

# Policy Analysis

No. 691

January 18, 2012

## *Renewing Federalism by Reforming Article V Defects in the Constitutional Amendment Process and a Reform Proposal*

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### **Executive Summary**

The constitutional amendment procedure of Article V is defective 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 prevented 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. 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. Article V should be reformed to allow two-thirds of the state legislatures to propose a constitutional amendment which would then be ratified or rejected by the states, acting through state conventions or state ballot measures. Such a return of power to the states would militate against our overly centralized government by helping to restore the federalist character of our Constitution. Moreover, a strategy exists that would allow this reform to be enacted.

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**The only effective way of amending the U.S. Constitution requires Congress's approval.**

## **Introduction**

Every constitution requires change occasionally. An 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. Article V of the U.S. Constitution sets out its amendment process. Although some experts think Article V is too strict,<sup>1</sup> its supermajority rules have benefits, such as promoting better amendments.<sup>2</sup> The real defect in Article V lies elsewhere.

The Framers of the U.S. Constitution tried to establish an amendment process that located the power to propose amendments both in Congress and outside of Congress. In fact, though, the noncongressional amendment process does not work. Thus, the only effective way of amending the U.S. 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 needed to correct or update the Constitution have not been enacted. Instead, only those that reflect congressional preferences have been passed.

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 policy analysis I explore this constitutional defect, explain why it occurs, specify how it damages the Constitution, offer a reform that would correct the defect, and identify a realistic meth-

od for enacting that reform.

## **Article V's Amendment Methods**

Article V of the U.S. 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.

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 propose an amendment. Similarly, an amendment can be ratified by three-quarters of the states, either through their legislatures or through state conventions.

Article V's purpose in providing alternative methods is evident: to prevent a single

## Defects of the Convention Method

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. Similarly, while the state legislatures can ratify amendments, they might choose to reject amendments that constrain their powers. Therefore, the Constitution allows Congress to select for ratification by state conventions, which would have different interests than the state legislatures.<sup>3</sup>

Statements made at the Founding support this interpretation of the amendment process. 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.”<sup>4</sup> 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.”<sup>5</sup>

The convention method thus appears to have been designed to prevent Congress from having a veto over potential amendments. Under this method, two-thirds of the state legislatures can bypass Congress by applying for a constitutional convention. The convention has the job of proposing a constitutional amendment, which then has to be ratified by three-quarters of the states. But this constitutional amendment method has never been used. The nation has always relied on the Congressional proposal method.<sup>6</sup>

The reason for the lack of use of the national convention method is that it 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. I now turn to examining those reasons in detail.

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

### 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 likely 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

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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.

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 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.

***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. This possibility may chill the desire among some states for calling a convention.

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 instead proposes 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 itself 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 of 1787 illustrates. A nonconforming amendment might become popular at the convention for a variety of reasons, including because an issue suddenly becomes prominent or because 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.

A runaway convention that resulted in the 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 to be 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 to be invalid, then its supporters would tend to claim that 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 symbol of national unity.<sup>7</sup> 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—once at the proposing stage and again 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. 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. 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 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 bicamerally, through a two-thirds vote in

each house, which is more difficult to obtain 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 specifically worded 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.

*The Unwillingness to Apply for a Convention.* Although these problems are important, the biggest defect in the national convention process is the result of a combination of these factors: the national convention method simply does not work. Because of 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 the existing national convention-amendment procedure, state legislators face

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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.<sup>8</sup> 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 imagine that bad amendments might be enacted. Second, state 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.

In addition to these costs, state legislators must also consider the reduced benefits of the convention method in that this method is less likely to result in the enactment of the amendment that they desire. They must entertain the possibility that Congress will use its important role in the amendment process to block passage of an amendment that Congress refused to pass. State 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 because of Congress's actions 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 fails to produce either conventions or amendments.<sup>9</sup> 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 ben-

efits 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.

## **Harm Done**

This paper so far has been largely descriptive, arguing that the national convention procedure does not produce amendments. 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 contend 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. Finally, in the last two sections, I argue that a constitutional amendment process similar to the national convention method, but without the defects, is both desirable and capable of being enacted.

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.<sup>10</sup> Indeed, if it 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, it 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, exhibit less desirable provisions. If constitutional changes were needed, there would be no way for them to occur. Moreover, if one believes (as I do) that amendments that pass through a functioning supermajoritarian process would generally be desirable, then the absence of an amendment process would prevent the enactment of desirable changes. 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 constitution with 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.<sup>11</sup> 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. It would fail to add the needed checks on Congress and the federal government, but it would grow to include additional limitations on the states (and perhaps on the president).

Finally, consider the existing Article V provisions. We can see that they are largely

the same as the one described immediately above, which permits only the congressional amendment process. Given the defects in the convention process, it is as if the convention process does not exist. Thus, the same normative distortions that apply to a constitution with only the congressional amendment procedure—a bias in favor of Congress and the national government, and against the states—apply to the existing Constitution.<sup>12</sup>

My argument that the failure of the convention method has prevented amendments that constrain Congress, and thereby distorted the Constitution, appears to be 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). A second category, composed of the enormously important Fourteenth Amendment by itself, imposes limitations only on the states. A third category of amendments operates to grant rights against both the state and federal governments, such as the Thirteenth Amendment (prohibiting slavery), the Fifteenth Amendment (prohibiting racial discrimination in voting), the Nineteenth Amendment (prohibiting discrimination based on sex in voting), and the Twenty-Sixth Amendment (guaranteeing the right to vote to eighteen-year-olds), but in no case did Congress grant a right that it opposed at the time or one that would operate to harm congressional interests.<sup>13</sup> A fourth category improves the operation of the federal government, such as the Twelfth Amendment (reforming presidential

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elections), the Twentieth Amendment (reducing the extent to which federal officers serve in a lame-duck status), and the Twenty-Fifth Amendment (providing for a temporary or permanent vacancy of the presidency). Finally, the Twenty-Second Amendment imposed term limits on the president, Congress's primary competitor for power. While this provision arguably limited the power of part of the federal government, it also appears to have enhanced Congress's power.

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 10 amendments and the Twenty-Seventh Amendment, which Congress originally passed as part of the Bill of Rights 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 it led Congress to pass the Bill of Rights.<sup>14</sup> 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.

The Eleventh Amendment also appears to fit into this category. 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* 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. 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 because of a systematic political strategy 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. This political strategy arguably improved the amendment process and was used as well to pass the Nineteenth Amendment. Unfortunately, it can only be employed for a subset of amendments.<sup>15</sup>

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, 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 the people believed restraints were necessary.

There is, however, a solution to this distortion. An undistorted 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.

## The State Drafting Reform Proposal

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 approved the same specific language for an amendment, that amendment would 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.

Under the simplest 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, since 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.

This simple version of the reform could be improved in three ways. First, to facilitate deliberation and coordination, the amendment process should 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 should be decided by either state conventions or the people of the states through ballot measures. Let's consider each improvement in turn.

### An Advisory Convention

While the simple version of the reform would have significant benefits, it would provide insufficient opportunity for deliberation and coordination among the states.

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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 10 states have approved a specific amendment, the 11th state decides that a different version of the amendment would be superior. That state must then decide whether to propose what it deems to be a better version—at the cost of losing the 10 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. Proposals would result only from the actions of the state legislatures. Second, calling an advisory 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 only 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.

### **Modifying State Voting Weights**

A second problem with the simple version of the state drafting approach involves the degree of power that it confers on the small states. Under the simple version, there are 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 considered 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 39 percent of the population of the United States.<sup>16</sup> 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, as I do, that the supermajority requirements for constitutional amendments promote high-quality constitutional provisions, then constitutional provisions enacted by representatives of only 39 percent of the nation's population would not be desirable. However, this aspect of the simple version of the state drafting method is not as problematic as it might at first seem. First, even focusing 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 39 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 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 39 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 39 percent of the population is required.

Despite these mitigating factors, an amendment procedure that allows states representing only 39 percent of the popula-

tion to amend is simply too lax. We should therefore adopt an amendment procedure that does not provide equal votes to each state. Given the cause of the problem, the best procedure might be to weight the votes of each state based on population. This could be accomplished in a relatively simple way, as each state's vote could be weighted based on its population, rather than given equal weight, when proposing and ratifying amendments. Each state would then have the number of representatives it has in the House of Representatives. For example, if California proposed an amendment, that would count for 53 votes. If North Dakota proposed an amendment, that would count for only 1 vote. The amendment would be deemed proposed when it received votes equal to two-thirds of the members of the House of Representatives.

This proposal 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 the national convention process that would still allow the reform to pass. We need a compromise between the small and large states.

Instead of allocating votes to each state based on its population, we 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 55 votes, based on 53 representatives and 2 senators, while a small state like North Dakota would be entitled to 3 votes, based on 1 representative and 2 senators.

It is true that the small states would lose voting power under this proposal as compared to the equal-state voting rule, but that would happen under any compromise—and the Electoral College compromise is a famil-

**If the smallest three-quarters of the states were to support a constitutional amendment, those votes would only represent approximately 39 percent of the population of the United States.**

**Given modern communication methods, it seems reasonable to employ a direct vote of the people for the ratification decisions that the state conventions also make.**

iar 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 55 votes and 3 votes, 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, we 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. Second, 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 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 39 percent of the population could ratify a constitutional amendment, since 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 74 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. Thus, the state drafting rule would largely address

the distortions created by using equal states rather than populations to propose and ratify amendments.

*Modifying How 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 are the 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), 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 state legislatures that are attempting to enhance or defend their own powers. Yet, state conventions have not been used in many years and therefore might be thought of as an outdated or unfamiliar institution. Instead, we might employ a more modern institution to speak for the people: the ballot measure. A proposed constitutional amendment might be ratified by a simple vote of the people, as are state constitutional amendments and laws in many of the states. While the ballot measure would certainly be an innovation for the Constitution, its wide use by the states makes it a familiar and tested device. Given modern communication methods, it seems reasonable to employ a direct vote of the people for the ratification decisions that the state conventions—which were historically said to act in the name of the people—also make.

## Realism of the Reform

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, if the reform 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, the state legislatures would also have more power under the reformed amendment method than under the national convention method. Under the reformed amendment method, the state legislatures would not only be able to use an effective amendment method, but would also not have to secure the approval of the national convention to enact an amendment.

The reformed amendment process outlined here would resurrect the Constitution's original design by establishing an amendment method that would both function to allow amendments to pass and would not require the approval of Congress. The reformed process would work because it would increase the benefits and decrease the costs to state legislators of proposing an amendment. Most importantly, the cost would decrease because the process would prevent a runaway convention and the resulting possibility that a disliked constitutional amendment would be enacted. 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 it is quite difficult to secure the strict supermajority of states necessary to enact one. However, this reform would provide an alternative amendment process that would not go through Congress—an alternative path that was intended by the Founders. It would thereby counter the bias toward Congress and the national government that now marks the constitutional status quo.

The state drafting procedure might seem unlikely to be adopted under either the congressional proposal method or the national 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 any amendments—because of the problems we have already 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 extraordinary actions to prevent them, the state legislatures might be able to 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 own authority in the future.

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 specifically worded amendment, the states would significantly reduce the coordination problems among the states

**While the national convention method is defective, it may be possible to use it once to adopt a state drafting amendment.**

**The state legislatures that apply for a convention to pass identical amendments should pledge to vote against any nonconforming amendment.**

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 in their applications that they believe a runaway convention is both illegal and improper, and that they pledge to vote against any nonconforming amendment.

Moreover, state legislators should take strong actions to promote delegates to the convention who are likely to support the state drafting amendment and unlikely to support a runaway convention. One effective way of promoting such delegates would be to have prospective delegates take pledges to oppose nonconforming amendments. The delegates to the convention are likely to be selected either by the state legislature or by a popular election. If the state legislature selects them, it should insist that the candidates it selects take a pledge to oppose a runaway convention. If the delegates are chosen through a state election, the legislators should strongly campaign only for the candidates who pledge to vote against a runaway convention.

The legislators should also insist that the delegates agree not to sign or support any rules at the convention that would prevent them from disclosing a decision by the convention to debate a nonconforming amendment. In that way, these delegates can reveal that the convention is behaving improperly so that the nation can apply political pressure to restrain it.

Finally, the state legislators should attempt to oppose the ratification of any

nonconforming amendment. If Congress chooses the state legislatures to make the ratification decision, then they can certainly vote against ratification. If Congress chooses state conventions to make the decision, the state legislatures should campaign against ratification. Moreover, the state legislatures might even threaten to delay or to refuse to pass legislation scheduling elections for the ratification convention on the grounds that the proposed amendment was illegal.

These actions by the state legislatures would significantly decrease the possibility that a nonconforming amendment would be passed. This, in turn, should make it more likely for state legislatures to be willing to submit applications for the state drafting amendment. Of course, the state drafting amendment, like any proposed amendment, would only have a good chance of passing if it became popular. But the strategies outlined here suggest that, if the amendment does become popular, there might be a way of enacting it.

## **Conclusion**

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, including a 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. 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 just one time to pass the state drafting procedure. Such a return of power to the states would militate against our overly centralized government by helping to restore the federalist character of our Constitution.

## Notes

1. Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, 2006), pp. 160–64.

2. John O. McGinnis and Michael B. Rappaport, “Majority and Supermajority Rule: Three Views of the Capitol,” *Texas Law Review* 85 (2007): 1119.

3. Article VII of the Constitution, which provided that the Constitution took effect when 9 of the 13 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.

4. James Madison, *The Debates in the Federal Convention of 1787*, ed. Gaillard Hunt and James Brown Scott (New York: Oxford University Press, 1920), pp. 89–90.

5. James Madison, “Federalist No. 43” in the *Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), pp. 246–47.

6. No amendment has ever been passed under the national convention method, nor has a national convention ever been called. See Michael Stokes Paulsen, “A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment,” *Yale Law Journal* 103 (1993): 734. 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* (New York: Oxford University Press, 1988), p. 126.

7. See John O. McGinnis and Michael B. Rappaport, “Originalism and the Good Constitution,” *Georgetown Law Journal* 98 (2010): 1736–37, 1753.

8. That the fear of a runaway convention is real is suggested by the fact that concern about it has so often been mentioned. Many of those expressing these concerns have used it to argue against using the national convention procedure. See Caplan, p. vii, quoting Arthur Goldberg, “The Proposed Constitutional Convention,” *Hastings Constitutional Law Quarterly* 11 (1983): “There is nothing in Article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights.”; Caplan, p. viii quoting press release, Henry J. Reske, United Press Int’l, “Special Constitution Package: Hi-tech Constitution?” (May 24, 1987), 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, p. 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, pp. 81–82, quoting Edward Walsh, “President Denounces ‘Political Gimmickry’ of Drive to Balance Budget by Constitution,” *Washington Post*, March 28, 1979, 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, p. 84, quoting Richard L. Madden, “A Balanced U.S. Budget Debated in Connecticut,” *New York Times*, March 19, 1985, 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, p. 85, quoting *MacNeil/Lehrer NewsHour* (PBS, March 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, p. 85, quoting *Public Papers of the Presidents of the United States: Ronald Reagan, 1982* (Washington: Government Printing Office, 1982) (interview with reporters from the *Los An-*

ges Times, January 20, 1982, <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* (Lawrence, KS: University Press of Kansas, 1996), p. 433, 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," *Pacific Law Journal* 10 (1979): 628, 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" (August 9, 1987), reprinted in "Combating Chicanery About the Constitution," *The Phyllis Schlafly Report* 21, no. 2 (September 1987), <http://www.eagleforum.org/psr/1987/sept87/>.

9. It might be argued that the national convention method causes constitutional change by threatening Congress, which in turn passes desired amendments to be sent to the states. I believe history does not support this claim. See Michael B. Rappaport, "Reforming Article V: The Problems Created by the National Convention Method and How to Fix Them," *Virginia Law Review* 96 (2010): 1535–37.

10. Some of the delegates at Philadelphia appeared to believe that no amendment provision was necessary. See note 1, *The Records of the Federal Convention of 1787*, at p. 202.

11. 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. Constitution, Twenty-Second Amendment (placing term limits on the president).

12. 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 norma-

tive problems.

13. Actually, the Fifteenth, Nineteenth, and Twenty-Sixth Amendments did not really place limits on the federal government. While they did not forbid government from restricting the right to vote, the previous power to impose these restrictions was located mainly in the states. See, for example, U.S. Constitution, art. I, § 2, cl. 1, "[T]he Electors in each State [for the House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

14. 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 and A. C. Pritchard, "Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process," *Fordham Law Review* 62 (1993): 132–40. 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.

15. 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. See Lynn A. Baker, "They the People": A Comment on *U.S. Term Limits, Inc. v. Thornton*," *Arizona Law Review* 38 (1996): 862–63.

16. Figures compiled based on U.S. Census Bureau statistics. See also Charles L. Black, Jr., "Amending the Constitution: A Letter to a Congressman," *Yale Law Journal* 82 (1972): 198.