

# THE “MISSING THIRTEENTH AMENDMENT”: CONSTITUTIONAL NONSENSE AND TITLES OF NOBILITY

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*If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.*<sup>1</sup>

## INTRODUCTION

Titles of nobility were a subject of major concern in the early days of the United States.<sup>2</sup> Some colonial charters, such as that of Maryland, authorized the granting of such titles.<sup>3</sup> In *The Federalist*, Alexander Hamilton wrote:

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there

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1. Resolution proposing an amendment to the Constitution of the United States, 2 Stat. 613 (1810). The *Annals of Congress* record that “Emperor,” “King,” “Prince,” and “Power” were capitalized when Congress voted on the amendment. See 20 ANNALS OF CONG. 671 (1810); 21 ANNALS OF CONG. 2050 (1810).

2. One example of the perceived threat of titles of nobility was the popular distrust of the Society of the Cincinnati, an organization for officers in the Revolutionary army with aristocratic trappings. See ROBERT ALLEN RUTLAND, *THE ORDEAL OF THE CONSTITUTION* 44-48 (1966).

3. See THOMAS JAMES NORTON, *THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION* 90 (1922).

can never be serious danger that the government will be any other than that of the people.<sup>4</sup>

The Constitution prohibited the federal government<sup>5</sup> and the states<sup>6</sup> from granting titles, and persons holding any office of profit or trust from accepting a foreign title without the consent of Congress.<sup>7</sup>

The ratifying conventions of Massachusetts,<sup>8</sup> New Hampshire,<sup>9</sup> New York,<sup>10</sup> North Carolina,<sup>11</sup> Rhode Island,<sup>12</sup> and Virginia<sup>13</sup> proposed amendments that would either forbid Congress ever to grant such consent, or would have eliminated the "without the consent of Congress" clause. In the First Congress, similar amendments were discussed once in the Senate<sup>14</sup> and twice in the House,<sup>15</sup> but none

4. THE FEDERALIST No. 84, at 577-78 (Alexander Hamilton) (J. Cooke ed., 1961).

5. See U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

6. See *id.* at art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

7. See *supra* notes 5-6.

8. "Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept a title of nobility, or any other title or office, from any king, prince, or foreign state." 1 ELLIOT'S DEBATES, 323 (1836).

9. "Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept any title of nobility, or any other title or office, from any king, prince, or foreign state." *Id.* at 326.

10. "That the words without the consent of Congress in the seventh [sic] clause of the ninth section of the first article of the Constitution, be expunged." *Id.* at 331.

11. "That no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator or judge, or any other public office to be hereditary." 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 267 (Washington Department of State 1894).

12. "That the words 'without the consent of Congress,' in the seventh [sic] clause of the ninth section of the first article of the Constitution, be expunged." 1 ELLIOT'S DEBATES 336 (1836).

13. "That no man or set of Men are entitled to exclusive or separate public emoluments or privileges from the community, but in Consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator or Judge, or any other public office to be hereditary." VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, [hereinafter *Virginia Commission*] WE THE STATES 72-73 (1964).

14. The amendment stated "[t]hat Congress shall at no time consent that any person holding an Office of trust or profit, under the United States, shall accept of a title of Nobility, or any other Title or Office, from any king, prince, or foreign power." SENATE LEGISLATIVE JOURNAL 159 (1972).

15. An amendment by Representative Thomas T. Tucker would strike "without the consent of Congress" from art. I, § 9, cl. 8 and append "provided that this clause shall not be construed to affect the rights of those persons (during their own lives) who are now citizens of the

were submitted to the states for ratification. Finally, on May 1, 1810, an amendment on titles of nobility received the assent of Congress and was submitted to the states.<sup>16</sup>

An insufficient number of states ratified the Titles of Nobility Amendment ("TONA") to make it part of the Constitution.<sup>17</sup> But, although mostly forgotten in this century, the amendment was more than just a footnote to history in the last century. Well into the second half of the nineteenth century, some textbooks, state compilations of law, and even on one occasion a compilation of law published under the auspices of Congress erroneously included TONA as if ratified.<sup>18</sup> Further, after the ratification of the Twenty-seventh Amendment to the Constitution in 1992, scholars noted that if James Madison's amendment could be ratified after 203 years, there was no immediately obvious reason why TONA was not still viable, if still far distant from becoming part of the Constitution.<sup>19</sup>

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United States and hold foreign titles." 1 ANNALS OF CONG. 762 (Joseph Gales ed., 1789). An amendment by Representative Elbridge Gerry stated that "Congress shall at no time consent that any person holding an office of trust or profit under the United States shall accept a title of nobility or any other title or office from any King, Prince, or foreign State." *Id.* at 778.

16. See HERMAN V. AMES, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* 187 (Lennox Hill 1970) (1897). See *supra* text accompanying note 1.

17. See *infra* text accompanying notes 51-53.

18. See *infra* notes 54, 70-71, 85.

19. See, e.g., Richard B. Bernstein, *The Sleeper Wakes: The History And Legacy Of The Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 539 (1992). Prior to the ratification of the Twenty-seventh Amendment, courts and scholars usually held that amendments that had been submitted to the states but not ratified had lost their vitality.

[F]our amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.

Dillon v. Gloss, 256 U.S. 368, 375 (1921). See also Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *HARV. L. REV.* 386, 425 (1983) (indicating that the nonratified "amendments proposed in 1789 . . . raise no problems: they simply died." A court could easily dispose of all these elderly amendments, but "[n]o such need, however, is likely to arise."). But see *Coleman v. Miller*, 307 U.S. 433, 454 (1939) (holding that "what is a reasonable time [in which to ratify an amendment], lies within the congressional province"). Attempts since the ratification of the Twenty-seventh Amendment, so far unsuccessful, have been made to forestall the ratification of any of the amendments still languishing. See Christopher M. Kennedy, *Is There a Twenty-Seventh Amendment? The Unconstitutionality of a "New" 203-Year-Old Amendment*, 26 *J. MARSHALL L. REV.* 977, 988 n.71 (1993) (noting S. Con. Res. 121, 102d Cong. (1992)). Whether Congress could declare TONA stale is beyond the scope of this Article. For one Supreme Court Justice's opinion on the power of Congress to declare amendments stale, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 *TEX. L. REV.* 919, 925-26 (1979).

But even before the ratification of the Twenty-seventh Amendment gave the other amendments to the Constitution that were submitted to the states but not ratified<sup>20</sup> their fifteen Warholian minutes of fame, TONA also had received attention from a different—and disturbing—source. In August 1991, an extremist small-press magazine entitled *AntiShyster* published a series of articles by David Dodge,<sup>21</sup> who claimed to have discovered that TONA in fact had been ratified and later suppressed.<sup>22</sup> Dodge's articles have found a ready audience

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20. The Congressional Apportionment Amendment, which stated,

[a]fter the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons,

was proposed in 1789 and ratified by 10 states. CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION*, S. DOC. NO. 103-6, 47 (1996). The States' Rights Amendment, which stated that "[n]o 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," was proposed in 1861 and ratified by three states. *See id.* at 48. The Child Labor Amendment, which stated that "Congress shall have the power to limit, regulate, and prohibit the labor of persons under 18 years of age," was proposed in 1924 and ratified by 28 states. *Id.* The Equal Rights Amendment, which stated that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," was proposed in 1972 and ratified by 35 states, and, according to the deadline set by Congress, is no longer open to ratification. *Id.* at 49. The D.C. Statehood Amendment, which would have repealed the Twenty-third Amendment and stated that "[f]or purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State," was proposed in 1978 and ratified by 16 states, and, according to the deadline set by Congress, is no longer open to ratification. *Id.* at 49.

21. Dodge has been described as a "constitutional gadfl[y]" who acts as a "legal representative" for "sovereign citizens." *See* Geoff Davidian, *Sovereign Citizens Defy Law*, MAINE SUNDAY TELEGRAM, Aug. 7, 1988, at 1A; *see, e.g.*, *Thompson v. Maine*, 625 A.2d 299, 299 (Me. 1993) (Dodge allowed to sit at counsel table with molestation defendant proceeding pro se); Phil Mueller, *Southern Utah Traffic Stop Escalates Into Constitutional Battle*, SALT LAKE TRIB., July 23, 1995, at B1 (Dodge filed motions on behalf of defendant challenging traffic laws on constitutional grounds). Dodge allegedly will "ask for full-blown jury trials for speeding, illegal fishing or other minor violations, and then, after lengthy presentations by the prosecutor, offer as [a] defense the argument that the constitution has been subverted and therefore the state has no authority. . . ." *See* Davidian, *supra*, at 1A.

22. "To create the present oligarchy (rule by lawyers) which we now endure, the lawyers first had to remove the 13th 'titles of nobility' Amendment that might otherwise have kept them in check." David Dodge, researcher, and Alfred Adask, ed., *The Missing Thirteenth Amendment, Part II: Paradise Lost, Ratification Found*, 1 ANTI-SHYSTER at 120, 122 (1991) [hereinafter *Part II*]; the text of this article is available in Adobe Acrobat (PDF) format: (last modified Nov. 19, 1995) <ftp://w3.metronet.com/antishys/pub/vol1-6.pdf>. *See also infra* note 143; David Dodge, researcher, and Alfred Adask, ed., *The Missing Thirteenth Amendment, Part I: "Titles of*

in many extremist organizations,<sup>23</sup> and have found their way onto the Internet, where they are available from world wide web sites, along with additional commentary and information from TONA proponents.<sup>24</sup> Following Dodge, TONA proponents put forward an assortment of "constitutional nonsense," such as the claim that the amendment would exclude lawyers ("esquires") from public office.<sup>25</sup> Some even use TONA to justify "sentencing" state officials to death or murdering police officers.<sup>26</sup>

Dodge's claims do not stand up to cursory, much less careful scrutiny. But alternative, if not mainstream, media outlets have on occasion accepted his claims as accurate.<sup>27</sup> Further, the limited attention TONA has received from scholars has overlooked key facts about TONA's history, allowing extremist claims about the amendment to

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*Nobility*" and "Honors," [sic] 1 ANTI-SHYSTER at 115 (1991) [hereinafter *Part I*]; the text of this article is available in Adobe Acrobat (PDF) format: (last modified Nov. 19, 1995) <ftp://w3.metronet.com/antishys/pub/vol1-6.pdf>; David Dodge, researcher, and Alfred Adask, writer, *The Missing Thirteenth Amendment, Part III: Arguments*, 1 ANTI-SHYSTER at 138 (1991) [hereinafter *Part III*]; the text of this article is available in Adobe Acrobat (PDF) format: (last modified Nov. 19, 1995) <ftp://w3.metronet.com/antishys/pub/vol1-7.pdf>.

23. See, e.g., Thomas Korosec, *We are the R.O.T.*, DALLAS OBSERVER, May 8, 1997 (Magazine), at 26-27 ("Republic of Texas"). For other groups with constitutional views similar to those of Dodge, see Nicholas Riccardi, *Judge Not Amused by Woman's Claim of Sovereign Authority*, L.A. TIMES, May 9, 1996, at 5 (Montana "freemen" disciple); Peter Rowe, *Guilty, By Reason of Insanity*, SAN DIEGO UNION & TRIB., Apr. 11, 1996, at E1 (San Diego "common law court"); Henry J. Cordes, *Disgruntled Citizens Heed No Court But Their Own What They Believe*, OMAHA WORLD-HERALD, Dec. 10, 1995, at 1A ("Our One Supreme Court in Douglas County"); Stephen Braun, *Their Own Kind of Justice; The Common Law Movement's Rogue Courts Let Those Alienated By America's Legal System Play Judge and Jury for a Night*, L.A. TIMES, Sept. 5, 1995, at A1 ("Common Law court of Ohio, Our One Supreme Court"); William H. Freivogel, *Talk Show Leads Listener to Form "People" Chapter*, ST. LOUIS POST-DISPATCH, May 10, 1995, at 5B ("For the People"); Jay Meisel, *Yellville Fends Off Protesters; "We the People" Sets Goal of Own Court*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 20, 1994, at 1B ("We the People").

24. See, e.g., David Dodge, researcher, and Alfred Adask, ed., *The Missing 13th Amendment* (last visited Feb. 25, 1999) <http://www.nidlink.com/~bobhard/orig13th.html>. This and other sites posting Dodge's articles do not preserve the original layout and separate identity of the articles, and have changed some of their text. Cf. *The Ring of Untruth*, BOSTON GLOBE, Nov. 22, 1997, at A14 ("Unfettered by the standards of peer review required of scholarship . . . communicators on the Internet post up the most preposterous theories . . .").

25. See *infra* text accompanying notes 150-181.

26. See *infra* note 141. In the latter case, George Sibley, a fugitive from justice, shot officer Roger Motley after Motley asked for his driver's license and ordered Sibley to step away from his car. Sibley continued to fire as Motley tried to flee to his cruiser. Linda Lyon joined him, pumping a 14-round clip into the officer's car and body. Both have been sentenced to death. See Michael Pearson, *Couple Appealing Death Sentence Claim Cop-Killing Was Legal*, L.A. TIMES, Sept. 8, 1996, available in Westlaw, 1996 WL 11641908.

27. See *infra* text accompanying note 139.

flourish.<sup>28</sup> Under some—if not most—circumstances, responding to extremist claims is an exercise of dubious value, lending them credence they do not merit.<sup>29</sup> But because TONA has received so little scholarly attention—and because its proponents claim the amendment would disenfranchise lawyers from serving in public office, a significant attack on our system of government and civil liberties<sup>30</sup>—the history of and claims about TONA merit attention.

This Article therefore will first review the history of TONA. Second, it will respond to some of the more significant—if meritless—arguments in support of the proposition that TONA was ratified. Finally, the Article will review and debunk the effects that TONA, according to its proponents, allegedly would have if ratified, and consider what lessons the amendment, its history, and the alienation of its proponents may have for modern concerns about divisions in society.

## I. THE “MISSING THIRTEENTH AMENDMENT”

On January 18, 1810, Republican Senator Philip Reed introduced a constitutional amendment addressing the acceptance of titles of nobility by American citizens.<sup>31</sup> It was referred to a select committee of three,<sup>32</sup> and twice afterwards to a larger committee of five,<sup>33</sup> which submitted several versions of the amendment to the Senate.<sup>34</sup> The amendment was approved by the Senate by a vote of 19 to 5 on April 27, 1810, in the following form:

If any citizen of the United States shall accept, claim, receive, or retain, any title of nobility, or honor, or shall, without the consent of Congress, accept any present, pension, office or emolument, of any kind whatever, from any Emperor, King, Prince or foreign Power, such person shall cease to be a citizen of the United States, and shall

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28. See *infra* text accompanying note 117.

29. See *People v. Smith*, 486 N.E.2d 1347, 1355 (Ill. App. Ct. 1985) (“People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve.”).

30. See *infra* text accompanying note 150.

31. “If any citizen of the United States shall accept of any title of nobility from any King, Prince, or foreign State, such citizen shall thenceforth be incapable of holding any office of honor or profit under the United States.” 20 ANNALS OF CONG. 530 (1810).

32. See *id.* at 547, 549.

33. See *id.* at 571, 572, 576, 635.

34. See *id.* See also *infra* note 1.

be incapable of holding any office of trust or profit under them, or either of them.<sup>35</sup>

The House of Representatives then approved the amendment on May 1, 1810 by a vote of 87 to 3,<sup>36</sup> and TONA was submitted to the states for ratification.

No debates about the amendment are recorded in the Annals of Congress or contemporary newspapers,<sup>37</sup> so the reasons for its proposal are a matter of some speculation. One theory is that TONA was a reflection of the general animosity to foreigners evident in the United States before the War of 1812.<sup>38</sup> This animosity manifested itself in a number of fashions. Henry Clay, for example, only with difficulty succeeded in limiting a Kentucky bill prohibiting the citation of British court decisions or treatises to works written after July 4, 1776.<sup>39</sup> A similar bill was passed in Pennsylvania in 1810.<sup>40</sup> Georgia's constitution of 1777, in force until 1789,<sup>41</sup> excluded any person who held or claimed a title of nobility from voting or holding office.<sup>42</sup> It is therefore understandable, Ames states, that in addition to finding nearly unanimous support in Congress, TONA found strong support in some states, for example passing both houses of the Pennsylvania legislature unanimously.<sup>43</sup>

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35. *Id.* at 670-72. One of the Senators voting against TONA was Nicholas Gilman of New Hampshire, the only member of the 11th Congress who had attended the Constitutional Convention. See 2 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 332 (1901).

36. See 21 ANNALS OF CONG. 2050-51 (1810).

37. See AMES, *supra* note 16, at 187.

38. See *id.* at 188.

39. See 3 JOHN BACH McMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 417-18 (1928); 1 CARL SCHURZ, LIFE OF HENRY CLAY 49-50 (Boston, Houghton Mifflin ed. 1915) (1887). Ironically, Clay supported TONA in preliminary votes, although he did not participate in the final vote on its passage. See 20 ANNALS OF CONG. 670-72 (1810).

40. See McMASTER, *supra* note 39, at 417-18; SCHURZ, *supra* note 39, at 49-50.

41. See Thorpe, *supra* note 35, at 331.

42. No person shall be entitled to more than one vote, which shall be given in the county where such person resides, except as before excepted; nor shall any person who holds any title of nobility be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit, or trust in this State, whilst such person claims his title of nobility; but if the person shall give up such distinction, in the manner as may be directed by future legislation, than, and in such case, he shall be entitled to a vote, and represent, as before directed, and enjoy all the other benefits of a free citizen.

GA. CONST. art. XI (1777).

43. See AMES, *supra* note 16, at 188 n.2 (citing JOURNAL OF THE 21ST HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 290, 294 (Lancaster, Benjamin Grimler, 1810 [1811]); JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA (1810-11) 180 (Lancaster, William Greer, 1810 [1811])).

Another theory attributes TONA to the reaction against the involvement of Napoleon Bonaparte's younger brother, Järôme Bonaparte, in American public life the preceding decade. His American wife from 1803 until 1806, Elizabeth Patterson, was from a prominent Baltimore Republican family, and in 1809 was granted an annuity by the French government with hints of a title to follow.<sup>44</sup> Republican Representative Nathaniel Macon of North Carolina is recorded to have said, when voting on TONA, that "he considered the vote on this question as deciding whether or not we were to have members of the Legion of Honor in this country."<sup>45</sup>

An article published decades later in *Niles' National Register*, a national newsweekly published in Baltimore, refers to an amendment having been adopted to prevent any person but a native-born citizen from becoming President of the United States.<sup>46</sup> While this statement is in error,<sup>47</sup> as is the article's statement that the Federalists introduced the amendment (if it meant to refer to Reed's amendment),<sup>48</sup> the article does state that the amendment was introduced out of concern about Järôme Bonaparte.<sup>49</sup> Modern historians have speculated that Reed may have introduced the amendment on behalf of concerned Marylanders, as well as to outflank the Federalists, transforming TONA into a nonpartisan measure not meriting debate.<sup>50</sup>

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44. See W.H. Earle, *The Phantom Amendment and the Duchess of Baltimore*, AM. HIST. ILLUSTRATED, Nov. 1987, at 35-37. Elizabeth Patterson's sister-in-law, Mary Patterson, would later marry the Marquess of Wellesley, the brother of the Duke of Wellington and then Lord Lieutenant of Ireland. See ANNIE LEAKIN SIOUSSAT, OLD BALTIMORE 204 (1931). One of Elizabeth Patterson's grandsons, Charles J. Bonaparte, would in 1905 become Theodore Roosevelt's Secretary of the Navy and in 1906 Attorney General. See ALICE CURTIS DESMOND, BEWITCHING BETSY BONAPARTE 294 (1958). Elizabeth Patterson's great-grandson, Jerome Napoleon Bonaparte IV, was informally offered the throne of Albania in 1921. See *id.* at 293. In the eyes of the Catholic Church, which refused to annul Järôme Bonaparte and Elizabeth Patterson's marriage, the Pattersons were the legitimate heirs to the Imperial throne of France after the death of Napoleon IV in 1879 until the line became extinct in 1945. See *id.*

45. 21 ANNALS OF CONG. 2050 (1810). There are approximately 550 living American members of the Legion of Honor. The membership list includes astronaut Neil Armstrong, TV news anchor Walter Cronkite, composer Quincy Jones, cosmetics tycoon Estee Lauder, singer Liza Minelli, actor Gregory Peck, President Ronald Reagan, and singer Barbara Streisand. John-Thor Dalburg and Darryl Fears, *For US 'doughboys,' a French decoration*, BOSTON GLOBE, Nov. 12, 1998, at A15.

46. *The Presidency—National Conventions*, NILES' NAT'L REG., May 15, 1847, at 166.

47. See U.S. CONST. art. II, § 1, cl. 5.

48. *The Presidency—National Conventions*, *supra* note 46, at 166.

49. See *id.* The article states that the Federalists intended to use the amendment as a "political trick," to show the subservience of the Republicans to French influence, but the Republicans supported the amendment as "[i]t can do no harm." *Id.*

50. See Earle, *supra* note 44, at 37. Modern historians also have noted that an amendment, instead of a statute, probably was proposed because citizenship was then understood to be under

Twelve states ultimately ratified TONA, not enough to make it part of the Constitution under Article V of the Constitution.<sup>51</sup> Secretary of State John Quincy Adams, through President James Monroe, reported to Congress in 1818 that the following actions had transpired:

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Ratifications:	
Maryland	December 25, 1810
Kentucky	January 31, 1811
Ohio	January 31, 1811
Delaware	February 2, 1811
Pennsylvania	February 6, 1811
New Jersey	February 13, 1811
Vermont	October 24, 1811
Tennessee	November 21, 1811
Georgia	December 13, 1811
North Carolina	December 23, 1811
Massachusetts	February 27, 1812
New Hampshire	December 10, 1812
Rejections:	
New York	March 12, 1812
Connecticut	May 13, 1813
Rhode Island	September 15, 1814
South Carolina	December 21, 1814
No Reply:	
Virginia. <sup>52</sup>	

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the jurisdiction of the states. See John P. Roche, *The Expatriation Cases: "Breathes there the man, with soul so dead. . .?"* 1963 SUP. CT. REV. 325, 335.

51. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution . . . which . . . shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

U.S. CONST. art. V.

52. See *Amendment proposed to the Constitution in relation to titles of nobility, &c.*, 2 AMERICAN STATE PAPERS, Class X, Misc., 477-78 (Walter Lowrie and Walter S. Franklin, eds. 1834), microformed on CIS No: ASP038 (Cong. Info. Serv.). Adams' report is dated February 3, 1818; Monroe's letter is dated February 4, 1818; and the House of Representatives is recorded to have received it on February 6, 1818. See *id.*; 31 ANNALS OF CONG. 866 (1818).

Adams' original report did not include definitive information on South Carolina; the state Senate was known to have approved the amendment on November 29, 1811, but the action of the state House of Representatives was unknown. See *Amendment proposed to the Constitution in relation to titles of nobility, &c.*, at 478. Monroe on February 28, 1818 transmitted to Congress a letter from Governor Andrew Pickens dated February 14, 1818 received by Adams reporting that the state House had rejected the amendment. See *id.* at 478-79; 31 ANNALS OF CONG. 1074 (1818).

One secondary source asserts that the "official file" states that no action was taken upon the amendment by Louisiana. See VIRGINIA COMMISSION, *supra* note 13, at 111. No such statement

Although Virginia did not reply to Adams' inquiry, its own legislative journals record that the state rejected TONA on February 14, 1811.<sup>53</sup>

Confusion, however, persisted for many years as to whether TONA had become part of the Constitution. The most prominent inclusion of TONA as part of the Constitution was its appearance in the 1815 edition of *United States Statutes at Large* (the "Bioren edition").<sup>54</sup> Congress authorized its publication in 1814,<sup>55</sup> to replace the first official compilation of the laws of the United States, which had been authorized in 1795.<sup>56</sup> James Monroe, then Secretary of State,

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appears in the thin file maintained by the National Archives on the amendment, Unratified Amendments (on file with the National Archives, 1810 and 1924, Series RG-11, Washington, D.C.) [hereinafter Unratified Amendments], nor do any of the other states that joined the Union after 1810 appear to ever have acted on TONA. See *infra* text accompanying notes 114-135. The state notices of ratification and rejection at the National Archives are reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES, *supra* note 11, at 454-515.

53. See JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 83 (Richmond, Thomas Ritchie, 1810 [1811]), *microformed on* Early American Imprints 1801-19 (American Antiquarian Society). The House of Delegates previously had approved TONA on February 2, 1811. See JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 91 (Richmond, Samuel Pleasants, 1810 [1811]), *microformed on* Early American Imprints 1801-19 (American Antiquarian Society). Even the Governor of Virginia three years after the fact was unsure; in a letter to the Virginia Senate and House of Delegates on January 25, 1814, James Barbour wrote that:

I have received a letter from the Secretary of State, [James Monroe] requesting to be advised whether the Legislature of Virginia had agreed to, or rejected, an amendment proposed to the Constitution of the United States, which had for its object the prevention of any citizen accepting any title of nobility, present, pension, or office, from any foreign prince or power. Upon reference to the archives of this Department, no official document can be found which justifies a reply affirmatively or negatively. I submit to the Legislature the propriety of adopting some mode by which the difficulty may be obviated.

JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 145 (Richmond, Samuel Pleasants, 1813 [1814]). It appears that Barbour's request was never answered—until now. One should note that, as far as this Author is aware, these facts have never before appeared in print; all past commentators merely cited Adams' report or a source relying upon it.

54. 1 LAWS OF THE UNITED STATES OF AMERICA 74 (John Bioren and W. John Duane, eds., Washington City, R.C. Weightman, 1815), *microformed on* Early American Imprints 1801-19 (American Antiquarian Society). Originally published in five volumes, supplementary volumes 6-10 appeared through 1845. See Curt E. Conklin, *The Case of the Phantom Thirteenth Amendment: A Historical and Bibliographical Nightmare*, L. LIBR. J., Winter 1996, at 122 n.5.

55. See An act authorizing a subscription for the laws of the United States, and for the distribution thereof, 3 Stat. 129 (1814).

56. See An act for the more general promulgation of the laws of the United States, 1 Stat. 443 (1795).

appointed John B. Colvin to edit the new edition.<sup>57</sup> Not able to conclude whether TONA had been ratified, Colvin made the following prefatory remarks in the first volume:

There has been some difficulty in ascertaining whether the amendment proposed, which is stated as the thirteenth . . . has, or has not, been adopted by a sufficient number of the state legislatures to authorize its insertion as part of the constitution? The secretary of state very readily lent every suitable aid to produce full information on the question; but the evidence to be found in the office of that department is still defective. It has been considered best, however, to publish the proposed amendment in its proper place, as if it had been adopted, with this explanation, to prevent misconception.<sup>58</sup>

After the amendment also appeared in copies of the Constitution printed for members of the Fifteenth Congress,<sup>59</sup> Republican Representative Weldon Nathaniel Edwards of North Carolina proposed a resolution on December 31, 1817 to ask President Monroe to provide the House of Representatives with information as to "the number of States which have ratified the 13th article of the amendments . . ."<sup>60</sup> The resolution was approved without opposition.<sup>61</sup> Monroe's response, incorporating the information gathered by John Quincy Adams, was that TONA had not become part of the Constitution.<sup>62</sup>

Contemporary scholars understood that the amendment had not been ratified. William Rawle wrote that it "has been adopted by some of the states; but not yet by a sufficient number."<sup>63</sup> Joseph Story wrote that "it has not received the ratification of the constitutional number

57. See Conklin, *supra* note 54, at 122.

58. 1 LAWS OF THE UNITED STATES OF AMERICA, *supra* note 54, at ix.

59. See 31 ANNALS OF CONG. 530-31 (1817). Whether this in fact was the Bioren edition is not clear.

60. *Id.* at 530. Monroe had previously written to governors as Secretary of State on March 23, 1813, to request authenticated copies of state actions on TONA. See Unratified Amendments, *supra* note 52.

61. See 31 ANNALS OF CONG. 531 (1817).

62. See *supra* text accompanying note 54. See also *Constitution of the United States*, NILES' WEEKLY REG., vol. XIV, Apr. 25, 1818, at 150. Ironically, on December 2, 1817, John Quincy Adams wrote to Charles Nicholas Buck of Philadelphia to inform him that TONA would strip him of his citizenship and right to hold public office if he accepted an appointment as the Consul General in the United States of the Imperial City of Hamburg. National Archives, 17 DOMESTIC LETTERS OF THE DEPT. OF STATE 93-94 (1943). In a subsequent letter to Buck on March 21, 1818, Adams retracted the claim that TONA had been ratified, but made another error in claiming that upon the return of information from Virginia, "it will be known with precision what is the fate of the proposed amendment." *Id.* at 136-37. See *supra* text accompanying notes 117-35.

63. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 120 (Philadelphia, P.H. Nicklin, 1829).

of states to make it obligatory, probably from a growing sense, that it is wholly unnecessary."<sup>64</sup> Although the 1839 edition is silent on the subject,<sup>65</sup> by 1848 Bouvier's *Law Dictionary* recorded that TONA "has been recommended by Congress, but it has not been ratified by a sufficient number of states to make a part of the constitution."<sup>66</sup>

But the amendment continued to appear as part of the Constitution in official and unofficial publications well into the second half of the nineteenth century.<sup>67</sup> Although its appearance in the Bioren edition has been described as already an anachronism,<sup>68</sup> a new edition of *Statutes at Large* was not authorized until 1845.<sup>69</sup> TONA could be—and was—easily transcribed into other publications, thus perpetuating the erroneous belief that the amendment had become part of the Constitution. The most prolific of those publications—both in terms of impact and distribution—is said to have been textbooks,<sup>70</sup> but many

64. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1346 (Boston, Hilliard Gray, 1833).

65. See 2 JOHN BOUVIER, LAW DICTIONARY 182-83 (Philadelphia, T. & J.W. Johnson, 1839).

66. 2 JOHN BOUVIER, LAW DICTIONARY 211-12 (Philadelphia, T. & J.W. Johnson, 3rd ed., 1848).

67. One should note that the Pattersons' noble aspirations and connections also endured into the second half of the 19th century and beyond. As late as 1870, turmoil in France led one newspaper to suggest that "[i]t would be a piece of poetic justice if Time should balance the account" of the Pattersons. *The American Bonapartes: The Imperial Family of France and its Connections in Baltimore*, BALTIMORE SUN, Jan. 19, 1870, at 4. See also *supra* note 44.

68. See Earle, *supra* note 44, at 37.

69. See Resolution of March 3, 1845, 5 Stat. 798 (1845). Colvin's error was corrected in the new edition. See Amendments to the Constitution, 1 Stat. 21 (1845).

70. See Conklin, *supra* note 54, at 126. Apparently textbooks in the nineteenth century were no more reliable than they are in the twentieth century. See, e.g., *Textbooks Offer Up Scrambled History*, CHI. TRIB., Nov. 10, 1991, §1, at 6 (citing errors such as that President Harry Truman ended the Korean War by dropping an atomic bomb, Napoleon Bonaparte was victorious at Waterloo, and Sputnik was "the first successful intercontinental ballistic missile launched by the Soviet Union [and] carried a nuclear warhead"). See generally JAMES W. LOEWEN, LIES MY TEACHER TOLD ME (1995).

Examples given by AMES, *supra* note 16, at 189 n.2 are: JOHN FROST, A HISTORY OF THE UNITED STATES 318 (2d ed., Philadelphia, Thomas Cowperthwait, 1843); B.J. OLNEY, A HISTORY OF THE UNITED STATES 287 (New Haven, Durrie & Peck, 1840); CONSTITUTION OF THE UNITED STATES OF AMERICA (New York, Francis Hart & Co., n.d.).

Other publications that included TONA are: JOSEPH COE, THE TRUE AMERICAN 25 (Concord, I.S. Boyd, 1841); EDWARD CURRIER, THE POLITICAL TEXT BOOK 129 (Holliston, Mass., W. Blake, 1841); JOHN S. HART, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 100 (Philadelphia, W. H. Butler & Co., 1850); 2 SAMUEL MAUNDER, THE HISTORY OF THE WORLD: 462 (New York, Henry Bill, 1850); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 89 (Boston, Marsh, Capen & Lyon, 1832); HENRY POTTER, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 404 (2d ed., Raleigh, J. Gales & Son, 1828); M. SEARS, THE AMERICAN POLITICIAN 27 (Boston, E. Leland & W.J. Whiting, 1842).

official state and territorial publications, as well as the press, also legitimated TONA.<sup>71</sup>

Only one court ever has examined the substance of TONA,<sup>72</sup> and even then only tangentially. In *Afroyim v. Rusk*,<sup>73</sup> the Supreme Court briefly examined the circumstances surrounding the proposal of TONA in order to determine if they provided any guidance as to whether Congress could enact a law stripping an American of his citizenship without a voluntarily renunciation.<sup>74</sup> The Court held contemporary judgments about TONA to be inconclusive, but noted that the 14th Amendment since had settled the issue.<sup>75</sup> In dissent, Justices Harlan, Clark, Stewart, and White examined TONA in slightly greater detail, but also concluded that the "obscure enterprise" of 1810 did not "offer any significant guidance for solution of the important issues now before us."<sup>76</sup>

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But not all publications of the era erroneously included TONA, even if they contained other errors. See, e.g., THE PATRIOT'S MANUAL 38-42 (Jesse Hopkins, ed., Utica, William Williams, 1828) (including all twelve of the amendments sent out by the First Congress in 1789 as if ratified). See also *infra* text accompanying note 105.

71. See *Chronicle*, NILES' WEEKLY REG. May 19, 1821, at 191; *Constitution of the U. States*, NILES' WEEKLY REG., June 16, 1821, at 255 (retracting claim that TONA was ratified). See also *infra* at note 75.

72. At least two courts in recent years have addressed claims that TONA was ratified. One court has dismissed with prejudice a claim demanding the "restoration" of TONA. See *Smith v. United States President*, No. 95-2306, at 1 (D. Conn. Nov. 5, 1996), (LEXIS, News Library, Clt file) ("[P]laintiff seeks to restore the 'missing' Thirteenth Amendment to the United States Constitution; he states that the Thirteenth Amendment prohibits any advantage or privilege that would grant some citizens an unequal opportunity to achieve or exercise political power, was ratified to ensure political equality among all American citizens."). A further court rejected a collateral attack based on TONA. See *Anderson v. United States*, No. 97 C 2805, 1998 WL 246153, at \*3 (N.D. Ill. Apr. 27, 1998) ("Mr. Anderson claims that no lawyer or member of Congress is a citizen of the United States because the penalty for violation of the 'Original' Thirteenth Amendment ('claiming a title of nobility') is loss of citizenship. . . . These arguments may be amusing to some but are meritless and must be rejected.").

73. 387 U.S. 253 (1967).

74. See *id.* at 258-59 (citing Representative Republican Richard C. Anderson, Jr. of Kentucky:

The introduction of this article declares the opinion . . . that Congress could not declare the acts which should amount to a renunciation of citizenship; otherwise there would have been no necessity for this last resort. When it was settled that Congress could not declare that the acceptance of a pension or an office from a foreign Emperor amounted to a disfranchisement of the citizen, it must surely be conceded that they could not declare that any other act did.

31 ANNALS OF CONG. 1038 (1818)).

75. See 387 U.S. at 262-63.

76. *Id.* at 279 (Harlan, J., dissenting). The dissent repeats the error of Ames and other scholars, that TONA fell only one state short of ratification. See *id.* at 278. See also *infra* text accompanying notes 114-35.

In 1993, David Dodge and other extremists requested that the Acting Archivist of the National Archives and Records Administration (NARA) certify that TONA had become part of the Constitution.<sup>77</sup> The Acting General Counsel, Christopher M. Runkel, concluded that NARA had no authority to certify that TONA had become part of the Constitution.<sup>78</sup> First, he concluded that the authority of NARA to certify an amendment under 1 U.S.C. § 106b<sup>79</sup> was limited to situations in which NARA had received "official notification" from at least three-quarters of the states then in existence.<sup>80</sup> Second, Runkel concluded that NARA lacked the authority to determine whether, as a matter of law, TONA actually had become part of the Constitution.<sup>81</sup> NARA's authority is limited to determining whether sufficient notices of ratification have been received from the states, and does not extend to an amendment's validity.<sup>82</sup>

## II. CONSTITUTIONAL NONSENSE

Although the claim of TONA proponents that the amendment was suppressed by a conspiracy of lawyers, bankers, and foreign interests<sup>83</sup> can be dismissed instantly as frivolous,<sup>84</sup> their claims as to why TONA was ratified deserve some attention, if only to demonstrate why they are meritless. The first claim is grounded on the fact that TONA was included in numerous publications in the nineteenth century, including state compilations of law.<sup>85</sup> If so many publications

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77. See Memorandum from Christopher M. Runkel, Acting General Counsel, National Archives and Records Administration, to Michael J. Kurtz, Acting Assistant Archivist for the National Archives 2 (May 17, 1994) (on file with Author). For the reasons why Dodge, et al. claimed TONA had been ratified, see Part II, *infra*.

78. See *id.*

79. Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

80. See *id.* at 2-4. See also text accompanying *supra* notes 117-35.

81. Runkel, *supra* note 77, at 4.

82. See *id.*

83. See *infra* note 150.

84. See Conklin, *supra* note 54, at 127 ("Just who these conspirators were is never revealed.").

85. A supplement attached to Dodge, *The Missing 13th Amendment*, *supra* note 24, by Bob "Barefoot Bob" Hardison claims that TONA proponents have found it included in 78 official publications by 24 states and territories between 1818 and 1873. Hardison has been described as "easy to classify . . . as a crackpot after a look at his bare-bones existence and a read through his online ramblings about the U.S. Constitution and survival." See Cynthia Taggart, 'Barefoot Bob'

included TONA, so the claim goes, TONA must actually have become part of the Constitution.<sup>86</sup> The second claim is grounded on the fact that the amendment was included in a state compilation of law,<sup>87</sup> the publication of which was authorized by the Virginia legislature on March 12, 1819.<sup>88</sup> If Virginia published TONA, so the claim goes, Virginia must have actually ratified TONA.<sup>89</sup>

First, in the late eighteenth and early nineteenth centuries, there was frequent confusion about whether proposed amendments had become part of the Constitution.<sup>90</sup> "At that time no legal procedure existed to control the communication of action by States to the Federal Government. . . . Uncertainty as to the status of [TONA] continued for eight years."<sup>91</sup> The Eleventh Amendment became effective on February 7, 1795, but was not acknowledged by President John

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*Boasts Worldwide Audience*, SPOKESMAN-REV. (Spokane, WA), Mar. 19, 1997, at B1. Although this Author has not attempted to confirm every publication cited by TONA proponents, there is no doubt that TONA for many years was published as part of the Constitution by some states and territories. One late example is GENERAL STATUTES OF THE STATE OF KANSAS 19 (Lawrence, John Speer, 1868) which includes the actual Thirteenth Amendment of 1865 as the Fourteenth Amendment.

86. "Maybe you can show them that the . . . legislatures which ordered it published . . . consisted of ignorant politicians who don't know their amendments from their . . . [sic] ah, articles. . . . Maybe. But before you do, there's an awful lot of evidence to be explained." See Dodge, *Part II*, *supra* note 22, at 119. Some TONA proponents apparently apply this same reasoning to conclude that the infamous anti-Semitic forgery, *Protocols of the Learned Elders of Zion*, is genuine. See Mike Lafferty, *Disaffected Citizens Trying to Take Law Into Their Own Hands*, COLUMBUS DISPATCH, Dec. 17, 1995, at 1A. See also *supra* note 29. Alleged links between lawyers, titles of nobility, and Jews are not new. See RUTLAND, *supra* note 2, at 146 (Pennsylvania Antifederalists identified Federalists as being "shopkeepers, packhorsemen, half pay officers, Cincinnati, attorneys at law, public defaulters, and Jews").

87. 1 THE REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 30 (Richmond, Thomas Ritchie, 1819).

88. "Be it enacted by the General Assembly, that there shall be published an edition of the Laws of this Commonwealth in which shall be contained the following matters, that is to say: The Constitution of the United States and the amendments thereto." ACTS PASSED AT THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 50 (Richmond, Thomas Ritchie, 1819), *microformed on* Session Laws of American States and Territories, Virginia, Commonwealth, 1776- 1899 (RIR).

89. "In this fashion, Virginia announced the ratification: by publication and dissemination of the Thirteenth Amendment to the Constitution." See Dodge, *Part II*, *supra* note 22, at 119 (emphasis omitted). In fact, Virginia rejected TONA on February 14, 1811. See *supra* text accompanying note 53. An interesting historical parallel lies in the seven Virginia Resolves of 1765, of which the House of Burgesses ultimately only adopted four, but virtually every American printer printed as if all had passed. See COLONIES TO NATION, 1763-1789 59 (Jack P. Greene ed. 1975).

90. See, e.g. *The Presidency—National Conventions*, *supra* note 46, at 166; *Chronicle*, *supra* note 71, at 191; *Constitution of the U. States*, *supra* note 71, at 255.

91. VIRGINIA COMMISSION, *supra* note 13, at 111-12.

Adams as being in effect until January 8, 1798.<sup>92</sup> Similarly, President Thomas Jefferson's Secretary of State, James Madison, did not declare the Twelfth Amendment in effect until more than three months after it became part of the Constitution.<sup>93</sup> Even in 1845, the editors of United States Statutes at Large were unsure exactly when the Eleventh and Twelfth Amendments had been ratified.<sup>94</sup>

In addition, TONA may have been propagated because of how Congress adopted organic acts for territories. When territories were organized, Congress passed an organic act to establish a government for the territory. Not only were organic acts for new territories based on those for older territories,<sup>95</sup> but the laws of the territory itself often were copied from other states or territories.<sup>96</sup> Even if the compilers of a territorial code noticed TONA, and were doubtful as to its validity, there was relatively little they could do; in the early nineteenth century, "precise knowledge [about the Constitution] simply was not common."<sup>97</sup>

Furthermore, despite the volume of citations in state compilations of law that have been collected by TONA proponents, for every time that TONA was published, there were far more occasions upon which it was not published. Sixteen of the thirty-eight states that joined the Union by 1879, including half of the states that ratified the amendment, are not alleged to have published TONA even once.<sup>98</sup> TONA proponents also concede that many states noted that when TONA had been published its inclusion was in error; New York's code in 1829 noted that:

92. See *id.* at 85.

93. See *id.* at 87.

94. The Eleventh Amendment is noted to have been ratified "before 1796" and the Twelfth Amendment "before September, 1804." Amendments to the Constitution, 1 Stat. 21 (1845).

95. Although an increasing amount of detail was added over time, there is a clear evolution among organic acts such as Act of May 30, 1854, 10 Stat. 283 (1854) (organizing Kansas); Act of June 12, 1838, 5 Stat. 235 (1838) (organizing Iowa); Act of April 20, 1836, 5 Stat. 10 (1836) (organizing Wisconsin); Act of Feb 3, 1809, 2 Stat. 514 (1809) (organizing Illinois); Act of Jan. 11, 1805, 2 Stat. 309 (1805) (organizing Michigan); and Act of May 7, 1800, 2 Stat. 58 (organizing Indiana).

96. For example, sections of the Oklahoma code were copied from Indiana, Kansas, and Dakota (which in turn were copied in part from California). See *Evolution of Oklahoma Statutes*, in 1 OKLAHOMA STATUTES ANNOTATED, xv (1997). Sections of the Oregon code were taken "word for word" from New York. See *Advertisement*, STATUTES OF OREGON, at 3 (Oregon, Ashael Bush, 1855).

97. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 84 (1986).

98. See "Barefoot Bob" supplement to Dodge, *The Missing 13th Amendment*, *supra* note 24.

In the edition of the Laws of the U.S. before referred to [the Bioren edition], there is an amendment printed as article 13, prohibiting citizens from accepting titles of nobility or honor, or presents, offices, &c. from foreign nations. But, by a message of the president of the United States of the 4th of February, 1818, in answer to a resolution of the house of representatives, it appears that this amendment had been ratified only by 12 states, and therefore had not been adopted.<sup>99</sup>

By the late nineteenth and early twentieth centuries, it was commonly recognized that TONA had not become part of the Constitution.<sup>100</sup>

A second response is that the publication of an amendment as part of the Constitution in a compilation of state law cannot serve as a ratification. The publication of an amendment as part of the Constitution at most indicates that the publisher who compiled the statutes of a state on behalf of the state legislature thought that it was part of the Constitution; after all, the official edition of United States Statutes at Large included the amendment,<sup>101</sup> and there were few secondary sources of consequence until the 1820s.<sup>102</sup> Many publishers, public and private, in fact gave scant attention to the Constitution: "[T]here were often grave mistakes in copying."<sup>103</sup> The textbooks that glorified it "contained all sorts of inaccuracies about the Constitution",<sup>104</sup> at least one textbook included not only TONA but all twelve of the amendments sent out by the First Congress in 1789 as if ratified.<sup>105</sup>

99. 1 REVISED STATUTES OF THE STATE OF NEW-YORK, PASSED DURING THE YEARS ONE THOUSAND EIGHT HUNDRED AND TWENTY-SEVEN, AND ONE THOUSAND EIGHT HUNDRED AND TWENTY-EIGHT 23 (Albany, John Duer, B.F. Butler, John C. Spencer, 1829). See Dodge, *Part II*, *supra* note 22, at 120-21. See also STATUTES OF OREGON, *supra* note 96, at 23; *infra* note 116.

100. See, e.g., Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1010 n.10 (1939) ("Colvin . . . made the serious mistake . . . of including a thirteenth amendment . . . which had not been ratified, and which never was subsequently ratified.").

101. See Conklin, *supra* note 54, at 126.

102. See Kammen, *supra* note 97, at 77.

103. *Id.* at 24 (quoting 1 BEN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* iii (Washington, D.C., Government Printing Office, 1877)).

104. Kammen, *supra* note 97, at 3-4. Indeed, if one believes that TONA became part of the Constitution merely because it was frequently published, one should immediately mount an expedition to find Buss Island, a "phantom" island in the North Atlantic which appeared on maps from 1592 until 1856. See DONALD S. JOHNSON, *PHANTOM ISLANDS OF THE ATLANTIC* 80 (1994). Buss Island had its own conspiracy theorists; in 1770, an anonymous author accused the Hudson's Bay Company of keeping its location a secret in order to maintain financial control over it. See *id.* at 90.

105. See ENMA WILLARD, *HISTORY OF THE UNITED STATES* xxx-xxxii, 284, (New York, White, Gallaher & White, 1829).

Although the first statute governing the process for ascertaining the ratification of constitutional amendments was drafted in response to the confusion over the status of TONA,<sup>106</sup> the statute cannot be presumed to have retroactive effect.<sup>107</sup> But the Supreme Court has ruled that “the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution,” not the people of a state.<sup>108</sup> Constitutional amendments may be ratified by a vote of the state legislature or by convention, as Congress may specify under Article V of the Constitution, and by no other method, such as a referendum.<sup>109</sup> The Court’s evident instruction in *Hawke v. Smith* is that any departure from constitutional requirements to comport with state legislative processes is invalid: “[R]atification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.”<sup>110</sup>

The act of the Virginia legislature authorizing the 1819 publication of the Constitution as well as the laws of the Commonwealth was an ordinary act of legislation, signed by the Governor, that incorporated no mention of any new amendments to the Constitution.<sup>111</sup> In contrast, “the 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 . . . .”<sup>112</sup> Therefore, although the ratification of an amendment through its inclusion in a compilation of state law

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106. Act of April 20, 1818, 3 Stat. 439 (1818); its successor is today codified at 1 U.S.C. § 106b. See VIRGINIA COMMISSION, *supra* note 13, at 111-12.

107. See, e.g., *Landsgraf v. USI Film Products*, 511 U.S. 244, 264 (1994).

108. *Hawke v. Smith*, 253 U.S. 221, 230 (1920).

109. See *id.* at 227.

110. *Id.* at 229. But see *Coleman v. Miller*, 307 U.S. 433, 446-47 (1939) (expressing no opinion as to whether a Lieutenant Governor, as the presiding officer of a state Senate, could cast his vote to break a tie on an amendment). One should also note that TONA proponents are cut from the same mold as extremists who, in contrast, adopt a restrictive view of the constitutional amendment process and claim that the Sixteenth Amendment was not ratified because of variations in spelling and capitalization among state ratifications. See Braun, *supra* note 23, at A1; Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 302 (1997). But there are at least seven different versions of TONA in terms of capitalization alone among the state ratifications on file at the National Archives. See *Unratified Amendments*, *supra* note 52.

111. See *supra* note 88.

112. *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (rejecting claim that Nineteenth Amendment was not ratified).

authorized by ordinary legislation would not be a constitutional procedure in any case, in this case the publication was not even intended to be a ratification.<sup>113</sup>

Virginians in later years also questioned how in 1819 the conclusion could have been drawn that TONA had been ratified. On August 1, 1849, C. Robinson and J.M. Patton, who were preparing a revised edition of the laws of Virginia, wrote to William B. Preston, Secretary of the Navy,<sup>114</sup> and noted that although TONA was included in the Revised Code of 1819, "[w]e are satisfied that this amendment was never adopted, though it is difficult to account for the fact that it should have been put into the Code of 1819 as an amendment which had been adopted."<sup>115</sup> The revised code noted that the previous publication was in error.<sup>116</sup>

Further, even if TONA was ratified by Virginia, the state was never in a position to make TONA part of the Constitution. This crucial fact has been overlooked by virtually every scholar, since and

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113. One should note that even though Virginia did not do so, the prevailing view is that Virginia could have reconsidered its rejection of TONA, see *supra* text accompanying note 53, and ratified TONA. Cf. Bernstein, *supra* note 19, at 547. In recent years, the Twenty-seventh Amendment was ratified by New Jersey in 1992, after rejecting it in 1789, and by New Hampshire in 1985, after rejecting it in 1790. See *id.* The Fourteenth Amendment, Fifteenth Amendment, and Sixteenth Amendment also became part of the Constitution on the basis of ratifications by states that previously had rejected them. See CONG. RESEARCH SERV. The Constitution of the United States of America—Analysis and Interpretation, S. DOC. NO. 103-6 (1996), *supra* note 20, at 30-34. The validity of such ratifications was held a political question in *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

One should also note that NARA has declined to decide whether Virginia ratified TONA, both because NARA lacks the power to do so and because NARA need not do so as long as the number of ratifications received by TONA remains at a total far from 38. See Runkel, *supra* note 77, at 4-5.

114. The son of James P. Preston, Governor of Virginia 1816-19. See 5 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 446 (New York, J.T. White ed., 1907) (1891).

115. Unratified Amendments, *supra* note 52. Preston relayed their letter to the State Department. John M. Clayton, Secretary of State, responded on October 10, 1849, noting the dates of state action upon TONA; that no copy of the amendment, claiming to be part of the Constitution, had been deposited with the State Department; and that the amendment did not appear in a copy of the Constitution printed under the direction of the State Department in 1820. See *id.* Clayton's letter omitted Massachusetts' ratification, which although reported by Monroe, see *supra* text accompanying note 52, is not in the file today available at the National Archives. See Unratified Amendments, *supra* note 52. In 1815, Colvin had noted that the file of the Secretary of State—presumably the predecessor of the file now at the Archives—was incomplete. See *supra* text accompanying note 58. One hundred and fifteen years later, Virginians would again confirm that TONA had not become part of the Constitution. See *infra* note 119.

116. See THE REVISED CODE OF VIRGINIA, WITH THE DECLARATION OF INDEPENDENCE AND CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF RIGHTS AND CONSTITUTION OF VIRGINIA 30 (Richmond, William F. Ritchie, 1849). Cf. *supra* note 99.

including Ames, who has written on the amendment. The common refrain has echoed Ames' claim that "[t]he amendment lacked only the vote of one State of being adopted"<sup>117</sup>—an error which has been exploited by TONA proponents.<sup>118</sup> Only the authors of the Virginia Commission compilation correctly observed that on the date Monroe wrote to Congress to report the status of TONA, fifteen ratifications would have been required to make it part of the Constitution.<sup>119</sup>

When TONA was submitted to the states in 1810, 17 states were members of the Union; 13 ratifications were required to make the amendment part of the Constitution.<sup>120</sup> But Louisiana was admitted to the Union on April 30, 1812; the number of state ratifications required to make TONA part of the Constitution thus rose to 14. Prior to that date TONA had received only 11 ratifications,<sup>121</sup> so it was never a single ratification short of immortality. New Hampshire ratified TONA on December 12, 1812,<sup>122</sup> again placing the amendment within two states of becoming part of the Constitution. But Indiana was admitted to the Union on December 11, 1816, and was followed by Mississippi on December 10, 1817 and Illinois on December 3, 1818, with no further ratifications emerging. By 1819, therefore, the threshold was 16 ratifications, and TONA fell four states short. If Virginia ratified at any time, it did not matter, but by 1819 it was far too late.

Article V of the Constitution does not specify whether the states that are to ratify an amendment are those in existence when an

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117. AMES, *supra* note 16, at 188. See also RICHARD BERNSTEIN, *AMENDING AMERICA* 178 (1993); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS* 117 (1996); NORTON, *supra* note 3, at 90; Conklin, *supra* note 54, at 122, 125; Dwan & Feidler, *supra* note 100, at 1010 n.10; Paul Kedrosky, *Unlucky for Some*, *ECONOMIST*, July 4, 1998, at 25; Morton Keller, *Failed Amendments to the Constitution*, *THE WORLD & I*, Sept. 1987, at 89; David Lightman, *Politicians Try Constitutional Amendments Again*, *HARTFORD COURANT*, Apr. 23, 1996, at A2 (citing Morton Keller); Meisel, *supra* note 23 (citing Howard Eisenberg); Roche, *supra* note 50, at 335. Ironically, Conklin states that the history of TONA should "remind us that we cannot always assume that what is published is true or necessarily accurate, even if it is 'official,'" even while making such an error himself. Conklin, *supra* note 54, at 127.

118. Dodge claims, "Can you imagine, can you understand how close we came to having a political paradise, right here on Earth? Do you realize what an extraordinary gift our forebears tried to bequeath us? And how close we came? One vote. One state's vote." Dodge, *Part I*, *supra* note 22, at 117.

119. See VIRGINIA COMMISSION, *supra* note 13, at 112. See also Runkel, *supra* note 77, at 1; Bernard J. Sussman, Letter to the Editor, *Lawyers Remain American Citizens*, *MONTGOMERY ADVERTISER*, June 24, 1996, at 9A.

120. See U.S. CONST. art. V.

121. See *supra* text accompanying note 52.

122. See *id.*

amendment is submitted to the states, or also includes those that join the Union after the amendment has been submitted to the states but prior to ratification. History, however, provides an answer. When the Bill of Rights was submitted to the states on September 25, 1789, only 11 states were operating under the Constitution; each amendment then required 9 ratifications to become part of the Constitution. But North Carolina ratified the Constitution on November 21, 1789 and Rhode Island on May 29, 1790, raising the number of ratifications required to 10.<sup>123</sup> Vermont then joined the Union on March 4, 1791,<sup>124</sup> raising the number of ratifications required to 11.<sup>125</sup> The official notice of the ratification of the Bill of Rights was not issued by Secretary of State Thomas Jefferson until March 1, 1792, after notices of ratification had been received from 11 states.<sup>126</sup>

On March 2, 1797, before the Eleventh Amendment was known to have become part of the Constitution,<sup>127</sup> Congress passed a resolution requesting the President to obtain information from states about what action they had taken on the amendment, including Tennessee, which had not been part of the Union when the amendment was proposed.<sup>128</sup> On October 16, 1797, Secretary of State Timothy Pickering wrote to Tennessee Governor John Sevier, enclosing a copy of the Eleventh Amendment.<sup>129</sup> Pickering stated that he thought it "expedient to transmit . . . a copy of the resolution, to be laid before the legislature of Tennessee, for their adoption or rejection."<sup>130</sup> The principle that new states are to be included in the ratification process of a

123. See Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONSTITUTIONAL COMMENTARY 101, 102 n.6 (1994). On September 24, 1789, when the House of Representatives transmitted to the Senate the twelve amendments to be submitted to the states in final form, it also passed a resolve, requesting "the President of the United States to transmit to the Executives of the several States which have ratified the constitution, copies of the amendments proposed by Congress to be added thereto; and like copies to the Executives of the States of Rhode Island and North Carolina." The Senate concurred. See 1 ANNALS OF CONG. 947-48 (Joseph Gales ed., 1789).

124. Vermont was admitted to the Union "as a new and entire member of the United States of America." Act of Feb. 8, 1791, 1 Stat. 191 (1791).

125. See ROBERT J. WAGMAN, *THE FIRST AMENDMENT BOOK* 41 (1991).

126. See BERNARD SCHWARTZ, *ROOTS OF THE BILL OF RIGHTS* 1202-03 (1980) (citing *First Things First*, HARPER'S, June 1963, at 43). Vermont's notice was the last to be received by President George Washington, although it was not the last state to ratify; its ratification was communicated to Congress on January 18, 1792. See 2 ANNALS OF CONG. 328 (1792).

127. See *supra* text accompanying note 92.

128. See Resolution of March 2, 1797, 1 Stat. 519 (1797).

129. See Letter from Timothy Pickering to John Sevier (Oct. 16, 1797), in *THE TIMOTHY PICKERING PAPERS* § 312-13 (Frederick S. Allis, Jr. & Roy Bartolomei, eds., 1966). See also LESTER BERNHARDT ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 74 (1942).

130. *Id.* at §312.

constitutional amendment has continued into the twentieth century. When New Mexico and Arizona joined the Union in 1912, the number of states required to ratify the Sixteenth Amendment increased to 36, which they were among.<sup>131</sup>

If to become part of the Constitution an amendment required only the number of ratifications that were required when it was first submitted to the states, the constitutional history of the United States would be very different.<sup>132</sup> The Congressional Apportionment Amendment, the original First Amendment, received ten ratifications; it would be part of the Constitution.<sup>133</sup> Similarly, the Twenty-seventh Amendment would not have become part of the Constitution in 1992 when it received its thirty-eighth ratification, but rather in 1983 when it received its ninth ratification.<sup>134</sup> Further, if only states that were

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131. The amendment was submitted to the states on July 12, 1909; New Mexico joined the Union on January 6, 1912 and ratified on February 3, 1913; Arizona joined the Union on February 14, 1912 and ratified on April 3, 1912. See CONG. RESEARCH SERV. THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, *supra* note 20, at 34 (1996); Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329, 387-388 & n.486 (1996). See also *infra* note 134.

132. Dodge claims that “to involve every new state in each on-going ratification could inadvertently slow the nation’s growth. . . . Neither possibility could appeal to politicians. . . . [I]t’s apparent that even the new states agreed that they should not be included in the ratification process.” Dodge, *Part III, supra* note 22, at 53. Even if politicians so believed—and Dodge offers no evidence that they did other than the fact that John Quincy Adams did not consult states that joined the Union after 1810, see *supra* note 52—convenience cannot override the Constitution. “The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.” *INS v. Chadha*, 462 U.S. 919, 959 (1982).

133. The amendment was ratified by Maryland, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Vermont, and Virginia. See Schwartz, *supra* note 126, at 1203. See also *supra* note 20.

134. Cf. Runkel, *supra* note 76, at 3-4 (citing *Congressional Pay Amendment*, 16 Op. Off. Legal Counsel 100, 101 (1992), available in Westlaw, 1992 WL 479546). According to official sources, Maine was the ninth state to ratify the amendment, on April 27, 1983. See Don J. DeBenedictis, *27th Amendment Ratified*, A.B.A. J., Aug. 1992, at 26. The amendment previously was ratified by Delaware, Maryland, North Carolina, Ohio, South Carolina, Vermont, Virginia, and Wyoming. See *id.* But it has been discovered that, in an action not reported to Congress, Kentucky ratified the amendment, along with the rest of the amendments submitted to the states by Congress in 1789, on June 27, 1792. See KYVIG, *supra* note 117, at 464, 545. See also Gregory D. Watson, A Petition Of Gregory D. Watson of Austin, TX (Sept. 8, 1997) (unpublished petition, on file with the Author) (citing ACTS PASSED AT THE FIRST SESSION OF THE GENERAL ASSEMBLY, FOR THE COMMONWEALTH OF KENTUCKY 25-27 (Lexington, John Bradford 1792)). Although this discovery leaves open the possibility that other “missing” ratifications of amendments may exist, Kentucky’s ratifications were or proved to be superfluous. Kentucky’s ratifications also provide additional support for the principle that, since the earliest days of the Union, newly admitted states have been entitled to ratify pending constitutional amendments.

eligible to vote on an amendment when it was submitted to the states are ever eligible to vote on that amendment, the constitutional history of the United States would be even more dramatically different. Only eight of the eleven states operating under the Constitution when the Bill of Rights was submitted to the states voted to ratify it in the eighteenth century; if states admitted later were not eligible to ratify it, then the Bill of Rights did not become part of the Constitution until 1939, when Connecticut, Georgia, and Massachusetts ceremonially ratified the first ten amendments,<sup>135</sup> marking the 150th anniversary of their drafting. Not even the most extreme of extremists appears to have put forward such a claim.

### III. TITLES OF NOBILITY

At this point, one might ask: So, why does it matter that the extremist fringe puts forward false claims about TONA? "To the unschooled, it can all sound real."<sup>136</sup> One should pause and remember that the vast majority of the American public knows very little about the Constitution.<sup>137</sup> If even law professors and Supreme Court Justices cannot be relied upon to write about the amendment accurately,<sup>138</sup> why should the public or the media be expected to know what to believe?<sup>139</sup> Furthermore, the little attention the legal press has

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135. See S. Doc. No. 103-6, *supra* note 20, at 25. But see *Suability of States*, 1 AMERICAN STATE PAPERS, Class X, Misc., 156 (Walter Lowrie and Walter S. Franklin, eds. 1834), *microformed on* CIS No: ASP038 (Cong. Info. Serv.) (A House of Representatives committee reported on Feb. 21, 1797 that the ratification of an additional state "would be sufficient to remove all doubts on the subject of the [Bill of Rights].").

136. Braun, *supra* note 23, at A13 (quoting Stephen Presser). See also John Vile, *Explicit and Authentic Acts*, 14 CONST. COMMENTARY 416, 423 n.42 (1997) (book review) ("This issue is assuming increased importance as various far-right wing groups have alleged that the amendment was adopted . . .").

137. A Hearst Corporation survey taken in late 1986, just prior to the Constitution's bicentennial, found that 46% percent of the adult American population do not know that the purpose of the original Constitution was to create a federal government and define its powers; 26% believed that its purpose was to declare independence from England; and 10% believed that it was intended to create the 13 original states. A majority (59%) did not know what the Bill of Rights was. Nearly half the public (49%) erroneously thought that the President can suspend the Constitution. See Michael Kammen, *Refuting Some Common Myths*, ST. PETERSBURG TIMES, May 31, 1987, at 1D, available in LEXIS, News Library, STPETE File.

138. See *supra* notes 76, 117. Cf. Kate Zernike, *Supreme Court Justice Returns to Class*, BOSTON GLOBE, May 2, 1996, at 29 (Justice Breyer implies that there are 26 amendments to the Constitution).

139. See, e.g., Brian Bourque, *13th Amendment Changes Claimed*, BATON ROUGE ADVOC., May 20, 1992, at 3B, available in Westlaw, 1992 WL 4962398 (quoting "a self-proclaimed student of the Constitution": "[i]f the U.S. Constitution's 13th Amendment reflected its original intent, lawyers would be prohibited from serving in public office"); Jerry Schnoebelen, *The Missing*

given to TONA proponents has tended to treat them as lovable rogues,<sup>140</sup> rather than recognizing that they have close ties to extremist groups and are advocates of violence.<sup>141</sup> TONA proponents are part a movement that threatens civil liberties and civil rights, using constitutional nonsense as a weapon.

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*Original 13th Amendment*, RIVER CITIES' READER (Davenport, Iowa), June 4, 1997, at 6, available at (last modified Mar. 6, 1997) <<http://www2.rcreader.com/rcreader/gate4.HTM>> (David Dodge is credited with "additional reporting"; in fact, whole passages are lifted almost verbatim from his articles). See also Pearson, *supra* note 26, at A4 (TONA approved by Congress in 1811); Adam Clymer, *Congress Fiddles While Flags Don't Burn*, N.Y. TIMES, June 11, 1995, § 4, at 5 (10 states ratified TONA); Betty Parham & Gerrie Ferris, *Q & A on the News*, ATLANTA J. & CONST. May 14, 1992, at A2 (TONA would allow U.S. citizens to become kings); Myron S. Waldman & Marie Cocco, *Bush Answers the Court*, NEWSDAY, June 28, 1989, at 5 (TONA approved by Congress "approx. 1811"); *Constitution of the U. States*, *supra* note 71, at 255 (TONA failed by one state). The *Washington Post*, however, recently opened an editorial by noting that "[g]enerally speaking, constitutional amendments are a tough sell. In fact, states still haven't ratified the one that Congress passed in 1810 barring U.S. citizens from accepting titles of nobility from foreign governments." Guy Gugliotta, *A Noble Attempt to Amend the Constitution*, WASH. POST, July 1, 1997, at A17.

140. Someday, the constitutional vision of the cyberpatriots may be the law of the land. If it is, it will be both bad news and good news for lawyers. The bad news is that we will all be destitute, disgraced and despised. The good news is that it will be a lot easier to buy the weapons needed to protect ourselves from our new leaders.

William C. Smith, *The Law According to Barefoot Bob*, A.B.A. J., Nov. 1996, at 112. Preliminary research for this Article, however, presented as an "FAQ" (Frequently Asked Questions) entitled *The Real Titles of Nobility Amendment FAQ*, (last modified June 19, 1997) <<http://www.nyx.net/~jsilvers/nobility.html>>, was cited in Ralph H. Brock, *"The Republic of Texas Is No More": An Answer to the Claim That Texas was Unconstitutionally Annexed to the United States*, 28 TEX. TECH. L. REV. 679, 698 n.85 (1997), and in James W. Paulsen, *If at First You Don't Secede: Ten Reasons Why the "Republic of Texas" Movement Is Wrong*, 38 S. TEX. L. REV. 801, 802 n.7 (1997).

141. Alfred Adask, publisher of *AntiShyster*, describes lawyers as "punks, weaklings, con artists and losers," and says that more than half of his estimated 45,000 readers are members of the so-called patriot movement. See Mike France, *Patriot Movement Has Lawyers in Its Sights*, NAT'L L.J., May 8, 1995, at A1. In March 1995, Adask was a speaker at "Preparedness Expo '95," along with Mark Koernke, one-time leader of the Michigan Militia, who has been linked to convicted Oklahoma City bomber Timothy McVeigh; and James "Bo" Gritz, the Vice Presidential candidate of the Populist Party ticket headed by David Duke, who has been linked to the Ku Klux Klan, see *id.*, and as of this writing awaits trial on kidnapping charges. See Associated Press, *Ruby Ridge, Freeman Negotiator Charged in Kidnap Attempt*, Sept. 30, 1996, available in Westlaw, 1996 WL 4442470. Conklin, the author of a previous article on the "missing thirteenth amendment," see *supra* note 54, has stated that "[s]everal members of America's 'Far Right' have phoned me, written me, and even threatened me about this. Our University policy [sic] tried to pursue the threat on my life, but they were unable to trace the long distance phone call beyond the state of Virginia." Electronic mail from Curt E. Conklin to Jol A. Silversmith (Jan. 13, 1997) (on file with Author). See also Susan Hansen, *A Rule of Their Own*, AM. LAWYER, May 1996, at 53 (Ohio Attorney General "sentenced" to death for giving "lawful status to a privileged class of nobility"); Pearson, *supra* note 26, at A4 ("cop-killer" alleged he acted lawfully because under TONA policeman was illegally in office).

In some cases, their constitutional nonsense is based on misuse of conventional legal premises in an attempt to deceive the layman as well as the inattentive professional.<sup>142</sup> For example, an opinion frequently cited by TONA proponents is that of Judge Saffold in *Horst v. Moses*.<sup>143</sup> In that case, state law authorized the Mobile Charitable Association to operate various gambling games on behalf of the common school fund of Mobile County.<sup>144</sup> Saffold wrote that by granting the Association this privilege, denied to all others in the state, the legislature had violated Article I, Section 32 of the state constitution:<sup>145</sup>

To confer a title of nobility, is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached, than to the otherwise empty title or order. . . . [The purpose of the prohibition on titles of nobility in the state constitution] is to preserve the equality of citizens in respect to their public and private rights.<sup>146</sup>

TONA proponents fail to mention quite a few relevant pieces of information about Saffold's opinion, however. First, after remand, the state supreme court affirmed that the law was invalid on other grounds.<sup>147</sup> Second, the opinion refers to the definition of "title of nobility" in the state constitution; similar phrases in state constitutions and the Federal Constitution do not necessarily receive like interpretations.<sup>148</sup> Third, the opinions in *Horst* were delivered seriatim; Saffold's opinion, which was not even the lead opinion, was of limited

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142. One should also note that some of the claims of TONA proponents are simply false. Bob "Barefoot Bob" Hardison claims that "Christopher Runkel of the National Archives acknowledged in 1994 that Virginia ratified the original Thirteenth Amendment on March 12, 1819." Bob "Barefoot Bob" Hardison, Original Thirteenth Amendment Ratification Table (last modified Sept. 28, 1997) <<http://www.nidlink.com/~bobhard/13table.html>>. This is false. Runkel stated that "[w]e reach no conclusion as to whether Virginia actually ratified the amendment." Runkel, *supra* note 77, at 4 n.3.

143. 48 Ala. 129 (1872). See "Barefoot Bob" supplement to Dodge, *The Missing 13th Amendment*, *supra* note 24.

144. See 48 Ala. at 130-31.

145. "[N]o title of nobility, or hereditary distinction, privilege, honour, or emolument shall ever be granted or conferred in this State." *Id.* at 129 (quoting ALA. CONST. art. I, § 32 (1867)).

146. *Id.* at 142.

147. See *Moses v. Mobile*, 52 Ala. 198 (1875).

148. For example, some state courts have held that the phrase "cruel and unusual punishment" in the Constitution does not have the same meaning as the phrase "cruel or unusual punishment" in a state constitution. See *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972), *superseded by const'l amendment*, CAL. CONST. art. 1, § 27 (1972); *Michigan v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992); *Medley v. North Carolina Dept. of Correction*, 412 S.E.2d 654, 660 (N.C. 1992) (Martin, J., concurring).

precedential value even in Alabama. Fourth, the opinion has never been cited on point (nor at all for more than sixty years); it almost certainly would have been forgotten if it had not been cited in a modern law review article on titles of nobility.<sup>149</sup> Fifth, the subject matter of the case was whether a group of individuals could be authorized by the state to conduct what was in effect a lottery even while a criminal statute prohibiting lotteries remained in place for all other individuals. If TONA were to employ the same principle, any professional granted a privilege to practice by a state (e.g. lawyers, doctors, barbers, cosmetologists) denied to the public at large would hold a title of nobility, be stripped of their citizenship, and be ineligible to hold public office.

But claims that embrace such nonsensical propositions are put forward by extremists. TONA proponents claim that the amendment would prohibit lawyers from serving in public office because lawyers are often referred to by the term "esquire."<sup>150</sup> But in the United States, the use of the term is nothing more than a custom. The Constitution prohibits the federal government and states from granting titles of nobility.<sup>151</sup> The one American experiment with excluding citizens holding titles of nobility from public office did not affect lawyers; the Georgia Constitution of 1777<sup>152</sup> did not prohibit lawyers from serving in the House of Assembly.<sup>153</sup> Further, as a matter of English history, titles of nobility and honor may only be conferred by the monarch, not

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149. See Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 114 (1984).

150. See Dodge, *Part I*, *supra* note 22, at 116 ("'Esquire' was the principle title of nobility which the 13th Amendment sought to prohibit from the United States. Why? Because the loyalty of 'Esquire' lawyers was suspect. Bankers and lawyers with an 'Esquire' behind their names were agents of the monarchy, members of an organization whose principle purposes were political, not economic, and regarded with the same wariness that some people today reserve for members of the KGB or the CIA."). See also Vile, *supra* note 136, at 423 n.42 ("their fairly implausible theory is that the title 'esquire' is a prohibited title of nobility"). One should take note that, according to BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, S. Doc. 100-34 (Bicentennial ed. 1989), 8 of the 19 Senators and 28 of the 87 Representatives who voted for TONA are known to have been lawyers.

151. See *supra* notes 5-6.

152. See *supra* notes 41-42.

153. Examples of lawyers who served in the unicameral legislature include Abraham Baldwin and William Few, both of whom also attended the Constitutional Convention and signed the Constitution. See 1 DICTIONARY OF AMERICAN BIOGRAPHY 530-31, (Allen Johnson & Dumas Malone, eds., 1958), 3 *id.* at 352. But see text accompanying *supra* note 148.

as self-identification.<sup>154</sup> *Black's Law Dictionary*, for example, defines "nobility" as such:

In English law, a division of the people, comprehending dukes, marquises, earls, viscounts, and barons. These had anciently duties annexed to their respective honors. They are created either by writ, *i.e.*, by royal summons to attend the house of peers, or by letters patent, *i.e.*, by royal grant of any dignity and degree of peerage; and they enjoy many privileges, exclusive of their senatorial capacity.<sup>155</sup>

*Black's* similarly provides the following definition of "honor":

"In old English law, a seigniorship of several manors held under one baron or lord paramount. Also those dignities or privileges, degrees of nobility, knighthood, and other titles, which flow from the crown as the fountain of honor."<sup>156</sup>

*Black's* also establishes that the term "esquire," as used in the United States, is not equivalent to its usage in English law. In addition, when the term is used to denote status, it is not a title of nobility or honor, and it has other uses also:

In English law, a title of dignity next above gentleman, and below knight. Also a title of office given to sheriffs, serjeants, and barristers at law, justices of the peace, and others. In United States, title commonly appended after name of attorney; *e.g.* John J. Jones, Esquire.<sup>157</sup>

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154. One wonders if TONA proponents would strip members of the Society for Creative Anachronism, who re-enact medieval society and invest themselves with peerages, of their citizenship and right to hold public office. See, *e.g.*, Glen Martin, *Beyond Retro*, SAN FRANCISCO CHRON., Jan. 10, 1993, at 8.

155. BLACK'S LAW DICTIONARY 1047 (6th ed. 1990). One should note, however, that Black's definition contains an error. It continues to state that "[s]ince 1963 no new hereditary ennoblements have been created." In the 1980s and 1990s, several new hereditary titles were created. See Philip Johnston, *Thatcher and Allies Become Life Peers*, DAILY TELEGRAPH, June 6, 1992, at 1, available in LEXIS, News Library, TELEGR File.

156. BLACK'S LAW DICTIONARY, *supra* note 155, at 546.

157. *Id.* at 546. See also Penny Corfield, *The Democratic History of the English Gentleman*, HIST. TODAY, Dec. 1992, at 41 ("It was certainly not a title conferred by the king."); Lafferty, *supra* note 86, at 1A (quoting Stephen Presser: "In England, there were squires, but those were not nobles, they were members of the upper middle class."). In fact, as early as the sixteenth century, commentators had noted the dual use of "esquire." See DEBRETT'S PEERAGE AND BARONETAGE 79 (Charles Kidd & David Williamson eds., 1995). One should also take note that even if the use of "esquire" in the United States somehow could be interpreted to be an English title, since 1963 such titles can be disclaimed, although there is a limited period in which to do so, under the Peerages Act, 1963 ch. 48 (Eng.). Notable examples are Prime Minister Alec Douglas-Home and Labour Member of Parliament Tony Benn, who both left the House of Lords to sit in the Commons. See James Blitz, *Minister Renounces His Earldom*, FIN. TIMES, Nov. 29, 1994, at 10, available in LEXIS, News Library, FINTIME File.

The *Oxford English Dictionary* likewise notes that the term “esquire” has been extended in English usage to apply to individuals not of noble birth to whom an equivalent degree of rank or courtesy is attributed, and notes its separate usage in the United States for lawyers and public officers.<sup>158</sup> Indeed, some experts on the English language conclude that the evolving use of the term has stripped it of all meaning, save as a general term of address for men: “[T]he impossibility of knowing who is an esquire and who is not, combined with a reluctance to draw invidious distinctions, has deprived *esquire* of all significance.”<sup>159</sup> The few courts that have directly considered the meaning of “esquire” concur.<sup>160</sup> This was true even in the early nineteenth century: “[E]squire” was “a title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law and, therefore, it confers no distinction in law.”<sup>161</sup>

Even if ratified, TONA would be unlikely to have a significant effect on American society. Since World War II, more than sixty American citizens have been granted honorary knighthoods by the

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158. See 5 OXFORD ENGLISH DICTIONARY 398 (2d ed. 1989).

159. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 167 (rev. 2d ed. 1965). Further, in terms of social rank, not all English lawyers are esquires; barristers are, at least once they have “taken the silk,” but solicitors are mere gentlemen. See *id.* See also Corfield, *supra* note 157, at 40-42. A new edition of Fowler further notes that the use of “esquire” in the United States departs from English practice in that it is “curiously . . . appended to the names of women lawyers as well as men.” FOWLER’S MODERN ENGLISH USAGE 262 (R.W. Burchfield ed., 1996).

160. See, e.g., *Wright v. Leasecomm Corp.*, 817 F.Supp. 106, 108 (M.D. Fla. 1993) (Plaintiff’s claim that defendant was “in violation of the United States Constitution for using the [t]itle of . . . [e]squire” failed to support a legal cause of action.); *Abernathy v. State*, 187 So. 2d 287, 289 n.1 (Ala. Ct. App. 1966) (“Additions of estate, as ‘esquire,’ ‘gentlemen,’ and the like . . . can . . . be claimed by none, and may be assumed by any one.’”).

161. 1 BOUVIER, *supra* note 66, 370.

United Kingdom alone.<sup>162</sup> But the American public has expressed little if any concern<sup>163</sup>—perhaps because such awards are symptoms of divisions in society, not their cause.<sup>164</sup> Further, TONA would not apply to such commendations. Knighthoods, which for Americans carry no obligations or privileges,<sup>165</sup> are not titles of nobility.<sup>166</sup> When General Norman Schwarzkopf accepted a honorary knighthood, he was still a serving officer,<sup>167</sup> but no constitutional violation occurred. Apparently, a honorary knighthood does not violate the federal nobility clause, which sweeps more broadly than TONA,<sup>168</sup> or it is of “minimal value” and its acceptance consented to by Congress by statute if it is received as a mark of courtesy.<sup>169</sup> Further, although once accepted

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162. Either General Colin Powell or National Security Advisor Brent Scowcroft was the 59th, according to, respectively, Verne Gay, *People*, NEWSDAY, Oct. 1, 1993, at 8, and Nadine Brozan, *Chronicle*, N.Y. TIMES, Feb. 22, 1993, at B4. The identity of the 58th is also in dispute in the news media; it was either General H. Norman Schwarzkopf or President Ronald Reagan, according to, respectively, Laura Parker, *Stormin' Norman, The Desert Knight*, WASH. POST, May 20, 1991, at C1, and *Accolade for Reagan: Honorary Knighthood*, N.Y. TIMES, June 15, 1989, at A5. Recipients since include President George Bush, see *Bush Is Knighted, But He's Not Sir George*, CHICAGO TRIB., Dec. 1, 1993, at 7; Secretary of State Cyrus R. Vance, see Eric Malnic, *Queen Awards Vance Honorary Knighthood*, L.A. TIMES, July 9, 1994, at 26; Speaker of the House Tom Foley, see *Tom Foley Stated for Knighthood*, USA TODAY, Mar. 1, 1995, at 9A; Secretary of State Henry Kissinger, see *Kissinger Knighted*, USA TODAY, June 22, 1995, at 7A; philanthropist Raymond Sackler, see *State Philanthropist to Receive Knighthood*, HARTFORD COURANT, Oct. 20, 1995, at A16; conductor Andre Previn, see Kevin Chaffee, *Few Guests Digger at Previn Bash*, WASH. TIMES, Mar. 1, 1996, at C14; and Admiral Leighton W. Smith Jr., see British Information Services, New York, *Britain in the USA: Honorary KBE For Admiral Leighton Smith USN (Retd)*, (last modified Feb. 28, 1997) <<http://britain.nyc.ny.us/bis/fordom/defence/pr022797.htm>>. See also *supra* note 45.

163. See William Safire, *In Search of the Happy Medium Between Prince and Pauper*, CHICAGO TRIB., June 23, 1989, §1, at 27.

164. See text accompanying *infra* notes 176-202.

165. Only British and Commonwealth subjects are entitled to be addressed as “Sir” or “Lady,” and the investiture ceremony does not involve kneeling or tapping of the shoulders with a sword. See, e.g., Gordon McKibben, *Elizabeth II Gives Reagan a Knighthood*, BOSTON GLOBE, June 15, 1989, at 1. Etiquette, however, does seat honorary knights closer to the monarch at dinner parties than the unknighthooded. See *This Knight Will Not Be “Sir Ron,”* CHICAGO TRIB., June 15, 1989, §1, at 6.

166. See Don Shoemaker, *Pay Up, Your Lordship*, THE RECORD, NORTHERN NEW JERSEY, Nov. 23, 1986, at 4. See also JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 1809 (Francis Rawle ed., 8th ed. 1914) (“In administrative law . . . knights were liable to special burdens, but in no other respect did he differ from the mere free man.”).

167. See Christopher Hitchens, *Knighting of General Norman Schwarzkopf*, THE NATION, June 17, 1991, at 802. Other government officials apparently have accepted honorary knighthoods only after leaving government service. See *supra* note 162, *infra* note 174.

168. Compare *supra* note 5 with text accompanying *supra* note 1.

169. See 5 U.S.C. § 7342(c)(1)(A). Jack Maskell, Legislative Attorney of the Congressional Research Service of the Library of Congress, opined that the title was a mere decoration permitted by the aforementioned Foreign Gifts and Decorations Act. See Ralph Slovenko, *Titles in America*, 19 J. OF PSYCHIATRY & L. 351, 353 & n.7 (1991).

honorary knighthoods cannot be renounced,<sup>170</sup> they can be revoked.<sup>171</sup> Therefore, under TONA, few American citizens, unless possessed of an actual title of nobility<sup>172</sup> or unable or unwilling to extricate themselves from a foreign commendation, necessarily would be stripped of their citizenship and right to participate in civil society<sup>173</sup>—a fact which would be a relief for leading politicians, businessmen, and celebrities.<sup>174</sup> The remaining provisions—dealing with presents, pensions, offices, and emoluments—simply can be bypassed by an act of Congress.<sup>175</sup>

In contrast, the modern role of the clauses of the Constitution that prohibit the federal government and states from granting titles of nobility<sup>176</sup> is a subject that merits attention. The Constitution's nobility clauses on occasion have been invoked by courts,<sup>177</sup> although most suits filed claiming a violation of the clauses are meritless.<sup>178</sup>

170. See David Wallen, *Sir Ti Liang Can't Give Knighthood Back, Say Experts*, SOUTH CHINA MORNING POST, Oct. 22, 1996, at 6 (“[t]here is no precedent for the act”).

171. See *id.* (financier Jack Lyons); Jim Hoagland, *Superpowers, 'Pragmatism' and Dictators*, WASH. POST, Dec. 28, 1989, at A23 (Romanian President Nicolae Ceausescu).

172. For example, Grace Kelly “as consort to the Prince of Monaco, one of the most titled crowned heads of Europe” retained dual citizenship. See STEVEN ENGLUND, *GRACE OF MONACO: AN INTERPRETIVE BIOGRAPHY* 206 (1984). See, e.g., Robert I. Friedman, *Defending the Seemingly Indefensible*, NEWSDAY, July 28, 1986, at 45. A contemporary example is the current Earl of Wharnccliffe, who resides in Maine. See DEBRET'S PEERAGE AND BARONETAGE, *supra* note 157, at P1306.

173. TONA apparently was intended to have retroactive effect, applying to citizens who “retain” a title of nobility or honor. See Resolution proposing an amendment to the Constitution of the United States, 2 Stat. 613 (1810). See also *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (recognizing “a constitutional right to remain a citizen in a free country unless [one] voluntarily relinquishes that citizenship”).

174. Further recipients of honorary knighthoods include General Dwight D. Eisenhower, actor Douglas Fairbanks Jr., Senator William J. Fulbright, philanthropist John Paul Getty II, food magnate Henry J. Heinz II, philanthropist Paul Mellon, actor Sidney Poitier, and Secretary of State Dean Rusk. See *Accolade for Reagan: Honorary Knighthood*, *supra* note 162, at A5. Other recipients include car magnate Henry Ford II, Admiral Ernest King, Admiral William Leahy, General George C. Marshall, Admiral Chester Nimitz, and Secretary of Defense Caspar W. Weinberger. See *Elizabeth II Gives Reagan a Knighthood*, *supra* note 165, at 1.

175. See text accompanying *supra* note 1.

176. See *supra* notes 5-6.

177. The clauses have not controlled the outcome of any “significant” litigation, however. See 16 AM. JUR. 2D, *Const. Law* § 283 n.25 (1997).

178. See, e.g., *Woodson v. Davis*, No. 89-8034, No. 89-8035, and No. 89-8036, 1989 WL 117932, at \*1 (4th Cir. Oct. 26, 1989) (“Officer of the Court” is not a title of nobility); *United States v. Thomason*, 444 F.2d 1094 (9th Cir. 1971) (military rank is not a title of nobility); *United States v. Smith*, No. Civ. A. 91-A-292-S, 1991 WL 326647, at \*5 (M.D.Ala. Dec. 30, 1991) (“taxpayer” is not a title of nobility); *United States v. Riley*, No. Civ. A. 89-1403-T, 1991 WL 192115, at \*2-3 (D.Kan. Sept. 10, 1991) (“magistrate” is not a title of nobility); *United States v. Singer*, No. 85-00283-01, 1990 WL 161258, at \*6 (E.D.Pa. Oct. 18, 1990) (“person” as defined in the tax code is not a title of nobility); *Hilgeford v. People's Bank*, 113 F.R.D. 161, 163 (N.D.Ind. 1986)

Although we should not allow ourselves to be deceived and distracted by TONA proponents, we should attempt to address the root causes of their alienation. At least a few commentators believe that the nobility clauses can play a role in dealing with divisions in modern society<sup>179</sup>; our contemporary concerns about divisions in society are hardly unprecedented. The practice of handing out ambassadorships to campaign contributors has been described as a form of "title worship," although not unconstitutional.<sup>180</sup> Indeed, even though "esquire" as used by American lawyers is not a title, some lawyers feel that the term is divisive and pretentious, and should be banished. It is a term exclusively for men in a day and age when almost half of law school graduates are female; "[w]e should exile this odious pretension as we have horsehair wigs and gold collar buttons."<sup>181</sup>

Three Supreme Court decisions have invoked the nobility clauses of the Constitution in concurring or dissenting opinions. In *Fullilove v. Klutznick*,<sup>182</sup> the Court upheld a minority set-aside provision of the Public Works Employment Act. Justice Stewart, dissenting, cited the federal clause when he declared that "[t]he Framers . . . lived at a time when the Old World still operated in the shadow of ancient feudal traditions . . . . [T]hey set out to establish a society that recognized no distinctions among white men on account of their birth."<sup>183</sup> In *Mathews v. Lucas*,<sup>184</sup> which concerned illegitimate children's right to receive survivors' insurance benefits, a dissenting opinion urged that the federal clause forbids economic distinctions based on birth.<sup>185</sup> In *Zobel v. Williams*, four concurring Justices invoked the clauses to disapprove of a fiscal giveaway by Alaska.<sup>186</sup> In a footnote, Justices

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("lawyer" is not a title of nobility); *Peth v. Breitzmann*, 611 F.Supp. 50, 53-54 (E.D.Wis. 1985) (summons does not create a title of nobility); *Frederick v. Clark*, 587 F. Supp. 789, 791 (W.D.Wis. 1984) ("lawyer" is not a title of nobility); ; *White v. Commissioner*, No. 1183-80 1981 WL 11137, at \*18 n.11 (T. C. Sept. 15, 1981) (degree is not a title of nobility); *Anunziato v. Commissioner*, No. 537-78, 1978 WL 3146, at \*4 (T. C. Dec. 4, 1978) (income tax does not create a title of nobility); *North Dakota v. Larson*, 419 N.W.2d 897, 898 (N.D. 1988) (driver's license is not a title of nobility); *City of Bismarck v. Vetter*, 417 N.W.2d 186, 186 (N.D. 1987) (dog license is not a title of nobility).

179. See generally Delgado, *supra* note 149.

180. See Michael Kilian, *Put Up Your Dukes: Decreeing an End to this Untitled American Society is a Right Honorable Idea*, CHI. TRIB., Mar. 11, 1987, Style, at 4.

181. Rick L. Knuth, *A Modest Proposal Concerning "Esquire,"* UTAH B. J., Mar. 1996, at 10, 32.

182. 448 U.S. 448 (1980).

183. *Id.* at 531 n.13 (Stewart, J., dissenting).

184. 427 U.S. 495 (1976).

185. *Id.* at 520 n.3 (Stevens, J., dissenting).

186. 457 U.S. 55 (1982).

Brennan, Marshall, Blackmun, and Powell charged that the state's degrees-of-citizenship approach established a latter-day nobility in violation of the federal clause, noting that "[t]he American aversion to aristocracy developed long before the Fourteenth Amendment and is . . . reflected . . . in the Constitution."<sup>187</sup>

Two modern lower court opinions also have cited the nobility clauses.<sup>188</sup> In *Eskra v. Morton*, an American Indian sought review of a Board of Indian Affairs ruling that her illegitimacy would prevent her from inheriting her mother's property. The Seventh Circuit reversed, holding that attachment of an official stigma at birth would constitute a badge of ignobility.<sup>189</sup> In *In re Jama*,<sup>190</sup> a citizen applied to a New York court to change his name to "Von Jama," the family name before immigrating to the United States. The court rejected his request partly on nobility grounds. "True Americanism," it declared, prohibited any political divisions resting on race, religion or pigmentation of skin: "'Von' . . . is a prefix occurring in many German and Austrian names, especially of the nobility. The court cannot think of a greater nobility than being an American . . . This is the law of the land and declaratory for our own public policy."<sup>191</sup>

The *In re Jama's* court's description of Jama's arguments as "puerile, if not pathetic"<sup>192</sup> perhaps is itself an example of the elitism with which we should be concerned. But the court's decision does underlie the notion that, as some commentators suggest, the nobility clauses could be sources of equality-protecting doctrine.<sup>193</sup> Until recently, the greatest danger to equality in America, Delgado argues, was attitudes and practices that ruthlessly subjugated Blacks, Hispanics, Indians, women, and the poor.<sup>194</sup> But now there is a new evil, the enrichment of those at the top of the social ladder coupled with indifference to the rest, that the nobility clauses are well adapted to address.<sup>195</sup> Further, assigning an explicit role to the nobility clauses

187. *Id.* at 69 n.3 (Brennan, J., concurring).

188. But the clauses have not controlled the outcome of any significant litigation, *see supra* note 177.

189. 524 F.2d 9, 13 n.8 (7th Cir. 1975).

190. 272 N.Y.S.2d 677 (N.Y. Civ. Ct. 1966). *But see* *Societe Vinicole De Champagne v. Mumm*, 143 F.2d 240, 240-241 (2d Cir. 1944) (since the Weimar Republic abolished titles, "Von" has not been a designation of nobility). *See generally* *Slovenko*, *supra* note 169.

191. *Id.* at 678. One wonders if TONA proponents, to be consistent, would strip all Americans of their citizenship and right to hold public office.

192. *Id.*

193. *See* Delgado, *supra* note 149, at 109.

194. *See id.* at 117-18.

195. *See id.* at 118.

would lessen the likelihood that courts will sporadically and unpredictably invalidate legislation because it offends unstated preferences.<sup>196</sup>

There are, of course, also arguments against reinvigorating the nobility clauses.<sup>197</sup> Although Delgado finds them unpersuasive, he notes that one could argue that antinobility analysis could be used to strike down practically every governmental action or program; that it would require affirmative obligations on behalf of the poor; and that it could not be effectuated by courts or any other branch of government.<sup>198</sup> But again, no serious debate can be had on the subject if waiting in the wings are the TONA proponents who would strip anyone of any privilege of their citizenship and bar them from civil society. The alienation of such extremists should be taken as a sign that something is wrong in modern American society.<sup>199</sup> We should remember that the nobility clauses were adopted because the founders were concerned not only about the bestowal of titles but also about an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank, and political, cultural and economic privilege<sup>200</sup>—a system of inequality that some commentators argue is reemerging.<sup>201</sup> But any use of the clauses to address such concerns also must be tempered by common sense, not driven by a fringe. To grant a privilege is not to grant a title of nobility: “Merely singling out an individual for a special benefit is a far cry from creating or attempting to create a new Brahmin-style caste or a new social elite.”<sup>202</sup>

## CONCLUSION

The Titles of Nobility Amendment does not have an illustrious history. The reasons for its proposal are obscure; what we know of them suggests partisan politics or xenophobia, neither an admirable nor worthy motive for amending the Constitution. The amendment’s

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196. *See id.*

197. *See id.* at 121-24.

198. *See id.*

199. *Cf. Tarble’s Case*, 80 U.S. (13 Wall.) 397, 408 (1872) (“[I]n times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void.”).

200. *See* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 11-24 (1991).

201. *See* Delgado, *supra* note 149, at 118.

202. J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2352 (1997).

history is likewise obscure; scholars have almost universally failed to portray it accurately, amplifying the confusion about the amendment. Today, it is virtually forgotten, meriting at most a few lines in even the most detailed tomes on the Constitution.

If the amendment had remained a footnote to history, its obscurity might not be of great significance. But even before the 1990s, the amendment carried two important messages: that concern about divisions in society in the United States is a historic problem, and that the legal community, both in the nineteenth and the twentieth centuries, has not invested sufficient effort into accurately communicating the law to the profession, as well as to the public. Further, these messages now have manifested themselves in a new, disturbing guise: that of extremists who have taken advantage of the amendment's obscure history to mislead the public as to its validity and purpose, driven by their anti-lawyer agenda and alienation.<sup>203</sup>

These misrepresentations should be taken seriously and countered, both for the good of the profession and of the public. Too often, legal scholarship has been and continues to be guilty of "scholarly defects of the most elementary kind."<sup>204</sup> Law cannot have—and does not deserve—the public trust if the law is itself untrustworthy.<sup>205</sup> But past failures should not lead lawyers to withdraw from the field and leave it to extremists. One should remember that the oft-misquoted line from Shakespeare, "[t]he first thing we do, let's kill all the lawyers,"<sup>206</sup> actually speaks to the vital role that lawyers historically have played in society; only if all of the King's learned advisors were vanquished would rebels be able to install a tyrant.<sup>207</sup> If there is any nobility in being a lawyer, it is because of the role and responsibility of

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203. Erwin Chemerinsky, a professor of constitutional law at the University of Southern California, summarizes TONA proponents thusly: "What they are doing is pulling together things that have some academic respectability and distorting them and then mixing them with some silly, ludicrous things." Mike France, *Constitution Cultists Fuel Right Fringe*, NAT'L L.J., June 26, 1995, at A1.

204. DAVID ROSENBERG, *THE HIDDEN HOLMES* 164 (1995). Rosenberg notes that "rudimentary errors of research and interpretation" are not unique to the present day. *See id.* at 167-68.

205. The "process of errant revision is particularly tenacious and destructive in law." *Id.* at vii.

206. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 4, sc. 2.

207. *See, e.g.,* *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) (Dick the Butcher's statement "was spoken by a rebel, not a friend of liberty. . . . Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.").

protecting society from those who seek to create and exploit divisions within it.