



Legal Studies Research Paper Series

Research Paper No. 11-049
January 2011

REFORMING ARTICLE V: THE PROBLEMS
CREATED BY THE NATIONAL CONVENTION
AMENDMENT METHOD AND HOW TO FIX THEM

Michael B. Rappaport

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=1748854>

VIRGINIA LAW REVIEW

VOLUME 96

NOVEMBER 2010

NUMBER 7

ARTICLES

REFORMING ARTICLE V: THE PROBLEMS CREATED BY THE NATIONAL CONVENTION AMENDMENT METHOD AND HOW TO FIX THEM

*Michael B. Rappaport**

INTRODUCTION.....	1511
I. A BRIEF OVERVIEW OF THE NATIONAL CONVENTION	
PROCEDURE.....	1515
A. <i>The Structure of Article V</i>	1516
B. <i>Limited or Unlimited Conventions</i>	1517
C. <i>Can Congress Regulate the Convention?</i>	1523
II. DEFECTS OF THE NATIONAL CONVENTION PROCEDURE.....	1526
A. <i>Coordination and Congressional Power</i>	1527
B. <i>The Possibility of a Runaway Convention</i>	1528
C. <i>The Unwillingness to Apply for a Convention</i>	1532
D. <i>The Threat of a Convention</i>	1535
III. THE CONSEQUENCES OF A BROKEN NATIONAL CONVENTION	
PROCEDURE.....	1537
A. <i>Normative Consequences</i>	1538
B. <i>Elaborating the Normative Approach</i>	1544
C. <i>Interpretive Consequences: Interpreting Based on a</i> <i>Desirable Constitutional Amendment Process</i>	1546
D. <i>Implementing the Normatively Desirable</i> <i>Interpretations</i>	1548

* Professor of Law, University of San Diego School of Law. The author would like to thank Larry Alexander, Don Dripps, John McGinnis, David McGowan, Mike Ramsey, and Steve Smith for comments.

<i>E. The Overall Effect of the Failure of the National Convention Method</i>	1554
IV. A BETTER PROCEDURE: STATE DRAFTING.....	1555
<i>A. Normative Preliminaries</i>	1556
<i>B. The State Drafting Reform</i>	1557
1. <i>The Simple Version with an Advisory Convention</i>	1557
2. <i>Modifying State Voting Weights</i>	1559
3. <i>Modifying How the States Vote</i>	1563
<i>C. Alternative Reforms</i>	1566
V. HOW TO ENACT THE STATE DRAFTING METHOD.....	1567
<i>A. Agreeing on a Single Proposal</i>	1569
<i>B. Applying for a Convention</i>	1569
<i>C. Selecting Delegates to the Convention</i>	1572
<i>D. The Convention and the Ratification Process</i>	1573
<i>E. The Overall Effect of Political Controls</i>	1574
<i>F. Legal Controls</i>	1575
<i>G. The Probability of Enacting the State Drafting Method</i>	1578
CONCLUSION.....	1580

“It would be improper to require the consent of the Natl. Legislature [for an amendment], because they may abuse their power, and refuse their consent on that very account.”

George Mason at the Philadelphia Convention¹

“A state without the means of some change is without the means of its conservation.”

Edmund Burke²

INTRODUCTION

ONE of the key parts of a constitution is its amendment method. The amendment method must be strict enough so that the government cannot easily change existing constitutional provisions, but not so strict that it prevents the changes necessary to reform and update the constitution. Unfortunately, the amendment provisions of the U.S. Constitution have a serious defect. Although some commentators claim that the supermajority rules in these provisions are too strict,³ it is by no means clear that this criticism is correct. These strict supermajority rules do make it difficult to pass amendments, but they also have offsetting benefits, such as promoting high quality amendments.⁴

Rather, the clear defect in the amendment provisions is that the only *effective* way they provide of amending the Constitution requires Congress’s approval and therefore Congress enjoys a veto over all amendments. No amendment that fails to secure the support of two-thirds of both houses of Congress has a realistic chance of being enacted. This effective congressional veto has significant normative implications. It suggests that the Constitution has over time become distorted, as the full range of amendments that are

¹ James Madison, *The Debates in the Federal Convention of 1787*, at 89–90 (Gillard Hunt & James Brown Scott eds., 1920).

² Edmund Burke, *Reflections on the Revolution in France* 19 (Frank M. Turner ed., 2003).

³ See, e.g., Sanford Levinson, *Our Undemocratic Constitution* 160–64 (2006).

⁴ See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 *Tex. L. Rev.* 1115, 1119 (2007) [hereinafter McGinnis & Rappaport, *Three Views*].

needed to correct or update the Constitution have not been enacted. Instead, only those that reflect congressional preferences have had a realistic chance of passing.

Consequently, constitutional amendments that reduce or constrain Congress's power are unlikely to be enacted, even if they are necessary to check congressional excesses or to improve the operation of the government. Moreover, constitutional amendments that would conflict with Congress's ordinary preferences—amendments that would reduce the power of the national government or increase the power of the states— would also appear to face an uphill battle. In this Article, I explore this constitutional defect, explain why it occurs, specify how it damages the Constitution, offer a reform that would correct the defect, and even identify a realistic method for enacting that reform.

It is true that the Constitution does not formally provide Congress with a veto over constitutional amendments. In fact, Article V of the Constitution appears to be structured to prevent Congress from having a veto, by establishing two different methods for enacting amendments. Under the congressional amendment method, two-thirds of each house of Congress must propose an amendment, which is then ratified by three-quarters of the states. Under the national convention method, two-thirds of the state legislatures must apply for Congress to call a convention. The convention is tasked with the job of a writing a constitutional amendment, which then has to be ratified by three-quarters of the states.

While the national convention method largely bypasses Congress, unfortunately this method does not work. It is broken. It is not merely that no constitutional amendments have ever been enacted under this method. It is also that there are strong reasons to believe that two-thirds of the states will never apply for a convention. State legislatures will regard applying for a convention as unattractive because various aspects of the process reduce the likelihood that they will secure the passage of the amendment that they desire, and other aspects make it quite possible that a different amendment, perhaps one they strongly dislike, will result. First, the national convention method may not result in any amendment, because it generates many uncertainties that can defeat the passage of an amendment. These uncertainties include what the legal rules are that govern the amendment process, what actions the other

states will take, what role the Congress will play, and what amendment the convention will propose. Second, this method may result in a different amendment than the one that the state legislature desired through a runaway convention. Even if the state legislature specifically provided that the convention should only address a particular amendment, it is quite possible that the convention could propose an entirely different amendment and that amendment would then be ratified by the states.

The effective veto that Article V confers on Congress appears to have had a significant effect. In the last three decades, Congress has refused to pass several popular amendments that would have constrained Congress's powers. Had there been an effective non-congressional amendment method, it is quite possible that the Constitution would now include one or more of the following provisions: a line-item veto, congressional term limits, or a balanced budget requirement. More generally, if there had been an effective noncongressional amendment method over the past two centuries, the Constitution might now contain many additional limits on Congress. Instead, the congressional amendment method has allowed Congress to promote amendments that accord with its own preferences, including expansions of congressional power, restrictions on the President's powers, and limits on state powers. While it is often thought that the increased nationalization of the country has been the result of changes in values and technology, the Constitution's amendment method may bear a large part of the responsibility.

One might have hoped that the Supreme Court, which has often interpreted the Constitution based on normative values rather than its original meaning, would attempt to correct these defects. Yet the Court has been completely unresponsive to these concerns. For example, in recent years, the Supreme Court decided cases involving both congressional term limits and a federal line-item veto.⁵ A Supreme Court that was sensitive to the defects of the congressional veto might have construed the Constitution so as to uphold these provisions. Instead, the Supreme Court wrote opinions that stretched the Constitution to strike them down.

⁵ See *infra* Section III.D.

These flaws in Article V, however, could be corrected by adding another amendment method to the Constitution. The reform that I propose would allow the state legislature to draft an amendment. When two-thirds of the state legislatures approve the exact same amendment, that amendment would then be deemed formally proposed. The amendment would then have to be ratified by three-quarters of the states. Since only the specific amendment approved by the state legislatures could be sent to the states for ratification, there is no chance of a runaway convention. Moreover, most of the uncertainties that afflict the existing Article V convention method would also be eliminated.

This amendment method, however, would be improved with three additional features. First, to allow the states to deliberate and coordinate with one another, an advisory convention of the states would be encouraged. Although the convention would not have any power, it would permit the states to debate, determine the popularity of, and possibly agree on proposals. Second, the proposed amendment method would be substantially improved by modifying the weighting of the states' votes. If the large and small states had equal authority at both the drafting and the ratification stage, that would provide the small states with excessive power and reduce the representativeness of the amendment process. To correct this distortion, an amendment should be deemed ratified only when states representing three-quarters of the electoral votes, rather than simply three-quarters of the states, approve it. Finally, because the state legislatures draft the amendment, they should not have any role in ratifying it. Therefore, the proposal allows ratification either by state conventions or by a vote of the people through state ballot measures.

While this proposal might solve the congressional veto problem, it might be thought to be merely academic. Congress would be expected to oppose this solution, since it would allow Congress's veto to be bypassed. Thus, the only way to pass this reform would be to do so under the national convention method, which is unfortunately broken.

Yet, there may be a way to pass one amendment through the national convention process. The main problems under the existing national convention method are the various ways in which it creates uncertainty, including the possibility of a runaway convention.

The state legislatures might be able to overcome those uncertainties if the great majority of the states agreed on a single proposal when applying for a convention, strongly asserted that a national convention that considered other proposals would be acting improperly or illegally, and attempted to promote the selection of convention delegates who were unlikely to vote for a different proposal. The states could pursue this strategy by sending representatives to an advisory convention where they negotiated a specific proposed amendment and a common strategy for pursuing it. The state legislatures could then attempt to pursue this strategy by applying for a convention to draft that specific amendment and announcing that they regarded the convention as limited to deciding only whether to propose that specific amendment.

The Article proceeds in five parts. Part I describes the existing procedures for using a national convention to propose a constitutional amendment. It notes several of the most important questions that remain open under this method. It also argues that the existing Constitution allows for limited conventions, even though most commentators have argued that the Constitution only permits conventions that are unrestricted as to their subjects. Part II argues that this amendment method is defective, because the uncertainties about the process and the possibility of a runaway convention mean that state legislatures are unlikely to apply for a convention. Part III explores the normative and interpretive implications of this failure of the national convention amendment method. Part IV proposes a reform of the national convention process by substituting a state drafting process. Finally, Part V describes how the state drafting method might actually be adopted under the existing national convention method.

I. A BRIEF OVERVIEW OF THE NATIONAL CONVENTION PROCEDURE

This Part discusses the procedure for enacting a constitutional amendment through a national convention. It first describes the text and structure of Article V. It then discusses some of the issues that Article V does not clearly resolve, including whether Article V allows limited conventions and whether Congress can regulate the national convention. While I will discuss various legal positions on

the issues, I do not generally attempt to resolve the issues. The point is to explore the legal terrain, not to conquer it.

A. The Structure of Article V

Article V of the Constitution describes in a single paragraph the various methods for amending the Constitution. It provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.⁶

Article V thus establishes a two-step process for enacting an amendment: first an amendment is proposed and then it is ratified. There are also two ways of completing each step. An amendment can be proposed either by two-thirds of each house of Congress or by two-thirds of the state legislatures applying for Congress to call a convention that would an amendment. Similarly, an amendment can be ratified by three-quarters of the states, either through their legislatures or through state conventions. Finally, Article V is modular: either of the proposal methods can be paired with either of the ratification methods.

Although Article V thus provides four paths to amending the Constitution, the nation has almost always relied on only one of them: Congress proposes an amendment and the state legislatures ratify it.⁷ Yet, Article V's purpose in providing alternative methods

⁶U.S. Const. art. V.

⁷No amendment has ever been passed under the national convention method, nor has a national convention ever been called. See Michael Stokes Paulsen, A General

is evident: to prevent a single government entity from having a veto over the passage of an amendment. While Congress is given the authority to propose amendments, the convention method allows the nation to bypass Congress and enact amendments that would constrain Congress's powers.⁸ Similarly, while the state legislatures can ratify amendments, they might choose to reject amendments that constrain their powers. Therefore, the Constitution allows ratification by state conventions, which would have different interests than the state legislatures.⁹

This understanding of the congressional amendment process is supported by statements made at the time of the Founding. Thus, George Mason, argued at the Philadelphia Convention that “[i]t would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.”¹⁰ Similarly, James Madison wrote in *The Federalist No. 43* that Article V “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”¹¹

B. Limited or Unlimited Conventions

Although the Constitution specifies that an amendment may be drafted by a national convention, it unfortunately does not clearly answer various questions about this amendment method. An important question about this method is whether the Constitution allows limited conventions—that is, conventions limited to a specific

Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, 103 Yale L.J. 677, 734 (1993). Only once, for the Twenty-First Amendment, has Congress employed state conventions, rather than state legislatures, to ratify an amendment. See Russell L. Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention* 126 (1988).

⁸ Of course, the fact that one purpose of the provisions was to avoid providing any entity with a veto does not mean that it was the only purpose. The enactors might have had other purposes, such as ensuring deliberation or an efficient amendment process.

⁹ Article VII of the Constitution, which provided that the Constitution took effect when nine of the thirteen states ratified it, used state conventions rather than the state legislatures in part because it was believed that the state legislatures had interests that would lead them to oppose the new Constitution.

¹⁰ Madison, *supra* note 1, at 89–90.

¹¹ *The Federalist No. 43*, at 246–47 (James Madison) (Clinton Rossiter ed., 1961).

matter. One position holds that limited conventions are constitutional. Under this limited convention view, if the states apply for a convention limited to a specific subject, then Congress is required to call for such a convention and the convention is obligated to consider only that subject.¹² Any proposals that it makes on other subjects are illegal. An even stricter version of this position holds that if the states seek a convention limited not merely to a specific subject but to specific language for an amendment, the convention is limited to deciding whether to propose that language.

The alternative position holds that the Constitution does not recognize limited conventions. Under this unlimited convention view, a convention can never be limited as to the subjects it will consider, because the Constitution does not recognize limited conventions.¹³ If the states apply for a limited convention, the result will depend on the nature of the applications.¹⁴ If it is clear that the state applications request only a limited convention, then Congress would not even be authorized to call a convention, because there would be no applications for the only constitutional type of convention—an unlimited convention. By contrast, if the states preferred a limited convention but were understood to be applying for an unlimited convention if a limited convention were not deemed legal, then Congress would be required to call an unlimited convention and any proposals it would make would be legal.

This issue has been vigorously debated, and I will not attempt to resolve it here. My concern is only to show that both positions are plausible. While the greater part of the commentary appears to argue for the unlimited convention view, I judge the case for the limited convention view to be at least as strong as the opposing view.¹⁵

¹² See Caplan, *supra* note 7, at x; William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 *Duke L.J.* 1295, 1305 (1978).

¹³ See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 *Yale L.J.* 189, 198 (1972) [hereinafter *Black, Letter to a Congressman*] (stating that “[t]hirty-four times zero is zero” in reference to the view that if two-thirds of the states apply for a limited convention, these applications should not be considered valid); Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 *Yale L.J.* 1623, 1624 (1979); Paulsen, *supra* note 7, at 738.

¹⁴ See Paulsen, *supra* note 7, at 738.

¹⁵ My argument does not require resolution of this issue—it is enough for there to be reasonable arguments on each side—because my primary claims are that nonconforming amendments are undesirable and that there is a method for eliminating them.

Therefore, I will spend more time defending the position that limited conventions are allowed.

Let us begin with the arguments for the unlimited convention view. First, the constitutional text might be thought to cut against a limited convention. The text provides that “The Congress, . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments”¹⁶ One might argue that “a Convention for proposing Amendments” suggests a convention that can propose whatever amendments it likes.¹⁷ Thus, the states apply for a convention and the convention decides which amendments to propose. Further, the Philadelphia Convention, which wrote Article V, had been limited in its mandate but chose to exceed that limitation, and its decision was accepted and approved by the nation.¹⁸ Finally, a limited convention,¹⁹ especially one limited to considering a specific amendment, might seem to relocate the proposal power to the states and render the work of the convention “a cipher or sham.”²⁰

The arguments for the limited convention view are also strong. To begin with, the language of the clause can be interpreted to allow limited conventions. That is, the language “Congress, . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments” can be

The only area where I come close to relying on the limited convention view is my suggestion that state legislatures should announce that they believe this interpretation and regard it as unconstitutional for Congress or the national convention to depart from their limitations. See *infra* Section V.B. But this does not assume the constitutionality of a limited convention. It merely asserts that it is reasonable for state legislatures, who believe it, to announce that they do. State legislatures that do not believe it can always announce that they believe that the conventions should follow the restrictions as a matter of political morality, even though they are not legally required to follow them. Similarly, if the courts were to conclusively rule that the convention need not follow state directions, the legislatures can continue to advocate those directions on the basis of political morality.

¹⁶ U.S. Const. art. V.

¹⁷ See Black, Letter to a Congressman, *supra* note 13, at 198; Paulsen, *supra* note 7, at 738.

¹⁸ Paulsen, *supra* note 7, at 740.

¹⁹ It might also be argued, in favor of an unlimited convention, that the role of the convention in proposing amendments appears to be similar to the role of Congress in proposing amendments, and there are no restrictions on Congress’s authority to propose amendments. See Black, Letter to a Congressman, *supra* note 13, at 198–99. But see *infra* note 25 (responding to this argument).

²⁰ Paulsen, *supra* note 7, at 739; see also Dellinger, *supra* note 13, at 1624.

fairly read to suggest that two-thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call. This reading of the language involves three steps. First, “a Convention for proposing Amendments” is broad enough to cover not merely unlimited conventions but also limited conventions. Put differently, a limited convention would be one type of “Convention for proposing Amendments.”²¹ Second, if Congress can call a limited convention, then the language certainly suggests that the convention should conform to the limitations in that call. As the language appears to obligate the convention to meet, it would also appear to obligate the convention to follow the basic terms set forth in the call. Third, the language allowing the states to apply for Congress to call a convention also appears to obligate Congress to call a limited convention. When two-thirds of the states submit applications, that obligates Congress to call a convention. Similarly, when two-thirds of the states submit applications for a limited convention, then that would also seem to obligate Congress to call that limited convention.

One might wonder why the language here does not more clearly indicate that the state legislatures can make binding applications for limited conventions. But the language needed to be broad enough to extend to applications not merely for limited conventions but also for unlimited ones. Thus, the Constitution speaks in neutral terms of a convention for proposing amendments and of a process whereby the states apply for, and Congress calls, such a convention. After all, the Framers would certainly have desired that unlimited conventions be permitted, since there is no reason to believe that the various states would have been able to agree on a specific subject or amendment, especially given the lack of deliberation between states in a world with limited communication technology. But the fact that the states might not always be able to agree on a subject does not suggest that they never could or that their desire to restrict the convention to such a subject should have been ignored.

²¹ That the language speaks of a convention for proposing “Amendments” rather than “an Amendment” surely does not change this result. A limited convention might be restricted to two subjects. Moreover, the language needed to be broad enough to cover both unlimited and limited conventions.

There are also structure and purpose arguments that support the limited convention view. If limited conventions are not recognized by the Constitution, then the constitutional provision allowing the states to decide whether to hold a convention seems peculiar. Why would the Constitution allow the states to decide to call a convention, but not allow them to specify what subjects the convention should discuss? Put differently, why would the constitutional enactors allow the states to decide not to hold any convention—and thereby to determine that none of the current problems warrant a convention—but not allow them the lesser power of determining that only certain problems warrant a convention?

Another structure and purpose argument for the limited convention view is that allowing the state legislatures to request either a limited or unlimited convention, depending on the circumstances, appears to be a superior amendment procedure. Put differently, it is hard to understand why the Philadelphia Convention would have desired to deprive the state legislatures of the ability to request a limited convention. While the option to have an unlimited convention that could make large changes to the Constitution is certainly an important feature, the availability of such unlimited conventions does not require that the state legislatures should be prevented from requesting limited conventions in other circumstances. In some circumstances, state legislatures might believe that smaller constitutional changes are needed and that an unlimited convention is not the appropriate way to effect these changes.²² By denying the state legislatures the ability to apply for limited conventions, the unlimited convention view would make it more difficult, if not impossible, to use the noncongressional amendment method.²³

²² See Van Alstyne, *supra* note 12, at 1305 (arguing that a national convention is most likely to be called in response to some “*particular event*” and that a limited convention would be the appropriate way to address a specific concern).

²³ There are at least two other structural arguments that support recognizing limited conventions. First, the possibility of a runaway convention means that the national convention process might subject amendments to less strict requirements than the congressional amendment process. Second, the possibility of a runaway convention means that the states may refuse to call a convention on a subject for fear that the convention will act on other subjects. This has the effect of significantly weakening the national convention process. While these structural arguments are relevant, I make similar arguments in the normative section of the paper and therefore will not develop them further here.

Proponents of the limited convention view also have responses to the other arguments for the unlimited convention view. The argument that the Philadelphia Convention was a runaway convention, suggesting that such conventions were allowed, is also problematic. To begin with, the Federalists certainly attempted to deny or minimize that the Philadelphia Convention had exceeded its powers, not something that the Federalists would have done if a runaway convention were considered acceptable.²⁴ Furthermore, the Philadelphia Convention might have thought that its actions were justified, even if they conflicted with the prior law, because the Articles of Confederation had been seriously violated and thus were voidable.²⁵ Moreover, even if the delegates believed they were violating the Articles, that does not mean they thought it legal to do so. Rather, they might have simply believed that a revolution was justified because the Articles were functioning poorly.²⁶ Finally, while a limited convention devoted to a single pre-specified amendment would certainly have less responsibility than an unlimited convention, that does not mean that its proposing power would have been transferred to the states. The convention would still be a proposing convention, because it would decide whether the specific amendment should be proposed. By themselves, the states could propose nothing.

If there are limited conventions, then difficult questions are raised for Congress when deciding whether the states have called for a convention on a specific subject. Most importantly, what happens if the states seek conventions on similar but not identical subjects? For example, one state might seek a convention on a balanced budget amendment, whereas another might seek one on a balanced budget and tax limitation amendment. In this case, Con-

²⁴ The Federalist No. 40 (James Madison), *supra* note 11, at 222–23.

²⁵ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1048 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 465 (1994).

²⁶ The argument that the role of the national convention is similar to that of Congress, which enjoys unrestricted authority to propose amendments, can also be rebutted. See *supra* note 19. One might argue that the role of Congress is actually shared by the states and the convention, because the states decide whether the convention should meet. Thus, one cannot infer that the convention, rather than the states, enjoyed the power to decide what subjects to discuss.

gress would first have to interpret each state's application. Did the second state, in the above example, authorize a convention on solely a balanced budget amendment if that is what all the other states authorized? If the states do not expressly instruct Congress on how to interpret their applications in those circumstances, then Congress faces a difficult, if not impossible, task in doing so. Should Congress assume that a state is willing to authorize a convention on a subset of the subjects it authorized? Or should it assume that a state is willing to authorize a convention on another subject in addition to the one it specified if that other subject is reasonably related to the subject it authorized? These and a host of other difficult questions confront the Congress that must address similar but distinct applications.

C. Can Congress Regulate the Convention?

Once Congress determines the kind of convention that can be called and whether the states have applied for one, the next question is what powers Congress has over the formation and operation of the convention.²⁷ Here, I focus on three specific questions concerning whether Congress might or might not have power over the convention. First, who determines how delegates are selected for the convention? Second, who determines the voting rule at the convention, such as majority or supermajority rule? Third, who determines voting rights at the convention, such as voting based on equal states or on population? Although these issues are distinct, they turn on a common analysis.

Let us start with the first question: who determines how members are selected at the convention? One possibility is that the selection method is based on state law.²⁸ When the convention is called, state law may already provide a method for selecting the delegates or the state legislature may enact a method. State law might provide that the delegates are selected by popular election or are chosen by the legislature.

²⁷ For a variety of views on Congress's power over formation and operation of the convention, see *A Constitutional Convention: How Well Would It Work?* 8 (Am. Enterprise Inst. 1979) (presenting views of Walter Berns, Gerald Gunther, Antonin Scalia, and Paul Bator).

²⁸ See Caplan, *supra* note 7, at 119 (arguing that the selection method of delegates "is up to each state").

Another possibility is that Congress could establish a method for selecting delegates. But what authority would allow Congress to legislate as to the convention? It might be thought that Congress has power under Article V and the Necessary and Proper Clause.²⁹ The latter Clause grants Congress the power to enact laws that are necessary and proper for carrying into execution "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."³⁰ If the national convention is part of the government of the United States, then Congress presumably could pass laws carrying it into execution. Of course, even if Congress possessed this power, it might not necessarily have to exercise it. Instead, it might choose to forgo regulating the selection of delegates, leaving the matter to the states.³¹

Whether the Necessary and Proper Clause confers this authority on Congress is an interesting question that might be resolved in either direction. To conclude that Congress has authority to pass laws on this matter, one might conceive of a national convention as a federal entity rather than as an agent of the states.³² But even that conclusion is not sufficient, because the Necessary and Proper Clause requires the convention to be part of the federal government. Some entities may be federal but not part of the government, such as private corporations with federal charters. Thus, one would

²⁹ See Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *Yale L.J.* 957, 964 (1963) (arguing that Congress has power under the Necessary and Proper Clause to regulate the mode of election of the convention).

³⁰ U.S. Const. art. I, § 8, cl. 18.

³¹ It might be thought that the states would not have any power to regulate the selection of delegates if the convention is deemed a national government entity, and it is thought that the states do not have any reserved legislative authority as to such entities. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 781 (1995). In that event, Congress would be obligated to establish a method for selecting delegates. See Black, *Threatened Disaster*, *supra* note 29, at 964.

³² Even if the convention is a federal government entity, Congress's regulation must still be necessary and proper for carrying it into execution. Cf. Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 *Ga. L. Rev.* 1, 23-24 (1979) (arguing that Congress has certain powers under the Necessary and Proper Clause as to the convention, but may not impose substantive regulations on the convention). Under one view of this analysis, one would ask whether the congressional regulations allow the convention to perform its job more effectively. The classic article on the horizontal use of the Necessary and Proper Clause is William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 *Ohio St. L.J.* 788, 793-94 (1975).

seem required to argue that the national convention is part of the federal government on the ground that it performs governmental functions.³³

Yet, one might dispute this argument.³⁴ First, one might maintain that the convention is not a federal entity, but instead is a cooperative venture of the states. The convention in Philadelphia may have been thought of in this way. Second, one might argue that even if it were federal, the convention is not part of the government. The Framers' generation sometimes thought of conventions as reflecting the people themselves imposing a check on the government.³⁵ Thus, they might have regarded it as strange to call the convention a government entity. If the convention is either not federal or not governmental, then Congress cannot regulate it and the states would have the authority to determine how to select members.

The second question—who determines the voting rule at the convention—raises some of the same issues, but additional ones as well. This question might be resolved in three different ways. First, once again, Congress might have the authority to determine the voting rule under the Necessary and Proper Clause.³⁶ Second, the Constitution itself might resolve the question. The most likely possibility here is that the concept of a convention implies a majority voting rule. Finally, the matter might be left for the convention itself to determine, because Congress either lacks the power to resolve it or chooses not to do so.³⁷ There is at least something to be said for each of these possibilities.

³³ Even if the convention is not deemed a federal government entity, it might be argued that Congress has the authority to regulate it based on its power to call the convention. I find this argument to be quite a stretch, but it might be defended by those with a much broader view of federal power.

³⁴ See Caplan, *supra* note 7, at 118–19 (arguing that Congress has limited powers over the convention, which do not include the authority to regulate the method of election of the convention delegates).

³⁵ See Paulsen, *supra* note 7, at 738 (describing the constitutional convention as an assembly of the people).

³⁶ See Black, *Threatened Disaster*, *supra* note 29, at 964 (arguing that Congress has power under the Necessary and Proper Clause to regulate the voting rule at the convention).

³⁷ See Caplan, *supra* note 7, at 119 (arguing that voting matters are “within the discretion of the convention itself”); see also Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 *Harv. L. Rev.* 1612, 1634 (1972) (arguing that Congress must decide on the initial voting rule at the convention, but that it would be unconstitutional for Congress to require more than a

Finally, the third question—who determines voting rights at the convention—has the same three possible resolutions as the voting rule determination. Congress might have the power to determine the appropriate weight for the votes of the delegates under the Necessary and Proper Clause, the Constitution might decide this issue, or the question might be left to the convention because Congress lacks the power or chooses not to exercise it. There are various voting rights systems that might be adopted. Voting might be based on population (so that delegates from California and Rhode Island had votes proportional to their populations), on state equality (so that California and Rhode Island had equal votes), or on a compromise between the two systems.³⁸

After the convention, the proposed amendment would then have to be sent to the states for ratification. Under the Constitution, Congress determines whether the amendment should be ratified by state legislatures or state conventions.³⁹

II. DEFECTS OF THE NATIONAL CONVENTION PROCEDURE

Having briefly outlined the national convention process, we are now in a position to discuss the various problems with the process. These problems include coordination difficulties, the risk that

simple majority vote and that the convention may vote to alter the voting rule). One might question how the convention could decide on the voting rule, since it would need a voting rule to decide on the proper voting rule. Despite the circular quality of this resolution, legislatures make this type of determination all the time. For example, every two years, the House of Representatives starts out the new Congress without any promulgated voting rule, relying instead on the common law voting rule to enact new rules. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 *Yale L.J.* 483, 491 n.40 (1995). This method could be used by the convention as well. There is a strong argument that the common law or default rule for the convention would be majority rule. The convention could then use that voting rule to adopt a stricter rule, such as a supermajority rule.

³⁸ Having the convention decide voting rights, however, would be more difficult than having it decide the voting rule. The default rule for voting rights is less clear than for the voting rule. Probably, the most likely default rule would equalize voting rights for states, since Article V gives each state an equal vote at both the application and ratification stage. Using this default rule, the convention might then adopt other voting rights, such as those based on population. While the small states might resist such a move, the larger states would resist equal voting rights, and some compromise might be necessary.

³⁹ U.S. Const. art. V.

Congress will impede the process, the possibility of a runaway convention, and, most importantly, the ineffectiveness of the process. Significantly, these different problems largely have a single source: uncertainty—uncertainty about what the law requires and uncertainty about the actions of the relevant political actors.

A. Coordination and Congressional Power

One serious problem relates to coordination among the states when they are applying for a convention. A state seeking a limited convention must decide on what subject to apply for one. One state may call for a limited convention on a certain subject only to find another state calling for it on a marginally different subject. It may be difficult for the states to coordinate their applications so that they match. The state legislatures must also coordinate on whether to apply for a limited or unlimited convention. Coordination is also needed between the states and Congress. Even if the state legislatures all apply for a limited convention, Congress might conclude that the limited conventions are unconstitutional and therefore treat the applications as invalid.

A second problem derives from the potentially significant role that Congress plays in the national convention process. Because the national convention method does not require the approval of Congress to propose or ratify an amendment, Congress would be expected to oppose the amendments proposed under this process. One way that Congress can act against such amendments involves the state applications for conventions. If different states apply for limited conventions covering marginally different subjects, then it is quite possible that Congress will use its discretion to determine that the requisite number of states have not agreed on a single subject to apply for a convention. Similarly, even if two-thirds of the states applied for the same limited convention, Congress might use its discretion to determine that limited conventions are not allowed.⁴⁰

Congress might also use its power to interfere with the process in other ways. Although it is not clear whether Congress has the authority to regulate the operation of the convention or the selection

⁴⁰ Moreover, it is not clear whether there would be judicial review of these congressional decisions or the others discussed in this Section.

of its delegates, Congress still might assert these powers to impede the passage of amendments it dislikes. For example, Congress could choose a convention voting rule, such as two-thirds, that makes it harder for the convention to adopt a proposal. Or Congress might assign voting rights that make it less likely for a proposal to be passed.⁴¹

B. The Possibility of a Runaway Convention

A third set of problems afflicting the national convention process derives from the possibility of a runaway convention. Because the rules are not clear, it is possible that the states will authorize a limited convention on one subject, but the convention will end up proposing an amendment on a different subject—what I call a nonconforming amendment. Moreover, that nonconforming amendment might then be ratified by the states.

A runaway convention might arise in various ways. First, the states might apply for and Congress might call a limited convention, but then the convention might propose an amendment that ignores the limitation and propose a nonconforming amendment. Second, the states might apply for a limited convention, but Congress might believe that limited conventions are not constitutionally recognized. Yet, Congress might mistakenly interpret one or more of the state applications as applying for an unlimited convention in the event that Congress concluded that limited conventions were unconstitutional. Finally, the states might apply for a limited convention, but Congress might be unable to agree on whether there are limited or unlimited conventions. Congress might then simply call for a convention without specifying the type of convention. The convention might then decide that it is an unlimited convention. There are, no doubt, other possibilities.

A runaway convention is not merely a theoretical possibility, but could easily arise, as the runaway Philadelphia Convention illustrates. A nonconforming amendment might become popular at the convention for a variety of reasons, including because an issue sud-

⁴¹ Of course, if Congress does not regulate the convention, there may be other problems. Uncertainty about the voting rule and voting rights at the convention may also lead to divisions among the delegates. Indeed, it is possible that the disputes about the voting rights might lead some delegates to walk out of the convention.

denly becomes prominent or some of the delegates choose to promote another amendment. It is true that the nonconforming amendment would still need to be ratified by the states, but that might occur even though the state legislatures did not intend to ratify a different amendment when they applied for the convention. A proposal can take on a life of its own and this momentum can persuade legislators to vote for it, even though they did not initially expect to support it when they applied for the convention. More importantly, Congress might decide that the ratification decision as to the nonconforming amendment should be made by state conventions rather than state legislatures.⁴²

A runaway convention that resulted in ratification of a nonconforming amendment would create several undesirable results. First, after the amendment was ratified, the nation—in most instances through the courts—would have to determine whether it was constitutional and should be enforced. This decision would be problematic however it was resolved. If the amendment were found valid, then its opponents would tend to believe that part of the Constitution was illegal, because the limits on the convention had been abridged. If the amendment were found invalid, then its supporters would tend to claim that the part of the Constitution had been nullified, because the courts had improperly second-guessed the decisions of the convention and of three-quarters of the states. In either case, there would be a significant dispute about the content of the nation's fundamental law. Such disputes can be extremely divisive, especially in a pluralistic country like the United States that relies on the Constitution as a source of allegiance and a

⁴² Another possible way that a nonconforming amendment might be enacted is if the convention successfully changes the way that an amendment is ratified. A convention that sought to dramatically change the Constitution might propose an amendment that not only incorporates dramatic changes, but also purports to change the method by which it is ratified (such as decreasing the number of state legislatures required for ratification from three-quarters to two-thirds). The original Philadelphia Convention of 1787 adopted a new ratification method, which was accepted by the country. Although there is a strong argument that such a change in the ratification method placed in the amendment that the convention passes would be constitutionally invalid, the country might nonetheless accept it. Consequently, state legislatures would need to consider this possibility, even though it seems unconstitutional.

symbol of national unity.⁴³ One can only imagine the conflict if the dispute involved a hotly contested issue, such as an amendment outlawing or protecting same-sex marriage.

Another problem with a runaway convention is that it can produce a constitutional amendment through a process that employs less scrutiny than either the congressional amendment process or the limited convention process. One of the key features of constitutional amendments under the Constitution is that they are required to pass through two supermajority rules—a supermajority rule at the proposing stage and at the ratification stage. John McGinnis and I have argued that this double-supermajoritarian process produces high-quality constitutional provisions to which the nation will feel allegiance.⁴⁴ Reducing the scrutiny needed to enact constitutional provisions would risk undermining these important values.

Enacting a constitutional amendment through the runaway convention process subjects it to less scrutiny than under either the congressional amendment process or the limited convention process.⁴⁵ Under the congressional amendment process, a specific, written amendment must secure two-thirds of each house of Congress and three-quarters of the states. Under the runaway convention procedure, two-thirds of the states will have approved a different amendment or subject. Thus, their actions provide no scrutiny for

⁴³ See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *Geo. L.J.* 1693, 1736–37, 1753 (2010) [hereinafter McGinnis & Rappaport, *The Good Constitution*].

⁴⁴ John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 805–06 (2002) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*].

⁴⁵ While I use the double supermajority rule in the congressional amendment process as the basis for comparison, one might wonder whether that procedure or some other one is the optimal supermajority rule. For a discussion of some of the considerations relevant to determining the optimal supermajority rule, see McGinnis & Rappaport, *Three Views*, *supra* note 4, at 1170–83. In this Article, I shall assume that the congressional rule does correspond to the optimal rule, since I believe it is plausible and there is no obvious alternative one. Of course, one might argue that a weaker supermajority rule is optimal. And one might further argue that making the national convention process subject to a weaker rule would only operate to improve the Constitution, not weaken it, especially from the perspective of those who believe that the states should be given a greater role in the governance of the nation. This argument would have force except that, as developed below in the text, allowing runaway conventions actually makes the national convention amendment process less likely to be used and therefore reduces the power of the states in the constitutional system.

the different amendment that passes. While that amendment is approved by the convention, this approval does not substitute for the two-thirds approval of the Congress. If the convention employs a majority voting rule, then the degree of scrutiny will clearly be less than the two-thirds vote required for Congress to propose an amendment. Moreover, Congress approves the amendment bicamercially, through a two-thirds vote in each house, which is more difficult than through a single vote of the convention. Thus, even if the convention uses a two-thirds supermajority rule, it will still be weaker than the congressional amendment process, because the convention lacks Congress's bicameralism.

The runaway convention process also subjects the resulting amendment to less scrutiny than the limited convention process. While the amendment produced by the runaway convention process is not scrutinized by the states when they apply for a convention, the amendment produced by the limited process is. Moreover, the limited convention process scrutinizes the resulting amendment to a degree comparable to that imposed by the congressional amendment process. Under the limited convention process, two-thirds of the state legislatures approve either the basic idea of the amendment (if they seek a convention limited to a specific subject) or the amendment itself (if they seek a convention limited to a specific amendment). The convention then approves a specific amendment. By contrast, under the congressional amendment procedure, two-thirds of each house approves a specific amendment. The approval by two-thirds of the state legislatures and then by what would probably be a majority of the convention appears similar to approval by two-thirds of both houses of Congress.⁴⁶

⁴⁶ It is true that if the states apply for an unlimited convention, that might result in a less strict amendment process than the congressional amendment process as well. But there are at least two defenses of the states' application for an unlimited convention that distinguish it from a runaway convention. First, an unlimited convention might be needed if the states believe there are serious problems facing the nation but are unable to agree on a subject in advance of the convention. Given the dispersed nature of the state legislatures, especially when the Constitution was written, an unlimited convention was necessary, even though it might have involved less scrutiny. Second, when the states apply for an unlimited convention, they are in essence choosing to delegate their decision to the convention. Thus, they have at least exercised the scrutiny necessary to determine that they need to delegate the decision. By contrast, under a runaway convention, the states have determined, not that they need to delegate, but that

C. The Unwillingness to Apply for a Convention

Although these problems are important, the biggest defect in the national convention process is that it is ineffective. Due to the possibility of a runaway convention and the other uncertainties, state legislatures are exceedingly unlikely to apply for a national convention in the numbers necessary to require Congress to call one. Consequently, the national convention process has never produced an amendment or even a convention.

Under a reformed process, the state legislatures could propose an amendment without having to worry about a runaway convention. Moreover, there would not be uncertainty about coordinating their efforts or the possibility that Congress would use its powers to impede the process. I propose a reform that satisfies these characteristics in Part IV.

Such a reformed amendment process would provide state legislators with a much greater incentive to propose amendments, because it would increase the benefits and decrease the costs of proposing an amendment. Under the reformed process, the main benefit of proposing an amendment is the possible enactment of the amendment that the legislators supported. The main cost would be the effort required to pass the amendment. Of course, as with the functioning congressional amendment process, one would not expect many amendments to be proposed under this process. Most state legislators are unlikely to believe that the Constitution requires many amendments, and they know that it is quite difficult to secure the strict supermajorities necessary to enact one.

Under the existing national amendment procedure, however, state legislators face both additional costs and reduced benefits in choosing to apply for a convention. The first of these costs is the possibility of a runaway convention that results in an enacted amendment that they strongly oppose. Further, since there are no limits on the amendments that the runaway convention might produce, the legislators can imagine a whole range of amendments that they would find objectionable. And because the products of the runaway convention are not subject to the same degree of scrutiny that other amendments are, it would be easier for legislators to

they do not need to do so. The convention contradicts, rather than follows, their decision.

imagine that bad amendments might be enacted.⁴⁷ Second, state

⁴⁷ That the fear of a runaway convention is a real one is suggested by the fact that concern about a runaway convention has so often been mentioned. Many of those expressing these concerns have used it to argue against using the national convention procedure. See Russell L. Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention*, at vii (1988) (quoting Arthur Goldberg, *The Proposed Constitutional Convention*, 11 *Hastings Const. L.Q.* 1, 2 (1983) (“There is nothing in Article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights.”)); Caplan, *supra*, at viii (quoting Press Release, Henry J. Reske, United Press Int’l, *Special Constitution Package: Hi-tech Constitution?* (May 24, 1987) (available at LexisNexis) (expressing Justice Brennan’s fear of “the trauma of redoing the Constitution” and calling a constitutional convention “the most awful thing in the world”)); Caplan, *supra*, at 81 (quoting 125 *Cong. Rec.* 3159 (1979) (recording Senator Barry Goldwater as stating that in the event of a convention, “every group in this country . . . is going to get its two bits in and we are going to wind up with a Constitution that will be so far different from the one we have lived under for 200 years that I doubt that the Republic could continue”)); Caplan, *supra*, at 81–82 (quoting Edward Walsh, *President Denounces ‘Political Gimmickry’ of Drive to Balance Budget by Constitution*, *Wash. Post*, Mar. 28, 1979, at A10 (relating President Carter’s correspondence with the Speaker of the Ohio House of Representatives in which he expressed his opinion that a convention is a “radical and unprecedented action” that “might do serious, irrevocable damage to the Constitution”)); Caplan, *supra*, at 84 (quoting Richard L. Madden, *A Balanced U.S. Budget Debated in Connecticut*, *N.Y. Times*, Mar. 19, 1985, at B4 (recounting Thomas I. Emerson’s statement that the uncertainty of a constitutional convention could result in a “constitutional crisis that could tear the country apart”)); Caplan, *supra*, at 85 (quoting MacNeil/Lehrer NewsHour (PBS television broadcast Mar. 24, 1986) (transcript #2736) (stating Senator Paul Simon’s opinion that, with regard to a convention to propose a balanced budget amendment, “number one, we don’t know what kind of a budget amendment they might draft. Second, that constitutional convention can . . . modify the Bill of Rights, they can put an abortion amendment in the Constitution, they can [raise] all kinds of havoc.”)); Caplan, *supra*, at 85 (quoting *Public Papers of the Presidents of the United States: Ronald Reagan, 1982* (interview with reporters from the *L.A. Times*, Jan. 20, 1982) (available at <http://www.reagan.utexas.edu/archives/speeches/1982/12082e.htm>) (reporting President Reagan’s stance that a convention for a balanced budget amendment was “a last resort, because then once it’s open, they could take up any number of things”)); see also David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995*, at 433 (1996) (noting that President Jimmy Carter called a convention “extremely dangerous” because it is “completely uncontrollable”); Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 *Pac. L.J.* 627, 628 (1979) (calling a convention to consider a balanced budget amendment “needless and perilous . . . likely to generate uncertainties where confidence is indispensable . . . to invite division and confrontation where unity and cooperation are critical . . . to thwart rather than vindicate the will of the American people and damage rather than mend the Constitution”); Phyllis Schlafly, *An Address to the American Bar Association’s Bicentennial Showcase Program* (Aug. 9, 1987), *reprinted in Combating Chicanery About the Constitution*, *The Phyllis Schlafly Report*, Vol. 21, no. 2 (Sept. 1987), available at <http://www.eagleforum.org/psr/1987/sept87/>

legislators must also include within the costs of a convention the possibility that a runaway convention will produce a constitutional crisis over the validity of the amendment it enacts. These costs, moreover, are not restricted to a situation where it is unclear whether runaway conventions are permitted. If Congress were to clearly indicate that no limited conventions will be called, legislators would then have even less incentive to call for a convention, because there would be a greater chance that the convention would produce a different amendment than the legislators desired.

In addition to these costs, legislators must also consider the increased chance that the defects in the amendment process will prevent the benefit they seek—their desired amendment—from being enacted. They must consider the possibility that Congress will use its important role in the amendment process to block passage of an amendment that Congress refused to pass. Legislators must also consider the possibility that coordination problems between the different states may also cause the applications to fail.

These considerations heavily influence the probability that legislators will vote to propose an amendment. The possibility that a strongly disliked amendment will be enacted and a constitutional crisis will result, compounded by the reduced chance that a desired amendment will be passed due to Congress and the lack of state coordination, makes it much less desirable for legislators to apply for a convention.

This analysis, then, explains why the national convention process does not work. Even under a functioning amendment process, state legislators would be unlikely to seek to amend the Constitution very often. When this low propensity to amend is combined with the increased costs and reduced benefits of seeking an amendment under the convention process, the result is a situation where state legislators are never willing, in the requisite numbers, to apply for a convention. The national convention process is broken.

psrsept87.html (quoting former Chief Justice Warren Burger as stating, “There is no way to put a muzzle on a Constitutional Convention,” and James Madison as stating, “Having witnessed the difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance, I should tremble for the result of a second.”).

D. The Threat of a Convention

It might be thought that my analysis of the defects of the national convention procedure is mistaken because it omits a key contribution of the convention procedure: the threat of a convention may cause Congress to pass an amendment that it otherwise would have refused to enact. Thus, even if a convention has never been called, that does not mean the convention procedure has not had a significant impact.⁴⁸

This “threat” view of the convention procedure is often asserted, but there is little evidence that the convention procedure has had this effect after the early years of the Republic. It is true that, in the first years under the Constitution, the threat of a convention may have helped persuade Congress to pass the Bill of Rights. But as I argue below, the early years under the Constitution are atypical, because at that time many state legislators were not scared of a runaway convention, but instead hoped a convention would significantly revise the Constitution.⁴⁹ By contrast, during virtually all of the nation’s constitutional history, state legislatures appear to have feared a runaway convention that might do great harm to a highly prized Constitution. This fear has allowed Congress to largely ignore the convention threat.

The threat view holds that the convention method will often induce Congress to pass an amendment when almost the requisite two-thirds of the states have applied for a convention. But this has not happened. In the 1980s, thirty-two of the required thirty-four states had applied for a convention to pass a balanced budget amendment, but Congress did not enact the amendment.⁵⁰ Similarly, in the 1960s, thirty-three state legislatures had applied for a convention to address state apportionment issues, but Congress failed to pass any amendment.⁵¹ The reason the threat does not work seems straightforward. When the number of state legislative

⁴⁸ See Akhil Reed Amar, *America’s Constitution: A Biography* 290 (2005); Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 *Cardozo L. Rev. de novo* 74, 77–78 (2009).

⁴⁹ See *infra* Section III.A.

⁵⁰ See Caplan, *supra* note 7, at 83; Kyvig, *supra* note 47, at 439–40.

⁵¹ See Caplan, *supra* note 7, at 76; James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 *Harv. J.L. & Pub. Pol’y* 1005, 1009 (2007).

applications approaches the requisite two-thirds, a game of chicken arises, with the state legislatures hoping that Congress will pass the amendment and Congress hoping that the last few state applications will not be issued. In recent years, Congress has clearly won these contests by refusing to take action and watching the state legislatures not issue the final applications. Congress's victories seem related to advantages that it possesses. If two-thirds of the states were to apply for a convention, Congress could probably avoid calling a convention by claiming that one or more the applications were invalid (either because they did not match the other applications or for some other reason).⁵² In the meantime, a state legislature might be persuaded to repeal its application. If Congress ever did feel forced to call the convention, it would then have time enough to pass the amendment. Thus, the threat effect of the convention method seems largely nonexistent.

The one possible counterexample to the febleness of the threat effect is the Seventeenth Amendment,⁵³ which established the direct election of senators, but even here the evidence for the threat effect is weak. It is true that under some counts the number of state applications had reached one below the necessary two-thirds for a convention when Congress passed the amendment in 1912.⁵⁴ But it is unlikely that the traditional Senate, which had adamantly opposed all prior attempts to establish the direct election of senators, would have agreed to a convention if one more application had been filed. Since some of the applications differed from one another,⁵⁵ the Senate could have claimed that they were insufficient to trigger the calling of a convention. No one has supplied any other evidence that the existing state applications induced the Senate to act.⁵⁶

⁵² For example, when thirty-three applications for a convention on apportionment were issued, some members of Congress argued that many of the applications were invalid because they derived from malapportioned state legislatures. See Magliocca, *supra* note 48, at 81–82.

⁵³ U.S. Const. amend. XVII.

⁵⁴ See Caplan, *supra* note 7, at 63–64; C.H. Hoebeker, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* 149 (1995).

⁵⁵ See Magliocca, *supra* note 48, at 11 n.24.

⁵⁶ See Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 *Yale L.J.* 1971, 1979 n.36 (1994).

The better explanation for the passage of the Seventeenth Amendment appears to be the existence of a systematic political strategy for securing congressional support for amendments.⁵⁷ Beginning in 1901, many states adopted mechanisms, such as the famous Oregon system,⁵⁸ that caused senators largely to be popularly elected. When the Senate passed the Seventeenth Amendment, senators from at least fifty-eight percent of the states (and possibly as high as seventy-seven percent of the states) were chosen through some mechanism of popular election.⁵⁹ These senators owed their election to popular support and they acted to promote that support through a constitutional amendment. Thus, there is a strong argument that it was this systematic political strategy, rather than the possibility of a convention, that caused the Senate to approve the amendment. Overall, then, there is very little evidence that there is any significant threat effect under Article V. The national convention method remains broken.

III. THE CONSEQUENCES OF A BROKEN NATIONAL CONVENTION PROCEDURE

The Article so far has been largely descriptive, arguing that the national convention procedure does not produce amendments and attempting to explain why. I now turn to the significant normative consequences that flow from the ineffectiveness of the convention process. First, I argue that the failure of the convention process not only renders the amendment procedures defective, but also serves over time to distort the entire Constitution. Second, I set forth my

⁵⁷ In an important article, Kris Kobach showed that the Seventeenth Amendment and the Nineteenth Amendment (guaranteeing women the right to vote) were adopted under what he described as an extraconstitutional system. See *id.* at 1976–80. This system involved proponents of a change causing it to be adopted at the state level, mainly either through initiative or state constitutional amendment. After members of Congress were elected under the new system, they then supported that new system.

⁵⁸ Under the Oregon system, candidates for United States Senate were nominated by voter petition and citizens voted for their choice in an election. Candidates for the state legislature could sign one of two statements, either promising to vote for the winner of the popular vote or to consider it advisory. Most state legislators agreed to vote for the popular vote winner. See *id.* at 1978.

⁵⁹ Fifty-eight percent of the states provided for direct nomination by the people, as in the Oregon system. Another nineteen percent of the states had some measure of popular input in the selection of senators. See *id.* at 1978–79.

normative approach to constitutional amendment procedures, maintaining that a constitutional amendment procedure similar to the existing one (without the defects) is the most desirable. Third, I argue that the failure of the national convention procedure has implications for those who interpret the Constitution based on normative desirability. To promote a desirable constitution, judges should attempt to give effect to provisions that would have passed under a functioning national convention process. There is a strong case that three amendments—the line-item veto, the balanced budget, and term limits—might have been enacted under a functioning convention process and therefore the courts should attempt to interpret the Constitution to give effect to these provisions. I conclude this Part by arguing that the failure of the convention process may have had a significant effect on the Constitution, making it more nationalist and less federalist. Thus, the historical development towards a nationalist Constitution, which has been held to reflect people's values and modern circumstances, may actually be the result of a broken amendment system.

A. Normative Consequences

To assess the normative consequences of the failure of the national convention process, it is useful to consider not merely the existing Article V, but also two other alternative amendment processes. First, imagine that the Constitution did not contain any amendment provisions at all.⁶⁰ Indeed, if that constitution were read as having a static meaning, then there would be no method for changing it. It seems clear that such a constitution would be normatively problematic for at least two basic reasons. First, the Constitution would over time come to be less in accord with popular values. While the original Constitution reflected public sentiment because it was enacted through a process that required approval of popular representatives, as values and circumstances changed it would become out of date and would no longer reflect the public's views. Second, the Constitution would over time develop less desirable provisions. If constitutional changes were needed, there

⁶⁰ Some of the delegates at Philadelphia appeared to believe that no amendment provision was necessary. See 1 *The Records of the Federal Convention of 1787*, at 202 (Max Farrand ed., 1911) (James Madison).

would be no way for them to occur. Moreover, if one believes (as I will argue) that amendments that pass through a functioning supermajoritarian process would generally be desirable, then the absence of amendment provisions would prevent the enactment of desirable changes.⁶¹ Over time, then, a constitution without an amendment process would lose its hold on us, both morally and politically, and would need to be replaced.

Now, consider a different amendment provision. This provision allows Congress to amend the Constitution, subject to ratification by state legislatures or conventions, but it provides no other amendment method. Thus, it gives Congress a veto on any amendments. This provision would also make the Constitution less reflective of popular views and less desirable.

Given the desire of political entities to maintain and expand their power, Congress is unlikely to allow the Constitution to be amended to limit its power. Moreover, because Congress tends to adopt the perspective of the federal government generally, Congress might not be quick to limit the power of the other branches of the federal government.⁶² Thus, if a change in values or circumstances were to require additional limitations on Congress or even on the federal government, it is unlikely that an amendment adopting those changes would be passed. Moreover, if Congress were to abuse its power, no constitutional reform would be forthcoming. Over time, then, one would expect the Constitution to become increasingly distorted normatively. The Constitution would fail to add needed checks on Congress and the federal government, but would grow to include additional limitations on the states (and perhaps the President).

Finally, consider the existing Article V provisions. We can see that it is largely the same as the one described immediately above that permits only the congressional amendment process. Given the defects in the convention process, it is as if that process does not exist. Thus, the same normative distortions that apply to a constitution with only the congressional amendment procedure—a bias in

⁶¹ See *infra* Sections III.B–C.

⁶² One possible exception to Congress's general preference for the federal government is that it will sometimes favor placing limits on its principal competitor, the President, if those limits enhance its own power. See U.S. Const. amend. XXII (placing term limits on the President).

favor of Congress and the national government, and against the states—apply to the existing Constitution. The one exception to this claim is that the national convention process would be available if matters ever turned catastrophic. At that point, the state legislatures might be willing to risk a runaway convention and the other costs to address genuinely overriding problems. But absent this extraordinary situation, the national convention process would not be employed and the Constitution would exhibit serious normative problems.

My argument that the failure of the national convention method undermines the constitutional amendment process by preventing certain amendments from being enacted is confirmed by our constitutional history. The dominant pattern of constitutional amendments reveals an amendment process that has neither placed checks on Congress or the federal government, nor provided protections to the states. Instead, it has often expanded the federal government's power or taken actions that have been largely orthogonal to the federal government's interests.

The constitutional amendments can be classified into several different categories. One category involves the direct expansion of federal power, such as the Sixteenth Amendment (income taxation), and the Thirteenth, Fourteenth, and Fifteenth Amendments (federal enforcement of anti-slavery, civil rights, and voting rights provisions).⁶³ A second category, composed of the enormously important Fourteenth Amendment by itself, imposes limitations only on the states.⁶⁴ A third category of amendments operates to grant rights against both the state and federal governments, such as the Thirteenth Amendment (prohibiting slavery),⁶⁵ the Fifteenth Amendment (prohibiting racial discrimination in voting),⁶⁶ the Nineteenth Amendment (prohibiting discrimination based on sex in voting),⁶⁷ and the Twenty-Sixth Amendment (guaranteeing the right to vote to eighteen-year-olds),⁶⁸ but in no case did Congress

⁶³ U.S. Const. amends. XIII–XVI.

⁶⁴ U.S. Const. amend. XIV, § 1.

⁶⁵ U.S. Const. amend. XIII.

⁶⁶ U.S. Const. amend. XV.

⁶⁷ U.S. Const. amend. XIX.

⁶⁸ U.S. Const. amend. XXVI. Actually, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments did not really place limits on the federal government. While they did forbid government from restricting the right to vote, the previous power to impose

grant a right that it opposed at the time or would operate to harm congressional interests.⁶⁹ A fourth category improves the operation of the federal government, such as the Twelfth Amendment (reforming presidential elections),⁷⁰ the Twentieth Amendment (reducing the extent to which federal officers serve in a lame duck status),⁷¹ and the Twenty-Fifth Amendment (providing for a temporary or permanent vacancy of the presidency).⁷² Finally, the Twenty-Second Amendment imposed term limits on the President, Congress's primary competitor for power.⁷³ While this provision arguably limited the power of part of the federal government, it appears to have enhanced Congress's power.⁷⁴

There are only two categories of exceptions to this list. First, there are the amendments that were originally passed by Congress as the Bill of Rights—the first ten amendments and the Twenty-Seventh Amendment, which Congress originally passed as part of

these restrictions was located mainly in the states. See, e.g. U.S. Const. art. I, § 2, cl. 1 (“[T]he Electors in each States [for the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

⁶⁹ The Twenty-Fourth Amendment could also be placed in this group of provisions, except that its prohibition against poll taxes only applies to federal, not state, elections. But like the other provisions in this group, it did not confer a right that Congress at the time opposed or that harmed its institutional interests. The exemption of state elections from this provision was largely due to opposition from southern states, but did not reflect any desire to place especially strong limits on the federal government. Interestingly, a restriction on state elections was supplied by the Supreme Court shortly after the Amendment took effect. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665–67 (1966).

⁷⁰ U.S. Const. amend. XII.

⁷¹ U.S. Const. amend. XX.

⁷² U.S. Const. amend. XXV. The Twenty-Third Amendment, which provides electoral votes to the District of Columbia, also did not restrain Congress or the federal government. U.S. Const. amend. XXIII.

⁷³ U.S. Const. amend. XXII.

⁷⁴ Although a bit of a mixed case, the Eighteenth Amendment, which imposed prohibition, and the Twenty-First Amendment, which repealed it, also appear consistent with this analysis. The Eighteenth Amendment largely appears to have strengthened the national government, since it gave the federal government authority to enforce an important law it previously lacked. This strengthening, though, was limited because it was the Constitution, rather than the Congress, that imposed the law and therefore Congress lacked power to eliminate it. The repeal of prohibition in the Twenty-First Amendment also does not conflict with my analysis. It is true that the repeal did reduce Congress's power to a limited extent, but Congress at the time did not really desire that power, as national prohibition was unpopular. Nor was this power important to Congress's or the national government's institutional interests.

the Bill but was not ratified until 1992. These provisions clearly restrained Congress's powers, preventing Congress from exercising authority it might otherwise have chosen to pursue. But this is the exception that proves the rule. When the original Bill of Rights was enacted, many state legislatures did not fear a national convention. Instead, they hoped that such a convention would allow them to rewrite a Constitution that they believed was too nationalist and that had been enacted without their approval. Because a national convention was thus a real possibility, it was feared by the federal government and the Federalists, and led Congress to pass the Bill of Rights.⁷⁵ Therefore, a national convention was more effective in those unique circumstances where state legislators believed they might benefit from such a convention as compared to an existing Constitution that they sought to change.⁷⁶

⁷⁵ Donald Boudreaux and A.C. Pritchard offer an alternative explanation for the passage of the Bill of Rights. They argue that the fact that the federal government was in its infancy at the time of the Bill's passage prevented Congress from exercising sufficient power to block its enactment. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *Fordham L. Rev.* 111, 132-40 (1993). While the federal government's undeveloped state no doubt helped passage of the Bill, it is unlikely to have made more than a minor contribution. It was the willingness of the state legislatures to call a convention that was the key factor. Even if the federal government had been strong, the state legislatures would have been very likely to have called for a convention to enact the Bill if the Congress had not done so. To prevent the convention from being called, Congress would still have had an incentive to enact the Bill, despite the existence of a strong federal government. Moreover, if the state legislatures had not desired to call a wide ranging convention, the Bill of Rights might not have been enacted, even without a strong federal government. As it was, the Congress seemed ready not to enact a Bill of Rights until James Madison took the initiative and proposed one to the House. Without the credible threat of a second convention, it seems unlikely that the Bill would have secured the requisite two-thirds support in both houses of Congress.

⁷⁶ Those circumstances were relatively unique and unlikely to occur again. At that time, the Federalists had succeeded in enacting a Constitution that reflected the nationalist end of the political spectrum. Any convention was unlikely to move it further towards that end. But there was a real possibility that the Anti-Federalists might pass an amendment that would move it closer towards states rights. Thus, the Anti-Federalists did not fear the convention, whereas the Federalists did. Today, most amendments involve relatively narrow matters that compete with other policy proposals. Thus, proponents of any particular proposal to change the Constitution would have to worry about other policy proposals that a convention might propose. By contrast, after the Framing, the only realistic possibilities were a set of amendments that would cut back on the federal government's powers.

The Eleventh Amendment also appears to fit into this category.⁷⁷ Ratified a bit more than three years after the Bill of Rights, the strong opposition to the Supreme Court's decision in *Chisholm v. Georgia*⁷⁸ might have led to a national convention if Congress had not passed the amendment. While the state legislatures and Anti-Federalists may not have been as actively opposed to the Constitution at that point, they still would not have shied away from the possibility that a national convention would be called. Moreover, unlike the Bill of Rights, the Eleventh Amendment only imposed a limited restraint on Congress and the federal government, and therefore Congress would be less reluctant to adopt the amendment.

The second exception is the Seventeenth Amendment, which established the direct election of senators.⁷⁹ This appears to be an extraordinary change because senators were altering their own method of election. One might have predicted that senators elected by state legislatures would be unwilling to vote for this change. But as I discussed earlier, due to a systematic political strategy operating at the state level, as a practical matter a majority of the senators (and perhaps even a high supermajority) were no longer really elected by state legislatures.⁸⁰ This political strategy arguably improved the amendment process and was used as well to pass the Nineteenth Amendment conferring the right to vote on women. Unfortunately, it can only be employed for a subset of amendments.⁸¹ Although this mechanism was being used most recently to promote a congressional term limits amendment, the Supreme Court terminated this effort when it declared, in a dubious decision, state-imposed congressional term limits unconstitutional.⁸²

⁷⁷ See U.S. Const. amend. XI.

⁷⁸ 2 U.S. (2 Dall.) 419 (1793).

⁷⁹ U.S. Const. amend. XVII.

⁸⁰ See supra notes 53–59 and accompanying text.

⁸¹ The mechanism can only be used where the proposed amendment would change the election method for members of Congress, and the states have the authority to change the method of election prior to the passage of the amendment.

⁸² See Lynn A. Baker, "They the People": A Comment on *U.S. Term Limits, Inc. v. Thornton*, 38 Ariz. L. Rev. 859, 862–63 (1996); see also infra notes 111–13 and accompanying text.

B. Elaborating the Normative Approach

A discussion of the normative aspects of the constitutional amendment process might be thought to require further development. While it might be clear that the absence of a noncongressional amendment procedure is normatively defective, a fuller treatment would seem to require a discussion of the best method for amending the Constitution. That discussion would help us address two remaining normative issues: how the national convention amendment process should be reformed and how to interpret the Constitution to reach normatively desirable results.

The ideal amendment procedure for the Constitution is, however, an extremely contested issue. In particular, there is significant controversy about how difficult it should be to amend the Constitution and which entities should be entrusted with the task.⁸³ It is not possible in an article about convention methods to adequately resolve these issues. Yet, I can briefly explain why I believe that the normatively best amendment procedure is similar in strictness and structure to those in the existing Constitution. In particular, the amendment procedure should employ: (1) strict supermajority rules, such as the two-thirds or three-quarters rules in the amendment process,⁸⁴ and (2) a two part procedure, with one entity proposing an amendment and another ratifying it. These procedures would be better than the commonly voiced view that amendments should be much easier to pass than under the existing Constitution.

Let me address these aspects of the existing amendment procedures in reverse order. First, there are important reasons for the two-part process of enacting a constitutional amendment. That

⁸³ Compare Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a "New Political Science,"* 89 B.U. L. Rev. 409, 420 (2009), and Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 Const. Comment. 171 (1995), with McGinnis & Rappaport, *The Good Constitution*, supra note 43, and McGinnis & Rappaport, *Our Supermajoritarian Constitution*, supra note 44, at 785–90.

⁸⁴ In my work on constitutional amendments, I have not taken a firm position on the exact supermajority rules that should be employed. See, e.g., McGinnis & Rappaport, *The Good Constitution*, supra note 43. Instead, I believe that there is a range of reasonableness, with the Constitution's two-thirds for proposal and three-quarters for ratification being at the strict end of the range. Thus, it is possible that a three-fifths proposal and two-thirds for ratification could be optimal. In that event, the Constitution would be too strict, but not by that much.

there are two entities which must agree to an amendment means that no single entity can enact an amendment. Therefore, amendments that are strongly supported by the institutional interests of an entity must be shown to be attractive to other entities as well. Congress, no matter how many of its members support an amendment, cannot empower itself without securing the consent of the states. Moreover, the two-step process serves to extend the period during which the amendment is considered, so that short-term bursts of enthusiasm, that are soon regretted, cannot produce an amendment.⁸⁵

Second, there are strong reasons for preferring an amendment procedure that requires passage through a strict supermajority, such as the Constitution's requirement of two-thirds to propose an amendment and three-quarters to ratify. There is a tradeoff between lenient voting rules, like majority rule, and super-strict voting rules, such as those approaching unanimity. The optimal tradeoff for constitutional amendments appears to be close to the two-thirds/three-quarters supermajority rule. A super-strict supermajority rule produces many benefits, including protecting minorities, promoting consensus support for constitutional provisions, and causing constitutional provisions to be enacted behind a limited veil of ignorance.⁸⁶ But such rules also have significant costs, including making it too difficult to enact provisions, which provides undue protection of the status quo and of erroneous Supreme Court decisions. In a series of articles, John McGinnis and I have argued that the optimal voting rule lies between a mere majority and something close to unanimity—a supermajority rule, such as two-thirds or three-quarters, similar to the rule that the Constitution requires.⁸⁷

A second reason to promote a constitutional amendment process for national conventions that is similar in strictness and structure to the existing amendment process is that the new amendment

⁸⁵ See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 44, at 707–08.

⁸⁶ See McGinnis & Rappaport, *Three Views*, *supra* note 4, at 1182–83.

⁸⁷ See generally *supra* note 45; see also McGinnis & Rappaport, *Three Views*, *supra* note 4, at 1119; McGinnis & Rappaport, *The Good Constitution*, *supra* note 43, at 1695.

must fit into the existing structure.⁸⁸ If one were to establish a new convention method that had only a single entity enacting it with a three-fifths supermajority rule, that would leave the Constitution with a much easier route to amendment by noncongressional actors than by Congress. Thus, even if one favored weaker requirements for passage of an amendment than the Constitution currently provides, one might still favor duplicating those existing requirements when simply changing the national convention procedure.⁸⁹

For these reasons, the most desirable constitutional amendment process combines a strict supermajority requirement with separate entities proposing and ratifying the amendment. I will therefore employ this normative standard in the remainder of the Article, using it to determine how judges should interpret the Constitution to reach normatively desirable results and how the convention process should be reformed. For those who disagree with my normative approach, there still should be much here that is relevant, since the arguments can be adjusted to reflect different normative premises.

C. Interpretive Consequences: Interpreting Based on a Desirable Constitutional Amendment Process

While there are various approaches to interpreting the Constitution, one of the most popular is to interpret it, at least in part, to reach normatively desirable results.⁹⁰ The most common way to interpret the Constitution to reach desirable results is for judges to evaluate different interpretations based on what they regard as the normatively best results. Some advocates of this approach might recommend that judges assess the results based on their own val-

⁸⁸ Another reason to limit ourselves to an amendment process that is similar in strictness and structure to the existing process is the need to frame a proposal that might be able to get passed. Staying close to the existing amendment process makes the proposal less radical, which might increase the likelihood that state legislatures would support it.

⁸⁹ A strong advocate of more lenient amendment procedures might nonetheless believe that the benefits of weakening the supermajority rule outweigh the incongruity of having different voting rules for Congress and the noncongressional method. They might even believe that Congress would respond to the passage of the amendment with a new amendment reducing the strictness of the supermajority rule for the congressional enactment amendment procedure.

⁹⁰ See, e.g., Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996); Richard A. Posner, *Law, Pragmatism, & Democracy* (2003).

ues, whereas others might recommend that they look to the contemporary values of the society. But in either case, judges will be making interpretive decisions based on what they regard as the applicable normative values.

Having judges decide on the applicable values is not the only way to interpret based on normative considerations. Another way is to identify a desirable process for establishing policy and then to implement the results of that process. Based on the argument in the previous Section, a constitutional amendment process that allows a strong supermajority of the nation to enact measures generally results in desirable amendments. Thus, judges will promote normatively desirable results by giving effect to the amendments enacted under that process.⁹¹ But if that process has stopped functioning, then judges might promote normatively desirable results by giving effect to the amendments that would have passed under a functioning amendment process.⁹² One might prefer this process-oriented interpretive approach to one allowing judges to nakedly assess values if one believes that the process will produce better results than the judges will.⁹³

The interpretive approach that I develop here then requires judges to treat as normatively desirable proposed constitutional amendments that would have been enacted were the national con-

⁹¹ It might be objected that interpretation based on normative considerations looks to the substantive desirability of an interpretation, whereas my argument here looks to what a desirable procedure would produce. But this distinction is no objection to my argument. What a desirable procedure would produce is a key means for determining what is substantively desirable. Cf. John Hart Ely, *Democracy and Distrust* 181–83 (1980) (arguing on substantive normative grounds that the Constitution should be interpreted to allow for a desirable process for passing laws).

⁹² It is worth contrasting this process-oriented approach to John Hart Ely's representation-reinforcing approach. See Ely, *supra* note 91, at 181–83. Under Ely's approach, one interprets the Constitution in order to allow for an effective democracy. Once that is done, then judges presumably would enforce the statutes that are enacted as the product of democratic politics. By contrast, the approach discussed here interprets the Constitution itself to give effect to the amendments that would have passed if the constitutional amendment process were working. Thus, both approaches see a value in the results of certain processes—in Ely's case, democratic policies, in this Article's case, constitutional amendment processes—and both attempt to interpret the Constitution to further those processes.

⁹³ Alternatively, one might combine the two different approaches. Under this combined view, judges would both assess the applicable values and would also consider what amendments might have passed under a functioning amendment process.

vention process functioning properly.⁹⁴ Treating these proposed amendments as normatively desirable, however, does not mean that they will necessarily be enforced. Most interpretive approaches that focus on desirability also consider other factors, such as text, structure, and precedent. But, at the least, this approach would require a bump, perhaps a big bump, in favor of the results that a functioning constitutional amendment process would have produced.

D. Implementing the Normatively Desirable Interpretations

The most difficult aspect of this interpretive approach is determining what provisions would have been enacted under a reformed amendment process. Such a counterfactual inquiry raises hard questions, but in many cases the answer would be tolerably clear. Let us start with the easiest cases: constitutional amendments where there is strong evidence that they would have been enacted under a reformed process. These cases would usually involve an amendment that was supported by a significant political movement but nonetheless failed to get the requisite support either in Congress or from the state legislatures. These cases would also often involve strong support for the provision in other areas, such as at the state level.

Several recently proposed amendments might satisfy these evidentiary standards. One is a balanced budget amendment, which has received very significant support. At the congressional level, there has been strong support for various versions of the amendment. Significantly, in 1982 the amendment received the requisite two-thirds of the Senate and fifty-five percent of the House. And then in 1995, the amendment secured the requisite two-thirds of the House, while falling just two votes below that requirement in the Senate. On several occasions, the amendment has also come

⁹⁴ If someone believed that the existing constitutional amendment structure is too strict, they could modify this interpretive argument. Instead of giving effect to amendments that had enough support to pass under a strict supermajoritarian process, one would give effect to those that had enough to support under a more lenient process. This would, if anything, provide more of a role for this type of process-oriented interpretation.

within at least a few votes of passing one house.⁹⁵ Moreover, its failure to pass Congress is not surprising since it would operate to restrain Congress's power to deficit spend.⁹⁶ Balanced budget requirements have also been popular at the state level, existing in some form in forty-five states.⁹⁷ In the 1980s, moreover, the legislatures of thirty-two states applied for a constitutional convention to consider this amendment, falling just two states short of Article V's requisite two-thirds.⁹⁸

⁹⁵ Congress has voted on seven versions of the balanced budget amendment since the early 1980s. James W. Bowen, *Enforcing the Balanced Budget Amendment*, 4 *Seton Hall Const. L.J.* 565, 568–69 (1994) (discussing a 1990 version of the amendment which failed by seven votes in the House; and also stating that in 1992, a version of the amendment failed by nine votes in the House, and that in 1994, a version of the amendment failed by four votes in the Senate and by nineteen votes in the House); Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 *Ky. L.J.* 679, 753 n.277 (1999) (noting that a version of the amendment passed in the House in 1995 with a vote of 300-132, but failed in the Senate in 1996 with a vote of 64-35; and that in 1997, a similar version failed in the Senate by one vote); David E. Kyvig, *Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution*, 28 *Akron L. Rev.* 97, 99–100 (1995) (noting that in 1986, a version of the amendment fell just one vote short of a supermajority in the Senate); Rogers, *supra* note 51, at 1009, 1010 n.32 (noting that in 1982, a version of the amendment passed the Senate with a vote of 69-31, but failed in the House with a vote of 236-187).

⁹⁶ Congress, however, has been willing at various times to pass legislation requiring the reduction of the federal deficit. See, e.g., Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. § 900 *et seq.*) (requiring that the federal deficit be reduced in stages to zero by 1991). But see John R. Vile, *Balanced Budget Amendment*, in *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–1995*, at 24 (ABC-CLIO, 1996) (stating that this and similar legislation “has proved relatively unsuccessful in ending deficits”).

⁹⁷ D. Roderick Kwiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 *J. L. Econ. & Org.* 62, 67 (1996) (noting no limitation on state borrowing only in five states); see also John L.S. Simpkins, *Structuring State Constitutional Review: Comparative Perspectives*, 3 *Charleston L. Rev.* 535, 543 (2009) (stating that, due to recessions in the 1970s and 1980s, a “number of states passed balanced budget amendments making it unconstitutional for the state government to engage in deficit spending or placed limits on state taxing or spending powers”); Ronald K. Snell, *Nat'l Conference of State Legislatures: State Balanced Budget Requirements: Provisions and Practice* (2004), www.ncsl.org/default.aspx?tabid=12651.

⁹⁸ Paulsen, *supra* note 7, at 765–89 (listing every state application for a constitutional convention, including the applications of thirty-two states for a convention to discuss a balanced budget amendment); see also E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 *Duke L.J.* 1077, 1078 & n.2 (1985) (discussing the movement for a balanced budget amendment instigated by the National Taxpayers Union

Another possible amendment involves providing the President with the line-item veto, which has been proposed in Congress, but has not gained the requisite support.⁹⁹ It is easy to understand why Congress has refused to pass this authority, as it would strengthen the power of its institutional rival to eliminate spending that Congress proposes. The line-item veto, however, has strong support, as reflected by the fact that it exists in forty-three states.¹⁰⁰ Moreover, a line-item veto statute was passed at the federal level and operated until it was declared unconstitutional by the Supreme Court.¹⁰¹

A third possible amendment involves congressional term limits. Congress has not been willing to propose the amendment despite strong public support since it would limit members of Congress from running for reelection. Term limits, however, have been popular at the state level in two significant ways. First, states attempted to enact term limits to apply against members of Congress in at least twenty-two states, but this movement was stopped when the Supreme Court found such term limits to be unconstitutional.¹⁰²

in 1975, and noting that this movement resulted in applications for a constitutional convention by thirty-two state legislatures by 1985).

⁹⁹ Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 *Case W. Res. L. Rev.* 1659, 1667 (1997) (discussing the possibility of a congressional vote on a line-item veto amendment and implying that it has not been voted on by Congress); Michael G. Locklar, *Is the 1996 Line-Item Veto Constitutional?*, 34 *Hous. L. Rev.* 1161, 1164-65 (1997) (noting that “in the 99th Congress alone, at least ten separate constitutional amendments were introduced to give the president line-item veto authority”).

¹⁰⁰ Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 *Tul. L. Rev.* 265, 274 (2001).

¹⁰¹ See *Clinton v. City of N.Y.*, 524 U.S. 417, 418 (1998) (declaring the Line-Item Veto Act, which was passed by Congress in 1996, unconstitutional).

¹⁰² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 917 n.39 (1995) (Thomas, J., dissenting) (noting that the majority’s opinion will overturn term limit provisions in twenty-two states); Walter M. Frank, *Individual Rights and the Political Process: A Proposed Framework for Democracy Defining Cases*, 35 *S.U. L. Rev.* 47, 89 (2007) (noting that twenty-two states had enacted congressional term limits for their representatives either by pure term limits or restricted ballot access, including six states in 1994, and calling this movement “perhaps the most significant grass roots democratic reform movement since the Progressive Era”); see also Kermit L. Hall, *U.S. Term Limits, Inc. v. Thornton*, in *The Oxford Companion to the Supreme Court of the United States* (2005), available at <http://www.encyclopedia.com/doc/1O184-USTermLimitsIncvThornton.html> (stating that “between 1990 and 1993 . . . twenty-three states placed such restrictions on members of their congressional delegations”).

Second, many states have applied term limits to their own government officials.¹⁰³

Given the support for these amendments, one might conclude that there was strong evidence that they would have passed under a reformed amendment process. In that event, one might argue that the Supreme Court should decide cases to further the results that would have obtained had these amendments passed. Instead, in the last decade, the Supreme Court has decided two cases involving these matters and exhibited extreme hostility to the policies underlying the amendments.

Start with the Supreme Court's decision in *Clinton v. City of New York*.¹⁰⁴ In this case, the Supreme Court held that the Line-Item Veto Act—a statute intended to mimic line-item veto authority—was unconstitutional.¹⁰⁵ The statute provided the President with what it deemed cancellation authority—the power within five days of a federal statute's enactment to decide not to spend funds that Congress had appropriated.¹⁰⁶ This cancellation authority could have been viewed, like virtually all “delegations of legislative power” to the executive, as a species of executive power.¹⁰⁷ Such delegations of legislative power have been widely conferred on the executive branch since at least the New Deal. Moreover, wide authority not to spend appropriated funds had been enjoyed by presidents since the early years under the Constitution.¹⁰⁸ Finally, many federal statutes had conferred cancellation authority since the New Deal and the Supreme Court had approved grants of such authority.¹⁰⁹ Despite all these factors, the Court chose to subject cancellation authority to an extraordinarily strict standard and struck down the statute. It seems evident that the Court's decision was neither required by the original meaning of the Constitution

¹⁰³ Nat'l Conference of State Legislatures, *The Term Limited States* (2009), <http://www.ncsl.org/Default.aspx?TabId=14844> (listing fifteen states with legislative term limits).

¹⁰⁴ 524 U.S. at 417–21.

¹⁰⁵ *Id.* at 421.

¹⁰⁶ The Line Item Veto Act, 2 U.S.C. § 691 (2000).

¹⁰⁷ Rappaport, *supra* note 100, at 304.

¹⁰⁸ See *id.* at 287.

¹⁰⁹ See Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 *Geo. Wash. L. Rev.* 1, 16 n.100 (1998).

nor precedent, but was motivated by hostility to the line-item veto type of authority conferred by the statute.¹¹⁰

Under the interpretive approach discussed here, even if the Supreme Court believed that the statute was unconstitutional under the existing Constitution, it should have seriously considered upholding it, because a line-item veto would have been likely to have been enacted under a reformed amendment process. Instead, the Court stretched its precedents to strike it down.

Another example of Supreme Court hostility towards amendments blocked by Congress is *U.S. Term Limits, Inc. v. Thornton*, which involved term limits for members of Congress adopted by ballot measure in Arkansas.¹¹¹ Once again, the Supreme Court could have easily found that these term limits were constitutional. While the prior decision of *Powell v. McCormack* had held that Congress could not add qualifications for members of Congress to those stated in the Constitution,¹¹² the Court could have distinguished that case on the ground that these term limits were imposed by a state. Indeed, a strong argument suggested that the original meaning of the Constitution allowed the states to impose term limits on its own members of Congress. Instead, the Supreme Court held state term limits were unconstitutional.¹¹³

While the strongest justification for judicial correction of the distortions of the amendment process arises in cases when there is strong evidence that these amendments would otherwise be enacted, one might also believe that the courts should take action in cases with less compelling evidence. After all, if the judiciary corrects only when there is, say, a sixty-seven percent chance the Constitution would have been amended under a well-functioning process, it would miss the cases when there is between a fifty-one and sixty-six percent chance—that is, where the evidence suggests it is merely more likely than not that an amendment would have otherwise passed. For example, an amendment might not be supported by a strong national movement because it is costly to estab-

¹¹⁰ See Prakash, *supra* note 109, at 4 & n.17; Rappaport, *supra* note 100, at 272.

¹¹¹ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783–84 (1995) (discussing Amendment 73 to the State Constitution of Arkansas and quoting from the portion of the amendment relevant to the opinion).

¹¹² *Powell v. McCormack*, 395 U.S. 486, 522 (1969).

¹¹³ *Thornton*, 514 U.S. at 783.

lish such a movement and the proponents foresee that it will be blocked by Congress. Alternatively, the amendment might not exist at the state level, because it might not be thought appropriate there, such as protections of the enumerated powers limitations.

If one did extend the correction of distortions of the amendment process to cases involving less compelling evidence, how would one do so doctrinally? One possibility would be for the courts to attempt to predict what constitutional provisions were more likely than not to be amended under a reformed Article V. But if making such predictions is difficult, it is possible that it would be better for the courts simply to establish a general doctrinal preference, such as a clear statement rule, against all constitutional interpretations that empower Congress or limit the states. Thus, the defects of Article V might justify a federalism-driven interpretive canon that otherwise seems to have no strong theoretical basis.¹¹⁴

Finally, this interpretive approach significantly conflicts with the dominant “post-New Deal” or “nationalist” approach to constitutional interpretation.¹¹⁵ In fact, the post-New Deal approach appears to adopt the opposite position, as it is strongly inclined to allow congressional actions against the states (and often against the President). Ironically, one of the bases for this approach is an inference from the difficulty of amending the Constitution. Because it is so difficult to secure the supermajority necessary to amend the Constitution, this approach argues that the courts should follow a living constitution that would protect individual rights. But if proponents of this approach are genuinely concerned about the difficulty of amending the Constitution, they should be recommending a different approach—one that protects the states against congressional action and one that narrowly views congressional powers. The defects of the amendment process are greatest for amendments that protect the states against congressional action or that seek to limit Congress’s power. The refusal of the post-New Deal approach to protect the states or limit Congress’s powers raises the possibility that proponents of this approach have adopted it, not

¹¹⁴ But see Antonin Scalia, *A Matter of Interpretation* 27–29 (1997) (expressing skepticism about the basis for interpretive rules that protect substantive values).

¹¹⁵ For a description and praise of the New Deal interpretive approach, see Larry D. Kramer, *Foreward: We the Court*, in *The Supreme Court*, 2000 Term, 115 *Harv. L. Rev.* 5, 122–28 (2001).

because of the defects of the amendment process, but because they favor the policies it promotes.

E. The Overall Effect of the Failure of the National Convention Method

The first three Parts of this Article have shown that the national convention process is broken and that its failure is a significant normative defect. While it is generally known that the national convention process does not work, it is not usually recognized how consequential this failure has been. The ineffectiveness of the convention process does not simply make it harder to amend the Constitution. Rather, there is a strong argument that the current process has distorted the current Constitution in favor of Congress and against the states. Indeed, the entire pattern of constitutional history would seem to be affected. That history has been characterized largely by a movement, through both constitutional amendments and constitutional interpretations, from federalism to nationalism. The main constitutional changes—the Reconstruction Amendments, the Progressive Era Amendments, the New Deal interpretations, and the Warren Court interpretations—have generally led to a more nationalist constitution. Those who sympathize with this development tend to view it as a necessary response to modern forces—as an appropriate reaction to moving from a horse and buggy world to one of airplanes and the Internet. Even those who are less happy with the trend toward nationalism often view it as reflecting the genuine views of the American people. But my argument here suggests that these accounts offer at best a partial explanation. The movement towards nationalism appears to be in part the result of a constitutional amendment process that blocks amendments that would move away from nationalism either by limiting the federal government or empowering the states. If constitutional amendments relating to balanced budgets, a line-item veto, and term limits had been enacted—to mention just three examples from recent years—one would see a less unidirectional constitutional history. The Constitution might then be seen as embracing the national government when it was perceived as solving problems, but imposing restraints on the national government and Congress when they were seen as necessary.

There is, however, a solution to this distortion. A nondistorted constitutional amendment process that conforms to the nature and structure of the Constitution is possible. Equally important, there is even a way that the Constitution might be amended to adopt this new method.

IV. A BETTER PROCEDURE: STATE DRAFTING

There is a way to address the defects of the national convention approach. The nation could adopt an amendment process that avoids the problems of a runaway convention and most of the other uncertainties while also depriving Congress of the ability to block amendments. Under this reformed amendment process, the state legislatures would draft the amendment themselves rather than have a convention draft it. Once two-thirds of the state legislatures had approved the same specific language for an amendment, that amendment would thereby be formally proposed. This would trigger the ratification stage, which would require, as it does now, three-quarters of the states to ratify a constitutional amendment.

This simple version of the reform could be improved in three ways. First, to facilitate deliberation and coordination, the amendment process would specifically authorize an advisory convention among the states so that they could discuss, in a nonbinding way, possible amendments to propose. Second, to prevent the small states from having excessive power relative to their populations, the voting rule for ratification should be changed so that each state's ratification does not count equally, but instead is measured based on its electoral votes. Third, to ensure that the ratification decision is made by a different entity than the state legislatures that propose the amendment, ratification would be decided by either state conventions or the people of the states through ballot measures.

This Part argues for the state drafting reform. First, I briefly address the normative arguments for the reform. I then move to argue for the state drafting approach, presenting the argument in several stages. Finally, I discuss some alternative reforms that might be pursued under other premises.

A. Normative Preliminaries

In proposing this reform, I will rely on the normative approach that I outlined earlier. In particular, I will assume that the best way to pass constitutional provisions is through a strict supermajority process that uses one entity to propose the amendment and another to ratify it. Yet, I will make one significant adjustment to this normative approach—limiting my proposals to those that are likely to be attractive to state legislatures. As I discuss in the next section, Congress is not likely to amend the Constitution to eliminate its veto, but the state legislatures might call a convention to increase their power. For state legislatures to do this, however, the amendment procedure has to be attractive to them.¹¹⁶ My goal in this Article is not merely to explore the normative defects of the broken convention process. It is also to show that a reform is available that would solve the problem and that could conceivably be enacted under the existing system. Thus, focusing on reforms that might be adopted is not an arbitrary limitation, but one that is essential to my purposes.

Obviously, this focus places limits on the normative attractiveness of the reforms that are available. If the state legislatures would be unwilling to enact good reforms, then no good reform could occur. Fortunately, I do not believe this is a significant problem. Given my assumption that a strict supermajoritarian process that uses two entities is desirable, the reform I propose here is close to what one might regard as the ideal. While the need for state legislative enthusiasm does require adopting a less than ideal approach, the defects are not so large as to make the proposal unattractive. The best is sometimes the enemy of the good. It makes sense, however, to address these possibly superior alternatives, which state legislatures are unlikely to adopt, after discussing the reform proposal.

The various assumptions that I make narrow the possible amendment proposals. First, of course, Congress cannot be a significant part of the process. Moreover, if one also avoids a federal convention on the ground that it is part of the failed existing process, our efforts become focused on the state level. Thus, in making

¹¹⁶ Existing constitutional assumptions, including the preference for a two-entity supermajoritarian amendment process, are likely to be attractive to state legislatures.

the proposal I will concentrate on the states, but afterward I will consider other entities that might arguably contribute.

B. The State Drafting Reform

1. The Simple Version with an Advisory Convention

Under the simple version of the reform proposal, each state legislature would have the power to offer specific amendments. When the legislatures of two-thirds of the states endorse an identical amendment, that amendment is formally proposed and must then be sent by Congress to the states for ratification. This arrangement would eliminate the main problems under the existing convention approach. First, because Congress's role would be so limited, it could not sabotage the amendment process. Second, there would be no possibility of a runaway convention. There is no convention at all, and a formal proposal must employ the specific language approved by the state legislatures. Third, because the states would have to agree on specific language, there would be no uncertainty about whether an amendment would actually have been proposed.

While this simple version of the reform would have significant benefits, it would provide insufficient opportunity for deliberation and coordination among the states. The problem is that each state legislature would decide on its own what amendment to pass. The simplified procedure would provide no opportunity for the states to debate one another as to whether an amendment makes sense in general and, if so, what particular version of the amendment should be adopted. The opportunity for a debate could bring together diverse viewpoints, which could improve the proposal. The simplified procedure would also provide no opportunity for the states to coordinate their behavior so as to agree on a single proposal. Ultimately, the states would have to agree on a specific amendment if one is to be proposed, and they may therefore have to compromise with one another.

If the states operate separately, then the process may be quite inefficient and unwieldy. For example, assume that after ten states have approved a specific amendment, the eleventh state decides that a different version of the amendment would be superior. The eleventh state must then decide whether to propose what it deems to be a better version at the cost of losing the ten state approvals

that have already been secured. Thus, the simple amendment process may lead either to too few new suggestions or to numerous suggestions that are hard to get approved.

To address this problem, it would be useful for the states to hold a convention, but to do so in a way that avoids the pitfalls of the existing convention method. The Constitution ought to authorize conventions that are both voluntary and advisory. A group of states could choose to hold a convention whenever they deemed it advisable, but no state would be required to attend. The convention would not have any binding powers. Instead, it would allow the states to debate the merits of different proposals. It would also allow them to assess the popularity of different proposals and to compromise on a single amendment to be considered by each state legislature. A successful convention would endorse a single proposal that each state legislature could then approve.

This type of convention would avoid the problems that afflict national conventions under the existing convention approach. First, it could not result in a runaway convention. The convention itself would have no power and its endorsement therefore could not allow a proposal to avoid state scrutiny. There also could be no runaway convention because proposals would result only from the actions of the state legislatures. Second, calling a convention would not require the states to agree on a single subject. A convention would not require specification of a subject and the delegates could discuss whatever they deemed important. But because the convention would have no power, it would have an incentive to discuss subjects that the state legislatures were interested in. Third, there would be no need for the convention to agree on specific voting rules or voting rights. While the convention might want to do so, nothing significant would turn on it since it would be an advisory body. The convention could report its votes in a variety of ways, tabulating them based on state population, state equality, or some combination. With this information, the state legislatures would then be in a position to determine which proposals had significant support and to decide whether to formally endorse those proposals. Finally, there would be no problem of congressional sabotage of the convention because Congress would have no authority over it.

2. Modifying State Voting Weights

A problem with the simple version of the state drafting approach involves the degree of power that it confers on the small states. Under this arrangement, there are essentially two limits on a constitutional amendment: it must be proposed by two-thirds of the states and then it must be ratified by three-quarters of the states. I will focus on the latter requirement, since it imposes the stricter requirement. While the three-quarters supermajority rule appears to be strict from the perspective of the number of states, it actually appears quite lenient when one considers it from the perspective of the number of citizens who are represented. It turns out that, if the smallest three-quarters of the states were to support a constitutional amendment, those votes would only represent approximately thirty-nine percent of the population of the United States.¹¹⁷ Thus, an amendment might be enacted that would have been approved by legislatures representing less than half of the country.

This appears to be a serious matter. If one believes that the supermajority requirements for constitutional amendments promote high-quality constitutional provisions, then one would not want constitutional provisions enacted by representatives of only thirty-nine percent of the nation's population. While I believe this is a substantial defect that requires modification of the proposed amendment process, this aspect of the simple version of the state drafting method is not as problematic as it might at first seem. First, even if one focuses entirely on the representation of citizens, a requirement that three-quarters of the states ratify an amendment is a tough one to meet. While state legislatures that represent only thirty-nine percent of the people could enact a constitutional amendment, that result could occur only if all of the smallest states voted to approve the amendment and all of the other states voted against it. By contrast, to the extent that people's views are not correlated with the size of their states, the expected result under the three-quarters supermajority rule would be ratification by legislatures representing three-quarters of the people. Thus, it is only

¹¹⁷ U.S. Census Bureau, *State Rankings – Statistical Abstract of the United States – Resident Population*, <http://www.census.gov/statab/ranks/rank01.html> (Dec. 12, 2008) (list of states by population); U.S. Census Bureau, *Statistical Abstract of the United States: 2010*, at 18–19 (2009); Federal Election Comm'n, *Distribution of Electoral Votes*, <http://www.fec.gov/pages/elecvote.htm> (last updated Oct. 3, 2003).

some of the time that state legislatures representing three-quarters of the people would not be required, and it would be extremely unlikely ever to be thirty-nine percent. Second, the constitutional requirement of ratification by three-quarters of the state legislatures reflects a view, not much accepted today, but clearly written into the Constitution, that the United States consists of a mixture of equal individuals and equal states. Under this view, it is important that three-quarters of the states are needed, even if only thirty-nine percent of the population is required.¹¹⁸

Despite these mitigating factors, an amendment procedure that allows states representing only thirty-nine percent of the population to amend is, in my view, simply too lax. One should therefore adopt an amendment procedure that does not provide equal votes to each state. Given the cause of the problem, one might think that the best procedure would be to weight the votes of each state based on population. One could accomplish this in a relatively simple way. When proposing and ratifying amendments, each state's vote could be weighted based on its population rather than given equal weight. Each state would then have the number of representatives it has in the House of Representatives. Then, for example, when California proposes an amendment, that would count for fifty-three votes. When North Dakota proposes one, that would count for only one vote. The amendment would be deemed proposed when it receives votes equal to two-thirds of the members of the House of Representatives.

While some readers (as well as the author) might find this proposal attractive, it faces at least one major obstacle. It is unlikely to be supported by the small states, as it would reduce much of their voting strength. Since part of my argument is that there is a practical and feasible way to reform the national convention process, I take this obstacle seriously. Fortunately, there is a way to improve

¹¹⁸ There is another problem with a voting rule that grants each state an equal number of votes. The voting rule will also allow a small percent of the public to block a constitutional amendment. The smallest thirteen states could prevent a proposed amendment from being ratified, yet those thirteen states only represent approximately four percent of the country. U.S. Census Bureau, *State Rankings – Statistical Abstract of the United States – Resident Population*, www.census.gov/statab/ranks/rank01.html (Dec. 12, 2008); U.S. Census Bureau, *Statistical Abstract of the United States: 2010*, at 18–19 (2009). This suggests that the three-quarters standard can also be too strong.

the national convention process that would still allow the reform to pass. One needs a compromise between the small and large states.

Instead of allocating votes to each state based on its population, one could allocate votes based on the number of electoral votes a state has. Because electoral votes are the sum of the number of representatives and senators for each state, they represent a compromise between representation based on population and representation based on equal states. A large state like California would be entitled to fifty-five votes, based on fifty-three representatives and two senators, while a small state like North Dakota would be entitled to three votes, based on one representative and two senators.¹¹⁹

It is true that the small states would lose voting power under this proposal as compared to the equal voting vote, but that would happen under any compromise and the Electoral College compromise is a familiar one from the Constitution. More importantly, the small states might believe that the compromise was biased against their interests. Going from a voting rule in which California and North Dakota receive equal votes to one in which they receive fifty-five and three respectively might not seem like a fair compromise, even though North Dakota gets more votes than its population warrants.

Two responses can be made to North Dakota. First, to sweeten the deal for the smaller states, one should use the Electoral College rule for only one of the two constitutional amendment votes. I recommend using the Electoral College measure for the ratification vote, while using the equal state voting rule for the proposal vote.¹²⁰ Second, as I shall argue in the next Section, the small states would gain from a deal that allowed the state drafting amendment to be enacted. Under the existing national convention approach, the states have equal rights to seek a convention, but since the process

¹¹⁹ See Federal Election Comm'n, *Distribution of Electoral Votes*, <http://www.fec.gov/pages/elevote.htm> (last updated Oct. 3, 2003).

¹²⁰ There is a strong reason for using the Electoral College measure for the three-quarters ratification rule rather than the two-thirds proposal rule. Under the equal state measure for the ratification decision, the smallest twelve states representing approximately four percent of the U.S. population would be able to block an amendment. See *supra* note 118. By contrast, using the equal states measure for the proposal and the Electoral College measure for the ratification would increase the percentage of the population required to block an amendment.

is never used, their equal power has little value. Under the reformed process with votes based in part on the Electoral College, the small states would have less formal voting power, but their votes would be more valuable because the voting process would be used more often. While equal voting power and state drafting of amendments might be preferred by the small states, the large states would be unlikely to agree to this proposal and might hold out for additional representation. In the end, the Electoral College weighting of votes for ratification would seem to be a fair and acceptable compromise.

This compromise would also respond to the concern that states representing thirty-nine percent of the population could ratify a constitutional amendment. This would no longer be the case. Under the Electoral College weighting, the three-quarter supermajority of electoral votes would mean that states representing at a minimum of seventy-four percent of the people would have to support an amendment for it to pass—virtually the same percentage of popular support as the percentage of Electoral College votes.¹²¹ Thus, the state drafting rule would largely address the distortions created by using equal states rather than populations to propose and ratify amendments.¹²²

¹²¹ See Federal Election Comm'n, *Distribution of Electoral Votes*, <http://www.fec.gov/pages/elevote.htm> (last updated Oct. 3, 2003).

¹²² An alternative mechanism has some virtues but in my opinion is inferior. This mechanism would mirror the congressional amendment method. Just as proposing an amendment under the congressional method requires securing two-thirds of the House and two-thirds of the Senate, so too proposing an amendment under the state drafting method might require two-thirds of the states as measured by population and two-thirds of the states with each state counting equally. This method would operate as a compromise between the small and large states. It would also prevent states representing a small percentage of the population from enacting an amendment. Indeed, under this method, states representing two-thirds of the population would be needed to propose an amendment. Further, this mechanism would be more comparable in strictness to that of the congressional method than the one discussed in the text. Disadvantages of this method include that it is more complex and more of a departure from the existing Constitution. But the biggest disadvantage is that the equal state voting rule for ratification means that states representing approximately four percent of the country can block a constitutional amendment.

3. Modifying How the States Vote

We now come to the last necessary modification of the simple version of the state drafting proposal: changing how the states vote. Under the simple version, the state legislatures first propose the amendment and then the state legislatures or state conventions ratify the amendment. This arrangement creates a problem. Allowing the state legislatures to both propose and ratify the amendment would confer too much power on a single entity. That entity could then pursue its institutional interests without sufficient constraint.

This problem, however, can be corrected by shifting ratification power from the state legislatures to another entity. There are at least two entities that could do the job. First, one might rely on state conventions, which are now permitted to ratify constitutional amendments under the existing Constitution. Although they have only been used for one amendment (as well as for ratifying the original Constitution),¹²³ they could certainly be employed for constitutional amendments in the future. They would provide an independent source of authority and therefore would operate as a check on the state legislatures attempting to enhance or defend their powers. Indeed, this was a significant reason why the constitutional framers employed them in the first place.

Yet, state conventions have not been used in many years and therefore might be thought to be an outdated or unfamiliar institution. Instead, one might employ a more modern institution to speak for the people: the ballot measure.¹²⁴ 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 con-

¹²³ See U.S. Const. amend. XXI; U.S. Const. art. VII.

¹²⁴ See John G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* 8 (2004) (discussing the ballot measure and noting that seventy-one percent of Americans live in a state or city or both that allows the popular initiative).

ventions—which were said to act in the name of the people—make.¹²⁵

It also seems likely that the state legislatures would be willing to propose such an amendment method. While they might prefer having greater power, they would likely understand the importance of having two separate entities involved in the process. Moreover, as discussed in the next Part, if the amendment is to be passed, it would need to obtain the support of a national convention, and that convention might be skeptical about approving an amendment that seemed to be a state legislative power-grab. Further, under the existing national convention procedure, the state legislatures have far less power. Not only must they secure the approval of the national convention, but Congress also has the discretion to employ state conventions for the ratification decision.

Finally, it might be argued that it would be better to have a national institution, rather than a state institution, make the ratification decision. One might believe that it is important not only for two separate entities to decide on whether to enact an amendment, but also for each of these entities to exist on a different level of government—with one from the separate states and one from the nation as a whole. In this way, the amendment would not exclusively reflect a state or a national perspective. There is much to be said for this feature of amendment procedures. The question is whether it is possible to design an otherwise desirable amendment procedure that has this characteristic.

Unfortunately, it is not easy to find an appropriate national institution for ratifying the amendment proposed by the state legislatures. Certainly, Congress could not do it, since the whole point of the noncongressional method is to deprive Congress of a role. Us-

¹²⁵ Another issue is who should decide whether the ratification decision is made by state conventions or state ballot measures. Under the existing Article V, Congress chooses the ratification method, both as to the congressional amendment process and the national convention process. For the state drafting process, the choice would seem to be between allowing Congress to make the decision or allowing the state legislatures to specify it in the amendment itself. While it might seem dangerous to allow Congress a role in the process, permitting the state legislatures to decide would deprive national institutions of any role in a constitutional enactment. Perhaps the best approach would be to authorize Congress to choose the ratification method, but to permit the state legislatures to specify a method in the amendment itself that would become binding if Congress fails to select a ratification method within a specified time after the amendment is formally proposed.

ing a national ballot measure also seems problematic. Such a ballot measure has never been employed in the United States and is therefore untried. More importantly, a national ballot measure weights votes based on population and therefore would be opposed by the small states.

This leaves one last national institution—a national convention. It would be ironic if a national convention were part of the reform of a method broken largely because it employed a national convention. Still, the national convention here would be employed to ratify the amendment rather than to propose it. While a national convention has certain problems, it cannot be easily dismissed. One problem with a national ratifying convention is that it has never been used and therefore would seem quite extraordinary and unfamiliar. Another problem is that it would raise numerous questions that we have already discussed—such as how the members would be elected, how many members would participate from each state, and the voting rules at the convention. These questions would occasion strategic conflict, significantly raising the costs of the convention. Yet, this problem might be addressed by having the Constitution more clearly specify the answers to these questions. The delegates could be selected through a method written into the Constitution. The states could receive the same number of votes as their electoral votes. The voting rule at the convention might require two-thirds or three-quarters of the delegates.

Perhaps the biggest problem is restricting the size of the convention to one which suits deliberation and debate. If each state were given one representative for each electoral vote, that would result in 535 members—too many to allow for effective debate. To have effective debate, one would want no more than seventy-five or one hundred delegates.¹²⁶ But can one do that while still giving each state the equivalent of its electoral votes? While one can imagine systems that might do the trick, they appear to create other problems.¹²⁷

¹²⁶ Vik D. Amar, Note, *The Senate and the Constitution*, 97 *Yale L.J.* 1111, 1118 (1987).

¹²⁷ One method for restricting the delegates to less than one hundred would involve giving them differently weighted votes. One promising rule would be to give each delegate eight votes unless a lesser number were needed. For example, California has fifty-five electoral votes, so six of its delegates would get eight votes and one would

Although I would not rule out a national convention, I believe that these problems outweigh the advantages of having a national institution as part of the amendment process. Therefore, I believe that the best approach would use state conventions or state ballot measures to make the ratification decision.

C. Alternative Reforms

This Part has explored various reform proposals. While several of them seem plausible, the one that I regard as best meeting my criteria of desirability and possibility of being enacted takes the following form. When two-thirds of the states through their legislatures approve the exact same amendment, that amendment is deemed formally proposed and then may be ratified by three-quarters of the states through state conventions or state ballot measures, as Congress shall decide. While the proposal supermajority rule counts each state equally, the ratification supermajority rule weights states based on their Electoral College votes.

Although this amendment process has many desirable features, it is not the normatively best one available. Adjustments have been made to make it attractive to state legislatures, especially those from small states. By far, the most important of these adjustments involves departing from supermajority rules for proposal and ratification that weight state votes based on population to supermajority rules that weight states equally for proposal and that weight states based on electoral votes for ratification. Nonetheless, this one significant defect does not render my reform proposal undesirable. In fact, the state drafting method that I defend gives smaller states less power than the congressional enactment method. Moreover, the entire Constitution is afflicted with the equal state feature, since the feature is built into the Senate, and the Senate has a significant role on laws, treaties, appointments, and electoral votes.¹²⁸ But people who regard the equal states feature as a defect still generally accept the representative nature of the Constitution.

get seven. By contrast, North Dakota would have one representative, who would have three votes. This mechanism might allow the number of delegates to be reduced below one hundred, while still allocating votes based on a state's electoral votes. But it has the problem of allocating unequal votes to different delegates, which has not generally been tried and might create problems.

¹²⁸ See Amar, *supra* note 126, at 1117.

Similarly, the state drafting reform, while not perfect, would still further the fundamental goal of allowing a national consensus to be enacted into the Constitution without requiring congressional approval.

Finally, it should be emphasized that this state drafting reform does not replace, but rather, supplements the existing national convention method. While the existing convention method does not allow for ordinary amendments, it might turn out to be useful if there should ever be a desire to radically restructure the Constitution.¹²⁹ Thus, the convention method should be left in place and the state drafting method added as a third amendment method.

V. HOW TO ENACT THE STATE DRAFTING METHOD

While the state drafting procedure is superior to the national convention method, this claim might seem like largely an academic point, because the reasons that make Article V defective would appear to prevent it from being reformed. The state drafting procedure might seem unlikely to be adopted either by Congress or by the convention method. Congress is extremely unlikely to propose a state drafting procedure that would deprive it of the effective veto over the amendment process that it currently enjoys. This leaves the national convention method. But that method might seem unlikely to produce an amendment, because of the problems we have discussed—especially the coordination problems and the fear of a runaway convention.

There is a great irony here in that the very reasons that make the national convention method so important and so problematic also prevent its reform. But this irony turns out to be only apparent. While the national convention method is defective, it may be possible, through significant effort, to use it once to adopt a state drafting amendment. This old, broken car may still be capable of one last trip to the dealership to buy a replacement.

It is true that state legislators are ordinarily wary of applying for a national convention. But by anticipating the difficulties and taking actions to prevent them, the state legislatures might be able to

¹²⁹ For recent proposals for a radically restructuring of the Constitution through the convention method, see generally Sanford Levinson, *Our Undemocratic Constitution* 11 (2006); Larry J. Sabato, *A More Perfect Constitution 199–200* (2007).

significantly reduce the coordination problems and the possibility of a runaway convention. Knowing that these problems could be addressed, the state legislatures might be willing to apply for a convention to enact a state drafting amendment that would significantly enhance their authority.

The state legislatures could address these difficulties by combining elements of the state drafting procedure with the existing national convention approach. First, the states should hold a voluntary convention in order to agree on a single specific amendment and a strategy for adopting it. By proposing a single specific amendment, the states would significantly reduce the coordination problems among the states and between the states and Congress. With two-thirds of the state legislatures calling for the exact same amendment, Congress would have no discretion to argue that the applications were not for the same subject.

Second, the states could take a variety of actions that would significantly reduce the possibility of a runaway convention. Most importantly, they could attempt to promote a legal or moral norm against a runaway convention by passing various measures deeming such conventions illegal or improper. For example, the two-thirds of the state legislatures that apply for a convention to pass identical amendments should also announce that they believe a runaway convention is both illegal and improper. Moreover, the state legislature should take appropriate actions, depending on the method for selecting convention delegates, to promote delegates who are likely to support the state drafting amendment and unlikely to support a runaway convention.

This Part first discusses the strategy that the state legislatures could use to pass the state drafting amendment. I describe a strategy that employs political controls—political, nonbinding actions by the state legislature. I then briefly discuss a second possible strategy that the state legislature could take which employs legal controls—enactments that purport to establish binding rules on various aspects of the enactment process. Finally, I assess the probability that the state drafting amendment could actually be enacted.

A. Agreeing on a Single Proposal

The adoption of the state drafting amendment would, of course, require that there be a strong support for the amendment. Let us assume, then, that for whatever reason significant support for the amendment emerges.¹³⁰

The first action that the states should take is to agree among themselves to support a specific amendment proposal. To reach an agreement, the states, or at least a substantial number, would first need to reach an agreement on specific language for the amendment. This could best be achieved through the organization of a voluntary interstate meeting or, if you will, a convention. Such voluntary meetings have been held more than once in the past and certainly would be constitutional under existing law.¹³¹ There is nothing that stops the states from sending representatives to meet and reach a nonbinding agreement to propose an amendment.

With this meeting, the states could agree on a specific version of the state drafting amendment. But the states should also agree on a strategy for avoiding the problems that the national convention method raises. While it is not necessary that all states agree on this strategy, the greater the number, the better the results.

B. Applying for a Convention

The states should begin with an application for a limited convention restricted to the subject of amending the national convention portion of Article V. In fact, the states should go further and apply for a convention limited to deciding whether to propose a specifically worded amendment.

The state applications should include language of the following type:

This is an application for a limited convention. We regard the convention as being limited to deciding whether to propose the specifically worded amendment referenced in this application. In

¹³⁰ See *infra* notes 143–44 and accompanying text (discussing one scenario where support for the state drafting amendment might arise if Congress fails to enact desired amendments that cut back on its power).

¹³¹ See Caplan, *supra* note 7, at 73 (meeting of state legislators and other state government officials concerning proposed amendment on state legislative reapportionment); Magliocca, *supra* note 48, at 80.

our view, a convention that goes beyond this limited authorization is illegal, as are its proposals. We promise not to vote to ratify any such proposed amendments and we regard such votes as illegal. This legislature has an obligation to vote against such measures, irrespective of its evaluation of their merits. We condemn any state legislature or convention that does not follow this principle. And we believe that the courts would be obligated not to enforce such measures.

These obligations and limitations are all the more important in the case of this amendment. This proposed amendment is based on the premise that the national convention amendment process is defective in part because of the possibility of a runaway convention. For there to be a runaway convention as part of the process whereby the Constitution is amended to prevent future runaway conventions would be exceedingly improper and should especially be resisted.

While this state believes that the Constitution recognizes limited conventions, if Congress should determine that such conventions are unconstitutional, then this application for a convention should be interpreted to be an application for a formally unlimited convention, combined with the strong belief of this state that the convention should voluntarily limit itself to this specific proposal.

If at least two-thirds of the states agreed to the application, this would eliminate most of the discretion that Congress ordinarily exercises when there are calls for a limited convention. First, with two-thirds of the states calling for the same convention, Congress would not have to decide whether state applications that differed from one another should be interpreted as calling for a single limited convention. Second, this proposal would also address the situation where Congress holds that there are no limited conventions.¹³² The contingency portion of this application would address that possibility and require Congress, in those circumstances, to call an

¹³² As discussed above, some academic commentators have argued that the Constitution does not recognize limited conventions and therefore applications for such conventions are not valid. See *supra* Section I.B.

unlimited convention. Thus, this proposed application would largely eliminate the two main ways that Congress might hold that applications for a limited convention did not actually require such a convention to be called.

This proposal would also help to reduce the chances of a runaway convention. It would do this in part by helping establish the prohibition on runaway conventions as a widely accepted norm throughout the country. A minimum of two-thirds of state legislatures would not only support an amendment to end runaway conventions, but would also be on record that such conventions were unconstitutional and improper. While some people will no doubt continue to argue that runaway conventions are permissible, the large number of states opposing such conventions will count as a powerful force against them.

In addition to helping to establish the norm against runaway conventions, the proposal is also likely to reduce the chances of a runaway convention because it involves a pledge by the state legislatures to vote against any nonconforming amendment. As discussed below, this pledge makes it less likely that such an amendment will be ratified.¹³³ Moreover, national convention delegates are more likely to support a nonconforming amendment if they think it will be ratified. A nonconforming amendment that will not be ratified will neither change the Constitution nor provide significant fame to the delegates who promote it. By contrast, a nonconforming amendment that is ratified will not only alter the Constitution, but may provide significant publicity to those who are seen as most responsible for its enactment.

This proposal will help to establish a norm against runaway conventions most if Congress calls a limited convention. If Congress claims there are no limited conventions and calls an unlimited convention instead, this is likely to reduce the effect of these application statements. After all, Congress will have called an unlimited convention and therefore in a sense a runaway convention is no longer technically possible. Nonetheless, the arguments against a runaway convention should still have some political force. Despite Congress's action, the states (and many others) would still believe that they legally applied for a limited convention which Congress

¹³³ See *supra* notes 140–41 and accompanying text.

should have called. Moreover, because the states are proposing an amendment to put an end to runaway conventions, a convention's attempt to propose a nonconforming amendment is exactly the type of action that there is strong support for prohibiting. The political force of the arguments against the passage of a nonconforming amendment would be strengthened if the state legislatures were also to pledge to vote against any such amendment proposed by the technically unlimited convention.¹³⁴

C. Selecting Delegates to the Convention

After the states have made a valid application, Congress must call for a convention. At this point, Congress will have to decide whether it seeks to regulate the selection of delegates. If Congress does not exercise this authority, then state law would determine how the delegates are to be selected.¹³⁵

If state law governs the delegate selection, then it is likely either to allow the state legislature to select them or to require a popular election. If Congress makes the decisions, it will probably choose from these alternatives as well, although it seems unlikely that Congress would allow the state legislature to do the selecting.

If the state legislature selects the delegates, it could certainly use its power to select delegates who would promote the legislature's goals. First, the legislature could select persons who are strongly against runaway conventions. It might even be able to choose persons who promise that they would vote against any amendment that differed from the specific language proposed by the state legislature. The state legislature could also select persons who strongly favored the state drafting amendment. In fact, a great advantage of a state drafting amendment that ends runaway conventions is that

¹³⁴ Another way that this arrangement makes a runaway convention less likely is that it involves agreement on a specific amendment. If the requisite number of state legislatures agrees on a specific amendment, then it would seem that the convention is ignoring a specific decision made by the necessary number of state legislatures if it proposes something else. By contrast, if the requisite number of states do not agree on a specific amendment or even on a single subject, then it is much harder to argue that the convention has ignored a decision made by the required number of state legislatures.

¹³⁵ To discourage Congress from exercising this authority, the states might include within their application for a convention a statement that they do not believe that Congress has this authority.

people who favor that amendment are also likely to oppose runaway conventions.¹³⁶ Thus, the state legislatures need not choose between those who favor the state drafting amendment and those who are against runaway conventions.

If the delegates are to be chosen by popular vote, then the state legislature would have less power, but it could still exercise influence. The state legislators could campaign for certain candidates, issue resolutions against runaway conventions, and place issues on the agenda, such as asking the candidates whether they are willing to affirm a pledge to vote against any nonconforming amendments. Moreover, it would be hard for candidates to avoid taking a position on whether they support the specific amendment, because the convention was called to decide on that amendment. Finally, some of the same forces that operate against runaway conventions when the state legislature selects the delegates, such as the tendency of people who favor the state drafting amendment to oppose runaway conventions, would also operate in a popular election.

D. The Convention and the Ratification Process

Once the delegates are selected, the states' ability to influence the convention will be limited. The principal influence that the states have on the convention is through actions taken ahead of time—by strengthening the norm against runaway conventions, by selecting appropriate delegates, and by indicating that they will vote against nonconforming amendments. Still, if the convention seems to be considering nonconforming amendments, the state legislatures could continue to strongly condemn such actions and promise to work against their ratification.

If the convention does pass a nonconforming amendment, Article V gives Congress the decision whether the amendment should be sent for ratification to the state legislatures or to state conventions. If Congress sends the amendment to the state legislatures, then obviously they will be in a position to guard against ratifying a nonconforming amendment. In particular, if two-thirds of the states have issued the application for a convention that I recom-

¹³⁶ In addition, the state legislature should not select delegates who are known for favoring other causes. Such delegates might be more willing to pursue a runaway convention if it would enable them to secure their other goals.

mended above, they will have pledged to vote against any nonconforming amendment. This makes it relatively unlikely that any nonconforming amendment would be ratified. If a mere one-third of the states that applied for the convention (eleven of the thirty-four that applied) plus two more states (for a total of thirteen states) choose to reject the nonconforming amendment, it will be defeated. Put differently, it will be extremely difficult to ratify an amendment if there is at least some significant opposition to the amendment because it is nonconforming (in addition to those opposed to it on substantive grounds).

By contrast, if Congress chooses state conventions to ratify the nonconforming amendment, then the state legislatures will have less power. Still, they could take several actions, such as issuing resolutions stating that they believe that ratifying the amendment is illegal and improper or campaigning for persons running to be delegates for the convention who are opposed to the nonconforming amendment. Especially if the nonconforming amendment is unrelated to the proposed state drafting amendment, the state legislators could make the powerful argument that it is wrong to ratify a nonconforming amendment that came into being as a result of applications that sought an amendment to put an end to runaway conventions.

E. The Overall Effect of Political Controls

The overall effect of the political controls would be significant. In my view, they would operate to strongly discourage the passage of nonconforming amendments and to provide a reasonably strong chance that a state drafting amendment would, if it were actually popular, be enacted. While there is no single aspect of the process that guarantees these results, the combination of effects is likely to be powerful. First, the state agreement largely eliminates the coordination problems and therefore assures that if two-thirds of the states apply, a convention will be called. Second, the joint strategy of the states to write a specific amendment, to announce that a runaway convention would be illegal and improper, to select sympathetic convention delegates, and to attempt to block any nonconforming amendment at the ratification stage should have a significant effect in both blocking a runaway convention and in promoting passage of the state drafting amendment.

The political controls will work best if Congress calls a limited convention, the state legislatures actually pick the delegates, and the state legislatures make the ratification decision. This will maximize the influence of the state legislatures and the force of the arguments against a runaway convention. By contrast, the greatest risk of a nonconforming amendment will occur if Congress calls an unlimited convention, the people elect the delegates, and state conventions make the ratification decision. Yet, even in this situation, the state legislatures can take a variety of political actions that could help promote the state drafting amendment and block the nonconforming amendment. In general, then, state legislatures would have a reasonable basis for attempting to use the national convention method to enact a state drafting amendment.

F. Legal Controls

While I believe these political controls are likely to address the defects of the national convention process to allow the passage of the state drafting amendment, there can be no certainty about this. Thus, it is worth exploring the possible legal controls that might be employed. Legal controls, which purport to impose legally binding constraints on the amendment process, have the potential to significantly constrain the possibility of a runaway convention, but these controls have a risk of backfiring that makes their use problematic. Apart from their effectiveness, the legality of these controls raises significant issues. Since I do not recommend employing the legal controls, a short discussion that highlights the issues should be sufficient.

There are a variety of legal controls that might be adopted, but here I will mention just three. In many respects, they mirror the political controls, but purport to be binding. First, a state might pass a law making it illegal under state law for that state's convention delegates to vote for a nonconforming amendment. Second, a state might pass a law governing the election of that state's delegates to the national convention. The law might require that all candidates in the election must take an oath or affirm that they will not vote for any nonconforming amendment. Alternatively, the law might allow delegate candidates to refuse to take the oath or affirmation, but require that ballots indicate the refusal. Finally, a state

might pass a law forbidding the state legislature or the state convention from voting to ratify a nonconforming amendment.

Many people will regard these laws as unconstitutional. Consider, for example, the law that requires candidates to be delegates at the national convention to pledge that they will oppose any nonconforming amendments. If a runaway convention is allowed under the Constitution, then there appears to be a strong argument that this law is unconstitutional. After all, if runaway conventions were permissible, then the Constitution would appear to give the convention the right to decide what amendment to propose. The state legislature would have no right to control that decision.¹³⁷

While this argument is powerful, there is another side to the matter. First, if it turns out that runaway conventions are unconstitutional, then it is not clear why the state cannot take actions to forbid or discourage their delegates from voting for a nonconforming amendment. After all, if an action is unconstitutional, then why would the Constitution prevent the states from penalizing it?¹³⁸ The states' actions would not directly conflict with the Constitution. Of course, the Constitution might forbid the states from passing a law in this area or allow Congress to preempt the states' actions, but that conclusion needs to be supported with an argument, and it is not clear that it would be persuasive, especially in the absence of congressional action.

Second, even if the Constitution allows a runaway convention, the states might still have the authority to pass the law requiring delegates to pledge not to vote for a nonconforming amendment.¹³⁹ In the history of the nation, similar laws have been enforced and some continue to be applied today. For example, many states at present have laws that purport to take away any discretion that members of the Electoral College have to independently select a

¹³⁷ Cf. *Bush v. Gore*, 531 U.S. 98, 112–23 (2000) (Rehnquist, C.J., concurring) (positing that state court had no power to determine how presidential electors should be chosen).

¹³⁸ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1512–17 (1987) (discussing “converse-1983” actions, which would create a cause of action against an agent of the federal government for unconstitutional acts).

¹³⁹ For a discussion of related but distinct legal controls, see Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 *Wm. & Mary L. Rev.* 1037 (2000).

President, even though there is a strong argument that their independence was a key ingredient of the College. Nonetheless, states regularly adopt intrusions on this discretion, including requirements that Electoral College candidates affirm that they will vote for a specific candidate, the imposition of fines on Electoral College members who violate their pledge, and the listing on the ballot of the names of the presidential candidate rather than the Electoral College candidate.¹⁴⁰ Historically, a similar practice was employed when, prior to the direct election of senators, the ballot for state legislative candidates was required to indicate whether or not they had pledged to support the senatorial candidates selected by a popular vote.¹⁴¹

Apart from the constitutionality of these laws, one might wonder whether they are a prudent method of discouraging a runaway convention. Three possible results of enacting these laws are worth distinguishing. First, if the courts found these state laws to be constitutional and enforceable, then the laws would have been beneficial. They might have significantly reduced the possibility of a runaway convention. Second, the laws might not be adjudicated by the courts, either because they were not challenged or because they were not deemed justiciable.¹⁴² In this situation, the laws would be likely to be enforced and therefore would operate to deter a runaway convention. But there is a third possibility. These laws might be challenged and found unconstitutional. Even more problematically, it is possible that the courts—perhaps the Supreme Court, which might be thought unlikely to support the state drafting amendment—might issue a strong opinion suggesting that a runaway convention was fully constitutional and that the states had no authority to limit the convention. These judicial decisions might

¹⁴⁰ See Robert W. Bennett, *Taming the Electoral College* 44–45, 95–97 (2006) (discussing the listing of the names of presidential candidates rather than electors on ballots, the requirement of pledges by electors, and the imposition of fines or other penalties on “faithless” electors).

¹⁴¹ See Caplan, *supra* note 7, at 62–63; Kobach, *supra* note 56, at 1978–79 (discussing the “Oregon system,” which allowed candidates for state legislature to sign a statement pledging to support the popular candidate for Senate, and noting that a majority of states had adopted this system by 1908).

¹⁴² See 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure* 440–45 (4th ed. 2007) (discussing the political question doctrine relating to constitutional amendments).

greatly diminish the force of the state legislatures' legal and political controls against a runaway convention.

Different people might evaluate this array of possible results differently. Given my view that political controls are likely to constrain the possibility of a runaway convention, I do not think it is worth passing legal controls, given the risk of a Supreme Court decision approving runaway conventions. Instead, the states should rely on political controls, which, not being binding, should not be subject to judicial review.

G. The Probability of Enacting the State Drafting Method

Finally, one might ask how likely it is for the state drafting amendment to pass. Like any proposed amendment, the state drafting amendment would have to become very popular for it to have a chance of being enacted. One obstacle preventing the state drafting amendment from becoming popular, though, is that a procedural provision such as that might seem unlikely to become the object of popular attention. Yet, there is a predictable way that the amendment might become popular. If Congress were to block one or more proposed amendments, then people might begin to realize that something like the state drafting amendment was needed.

While this might seem to be an unlikely possibility, something like this actually occurred during the early 1960s. At that time, various states organized a meeting where they discussed the passage of several amendments.¹⁴³ Many of the states were concerned about several Warren Court cases, including the reapportionment decisions. These states proposed a series of amendments that had little chance of passing Congress. To enact the amendments, the states also proposed something very similar to the state drafting amendment. Under their proposed amendment, when two-thirds of the state legislatures had approved the same specific language, it would be deemed formally proposed, and then would be sent to

¹⁴³ See Caplan, *supra* note 7, at 73–74; Paul Oberst, *The Genesis of the Three States-Rights Amendments of 1963*, 39 *Notre Dame L. Rev.* 644, 649–50 (1964); see also George McGovern, *Confederation vs. Union*, 9 *S.D. L. Rev.* 1, 1–3 (1964) (discussing generally the proposed amendments); William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 *Geo. L.J.* 1, 4–11 (1963) (discussing generally the meeting and its proposals).

the states for ratification.¹⁴⁴ The amendment differed from the one I recommend here only in that it did not specifically provide for an advisory convention, did not weight the votes based on the Electoral College, and did not employ state ballot measures as a means of ratification. The states also proposed a similar strategy to the one I advocate. They planned to pass the amendment through a limited Article V Convention that was intended not to depart from that proposed amendment.¹⁴⁵

While the proposed amendment strategy gained some initial support from several states, it then seemed to stall. Although it is not entirely clear what happened, it appears that the substantive amendments—which would have overturned the one person, one vote decisions and established a new, modified Supreme Court—simply were not popular enough with the other state legislatures to gain sufficient support for the state drafting amendment.

Although this prior effort to pass a state drafting amendment failed, it is still quite possible that new issues could arise that would lead to a movement towards modifying Article V. To mention just one possibility, if the country perceived that fiscal irresponsibility and corruption had taken hold of Congress, the public might support amendments imposing term limits, balanced budgets, and an line-item veto that Congress would probably refuse to pass. A state drafting amendment might then become politically popular. That the political system promoted a version of the state drafting amendment before makes it doing so in the future more likely.

Of course, it does not seem very likely that this scenario, or another one like it, will occur. But the probability that a state drafting will not be enacted is largely beside the point. No amendment is likely to be passed, because so few provisions are that popular. The focus of this Part has been to show that the state drafting reform

¹⁴⁴ See Caplan, *supra* note 7, at 73; Oberst, *supra* note 143, at 644–45; see also McGovern, *supra* note 143, at 4–6 (discussing generally the proposed change to the process of state-proposed amendment); Swindler, *supra* note 143, at 9, 12–23 (discussing the proposed change to Article V and the history of the convention process).

¹⁴⁵ See Council of State Governments, *Amending the Constitution to Strengthen the States in the Federal System*, 36 St. Gov't 10, 11–12 (1963) (reproducing the recommendation for the proposed amendment of Article V by means of a constitutional convention); Black, *Threatened Disaster*, *supra* note 29, at 962–64 (discussing the proposed amendment and suggesting that the state applications for a convention to propose this amendment limit the scope of the requested convention).

could be enacted if the support for it were strong, not that that it will be enacted. While some people might believe that the defects of Article V pose an insuperable obstacle to enacting the state drafting method, this Part has tried to show that the state legislature could use the national convention to enact the reform.

One can compare the state drafting amendment to the equal voting rights of states in the Senate. While many people argue that this equal voting provision is undesirable, the Constitution prohibits an amendment that would change the provision and at best allows it to be changed through two amendments.¹⁴⁶ But passing two amendments would be extremely difficult, even if constitutional, and might be close to impossible. If there were no way around the problems of the national convention process, then one might regard the state drafting amendment as little more attainable than modifying voting rights in the Senate. But if my argument here is correct, there is a reasonable chance to enact the state drafting amendment if it becomes popular.

CONCLUSION

In this Article, I have argued that the constitutional amendment procedure of Article V is defective—not because the supermajority requirements it imposes are too strict, but instead because the national convention amendment method does not work. Because no amendment can be enacted without Congress's approval, limitations on the federal government that Congress opposes are virtually impossible to pass. This defect may have had enormous consequences in recent decades, possibly preventing the enactment of several constitutional amendments that would have constrained Congress, such as amendments establishing a balanced budget limitation, a line-item veto, or congressional term limits. Thus, the increasingly nationalist character of our constitutional charter may not be the result of modern values or circumstances, but an artifact of a distorted amendment procedure.

Happily, reforms of the national convention amendment method exist that would address this defect. Here, I have recommended a

¹⁴⁶ Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 *J.L. & Pol.* 21, 68–70 (1997) (discussing two amendment procedure for eliminating the equal voting procedure).

procedure that would allow two-thirds of the state legislatures to propose an amendment. That proposed amendment would then be subject to ratification by the states, acting through state conventions or state ballot measures. I also argue that it may even be possible to place this new state drafting procedure in the Constitution. While the national convention amendment method is broken, a strategy exists that might allow this method to be used one time to pass the state drafting procedure. If the nation ever does decide to employ this strategy and enact something like the state drafting procedure, this may help to restore the federalist character of our Constitution and political system.