new ACs could be kept separate in time.[Note 14]

The solution I prefer allows self-amendment despite the self-contradiction of its nature. A section below (21.B) explores how acceptance can permit us to absorb, tolerate, or forgive some contradiction in law, without obliging us to tolerate all contradiction.

The direct acceptance theory of legal change and validity offers, then, two satisfactory solutions to the paradox of self-amendment. Justifying the direct acceptance theory has only been a parenthetical task of this essay. Demonstrating the inadequacy of the inference model has been much closer to the center of concern. (But see Section 21.D below.) Ross's postulate of a tacit, transcendent rule is theoretically coherent, but it is designed to make strict (reflexive) self-amendment unnecessary, which is itself unnecessary, and it clearly fails to explain actual practice.

Whether self-amendment is legally valid depends not on a nation's law or its AC, but on its concept of law. Permitting change of the AC is compatible with many theories of law, even the inference model, but permitting strict self-amendment of the clause is incompatible with the inference model. Permitting self-amendment in fact is itself permissible in any legal system that currently seems to bar self-amendment (although I know of none of these). One act of accepted self-amendment would overturn the inference model as a descriptive model of law for that system. The proposal and ratification of the reflexive amendment would at the time run afoul of the inference model and perhaps some explicit rules of procedure. But direct acceptance could cure these defects after the fact, contingently, if acceptance shifted in their favor. The reason that violations can be accepted as amendments is that the question of legal permissibility is empirical and turns on what we find when we look. Whether self-amendment is formally contradictory may be a matter for a priori analysis, but that is always distinct from the question of the content of law, even the question of the logical content of law.

Contingent immutability and contingent omnipotence

The direct acceptance theory implies that no rule is absolutely immutable. It follows from this that every AC and even acceptance itself have a sort of continuing omnipotence. If a rule purports to be immutable, for example through complete self-entrenchment, then it may be amended or repealed if the requisite acceptance is obtained. This may be called the "transmutation" of the "immutable" rule into a "mutable" rule. The future generations that were to have been bound immutably may decide (as we have decided) that they cannot be bound immutably, and repeal what was earlier believed to be an immutable rule. This is true, of course, even if the generation that enacted the "immutable" rule intended to bar all repeal, and reasonably believed that they had used legal devices that made repeal unlawful. This means that rules that purport to be immutable are really mutable, but only contingently. With the requisite acceptance, the people can repeal any law; but it is always a matter of historical contingency whether that requisite acceptance will be summoned. And some "immutable" laws may remain unchanged forever if the acceptance that would support amendment or repeal contingently never arises. So while some rules might contingently remain unchanged forever, none is totally immutable. The possibility of contingent amendment and repeal is permanent.[Note 15]

For the same reason any limitation on the amending power, original or self-imposed, is contingently revocable by the AC even if the limitation purports to be immutable. If an AC is used to overcome its own limitations (to disentrench itself), its success is contingent upon future events — namely, the mustering of sufficient acceptance. These somewhat anomalous powers may be called the contingent omnipotence of the AC and the contingent immutability of rules, as opposed to the categorical omnipotence of the AC and the categorical immutability of rules.

Contingent omnipotence implies contingent, continuing omnipotence. The contingent omnipotence of the AC cannot be limited irrevocably, for the subsequent repeal of the limitation is always contingently possible, not categorically impossible. Similarly, acceptance itself cannot irrevocably be deprived of its power to authorize law, under the direct acceptance theory, for any such attempt could be invalidated in the future by a shift of acceptance. If we try to prevent this contingency by law, we must use contingently mutable rules; by the nature of the case, this will fail. So while the people and officials may in a spasm of bad judgment or in submission to overpowering force turn their law-authorizing power over to a military or priestly caste, the new regime is lawful only as long as the people and officials accept it; acceptance can always revoke its delegated authority and restore its sovereignty.[Note 16]

This view has the merit of allowing continuing omnipotence without any immutable rule to guarantee its continuity. Until now it seemed that the paradox of self-amendment put us in a harsh dilemma in which we had to choose between paradox and immutability. The direct acceptance theory eliminates immutability and softens paradox to a literally acceptable form. The effect is not only theoretically elegant; by eliminating the need for immutable rules, the direct acceptance theory eliminates an ancient ground for bad faith in recognizing our responsibility for law. No law inherited from our ancestors or "arising from the nature of things" is immutable; if unjust laws persist, we are responsible for them.

The omnipotence of the AC may be abridged by self-imposed limitations, and these limitations may contingently last forever. But because they are always revocable, the AC has a kind of continuing omnipotence.[Note 17] Even acceptance is not guaranteed continuity by a categorically immutable rule, for it may contingently fail to overcome its self-imposed limitations or its transfer of powers to another source of authority. However, if its failure to shed its limitations is only contingent, then it is permanently possible that it may succeed at another time.

If contingent omnipotence implies a kind of continuing omnipotence, it equally implies a kind of self-embracing omnipotence. A contingently omnipotent AC may limit itself in any way, including ways that appear irrevocable at the time and ways that are contingently unrevoked forever. It may also strip away any limitations, including those that appeared irrevocable when enacted.

This view, then, escapes through the horns of a second dilemma posed by categorical self-embracing and categorical continuing omnipotence. We seem bound to choose between a power that can make immutable rules (self-embracing omnipotence) and one that is defined by immutable rules (continuing omnipotence), or —this is a tongue twister— between a power that is unlimited but limitable immutably and a power that is immutably limited but otherwise illimitable. If one denies omnipotence altogether, then one thereby admits that immutable rules exist to limit power. Contingent omnipotence cannot make categorically immutable rules, and is not defined by categorically immutable rules. Therefore, contingent, continuing omnipotence is also contingent, self-embracing omnipotence. Under this view, there need not be any categorically immutable rules. All the elements of contingently omnipotent rules of change, including their contingent, continuing omnipotence, are subject to self-amendment, and therefore are contingently mutable.

On this view the advantage that no rule is categorically immutable is bought at the price of making every rule of change contingently omnipotent. However, this can be shown to fit the facts of actual practice. I argue in Section 21.C below that the elimination of categorically immutable rules does not require one categorically immutable rule to bar others.

Although acceptance frees us from the paradox of self-amendment and the need for categorically immutable rules, it has something of a paradox of its own, at least implicit in Hart's version of the theory. If acceptance functions to authorize law because the rule of recognition must say that it does, and if the rules authorized by acceptance, particularly the rule of recognition, are discerned from the practice of officials, or if official practice is considered to create or recognize rules, then acceptance authorizes law only because a rule of law says it should. The view that official practice creates or recognizes rules I have called the normative practice doctrine. Hart seems to assert it, but it is not necessary to an acceptance theory of legal validity. Nor must an acceptance theory hold that any rule of law points to acceptance as its authority.

The normative practice doctrine implies that acceptance authorizes a rule that authorizes acceptance to authorize law. Acceptance is not only self-justifying (like the wind and the water), but justified in a circle that passes through a network of rules before returning to acceptance.

Even though I reject the premises that generate this difficulty, I find nothing objectionable in the self-justification of acceptance, and even prefer it to the alternatives of an unjustified source of authority and an infinite regress of sources. One might object that if acceptance can authorize itself, then tyranny or gangster rule can do the same; but this objection is misconceived. A would-be tyrant may declare, in a manner consistent with tyranny, that tyranny is justified, and no harm comes from concluding that by its own standard tyranny is validly self-justified. But it is not thereby made valid law, except to a proponent of tyranny who accepts its standard. A self-proclaimed and self-justified tyrant would not become a valid lawmaker under the acceptance theory unless actually accepted as such in the appropriately complex sense.

But isn't this to beg the question by letting the acceptance theory judge the success of the tyrant's circular logic? Surely if we let the tyrant judge the success of the acceptance theory's circular logic, the conclusion would be equally negative and more emphatic. The reply is that this is not mere favoritism or question-begging. The acceptance theory purports to be an empirical theory that explains the actual source of legal authority. The theory of self-proclaimed tyranny is not an empirical theory, but a program; or if it is an empirical theory, it is easily dismissed as unobservant. The self-authorization of acceptance may be logically similar to other types of self-justifying authorities, but this similarity alone does not enable the other types to become capable, by mere self-proclamation, of seizing the reins of any legal system, except to an extreme formalist for whom legal and logical criteria of validity are congruent. For it is just the history beyond logic that differentiates acceptance from tyranny.

Another virtue of the direct acceptance theory is its consonance with democratic theory. The people cannot categorically limit or repeal their right to make law. This limitation is not paternalistic, and not even self-paternalistic, but an expression of the inalienability of their sovereignty. Actually, the people's sovereignty is contingently alienable, but any alienation of it is contingently revocable as well. This sovereignty, of course, takes the greatly weakened form of acceptance alone. The equal sovereignty of future generations, and their equal right to make and change their laws is contingently inviolate: if we violate the right of future generations to make and change law, then they may restore this right —revoke our limitation on their power— at will. No generation can bind its successors with categorically immutable rules.

The paradox of omnipotence purports to show that no entity can be omnipotent in an unqualified sense. In this way it is like the Barber paradox. For many philosophers the paradox of omnipotence shows that there can be no omnipotence as defined in the usual unqualified ways. In one

sense I have given the paradox its victory, for contingent omnipotence is certainly very far from unqualified omnipotence. But on the other hand, the contradictions that are supposed to preclude the existence of unqualified omnipotence are either eliminated or made acceptable by my solution to the paradox. Self-amendment can be lawful despite acknowledged self-contradiction. Self-limitation can be permanent, contingently, despite the persistence of omnipotence. These consequences are made possible by special properties of law not available to logicians seeking a purely logical solution.

Not surprisingly, there is a theological parallel to this solution available to any theologian willing to assume that an omnipotent deity might perform contradictions. The most distinguished example of such a theologian is Descartes, who wrote to Mersenne in 1634 that[Note 18]

> God was as free to make it false that all the radii of a circle are equal as to refrain from creating the world.

and to Mesland in 1644 that

> As for the difficulty in conceiving how it was a matter of freedom and indifference to God to make it true that the three angles of a triangle should equal two right angles, or generally that contradictions should not be able to be together, one can easily remove it by considering that the power of God can have no limit....God cannot have been determined to make it true that contradictions cannot be together, and consequently He could have done the contrary.

and to Mersenne in 1630 that

> You will be told that if God established these truths He would be able to change them, as a king does his laws; to which it is necessary to reply that this is correct.

Lawyers and theologians who deny that the principle of non-contradiction rules in their realm may accept the paradox with equanimity, as a dialectical logician might and a formal logician never could. I will let theologians speak for themselves from this point, and say only that lawyers who take this path are not simply choosing to play a different game from formal logic; they are arguing that formal logic has limited applicability in their domain, which is a domain of actuality. Formal logic will never accept these arguments as "repeals", but only as "violations", just as the formalist view of self-entrenchment clauses is that all attempted repeals are violations. But self-entrenchment clauses actually fall, and formal logic is the logic of regret, not prevention, or of powerless prescription, not true description, or of abstractly constructed fiction, not reality.

In summary, the direct acceptance theory implies that rules of law have contingent immutability and that amendment clauses have contingent omnipotence. This frees us from two difficult dilemmas, one that would have us choose between paradox and immutability, and another that would have us choose between continuing and self-embracing omnipotence. It also explains self-amendment without ironing it out into a fictitiously linear operation. By explaining genuinely reflexive self-amendment, it explains how law can be lawful without an infinite genealogy, and hence how legality can exist at all. Finally, it reminds us that we can erect no immutable barriers to evil law, and must recognize no immutable obstacles to good law. Law is firm enough to save us from ourselves, and to thwart us, for only a very short time; the only final check to our worst tendencies and protection of our best achievements is our will.

B. Acceptance and consistency

If the inconsistencies of self-amendment are acceptable, then are all inconsistencies acceptable? Whether the answer is yes or no, we must still decide how legal systems distinguish between "good" and "bad" inconsistencies. For if all inconsistencies are acceptable, still some are not accepted; and if not all are acceptable, then even more clearly a line has been drawn that excludes some inconsistencies. No legal system permits or accepts all inconsistencies or contradictions. Therefore, my solution to the paradox of self-amendment would not be complete if I did not make a preliminary attempt to say when the ideal of consistency may be overridden by other values and when it requires overriding all others.

For in one sense my solution is a logical cheat. Paradoxes disturb primarily for making contradiction seem unavoidable. Paradoxes put us in peculiar positions from which all paths out, and standing pat, appear equally contradictory. Yet one cannot easily imagine how to prevent arrival at such positions without barring too many useful paths. If one removes the sting and urgency of paradox by declaring one's willingness to live with contradiction, then one has given up the task imposed by the paradox, not accomplished it. Such a strategy is not without dangers in any case, for it usually underestimates the difficulties of accepting even some contradiction. If one has not become an utter irrationalist, then by any test the burden of proof has shifted to one to justify the selective abandonment of the principle of non-contradiction. I have adopted such a strategy, in effect, for law, and accept the burden of proof. Law can permit self-amendment without attempting to dissolve the paradox latent in it, without waiting for logicians to solve it or declare it illusory, and without fictitiously assuming it away. Law may admit the self-contradictory character of self-amendment and still permit it, while prohibiting much else in the name of consistency.

My answer to this legal ambivalence about formal consistency is twofold: (1) all inconsistencies are in principle (contingently) acceptable, but comparatively few are actually accepted, and (2) just which inconsistencies are actually accepted is a matter of contingent history. Accepting inconsistencies of types that constitute outrageous injustice, hypocrisy, or theoretical confusion are not ipso facto legally impossible, but ipso facto legally improbable. But can we say which inconsistencies are more likely, and which are less likely, to meet with actual acceptance?

Even a preliminary stab at an answer must acknowledge the empirical character of the question. I do not claim the historical competency to provide a detailed account of the inconsistencies most and least likely to be accepted, but I can provide a plausible rough sketch. I offer just a

beginning or approach to the historical understanding that must eventually answer the question fully, if we are to have a full answer. If the question is not thought empirical, then the claims of formal logic must be given unqualified recognition, which would completely bar the legal acceptability or validity of inconsistency. I believe that position has been sufficiently dealt with in Part One.

Consistency is a virtue in both statutory and common law. In each, the existence of inconsistent rules is admitted, but the effects of applying inconsistent rules to the same case are mitigated or wholly blocked by devices such as canons of interpretation and construction, the doctrine of implied repeal and amendment pro tanto, equity jurisdiction, judicial attempts at reconciliation and powers of narrow reading, distinguishing, overruling, and nullification, and even "benign neglect" or disregard of one of the rules. All these devices reflect strong repugnance for applying inconsistent rules to the same party in the same sense at the same time. The basis for this repugnance is rarely articulated, but probably stems less often from a sense of theoretical inelegance or "impossibility" than from the gross unfairness and unconscionability of applied contradiction.

My own belief is that inconsistencies in law are least likely to be accepted when they require incompatible acts from the same person or punish a mandatory or permissible act, and most likely to be accepted when they harmlessly infect the abstract concept of a useful procedure or institution such as self-amendment, some applications of the bootstrap doctrine (the jurisdiction of a court to determine its own jurisdiction), and the self-justification of constitutions and revolutions.

Sometimes inconsistencies of the second type may be accepted only because they are overlooked. And of course in many such cases even logicians may disagree on whether a supposed contradiction in them is necessary or eliminable. But I suspect that even a consensus of logical opinion and a crusading legal advocate would fail to stir much reform spirit for the elimination of the second type of inconsistency. Our basic legal policy about contradiction seems to be: if it hurts or is unfair, eliminate it or prevent its application through adjudicatory devices; otherwise smile at the sweating logicians.

The acceptability of at least some contradiction I take to have been established by Part One. Self-amendment is accepted despite the failure of the logical attempts to date to eliminate its contradiction. The mere fact that some contradiction or inconsistency is actually accepted has several important consequences. First, it falsifies the common view that no "actual" inconsistencies exist in law. According to this view, "apparent" inconsistencies abound, but (on the strong version of this view) in every pair of inconsistent rules, at least one member is void or (on a weaker version) a good judge will never apply inconsistent rules to the same party at the same time. Either the inconsistent rules include some nullities, or they succeed each other in time,[Note 19] or they are applicable only in spatially distinct jurisdictions, or they are reconcilable in application by various devices at the judge's disposal.

This view is either false or beside the point. If it applies only to inconsistencies between substantive rules, then it does not reach cases like self-amendment and we cannot assume the unreality of all legal contradiction. If it purports to reach all inconsistencies, then it is falsified by the historical acceptance of inconsistencies such as self-amendment.

Second, a well-known rule of standard, formal logic declares that all propositions (including all contradictions) follow from any contradiction. If some contradictions are legally acceptable, then logically all others would follow. But legally not all do follow. That not all contradictions are legally accepted I take to be an empirical proposition of even greater certainty than the acceptability of some contradiction. But if we suppose that some but not all contradictions are actually accepted, then the logical rules of inference that would require all if any contradiction are obviously inapplicable to law or not fully operative within it.

Rules of deductive inference may have a role to play in law, but they are not permitted to validate as law every proposition that is strictly deducible from propositions already validated as law. Hence the often quoted statement of Lord Halsbury in Quinn v. Leathem, (1901) A.C. 495 at 506:

> [A] case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

This means that arguments by reductio ad absurdum should have only limited force in law, for the "logical extreme" of an accepted proposition may not itself be an accepted proposition even though it follows infallibly by logical rules (hence, restates tautologously propositions that are already accepted). This actually undercuts a more basic argument form, the modus tollens, or the argument that a proposition is false if it implies a falsehood. In law, a rule may be legally valid and yet imply others that are legally invalid. The line separating the valid from the invalid, therefore, is not a logical line or is not formally ascertainable; it is always a question of policy. In law we do not "live with the consequences" of our acts and affirmations, at least not if this means the logical consequences. Every step is taken on policy grounds or in bad faith, for normative reasons or by fraudulent appeals to the inexorability of our premises and rules. The ways in which this does, and does not, abrogate the sense in which law is rule-like will be explored below in Sections 21.C and 21.D.

It is true, however, that inconsistent substantive rules need not ever be "actualized" in the same case. But some of the devices for preventing the application of inconsistent rules do not eliminate the inconsistency itself; they merely prevent it from doing mischief in a single case. For example, the common law rules that a person should use her property so that it harms no one else, and that her rights in her property extend from the depths to the heavens, tug in opposite directions when a person contemplates building a tall, noisy, or malodorous building or business on her land. Her rights will be adjudicated without repealing either of the general principles. The inconsistency of the two principles in her case is probably settled for future parties similarly situated —at least until the attitudes toward business and community change again. In one sense this lessens the

area of overlap and inconsistency of the general principles. If the case were resolved by ranking one principle over the other, then inconsistency in application is avoided, even if the ranking is reversed or ignored in the next case. But the ranking leaves inconsistent rules valid and effective; it merely saves defendants from their joint operation. In this sense we show our distaste for contradiction by devices that prevent it from hitting defendants as it were from both sides at once, but we show our toleration of "theoretical" contradiction by devices that leave contradictory rules intact.

The common law has innumerable inconsistent rules. That is never denied, and indeed the abundance of inconsistent precedents, authorities on each side of each case, and tortured attempts to distinguish cases contrary to the desired outcome are endemic and notorious features of common law adjudication. We accept the inconsistencies latent in the mass of common law rules at least in part because of the devices that can prevent inconsistent rules from reaching simultaneous application. But this shows that we accept the permanent possibility of the simultaneous application of inconsistent rules.

Even when actual reconciliation is attempted, the favored common law technique is piecemeal, or case by case restatement and harmonization. This shows that we tolerate slow reconciliation. Moreover, the piecemeal method results in cases that may stand next to others to form new inconsistencies. We tolerate uncoordinated reconciliation that, if viewed from a distant, exclusively logical standpoint, may take one step backward for every step forward.

The devices that prevent the joint operation of inconsistent rules do not change the fact that we accept continuing contradictions in these ways. For such devices do not protect non-parties from the uncertainty and unpredictability of the law. No common law device is used to help the citizen trying to arrange her primary conduct by looking to the law for guidance. Indeed the difficulties of planning are compounded if inconsistent rules are reconciled only at the stage of adjudication. In this sense, merely "practical" avoidance of contradiction for defendants that leaves inconsistent laws intact does not avoid all the "practical" costs of contradiction.

The problems of slow, uncoordinated, piecemeal reconciliation of inconsistent rules are often solved at one stroke by codification. The resistance to codification in some fields, such as tort law, shows our preference for "flexibility" and "growth" even at the cost of greater inconsistency and uncertainty. Where codification has occurred, it is safe to assume that whatever inconsistencies remain are rarely if ever accepted and cannot easily be used to show our toleration of contradiction. In these contexts it is important to distinguish contradictions we accept from those we overlook. As noted, I do not claim that all existing contradictions are accepted. Some are pounced upon as soon as they are discovered and were suffered to exist in the first place only because we were unaware of them and because our piecemeal and uncoordinated methods of enacting and amending law cannot be prevented from issuing an occasional (or frequent) unexpected inconsistency. Note that even the view that law is a quasi-logical system in which the criteria of logical validity determine legal validity is compatible with much inadvertent inconsistency, provided that sufficient procedural devices exist to reconcile or invalidate them ab initio whenever discovered.

But even in those areas of law where the ideal of consistency is most rigorously upheld, such as criminal law, consistency is not valued for its logical properties, but for policy reasons. Under the right combination of circumstances policy decisions may overrule the ideal of consistency even in an area of carefully codified law. One policy of course is fairness. It is simply unfair to apply rules inconsistent by the direct or compliance test to the same person at the same time. In Lon Fuller's example, U.S. v. Cardiff, 344 U.S. 174 (1952), two sections of a single statute seemed contradictory. One appeared to require that factory owners permit federal inspectors to enter their premises; another appeared to give factory owners a right to refuse consent. As Fuller argues, a logically coherent interpretation was available to the Supreme Court, but the Court perceived the issue ultimately as one of fairness and notice, and voided the conviction of a factory owner who refused consent to an inspection.[Note 20]

Statutory and contractual duties may also conflict in a way that makes simultaneous compliance impossible. A.M. Honore gives the example of a drunk truck driver who must return her truck to the depot by 5 p.m. Either she drives and violates the traffic laws, or stays put and violates her contract.[Note 21] The same logic is involved in these cases, but the policy of preventing the application of conflicting rules is considerably weakened by our sense that the defendant got into her dilemma only through her own fault. In different cases we may let the defendant suffer even without a judgment of her fault. For example, if a manufacturer can only meet her sales contracts by polluting in excess of legal standards, then normally we will give priority to the statute expressing the social value of a clean environment. Occasionally, however, a judge will improvise a "compliance schedule" that permits excessive pollution for a generous period. But these examples show that the mere fact that a person is trapped by inconsistent legal rules and must violate one to comply with others is not by itself a sufficient reason to provide judicial relief. Sometimes the defendant will be left to suffer the consequences of her fault, sometimes to suffer the consequences of overriding social values. But whether the defendant is protected from unfairness or left to choose which rule she will violate, we are allowing policy judgments to supersede and govern the application of the ideal of consistency.[Note 22]

Another policy served by consistency is predictability. Consistent laws make it easier for citizens to understand their rights and obligations and therefore to make plans in reliance upon the boundaries of their liability. Dennis Lloyd has said that one of the "vital aims" of consistency is to enhance the "security and predictability" of our social and economic life.[Note 23] The policy of predictability, however, like that of fairness, does not universally require consistency. The conflict of the policy of predictability with itself is well illustrated in the ironic attempt of courts to render the law more consistent by overruling anomalous rules when many citizens had come to rely upon those very rules. The disruptive effects of overruling settled but undesirable or inconsistent law is mitigated by making the change of law prospective only. But of course even prospective overruling can upset the reliance of long-range planners. Predictability would be best served by ceasing all change of law, the very absurdity of which shows that predictability is not a supreme policy interest. Freezing the law would also freeze inconsistencies, which suggests that our desire

to change the law is partly aimed at ameliorating inconsistency and partly at furthering other values at the expense of consistency and predictability.

Change of law is almost never prompted by a merely theoretical desire for consistency, symmetry, or elegance. A problem must be solved, conflict reconciled, injustice remedied, novelty subsumed, ambiguity clarified, interest promoted, mischief hindered, or clamor satisfied. The policy prompting change may not be articulate, but it is the controlling motive, subordinating the claims of formal consistency.[Note 24] One of the native features of legal rationality is the tendency to accommodate the need for change by extending the rules and principles of antecedent law, with one eye on consistent development of the system and one eye on the difficulty that arose in experience. J.D.I. Hughes usefully distinguishes between the "sociological" and the "utilitarian" methods of legal change:[Note 25] in the sociological method

> we may refuse to attempt to complete the system by a purely logical process, but prefer to refer the matter back, as it were, to the facts of life....The rules were originally derived from human institutions, and were not formulated in the air. When they fail, let them be referred back to these human institutions for further development, and so make logic subservient to life. Logic will still be necessary in order to harmonize any fresh rules with those already in existence, but will not exercise a cramping effect when life demands an adjustment.

In the utilitarian method, by contrast, we may[Note 26]

> take a short cut, and...create at all costs an exception, trusting to luck that the exception may not lead to further trouble, that it may ultimately suggest a principle capable of logical harmonization with the rules already existing.

Our priority is to solve the problem that arose in life and worry about harmonization only later or secondarily. Careful drafting aspires (inter alia) to harmonize a new law with old, but it draws on content that was determined more by the exigencies of the problem and our living policies than the exigencies of consistency. But even the secondary desire for consistent or "harmonized" solutions to difficulties is prompted more by policies of fairness and predictability than logical symmetry. Logical criteria of validity do not interpose themselves on law and invalidate inconsistencies, as Ross and a few others[Note 27] suppose, and thus assure harmony by superior, invariable effectiveness. On the contrary. As Honore put it,[Note 28] the infrequency of actual inconsistency

> is a tribute to the wisdom of legislators, not a logical characteristic of legal rules. Of course, if the 'law of contradiction' is simply intended as [a] reminder to legislators to refrain from requiring courses of conduct which experience shows to be usually incompatible, it is unobjectionable.

In a similar vein, A.G. Guest wrote,[Note 29]

> [I]t is clear that the law is not a logically monistic system in fact, being full of paradoxes and contradictions. We experience a pleasant surprise when it proves capable of even a small amount of consistency. It would be wrong, however, to attribute this degree of consistency to the dictates of logic, for its coherence may be due to other extra-logical factors.

In short, consistency is a value subservient to other values in law. Even when its turn comes, or in contexts where it is the premier value, it may be analyzed as the product of alogical values such as fairness and predictability. When we hesitate to bring inconsistent rules down on the head of a defendant, it is from a sense of fairness, not logical scruple, and in different cases our sense of the injustice of such applications will be notably weakened without a significant change in the abstract logic of the situation. The development of law may approach consistency, but only because or when consistency best promotes our alogical values.[Note 30]

The desire for consistency in its own right cannot, however, be excluded altogether. The most judicious statement of the various elements of legal decision-making is probably Cardozo's, which makes logic just one element always subject to the superior weight of other values:[Note 31]

> [L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired....There shall be symmetrical developments, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a goal when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.

The inconsistency of self-amendment interferes with no overriding social values. The same is generally true of inconsistencies that obtain between any procedures and their outcomes[Note 32] or within procedures. By and large the substantive rules of criminal law must be consistent to avoid unfairness, and of the civil law to encourage reliance and planning. But procedures will always be as useful as their products. This utility will rarely be outweighed by disadvantageous side-effects of an inconsistency latent in the procedure. The inconsistency of self-amendment, if indeed it is eliminable, has rarely been noticed. But since Alf Ross noticed it and published his persuasive argument against its logical possibility, no actual instance of self-amendment has been enjoined, nullified, or even criticized on logical grounds by lawyers. Nor has any instance been found objectionable by anyone, including Ross, on policy grounds such as fairness or predictability from which the ideal of consistency in law may

derive.[Note 33] In short, the inconsistency of self-amendment and other procedural "impossibilities" is acceptable because it injures no social interest. It is even desirable to the extent that its product (amended ACs, for example) is desirable and obtainable by no other equally acceptable means. As a society we forgive the contradiction of self-amendment in order to procure amended ACs without imposing questionable exceptions on unqualified language, allowing blatant amendment by judiciary, or increasing the risk of revolution. A society that finds an alternative method of procuring amended ACs without unacceptable or less acceptable consequences will be much more at liberty to forbid strict self-amendment on logical grounds.

The acceptance theory is saved from absurdity if it can explain why some inconsistencies are contingently accepted in law while others are not. My belief is that such acceptance is a function of perceived harmlessness to social values, that consistency is not itself an important social value but promotes several others, and that in some contexts, especially in the definition of certain procedures, contradiction may be stark, ineliminable, and widely noticed and still be accepted. These conclusions bear on the question of the role of deduction in law at least (as noted) by highlighting the limited validity of arguments by modus tollens in law, and the invalidity of deriving all propositions (hence, all contradictions) from one contradiction in law. Other consequences for the role of formal logic in law I leave for another occasion.

C. Some oddities and implications

The theory of contingent omnipotence and contingent immutability has highly unusual consequences that must explicitly be jettisoned or embraced if the theory as a whole is to maintain its plausibility. One of the most unusual consequences is that every rule of change, not just constitutional ACs, has contingent omnipotence. Statutes, for example, provide a rule of change for statutes and case law, but are ordinarily thought incapable of amending the constitution. But under the direct acceptance theory, if a statute did purport to amend the constitution, its success could not be ruled categorically impossible. Its success would be contingent upon future events, namely, the mustering of sufficient acceptance. The requisite acceptance could override or amend the rule of recognition that stated that statutes were incapable of amending constitutions. If such an event occurred, it might be true to call it a revolution, but it would not be helpful in deciding its legality. For if we are already committed to the direct acceptance theory, then we know that appropriate acceptance can validate revolution. Under any name, it would be lawful or, more precisely, it would have been made lawful ex post facto by contingent social practices.

Such a showing of acceptance is improbable, and the existing forms of law and the general loyalty to them are large reasons why it is improbable. But it is contingently possible, which is the point here. This gives the statute-making power contingent omnipotence. For the same reasons, the power of judges to amend rules of case law, the power of administrative agencies to amend regulations, and the power of the Chicago City Council to amend Chicago municipal ordinances can each amend the federal constitution, federal and state statutes (even those of other nations), and one another. Each rule of change can amend each, and each can amend every sort of legal rule —contingently.

The probabilities that these contingencies will come to pass diminish fast, and are vanishingly small for the power of the Chicago City Council over the federal constitution. No number need be assigned to these probabilities, and no threshold of probability need be surpassed to call them contingently possible. The direct acceptance theory implies this omni-omnipotence, which should be acknowledged.

But immediately after that is acknowledged, the extreme improbability of these absurdities actually occurring must be acknowledged and emphasized. The legal formalist, horrified by what has been made possible, will seize upon the possibility without regard to its improbability. The direct acceptance theory is an empirical theory that attempts to understand the historically actual foundations of legality —in acceptance— and the historical processes that govern so basic a phenomenon. The theoretical possibility of the Chicago City Council amending the federal constitution, because it is dramatic and absurd, obscures the fact that acceptance is historical, actual, and determined by a web of interests, developments, and movements inseparable from human preferences and practices. The possibility of it authorizing absurdity is not on the order of a coin coming up heads 100 times in a row —improbable but in the long run inevitable. It is a function of what the people and officials of a legal system desire, produce, and tolerate. The occurrence of absurdity is not to be feared as if a capricious, random process were at work. We are at work, and will always have the overriding voice as to whether absurdity will occur. In fact, it is just this burden of responsibility that we may contingently bear well or shirk that is captured by the concepts of contingent omnipotence, contingent immutability, and direct acceptance.

We respect and believe it right to respect the existing rules prohibiting statutory amendment of the constitution, defining the jurisdiction of the Chicago City Council, and so forth. The largest obstacle to the absurdities that are contingently possible is the content of existing law and our sense of obligation to abide by it on the whole. As Kelsen might say, an effective legal system is generally obeyed, with the consequence that its provisions are effectively safeguarded against absurd, contingent breaches. This is not at all surprising, for it simply restates the banality that law prevents chaos. It is a human device and as such occasionally falters and constantly requires attention and effort to prevent widespread faltering. The idea that law is so "firm" that it can protect us from ourselves —for long— is superstitious reification.[Note 34]

Acceptance is less likely to muster on behalf of a Chicago City Council amendment of the federal constitution the more blatantly the amendment violates existing rules and the current sense of loyalty to law. In this sense, law itself keeps the probabilities low that gross violations will be contingently accepted. This may be called the self-stabilization of law.[Note 35] It is not the same as self-preservation, for an accepted violation would ex hypothesi still be law. But the content of the existing rules and principles forbid their own violation. The pervasive respect for law assures us that the current content of law will be given effect by and large. Most violations of law are unacceptable in the sociological sense precisely because they are violations of law. In this sense law and acceptability reciprocally influence each other. While acceptance may contingently authorize a clear departure from existing law, more often it will override or amend the rule of recognition in cases where social loyalty to law is

indifferent or shaken, and where the content of law is unclear or vacillating. In the expansive range of ordinary cases the provisions and social support of present law reinforce the grip of present law and assure us that the wilder contingencies remain mere theoretical possibilities.

A word on the ambiguity of "contingency" may be in order. I have been speaking of contingent absurdities; but of course even the most ordinary legal enactments and decisions are also contingent. The difference is that the former are not authorized by the existing rules, while the latter are. In the former case the alegal source of legal authority in social acceptance overrules or amends the existing rules, and in the latter case this is not necessary. So while it is "possible" that the law will be obeyed, and "possible" that it will be violated in a way that brings curing acceptance with it, these are two distinct senses of possibility (hence, of contingency). In the phrases "contingent omnipotence" and "contingent immutability" I will use the latter sense. These, then, are an omnipotence and an immutability that are not authorized by existing rules but that are always within the horizon of human, historical possibility, ready to be effected by the same authoritative action and social practice that continually produces law itself.

If both the contingent possibility and historical improbability of forbidden amendments have been sufficiently emphasized, some further wrinkles in the direct acceptance theory may be explored. The contingent power of every rule of change to amend every legal rule gives each rule of change a sort of co-supremacy. In one sense they cannot be conceived any longer as hierarchical, but operate as contingent equals, each able when called to amend its "superiors".

Here precision is necessary. A hierarchy still exists because a hierarchy is still accepted as existing (or rules that define the hierarchy are accepted). The contingent omnipotence of each rule of change does not eliminate their hierarchical arrangement, but merely recognizes the contingent possibility of its abrogation. So long as the contingent power of an inferior rule to amend or repeal a superior is prevented from actualizing (through court decrees, failure of acceptance, etc.), then hierarchy remains valid and binding. The self-stabilization of law assures us that amendment of superiors by inferiors will be the exception, and the highly improbable exception most of the time.

In Section 12.C I outlined a theory of reflexive and irreflexive hierarchies.[Note 36] An irreflexive hierarchy is "straight" in the sense that inferiors never supersede superiors. A reflexive hierarchy displays just such anomalous priorities, normally as exceptions. One way to state the consequence of the direct acceptance theory under discussion is that it makes any hierarchical legal system into a completely reflexive hierarchy. The reflexivity of the hierarchy, partial or complete, is contingent, of course. Each inferior can supersede each superior, but only contingently. Such supersession is not antecedently authorized, but may be validated by contingent future events. This contingent possibility exists in the present, and does not refer to the improbable, contingent future moment when each inferior does supersede each superior. We need not say that the legal system of the United States may become a completely reflexive hierarchy, but that it is one now.

The structure of levels, ranks, and priorities obviously does not collapse by recognizing the present contingent completeness of the reflexivity. That structure is shown in its proper modality, not as a categorical or ahistorical network of logical relations, admitting only those exceptional reflexivities that complex systems are heir to, but as a contingent product of human labor, a human instrument consisting of human practices subject to the tides of human events. The system of levels maintains something of its rule-like quality because violation is admittedly not authorized, and the content of the present hierarchical rules admittedly has power to stabilize itself and interpret attempted exceptions as violations.

The contingent possibility of complete reflexivity is contingently immutable. It may not be eliminated by any adjustment of the system, except contingently, that is, unless acceptance is contingently never mustered for a reflexive exception to the hierarchy. There are some reflexivities in our present hierarchy —the checks and balances system itself is the most conspicuous example— but complete reflexivity is undoubtedly prohibited in effect by the entire set of rules defining the present hierarchy. This prohibition does not bar complete reflexivity with categorical immutability; even if explicitly self-entrenched, it could aspire only to contingent immutability.

In the debate between the legal realists, who emphasized the individual moral preferences and psychological inclinations of judges, and their opponents, who emphasized the general effectiveness of rules, much heat was lost over which end of judicial decision-making, the subjective or objective, deserved more emphasis. I do not deny that law is largely a matter of rules and principles, and that they function as such by constraining judges or by contributing to a milieu in which judges feel constrained to give them effect. The overriding power of acceptance does not substitute a Rousseauvian "general will" for rules and principles. The importance of redefining law to account for the supersession of rules and principles by outcomes authorized only by acceptance, and then after the fact, may distract attention from the routine operation of rules and principles as rules and principles. It may lead one to believe that proponents of such a view must intend to reduce much law to its terms. But I offer no estimate of the frequency of such supersession except to say that it is not the norm. I speak only of its theoretical importance. By positing or recognizing the overriding power of acceptance and the contingent omnipotence of every rule of change, and consequently the contingent, complete reflexivity of legal hierarchies, I do not mean to give these strange birds prominence in the genera of law.

One of the most improbable events that is contingently possible is the self-resurrection of an AC long thought dead through self-repeal or revolution. The contingent omnipotence of the AC implies that all limitations on its power are contingently revocable. This applies even to repeal. If an AC is repealed and subsequently cited as authority for an amendment that would revive it, then such self-resurrecting, self-authorizing amendment could be validated by acceptance.

The same conclusion may be seen from another perspective. Just as immutable rules are immutable only contingently, so mutable rules are mutable only contingently. Any rule may be immutable if it is contingently never repealed or if a prohibition of its repeal is contingently respected forever. This is the mirror image of the principle that any rule may be mutable if a prohibition of its repeal is contingently violated or repealed. Direct acceptance, in short, implies that all rules have contingent mutability and immutability (they are the same thing), just as it implies that all rules of change have contingent omnipotence.

If every rule has contingent mutability or immutability, then repeals are effective only as long as they are accepted as valid. After a certain point, however, a repealed law is invalid by default, not only by acceptance, as its repeal and even its former existence pass out of the minds of all. But if an anciently repealed law was a rule of change, then its sudden, present self-application, declared by a presently existing body, may contingently be accepted as valid. For these purposes it does not matter whether the old rule of change was self-repealed or superseded by revolution. It is dead only contingently, for its resurrection —indeed, its self-resurrection— is always contingently possible.

Laws do not apply to parties, to other laws, or to themselves without the agency of living human beings. Hence, if living human beings declared the resurrection of Roman law, and if it were accepted in the appropriately complex sense, then we could easily interpret the phenomenon as a bizarre but coherent act of present law-making authorized by present sources of authority. If the present "agents" of the change declared its authority to lie in the rules or system being resurrected, we could interpret their statement deferentially, but even then contemporaneous acceptance would have authorized ancient rules for present application. In this sense we could always avoid the interpretation of literal self-resurrection, unmediated even by present acceptance. But even the weaker sense of self-resurrection, acknowledging the authority of present acceptance, may be interpreted as present law-making. The contingent immutability of legal rules, then, does not require the ascription of anything as metaphysical or mysterious as continuing, dormant validity to repealed or superseded rules of law.

This raises the question whether revolution differs from ordinary repeal. It seems that neither revolution nor repeal can categorically invalidate any valid rule, but must settle for contingent invalidation compatible with contingent immutability. Moreover, if the contingent omnipotence of rules of change enables them to transmute and repeal even "immutable" rules, it seems they have acquired a power formerly ascribed only to revolution. An act of transmutation, or of violation that is subsequently accepted, seems to do in small what revolution does in large: disregard the rules and trust to an alegal source of authority to cure the breach of continuity.

Indeed, that is how I prefer to see the relation. Revolution and ordinary repeal and transmutation (if transmutation is ever ordinary) differ only in degree, not in kind. According to the direct acceptance theory, ordinary repeals can be valid even if they were not authorized by antecedent law, so long as they were subsequently accepted. Hence, revolution does not always differ from ordinary repeal in breaching antecedent law, since ordinary repeal may (but need not of course) breach antecedent law.

But revolution and repeal will usually differ in the sort of appeal made by proponents for the validity of their act, in the time it takes acceptance to catch up with what they have done, and in the social and psychological causes of the catching-up of acceptance or of the shift in acceptance toward the new rules or regime. Proponents of a change of law that exceeds the current authority to change law will often appeal to "implied" rules or conditions in that authority, and to custom, policies, practices, and precedents that tend to show antecedent legal authority for the change, as opposed to merely normative moral and political support. Revolutionaries typically try the same sort of appeal, but succeed less often and rest on it less exclusively. The difference between a legal and political justification of change is itself a mere matter of degree. The revolutionary more often stakes her case on the policy end of the scale, and the proponent of amendment or repeal on the legal end. Of course major exceptions of both types may be found.

More often than ordinary amendment or repeal, revolution is justified by appeal to the new norms that thereby come into effect (especially if "democracy" is one of them). In the right cases both types of change may be self-justifying in this sense, and with equal validity, but revolutionary change is more often deprived of other legal-seeming justifications and therefore resorts to it more often.

Ordinary legal change that for some technical reason exceeds its authority rarely causes a breach of social acceptance (though notable exceptions exist). No catching up is necessary. A wink and a smooth judicial opinion patch things up perfectly. Revolution typically causes a breach not only of antecedent law, but also of acceptance. There is a time when the people and officials are uncertain who is in control, when no control is yet "effective" in Kelsen's sense of receiving general obedience, or when control is unstable because many citizens would disobey if they believed disobedience could be safe or because the dethroned regime is poised to counter-attack. Finally, acceptance of ultra vires amendment or repeal ratifies what has been done usually because the officials of the system have engineered the change as if it were authorized, either through good faith belief in its legality or in the habituated cynicism of bureaucracies that operate on an "underground" system of rules based mostly on prudence and pragmatism. Acceptance of revolutionary change may be bought by terror, intimidation, appeals to nationalist pride or common alegal aspirations. Acceptance of ordinary amendment and repeal is an amalgam of acquiescence based on ignorance and loyalty based on a belief that nothing is wrong or that any violation is small and justifiable. Acceptance of revolution is an amalgam of acquiescence based on fear and prudence and loyalty based on a belief in the futility of opposition or the superior political and moral content of the new regime.

These crude simplifications are intended to show that ultra vires change of law that is subsequently accepted may be called either lawful repeal (amendment) or revolution. They differ in degree along several spectra, but in kind along none. According to the normative practice doctrine, the congeries of practices that comprises acceptance thereby determines a rule of recognition that distinguishes valid legal rules from everything else. But this is of no help in sharpening the distinction between revolution and ultra vires amendment or repeal. First, any such rule of recognition must

equally refuse its imprimatur to revolution and to ultra vires amendment. In fact, it may term the latter "peaceful revolution", especially if its subsequent validation is deemed to be the result of an amended rule of recognition. Moreover, once the ultra vires amendment or revolution were authorized by acceptance, the rule of recognition would equally grant its imprimatur. Second, an acceptance theorist may reject the normative practice doctrine, as I am tempted to do, and refer ultimate questions of authority to the same congeries of practice without distorting the latter by calling it a "rule".

A final, reflexive question should be asked. If the direct acceptance theory requires that there be no categorically immutable rules, then does it follow that there is one categorically immutable rule to the effect that there cannot be others? The answer seems to depend upon whether the direct acceptance theory categorically or merely contingently prevents categorically immutable rules. If the former, then we are left with a principle analogous to Augustine's —if there were no eternal truths, it would be eternally true that there were no eternal truths. The true answer is at once simpler and more complex.

Direct acceptance completely precludes categorically immutable rules. If there were one forbidding others, that would be one too many. It does not follow that a categorically immutable rule is contingently possible. The direct acceptance theory is a theory about law, not a set of rules or principles of or within law. If it bars something (does not recognize something), then it does not follow that legal rules bar that something. For an empirical theory of law completely to preclude something is to decide on the evidence that that something does not appear in law, and not necessarily because it is expressly forbidden by a rule of law. Some things are absent without command, descriptively rather than normatively. According to the direct acceptance theory, categorically immutable rules are completely absent from law, not because they are forbidden but because a true description omits them. There is not even one forbidding others.

A legal rule that purported to forbid categorically immutable rules would itself be contingently mutable or immutable. It could be repealed, but its repeal would not thereby enact the possibility of enacting categorically immutable rules. No change of law can enact or permit the enactment of categorically immutable rules because the alegal source of authority of law does not permit it and cannot itself be irrevocably changed by changes of law. Acceptance is that alegal source of authority, and it can serve this role as a "permanent" obstacle to categorically immutable rules even though its status as the alegal source of legal authority is only contingently immutable. Changes of law can replace acceptance with the decrees of a priesthood, military council, or economic elite, but only if such changes are accepted. The contingent immutability of acceptance means that acceptance may always awaken from dormancy and take back the power it once was accepted as having.

So if no categorically immutable rules are possible in law, in what sense are rules of change contingently omnipotent? There is one class of rules (categorically immutable rules) that cannot be enacted, even through the contingent favorable acceptance of future generations. That is true, and if it is a limit on omnipotence, then rules of change possess only a further qualified contingent omnipotence. However, rules of change can still authorize rules of any content at any time, which is more than categorically self-embracing or categorically continuing omnipotence could do. Moreover, they may make rules that are never repealed —though only by virtue of a perpetual, contingent failure to repeal. Even irrepealable rules could be made, though only if we mean contingent irrepealability.

While contingently omnipotent rules of change can authorize rules of any content at any time, they cannot authorize rules of any modality, if this is taken to refer to the categorical and contingent modes of mutability. The incapacity of a rule of change to make categorically immutable rules is identical to its own contingent mutability or immutability. The contingent mutability of a rule of change allows it to be amended or repealed, but only with contingent revocability. Thus its own status as contingently mutable bars it from any irrevocable self-limitation which is not itself subject to transmutation. Hence its status bars it from categorically irrevocable self-limitation. But since all categorically immutable rules (ex hypothesi) are categorically irrevocable limitations on the amending power, they are all barred; they cannot be made by the only powers available for making law. Hence, by defining rules of law —especially rules of change— as contingently mutable, we have already precluded the possibility of categorically immutable rules.

But the property of contingent mutability or immutability in all legal rules is inseparable from the property of contingent omnipotence in rules of change. Both define the maximum legal immutability as one subject to contingent future events, and to that extent as mutable in principle. The property of contingent mutability for rules in general defines this condition from the standpoint of the products of change, and the contingent omnipotence of the rules of change define it from the standpoint of the instrumentality of change. Hence this universal property of contingent mutability implies the impossibility of categorically immutable rules and the necessity of contingent omnipotence of the rules of change; and each of the latter implies each of the other two. Under these conditions it is difficult to conceive the impossibility of categorically immutable rules as a limitation on contingent omnipotence, for the concepts define and imply one another. But certainly if we adopt a broader concept of limitation, then we will find contingent omnipotence limited. For in truth, not even contingent omnipotence can make categorically immutable rules, any more than it could categorically cease being contingent omnipotence.

D. A word on the merits of the direct acceptance theory

My chief task in this work has been to show how law copes with one family of paradoxes. The actual means by which law copes with paradox —for example, permitting self-amendment without more ado— are of course subject to many interpretations and justifications. As I argued in Section 6, Hart's acceptance theory is one persuasive way to interpret the actual legal methods of coping, but I will refrain from affirming it simply on that ground, for other persuasive interpretations also exist. But clearly the capacity to explain the legality of self-amendment, so intractable to the formalist concepts of reason and law, is a strong argument in its favor. So is its consonance with democratic theory as noted in Section 21.A. As

"modified", the modified (direct) acceptance theory is a very powerful explanation of why we cannot and should not bind our successors irrevocably or with categorically immutable rules. The descriptive and normative sides of the theory work in harmony here. Categorically irrevocable or immutable rules would increase the freedom and power of their makers at the expense of their makers' descendants. Maximum freedom across generations consistent with equal freedom requires the impossibility of such rules. But previous theories could not urge this impossibility normatively, or explain it descriptively, without resort to other immutable rules. This goes directly to the merits of the direct acceptance theory.

On other fronts, Hart has forcefully argued the merits of acceptance as an explanans of law. But the merits of direct acceptance deserve an extra word. Ronald Dworkin has made three objections to Hart's acceptance theory, all of which are relevant to my modified theory.[Note 37] First, Dworkin objects that some rules of law are clearly valid and binding even though they are not validated by the rule of recognition. They are binding, Dworkin says, merely "because they are accepted as binding by the community." I agree entirely. Dworkin here points to the chief "modification" by which I depart from the usual interpretation of Hart. I may disagree with Dworkin's assessment that Hart himself denies this wrinkle, but that is unimportant here.[Note 38]

Dworkin's second objection is that the existence of valid rules authorized directly by acceptance shrinks the scope of the rule of recognition. Again I can agree fully. But I note that agreement is unnecessary if the "overruling" or "supplementation" of the rule of recognition by acceptance is held to amend to the rule of recognition.

Dworkin's third objection is directed more to the rule of recognition. If that ultimate rule serves the function that Hart attributes to it and "provides a test for determining social rules of law other than by measuring their acceptance," then it fails, for it collapses into a mere reflection of what people accept. Again I agree. The rule of recognition for Hart is usually not formulated in words but is reflected in the practice of officials in using and ascertaining the law. If it is identical to that congeries of practice,[Note 39]

> then it provides no such test at all, beyond the test we should use were there no master rule. The master rule becomes...a non-rule of recognition; we might as well say that every primitive society [thought by Hart to lack secondary rules] has a secondary rule of recognition, namely, the rule that whatever is accepted as binding is binding.

To this I may say in Hart's defense that the practice of officials is not the whole picture of acceptance. The people make an essential contribution even if, as Hart says, they are often ignorant of the law. But I accede to the thrust of Dworkin's objections, and have even sketched the sense in which I believe that acceptance for Hart operates through a rule that whatever is accepted as law is law (Section 7.B). Dworkin is here objecting that acceptance is not mediated by any rule-like device in authorizing law, which is exactly what the direct acceptance theory asserts. This weighs against the rule of recognition (qua rule), of course, but my own version of the direct acceptance theory does not depend upon a rule of recognition. The social practices that comprise acceptance in the appropriately complex sense may simply be called a rule of recognition. But such a move would be vulnerable to Dworkin's objection that the "rule" would offer no test different from acceptance itself. To that extent it would give us a false sense of the formalism of law.

The direct acceptance theory can accommodate what Dworkin calls "principles" more easily than the unmodified theory. The reason is that the direct theory is not committed to the rigid distinction of legal norms from other types —a distinction that is implied by the existence of a rule of recognition. The direct acceptance theory denies that law is a mere system of rules. This observation is necessary to disarm the only criticism of the direct theory I have found made by one who generally supports an acceptance theory of legal validity. Hugh Williamson has argued that law is a system or structure of rules and that acceptance of one rule logically requires acceptance of the whole system.[Note 40] Acceptance cannot cease for one rule without a different system becoming the object of acceptance. Hence, acceptance cannot selectively intervene to establish the validity or invalidity of individual rules. This objection is simply inapplicable to a theory that denies that consistency is paramount in law, or that denies that law is a system of rules, or that denies that acceptance is an "all-or-nothing" phenomenon; I make all three denials.[Note 41] In any case Williamson offers no argument for his unusual views of rules, acceptance, or systematicity except the "ordinary language" of lawyers, a test that seems to rule against his own conclusions.

A student of Dworkin's, Gabriel Mosonyi, has extended Dworkin's critique of Hart's theory of acceptance.[Note 42] Mosonyi, like Dworkin, believes the straight acceptance theory is inadequate and offers a few corrective principles and suggestions that, in my terms, favor the direct theory. What I have called "direct acceptance" is very similar to what Mosonyi has called "critical acceptance". Critical acceptance, Mosonyi argues, is the actual stance of most citizens and officials: "they may accept the rule of recognition generally, but reserve the right to reject it in particular cases e.g., where it works injustice."[Note 43] This reserved right to overrule the rule of recognition is just the modification I have drawn (to use the language of the "rule of recognition"). Mosonyi offers independent arguments that primary rules of obligation should be understood to derive their validity, not from a formal test or rule, but directly from social acceptance.[Note 44] This too is consonant with the direct acceptance theory, although I have taken no position on the question of the source of the validity of primary rules. Insofar as the rule of recognition, however, is a mere restatement or formalistic disguise of complex social practices, all that it validates may be considered validated "directly" by acceptance.

"Critical acceptance" is a good name for the sense in which the rules validated by acceptance are contingently mutable and always subject to repeal or, more subtly, to violations that are tolerated or even validated as repeals by acceptance. It is more than serendipity, therefore, that the most careful analysis of acceptable violations of binding law has concluded that acceptance is always capable of overruling the formal rules of a system. The analysis, of course, is Mortimer and Sanford Kadish's Discretion to Disobey.[Note 45]

The Kadishes argue against the "law and order" model of legal rules, according to which mandatory legal rules such as the criminal law demand unqualified obedience, impose an unremitting obligation to comply, and justify punishment for the smallest infraction. Punishment is justified for this model without regard to the defendant's moral defenses, public attitudes and expectations, and the benefits to society to be reaped by the offense or by non-prosecution. One of the Kadishes' chief legal tools in overturning the "law and order" model they call "principles of acceptance". These principles define how the fearsome, mandatory obligations of law are actually to be taken, which is not as unremitting, mandatory obligations.

The Kadishes evidently owe much of their discussion to Hart,[Note 46] but criticize him for silence or obscurity on their central questions: whether the accepted rule of recognition allows departures from "mandatory" rules in exceptional circumstances, and how citizens are to decide this question.[Note 47] They believe that principles of acceptance make up this deficiency of the Hartian rule of recognition. One way in which actual practice differs from the "law and order" model for the Kadishes is that violations may subsequently be validated by acceptance. The Kadishes emphasize the ex post facto application of the justification. In the following passage the "violation" is a judicial holding that exceeds antecedent authority, but in the name of social change; it could be taken as the judgment of an individual deciding to disobey.[Note 48]

> [J]ustification may have to wait for subsequent legal developments —developments for which the judgment itself may end up providing at least a practical ground. Until the future vindicates it, however, that judgment rests upon a gamble that it is, and will be recognized as, the sort of decision that law ought to be rendering in that kind of case.

The Kadishes conclude that law is not just mandatory rules, but neither is it anarchic acceptance without mandatory rules. It is "the combination of mandatory rules and principles of acceptance," or more precisely, "mandatory rules...tempered by principles of acceptance."[Note 49] This formulation is still imprecise; I believe it is rigorously fleshed out in the concepts of contingent omnipotence, contingent mutability or immutability, and direct acceptance.

Of course, many thinkers not at all concerned to justify anything like the direct acceptance theory have made the point that principles of acceptance or a reserved power to overrule any formal rule by social practices do not abolish mandatory rules, obligations, or the rule of law. The power, even the right, to depart from old rules may be ascribed to common law judges. But as Cardozo said,[Note 50]

> The judge, even when he is free, is still not wholly free....He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'

The direct acceptance theory does not assert that the contingent mutability of all legal rules, or the perpetual possibility that any violation may be ratified by future events, unweaves the fabric of law. Rules and principles function as rules and principles, even though they are subject to overruling by acceptance. This subjection to contingent overruling changes their modality but not their function, and is primarily of interest to historians and philosophers of law, not to officials or citizens. Even when such overruling actually occurs, anarchy is not the result, for the acceptable violation is endorsed by the complex of practices and preferences that comprise acceptance. If that structure constitutes or reflects common morality, then as Mosonyi put it, critical acceptance cannot make "the state of law...any more anarchic than that of conventional morality."[Note 51]

The special capacity of acceptance to tolerate contradiction does not imply that all contradiction must be accepted (Section 21.B). What Cardozo said about legal rules may be said of logical rules in law. That they may in a certain sphere be disregarded or overruled does not at all imply the inevitability or even the permissibility of arbitrary decision.[Note 52] Other theories than the direct acceptance theory can account for the persistence of standards or structure even in areas of "discretion" and in periods of suspension and rapid change. But none can account so well for the standards by which the rules are suspended, or by which a sphere of liberty is carved out. Logical paradoxes are not representative of most occasions and motives for this overruling of positive law by acceptance. But paradoxes are especially sharp cases because they cannot be coped with otherwise. They twist up the very rules of positive law itself. They demand an explanation that accounts for the relaxation of firm positive law and rigid logical principles in law.[Note 53] The rarity of the call upon the capacity for such relaxation does not diminish the need to account for it, any more than a small anomaly of Newtonian physics may be ignored even if the alternative is conceptually revolutionary.

I have articulated a theory of the direct authorization of law by complex social practices summarized under the name "acceptance". I have articulated the theory only as far as necessary to see its healthy effects on the paradox of self-amendment, omnipotence and immutability, democratic theory, and a few other issues in jurisprudence. But I have not given a complete theory of acceptance, for this was not the place to do so. However, to prevent omission of other parts of the theory from causing misunderstanding, I would like to make two points quickly.

First, the direct acceptance merely says that acceptance can, and occasionally does, authorize law directly. It does not make the absurd claim that all authority for all law takes the form of direct acceptance. On the contrary, most laws are directly authorized by other laws.

Second, the direct acceptance theory does not make the absurd claims that all people always know all the facts about their legal system, that they always know their true interests perfectly, or that they always act courageously —or even prudently— on their true interests. Hence, much acceptance will be ignorant or mistaken. Many of the practices that constitute acceptance —primarily, compliance and non-resistance— can be coerced by explicit violence, intimidation, and ideological control. The normative side of an acceptance theory must develop these points fully. A legal system is not legitimate simply because it is accepted. The quality and voluntariness of the acceptance may be investigated.[Note 54]

E. Self-application

No work of this kind is complete without inquiry into its self-referential consistency. If its conclusion is true, must it be false and vice versa? Does its existence subvert its claim to truth? The theory of direct acceptance is an empirical theory of law, falsifiable by empirical inquiry, but not falsifiable by any change of law. Changes of law may substitute another source of legal validity for acceptance, but only with contingent revocability — according to the direct acceptance theory. Acceptance cannot categorically dethrone itself or abdicate, so falsification should not be looked for from that direction. This should not be taken as an a priori part of the theory. For if direct acceptance is actually the alegal source of legal authority, then by its nature it will remain such with contingent immutability. An empirical theory may describe that characteristic without losing its empirical character.

The Kadishes speculate that informing juries of their right to disregard judge's instructions on the law will "reduce the impact of judges' instructions...and invite jury nullification on a greater scale."[Note 55] One might argue that my very exposition may tend to reduce respect for positive law and invite "acceptable overruling" to a greater extent. Possibly —no one knows. I take the possibility seriously because some have blamed the American legal realists for the rise of fascism. The posited effect, however, seems just as likely whether my thesis is true or merely influential (falsely believed true). Hence, it is not my thesis that could be self-confirming but, if anything, its exposition. Moreover, if the theory is false, then becoming influential may make it true, as violations, departures, and transmutations are more and more accepted as valid. The authority would be acceptance, but the inspiration could be this (originally false) theory. One might find an analogy in the fact that Kelsen's theories were not cited in English courts until they were needed by former colonies to justify revolution.

Naturally I do not rely upon any anticipated effect of my exposition to prove its content. Nor can I work up a genuine hope (or fear) that this exposition will justify anything that could not otherwise be justified from a more authoritative source (including those I cite on behalf of my thesis). I may have shown a way in which "immutable" rules may be approached by reformers. But if I have, this approach has been noticed before, for I learned it from historical interpretation. If I was wrong that these techniques are already valid law, then they may become valid law by a sort of self-fulfilling prophecy. There is a long tradition, especially in international law, of using the writing of jurists and scholars as an unofficial source of law. I cannot claim even that much authority. My claims as to the validity of transmutation or the contingent repealability of self-entrenchment clauses were supported by cases available to all plaintiffs, even if no cases exist directly on point for many hypothetical extensions of the theory. If I say that the repeal of self-entrenchment clauses is all for the good anyway, I begin a line of defense that I would rather not take to the end.

The only effect of my exposition that I anticipate is a heightened sense of our responsibility for law. If we believe that even part of the origin of law lies in the commands of a deity, in innate and unalterable patterns of behavior, in immutable morality, or in formal logic, then we are masking our responsibility. The truth here may be terrifying. If law is too unwieldy for lay citizens to understand, too expensive for most to use to protect their rights, too slow to adapt to new threats to liberty, then the fault is ours. If the infinitude of untried concepts contains a gem, the job is ours to find it. No rule made by our ancestors is beyond our reach. Admitting that puts the burden of justification on our will.

We did not choose to have every rule of law that we do have, and it distorts things to say we chose when we merely accepted. But we have accepted and tolerated every rule of law that we now have. Through our acceptance we exercise our sovereign power of authorizing law to be law. We are responsible not only for our choices, but also for our weaker, more hidden, thoughtless acts of acceptance. Our freedom to change the law, which is contingently omnipotent, need not lead us to a profusion of self-limiting rules, all contingently immutable, to quell our terror, nor to the mass repeal of the refined product of centuries. However, it should lead to a greater suspicion of formalist and naturalistic excuses for immutability, and a greater vigilance to arrest our lapses into bad faith. As citizens, advocates, legislators, and judges we are bound by existing rules, but not unremittingly or categorically. This essay should help us see that "being bound" by law is a complex idea, an organism of mutually dependent social practices and expectations with no immutable logical bones. We cannot simply throw off law as a fetter, for it is self-imposed for reasons that remain sound, but that deserve constant reexamination. But the form and content of this self-imposed structure of our freedom may be anything at all, contingently; it is up to us.

In the United States there is immense case law supporting the proposition that the federal government is a "limited" one —limited by popular sovereignty, federalist principles, a written constitution, the separation of powers, checks and balances, judicial review, bicameralism, periodic election of officials, and supermajority requirements for many important events including constitutional amendment. This is another way to say that the rules that limit the federal government have repeatedly been respected, even while every rule of change down to the power of the Chicago City Council to make ordinances has contingent omnipotence. The rules limiting the federal government have been respected, moreover, even while the federal government has steadily grown in size and power. We did not reach our present position by a series of revolutions, by anarchy, or by willful disobedience. The law grew by a series of small steps. These steps were accepted as they arose, perhaps because everybody thought they were authorized even when they were not, but normally because, without thinking about authority, most found them acceptable.

Notes

1. Alf Ross, "On Self-Reference and a Puzzle of Constitutional Law," Mind, 78 (1969) 1-24.

2. Ordinary deontic logics —the logics of permission and obligation— do not suffice for reasons that will appear briefly below. But I am coming to suspect that a temporally indexed deontic logic, capable of describing permissions and obligations that are enacted, amended, and repealed in time, may be made to work. No one has yet applied a temporally indexed temporal logic to the paradox of self-amendment, but for an idea of what

such a logic looks like, see L. Thorne McCarty, "Permissions and Obligations: An Informal Introduction," forthcoming, North-Holland. For reasons that will appear, even if temporally indexed deontic logic dissolves the paradox, it cannot do so for the inference model.

3. Hicks, J.C., "The Liar Paradox in Legal Reasoning," Cambridge Law Journal, 29 (1971) 275-91.

4. Hart, H.L.A., "Self-Referring Laws," in Festskrift Tillägnad Karl Olivecrona, Stockholm: Kunglia Boktryckeriet, P.A. Norstedt and Söner, 1964, pp. 307-16; reprinted in his Essays in Jurisprudence and Philosophy, Oxford University Press, pp. 170-78.

5. Raz, Joseph, "Professor Ross and Some Legal Puzzles," Mind, 81 (1972) 415-21.

6. Finnis, John M., "Revolutions and Continuity of Law," in A.W.B. Simpson (ed.), Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973.

7. If a temporally indexed deontic logic that statically described the dynamic change of norms could dissolve the paradox, it would be by rigorously enforcing the requirement of temporal separation. It might succeed at this, but would for that reason violate transtemporal validation. Hence it would not satisfy the inference model.

Also note that the objection based on transtemporal validation applies on both horns of the dilemma, whether we accept or reject the distinction between legal and logical contradiction.

8. Mackie, J.L., "Evil and Omnipotence," Mind, 64 (1955) 200-12; H.L.A. Hart, The Concept of Law, Oxford University Press, 1961, at 146.

9. For opposing views on the question whether the House of Lords can be abolished, see Peter Mirfield, "Can the House of Lords Lawfully Be Abolished?" Law Quarterly Review, 95 (1979) 36-58, and George Winterton, "Is the House of Lords Immortal?" Law Quarterly Review, 95 (1979) 386-92. Also see Winterton's "The British Grundnorm: Parliamentary Supremacy Reexamined," Law Quarterly Review, 92 (1976) 591-617; O. Hood Phillips, "Self-Limitation by the United Kingdom Parliament," Hastings Constitutional Law Quarterly, 2 (1975) 443-78; and Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty", Archiv für Rechts- und Sozialphilosophie, 44 (1958) 495-513. Geoffrey Marshall argues that the English Parliament formerly had continuing omnipotence but has edged toward self-embracing omnipotence; see his "Parliamentary Sovereignty: A Recent Development," McGill Law Journal, 12 (1966-67) 523-27.

10. Even if an AC has contingent omnipotence, it may not be supreme or "sovereign". It may share supremacy with unofficial methods of amendment, or actually be inferior to one such as judicial review. Although the paradox of self-amendment does not exist in a strong form for such ACs, reflexivity issues still abound. The federal government of the United States is a reflexive hierarchy in which some inferior rules occasionally supersede their superiors, creating circles in which mutual change and indirect self-amendment can occur. Non-supreme rules of change encounter the same logic in self-amendment as the supreme rule, but at lowered stakes. They will be mutable even without self-amendment (namely, at least by the supreme rule of change), and they will frequently be able to take advantage of wrinkles in the reflexive hierarchy to acquire a limited power over the powers that can change them, if not positively negate the checks and balances of its power by unilateral action. In Section 21.C I will explore the sense in which direct acceptance gives "lower" rules of change co-supremacy with "higher", giving each equally contingent omnipotence and giving the hierarchy complete reflexivity.

11. See e.g. Thomas Reed Powell, "Changing Constitutional Phases," Boston University Law Review, 19 (1939) 509-32. Powell believes that the illegality of the present constitution of the United States was cured by several historical accidents; see Appendix 1.D. If the current constitution had been ratified only in the terms it lays down for its own validity, however, Powell would find it an illegal constitution.

12. This type of self-amendment has actually occurred, most recently in Pennsylvania in 1967, Minnesota in 1974, Hawaii in 1978, and North Dakota in 1979.

13. Neither acceptance nor direct acceptance is equivalent to consent in the classical, Lockean sense. But acceptance is a significant variant of consent, and grounds a similar theory of legitimacy. Unjust laws may be valid by conformity to a rule of recognition and by acceptance, but they might be invalidated by the failure of acceptance even if they conform (otherwise) to a rule of recognition. Moreover, the difficulty of the amending process is a matter of degree that is inversely proportional, but only roughly, to the legitimacy of the system (see Section 2). Many factors complicate the inverse relation of amendatory difficulty and legitimacy, particularly the existence and use of unofficial methods of amendment, ignorance and indifference in the population, and the self-imposed character of some hurdles to amendment.

14. This is essentially the position that Hart takes in the essay cited in note 4 above.

15. Terminologically, a rule of law that is contingently unamended forever, but continually subject to amendment, should not be called "immutable", at least not without serious qualification. By calling it "contingently immutable" I intend to capture this qualification. It turns out that contingent immutability is equivalent to contingent mutability.

16. This is not to say that victims of oppressive laws are to blame for their condition. Any acceptance theory of legal authority and change, when fully worked out, must have a place for (1) ideological acceptance, which lacks the cognitive element of free consent, and (2) involuntary acceptance, which lacks the volitional element. The former is unfeigned, perhaps wholehearted and enthusiastic, but ignorant or delusional, and

may contradict the real interests of the acceptors; the latter is qualified and wary, resented acquiescence coerced by violence and the threat of violence. Both are pathological types of acceptance that create pathological legal systems in which legality and legitimacy are both compromised. Acceptance may exist in the fullest sense but then decline, or exist only because it is coerced or ideological. It may be absent, or the citizens who would express dissent may be expelled or silenced. The picture in any given society is not easy to read; my theory does not require that it be easy. But it does imply that legitimacy be a matter of degree tied to the complex fortunes of acceptance, and that where there is no genuine acceptance, but only submission to force, then there is no law, only gangster rule. See Section 2.B.

In a fully worked out acceptance theory, these details would be far more interesting and important than those that pertain to the domestication of paradox. But in the present work, unfortunately, further elaboration is beyond the topic.

17. I argue in Section 21.C below that the repeal of an amending clause makes acceptance of its self-resurrection significantly less likely but not categorically impossible. Such self-resurrection now seems on the verge of happening on Colombia.

18. Descartes' letters were first brought into the discussion of the paradox of omnipotence by Harry G. Frankfurt, "The Logic of Omnipotence," Philosophical Review, 73 (1964) 262-63.

19. In Section 10 I argued that rules inconsistent by content are not rendered consistent by temporal separation, even when one authorized the other. In Section 11 I argued that the specific authorization of a later rule by an earlier rule does not prevent inconsistency between the two rules.

20. Lon Fuller, The Morality of Law, Yale University Press, rev. ed. 1969, at pp. 67-68.

21. A.M. Honore, "Reflections on Revolutions," The Irish Jurist, n.s. 2 (1967) 268-78 at p. 270.

22. I should note that both Fuller and Honore believe that their examples can reasonably be interpreted as free of logical contradiction. I consider each an example of "inconsistency" as defined by the direct or compliance test discussed in Section 12.C. Fuller's example may also, perhaps best, be seen as an "inconsistency" by the deontic test of Section 12.C.

23. Dennis Lloyd, The Idea of Law, Penguin Books, rev. ed. 1976, at p. 294.

24. The classic statement that policy, not logic, governs the growth of law is Oliver Wendell Holmes, Jr., The Common Law, Little, Brown, and Co., 1881, at pp. 35-36:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis....[T]he law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism.

25. J.D.I. Hughes, "Judicial Method and the Problem in Ogden v. Ogden," Law Quarterly Review, 44 (1928) 217-26 at pp. 218- 19.

26. Hughes, ibid. at p. 219.

27. Another proponent of the strict formalist or inference model is Ricardo Alberto Caracciolo, e.g. in his "Contradictions in the Legal System," Archiv für Rechts- und Sozialphilosophie, 55 (1979) 457-73. His chief thesis is that legal systems must be consistent in the sense that, for any two contradictory norms, at least one must be invalid. He softens this rigid position by admitting that there is no adequate decision procedure for ascertaining which of two inconsistent norms is valid (a member of the system) and which is invalid (barred or preempted by the other). Hence "we cannot exclude the possibility that two rules may be incompatible for a judge, and may not be for another." Ibid. at p. 462. See also Eduardo Garcia Maynez, "Some Considerations on the Problem of Antinomies in the Law," Archiv für Rechts- und Sozialphilosophie, 49 (1963) 1-14.

28. Honore, op. cit. at pp. 270-71.

29. A.G. Guest, "Logic in the Law," in A.G. Guest (ed.), Oxford Essays in Jurisprudence, A Collaborative Work, Oxford University Press, 1961, pp. 176-97, at p. 178.

30. Cf. Holmes, op. cit. at p. 36:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

31. Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921, at pp. 112-13. On the limited value of legal symmetry expressed by Cardozo in this passage, compare Jack Leavitt, "Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments," Hastings Law Journal, 15 (1963) 45-91, at p. 91:

> The value of laws cannot be determined by their internal consistency or chaos, for legal symmetry is admirable only when its subject matter is equally symmetrical....What if...deserving parties would have been harmed by [a truly logical result]?

32. See Section 10, note 1, for some examples.

33. Many acts and proposals of self-amendment are criticized on policy grounds relating to democracy, e.g. that they (would) make amendment too difficult or too easy. But the values supporting these objections would not be served by forbidding all inconsistency or all self-amendment.

34. "Of what use [is it] to make heroic vows of amendment, if the same old law-breaker is to keep them?" Ralph Waldo Emerson, "Experience," Essays, Thomas Y. Crowell Co., 1962, p. 297.

35. Self-stabilization is a property of norms in general. Compare this discussion of the self-stabilization of legal norms with that of language norms in Peter Suber, "The Reflexivity of Change: The Case of Language Norms," Journal of Speculative Philosophy, 3, 2 (1989) 100-129 esp. 107f.

36. See also Suber, ibid., at p. 112.

37. Ronald M. Dworkin, Taking Rights Seriously, Harvard University Press, 1977, at pp. 42-43. These objections are contained in the chapter, "The Model of Rules I," which had earlier been published in the University of Chicago Law Review, 35 (1967) 14-46.

38. Dworkin's examples of law validated directly by acceptance are rules of customary and international law, and the "principles" which he has differentiated from "rules". I believe that Hart acknowledged direct validation by acceptance with regard to the entire class of common law rules decided in cases of first impression (Hart, Concept of Law, Oxford University Press, 1961, at p. 149).

39. Dworkin, ibid. at p. 42.

40. Hugh Williamson, "Some Implications of Acceptance of Law As A Rule-Structure," Adelaide Law Review, 3 (1967) 18-45, esp. pp. 28, 33.

Michael A. Payne also criticizes Hart's acceptance theory, though on a point not central here. He argues that acceptance cannot ground a concept of legal obligation. Michael A. Payne, "Law Based on Accepted Authority," William and Mary Law Review, 23 (1982) 501-28.

41. Note that I need not deny that every legal rule and principle partakes of some legal system. My inquiry does not reach this important question.

42. Gabriel Mosonyi, "Legal Obligation, Social Acceptance and the Separation of Law and Morals," Connecticut Law Review, 6 (1973) 36-48.

43. Mosonyi, ibid. at p. 38.

44. Mosonyi, ibid. at pp. 39-41.

45. Mortimer R. and Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules, Stanford University Press, 1973.

46. Kadishes, ibid. at pp. 191ff.

47. Kadishes, ibid. at p. 192.

48. Kadishes, ibid. at p. 203. Following this quotation they cite the passage in Hart's The Concept of Law (p. 149) where Hart most clearly acknowledged the capacity of acceptance directly to validate rules that the rule of recognition did not validate. Primarily on the strength of that passage I believe Dworkin and others are wrong to impute to Hart an "unmodified" theory of acceptance.

49. Kadishes, ibid. at pp. 211, 217.

50. Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921, at p. 141.

51. Mosonyi, op. cit. at p. 47.

52. See Richard A. Wasserstrom, The Judicial Decision: Toward A Theory of Legal Justification, Stanford University Press, 1961, at p. 24:

> I am arguing...that many legal philosophers are surely mistaken if they infer the inherent arbitrariness of the judicial decision process from the limited utility of formal deductive logic [in law].

53. One should not be surprised that lawyers and legal scholars would be reluctant to recognize this need. The need has been recognized by scholars outside law, however, who have contemplated its reflexivities. See Douglas R. Hofstadter, Gödel, Escher, Bach: An Eternal Golden Braid, Basic Books, 1979, at pp. 692-93: to solve reflexivity tangles in law we must turn to the people, to the "general reaction of society".

54. See note 16 above.

55. Kadishes, op. cit. at p. 65.

Appendices

Appendix 1: Attempts to Amend the Federal Amendment Clause

The amendment clause of the federal constitution is Article V. It has never been amended either by authorizing its own modification or by authorizing its replacement in a constitutional convention. Portions of the clause were under the control of sunset clauses inserted by the framers. The amending power was enhanced when the clauses expired in 1808, in effect amending the amending clause by augmenting its power or by revoking limitations on its power (see Section 14). Nothing in U.S. constitutional history comes closer to self-amendment at the federal level than the expiration of these sunset clauses and the limitations on the amending power they represented.

Recently Article V has been seen as an obstacle to conservatives who foresee difficulties in passing amendments to prohibit abortion and require a balanced budget, and by liberals who lost the struggle to ratify the Equal Rights Amendment. Hence proposed amendments to Article V have increased recently, though mostly by conservatives.

Another period of frequent proposals to amend Article V began after the ratification of the Eighteenth Amendment (Prohibition) in 1919. The adoption of the Nineteenth Amendment (Women's Suffrage) in 1920 intensified the discussion. Both amendments were much criticized, and challenged in court, for violating supposed implied limitations on the content or substance of amendments (see Section 8). The validity of the Eighteenth Amendment was upheld in the face of attack by Hawke v. Smith No. 1, 253 U.S. 221 (1920), National Prohibition Cases, 253 U.S. 350 (1920), Dillon v. Gloss, 256 U.S. 368 (1921), U.S. v. Sprague, 282 U.S. 716 (1931), and Coleman v. Miller, 307 U.S. 433 (1939). The validity of the Nineteenth Amendment was affirmed in Fairchild v. Hughes, 258 U.S. 126 (1922), and Leser v. Garnett, 258 U.S. 130 (1922). The period culminated in Roosevelt's proposal in 1937 to expand (and "pack") the Supreme Court. Eighteen proposed amendments to Article V were proposed from 1911 to 1928, and five were proposed in 1937 alone.[Note 1] Most would have made the amendment process more democratic in procedure, or less so in substance by prohibiting amendments of certain kinds.

A. Recent Proposals

These are the proposed amendments to Article V from three recent Congresses during a period of important amendment activity. The Equal Rights Amendment was proposed in 1972 with a ratification period of seven years; after a three year extension of the ratification period, it expired unratified June 30, 1982. All the following proposals died in their respective judiciary committees without a floor vote.

The 95th Congress: 1978-79

H.10,836. Sponsored by Hyde, Dornan, Grassley, Kelly, Logomarsino, Lunken, Thorne, and Young. It would provide procedures for calling a constitutional convention.

H.11,546. Sponsored by Symms, Crane, Ashbrook, and MacDonald. It would prohibit the President and officers from the Executive Branch from attempting to influence State legislatures to ratify, or not to ratify, a constitutional amendment.

H.11,600. Sponsored by Hyde, Cavanaugh, Smith (Neb.), Traxler, and Walsh. It would provide procedures for calling a constitutional convention.

H.12,503. Sponsored by Wiggins, Hyde, Sawyer, Hughes, and Evans (La.). It would provide procedures to determine the validity of a State's ratification of a constitutional amendment.

HJR.1110. Sponsored by LaFalce. It would allow Congress to determine that a simple majority of each house of a State legislature could suffice to ratify a constitutional amendment.

The 96th Congress: 1979-80.

HJR.595. Sponsored by Lujan. It would permit constitutional amendments to be ratified by a nationwide popular referendum.

The 97th Congress: 1980-81.

S.600. Sponsored by Helms. It would provide procedures for calling a constitutional convention.

S.817. Sponsored by Hatch and Deconcini. It would provide procedures for calling a constitutional convention. Supported by the American Bar Association.

H.297. Sponsored by Hansen (Ida.). It would give effect to State attempts to rescind ratification of constitutional amendments.

H.353. Sponsored by Hyde and Lundgren. It would provide procedures for calling a constitutional convention.

HJR.88. Sponsored by Jacobs. It would allow the States to propose amendments to the constitution.

B. An historical proposal passed by Congress

Only one attempt to amend Article V was among the select group of six proposed amendments that was actually passed by Congress and defeated by the states.[Note 2] It is the so-called Corwin amendment. Without its preamble it read:

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

Congress adopted this proposal on March 2, 1861. It is substantively, although somewhat covertly, concerned with slavery. It proposes to protect slave states from congressional interference. But it can rightly be considered an amendment to Article V because, if ratified, it would significantly and expressly have curtailed the federal amending power. Moreover, as originally adopted, Article V included an express limitation that prevented the abolition of slavery by amendment until 1808. The Corwin amendment would have renewed the limitation in perpetuity.

The Corwin amendment is ambiguous on the question whether it precludes an amendment directly abolishing slavery, or merely precludes amendments that authorize Congress to abolish slavery. The former would constitute the entrenchment, but not the self-entrenchment, of slavery; even under its stringent interpretation, the Corwin amendment did not (explicitly) bar its own repeal.

Orfield counts 14 proposed amendments that would somehow have precluded the abolition of slavery. Only the Corwin amendment passed Congress.[Note 3] Four years and one Civil War after passing the Corwin amendment, Congress passed the Thirteenth Amendment, abolishing slavery, which was ratified by the states. Needless to say, the ratification of the Thirteenth Amendment preempted the movement to ratify the Corwin amendment. However, the Corwin amendment had only been validly ratified by two states (Ohio, Maryland). Illinois attempted to ratify it, but probably did so defectively by voting to ratify it in a state constitutional convention that happened to be in session in 1861.[Note 4]

Incidentally, the Corwin amendment and the Thirteenth Amendment were the only proposed amendments ever signed by the President. James Buchanan signed the Corwin amendment two days before leaving office for Abraham Lincoln, in a desperate eleventh-hour effort to avert the Civil War. Lincoln signed the Thirteenth Amendment abolishing slavery, but thinking he erred he notified Congress. The Senate declared the signature unnecessary and not to be a precedent. When the Twelfth Amendment was still in Congress, a Senate resolution to submit it to the President (Jefferson) was defeated. Before and after the Corwin amendment Congress realized that the President need not sign, and cannot veto, a constitutional amendment.[Note 5]

C. Historical proposals not passed by Congress

Proposals to amend Article V prior to the 20th century have been collected by Herbert Vandenberg Ames and discussed in admirable detail in Chapter VI of his The Proposed Amendments to the Constitution of the United States During the First Century of its History.[Note 6] I list the proposals here in chronological order, not the order in which Ames discusses them.

> Rhode Island proposed an amendment to Article V at the time it ratified the constitution, May 29, 1790. It proposed that after 1793, no amendment be valid without the consent of at least 11 of the original 13 states. The other states resisted the strong appeal to their self-interest and defeated this proposal, leaving them without any legal privilege over subsequently admitted states.
>
> Although not strictly an amendment to Article V, in 1822 an attempt was made to call a convention to propose amendments to the body of the constitution generally but in a way violating Article V. Alabama, Georgia, New York, South Carolina, and Virginia attempted to call a convention of states; Delaware succeeded in averting the convention by arguing that Article V authorizes only a convention of the people, not a convention of states. But for Delaware's action, Article V may have been amended by violation, sub silentio, replaced by a self-declared successor.
>
> In 1826 Representative Herrick of Maine proposed that future proposals to amend the constitution be heard only every tenth year.
>
> In January of 1861, Senator Crittenden of Kentucky proposed to entrench absolutely the slavery laws of the several states, together with his own amendment. He would allow slavery below, and forbid it above, 36o 30', and would forever bar blacks from voting or holding public office. The self-entrenchment of the amendment would have been the first for a constitutional amendment. Crittenden also made it part of his proposal that it be ratified by popular referendum, which would have violated Article V even if approved unanimously (see ##7, 10, below).
>
> In January of 1864, Senator Henderson of Missouri proposed that the supermajority of state concurrences needed to ratify an amendment be reduced from three-fourths to two-thirds.
>
> Shortly after the Civil War, Virginia called and sponsored a "Peace Convention" attended by representatives from 21 states. The convention was not called under the procedures of Article V, yet it drafted amendments that it recommended to Congress; it did not purport to ratify the amendments. One proposal by a Mr. Florence, representative from Pennsylvania, is particularly germane to our topic:
>
> > The reserved power of the people in three-fourths of the states to call and form a national convention to alter, amend, or abolish this Constitution, according to its provisions, shall never be questioned, notwithstanding the direction in Article V of the Constitution.
>
> The amendment would in effect have made solid constitutional law out of the glorious but legally uncertain language of the Declaration of Independence (see Section 18). However, Mr. Florence did not appreciate that making the right to "alter, amend, or abolish" into an

express part of the constitution not only solidifies it, but also subjects it to amendment. The last clause of the proposal attempts to protect the right from amendment by entrenchment, but does so badly. It merely immunizes it from "the direction" —whatever that is— in Article V, which in any case may be replaced by self-amendment. Further, entrenchment clauses are liable to amendment, even if they are self-entrenched (see Sections 8, 9). Finally, the intent of the proposal is obviously to carve out an indefeasible right, but without heed to the paradox of self-amendment: even under their reserved power, may the people amend their indefeasible right to amend?

In January of 1869, Senator Davis of Kentucky proposed to allow ratification by popular referendum, not only for future amendments but also for his very amendment proposal. This raises the bootstrapping problem of #4 above, but cleared of the distractions of entrenchment and slavery (see also #10 below). Article V does not permit ratification by popular referendum; this is clear from Article V, confirmed in part by Hawke v. Smith, 253 U.S. 221, 10 A.L.R. 1504 (1920), and presupposed by Davis' own proposal. Insofar as Article V is exclusive (see Section 12.A), a popular vote simply could not ratify the Davis amendment —just as whites had to vote to give blacks the right to vote in the Fifteenth Amendment, and men had to vote to give women the right to vote in the Nineteenth Amendment. However, if Davis' proposal had been endorsed by the requisite popular vote, but never ratified under the procedures of Article V, and if it were treated as if it were validly ratified by the people and officials, then we would need something like an acceptance theory to explain its legality.

In 1869 Senator Morton of Indiana proposed to include in Article V certain minimal procedures to be used by state legislatures when ratifying federal amendments. His proposal was prompted by an embarrassing series of procedural irregularities that plagued the Indiana legislature in its "deliberations" on the Fifteenth Amendment (Black Suffrage). In the state senate, for example, the democrats —who opposed ratification— tried to break quorum by leaving the chamber. The republican leadership locked them in before they could escape. In the house, all but 10 democratic representatives abruptly resigned, again to break quorum. The speaker ruled that the house was still competent to act, and obtained a 2/3 vote in favor of ratification from the "members present".

In the same session of Congress, a proposal similar to Senator Morton's was introduced in the House by Representative Shanks, also of Indiana.

In January of 1872, Representative Porter of Virginia proposed to allow ratification of amendments by simple majority in a popular referendum. His proposal avoided the bootstrapping problems of ##4 and 7 above by requesting ratification through the methods of Article V, not through a popular referendum.

D. The Articles of Confederation

Although the AC of the present constitution has never been directly amended, one might argue that it is itself an amended form of the AC of the Articles of Confederation (hereafter, the "Articles"). If the present constitution was written under the authority of the Articles (which is controversial) and if the present AC differs from the old one (which is certain), then the latter authorized its own change, indirectly by convention rather than directly by amendment.

The AC of the Articles is contained in the first paragraph of Article XIII:

> [N]or shall any alteration at any time hereafter be made in any of them [the Articles]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

This clause differs from the present one in two significant respects: (1) it does not expressly allow amendment by convention, and (2) it requires unanimous concurrence by the states, not merely a three-fourths majority. The requirement that Congress assent to amendments remains in the new AC, although in the new AC Congressional assent must take the form of two-thirds of each house. More importantly, the condition of Congressional assent is missing from the new constitution's ratification clause (Article VII) under which the new constitution was adopted.

Ever since 1789 scholars have debated whether the new constitution was a product of the authority of the Articles or a revolutionary break with it. It could be a product of the Articles if it could be construed as a product of the Articles' AC, for the Articles provided no other means for their own replacement.

The convention of 1787 was called by Congress to suggest amendments. This by itself did not violate the Articles, for the convention's power was limited to the proposal of amendments and did not include their ratification. In its call for the convention, Congress declared that it intended to comply with the AC of the Articles. The language of Congress suggested that it wished for amendments to the Articles rather than an entirely new constitution. The resolution in pertinent part read:[Note 7]

> Whereas there is provision, in the Articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the Legislatures of the several states; and whereas experience hath evinced that there are defects in the present Confederation; as a mean to remedy which, several of the States, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government,—

> Resolved, That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union.

But notoriously the convention exceeded its mandate and wrote an entirely new document. However, the new constitution was merely a proposal that Congress had the power to discard or to take up under the Articles' AC for consideration by the states.[Note 8] The important question is not whether the convention went beyond its legal authority or the scope of its enabling resolution, for the Articles are silent on the methods of proposing revision, but whether the procedures laid down in the Articles were violated in the adoption of the new constitution.

Two violations of those procedures occurred. First, the new constitution by its own terms (Article VII) would be established if ratified by nine states (and only for the ratifying states), whereas the Articles required unanimous ratification. Thomas Reed Powell, among others, thinks this defect was cured by the fact that a unanimous ratification was eventually received.[Note 9] Powell believes the constitution did not become law until the 13th state (Rhode Island) ratified; ratification by the 9th state (New Hampshire) did not suffice. On this theory, there is a strong paradox for the nation during the two-year period between the 9th and 13th ratifications (June 21, 1788 to May 29, 1790): the new document was valid under its own terms but not under the terms of the Articles. If its own terms did not suffice, then at least after the 13th ratification, apparently, all the terms of the new document would be effective. That would include the validation of the new constitution's ratification clause, Article VII, which says that a 9/13 vote will establish the constitution. Does this mean that the 13th ratification would bring the retroactive validation of the new document for the previous two years?

The delegates to the constitutional convention, in writing the ratification clause of the new document, knew they were departing from the terms of the AC of the Articles. John Randolph, a delegate, defended the irregularity of the less-than-unanimous ratification terms by appeal to "necessity", on the theory that a new constitution, providing a strong national government, was necessary to preserve the union. To require unanimity, or to use the AC of the Articles, would risk defeat when the stakes were high.[Note 10]

In Federalist #43, James Madison also defended the irregular adoption of the new constitution by appeal to "absolute necessity", "self-preservation", and "the transcendent law of nature and of nature's God". With some diffidence he then offered a novel theory based on international treaty law: if the Articles were a treaty signed by sovereign powers, then breaches may be found in adequate numbers to absolve all signatories of future allegiance. In Federalist #40 he offered justifications based on a waiver theory, overriding moral duty, and the curative effect of subsequent ratification.

The second violation was the stipulation in the new constitution (again, Article VII) that ratification by the states without the assent of Congress will suffice, whereas the Articles required ratification by both the Congress and the states. This defect was cured, if at all, by the fact that Congress did ratify the new constitution —an historical contingency similar to the garnering of a unanimous state ratification.[Note 11]

John Alexander Jameson summarized the view of many when he said,[Note 12]

> [I]t is clear, that the act of disregarding the [amendment] provision of the 13th of the Articles of Confederation, was done confessedly as an act of revolution, and not as an act within the legal competence of either the people or the Convention, under the Constitution then in force.

The defects in the adoption of our constitution, that make it revolutionary or illegal, have also been the object of judicial notice. When the Nebraska constitution was challenged for procedural defects in its adoption, the Nebraska Supreme Court held that the challenge was as futile as one to the federal constitution, which is valid despite the well-known irregularities in its making and adoption. Brittle v. People, 2 Neb. 198, 210 (1873).

Our present constitution is valid even if not validated by its predecessor. The AC of the present constitution, according to most writers, cannot be considered a self-amended product of the AC of the Articles. It is a revolutionary replacement, not an antecedently authorized one.

E. Selected Suggestions by Writers

Many writers have proposed changes in Article V from their sovereign position as citizens.[Note 13]

Some writers have written entirely new constitutions that are serious in the sense that they are proposed for adoption and, in theory, are perfectly eligible to be taken up through proper channels and ratified. Some of these alternative or utopian constitutions are very thoughtful and challenging. Some are little more than excrescences of anger. A good example of the former was written by Virginia Woodhull,[Note 14] published in the same year (1872) that she became the first woman to run for President of the United States. (She ran for the Equal Rights Party, with Frederick Douglass for Vice President.) The amendment articles, XVIII and XIX, are not innovative except for including provision for ratifying the constitution itself. Woodhull's constitution is revolutionary in that it provides its own ratification procedure independent of antecedent authority (that is, the current Article V) and makes no pretension to derive its authority from that which it would replace. In that sense its relation to the present constitution would be the same as that of the present constitution to the Articles of Confederation.

Another well-considered alternative, presented as a series of criticisms and suggestions rather than as a proposed draft, is William MacDonald's A New Constitution for a New America.[Note 15] He proposes vast changes in the constitution, but no new amendment clause. However, he believes the present Article V is inadequate to accomplish the enormous task he contemplates, and breaks new ground by suggesting that the authority may be found in the Declaration of Independence for a "right of the people to abolish it [their form of government] and to institute a new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."[Note 16] This right is not abstract or merely rhetorical, he believes, but may support a call for a constitutional convention, though the need for it is surely based on a misinterpretation of the power of the present Article V.[Note 17]

An example of a less reflective work is provided by William Gardiner in A Proposed Constitution for the United States.[Note 18] The amendment clause, Article XX, is novel in allowing the unanimous Supreme Court to propose or ratify an amendment, but not both for the same amendment. In the ratification article, XXI, Section 1 stipulates that his constitution can be ratified through Article V of the present constitution. Section 2 permits ratification by a President who chooses to "make himself a dictator after arranging for safeguards that he will not become a permanent dictator." Section 3 describes the poverty and hardships endured by Greek farmers in 595 B.C. Section 4 tells how Solon "became a dictator and did a good job in cleaning up the mess."[Note 19]

Notes

1. For a thoroughly documented discussion of the efforts to amend Article V in that period see Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, Chapter VI.

2. The six amendment proposals rejected by the states after passing Congress are as follows: (1) a scheme to apportion the members of the House of Representatives (submitted with the Bill of Rights in 1789), (2) a rule barring Congressional salary increases from taking effect until after the next election of representatives (submitted with the Bill of Rights in 1789), (3) a rule to strip U.S. citizenship from any citizen accepting a title, present, or office from a foreign power without the consent of Congress (1810), (4) the Corwin amendment, an attempt to forestall the abolition of slavery, discussed in the text accompanying this note, (5) the Child Labor Amendment, which would have given Congress authority to regulate the labor of those under 18 years of age (1924), and (6) the Equal Rights Amendment, which would have prohibited discrimination by the state and federal governments on account of sex (1972).

3. Orfield, ibid., at 204.

4. Orfield, ibid., at 204-05; Herbert Vandenberg Ames, The Proposed Amendments to the Constitution of the United States During the First Century of its History, Washington, D.C.: Government Printing Office, 1897, at 286.

5. See Hollingsworth v. Virginia, 3 U.S. 378 (1798); Hawke v. Smith, 253 U.S. 221, 229; John Alexander Jameson, Constitutional Conventions, 4th ed. (1887), ##556-61; Orfield, op. cit. at 50.n.30.

6. Ames, op. cit. See also Michael A. Musmanno, "Proposed Amendments to the Constitution, House Document 551 (70th Congress, 2d Session), 1928, pp. 191-97.

7. February 21, 1787. The resolution is frequently reprinted, e.g. in Allen Johnson (ed.), Readings in American Constitutional History, 1776-1876, Houghton Mifflin Co., 1912, pp. 98-99. It also appears, with comparable resolutions of the various states, in W.U. Solberg, The Federal Convention and the Formation of the Union of the American States, The Liberal Arts Press, 1958, p. 54 (call by Congress), pp. 58ff (calls by the States).

8. The fact that the convention wrote an entirely new document, instead of submitting separate amendments, would be improper under the many state constitutions that distinguish "amendment" from "revision". Only revision, for them, embraces wholesale alteration. However, the call for a convention called for "revising the Articles", and in any case the silence of the Articles on the distinction between amendment and revision suggests that the scope of the proposed change was not a violation of the Articles' AC, even if it was a violation of the Congressional resolution calling the convention.

9. T.R. Powell, "Changing Constitutional Phases," Boston University Law Review, 19 (1939) 509-32, at pp. 511-12.

10. See Jonathan Elliott, Debates, vol. 5, J.B. Lippincott, 2d ed., 1886, pp. 352-56, 499-502, 532-34.

11. Orfield believes that the ratification by Congress did cure this defect, while the unanimous ratification by the states did not cure the first defect. Op. cit., at 147.

12. John Alexander Jameson, Constitutional Conventions, Callahan and Co., 4th ed., 1887, #564, p. 596.

13. The best discussion of the suggestions by jurists up to 1942 is Orfield's Chapter VI, op. cit.

14. Her constitution first appeared in Woodhull and Claflin's Weekly for February 10, 1872, and has been reprinted in Philip S. Foner (ed.), We, The Other People, University of Illinois Press, 1976, pp. 180-201.

15. William MacDonald, A New Constitution for a New America, B.W. Huebsch, 1921.

16. Ibid., at p. 211, quoting the Declaration of Independence, second paragraph, second sentence.

17. However, in his next chapter (Chapter XX) MacDonald solidifies his call for a convention by basing it on Article V. He maintains that the procedures of Article V are not exclusive and cannot limit the people's right to create a new form of government (p. 228).

18. William Gardiner, A Proposed Constitution for the United States, Summerfield, Florida: William Gardiner, 1973.

19. Gardiner, who earned a master's degree in 1924, calls himself "Dr. Gardiner" and reveals that he is a member of the "United Methodist Church, Phi Delta Kappa, Masonic Order, and Order of the Eastern Star."

Appendix 2: Self-Amendment of State Amendment Clauses

This appendix identifies the ACs of the 50 state constitutions and indicates whether they have been amended. I include noteworthy features of the ACs, their histories, or their case law, when especially relevant to the issues of this book. Many states have had more than one constitution, and normally the newer ones were proposed and adopted under the authority of the AC of the previous constitution. If the AC of the new constitution differs from the older AC, then indirect self-amendment has occurred.

The first constitutions of most states, other than the original 13 colonies, were drafted under enabling legislation passed by Congress. However, 12 states[Note 1] produced their first constitution without the authority either of a prior AC or a federal enabling act.[Note 2] The bootstrapping, or self-creation from nothing, of constitutional power, seen in successful revolutions and some chaotic conventions, is the mirror image of the self-authorized and self-amending power under consideration here.

I do not give the text or even a paraphrase of the text of the state ACs. Readers who wish to compare their contents without looking in 50 statute books should consult any of several reference works.[Note 3]

This survey is based on the works cited (last note) as well as the 50 official state codifications. The states are remarkably different in their attitudes toward their own legal history. Some reprint all prior, superseded constitutions, even with annotations; some do not. Some do not even print the year in which their current constitution was adopted. Major holes in the survey caused by defects in the state reporters have been filled from other sources. Limited time and resources, however, require that minor holes remain unfilled.

No constitutions ratified before a state was admitted to the Union have been included in this survey unless those constitutions remained or became valid upon admission. The date of a constitution as listed is the date of ratification or adoption, not the effective date, when the two differed.

For each constitution I ask "AC amended?" A "no" answer is always difficult to prove, especially for a badly annotated constitution. Hence, an occasional "no" answer will be followed by a question mark. A "yes" answer means that the AC directly authorized its own amendment. "Yes" does not refer to indirect self-amendment in which an AC authorized the replacement of the entire constitution including a new AC. Both "yes" and "no" answers refer only to the AC of the current constitution; whether prior ACs had been amended is noted separately when known.

Whenever a state had more than one constitution, the reader should assume that all newer constitutions after the first were drafted and adopted under the authority of the prior constitution's AC, unless noted otherwise. That is, indirect self-amendment is the norm for the creation of new constitutions, and only exceptions are noted. However, this is but a presumption, and in many cases the authority under which a new constitution was made was not indicated in the state codification.

A. Summary

As of January 1, 1981 (date of this survey), fully 35 states had directly amended their current AC. The following 15 had not: Arizona, Delaware, Florida, Illinois, Kentucky, Louisiana, Michigan, Missouri, Montana, New Jersey, North Carolina, Texas, Virginia, Wisconsin, and Wyoming. Of these 15, 5 are known to have directly amended at least one prior AC: Florida, Illinois, Michigan, Missouri, and Montana. Of those 15, 12 are presumed to have indirectly amended at least one prior AC: all except Arizona, Wisconsin, and Wyoming. If direct and indirect self-amendment are considered the only types of self-amendment, then only three states out of 50 have no history of self-amendment: Arizona, Wisconsin, and Wyoming. But of these, Wisconsin has adopted its current constitution without antecedent authority in a way that may presuppose a form of self-amendment.

B. Table of States

Alabama

Current constitution: 1901 AC: Article 18, §§284-87
Prior constitutions:
1875 AC: Article 17
1867 AC: Article 16
1865 AC: Article 9
1861 AC: Article 6
1829 AC: Article 6
AC amended? Yes. August 2, 1933.
Comment. The AC contains a clause completely entrenching the rule that representation in the legislature shall be based on population. The entrenching language is the most complete and explicit in any American constitution: "such...shall not be changed by constitutional amendment." Yet for a case holding that the entrenchment clause may itself be amended or repealed, and that the AC is no more privileged from amendment than any other section of the constitution, see Opinion of Justices, 263 Ala. 158, 81 So.2d 881 (1955).

Alaska

Current constitution: 1956 AC: Article 13

Prior constitutions: none
AC amended? Yes. August 25, 1970; August 27, 1974.

Arizona
Current constitution: 1910 AC: Article 21
Prior constitutions: none
AC amended? No.

Arkansas
Current constitution: 1874 AC: Article 19, §22
Prior constitutions:
1868 AC: Article 13
1864 AC: Article 4, unnumbered § after §32
1861 AC: Article 4, §34
1836 AC: Article 4, unnumbered § after §34
AC amended? Yes. February 16, 1925.
Comment. The Speaker of the Akansas House initially declared that the amendment to the current AC had been defeated, January 15, 1921; the Special Supreme Court ultimately declared that it had been validly adopted in Brickhouse v. Hill, 167 Ark. 513, 268 S.W. 965 (1925).
The ACs of the 1836, 1861, and 1864 constitutions were identical, preventing indirect self-amendment for those years.

California
Current constitution: 1879 AC: Article 18
Prior constitutions: 1849 AC: Article 10
AC amended? Yes, but only by the addition of AC §§3 and 4 in 1970. The 1849 AC §2 was amended November 4, 1856.
Comment. The amendment to the 1849 AC provided procedures for ratifying a new constitution after a convention, thus paving the way for the 1879 constitution.

Colorado
Current constitution: 1876 AC: Article 19
Prior constitutions: none
AC amended? Yes. AC §2 was amended November 6, 1900.
Comment. Article 2, §2, of the Bill of Rights asserts that "the people...have the sole and exclusive right...to alter and abolish their constitution and form of government whenever they may deem it necessary, provided such change be not repugnant to the Constitution of the United States."

Connecticut
Current constitution: 1965 AC: Articles 12, 13
Prior constitutions:
1955 AC: Article 11
1818 AC: Article 11
1776 AC: none
AC amended? Yes. November 27, 1974.
Comment. The 1955 AC was repealed and replaced by its own authority, August 5, 1955. The 1818 AC was never amended.
The 1776 "constitution" was actually a "constitutional ordinance" passed by the General Assembly under the authority of the colonial charter of 1662; it contains only a Bill of Rights.

Delaware
Current constitution: 1973 AC: Article 10
Prior constitutions:
1897 AC: Article 16
1831 AC: Article 9
1792 AC: Article 10
1776 AC: Article 30
AC amended? No.
Comment. The 1776 AC contains a self-entrenchment clause immunizing several sections from "violation", apparently forever. One must assume that amendment was intended, along with violation, as it is superfluous to forbid violation of a constitution and suspect to forbid violation of only some sections. If the clause prohibited amendments, then, it was violated by the replacement of the 1776 constitution in 1792, and the violation was accepted as valid lawmaking.
In December of 1851 a constitutional convention assembled, but it adjourned the next day in doubt of its own legality. It reconvened in March of 1852 and debated its legality for a week, finally deciding it had authority to write a new constitution. Its product differed very little from the 1831 constitution, which itself differed very little from the 1792 constitution. Nevertheless, the people overwhelmingly rejected it in the first popular

vote on a Delaware constitution.

The 1973 constitution was actually proposed as a series of amendments in 1969, but the legislature considered it an "amendment of the whole constitution of 1897" and it was ratified by the two successive legislatures (1971, 1973) as required for amendments. Delaware distinguishes piecemeal amendment from wholesale revision, Opinion of the Justices, 254 A.2d 342 (1970), and revision must be performed by convention. Arguably, Delaware has violated its AC by revising under a procedure for mere amendment.

Florida

Current constitution: 1968 AC: Article 11

Prior constitutions:

1885 AC: Article 17
1868 AC: Article 18
1865 AC: Article 14
1861 AC: Article 14
1838 AC: Article 14

AC amended? No.

Comment. The 1885 AC §1 was amended in 1948, and AC §4 was amended in 1964.

Georgia

Current constitution: 1968 AC: Article 12

Prior constitutions:

1945 AC: Article 13, §2-8101-8104
1877 AC: Article 13
1868 AC: Article 12
1865 AC: Article 5, §1.11
1861 AC: Article 5, §6
1798 AC: Article 4, §15
1789 AC: Article 4, §7
1777 AC: Article 63

AC amended? Yes. AC §1 was amended November 7, 1978.

Comment. The 1945 AC was amended five times.

At the same election in which the voters ratified the 1968 constitution, they ratified several amendments to the 1945 constitution; under Article 13, §1 of the 1968 constitution those amendments were incorporated into the 1968 constitution. This is an unusual case of amendments to one constitution applying to another. (See the entry on North Carolina, for a similar case, and on New Mexico, for an Attorney General Opinion that this practice is lawful.) Hence the AC of the earlier constitution had quasi-authority for amending (not merely instituting) its successor, though it had some help from provisions in its successor. Another way to put this is that the amendments in the 1968 election were proposed under one AC and ratified under two ACs working together. At least in Georgia in 1968 it was false that an AC and its self-authorized successor were had periods of validity that were cleanly distinct and not overlapping in time.

Hawaii

Current constitution: 1968 AC: Article 18

Prior constitutions: none

AC amended? Yes. The AC was renumbered from Article 15 to Article 18, November 7, 1978. AC §§2, 3 were substantively amended at the same time; AC §5 was added, November 5, 1968.

Idaho

Current constitution: 1889 AC: Article 20

Prior constitutions: none

AC amended? Yes. AC §1 was amended November 5, 1974. A proposed amendment to AC §2 was defeated November 5, 1968.

Illinois

Current constitution: 1970 AC: Article 14

Prior constitutions:

1870 AC: Article 14
1848 AC: Article 12
1818 AC: Article 7

AC amended? No.

Comment. The 1870 AC §2 was amended November 7, 1950, after proposed amendments had been defeated in 1946, 1932, 1924, 1896, and 1892. Two new constitutions made by convention were rejected by the voters on July 17, 1862, and December 12, 1922. The current AC is unusual in containing (§4) procedures for ratifying amendments to the federal constitution and for calling a federal constitutional convention. These may be the result of Illinois' embarrassment when it defectively ratified a federal amendment proposal (the pro-slavery Corwin amendment, see Appendix

1.B) in a state constitutional convention that happened to be in session.

When the 1870 constitution was ratified, four important articles of it were voted upon separately. One forbade "legislative or other authority" to release, remit, suspend or alter obligations of the Illinois Central Railroad to the State of Illinois. If the unqualified language of this prohibition reached the amendment power, which was never tested in court, then the unnumbered article was a (revocable) limit on the 1870 AC, although not a product of self-amendment.

Indiana

Current constitution: 1851 AC: Article 16

Prior constitutions: 1816 AC: Article 8

AC amended? Yes. AC §2 was amended November 8, 1966.

Comment. Article 1, §1 of the Indiana Bill of Rights recognizes that "the people have, at all times, an indefeasible right to alter and reform their government."

Iowa

Current constitution: 1857 AC: Article 10

Prior constitutions: 1846 AC: Article 10

AC amended? Yes. AC §3 was amended in 1964.

Comment. In 1920 the voters overwhelmingly approved a call for a constitutional convention. The legislature violated a mandatory provision of the constitution (AC §3) by failing to call the convention. Neither the courts nor the people imposed sanctions on the legislators, and no constitutional convention has been called since.

Article 1, §2 of the Iowa Bill of Rights asserts that the people have "the right, at all times, to alter or reform [their government] whenever the public good may require it."

Kansas

Current constitution: 1859 AC: Article 14

Prior constitutions: none

AC amended? Yes. Entire AC repealed and replaced, November 3, 1970.

Comment. For a case holding that the amendment of the AC above is valid because properly submitted pursuant to the old AC, see Moore v. Shanahan, 207 K. 1, 207 K. 645, 486 P.2d 506 (1971).

Kentucky

Current constitution: 1891 AC: §§256-63

Prior constitutions:

1850 AC: Article 12

1799 AC: Article 9

1792 AC: Article 11

AC amended? No.

Comment. Section 4 of the Kentucky Bill of Rights declares that the people "have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper."

Louisiana

Current constitution: 1974 AC: Article 13

Prior constitutions:

1921 AC: Article 21

1913 AC: Article 325

1898 AC: Articles 321-24

1879 AC: Article 256

1868 AC: Article 147

1864 AC: Article 147

1852 AC: Article 141

1845 AC: Article 140

1812 AC: Article 7

AC amended? No.

Comment. At least the 1913 and 1921 constitutions were not made under the authority of the prior ACs. The 1898 constitution contained no provision for revision by convention, and was revised (into the 1913 constitution) under a call by the legislature. State v. American Sugar Refining Co., 137 La. 407, 68 So. 742 (1915).

Maine

Current constitution: 1819 AC: Article 10, §4

Prior constitutions: none

AC amended? Yes. March 18, 1880; January 6, 1909; July 3, 1915; and September 19, 1957.

Comment. Article 1, §2 of the Maine Bill of Rights asserts that the people have "an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it."

Maryland

Current constitution: 1867 AC: Article 14

Prior constitutions:

1864 AC: Article 11

1851 AC: Article 11

1776 AC: Article 59

AC amended? Yes. AC §1 was amended November 7, 1944, November 7, 1972, and November 7, 1978. AC §1A was amended November 7, 1978. AC §2 was amended November 6, 1956.

Comment. The Declaration of Rights, which is separate from the main body of the constitution, declares in Article I that the people possess "the inalienable right to alter, reform, or abolish their form of government in such manner as they may deem expedient." The Declaration of Rights does not control the constitution when the latter is clear. Anderson v. Baker, 23 Md. 531 (1865). The AC in the main body has been found "clear, explicit, and unambiguous." Bourbon v. Governor of Maryland, 258 Md. 252, 265 A.2d 477 (1970). Maryland is the only state I know of in which the relation between the ordinary AC and the declaration of a right to alter or abolish has been settled by case law.

A new constitution was written by a constitutional convention but rejected by the voters in 1968.

Massachusetts

Current constitution: 1780 AC: §101, or Ch. 6, Art. 10, §2

Prior constitutions: none

AC amended? Yes. The AC was amended April 21, 1821, by §111, which was itself superseded November 5, 1918, by §§157-61 and then annulled by §178.

Comment. Massachusetts' is the oldest constitution still in effect in the United States. It has frequently been amended, especially in three waves: nine amendments adopted in 1821, five in 1917, and 14 in 1918. An entirely new constitution was rejected by voters in 1853.

Article 7 of "Part the First" (a bill of rights) asserts that "the people alone have an incontestable, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same when their safety, prosperity, and happiness require it."

Michigan

Current constitution: 1963 AC: Article 12

Prior constitutions:

1908 AC: Article 17

1850 AC: Article 20

1835 AC: Article 13

AC amended? No.

Comment. The 1908 AC §2 was amended in April of 1913 and again April 7, 1941; AC §3 was amended in November of 1917 and again April 7, 1941; and AC §4 was amended November 8, 1960. The 1850 AC §1 was amended in 1876; and AC §2 was amended in 1862.

A new constitution was rejected by the voters in 1867.

Minnesota

Current constitution: 1857, restructured 1974 AC: Article 14 (1857), Article 9 (1974)

Prior constitutions: none

AC amended? Yes. The 1974 restructuring was done by amendment and reworded many sections, including the AC, without intending to change their legal effect. The substance of AC §1 was amended in 1898, and of AC §3 on November 2, 1954.

Comment. Minnesota has one of the most stringent ACs in the nation. At the same election that ratified the restructuring amendment (November 5, 1974) an amendment that would have liberalized the AC was defeated. (It does not necessarily follow that Minnesotans want a difficult amendment procedure; it may be that the current procedure is too difficult to amend to reflect the wishes of the people.)

Mississippi

Current constitution: 1890 AC: Article 15

Prior constitutions:

1869 AC: Article 13

1832 AC: Article 7, unnumbered section

1817 AC: Article 6, unnumbered section

AC amended? Yes. AC §273 was amended August 26, 1955.

Missouri

Current constitution: 1945 AC: Article 12

Prior constitutions:

1875 AC: Article 15
1865 AC: Article 12
1820 AC: Article 12
AC amended? No.
Comment. The 1875 AC was amended November 2, 1920. A new constitution was rejected by the voters in 1846.

Montana
Current constitution: 1972 AC: Article 14
Prior constitutions: 1889 AC: Article 9, §§8-9
AC amended? No.
Comment. The 1889 AC §9 was amended November 3, 1970.

Nebraska
Current constitution: 1875 AC: Article 16
Prior constitutions: 1866 AC: Unnumbered
AC amended? Yes. AC §1 was amended in 1952 and 1968, and AC §2 was amended in 1952.

Nevada
Current constitution: 1864 AC: Article 16
Prior constitutions: none
AC amended? Yes. AC §1 was amended in 1972.
Comment. Amendments to AC §1 and §2 were ratified in 1886 but declared invalid because not properly entered on the journal of either House. Stevenson v. Tufly, 19 Nev. 391 (1887).
Article 1, §2 of the Nevada Bill of Rights declares that the people "have the right to alter or reform [their government] whenever the public good may require it."

New Hampshire
Current constitution: 1783 AC: Articles 99, 100
Prior constitutions: 1776 AC: none
AC amended? Yes. AC (Article 100) was amended in 1793 and 1964.
Comment. Article 1, §10 of the Bill of Rights asserts that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."

New Jersey
Current constitution: 1947 AC: Article 9
Prior constitutions:
1844 AC: Article 9
1776 AC: none
AC amended? No.
Comment. The 1844 constitution was not made under the authority of the 1776 AC, since there was no 1776 AC. The 1844 constitution was drafted by a convention called by the General Assembly and ratified in a popular election. Article 5 (Powers of the General Assembly) of the 1776 constitution did not give the General Assembly the power to call a convention.
Although the 1776 constitution did not contain an AC, it did suggest that amendment of the constitution of the colony (a different document) was possible by providing in Article 23 that legislators must take an oath not to "annul, repeal, or alter" certain sections of the charter.
The last paragraph of the 1776 constitution provides for the conditional nullification of the whole constitution —"if a reconciliation between Great Britain and these Colonies should take place."

New Mexico
Current constitution: 1911 AC: Article 19
Prior constitutions: none
AC amended? Yes. AC §§1, 2, 3, 4, and 5 were amended November 7, 1911.
Comment. The amendments to the AC noted above were required by Congress as a precondition of statehood. 37 Stat. 39 (August 21, 1911). New Mexico was the only state that had to amend its AC prior to admission to the Union. Without the federally required self-amendments, the AC was not substantially different from the ACs of many other states.
AC §1 contains the procedures for ordinary amendment. AC §5 entrenches §1, immunizing it from amendment except by a convention called to revise the whole constitution. Nevertheless AC §1 has been amended circuitously by an ordinary amendment, as follows. AC §1 says (inter alia) that "any amendment...to this constitution may be proposed...at any regular session" of the legislature. An ordinary amendment to Article 4, §5.B (November 5, 1940) limited the types of action that the legislature could consider in even-numbered years to a short list that did not include constitutional amendments. Because the latter amendment was adopted later than AC §1, the limitation on even-numbered years amends the

language, "any regular session," in AC §1. Op.Atty.Gen. No. 65-212 (1965). In short, the amendment to Article 4, §5.B amended AC §1 despite the entrenchment clause in AC §5. But note that there were eight proposed amendments in the even-numbered year of 1970. See Op.Atty.Gen. No. 69-151 (1969-70). Moreover, proposed amendments that would repeal the entrenchment clause were defeated on September 28, 1965, November 3, 1970, and November 2, 1971.

For a case holding that parts of AC §1 violated the 14th Amendment of the federal constitution (the one-person, one-vote principle), see State ex. rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143 (1968). For an Attorney General Opinion that the old constitution (particularly its AC) must be followed in making a new constitution, see Op.Atty.Gen. No. 69-105 (1969). For another opinion that a constitutional convention may submit a new constitution and an amendment to the old constitution at the same election, see Op.Atty.Gen. No. 69-118 (1960); see the entries for Georgia and North Carolina for examples.

AC §3 provides that if the constitution is amended to allow the people to enact laws directly, then the same limitations will apply to the people that now apply to the legislature. This is the only AC I know of that anticipates future amendments by a conditional provision (but see the conditional nullification of the New Jersey constitution of 1776).

Some of the tangles of the New Mexican history of self-amendment are discussed in Section 9.B.

New York

Current constitution: 1938 AC: Article 19

Prior constitutions:

1894 AC: Article 19

1846 AC: Article 13

1822 AC: Article 8

1777 AC: none

AC amended? Yes. AC §1 was amended in 1941, effective January 1, 1942.

Comment. New constitutions were rejected by the voters in 1867, 1915, and 1967. Although the 1777 constitution contained no AC, it was once directly amended (October 27, 1801), and of course once indirectly amended. The direct amendment was made by a convention called by an act of the legislature.

The current constitution was written in 1894 but widely revised by convention in 1938.

North Carolina

Current constitution: 1970 AC: Article 13

Prior constitutions:

1875 AC: Article 13

1868 AC: Article 13

1861 AC: Article 13

1776 AC: none

AC amended? No.

Comment. The 1776 constitution contains no AC, but does contain something like an entrenchment clause for the Declaration of Rights, asserting that the latter "ought never to be violated on any pretence whatever." See comment on Delaware, above.

At the same election that ratified the 1970 constitution, six amendments to the 1875 constitution were submitted and ratified. See comments on Georgia, New Mexico, above.

North Dakota

Current constitution: 1889 (rearranged 1979) AC: Article 15, §202 (1889), AC: Article 4, §45 (1979)

Prior constitutions: none

AC amended? Yes. Aside from the rearrangement and renumbering of 1979, the AC was amended on November 3, 1914, November 5, 1918, and November 7, 1978.

Comment. Article 1, §2 of the North Dakota Bill of Rights declares that the people "have a right to alter or reform [their government] whenever the public good may require."

The current AC is unusual in being located in the article on legislative power (after the 1979 rearrangement).

Ohio

Current constitution: 1851 AC: Article 16

Prior constitutions: 1802 AC: none

AC amended? Yes. In 1913, the current AC was added to the 1802 constitution, which had no AC. AC §1 was amended on May 7, 1974.

Comment. A new constitution was rejected by the people in 1874. A virtually new constitution was adopted in 1912 when 39 of 42 amendments proposed by a convention were adopted; one of the new amendments was the state's first AC. Prior to 1912 the only section resembling an AC was Article 8, §1 of the 1802 Bill of Rights, asserting that the people have "at all times a complete power to alter, reform, or abolish their government, whenever they deem it necessary."

Oklahoma

Current constitution: 1907 AC: Article 24

Prior constitutions: none

AC amended? Yes. AC §1 was amended July 1, 1952, and August 27, 1974.

Oregon

Current constitution: 1857 AC: Article 17

Prior constitutions: none

AC amended? Yes. The entire AC was repealed and replaced by the current AC §1 alone, June 4, 1906; AC §2 was added November 8, 1960.

Comment. Article 1, §1 of the Bill of Rights asserts that the people have "at all times a right to alter, reform, or abolish the government in such manner as they think proper."

Pennsylvania

Current constitution: 1874, renumbered 1967 AC: Article 18 (1874), Article 11 (1967)

Prior constitutions:

1838 AC: Article 10

1790 AC: none?

1776 AC: §47

AC amended? Yes, but only by renumbering, May 16, 1967, and by an insignificant word change in AC §1 (date unknown).

Comment. Article 1, §2 of the Declaration of Rights asserts that the people "have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such a manner asd they may think proper." Note that the last section of the article (§24) entrenches the whole article in some sense by asserting "that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate." See comment on Delaware, above.

The AC in the Pennsylvania constitution of 1776 was apparently the first explicit amending clause in world history. See Section 9, note 44.

Rhode Island

Current constitution: 1842 AC: Article 13

Prior constitutions: 1841 (People's Constitution) AC: Article 13

AC amended? Yes. The entire AC was annulled by the 42nd amendment.

Comment. Although Rhode Island became a state in 1790, it operated without a constitution until 1842. Prior to that time its organic law was its colonial charter, signed by Charles II in 1663. The charter greatly benefitted large landowners, contributing to the insurrection known as the Dorr Rebellion in 1841, in which disaffected and disenfranchised small landowners called a People's Convention in order to draft a constitution more to their liking. The product of the convention was ratified by a large majority of voters. The "Charter Government" called its own convention in response, drafted a more conservative document (though less conservative than the charter), and saw it rejected by the voters. Thomas Wilson Dorr, a leader of the rebellion, was elected governor under the People's Constitution, but the incumbent under the charter refused to step down, claiming that the People's Convention was a nullity. The United States Supreme Court called the issue a political question and refused to decide it, while deciding other aspects of the case. Luther v. Borden, 48 U.S. 1 (1849). The Supreme Court in effect shifted the case to the Executive Branch, where President Tyler decided in favor of the Charter Government. Dorr was arrested and his movement put down by military force. The Charter Government called another convention; it conceded enough to the rebels that its constitution was adopted by voters in 1842. That constitution is still in effect. A new constitution was rejected by voters in 1898.

Article 1, §1 of the Bill of Rights grants to the people the right to alter or abolish their form of government, but also makes the following addition. "[T]he Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." This is the only constitutional provision I have seen that says of the whole instrument, and even its successors, in effect, "valid and supreme until amended." Also note that the section claims to impose a duty even after the time of its replacement. As a result of the Dorr Rebellion, it also contains language ("an explicit and authentic act of the whole people") by which to test the validity of any future changes brought about by rebellion.

South Carolina

Current constitution: 1895 AC: Article 16

Prior constitutions:

1868 AC: Article 15

1865 AC: Article 12

1790 AC: Article 11

1778 AC: none

1776 AC: none

AC amended? Yes. The current AC was amended 11 times between 1965 and 1979, and apparently never before that.

Comment. The 1776 and 1778 constitutions were passed by the General Assemblies. The South Carolina Supreme Court declared soon after 1778 that both "constitutions" were actually statutes that the General Assembly could amend and repeal at will. That is one way to solve the problem of amending an organic law without an AC.

Article 1, §1 of the Declaration of Rights asserts that the people "have the right at all times to modify their form of government."

South Dakota

Current constitution: 1889 AC: Article 23

Prior constitutions: none

AC amended? Yes. AC §§1, 2, and 3 were each amended November 7, 1972.

Comment. Attempts to amend AC §§1 and 3 were defeated on November 3, 1964 and November 3, 1970. An attempt to amend AC §2 was defeated in November of 1916.

Article 6, §26 of the Bill of Rights declares that the people "have the right in lawful and constituted methods to alter or reform their form of government in such manner as they may think proper."

Tennessee

Current constitution: 1870 AC: Article 11, §3

Prior constitutions:

1834 AC: Article 11, §3

1796 AC: Article 10, §3

AC amended? Yes. The 1870 AC was replaced by the current AC by an act of convention in 1953.

Comment. Articlce 1, §1 of the Declaration of Rights recognizes "an inalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper." Article 11, §16 entrenches the Declaration of Rights in strong language: it "shall never be violated on any pretence whatever. And to guard against transgression of the high powers we [the people] have delegated, we declare that everything in the bill of rights contained, is excepted out of the General Powers of government, and shall forever remain inviolate." (See comment on Delaware, above.) Nevertheless, the following sections of the Declaration of Rights have been altered, either through direct use of the AC, or through succeeding constitutions, not counting mere numbering changes: §§3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 17, 18, 19, 20, 25, 26, 27, 29, 31, 32, 33, and 34.

The 1870 constitution declares in its preamble that it was drafted and ratified under the authority, not of the AC, but of Article 1, §1 of the Declaration of Rights of the 1834 constitution, which contained a right to alter or abolish similar to that spelled out above.

Texas

Current constitution: 1876 AC: Article 17

Prior constitutions:

1869 AC: Article 12, §50

1866 AC: Article 7, §§37-38

1861 AC: Article 7, §37

1845 AC: Article 7, §37

AC amended? No?

Comment. Article 1, §2 of the Bill of Rights declares that "subject to this limitation only [that there shall be a republican form of government], they [the people] have at all times the inalienable right to alter, reform, or abolish their government in such manner as they may think expedient."

Utah

Current constitution: 1895 AC: Article 23

Prior constitutions: none

AC amended? Yes. AC §1 was amended November 9, 1970, effective January 1, 1971.

Comment. Article 1, §2 of the Declaration of Rights asserts that the people "have the right to alter or reform their government as the public welfare may require."

Vermont

Current constitution: 1793 AC: Chapter 2, Art. 68

Prior constitutions: 1786 AC: Chapter 2, Art. 40

AC amended? Yes. The original 1793 AC (which had been numbered Chapter 2, Article 43) was repealed and replaced by the 25th Amendment in 1870.

Virginia

Current constitution: 1970 AC: Article 15

Prior constitutions:

1902 AC: Article 15, §§196-97

1870 AC: Article 12

1864 AC: none

1851 AC: none

1829 AC: none

1776 AC: none

AC amended? No.

Comment. The early Virginia constitutions were drafted by conventions called by the legislature; the 1870 constitution was drafted by a convention called by the federal Congress under the Reconstruction Acts.

Washington
Current constitution: 1889 AC: Article 23
Prior constitutions: none
AC amended? Yes. AC §1 was amended in November of 1912 (by the 7th Amendment, which became Article 2, §1.d) and again on November 6, 1962.

West Virginia
Current constitution: 1872 AC: Article 14
Prior constitutions: 1861 AC: Article 12
AC amended? Yes. AC §2 was amended November 8, 1960, and November 7, 1972.
Comment. Article 3, §3 of the Bill of Rights asserts that "a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish [its government] in such a manner as shall be judged most conducive to the public weal."

Wisconsin
Current constitution: 1848 AC: Article 12
Prior constitutions: none
AC amended? No?
Comment. Wisconsin drafted its first constitution in 1846 under a federal enabling act, and early in 1847 was admitted to the Union on the condition that its new constitution was ratified by its citizens. The people of Wisconsin rejected the constitution, however, and admission to the Union was postponed. Another constitutional convention was called in 1847 to draft a new constitution. Jameson believes that the original federal enabling act did not extend to the new convention; John Alexander Jameson, A Treatise on Constitutional Conventions, Callahan and Co., 4th ed. 1887, §§188ff. Hence on this view Wisconsin joins the states whose first constitutions were not antecedently authorized.

Wyoming
Current constitution: 1889 AC: Article 20
Prior constitutions: none
AC amended? No.
Comment. Article 1, §1 of the Declaration of Rights asserts that the people "have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper."

Notes

1. Arkansas, California, Colorado, Florida, Iowa, Kansas, Michigan, Nebraska, Nevada, Oregon, Tennessee, and Wisconsin; see John Alexander Jameson, A Treatise on Constitutional Conventions, Callahan and Co., 4th ed. 1887, §§188ff. Wisconsin is on this list because of some very interesting history; see the entry under Wisconsin in the text.

2. Cooley says that these constitutions were made

> irregularly by the spontaneous action of the people, or under the direction of the legislative or executive authority of the Territory to which the State succeeded. Where the irregularities existed, they must be regarded as having been cured by the subsequent admission of the State in to the Union by Congress.

Thomas M. Cooley, A Treatise on Constitutional Limitations, Little, Brown and Co., 8th (Carrington) ed., 1927, vol. 1, pp. 80-81. On cure by admission to the Union see Secombe v. Kittelson, 28 Minn. 555 (1882), concerning amendments irregularly made to the Minnesota constitution before Minnesota became a state. See Yawitz, "The Legal Effect Under American Decisions of Alleged Irregularities in the Adoption of a Constitution or Constitutional Amendment," St. Louis Law Review, 10 (1925) 279; Wayne B. Wheeler, "The Constitutionality of the Constitution is Not a Justiciable Question," Century Law Review, 90 (1920) 152.

3. Richard A. Edwards (ed.), Index Digest to State Constitutions, Columbia University Press, 1959. However, it is valid only up to September 1, 1958, and only covers the then-current constitutions. Less abbreviated and better annotated is Walter Farleigh Dodd, The Revision and Amendment of State Constitutions, Johns Hopkins University Press, 1910, but it is valid only up to 1910. Dodd's work is supplemented to some extent by T.R. White, "Amendment and Revision of State Constitutions," University of Pennsylvania Law Review, 100 (1952) 1132-52. The full texts of all state constitutions as of 1918 are collected in Charles Kettleborough's The State Constitutions, B.F. Bowen and Co., 1918. (It also includes the basic laws of the District of Columbia and the organic acts of Alaska, Hawaii, the Panama Canal Zone, Puerto Rico, the Virgin Islands, Guano Islands, Midway Islands, Tutaila, and Wake Island.) The full texts as of 1962 have been collected in a looseleaf service that is supposed to be updated regularly, although it is less current for some states than for others, and usually less current than the state statute books: Constitutions of the United States: National and State, Oceana Publications, 1967. A more complete service, though even slower to be updated, is William P. Swindler (ed.), Sources and Documents of the United States Constitutions, Oceana Publications, 1973, 10 volumes (not a looseleaf service). Recent amendments and revisions, and the procedures under which they came about, are well summarized in Albert L. Sturm, Thirty Years of State Constitution-Making, 1938-1968, National Municipal League, 1970, and the Council of State Governments, Modernizing State Constitutions, 1966-1972, Council of State Governments, 1973.

Appendix 3: Nomic: A Game of Self-Amendment[Note 1]

A. Introduction

If law-making is a game, then it is a game in which changing the rules is a move. Law-making is more than changing the rules of law-making, of course, and more than a game. But a real game may model the self-amending character of the legal system and leave the rest out. While self-amendment appears to be an esoteric feature of law, capturing it in a game creates a remarkably complete microcosm of a functional legal system.

Statutes are the paradigm legal rules. Statutes are made by a rule-governed process that is itself partly statutory. Hence the power to make and change statutes can reach some of the rules that govern the process itself. Most of the rules that govern the making of statutes, however, are constitutional and beyond the reach of the power they govern. Congress can change its parliamentary rules, committee structure, and revocably bind its future action by its past action, but through mere statutes it cannot alter the supermajority needed to override an executive veto, abolish one of its houses, start a tax bill in the Senate, or even delegate too much of its power to experts.

Statutes cannot affect constitutional rules, but the latter can affect the former. This is an important difference of logical priority. When a conflict exists between rules of different types, the constitutional rules always prevail. This logical difference is matched by a political difference: the logically prior (constitutional) rules are more difficult to amend than the logically posterior (statutory) rules. That these two differences occur together is not accidental. One purpose of making some rules more difficult to change than others is to prevent a brief wave of fanaticism from undoing decades or centuries of refined structure. It is self-paternalism, our chosen insurance against our anticipated weak moments. But that purpose is not met unless the two-tier (or multi-tier) system also creates a logical hierarchy in which the less mutable rules take logical priority over the more mutable rules. Otherwise the more mutable rules could by themselves undo basic patterns. If supermajorities and the concurrence of many bodies are necessary to protect the foundations of the system from hasty change, then that protective purpose is frustrated if those foundations are reachable by rules that require only a simple majority of a single legislature.[Note 2]

Although all the rules in the American system are mutable, it is convenient to refer to the less mutable constitutional rules as "immutable" and to the more mutable rules below them in the hierarchy simply as "mutable". The same is true in Nomic (from Greek nómos, law), where at least initially no rule is literally immutable. If our self-paternalism is to be effective, then, the "immutable" rules must conjoin logical priority with their defining characteristic of resistance to easy amendment. Many systems could have satisfied this requirement. Nomic has adopted a simple two-tier system. A system could, however, have any number of degrees of difficulty in the amendment of rules. Rules that are more difficult to amend must always take priority over those that are less difficult to amend in case of conflicts, and should contain more fundamental provisions of the legal system. Class A rules, the hardest to amend, could require unanimity of a central body and unanimous concurrence of all regional bodies. Class B rules could require 90% supermajorities, Class C rules 80% supermajorities, and so on. The number of such categories could be indefinitely large.

If appropriate qualifications are made for the informality of custom and etiquette, a case could be made that normal social life is just a system of indefinite tiers. Near the top of the "difficult" end of the series, below entrenched cultural norms, are actual laws, rising through case precedents, regulations and statutes, to constitutional rules. At the bottom of the scale are those rules of personal behavior that individuals may amend unilaterally without incurring censure. Above those are rules for which amendment is increasingly costly, starting with (say) costs on the order of furrowed brows and clucked tongues, passing through indignant blows and vengeful homicide.

Nomic is unambiguously a two-tier system, whereas the United States has such intermediate and anomolous things as administrative regulations, joint resolutions, treaties, executive agreements, higher and lower court decisions, state practice, parliamentary rules of order, judicial rules of procedure and evidence, executive orders, canons of professional responsibility, evidentiary presumptions, standards of reasonableness, rules for establishing priority among rules, canons of interpretation, contractual rules, and so on. Moreover, all legal systems have, as Ronald Dworkin has argued, such unwritten rule-like things as principles and standards.[Note 3] Nomic is a clean two-tier system, rather than a nuanced or multi-tier system, for the sake of simplicity and to make the game easier to learn and play. This is not to say that nuanced, intermediate levels may not arise through game-custom and tacit understandings. Moreover, the nature of Nomic allows players to add new tiers by explicit amendment as they see fit; and it is easier to add them to a simple game than to subtract them from a complex one.

The two-tier system, by complicating the simplicity of a unitary system, embodies the same self-paternalistic elements of the federal constitution. The "immutable" rules govern more basic processes than the "mutable" rules, and so shield them from hasty change. Because every last rule of the game can change in the the course of play, the players may feel that they are playing a "different game" after a few rounds than when they sat down.[Note 4]

In the United States, fundamental constitutional rules are mutable, but the procedure for amending them is more difficult than for less fundamental statutory rules. In Nomic, the "immutable" rules may also be amended. Rather than use a more difficult amending procedure, I have adopted a two-step procedure. The first is the "transmutation" of the "immutable" rule into a "mutable" rule; the second is the amendment of the mutable rule. In this sense all rules are amendable by the same procedure; some must simply be transmuted first. Unless players change this, Nomic permits the amendment of every one of its rules; there is no absolutely immutable foundation or inviolate level.

Nomic even makes some rules explicit in order to make them amendable, when in most games they are implicit —rules to obey the rules, rules that players each start with zero points, and so on. No tacit understanding that one brings to most games simply qua games, let alone any explicit rule,

is beyond the amendment power of Nomic. After Nomic was first published in Scientific American, a German philosopher wrote to me insisting that Rule 101 (that players should obey the rules) should be omitted from the Initial Set and made part of a truly immutable shell. He missed an essential point of the game. Rule 101 is included precisely so that it can be amended; if players amend or repeal it, they deserve what they get.

The plurality of tiers prevents the logical foundation of the game, or the physical activity comprising play, from changing radically in just a few moves. Continuity is a virtue of both games and governments, but players have an advantage over citizens in that they can adjust the degree of continuity and the rate of change at will and intelligently, whereas in life these mechanisms are barely known and partially beyond the reach of planned action. All other games possess the continuity of unchanging rules, or at least of rules that change only between, and not during, games. Nomic has more the continuity of a legal system than a normal game: it is a rule-governed set of processes, systems, and directives undergoing constant rule-governed change. The "game" for the purposes of presenting it, as in this appendix, is the Initial Set of rules. But the "game" is equally the dynamic rule-governed change of the Initial Set. The continuing identity of the game, like that of a state, is due to the fact (when it is a fact) that all change is the product of existing rules properly applied, and none is revolutionary. If exceptions to this continuity can be cured for states by acceptance or acquiescence or subsequent ratification, I leave it to players to decide whether breaches of continuity in Nomic may be cured by an analogous social practice.

Nomic includes provision for Judgment (Rule 212), not merely to imitate government on another front, but also for the reasons that government must make provision for judgment: rules will inevitably be adopted that are ambiguous, inconsistent, or incomplete, or that require application to individual circumstances not specified in the rule or not anticipated by the framers. "Play" must not be interrupted; some agency must be empowered to make an authoritative determination so that "play" may continue.

Judgments in Nomic are not bound by rules of precedent, for that would require a daunting amount of record-keeping for each game. But the doctrine of stare decisis may be imposed at the players' option, or may arise without explicit amendment as successive judges feel impelled to treat like cases alike. Without stare decisis players are put upon to draft their rules carefully, make thoughtful adjudications, overrule poor judgments, and amend defective rules. This is one way in which Nomic teaches basic principles and exigencies of law, even while it vastly simplifies.

The Initial Set must be sufficiently short and simple to encourage play, but sufficiently long and complex to cover contingencies likely to arise before the players get around to providing for them in a rule. It also needs a certain complexity to prevent any single rule-change from disrupting the continuity of the game. Whether my Initial Set satisfies these competing interests I leave to players to decide. Players who think not may wish to change the Initial Set before play rather than rely on amendments during play.[Note 5] They will then play "constitutional convention" more than "legislation".

There is no single AC or amendment rule in Nomic. Rule 116 permits amendment only when "a rule or rules make [amendment] permissible", thus allowing the complete extinguishment of the amendment power in principle. Rules 104 and 114 satisfy 116 by guaranteeing the continuing permissibility of some form of "rule-change", which is defined by 103 so as to leave no rule literally immutable. Rules 202 through 206 presuppose that amendment is permissible; a game-judge may well decide that they also satisfy the need in 116 for rules affirmatively permitting amendment. Rules 202 and 203 articulate the basic procedure of amendment: proposal and ratification. Rule 115 explicitly permits self-application.

Of course all these rules are (initially) subject to change. Many rules would have to be amended or repealed before amendment could itself become impermissible, and even then a judge (if there were still judges) might find an "inherent power" to amend before that too is extinguished. I leave to players the challenges of ascertaining (1) whether any rules can be made truly immutable while preserving some power to amend, and (2) whether the power to amend can completely and irrevocably be repealed.

Are games sufficiently different from legal systems to render the analysis of self-amendment in Part I inapplicable to them? Without pursuing the question to the lengths it deserves, we may note that a game is so much simpler than a legal system, with (almost?) all its rules explicit and in definitive form, that the inference model might apply without distortion. For these purposes we may want to distinguish games like tic-tac-toe and chess from cricket and sand-lot baseball. The former are finite and fixed rule-governed games that lose nothing by interpretation under the inference model, while the latter have a large element of uncodified custom and indeterminacy that may be oversimplified and distorted by the inference model. Games like sand-lot baseball, moreover, seem to contain a kind of meta-rule that permits changes in the rules authorized by consent or acceptance rather than by explicit procedures.

On the other hand, a game is not something we are born into; we expressly choose whether or not to play. Hence principles of contract or acceptance are peculiarly applicable to games. The elective nature of games and the comparatively small space they occupy in our lives suggest that the authority of game rules derives from the agreement of players and not from other rules from which the players cannot escape without great difficulty. If so, then Hart's acceptance model would apply to games much more perspicuously than Ross's inference model.

In addition to teaching many basic principles and pressures of a legal system, and allowing more intelligent adjustment of the degree of continuity and rate of change, Nomic has turned out to have many other unique and intriguing features. In other games, inept moves are their own punishments. Either they create a less interesting game or they increase the risk of defeat for their perpetrators. Initially the same is true for Nomic, but it need not remain true. The ineptness of a move may be measured along many parameters. A measure of ineptness may be instituted by rule, and then "inept" rules immediately met with punishment, price, or prohibition. In this way Nomic —like law— allows the blurring of a

distinction fundamental to most other games: the distinction between constitutive rules and rules of skill, or between lawful and artful play, between permissible and optimal action.

Similarly, most other games do not embrace non-play and do not become paradoxical by seeming to do so. Children often invent games that provide game-penalties for declining invitations to play, or that extend game-jurisdiction to all of "real life" and end only when the children tire or forget. ("Daddy, Daddy, come play a new game we invented!" "No, sweetheart, I'm reading." "That's 10 points!") Law does this too. One cannot choose not to play criminal law, and kill someone with impunity, or choose not to play tax law. These choices are not recognized by the rules of the "law game" as valid moves; one is liable anyway. Nomic can become law-like in this way, or child-like in the former way, to an arbitrary degree. A game of Nomic may embrace anything at the vote of the players. The line between play and non-play may shift at each turn, or it may apparently be eliminated. Players may be governed by the game when they think they are in between games or when they think they have quit. Part of the rationale of Rule 113 is to minimize the only obvious, disadvantageous consequence of this feature, or to require an explicit vote to institute those consequences.

For most games there is an infallible decision procedure to determine the legality of a move. In Nomic situations may easily arise in which it is very hard to determine whether a move is legal. Moreover, paradoxes may arise in Nomic that paralyze judgment. Occasionally this will be due to the poor drafting of a rule, but it may also arise from a rule that is well-drafted but mischievous. The variety of such paradoxes is truly impossible to anticipate. Rule 213 is designed to cope with them as well as possible without cluttering the Initial Set with too many legalistic qualifications. Note that Rule 213 allows a wily player to create a paradox, get it passed (if the rule seems innocent enough to the other players), and thereby win.

B. How to play Nomic

Nomic is a game in which changing the rules is a move. In that respect it differs from almost every other game. The primary activity of Nomic is proposing changes in the rules, debating the wisdom of changing them in that way, voting on the changes, deciding what can and cannot be done afterwards, and doing it. Even this core of the game, of course, can be changed.

Because the rules are always changing, there is no absolute set of rules to Nomic. There is only the starting or initial set of rules. There are 29 numbered rules in the Initial Set. Most are "procedural" and govern the process of changing the rules or the facts of life in a game where the rules are always changing. The chief exception is Initial Rule 202, which should be read first. Rule 202 is practically the only "substantive" rule in the Initial Set. It tells how to earn points to win. The mechanism is as simple as possible: one throws a die or makes a calculation. The substantive portion of the game is deliberately simple so that the players can decide, through rule-changes, what kind of game they want to play. If they make no decision here, they will be fully occupied in what I call a "procedural" game, which many players choose deliberately. In a substantive game, players aim to score points and win. In a procedural game, players try to tie the rules into the most interesting knots imaginable and to win not by points (Rule 208) but by paradox (Rule 213).

Two can play, but three or more make for a better game. With only two players, there is no (initial) difference between unanimity and majority rule, which takes away a lot of the fun. For two-person games, I recommend that an early rule-change add at least one "robot" player who cannot propose changes but who can vote on them by some mechanism (e.g. by a throw of the die). That way two humans can simulate a larger game and distinguish unanimity from lesser majorities.

Players will need paper and pencil and, at least in the beginning of face-to-face games, one die. Each player should have a copy of the Initial Set of rules to consult.

The physical method of play, other than the die and a requirement to write down all rule-changes, is not specified in the rules. Players can keep track of rule-changes in any way they like. One good way is as follows. Take 29 index cards and number them from 101 to 116 and from 201 to 213. Lay them out on the floor or a large table. Their layout (and perhaps their color as well) should indicate which rules are "immutable" (101-116) and which are "mutable" (201-213).

New proposals for rule-changes are also written on index cards, or (to save money) on scratch pads of the same size. If a proposal is adopted, the card is put in its place in the numerical order. If a proposal is an amendment to an existing rule, it lies on top of the card whose rule it amends. If a rule is repealed, its card is simply removed. Save the 29 cards numbered with the Initial Set for use in future games.

For more complex games players may prefer to transcribe into their own notebooks the text of each new rule or amendment and to keep a separate list, by number, of the rules still in effect. If this method is adopted, the rules should probably define a "master book" that contains the authoritative text of each rule in case of conflicts or transcribing errors.

The constantly changing body of rules makes Nomic a natural for word processors. Players who can share equipment or use a network to display the same file of rules might try to do so. A single player should probably be assigned the responsibility of entering and editing the text. Computers will permit very complex, long-term games to develop. Players may want to plan ahead when they start such a game, attempt to date each amendment and addition, and provide separate files for amended and repealed rules, and defeated proposals, in order to keep a record of the game.

Players who try to go beyond text processing and actually put some Nomic bookkeeping in a program are warned that the complexities are subtle. First, such a program should be as easy to modify as the rules of the game, or else the difficulty of changing it will put an unwanted brake on play.

Moreover, it is very easy inadvertently to give the program decisions to make that are not actually clerical and that belong to the players, that is, to change Nomic without realizing it. This is true even of the most deceptively simple decisions such as renumbering rules after amendment, computing scores, and deciding who plays next. For the same reasons, mere word processing can introduce distortions. Decisions necessary to write a program or edit text may require a precision not explicit in the rule as written, in which case the programmer usurps the power of the game Judge if she simply chooses a reading of the rule. In any case, the game Judge should be the final arbiter of all questions and decisions, even those made by a program, unless of course a rule has changed the role of the Judge.

Nomic

Initial Set of Rules

Immutable Rules

101. All players must always abide by all the rules then in effect, in the form in which they are then in effect. The rules in the Initial Set are in effect whenever a game begins. The Initial Set consists of Rules 101-116 (immutable) and 201-213 (mutable).

102. Initially rules in the 100's are immutable and rules in the 200's are mutable. Rules subsequently enacted or transmuted (that is, changed from immutable to mutable or vice versa) may be immutable or mutable regardless of their numbers, and rules in the Initial Set may be transmuted regardless of their numbers.

103. A rule-change is any of the following: (1) the enactment, repeal, or amendment of a mutable rule; (2) the enactment, repeal, or amendment of an amendment of a mutable rule; or (3) the transmutation of an immutable rule into a mutable rule or vice versa.

(Note: This definition implies that, at least initially, all new rules are mutable; immutable rules, as long as they are immutable, may not be amended or repealed; mutable rules, as long as they are mutable, may be amended or repealed; any rule of any status may be transmuted; no rule is absolutely immune to change.)

104. All rule-changes proposed in the proper way shall be voted on. They will be adopted if and only if they receive the required number of votes.

105. Every player is an eligible voter. Every eligible voter must participate in every vote on rule-changes.

106. All proposed rule-changes shall be written down before they are voted on. If they are adopted, they shall guide play in the form in which they were voted on.

107. No rule-change may take effect earlier than the moment of the completion of the vote that adopted it, even if its wording explicitly states otherwise. No rule-change may have retroactive application.

108. Each proposed rule-change shall be given a number for reference. The numbers shall begin with 301, and each rule-change proposed in the proper way shall receive the next successive integer, whether or not the proposal is adopted.

If a rule is repealed and reenacted, it receives the number of the proposal to reenact it. If a rule is amended or transmuted, it receives the number of the proposal to amend or transmute it. If an amendment is amended or repealed, the entire rule of which it is a part receives the number of the proposal to amend or repeal the amendment.

109. Rule-changes that transmute immutable rules into mutable rules may be adopted if and only if the vote is unanimous among the eligible voters. Transmutation shall not be implied, but must be stated explicitly in a proposal to take effect.

110. In a conflict between a mutable and an immutable rule, the immutable rule takes precedence and the mutable rule shall be entirely void. For the purposes of this rule a proposal to transmute an immutable rule does not "conflict" with that immutable rule.

111. If a rule-change as proposed is unclear, ambiguous, paradoxical, or destructive of play, or if it arguably consists of two or more rule-changes compounded or is an amendment that makes no difference, or if it is otherwise of questionable value, then the other players may suggest amendments or argue against the proposal before the vote. A reasonable time must be allowed for this debate. The proponent decides the final form in which the proposal is to be voted on and, unless the Judge has been asked to do so, also decides the time to end debate and vote.

112. The state of affairs that constitutes winning may not be altered from achieving n points to any other state of affairs. The magnitude of n and the means of earning points may be changed, and rules that establish a winner when play cannot continue may be enacted and (while they are mutable) be amended or repealed.

113. A player always has the option to forfeit the game rather than continue to play or incur a game penalty. No penalty worse than losing, in the judgment of the player to incur it, may be imposed.

114. There must always be at least one mutable rule. The adoption of rule-changes must never become completely impermissible.

115. Rule-changes that affect rules needed to allow or apply rule-changes are as permissible as other rule-changes. Even rule-changes that amend or repeal their own authority are permissible. No rule-change or type of move is impermissible solely on account of the self-reference or self-application of a rule.

116. Whatever is not prohibited or regulated by a rule is permitted and unregulated, with the sole exception of changing the rules, which is permitted only when a rule or set of rules explicitly or implicitly permits it.

Mutable Rules

201. Players shall alternate in clockwise order, taking one whole turn apiece. Turns may not be skipped or passed, and parts of turns may not be omitted. All players begin with zero points.

In mail and computer games, players shall alternate in alphabetical order by surname.

202. One turn consists of two parts in this order: (1) proposing one rule-change and having it voted on, and (2) throwing one die once and adding the number of points on its face to one's score.

In mail and computer games, instead of throwing a die, players subtract 291 from the ordinal number of their proposal and multiply the result by the fraction of favorable votes it received, rounded to the nearest integer. (This yields a number between 0 and 10 for the first player, with the upper limit increasing by one each turn; more points are awarded for more popular proposals.)

203. A rule-change is adopted if and only if the vote is unanimous among the eligible voters. If this rule is not amended by the end of the second complete circuit of turns, it automatically changes to require only a simple majority.

204. If and when rule-changes can be adopted without unanimity, the players who vote against winning proposals shall receive 10 points each.

205. An adopted rule-change takes full effect at the moment of the completion of the vote that adopted it.

206. When a proposed rule-change is defeated, the player who proposed it loses 10 points.

207. Each player always has exactly one vote.

208. The winner is the first player to achieve 100 (positive) points.

In mail and computer games, the winner is the first player to achieve 200 (positive) points.

209. At no time may there be more than 25 mutable rules.

210. Players may not conspire or consult on the making of future rule-changes unless they are team-mates.

The first paragraph of this rule does not apply to games by mail or computer.

211. If two or more mutable rules conflict with one another, or if two or more immutable rules conflict with one another, then the rule with the lowest ordinal number takes precedence.

If at least one of the rules in conflict explicitly says of itself that it defers to another rule (or type of rule) or takes precedence over another rule (or type of rule), then such provisions shall supersede the numerical method for determining precedence.

If two or more rules claim to take precedence over one another or to defer to one another, then the numerical method again governs.

212. If players disagree about the legality of a move or the interpretation or application of a rule, then the player preceding the one moving is to be the Judge and decide the question. Disagreement for the purposes of this rule may be created by the insistence of any player. This process is called invoking Judgment.

When Judgment has been invoked, the next player may not begin his or her turn without the consent of a majority of the other players.

The Judge's Judgment may be overruled only by a unanimous vote of the other players taken before the next turn is begun. If a Judge's Judgment is overruled, then the player preceding the Judge in the playing order becomes the new Judge for the question, and so on, except that no player is to be Judge during his or her own turn or during the turn of a team-mate.

Unless a Judge is overruled, one Judge settles all questions arising from the game until the next turn is begun, including questions as to his or her own legitimacy and jurisdiction as Judge.

New Judges are not bound by the decisions of old Judges. New Judges may, however, settle only those questions on which the players currently disagree and that affect the completion of the turn in which Judgment was invoked. All decisions by Judges shall be in accordance with all the rules then in effect; but when the rules are silent, inconsistent, or unclear on the point at issue, then the Judge shall consider game-custom and the spirit of the game before applying other standards.

213. If the rules are changed so that further play is impossible, or if the legality of a move cannot be determined with finality, or if by the Judge's best reasoning, not overruled, a move appears equally legal and illegal, then the first player unable to complete a turn is the winner.

This rule takes precedence over every other rule determining the winner.

Notes

1. An earlier version of Nomic and the commentary that follows was published in Douglas R. Hofstadter's column, "Metamagical Themas," in Scientific American, 246, 6 (June 1982) 16-28 ("About Nomic: A Heroic Game That Explores the Reflexivity of the Law"), reprinted slightly revised in his collection of columns, Metamagical Themas, Basic Books, 1985.

2. Note the practice of Canada in this regard. The Canadian Bill of Rights, Stat. Can. 1960, Ch. 44, is not part of its constitution, but a mere statute. Hence the important values protected by the Bill of Rights would be vulnerable to amendment pro tanto by every statute subsequently enacted in the slightest way inconsistent with it, unless special measures were taken to create a hierarchy among statutes. Section 2 of the Bill of Rights itself creates such a hierarchy:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared....

In Regina v. Drybones, 9 D.L.R. (3d) 473 (1970) the Canadian Supreme Court gave effect to the intent of this language and allowed the Bill of Rights statute by this means to raise itself above other statutes. See W. Friedmann, Law in a Changing Society, Columbia University Press, 1959, p. 59.

3. Dworkin, Ronald, "The Model of Rules," University of Chicago Law Review, 35 (1967) 14-46. For Dworkin, principles are definitely not rules; I call them "rule-like" here simply to place them as members of this long list of "legal ingredients".

4. But of course all that results from compliance with the rules is in some other sense the game Nomic. The point is that the substance of the game may change radically. Similarly, many have acknowledged that even an AC restricted to piecemeal amendment could, through repeated applications, create a fundamentally new constitution; see e.g. Lester Bernhardt Orfield, The Amending of the Federal Constitution, University of Michigan Press, 1942, at pp. 12, 44.

5. For the opposite view, see Alexander Hamilton in Federalist #85: "[I]t will be far more easy to obtain subsequent than previous amendments to the constitution." Clinton Rossiter (ed.), The Federalist Papers, New American Library, 1961, at p. 524. Hamilton offers three arguments. The first is that adopting a new constitution requires unanimity, whereas adopting subsequent amendments requires only some supermajority. This argument became inapplicable in our constitutional history when the unanimity requirement in the Articles of Confederation was superseded by the 9/13 requirement in Article VII of the new constitution. (See Appendix 1.D.) It is also inapplicable to Nomic, which requires unanimity for amendments, initially, matching the unanimity one presumes will be necessary to get players to play a game. My rationale for requiring unanimous votes for amendment, initially, is to create a kind of social contract in which no player can be overruled until she consents to take the risk by switching to majority rule or some other system.

Hamilton's second argument is that

> every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point —no giving nor taking.

Ibid. at 525.

His third argument (ibid. at 526) is that first trials in constitution writing are inevitably defective; time and experience are needed to perfect them. His second and third arguments apply as well to Nomic as to constitutions. It is worth considering Hamilton's arguments in detail, for once players learn the Platonic form of Nomic, there is no reason whatsoever why they should use my initial set of rules unless they, as sovereign citizens and players, find them satisfactory or cannot agree on anything better.

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