

# AMENDING THE AMENDMENT PROCEDURES OF ARTICLE V

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## PROPOSED AMENDMENT

Section 1. At the next election for Members of the House of Representatives and then every twentieth year thereafter, the question “Shall there be a Convention for proposing Amendments to the Constitution of the United States?” shall be submitted to the People of each State; and if in a majority of the several States the electors decide in favor of a Convention for such purposes, and a majority of the electors voting in the several States so decide, the Congress shall immediately call a Convention for proposing Amendments; and the electors of each State shall thereafter elect three delegates to convene on the first Tuesday of June next at the Capitol of the United States or in such other place in the District constituting the seat of Government of the United States as the Congress may direct, and shall continue their session until the business of such Convention shall have been completed.

Section 2. No person shall be a delegate to said Convention who shall not have attained the age of eighteen years, and been five years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State for which chosen. No delegate shall, during the Time for which elected, hold any other office of trust or profit under the Authority of the United States or of the several States.

Section 3. Every delegate shall receive for his or her services the same compensation annually payable to the members of the House of Representatives and shall be reimbursed for their expenses, while the Convention is in session, to the extent that a

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Representative would then be entitled thereto in the case of a session of the Congress.

Section 4. A majority of the Convention shall constitute a quorum for the transaction of business and no Amendment to the Constitution shall be submitted for approval to the States as hereinafter provided, unless by the assent of two-thirds of all the delegates elected to the Convention, the ayes and noes being entered on the journal to be kept.

Section 5. The Convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns, and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. In case of a vacancy, by death, resignation, removal, or other cause, of any delegate elected to the Convention, the executive authority of the State from which such vacancy occurs shall make a temporary appointment until the people of the State fill the vacancy by election as the legislature of the State may direct. The Convention shall have the power to appoint such employees and assistants as it may deem necessary and fix their compensation, to provide for the printing of its documents, journal, and proceedings, and to make provision for other expenses that said Convention may incur. The appropriation provisions of the Convention shall be self-executing and shall constitute a first claim on the Treasury of the United States.

Section 6. Any proposed Amendment which shall have been adopted by such Convention shall be limited to a single subject, and shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by conventions in a majority of the several States, and from which at least two thirds of the total number of Representatives of the several States are derived; provided that no ratification by any of the several States of any proposed Amendment shall be valid if made less than twenty-four months following the adoption of the proposed Amendment by the Convention; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Section 7. Upon the approval of such constitutional Amendments, in the manner provided in the last preceding section, such constitutional Amendments shall go into effect on the first day of January next after such approval.

## INTRODUCTION

The Constitution of the United States is “famously difficult to amend.”<sup>1</sup> Article V creates two routes by which amendments may be proposed: Congress may itself propose constitutional amendments by a two-thirds vote of both houses, or, if two-thirds of the state legislatures ask for it, Congress must call a convention for the purpose of proposing amendments.<sup>2</sup> Ratification of proposed amendments requires approval by three-fourths of the states, either by vote of the state legislatures or state conventions (Congress determines which).<sup>3</sup> These super-majority requirements present formidable hurdles.<sup>4</sup> Just thirty-three amendments have ever been proposed to the states for ratification and of these, only twenty-seven have been ratified.<sup>5</sup> Eleven of the twenty-seven amendments were adopted before the close of the eighteenth century; an additional four were adopted before the end of the nineteenth.<sup>6</sup>

Opportunities for Americans to participate in drafting and ratifying provisions of their federal Constitution have, therefore, been few and far between. While the Twenty-Seventh Amendment was ratified on May 7, 1992, Congress had proposed it to the states as part of the Bill of Rights some 203 years earlier, on September 25, 1789.<sup>7</sup>

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1. Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RESEARCH CTR. (Sept. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/09/15/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/>.

2. U.S. CONST. art. V.

3. *Id.*

4. This is not just a modern assessment. At the Virginia ratifying convention, Patrick Henry complained that under Article V, as a practical matter, “the way to amendment is . . . shut.” Statement of Patrick Henry (June 5, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 49 (Jonathan Elliot ed., 2d. 1888). Besides the difficulty of proposing amendments, he argued, the requirements for ratification were too high:

[W]hat is destructive and mischievous, is, that three fourths of the state legislatures, or of the state conventions, must concur in the amendments when proposed! In such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous. It would indeed be miraculous that they should concur in the same amendments, or even in such as would bear some likeness to one another; for four of the smallest states, that do not collectively contain one tenth part of the population of the United States, may obstruct the most salutary and necessary amendments.

*Id.* at 49–50.

5. See MICHAEL J. GARCIA ET AL., CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 49 (2017) [hereinafter S. DOC. NO. 112-9].

6. See *id.* at 25–45 nn.1–19.

7. *Id.* at 44–45 n.19.

Thus, it is the Twenty-Sixth Amendment that represents the most recent occasion on which Congress both proposed (on March 23, 1971) and the states ratified (on July 1, 1971) a change to the Constitution.<sup>8</sup> Accordingly, the only Americans alive today who have had a say in the proposal and ratification of any provision of our Constitution are those who were of voting age in 1971 (and thus today are in their mid-60s or older). Even these Americans have experienced the amendment process as a legislative—rather than a populist—endeavor. No amendments have ever been proposed by a convention because no national constitutional convention has met since the summer of 1787; and for all but the Twenty-First Amendment (ratified on December 5, 1933),<sup>9</sup> ratification has occurred by the vote of state legislatures, not state-level conventions.<sup>10</sup>

The difficulty of deploying Article V and its resulting rare usage have some important effects. Politics in the United States proceed as though the Constitution cannot ever be changed. Government representatives operate without threat that their powers could be curtailed or their decisions undone by constitutional amendment. More generally, problems in our political system have become immune to constitutional reform. However serious a deficiency may be, whatever the level of support for reform, amending the Constitution is not viewed as a viable option for improving the system of government.

That the Constitution cannot be changed has also come to mean that it *should not* be changed. Large portions of the American public (and its leaders) view the Constitution in sacred terms, such that amending it is akin to sacrilege, and even talk of amendment raises suspicions of treachery.<sup>11</sup> The lack of public experience with changing the Constitution through the procedures of Article V generates hostility towards ever doing so.

Yet while Article V's procedures have been shut off, the Constitution has not stagnated. Instead, with textual amendments

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8. *Id.* at 44 n.18.

9. See S. DOC. NO. 112-9, *supra* note 5, at 38 n.13.

10. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2015, at 383 (2015).

11. See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-2015, at 188 (2016) (reporting that by the centennial of the Constitution, “Americans referred to the Constitution as ‘the Ark of the Covenant,’ Independence Hall as ‘the holiest spot of American earth,’ and visitors to it as ‘pilgrims’ in ‘the spirit of worshippers before a shrine’”).

foreclosed, courts have gained power to adopt, in the name of constitutional interpretation, reforms they themselves view as desirable. Reading the Constitution, including its twenty-seven amendments, takes about thirty minutes. That exercise, however, would give a very incomplete understanding of the Constitution's meaning at various historical periods, how the document has changed, and what it means today. To know those things requires doing what every American law student does when studying the Constitution: reading thousands of pages of decisions by the U.S. Supreme Court (and lower courts). For instance, the Constitution protects the following rights: to marry a person of the same gender,<sup>12</sup> to burn the American flag without being subject to punishment,<sup>13</sup> to have a government-supplied attorney during police interrogations<sup>14</sup> and at criminal trial,<sup>15</sup> to send one's child to a parochial school,<sup>16</sup> to move from one state to another,<sup>17</sup> to view pornography,<sup>18</sup> to refuse medical treatment,<sup>19</sup> to purchase and use contraception,<sup>20</sup> and to obtain an abortion.<sup>21</sup> None of these rights are mentioned in the text of the Constitution; none of them came about because the original document was amended to expand the roster of individual liberties. Instead, each of these rights has resulted from judicial interpretation of text that has remained immune to change. Woodrow Wilson might have exaggerated when he called the Supreme Court "a constitutional convention in continuous session"<sup>22</sup> but Article III is a more likely route to constitutional change than is Article V.

Constitutional change via judicial interpretation has a problematic relationship to Article V. Popular judicial rulings can fuel disinclination to make use of Article V: if the courts can keep us all on the right track, there is no need to gear up the amendment machinery.

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12. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

13. *Texas v. Johnson*, 491 U.S. 397 (1989).

14. *Miranda v. Arizona*, 384 U.S. 436 (1966).

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

16. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

17. *See Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) ("The right of a citizen of one state to pass through, or to reside in any other state . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.").

18. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

19. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

20. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

21. *Roe v. Wade*, 410 U.S. 113 (1973).

22. Edward S. Corwin, *Curbing the Court*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 45, 49 (1936).

When, as a result of the practices of judicial interpretation, the Constitution comes to be viewed as the domain of the courts (rather than of the people) and the province of judicial expertise, intervention through amendment can appear additionally problematic and undesirable. On the other hand, correcting an unpopular judicial ruling is all the more difficult when, as a result of a lack of use, the amendment procedures of Article V have gone rusty. Knowing this, courts can be ever more confident that changes they pursue through rulings on the meaning of the text will not be subject to reversal through the amendment process. Acquiescence to judge-led reforms on the part of political actors and the public leads to paralysis with respect to judicial rulings, even those that generate widespread criticism and opposition.

There is little point in advocating constitutional amendments to address a defect in our structures of government or to alter the roster of existing protections for individual rights without first confronting the barriers of Article V and their resulting political and cultural impacts. This Article is thus directed at amending the amendment procedures of Article V itself. The amendment that this Article proposes requires periodically asking voters whether a constitutional convention should be held. Should voters approve holding a national convention, it would have power to propose amendments and state-level conventions would decide whether to ratify the proposals. The amendment this Article offers provides a means for constitutional change that does not depend upon either Congress or the state legislatures, but also contains safeguards to ensure that any alterations to the Constitution reflect broad and sustained public support. The proposal also includes provisions for the composition and operation of the envisaged convention and the ratification process.

Part I sets out the key features and benefits of the proposed amendment. Part II draws upon experiences at the state level with holding constitutional conventions, provides some lessons about how the proposal offered here would operate, and explains the attendant risks. Part III takes up some additional issues the proposal presents including the likelihood, in practice, that the new mechanism contemplated would actually generate constitutional reform and the risk also of a runaway convention producing too many or undesirable changes.

## I. A PROPOSED CONSTITUTIONAL AMENDMENT

This Part begins by setting out the key features of the proposed amendment. It then discusses the likely benefits of the proposal, which include democratizing the amendment process and enhancing our constitutional culture.

### *A. Key Features*

Section 1 of the proposed amendment requires asking voters<sup>23</sup> at the next federal election, and then in federal elections every twenty years thereafter, whether they favor holding a constitutional convention. If *both* a national majority of those voting favors a convention *and* a convention is favored in a majority of the states, then Congress is obligated to call the convention. The voters in each state must then elect three delegates to represent the state and convene in Washington, DC the following June.

Sections 2 and 3 of the proposal discuss qualifications and compensation for convention delegates. Section 2 requires that delegates be eighteen years of age, citizens of the United States for five years, and inhabitants of the state they represent at the convention. Section 2 also prohibits delegates from holding other national or state offices while serving in the convention. For example, a Senator or Governor would be ineligible to serve as a delegate. Section 3 provides for delegates to receive a salary and expenses during the time of their service at the convention in the same manner as a U.S. Representative during a congressional session.

Sections 4 and 5 specify the basic operations of the convention. As provided in section 4, a majority of delegates constitutes a quorum. Proposed amendments, however, require the approval of two-thirds of all convention delegates. Section 5 gives the convention power to determine its operating rules, choose its officers, resolve disputes over the qualifications of delegates, appoint staffers, and keep records, and it guarantees federal funding for convention expenses. At the same time, section 5 permits removal of a delegate for cause only upon a two-thirds vote by the convention members; the procedure for filling vacancies is also specified (the governor may make a temporary appointment until voters are able to elect a new delegate).

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23. Voters are called “electors” to track the language of Article I, section 2.

Section 6 specifies the process for ratification of proposed amendments. Under section 6, a proposed amendment must be limited to a single subject and submitted to state ratifying conventions. Section 6 specifies that a majority of the states must approve the proposal *and* that the majority derive at least two thirds of the number of U.S. Representatives from all of the states. The latter provision serves as a proxy for population. With 435 Representatives from the states today,<sup>24</sup> a proposed amendment would require ratification by at least 26 states with a combined total of at least 290 Representatives. In addition, section 6 delays ratification at the state level for two years after the Convention itself approves an amendment. In other words, section 6 contains a built-in lag between proposal and ratification. Finally, section 7 specifies that ratified amendments take effect on the first day of the year after ratification.

### *B. Benefits*

The proposed amendment has several interrelated benefits. The proposal creates an amendment process that is more democratic than those that Article V presently provides. It also ensures any resulting amendment is the product of sustained deliberation rather than hasty action. In addition, the proposal promotes a healthier constitutional culture than presently exists.

#### 1. Democracy

A principal virtue of the proposal is that it democratizes the amendment process. Under the existing provisions of Article V, amending the Constitution depends upon the acquiescence of legislators both at the proposal and ratification stages. Proposal of an amendment requires action on the part of either Congress (by making the proposal) or the state legislatures (by calling a convention).<sup>25</sup> Ratification requires state legislative action or a decision by Congress to send the proposal to a state ratifying convention. Legislators, however, tend to disfavor amendments and conventions: they much prefer the status quo, particularly if their own powers are at risk.<sup>26</sup>

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24. See Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13.

25. U.S. CONST. art. V.

26. See Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RESEARCH CTR. (Sept. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/09/15/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> (reporting that “[s]ince 1999, 742 proposed amendments to the U.S. Constitution have been introduced in the House or Senate” but that “only 20 times since 1999 have



This is true even though individual politicians routinely propose constitutional amendments—typically as a means of making a statement rather than to produce constitutional reform.<sup>27</sup> Because Article V erects a legislative barrier, amendments have very little chance of success.<sup>28</sup>

This Article’s proposed amendment to Article V thus creates a mechanism for amending the Constitution that does not depend upon the cooperation of federal and state legislatures. Instead, under the proposal, voters are able to decide for themselves whether a convention should be held; conventions at the state level are then responsible for ratification.<sup>29</sup> The existing mechanisms of Article V allow for Congress to bypass the state legislatures: it can propose amendments and submit them to state conventions. Article V also allows the states to bypass Congress: the states themselves can call for a convention. The Constitution thus addresses the problem that Congress will naturally be reluctant to put forth amendments that diminish its own authority.<sup>30</sup> But there is no mechanism to bypass

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amendments . . . been voted on by the full House or Senate”). Thus, for example, Congress is very unlikely to approve a balanced budget amendment—because the need to balance the budget would severely curtail the ability of members of Congress to deliver federally-funded benefits to their constituents—even though there is broad public support for such an amendment. Of course, legislators do not always act in a uniform way. For example, proposals to reform the electoral college have received support in the House but have faced opposition in the Senate. In 1989, the House approved by a vote of 338-70 a proposed amendment abolishing the electoral college and providing for direct popular election of the President. The proposal was filibustered in the Senate. See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 87–88 (2002) (reporting on the fate of the 1989 electoral college proposal).

27. See Mark V. Tushnet, *Entrenching Good Government Reforms*, 34 HARV. J. L. & PUB. POL’Y 873, 876–77 (2011) (“Politicians basically propose an amendment so that they can send out a press release, not so the Constitution actually will be amended. . . . [I]t is not actually a serious policy proposal from the politician’s point of view.”).

28. U.S. CONST. art. V.

29. In place of state ratifying conventions, there are arguably benefits to submitting proposed amendments to voters in each state in a referendum. As Professor Rappaport writes (in offering modifications to the Article V procedures for a convention of states):

A proposed constitutional amendment might be ratified by a simple vote of the people, as are state constitutional amendments and other state laws in many states throughout the nation. While the ballot measure would certainly be an innovation for the Constitution, its wide use by the states makes it a familiar and tested device. Given modern communication methods, it seems reasonable to employ a direct vote of the people for the ratification decisions that the state conventions—which were said to act in the name of the people—make.

Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1563–64 (2010).

30. As one delegate to the New York ratifying convention explained:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the

both the state and the national legislatures: this Article's proposal accomplishes exactly that.<sup>31</sup>

## 2. Deliberation

The proposed amendment ensures that any resulting amendments reflect sustained deliberation, not hasty action. It guards against the excessive populism that has generated criticism of amendment procedures at the state level and in some foreign systems.<sup>32</sup> For a convention to be held, there must be support from a majority of the states as well as at the national level. For amendments the convention proposes to take effect, there must be support from a majority of the states and those states must represent a super-majority of the population (as measured by their proportion of Representatives in the House).

By allowing voters to call for a convention only every twenty years, the proposal provides a mechanism for responding to long-term pathologies while minimizing the risk of its deployment in response to short-term problems. Delaying state ratification conventions for two years after the proposal of any amendment also serves to guard against hasty reforms. Likewise, while the two-thirds threshold for

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constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of the government, if upon trial it should be found they had given too much.

New York Assembly Debates (Feb. 4, 1789), in 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2501, 2522 (John P. Kaminski & Gaspare J. Saladino et al. eds., 2009).

31. Adopting the proposal will likely be easier than adopting (in accordance with Article V's provisions) most *other* possible amendments because the proposal does not itself contain any *substantive* change to the Constitution, only a new *procedural* mechanism for future reform. Nobody today could confidently predict if and when, in the future, voters will call for a convention or the nature of a future convention's proposed amendments or their likelihood of ratification. Uncertainty, in this context, is a virtue, not a vice.

32. Warning against amending the federal Constitution, Kathleen Sullivan has written:

While the federal Constitution has been amended only 27 times in over 200 years, the fifty state constitutions have had a total of nearly 6,000 amendments added to them. They have thus taken on what Marshall called in *McCulloch* "the prolixity of a legal code"—a vice he praised the federal Constitution for avoiding. Many of these state constitutional amendments are products of pure interest-group politics. State constitutions thus are difficult to distinguish from general state legislation, and they water down the notion of fundamental rights in the process: The California constitution, for example, protects not only the right to speak but also the right to fish.

Kathleen M. Sullivan, *Constitutional Amendmentitis*, 23 AM. PROSPECT 20 (Fall 1995), <http://prospect.org/article/constitutional-amendmentitis>.

ratification is lower than the current Article V requirement,<sup>33</sup> it remains high enough to avoid use of the amendment mechanism to cure merely local or transient problems.

### 3. Constitutional Culture

The proposed amendment offers broader benefits to our constitutional democracy. It will facilitate increased knowledge on the part of citizens about the Constitution and help bolster the Constitution's claim to legitimacy. By asking citizens to consider periodically whether the Constitution currently serves them well or should be reformed, the proposed amendment encourages the spread of information about the Constitution and provides an occasion for conversation and debate around its provisions. Giving citizens an opportunity to affirm the Constitution in its existing form or to proceed to a convention will also mean the Constitution is no longer the product of past generations: it becomes instead the work of the living.

Here, some peculiarities of our constitutional system bear emphasis. On the whole, Americans hold the Constitution in very high regard. In surveys they generally express opposition to making significant changes to the document.<sup>34</sup> Levels of support do, however, vary among different demographic groups.<sup>35</sup> There also exists a steady

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33. See U.S. CONST. art. V.

34. See, e.g., Aspen Ideas Festival, “*Does the US Constitution Still Work for 21st Century America?*” PENN SCHOEN BERLAND POLL (July 9, 2010), <https://issuu.com/psbsrch/docs/aspen-ideas-2010> (reporting that 60% of respondents took the view that the Constitution “is timeless and should be changed minimally” while only 32% answered that the document “needs significant updates” even while only 25% of respondents were satisfied with the way the government functions today and nearly 70% answered that “the Government today is functioning WORSE than intended” by the framers); Nicholas Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U. L. REV. 113, 138 (2016) (reporting that in a national survey asking people the extent to which they approve of the Constitution that it received an average approval score of 7.8 out of 10 and a median score of 9, whereas state constitutions received an average score of 6.7 out of 10 and a median score of 8, and concluding that “Americans strongly back their federal Constitution”); *What We Love and Hate about America*, THE HARRIS POLL (June 8, 2010), <https://theharrispoll.com/new-york-n-y-june-8-2010-a-new-harris-poll-measures-what-americans-think-about-the-united-states-or-more-specifically-how-they-rate-16-elements-of-american-life/> (reporting that in response to the question, “How would you rate each of the following in the United States: Constitution?,” 33% responded “excellent,” 37% responded “pretty good,” 22% responded “only fair” and 8% responded “poor.”); 56% *Think Constitution Should Be Let Alone*, RASMUSSEN REPORTS (July 2, 2013), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2013/56\\_think\\_constitution\\_should\\_be\\_left\\_alone](http://www.rasmussenreports.com/public_content/politics/general_politics/june_2013/56_think_constitution_should_be_left_alone) (reporting that 56% of Americans believe the Constitution should be left alone; 33% support minor changes; 4% favor major changes; and 2% call for scrapping the existing Constitution and starting over).

35. See, e.g., Stephanopoulos & Versteeg, *supra* note 34, at 146–60 (reporting that

minority for constitutional reform,<sup>36</sup> again with demographic variations.<sup>37</sup> In addition, as discussed further in Part III, there exists considerable support for *specific* amendments. At the same time, the public's knowledge about the *actual* provisions of the Constitution is quite low.<sup>38</sup> Americans thus revere a document they do not know much about.

In addition, even while Americans give the Constitution high marks, they take a dim view of the government that operates under it. Surveys show that “the overall level of trust in government” is “near historic lows,”<sup>39</sup> that a majority of Americans are dissatisfied with the

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respondents who self-report higher knowledge about the Constitution and who follow the news more closely are more supportive of the Constitution; that support for the Constitution is lower among African Americans compared to other racial groups and lower among women than among men; that support rises with education and income and is higher also among older Americans than among younger Americans; and that Republicans rate the Constitution slightly higher than do Democrats).

36. See, e.g., William D. Blake & Sanford V. Levinson, *The Limits of Veneration: Public Support for a New Constitutional Convention*, 1 CONST. STUD. 1, 10 (2016) (reporting on a 2011 survey showing that one in three Americans favors a constitutional convention); Aspen Ideas Festival, *supra* note 34 (reporting 49% of respondents supported changes to the Constitution by popular referendum).

37. Blake & Levinson, *supra* note 36, at 12–13 (reporting that “African Americans and Hispanics express significantly more support for a constitutional convention than whites;” that while 56% of Americans between the ages of 18 and 24 are more likely to support holding a convention, support drops to 20% amongst Americans aged 65 or older; and that support for a convention among Americans earning less than \$20,000 a year is 41% but that among those who earn more than \$150,000 a year the figure is only 21%).

38. See, e.g., SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE 10–14 (2003) (summarizing evidence of voter ignorance); DANIEL R. DENICOLA, UNDERSTANDING IGNORANCE: THE SURPRISING IMPACT OF WHAT WE DON'T KNOW 6 (2017) (reporting survey evidence that a third of respondents could not name any First Amendment rights, that 42% believed the Constitution establishes English as the official language of the United States, and that 62% could not name the three branches of the federal government); RICK SHENKMAN, JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER 24 (2008) (reporting that only 34% of Americans know Congress has power to declare war and only 35% know Congress can override a presidential veto of legislation; and that 49% of Americans believe the President can suspend the Constitution, 60% believe the President can appoint judges without Senate confirmation, and 45% believe the Constitution punishes revolutionary speech); AM. COUNCIL OF TR. AND ALUMNI, *A Crisis in Civic Education* (Jan. 2016), [https://www.goacta.org/images/download/A\\_Crisis\\_in\\_Civic\\_Education.pdf](https://www.goacta.org/images/download/A_Crisis_in_Civic_Education.pdf); ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., *Americans Are Poorly Informed About Basic Constitutional Provisions* (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions>; *One in Three Americans Fail Immigrant Naturalization Civics Test*, XAVIER UNIV. CTR. FOR THE STUD. OF THE AM. DREAM (April 27, 2012), [https://www.xavier.edu/campusuite25/modules/news.cfm?seo\\_file=One-in-Three-Americans-Fail-Immigrant-Naturalization-Civics-Test&grp\\_id=319#.Wo\\_w\\_9ajwa70](https://www.xavier.edu/campusuite25/modules/news.cfm?seo_file=One-in-Three-Americans-Fail-Immigrant-Naturalization-Civics-Test&grp_id=319#.Wo_w_9ajwa70).

39. See *Public Trust in Government Remains Near Historic Lows as Partisan Attitudes Shift*, PEW RESEARCH CTR. (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift/> (reporting that “the

direction the country is taking,<sup>40</sup> and that only a minority is satisfied with the way the nation is being governed.<sup>41</sup> Congress and its members receive particular disapproval: “Congress engenders the lowest confidence of any institution that Gallup tests, and Americans rate the honesty and ethics of members of Congress as the lowest among 22 professions in Gallup’s [surveys].”<sup>42</sup> In 2017, approval of Congress was only at 19% of those surveyed, making 2017 “the eighth consecutive year in which less than 20% of Americans have approved of Congress.”<sup>43</sup> Current views towards both the Democratic and Republican parties are likewise at historic lows.<sup>44</sup> “Dissatisfaction with government” tops the list of national problems respondents identify.<sup>45</sup> (Of all public institutions, the military has the strongest level of support.<sup>46</sup> The Supreme Court also consistently receives higher marks than do the other branches of the federal government.<sup>47</sup>) Half of Americans even believe the federal government “poses an immediate threat to the rights and freedoms of ordinary citizens.”<sup>48</sup> In sum, we

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overall level of trust in government remains near historic lows; and that just 20% say they trust the government to do what’s right always or most of the time”).

40. *Id.* (“By 66% to 30% more Americans say they are dissatisfied than satisfied with the way things are going in the country today.”).

41. Jeffrey M. Jones, Frank Newport & Lydia Saad, *How Americans Perceive Government in 2017*, GALLUP (Nov. 1, 2017), <http://news.gallup.com/opinion/polling-matters/221171/americans-perceive-government-2017.aspx>.

42. *Id.*

43. Megan Brenan, *2017 Congressional Job Approval Average Remains Low*, GALLUP (Dec. 14, 2017), <http://news.gallup.com/poll/223598/2017-congressional-job-approval-average-remains-low.aspx>.

44. Jones, Newport & Saad, *supra* note 41.

45. In a 2017 survey, “dissatisfaction with government” topped the list of national problems respondents identified, with 20% of Americans citing this as the most important problem the country faces; the next highest category was healthcare, cited by 10% of respondents. Frank Newport, *Americans View Government as Nation’s Top Problem in 2017*, GALLUP (Dec. 19, 2017), <http://news.gallup.com/poll/224219/americans-view-government-nation-top-problem-2017.aspx>.

46. See Jim Norman, *Americans’ Confidence in Institutions Stays Low*, GALLUP (June 13, 2016), <http://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> (reporting that in 2016, 73% of respondents expressed “a great deal” or “quite a lot” of confidence in the military; the figure for Congress was 9%).

47. In a 2017 poll, 49% of respondents voiced approval of the “way the Court is handling its job;” 52% of respondents expressed a “great deal” of confidence and an additional 16% expressed “a fair amount” of confidence in the Court. *Historical Trends, Supreme Court*, GALLUP (Apr. 1, 2018), <http://news.gallup.com/poll/4732/supreme-court.aspx>. Support for the Court can vary with current events. For example, support among Republicans for the Court increased after the confirmation of Neil Gorsuch while it dropped among Democrats. Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <http://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx>.

48. Frank Newport, *Half in U.S. Continue to Say Government Is an Immediate Threat*, GALLUP (Sept. 21, 2015), <http://news.gallup.com/poll/185720/half-continue-say-gov-immediate>

live with paradox: “Americans have lost faith in their government, yet they revere the constitution that established their government and continues to structure its operations.”<sup>49</sup> All the while, public knowledge about the Constitution is low.

The proposed amendment represents a healthy intervention. It forces a focus on the relationships (for surely there are some) between the Constitution itself and the operations—and deficiencies—of contemporary government. It opens the door to examination of, conversation about, and perhaps rejection of specific features of the Constitution that, upon deliberation and debate, do not serve us well. The proposed amendment does not disparage current popular support for the Constitution, but rather provides mechanisms for ensuring that such support is based upon informed knowledge about the document and its effects and is developed in a context in which there exists the opportunity for reform. In essence, the proposed amendment provides for a *more* authentic commitment to our constitutional democracy than is possible when, as now, Article V precludes reform.<sup>50</sup>

## II. STATE CONSTITUTIONAL ANALOGS AND LESSONS

While the proposal would alter the mechanisms of Article V, it is not without precedent. It comports, at least in a broad sense, with constitutional amendment procedures that have long been available

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threat.aspx.

49. SOTIRIOS A. BARBER, CONSTITUTIONAL FAILURE 1 (2014).

50. Here, the work of Professor Barber is especially relevant. He explains that “[v]enerating the Constitution is a bad idea because it obscures . . . constitutional failure and the corresponding need to promote reformist institutions.” *Id.* at 18. On the other hand, he says, it makes considerable sense to “commemorate” and even “venerate” the Founding because to do so is to “revisit a perspective in which the Constitution is both a mere proposal and a mere set of means” to put in place institutions that will achieve desirable political goals. *Id.* at 18–19. In other words, it is better to focus on the “founding act,” *id.* at 18, of seeking to create a system of government that will serve ends such as those referenced in the preamble, rather than consider the specific provisions of the document itself immutable to reform when the goals are no longer served. Indeed, resistance to changing the Constitution appears inconsistent with the document itself: “Fidelity to the Constitution as written would entail reaffirming the Constitution’s claim to be an instrument of its ends, and one could not reaffirm that claim without subjecting it to a critical examination that constitution worship precludes.” *Id.* at 118. As Professor Barber explains:

Swearing to preserve and defend the Constitution is not promising to leave it as is, for the Constitution itself provides for change in Article V. . . . The amendability of this constitution and therewith the opportunity and the right to redo our founding is thus made part of what we take an oath to preserve and defend. Our constitution is thus officially ‘open to thought’—that is, open to reasoned criticism and change.

*Id.* at 21.

at the state level. Consideration of those procedures sheds some light on the benefits and feasibility of the proposal—as well as some potential hazards.

### A. State Amendment Mechanisms

States provide more mechanisms for altering their constitutions than are available under Article V to amend the federal Constitution.<sup>51</sup> Indeed, a feature of state constitutional history is that over time amendment processes have been liberalized.<sup>52</sup> One route at the state level is to hold a constitutional convention. Most state constitutions thus empower the state legislature to propose a convention (in some instances, a super-majority vote is required) and, if voters approve the proposal by referendum, the convention is held.<sup>53</sup> In addition, every state constitution except that of Delaware provides for the state legislature itself to propose amendments for voter consideration in a state referendum.<sup>54</sup> Two states, Florida and New Mexico, provide for a commission that operates separately from the legislature to propose amendments.<sup>55</sup> Eighteen states provide for amendments to be proposed and adopted through voter initiatives, without the need for any legislative approval.<sup>56</sup> In most states, the ratification of a proposed amendment requires a simple majority of voters approving the proposal by referendum.<sup>57</sup>

Some state constitutions also periodically require asking voters whether they favor a convention for the purpose of proposing

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51. At the state constitutional level, it is customary to distinguish between amendment, the “addition or subtraction of material,” and revision, the “replacement of one constitution by another.” See Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006). While there is some variation among states, revising a constitution typically requires a constitutional convention. *See id.*

52. See G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237, 271–72 (2016) (“During the twentieth century, states multiplied modes of proposal and eased requirements for proposal and ratification, thereby facilitating constitutional amendment.”).

53. See Benjamin, *supra* note 51, at 192.

54. See COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 12–13 tbl. 1.2 (2017), <http://knowledgecenter.csg.org/kc/system/files/1.3.2017.pdf> (listing the constitutional amendment procedure by the legislature of each state). Delaware's Constitution can be amended by a two-thirds vote of two successive legislatures without voter ratification. DEL CONST. art. XVI, § 1.

55. See COUNCIL OF STATE GOV'TS, *supra* note 54, at 14 tbl. 1.3 (“Constitutional Amendment Procedure: By Initiative”); FL. CONST. art. XI, § 10; N.M. CONST. art. XIX, § 1.

56. Tarr, *supra* note 52, at 271.

57. *Id.* at 274.

amendments—the state analog to the reform offered in this Article.<sup>58</sup> Although Thomas Jefferson is often credited with the idea of periodically reforming constitutions,<sup>59</sup> Massachusetts got there first. The 1780 Massachusetts Constitution provided that, “In order the more effectually to adhere to the principles of the Constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary,” the voters would be asked “their sentiments on the necessity or expediency of revising the Constitution.”<sup>60</sup> Approval by two-thirds of the voters was required to trigger the revision process.<sup>61</sup>

Today, fourteen state constitutions contain provisions *requiring* that voters be asked at designated intervals whether to call a state constitutional convention.<sup>62</sup> Eight states put the question to voters every twenty years, four states do so every ten years, in one state (Michigan) the period is sixteen years, and in another (Hawaii) it is every nine years.<sup>63</sup>

Although once the source of regular state conventions, over time, use of automatic question provisions to actually call a convention has declined: from one hundred and forty-four state conventions during the nineteenth century to sixty-four during the twentieth and twenty-first centuries.<sup>64</sup> Since 1970, there have been only four conventions pursuant to an automatic vote,<sup>65</sup> with conventions held in New Hampshire in 1974 and 1984, in Hawaii in 1978, and in Rhode Island

58. COUNCIL OF STATE GOV'TS, *supra* note 54, at 15 tbl. 1.4.

59. In a letter to Samuel Kercheval on reforming the Virginia Constitution, Jefferson wrote “let us provide in our constitution for its revision at stated periods” so that “[e]ach generation” can “choose for itself the form of government it believes most promotive of its own happiness . . . .” Observing that “[b]y the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years,” Jefferson recommended that there be “a solemn opportunity” to revise a constitution “every nineteen or twenty years, . . . so that it may be handed on, with periodical repairs, from generation to generation.” Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON, CORRESPONDENCE AND PAPERS 1816-1826, at 12–13 (Paul Leicester Ford ed., Federal ed. 1905).

60. MASS. CONST. ch. 6, art. X (1780).

61. *Id.*

62. ALASKA CONST. art. XIII, § 3; CONN. CONST. art. XIII, § 3; FLA. CONST. art. XI, § 4; HAW. CONST. art. XVII, § 2; ILL. CONST. art. XIV, § 1; MD. CONST. art. XIV, § 2; MICH. CONST. art. XII, § 3; MO. CONST. art. XII, § 3(a); MONT. CONST. art. XIV, § 2; N.H. CONST. pt. 2, art. 100(c); N.Y. CONST. art. XIX, § 2; OHIO CONST. art. XVI, § 3; OKLA. CONST. art. XXIV, § 2; R.I. CONST. art. XIV, § 2.

63. See COUNCIL OF STATE GOV'TS, *supra* note 54, at 15 tbl. 1.4.

64. Tarr, *supra* note 52, at 267.

65. *Id.*



in 1986.<sup>66</sup> No state convention—whether by mandatory vote or legislative proposal—has been held since 1992, the year a state constitutional convention took place in Louisiana by proposal of that state’s legislature.<sup>67</sup> In every mandatory periodic referendum so far this century, voters have rejected holding a constitutional convention, though in some instances by only small margins: in 2000 in Iowa (66.7% opposed);<sup>68</sup> in 2002 in Alaska (71.6%),<sup>69</sup> Missouri (65.5%),<sup>70</sup> and New Hampshire (50.9%);<sup>71</sup> in 2004 in Rhode Island (52%);<sup>72</sup> in 2008 in Connecticut (59.4%),<sup>73</sup> Hawaii (61.9%)<sup>74</sup> and Illinois (67.3%);<sup>75</sup> in 2010 in Iowa (67%), Maryland (48.5%), Michigan (67%), and Montana (58%);<sup>76</sup> in 2012 in Alaska (67%), New Hampshire (64%), and Ohio (68%);<sup>77</sup> in 2014 in Rhode Island (55%);<sup>78</sup> and in 2017 in New York (77.7%).<sup>79</sup>

State constitutional conventions that have resulted from voter approval of a mandatory ballot question have not, of course, consistently resulted in any constitutional amendments: the

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66. John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to their Passage*, 71 MONT. L. REV. 395, 396–97, tbl. 1 (2010).

67. *Id.* at 396. American Samoa held a convention in 2010. The resulting proposed amendments, which included greater autonomy for the territory, were later rejected by voters by a wide margin. Associated Press, *Faleomavaega Wins 12th Election to Congress*, KPUIA (Nov. 4, 2010), <https://perma.cc/QHV2-QUBX>; Sarah Wheaton, *An American Concept, Carried Out in Samoan Style*, N.Y. TIMES (June 24, 2010), <https://www.nytimes.com/2010/06/25/us/25samoa.html>.

68. Dinan, *supra* note 66, at 405.

69. *Id.*

70. *Id.* at 406.

71. *Id.* at 408.

72. *Id.* at 410.

73. *Id.* at 412.

74. *Id.* at 415.

75. *Id.* at 417.

76. John Dinan, *State Constitutional Developments in 2010*, in THE BOOK OF THE STATES 3, 4–5 (2011).

77. John Dinan, *State Constitutional Developments in 2012*, in THE BOOK OF THE STATES 3, 4 (2013).

78. John Dinan, *State Constitutional Developments in 2014*, in THE BOOK OF THE STATES 3, 4 (2015).

79. See N.Y. STATE BOARD OF ELECTIONS, *Proposal Election Returns Nov. 7, 2017*, <https://www.elections.ny.gov/NYSBOE/elections/2017/general/2017GeneralElectionProp1.pdf>. An additional 6.1% of voters left the question blank and those votes also count as no votes. See *id.* Note that in Oklahoma, section 2 of Article XXIV of the state Constitution requires asking voters every 20 years whether they approve calling a constitutional convention, but the most recent year in which voters were asked was 1970. Since then the legislature has refused to put the question on the ballot and bills requiring implementation of section 2 have failed. See Dinan, *supra* note 66, at 401. Although in 1994 the legislature put to voters in a referendum a proposal to abolish section 2, that proposal was defeated. *Id.*

convention itself still needs to approve an amendment and then the amendment must be ratified. Nonetheless, some such conventions have played important roles in shaping the content of modern state constitutions. The 1986 convention that occurred in Rhode Island (following voter approval in 1984) generated fourteen proposed amendments that were submitted to the voters in that year's general election.<sup>80</sup> Eight of the fourteen proposals were ratified.<sup>81</sup> These included a requirement to adopt a re-written constitution to account for all amendments since 1843, new ethics rules for government, and a set of constitutional rights.<sup>82</sup> The state constitution that Rhode Islanders have today is very much a product of the 1986 convention.

### *B. Lessons from the States*

Two lessons seem evident. One is that there already exists a tradition of periodically asking Americans whether they favor a constitutional convention—or at least a tradition of asking some Americans that question some of the time. A second lesson is that the opportunity is not always, indeed is only infrequently, seized. The pattern suggests that if voters are periodically asked if they favor a convention to amend the federal Constitution, the answer will sometimes, and perhaps often, be no. Depending on one's perspective that news will appear good or bad. Perhaps the implication is that because voters will only favor a convention in the most serious of circumstances, the proposed change to Article V is an appropriate mechanism. Alternatively, the implication might be that because voters won't make use of the mechanism, there is no point making it available. It is therefore helpful to consider some additional evidence about what is happening at the state level.

One obvious explanation for declining support for state constitutional conventions is that state citizens are (by now) satisfied with their constitutions and naturally there is not the same need to make repairs as there once was. Commentators tend not to put much stock in that explanation, however, and have offered different views on why voters today are less inclined to favor a state constitutional convention than they were in the past.

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80. Albert L. Sturm & Janice C. May, *State Constitutions and Constitutional Revision: 1986-87*, in *THE BOOK OF THE STATES* 2, 3 (1988).

81. *Id.*

82. *Id.*

Gerald Benjamin and Thomas Gais posit that automatic convention mechanisms at the state level suffer from “conventionphobia.”<sup>83</sup> They suggest that increasingly the public views state conventions as controlled by political insiders seeking to enhance their own power—rather than an opportunity for the people to adopt favorable reforms.<sup>84</sup> Under these circumstances, voters are disinclined to approve a convention.

A different explanation for the decline in state constitutional conventions is that state constitutions can be amended far more easily than can the federal Constitution, and without the need to hold a convention at all. Indeed, even though the number of state constitutional conventions has dropped, the rate at which state constitutions are amended has increased over time.<sup>85</sup> State constitutions have been amended more than 6,500 times, representing an average of 1.25 amendments per state per year.<sup>86</sup> During the period 2006 to 2017, 815 state constitutional amendments were proposed to voters and 584 proposed changes were adopted.<sup>87</sup> In 2017, voters ratified all 17 amendments proposed at the state level.<sup>88</sup> These numbers help make sense of the decline in voter approval of conventions: if easier procedures for amending particular provisions of a constitution are available, there is less of a need to call a convention. Perhaps, then, the lesson for the proposed change to Article V is that because the existing mechanisms to amend the federal Constitution are so difficult to deploy, voters will be *more* inclined to favor a federal convention than they currently favor conventions to amend state constitutions.

At the same time, the decline of state-level conventions remains significant. Professor Tarr deems the development “the professionalization of state constitutional change.” He explains:

In the nineteenth century, conventions served as a mechanism for popular influence on politics, often called by reluctant officials in response to popular pressures. But in the twentieth century far

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83. See Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 69 (1996).

84. *Id.* at 71.

85. See Tarr, *supra* note 52, at 267–68.

86. *Id.* at 256.

87. *Constitutional Amendments from 2006 through 2017*, BALLOTPEDIA, [https://ballotpedia.org/Constitutional\\_amendments\\_from\\_2006\\_through\\_2017](https://ballotpedia.org/Constitutional_amendments_from_2006_through_2017) (last visited Mar. 15, 2018).

88. *Id.*

fewer conventions have been called, and their character has changed. Typically, it has been political elites and professional reformers who have campaigned for constitutional revision, with the populace reduced to rejecting convention calls and proposed constitutions to register its distrust of a process that it no longer feels it controls.<sup>89</sup>

In this regard, the ability to amend a state constitution through legislative proposal and voter ratification, now the most common route, does not fully serve as a substitute for a convention. When amendments begin with the legislature, the process is easily dominated by political insiders rather than serving as an outlet for populist energies. The possibility of voter-initiated amendments is also an imperfect substitute for a convention: legislative proposals are ratified at higher rates than those that result from voter initiative. Proposals from conventions, however, are ratified at the highest rate of all.<sup>90</sup> The convention setting provides both a mechanism for generating different amendments than those that emerge from legislative processes and for proposing changes to a constitution that may receive very high levels of public support at the ratification stage.

Based on his analysis of recent mandatory convention referendums, Professor Dinan points to two reasons voters tend to reject calling a state constitutional convention: (i) indifference on the part of citizens to state constitutional reform that results from a low level of citizen knowledge about state constitutions<sup>91</sup> (only a bare majority of citizens may even know their state has a constitution)<sup>92</sup>; and (ii) opposition to a convention from the dominant legislative party and from many interest groups.<sup>93</sup> Professor Dinan also identifies corresponding factors that make it more likely voters will favor a convention when asked. In addition to more active campaigning by convention proponents, he finds that preparatory commissions can increase citizen knowledge and overcome citizen indifference, and that governors and gubernatorial candidates can play a strong role in bringing attention to the need for constitutional reform.<sup>94</sup> Professor Dinan reports further that efforts to overcome powerful opposition

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89. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 170 (1998).

90. Tarr, *supra* note 52, at 272.

91. Dinan, *supra* note 66, at 418–19.

92. TARR, *supra* note 89, at 2 n.4 (reporting 52% of respondents knew that their state had its own constitution).

93. Dinan, *supra* note 66, at 420–21.

94. *Id.* at 425–27.

interests succeed when such efforts focus on “identify[ing] institutional reforms or issues that command particular support but are blocked in the political process or do not stand a chance of emerging from the constitutional amendment process.”<sup>95</sup> In particular, he finds that when convention supporters highlight the possibility of adopting, through a convention, enhanced mechanisms for direct democracy (such as initiatives, recalls, and legislative term-limits) and amendments to overturn unpopular state supreme court rulings, voters are more likely to favor a convention.<sup>96</sup>

The result of the most recent mandatory vote on whether to hold a state convention, in New York in 2017, sheds some additional light. Despite widely-held views that their state government is in need of reform,<sup>97</sup> New Yorkers rejected holding a constitutional convention by a wide margin. A common concern was the fear of a runaway convention. Opposition to a constitutional convention on this ground unified the Right to Life Committee, the New York State Rifle and Pistol Association, and conservative political organizations with Planned Parenthood, the New York Civil Liberties Union, and labor unions.<sup>98</sup> Although these organizations had different particularized concerns, they shared the belief that a convention was dangerous because, once started, there was no telling what changes the convention would seek to make to the state constitution. In particular, opponents warned that a convention could easily seek to do away with constitutional rights.<sup>99</sup> None of the convention proponents had

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95. *Id.* at 428.

96. *Id.* at 428–31.

97. See NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS (Peter J. Galie et al. eds., 2016). One newspaper editorial board urged voters to approve a convention because “[t]he state’s government is a scandalous embarrassment. It is tilted to keep incumbents in power, to please special interests and to thwart reform. It is a system that, even on its good days, is maddeningly dysfunctional.” *Fix This Government and Vote This Fall for a Constitutional Convention*, N.Y. DAILY NEWS (May 22, 2017), <http://www.nydailynews.com/opinion/fix-government-vote-constitutional-convention-article-1.3180479>.

98. See, e.g., *Broad Coalition Forms to Fight Con Con*, SPECTRUM NEWS—STATE OF POLITICS, June 19, 2017, <http://www.nystateofpolitics.com/2017/06/broad-coalition-forms-to-fight-con-con>.

99. See, e.g., Josefa Velasquez, *State Supreme Court Justices Oppose Constitutional Convention*, N.Y. L.J., Oct. 19, 2017, <https://www.law.com/newyorklawjournal/almID/1202800857281/> (reporting on statement by Justice Deborah Dowling that “[a]fter thoroughly reviewing the issue, the Association of Justices of the Supreme Court of the State of New York has determined that a state constitutional convention is unnecessary, would be overly costly, and could result in the reversion, elimination or diminution of many current constitutional rights and safeguards”); Ned Hoskin, *Why We Must Say NO to a State Constitutional Convention*, N.Y. ST. UNITED TCHRS., Jan. 26, 2016, <https://www.nysut.org/news/nysut->

ever suggested the convention should seek to cut back on the liberties New Yorkers enjoy under their state constitution, but the fear that rights were at risk proved impossible to overcome.

Some of these same issues might emerge in a debate over whether to hold a convention to propose amendments to the federal Constitution. However, the political dynamics at the national level would probably differ. While there might well be opposition to a convention from powerful insiders and concerns that a convention could do away with favored constitutional protections, it is also likely that there would be countervailing forces: individuals and organizations capable of explaining why a constitutional convention is warranted and how there are checks on a truly runaway process. In particular, requiring that any proposed amendment be approved by a majority of the states with two-thirds of the Representatives (rather than a simple majority of voters) serves as a significant tempering element.

### III. SOME ADDITIONAL ISSUES

Four additional issues pertaining to this Article's proposed amendment to Article V merit further discussion. These are (A) some implications of the contemplated timing for asking voters whether they favor a Convention, (B) whether the new amendment route is likely to produce serious efforts at constitutional reform, (C) whether there is a risk of a runaway process that produces too many or unwise changes, and (D) some of the practical aspects of the amendment process that is envisaged.

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united/issues/2016/february-2016/why-we-must-say-no-to-a-state-constitutional-convention (“Many of the rights we enjoy as New York state citizens would be fair game should a State Constitutional Convention take place.”); *New York State Constitutional Convention*, N.Y. CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/issues/voting-rights/new-york-state-constitutional-convention> (“The NYCLU firmly opposes the constitutional convention. It would place in serious danger our state protections for civil rights and civil liberties. That’s because the process is rigged to favor the interests of the powerful.”); *Why Voters Should Reject a Constitutional Convention*, UNITED FED’N OF TEACHERS (Jan. 5, 2017), <http://www.uft.org/q-issues/why-voters-should-reject-constitutional-convention> (warning that “[a] constitutional convention is unlimited in the scope of what it could change. This would place New York State’s rights and protections at risk of alteration or elimination, including the guarantee of a free public education, a prohibition against aid to non-public schools and the right to Workers’ Compensation. The right to unionize and bargain collectively and state requirements regarding pensions and social welfare could also wind up on the chopping block”).

### A. *Timing*

A potential problem with any mandatory referendum on whether to hold a constitutional convention is that the time at which the vote occurs might not neatly correspond with a well-reasoned sense on the part of voters that constitutional reform is needed. On the one hand, problems that a convention could resolve might emerge years before a vote on holding a convention is scheduled. Thus we face the prospect of having to put up with some defect in our governing arrangements until a convention question year rolls around. On the other hand, some problems might arise immediately prior to the vote but without adequate time for voters to consider fully whether the problem is so serious that a convention should be called. In that scenario, “yes” votes might represent heat-of-the-moment decisions or a precautionary gamble given that the next opportunity to approve a convention will be twenty years away.

Issues of timing thus risk distorting convention referenda. Imagine, for instance, that on the day of a vote on whether to hold a convention the sitting President has become increasingly erratic and over the course of the preceding two months has vowed to launch nuclear attacks on a dozen countries he deems enemies of the United States and that neither Congress nor the courts appear willing or able to check the President’s actions. While it is probably unlikely the *next* President will engage in similar behavior—so that, as an institutional matter, amending the Constitution would be a heavy-handed response—and while there is little guarantee that a convention could act quickly enough to limit the current President’s powers, voters, anxious for some sort of response, might favor a convention.

A further issue of timing is that in the years in which a convention vote is scheduled, there might be undue attention paid to issues that in other years would not generate much passion. In other words, the availability of a convention might make relatively mundane issues appear to be problems of a constitutional dimension ripe for a convention-sponsored solution. For example, in off-cycle years, controversial Supreme Court decisions might be criticized and debated but nonetheless gain public acceptance. In years in which a convention vote is held, however, the same decisions might become targets for correction through the amendment process.

Furthermore, institutional actors might engage in strategic behavior to avoid the check of a constitutional convention. For example, Congress might delay enacting controversial legislation until

after a convention vote. The Supreme Court might put off a big ruling until the referendum is over. Presidents who are in office in periods leading up to a convention might act more modestly than presidents who know they have four or eight years that are referendum free.

It is not obvious that all of these risks demand responses beyond those the normal political process will make available. One key feature, though, to the proposed amendment bears emphasis: section 6 guards against hastily-adopted amendments by imposing a time lag between proposal and ratification. Section 6 sets a two-year delay between the national convention responsible for proposing amendments and the state conventions responsible for deciding whether to adopt the proposals. Putting off ratification for a time allows for further debate about proposed amendments, lets some problems resolve themselves through other means, and focuses amendment processes on issues of lingering institutional concern. There is, of course, room for debate about the appropriate period of delay. In some minds, two years might be too long: the period might mean energy for constitutional reform always dissipates before anything gets done and might prevent a needed quick response to a very serious problem. For others, two years might be too short. Perhaps a four-year lag makes more sense because within that period of time elections (and other processes) might well resolve problems without the need for a constitutional amendment.<sup>100</sup>

### *B. Possibilities of Reform*

Given the high degree of popular support for the Constitution (as described in Part I), it is fair to ask whether the proposal would ever result in a convention being called, the convention agreeing to

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100. A different risk bears flagging. With periodic voting on whether to hold a constitutional convention, members of the government might form the view that a 'no' vote signals that the citizenry is satisfied, even happy, with the way in which the government is operating. Thus, the failure of the people to convene and adopt amendments to alter what the government is doing—to require a balanced budget, impose term limits upon members of Congress, protect new rights, overturn a Supreme Court decision—could be taken to mean that no reform is desired or needed. Accordingly, government, emboldened, might continue on its same course or perhaps act more boldly. Given that voters might be both dissatisfied with what the government is doing and reluctant (for other reasons) to proceed to a convention to adopt amendments, there is a risk of the availability of the convention process proposed in this article increasing the gap between what government does and what citizens want. In other words, right now, we can comfortably say, "We don't like the way things are going but it is too hard to amend the Constitution to fix the problems." If amendment is a realistic option and yet not exercised, fault for political deficiencies shifts squarely to the public and inaction on its part might easily be taken as acquiescence.



amendments, and those amendments being ratified. Why, after all, would Americans proceed to a constitutional convention if they think so highly of their Constitution? Perhaps, then, the only benefit to the proposal is offering a means of constitutional change that in reality is never used.

It is hard to know in advance whether and how the proposed mechanism for amendments would be deployed. Nonetheless, it is important to recognize that while in surveys Americans express high regard for the Constitution and a general resistance to changing it, there is also support for specific amendments. In other words, Americans do support particular reforms even while, in the abstract, they say they do not favor altering the Constitution.

For example, surveys show majority support for congressional term limits and mandatory congressional retirement ages.<sup>101</sup> Americans also support abolishing the Electoral College so as to provide for popular election of the President<sup>102</sup> (although such support tends to be sensitive to electoral outcomes).<sup>103</sup> Some surveys show support for term limits and a retirement age at the Supreme Court and even for the election, rather than appointment, of the

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101. See Arthur H. Taylor, *Fear of an Article V Convention*, 20 *BYU J. PUB. L.* 407, 430–36 (2006) (citing *Nat'l Survey on Constitutional Change*, HARRIS INTERACTIVE (2005)) (reporting 71% of respondents in favor of congressional term limits); Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), <http://news.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx?version=print> (reporting that 75% of Americans would vote for congressional term limits); Aspen Ideas Festival, *supra* note 34 (reporting support for a mandatory retirement age for members of Congress (66% of respondents)).

102. See Saad, *supra* note 101 (reporting that 63% of Americans would vote for doing away with the electoral college); Aspen Ideas Festival, *supra* note 34 (reporting 74% of respondents favor abolishing the electoral college).

103. Since 1967 majorities have supported an amendment abolishing the electoral college and providing for popular election of the President; support has been as high as 80% (in 1968). See *The Public and Proposed Constitutional Amendments: We Love You, You're Perfect, Now Change*, ROPER CTR. FOR PUB. OP. RESEARCH (last visited May 18, 2018), <https://ropercenter.cornell.edu/the-public-and-proposed-constitutional-amendments-we-love-you-youre-perfect-now-change-2/>. Yet support has also varied depending on electoral outcomes: after Al Gore won the popular vote but lost the electoral college in 2000 support for an amendment sharply rose among Democrats. See *id.* After Donald Trump won the electoral college but lost the popular vote in 2016, surveys showed that Republicans (70%) favored keeping the electoral college while Democrats (78%) favored amending the Constitution to provide for popular election of the President. See Sarah Dutton et al., *Poll: More Americans Believe Popular Vote Should Decide the President*, CBS NEWS (Dec. 15, 2016), <https://www.cbsnews.com/news/poll-more-americans-believe-popular-vote-should-decide-the-president/>; Art Swift, *Americans' Support for Electoral College Rises Sharply*, GALLUP (Dec. 2, 2016) (reporting that 47% of Americans favor keeping the electoral college as a result of increased support among Republicans).

Justices.<sup>104</sup> Beyond the structures of government, a balanced budget amendment has long been popular with the public<sup>105</sup> as has an amendment to permit school prayer.<sup>106</sup> Recently, surveys have also shown that Americans favor, by large margins, modifying the birthright citizenship provision of the Fourteenth Amendment in response to so-called maternity tourism.<sup>107</sup>

This sort of evidence does not necessarily indicate that the proposed convention process would result in amendments to the Constitution on these or any other issues. Nonetheless, the evidence does suggest that there is likely to be interest, at least in some circumstances, in making use of the new amendment procedure.

### C. A Runaway Convention?

As described in Part II, opposition to state constitutional conventions has often focused on the risk of the runaway convention.<sup>108</sup> The concern has two dimensions. The first is that if a convention is called for a specific purpose, i.e. to consider certain constitutional amendments, it might just ignore that purpose and

104. Aspen Ideas Festival, *supra* note 34 (reporting majority support for a retirement age for members of the Supreme Court (69%), term limits for the justices (66%), and election rather than appointment of the justices (51%)).

105. See Taylor, *supra* note 101, at 432 (reporting 76% of respondents in support of a balanced budget amendment); The Economist/YouGov Poll (Nov. 8, 2017), <https://perma.cc/2L3T-7FH8> (reporting 43% “strongly support” or “somewhat support” an amendment to the Constitution requiring a balanced budget); NBC News/Wall Street Journal Poll (April 7, 2011), <https://perma.cc/D7ZH-ZD2V> (61% favoring a balanced budget amendment).

106. See Alison Gash & Angelo Gonzales, *School Prayer, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 77* (Nathaniel Persily et al. eds., 2008) (“[P]ublic opinion has remained [over four decades] solidly against the Court’s landmark decisions declaring school prayer unconstitutional. The public has been and continues to be highly supportive of a constitutional amendment overturning these decisions. . . . [P]ublic sentiment has changed only modestly over the years, even though the percentage of Americans who express no religious preference has notably increased.”); Taylor, *supra* note 101, at 433 (reporting 74% in support of an amendment “requir[ing] judges to interpret the laws and not write them” and 67% favoring an amendment permitting prayer at public school ceremonies).

107. A 2011 poll asked: “Some pregnant foreigners arrange trips to the United States, specifically timed so that they give birth during their stay, making any child born an automatic U.S. citizen. Do you think the U.S. Constitution should be changed to no longer allow for this?” 45% of respondents answered that the Constitution “definitely should” be changed; 22% answered it “probably should” be changed. *Two-thirds of Americans Think Constitution Should be Changed to Bar Maternity Tourism, THE HARRIS POLL* (June 21, 2011), <http://www.theharrispoll.com/immigration-has-long-been-a-hotly-debated-and-divisive-political-issue-a-recent-harris-poll-sheds-light-on-a-new-twist-in-the-old-debate-the-question-of-maternity-tourism-or-birthing-trips-where-pre/>.

108. See *supra* notes 97–99 and accompanying text.

propose other kinds of amendments beyond those contemplated at the time the convention call was approved. The second dimension is that a convention, once started, might rework large portions of the constitution, perhaps even undo the entire constitution, in ways that have unpredictable and potentially disastrous results.

Concerns about runaway conventions are also a frequent basis for opposition to a state-initiated convention under the existing provisions of Article V.<sup>109</sup> Notably there have been hundreds of state resolutions calling for a federal constitutional convention to consider specific amendments. In particular, in recent years twenty-seven states have sought a convention to propose a balanced-budget amendment.<sup>110</sup> Opposition—including from both the John Birch Society<sup>111</sup> and the ACLU<sup>112</sup>—has centered on the concern that, once called, the scope of any convention could not be limited and the entire Constitution would be up for reconsideration and change.<sup>113</sup> Convention proponents, by contrast, have argued that past experience at the state level shows that fears of a runaway convention are exaggerated and that conventions result generally in modest and predictable changes.<sup>114</sup>

These debates have given rise to a number of issues concerning a convention called by the states. One is whether there exists any legal mechanism for constraining such a convention. If, in accordance with the existing provisions of Article V, two-thirds of the states petition for a convention to consider an amendment on a specific issue and

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109. See Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2 (1983).

110. *America Might See a New Constitutional Convention in a Few Years*, ECONOMIST (Sept. 30, 2017), <https://www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention>.

111. *Id.*

112. See Jay Stanley, *Calls For a Constitutional Convention Heating Up in the States*, ACLU (Feb. 3, 2015), <https://www.aclu.org/blog/free-future/calls-constitutional-convention-heating-states> (“[T]here is no way to ensure that the convention would confine itself to whatever subject inspired its creation, without veering off into dangerously impetuous rewriting of our nation’s foundational legal document.”).

113. See, e.g., David A Super, *A Constitutional Convention is the Last Thing America Needs*, L.A. TIMES (May 15, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-super-constitutional-convention-20170315-story.html> (“No one—not Congress, not the Supreme Court and certainly not the president—has any authority to rein in a runaway constitutional convention. Given today’s politics, who could be sure that nothing crazy would be successfully proposed, and quite possibly ratified?”).

114. See, e.g., Nick Dranias, *10 Facts to Rebut the Mythology of a Runaway Convention*, GOLDWATER INST., [https://goldwaterinstitute.org/wp-content/uploads/cms\\_page\\_media/2015/6/3/10%20Facts%20Runaway%20Conv.pdf](https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/6/3/10%20Facts%20Runaway%20Conv.pdf).

Congress, in response, calls the convention for that purpose, is the convention limited to what the states sought and Congress gave? Scholars have offered different views on whether the scope of a convention can be limited and whether such limits can be enforced, including whether states even have power to seek a convention for a limited purpose.<sup>115</sup> A related issue is whether Congress can impose a check at the back end by deciding which, if any, convention-generated proposals to submit to the states for ratification. Some scholars (and an occasional Senator) have suggested that the check on a runaway convention is that Congress can refuse to send proposals to the states for ratification.<sup>116</sup> Other scholars contend that Congress lacks such a power.<sup>117</sup> Whatever the merits of the different positions on these

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115. For a sampling of views, see Charles L. Black, Jr., *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626, 630 (1979) (arguing that a convention necessarily has the same unlimited authority as does Congress to propose amendments); Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 6–11 (1979); Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 715 (2011) (“Perhaps no Article V question has been debated so fiercely, on so little evidence, as whether applying states may limit the scope of a convention for proposing amendments. A more complete view of the evidence tells us the answer is almost certainly ‘yes.’”); *id.* at 736 (“Because of its agency role, Congress may—in fact, *must*—limit the subject matter of the convention to the extent specified by the applying states.”); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 848 (2011) (“[T]here cannot constitutionally be such a thing as a limited Article V convention. . . .”); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 CONST. COMMENTARY 53, 56 (2012) (“[O]nce two thirds of the states apply for the same limited convention, Congress is obligated to call that limited convention. Moreover, the convention is required to conform to the limits in Congress’s call. If the convention were to violate the limitations in the call— if it were to propose an amendment that was not within the scope of its authority—then that proposal would be unconstitutional . . . and could not be legally ratified by the states.”); William W. Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985, 990–91 (1979); Bruce Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

116. See, e.g., Sam J. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 879 (1968); Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 907 (1968); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (Spring 2011); Interview by Shane Lehman with Sen. Tom Coburn (Jun. 28, 2017), <https://americanpastorsnetwork.net/2017/06/28/6-20-17-runaway-convention/> (“The other safety valve on this, is let’s say they pass something like that, the Congress would never send it to the states because it violates the constitution because they’re making amendments outside of the application that they’ve made. So first of all, if they pass something like that it will never get to the states.”).

117. Paulsen, *supra* note 115, at 842 (“[W]here Article V contemplates “checks” on the work of an amendment-proposing convention, it says so explicitly: Congress, not the convention, is given the power to prescribe the mode of ratification (state legislatures or state ratifying conventions) and three-fourths of the states must ratify for an amendment to become valid as part of the Constitution.”).

issues, it is not obvious that a court would intervene to resolve a dispute between Congress and a convention held upon application by the states. In the past courts have ducked challenges to amendments as political questions (or on other grounds),<sup>118</sup> and are probably very unlikely to get involved in future such challenges.

A further comparison between amending state constitutions and amending the federal constitution bears flagging: a state amendment process can never be fully runaway because the U.S. Constitution serves as a backstop to state-level change. This is true in two senses. First, amending a state constitution to reduce or eliminate protected rights would have no effect upon rights that are part of the federal Constitution. Second, there are federal constitutional limits to changes that can be made at the state level. For instance, states could not amend their constitutions to protect life at conception, or criminalize interracial marriage, or prohibit criticism of the government because all of these things would violate the federal Constitution. There is, however, no comparable backstop to the federal Constitution unless one accepts that some portions of it cannot be altered through the amendment process or that there are otherwise built-in-limits on the kinds of changes amendment procedures allow.<sup>119</sup>

The proposed amendment contains provisions that guard against a runaway process and the political disputes such a process might generate. First, under section 1, a convention cannot meet unless approved by a majority of voters in a majority of states. Second, under section 4, proposed amendments must be approved by two-thirds of the delegates before they can be submitted to the states for ratification. Third, under section 6, a majority of the state conventions must approve any proposed amendment and (as a proxy for population) those states must together have two-thirds of the voting Representatives in the House.

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118. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (holding that the question whether Kansas had properly ratified the proposed Child Labor Amendment was for Congress, not the Court, to determine); *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (rejecting challenge to the Nineteenth Amendment that “so great an addition to the electorate . . . destroys . . . [the] autonomy [of a state] as a political body”); *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) (rejecting an argument in a prisoner’s habeas corpus petition that the Eighteenth Amendment was unconstitutional because Congress, in imposing a seven-year time limit for the states to ratify the Amendment, had burdened the deliberative processes of the states); *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (rejecting several challenges to the Eighteenth Amendment).

119. For an argument along these lines, see Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747 (2005).

The ratification bar of section 6 is particularly significant for ensuring broad support for any amendment. Given the current number of states and Representatives, ratification would require the vote of 26 states with 290 Representatives. While there are various combinations of states that can reach that threshold, proposed amendments will fail without national support. In particular, if the four largest states decide against ratifying a proposed amendment, it is almost certainly doomed: California (53 U.S. Representatives), Texas (36), Florida (27), and New York (27) together have 143 Representatives. If they all vote against a proposed amendment, ratification will require approval in nearly every other state. Defeat in the next largest state, Pennsylvania (18 Representatives), would mean the amendment will fail, as would defeat in New Mexico, Nebraska or West Virginia (3 Representatives each).

These mechanisms provide significant safeguards against adoption of poorly thought out, minimally discussed, or hastily made constitutional changes. Significant reform is possible—that is the whole point—but only reforms that generate broad support over a sustained period of time will succeed. Thus, for example, some judicial decisions are initially very unpopular and provoke calls for a constitutional amendment but with time generate less opposition. This has been true with respect to same-sex marriage<sup>120</sup> and flag burning.<sup>121</sup> Such decisions are not likely to be targets for amendment.

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120. When Massachusetts became the first state to legalize same-sex marriage, see *Goodridge v. Dep't of Pub. Health*, 789 N.E.2d 941 (Mass. 2014), a clear majority of Americans supported amending the federal Constitution to prohibit same-sex marriage throughout the country. See *Nat'l Survey*, *supra* note 101 (reporting that 64% of Americans supported amending the Constitution to define marriage in all states as the union of a man and a woman). By the time the Supreme Court invalidated the provision of the Defense of Marriage Act defining marriage for federal purposes as between a man and a woman, see *United States v. Windsor*, 570 U.S. 744 (2013), there was no majority in favor of such an amendment. See Dana Blanton, *Fox News Poll: 49 Percent Favor Gay Marriage, Up From 32 Percent in 2003*, FOX NEWS (Mar. 21, 2013) (reporting that in response to the question, “Would you favor or oppose amending the U.S. Constitution to define marriage as being between a man and a woman?,” 41% of respondents answered they “strongly oppose[d]” the measure and 9% said they “somewhat oppose[d]” it; 32% answered they “strongly favor[ed]” the measure and 9% said they “somewhat favor[ed]” it); Quinnipiac Univ. Poll (July 12, 2013) <https://poll.qu.edu/images/polling/us/us07122013.pdf/> (reporting that in response to the question, “Do you think each state should make its own law on whether same-sex marriage is legal or illegal there, or do you think this should be decided for all states on the basis of the U.S. Constitution?,” 40% of respondents answered “state laws” while 53% answered the Constitution).

121. After the Supreme Court held in 1989 that the First Amendment protects the right to burn the flag, see *Texas v. Johnson*, 491 U.S. 397 (1989), 71% of respondents supported amending the Constitution in response to the decision. By 2006, the figure had dropped to 56%

#### D. Practicalities

While Article V provides for a convention on the application of two-thirds of the state legislatures, it does not provide any details about how such a convention is to operate. This leaves open some significant questions—and (because uncertainty can be a source of anxiety) likely helps explain why no Article V convention has ever been held. Among the most obvious issues are: how delegates are to be selected, their numbers and qualifications; whether states have equal voting rights (or even whether voting is by state); and whether at the convention proposed amendments must be approved by a simple majority (of states?) or some other formula. Article V also does not tell us *who* decides these and related issues. Given the lack of specificity in Article V itself, commentators have offered different views on which kinds of processes and arrangements are desirable or constitutionally required.<sup>122</sup>

At the state level, “[s]tate constitutions vary enormously in the degree of detail with which they deal with the specifics of staffing, convening, structuring, and operating a constitutional convention once it is called.”<sup>123</sup> In general, in states where the legislature has the power to decide whether to ask voters if they favor a convention, there tend to be few constitutionally-specified requirements about how the convention will operate.<sup>124</sup> The inference is that the legislature also gets to make such determinations through enabling statutes.<sup>125</sup> By

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and it continues to decline. See ROPER CTR. FOR PUB. OP. RESEARCH, *supra* note 103; see also Peter Hanson, *Flag Burning*, in Persily, *supra* note 106, at 199 (“[P]ublic opposition to flag burning has not changed. But support for an amendment to overturn the decision has waned, and the public no longer views flag burning as a high-priority issue.”).

122. See, e.g., RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 119 (1988) (arguing that individual states have authority to decide how delegates are to be selected and that the convention itself determines voting procedures and rules); Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *YALE L.J.* 957, 964–65 (1963) (arguing that Congress has power to determine the method of selecting delegates and the voting rules at a convention and that there is no constitutional requirement that voting occur on a state-by-state basis such that each state be given a single vote to be shared among delegates); Natelson, *supra* note 115, at 697–98, 740–41 (arguing that the practices of inter-colonial and interstate conventions during the 1770s and 1780s along with post-Founding practices provide the rules for conventions under Article V so that “the Article V convention is a creature . . . of the state legislatures, not of Congress, nor of the people directly” and “[t]hose legislatures, therefore, determine how delegates are allocated and selected[;]” and the convention itself determines voting rules and other aspects of its procedures).

123. Benjamin, *supra* note 51, at 194.

124. *Id.* at 194–95.

125. *Id.*

contrast, in states where the voters are able to bypass the legislature and themselves call for a convention, the state constitution is typically much more specific about how the convention will be structured.<sup>126</sup> The New York Constitution, for example, which provides for a referendum every 20 years on whether to hold a convention, contains a long list of procedural requirements any such convention must follow.<sup>127</sup> Within these general parameters, state constitutions contain various provisions specifying such things as the size of the convention and the selection of delegates, the time and place of a convention, and how the convention is to be funded.<sup>128</sup>

The organization and operation of a federal constitutional convention matters a good deal. For example, a convention in which each state is represented by its sitting U.S. Senators would be very different from one in which delegates are elected in a state special election. Evaluating whether the proposed change to Article V offered in this Article makes sense requires knowing something about how any resulting convention will operate and how amendments the convention generates will be ratified. The proposal offered here thus sets out key aspects of the convention, including (in section 1) the number of delegates and how they are to be selected, the timing and location of the convention (section 1), how salaries and expenses are to be paid (section 3), certain voting rules (sections 4 and 5), and the form that proposed amendments must take (section 6). There are other features of the convention that could be specified (and perhaps some that are offered that could be omitted from the list). There is also room for debate about the particular arrangements suggested. The key point, though, is that evaluating the proposed amendment requires attention to convention and ratification processes. Simply providing for voters to call a convention without any advance knowledge of how the convention will operate is not a recipe for success.

## CONCLUSION

A constitution that can never be altered or abolished is inconsistent with basic principles of popular sovereignty and democratic rule. A constitution whose amendment procedures are so onerous that in practice they foreclose virtually all modification and

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126. *Id.* at 196.

127. *See* N.Y. CONST. art. XIX, § 2.

128. Benjamin, *supra* note 51, at 197–200.



reform is similarly defective. Article V has turned out to be incompatible with our own constitutional traditions, which have emphasized a healthy skepticism of governing charters rather than blind faith in existing institutional arrangements. “The earth belongs in usufruct to the living,” Jefferson wrote, and “the dead have neither powers nor rights over it.”<sup>129</sup> According to Thomas Paine, “every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it.”<sup>130</sup> Noah Webster warned that “[t]he very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”<sup>131</sup> Reforming Article V in the manner proposed in this Article would return us to a constitutionalism marked by ongoing vigilance, informed deliberation, and periodic intervention. By putting responsibility for the Constitution back in the hands of the citizenry, the proposal would reinvigorate our constitutional democracy.

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129. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392, 396 (Julian P. Boyd ed., 1958).

130. Thomas Paine, *The Rights of Man*, in THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 243, 251 (Philip S. Foner ed., 1961).

131. Noah Webster (as Giles Hickory), *On the Absurdity of a Bill of Rights*, 1 AM. MAG. 13, 14 (Dec. 1787).