

Why We Need to Mend Our Amending Process: the Inherent Flaws of Article V of the
U.S. Constitution

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Introduction

Thomas Jefferson once famously remarked, “Every constitution... naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.”¹ While this proposition appears specious at best, surely any constitution can be expected to undergo a certain amount of change in its course to reflect the current times of the society it exists in.² However, if Jefferson were alive today, what he may find interesting, if not disheartening, is that the U.S. Constitution is considered to have one of the lowest “amendment rates” (avg. amendments/year) in the world, considering our mere 27 changes to the Constitution over a course of around 225 years.³ Constitutional critic and author Larry Sabato points out that this fact could lead some “defenders of the [Constitution’s] status quo” to believe that our low amendment rate could be attributed to the success of our constitution thus far compared to that of other constitutions.⁴ In the following paper, I will argue that this is not the case. Our abysmally low amendment rate is not the result of by and large acceptance of the Constitution by the American people, but instead an acquiescence of the people which is the direct result of a defective and unilateral amending system that has proven to be destructive towards, not just some of the fundamental individual and state liberties granted to us by the Constitution, but also towards the Constitution itself. I hope to shed some light on the fact that Article V of the U.S. Constitution is not a sufficient means of constitutional change as it stands and therefore requires revision of some form. Article V (more specifically its proposal method) does not provide an adequate avenue for making

¹ Wayne Franklin, *The Selected Writings of Thomas Jefferson* (New York: W. W. Norton & Company, Inc., 2010), 266.

² Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *The American Political Science Review* 88, no. 2 (June 1994), 357.

³ Ibid.

⁴ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., (2007), 200.

specific changes to the Constitution that Americans actually want. Further, this destructive tendency is only likely to weaken the Constitution and offend granted liberties more if not fixed.

Background

The very fact that Article V exists at all is a testament to the fact that the Drafters knew “that their handiwork was imperfect.”⁵ Fortunately most of the Framers, such as George Mason, had the insight to foresee that future generations would likely find parts of the Constitution “defected”, and “amendments... necessary”, and therefore provided an avenue for such change, lest the people might turn towards “violence” for change instead.⁶ Constitutional scholar, Donald Lutz, expands on this notion stating that the drafters recognized “that humans are fallible but capable of learning through experience,” and therefore, “[a] provision had to be made for altering institutions after experience revealed their flaws,” as well as allow the Constitution to “adapt to changing circumstances.”⁷ Simply put, the times change and therefore require a changing constitution. Likewise, humans make mistakes and need an outlet in which to correct those mistakes.

Accordingly, on June 11th, 1787, the delegates of the Constitutional Convention “unanimously approved ... that an amending provision was to be included in the Constitution,” while putting off the logistics of the amending process to another date.⁸ Near the end of Convention the procedural issue rose again prompting the delegates to choose a delicate standard

⁵ Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, Inc., 2006), 159.

⁶ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 61.

⁷ Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *The American Political Science Review* 88, no. 2 (June 1994): 355-370.

⁸ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 61.

in which amendments to the Constitution were to be made. There would have to be a fine balance struck between a unanimous decision and a simple majority. Currently living under the Articles of Confederation, the delegates knew how difficult and impractical it would be to require all the states to unanimously agree on change; Lutz notes that part of the decision not to make the amending process unanimous was also dependent on the fact that a process that is “too difficult, [interferes] with the needed rectification of mistakes, thereby [violating] the assumption of human fallibility, and prevents the effective utilization of popular sovereignty.”⁹ Richard Labunski, author of *The Second Constitutional Convention*, agrees, noting that if “the Constitution was too... time-consuming to alter, it would quickly fall out of step with changing conditions and values.”¹⁰ However, the Framers also acknowledged, “that the new Constitution would be the fundamental law of the nation, and should not be amended by ordinary legislative means” either.¹¹ Lutz describes how the current amendment process was crafted with “the distinction between normal legislation and constitutional matters” in mind and that an “easy” process, blurring this distinction “violates the need for a high level of deliberation and debases popular sovereignty,” noting the importance of an amending process that’s more entrenched than regular legislation (without requiring unanimity).¹² Labunski adds that if the Constitution was relatively easily to change “its legitimacy would be eroded” and would fail to “[preserve] enduring values... throughout later generations.”¹³

⁹ Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *The American Political Science Review* 88, no. 2 (June 1994): 355-370.

¹⁰ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 69.

¹¹ *Ibid.*, 64.

¹² Donald S. Lutz, “Toward a Theory of Constitutional Amendment,” *The American Political Science Review* 88, no. 2 (June 1994): 355-370.

¹³ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 69.

The Framers were also aware of the importance of divided powers. As a result, the delegates provided a two-tiered system for making amendments to the Constitution consisting of a proposal stage and a ratification stage. In turn, each stage allows for two possible methods. The proposal stage was originally designed to only allow amendments to be made after being proposed by state legislatures; this was likely a result of certain delegates being “concerned that if Congress had to give its approval for the Constitution to be changed, there was the danger that a too powerful legislature would not propose amendments even when the proposals enjoyed strong support.”¹⁴ The renowned delegate, Alexander Hamilton, countered this argument, with the support of others, stating that, if left to state legislatures, they would only apply for a Convention to “increase their own powers,” prompting Elbridge Gerry to raise a similar fear of a majority of states “binding” the rest.¹⁵ Eventually a compromise was struck allowing one or the other means of proposal. Perhaps out of a similar fear as the one raised by Hamilton earlier, the Convention decided that state legislatures were not to be the sole means of ratifying proposed amendments. Instead, the option was left open to state conventions as well, though the method to be utilized would ultimately be up to the discretion of Congress.

The text of Article V reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application to 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

¹⁴ Ibid., 61.

¹⁵ Richard B. Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, (New York: Random House, Inc., 1993), 18.

*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.*¹⁶

Thus, for a proposal to continue on to the ratification stage, it must either pass two-thirds of both houses of Congress, or be voted on by a Convention called forth by two-thirds of the state legislatures (currently thirty-four states). The twenty-seven amendments to our Constitution have so far all been proposed via the first method while a second Constitutional Convention has never been convened. At the discretion of Congress, the proposal is then either forwarded to the state legislatures (who may formally ratify a proposal if ratified by three-fourths of the state legislatures) or to Conventions held in the states (who may formally ratify a proposal if ratified by three-fourths of the state Conventions) (three-fourths of the states currently being thirty-eight). Congress has only implemented the latter method of ratification once for the twenty-first amendment.¹⁷ The only currently active proviso here being that no state may be denied its equal suffrage in the Senate.

It appears, then, that through this two-tiered option allowing for multiple methods, all of which require some sort of supermajority agreement to pass, that the Framers had in fact created a viable means for making amendments to our Constitution. In fact, this entrenched

¹⁶ U.S. Const. Art. V.

¹⁷ Congressional Research Service, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress* (2012), 2.

supermajority process *does* lead to more “desirable” amendments being passed.¹⁸ However, the defect of Article V rests not in its strict voting thresholds, but rather, in its proposal stage; the national convention amendment method is not a realistic option and therefore limits the likelihood that certain popular amendments that the American people want will actually surface.

In the following paper, I hope to make a compelling argument that we need to revise our Article V amending process. I will do this by compiling socio-legal texts and empirical data to create a narrative consisting of three parts: In *Part 1* I will show that there is an array of evidence pointing to the fact that there are a number of proposed amendments that Americans have been struggling to add to the Constitution, many of which constrict the power and scope of Congress. In *Part 2* I will show that, despite strong public support for many of these amendments, Article V’s defective nature makes it very unlikely that they will ever take shape; I will then describe why this phenomenon exists. Lastly, in *Part 3*, I will make some concluding remarks and mention some implications and potential consequences that a defective system poses for the American people, the states, and the Constitution, which will only persist and become exacerbated unless Article V is corrected.

Part 1: Popular Support for Certain Amendments

In order to see how article V is defective, we must determine two things: whether Americans by and large actually want and support various amendments to our Constitution and, if they do, what kind of amendments those are. In this section I will attempt to show that the American people *do* agree on many perceived flaws of our Federal Constitution and wish to amend them. By doing so I will also reveal that, not only do Americans want change for our

¹⁸ John O. McGinnis and Michael B. Rapport, “Majority and Supermajority Rule: Three views of the Capitol,” *Texas Law Review* 85 (2007), 1171.

Constitution, but that they favor specific types of changes to our Constitution as well- namely those that limit Congress's powers. I will demonstrate this by providing a list of recurring recommended amendments to our Constitution that appear in legal and constitutional scholarship. These amendments are supported by normative arguments concerning needed improvements to the current operation of the federal government. For the scope of this paper I have chosen to hone in on four theoretical amendments, each of which is agreed upon by multiple legal scholars and present some level of negative outcome for Congress. The four proposed amendments include the following: reforming/abolishing the Electoral College; Congressional reapportionment; Congressional term-limits; and a Congressional balanced budget. While not exhaustive, these four amendments should establish a degree of consensus regarding which amendments legal scholars agree we ought to add to our Constitution.

Given that these normative proposals on what we *ought* to do to our Constitution do not carry much weight by themselves, I will attempt to bridge the gap from a normative view to a social perspective by providing public opinion polls on the favorability of these specified amendments. By combining a normative and social perspective it should become clear that there is wide support for these Congress-limiting amendments, not just from learned socio-legal scholars, but from the American people as well. Thus, I will begin by giving brief descriptions of each proposed amendment and then provide statistical data showing what the public support for each of these proposals looks like.

Reforming/Abolishing the Electoral College + Congressional Reapportionment

Probably the most widely debated proposal that arises concerns the Electoral College. While this topic is controversial enough on its own, it closely ties in with the issue of Congressional apportionment, both of which I shall discuss here. The central problem that connects these two types of proposals lies within the democratic notion of “one person, one vote,” which essentially necessitates that every person receives equal representation in the voting process or, extrapolating to the state level, that voter representation is “allocated to each state in proportion to its percentage of the nation’s population.”¹⁹ Author Larry Sabato states that this concept is heavily embedded into American society and continues to be validated through our judicial system, referring to the Supreme Court decision in *Hadley v. Junior College District* that ruled “one person, one vote” must apply to the elections of all leading officials carrying out governmental tasks.²⁰ The proposed amendments that follow concerning the Electoral College and Congressional apportionment are related then by the fact that they address provisions which frustrate democratic equality in favor of state equality wherein each state is represented equally regardless of its population.

In his book, *A More Perfect Constitution*, Larry Sabato highlights and attacks this widely criticized element of democratic inequality within the Electoral College. He points out the embarrassing fact that “the winner of the popular vote does not necessarily win the presidency,”²¹ (which has happened four times in our nation’s history: in the elections of 1824,

¹⁹ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 211.

²⁰ *Ibid.*, 212.

²¹ *Ibid.*, 139.

1876, 1888, and 2000)²² a problem partially stemming from the related issue that senators skew the proportionality of state representation (which in turn skews electoral votes/state population).²³ However, Sabato later points out several strong points of the Electoral College: its reinforcement of federalism; its emphasis on all states, regardless of population; and its ability to consolidate agreement through the utilization of an enforced two-party system. Thus, referring to the Electoral College, Sabato makes a conservative proposal when he says “mend it, don’t end it.”²⁴ He believes the Electoral College is flawed, but too valuable to be outright abolished. Instead, he offers a few proposals on how to fix it that require amending our Constitution. His first proposal draws on Congressional apportionment and the fact that, all states, regardless of size, are allocated two senators. Previously having had advocated an amendment that allocates larger states extra senators, he also believes this would in turn shift the outcome of the Electoral College “in the correct direction.”²⁵ Since a state’s electoral votes are based on its representation in Congress, if larger states are granted more senators they would also receive more electoral votes and, according to Sabato, would theoretically “maximize the opportunity for the popular-vote winner to capture the presidency,” thus helping eradicate the electoral crises seen in the four election years mentioned above.²⁶ His proposed amendment would effectively allocate two extra senators to the ten largest states and one extra senator to the next fifteen largest states, leaving the other states with their current amount, creating a 135 member Senate.²⁷ Sabato also acknowledges the fact that this might not be the most pragmatic solution and therefore offers an alternative- directly changing the size of the Electoral College while leaving the Senate

²² Ibid., 134.

²³ Ibid., 140.

²⁴ Ibid., 135.

²⁵ Ibid., 149.

²⁶ Ibid.

²⁷ Ibid., 26.

untouched. In this proposal, the Electoral College itself would be enlarged to more accurately reflect the populations of larger states giving those states more votes and therefore achieving the same outcome as his first proposal.²⁸

In contrast, authors Richard Labunski and Robert A. Dahl propose the more liberal notion of eradicating the Electoral College altogether. Unlike Sabato, Labunski sees potential third-party candidates as a valuable element and is therefore one of the reasons why he advocates getting rid of the electoral system (which essentially necessitates a two-party system and leads third-party voters to feel as if they're "wasting their vote") and replacing it with a "direct vote of the people."²⁹ Labunski, however, also denounces the "winner-take-all system" that most states implement, pointing out the fact that a current candidate "could lose 39 states by huge margins and still be elected [president] if he or she won 11 of the most populous states," mirroring a similar concern as Sabato regarding the misrepresentation of the states in the Electoral College.³⁰

Likewise, Dahl cites "the inequality in the weight of votes in the Electoral College" and the possibility of winning with a minority of popular votes as inherent flaws in the system.³¹ Dahl details a phenomenon that has resulted over time in which smaller states have become overrepresented in both Congress and the Electoral College due to the fact that every state, regardless of population, is entitled to two senators. According to Dahl, the 2000 U.S. census shows us a couple of peculiar things- first of all, it is statistically possible for a proposed amendment to be blocked by "thirty-four senators from the seventeen smallest states," whose

²⁸ Ibid.

²⁹ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 365-366, 374.

³⁰ Ibid., 370.

³¹ Robert A. Dahl, *How Democratic Is the American Constitution?*, (New Haven & London: Yale University Press, 2003), 80-82.

total representation equals a meager “7.28 percent of the population of the United States.”³² Similarly, Dahl expands off an interesting fact raised by Sabato: Sabato observes that, when the Constitution was drafted, the “population ratio” between the largest and smallest state (Virginia and Delaware, respectively) was “12 to 1.”³³ Today, the ratio between the largest and smallest state (California and Wyoming) is “70 to 1,” a vast increase skewing the Senate in favor of smaller states.³⁴ Dahl draws off this fact and extrapolates this large discrepancy over to the Electoral College noting that “the vote of a Wyoming resident... is worth almost four times the vote of a California resident in the Electoral College.”³⁵ Thus when Dahl concludes that “equal representation in the Senate = unequal representation of citizens,” he joins the likes of Sabato and Labunski when it comes to the defects in Congressional apportionment and the Electoral College. He therefore proposes two possible amendments that could help ameliorate representation in the Electoral College: an amendment that replaces the Electoral College with popular vote or, alternatively, an amendment that allocates electoral votes “to candidates in direct proportion to their share of the popular votes in the state.”³⁶

In addition to the sources listed above, there exists a wide array of commentary criticizing and lamenting the flaws of the Electoral College and Congressional apportionment; some advocate and propose Constitutional change and others do not. I believe, however, that the coverage thus far provides strong enough evidence to prove the point that that these two related issues are indeed salient topics, at least at the scholarly level. And, while the changes these authors advocate may appear profound, they are far from new. It is well known that even James

³² Ibid., 161.

³³ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 24.

³⁴ Ibid.

³⁵ Robert A. Dahl, *How Democratic Is the American Constitution?*, (New Haven & London: Yale University Press, 2003), 81.

³⁶ Ibid., 86-87.

Madison, whom many consider to be the Father of the Constitution, had expressed “serious doubts about various aspects of the college by 1823 and proposed reform of it.”³⁷ Though some of the proposed amendments in this section differ on certain aspects (e.g. reforming vs. abolishing the Electoral College; the pros and cons of the Electoral College; whether or not to apportion more senators; etc.) they all agree that these aspects of our Constitution are flawed in that they disrupt democratic equality and the concept of “one person, one vote” and therefore require Constitutional change.

Congressional Term Limits

Another salient constitutional issue arising in socio-legal texts is that of Congressional term limits. Currently, the U.S. Constitution has no restrictions regarding how many terms a U.S. Senator or Representative may serve, essentially leaving the positions open for an unlimited number of terms. Scholars have identified a number of flaws that the prospect of indefinite term limits creates, as well as some proposed amendments to remedy such flaws. Listed below are a few such normative views that help illustrate the academic consensus on this topic.

In *A More Perfect Constitution*, Sabato posits that this aspect of our current Constitution is flawed as well. He appears to revere the “Roman ideal of the *citizen-legislator*,” which is the notion of citizens serving their country when needed and then “happily returning to private life,” afterwards.³⁸ He illustrates the fact that even the Framers were in favor of the idea of term limits for the legislative branch when he quotes Benjamin Franklin as saying, “In free governments, the

³⁷ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 142.

³⁸ *Ibid.*, 43.

rulers are the servants, and the people their superiors and sovereigns. For the former, therefore, to return to the latter [is] not to degrade but to promote them.”³⁹

From here Sabato elaborates the failings he finds in the current structure and its operation. First, he points to the fact that incumbents in Congressional elections have “overwhelming advantages” to keep their office, via partisan redistricting; voter incentives to keep a senior member in office; unfamiliarity of new candidates; and campaign financing, which can be skewed in favor of incumbents by means of support from interested lobbyists.⁴⁰ This “governmental structure,” says Sabato, “[has] become fundamentally unfair and tilted to those already in power,” and essentially limits any competition.⁴¹ Proving his point, Sabato cites that electorates reelect their Federal Congress members “as much as 98 percent of the time.”⁴² In addition to this, he laments the phenomenon he refers to as “career politicians” which is essentially the exact opposite of the citizen-legislator ideal and is “a more professionalized and careerist style of politics.”⁴³ This shift to professionalism, he argues, is the result of more centralized power in the legislative branch as well as the fact that a vast majority of newly elected congressmen receive higher pay than they did in their former jobs.⁴⁴ Finally, Sabato believes that an amendment that limits Congress’s terms would result in more courageous legislators who cast votes on the basis of “national or state interest instead of decisions made out of a desire to get reelected.”⁴⁵

³⁹ Ibid.

⁴⁰ Ibid., 41-49.

⁴¹ Ibid., 49.

⁴² Ibid., 46.

⁴³ Ibid., 44.

⁴⁴ Ibid.

⁴⁵ Ibid., 42.

Therefore, while Sabato doesn't offer a direct proposal to amend this part of our Constitution, he does suggest that we would benefit from a set of federal congressional term limits that mirror those seen in such states as Louisiana and Nevada, which impose on their state congressmen "twelve years in each house," (as opposed to the strict limits imposed by California and Michigan, which only allow for "six years in the lower house and eight years in the upper").⁴⁶

Labunski provides us with a much more straightforward proposal regarding term limits on our federal legislators. His proposal calls for a maximum of eight years (four two-year terms) for members of the House of Representatives and a maximum of twelve years for Senators (two six-year terms).⁴⁷ He adds that the years served do not have to be consecutive, but all persons would be absolutely barred from serving in a house after reaching their respective term limit. This proposal stems from similar reasoning as those offered by Sabato. Labunski believes that the advantages of incumbency (e.g. "free news coverage; taxpayer-funded mailings to the district or state that keep the incumbent's name before the public; the ability to acquire huge sums of campaign money from PACs and other interest groups based merely on the representative or senator's committee assignments; and the opportunity to offer constituent service") all act as means to ensure the defeat of the challenger.⁴⁸ As a result of incumbents' wide advantages in keeping their seats and staying in office for long periods of time, they "have a difficult time

⁴⁶ Ibid. 53.

⁴⁷ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 352.

⁴⁸ Ibid., 353.

understanding the lives of ordinary people,”⁴⁹ Labunski says (an effect Sabato refers to as “[going] Washington”).⁵⁰

Following suit, legal scholar George F. Will avidly criticizes the current lack of term-limits for our federal legislators in his book, *Restoration: Congress, Term Limits And the Recovery of Deliberative Democracy*. Will specifically laments the trend towards “professionalization of politics by people who come to Congress,” which he claims is a far cry from what the Framers envisioned and early politicians practiced.⁵¹ Will describes the living conditions of nineteenth-century Washington as cramped, uncomfortable, and expensive, providing just a few reasons why members of Congress were much less likely (compared to today) to seek reelection.⁵² The conditions of today have all but changed, he continues, citing the expanding role of Congress in creating federal policy and creating “opportunity,” “wealth,” and “prestige” as strong incentives keeping members of Congress seeking to prolong their tenure.⁵³ Like Sabato and Labunski, Will claims this phenomenon of a growing trend towards professionalization is in large part due to incumbents’ increasing ability to satisfy their constituents via the enhanced “spending, subsidizing, regulating” capabilities and “patronage powers” of the “modern state.”⁵⁴ This has inevitably led to incumbents securing a great advantage in reelection years over their competitors.

Will then provides statistical evidence for these claims in order to show how common career politics has become. According to his sources, the turnover rates for members of the

⁴⁹ Ibid.

⁵⁰ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 41.

⁵¹ George F. Will, *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy* (New York: The Free Press, 1992), 53.

⁵² Ibid., 12.

⁵³ Ibid., 90.

⁵⁴ Ibid., 77.

House of Representatives hovered around 30-40% for about the first sixty years of nation's history, spiked to about 76% in 1842, and then stayed around 55-60% for a few decades.⁵⁵ Since, however, the turnover rate has drastically and steadily been declining, hitting an all-time-low of 7.6% in 1988.⁵⁶ "In the entire history of the House of Representatives," Will grimly states, "the success rate for incumbents seeking reelection has rarely fallen below 70%," occurring only a total of seven times out of the one hundred and two elections from 1790-1988.⁵⁷ Similarly, his sources show that U.S. senators seeking reelection in 1946 had a 56.7% success rate, a rate that has progressively and fairly consistently increased over the decades yielding a 75% success rate in 1986, 85.2% in 1988 and 96.9% in 1990.⁵⁸

Will stresses the dangerousness of these trends and provides readers with a few negative consequences of their existence. One of the largest, he says, is the foolish spending of government money. A large majority of his book is devoted to detailing numerous instances of frivolous government spending, which he credits to the trend of professionalization mentioned above. According to Will, "if people served in legislatures only briefly... they would have less incentive to shovel out pork," whose "primary function" is "[buying] gratitude and dependency among clients" which equates to votes and essentially "longevity."⁵⁹ Further perpetuating this problem, legislators' long separation from the public weakens their "ability to discriminate between appropriate and inappropriate functions for the federal government."⁶⁰ In addition, Will adds that legislators' must fuel their self-interested reelections with investments and

⁵⁵ Ibid., 73.

⁵⁶ Ibid.

⁵⁷ Ibid., 77.

⁵⁸ Ibid., 89.

⁵⁹ Ibid., 36.

⁶⁰ Ibid.

advertisements paid for by interested “contributors” who are compensated with “access to decision-makers and influence on legislation and other government actions.”⁶¹

Therefore, Will concludes that we must prevent these trends from continuing and exacerbating by getting rid of these strong incentives for legislators via constitutional amendment. While he doesn’t offer us any specific term limits for Congress, Will believes an amendment limiting terms would be the “sensible” thing to do in order to “serve the core goal of republicanism,” which, according to him, is “deliberative democracy.”⁶² Further, a term-limiting amendment would serve “an expressive and affirming function,” where the idea expressed is that any “reasonably educated” citizen could represent their country (referring back to the financial struggles emphasized earlier) and affirm “democratic faith... in the broad diffusion in the public of the talents necessary for the conduct of the public’s business,” (in other words, the belief that democracy does not rely on a set few individuals, but everyone that composes it).⁶³

Balanced Budget

The last popularly proposed amendment that I will discuss in this section concerns the federal adoption of a balanced budget to our Constitution. Again, this proposed amendment has received wide attention from legal scholars and Constitutional experts, many of which agree that the current lack of any budgetary measures in our Constitution is problematic. It has long been acknowledged that, “the legislature... commands the purse,”⁶⁴ which is in itself a “most

⁶¹ Ibid., 92.

⁶² Ibid., 110.

⁶³ Ibid., 164.

⁶⁴ Alexander Hamilton, “Federalist #78,” in *The Federalist Papers*, (New York: Prometheus Books, 2000), 504.

complete and effectual weapon.”⁶⁵ Therefore, to limit Congress’s spending would be to limit their source of power, which, as I will detail below, many fear has grown to be too large. Fear of unchecked Congressional spending in America is nothing new. Writing to John Tyler in 1816, Thomas Jefferson said that debt ought to be “limited... to a redemption... within the lives of a majority of the generation contracting it,”⁶⁶ and “that the principle of spending money to be paid by posterity under the name of funding is but swindling futurity on a large scale.”⁶⁷ Below, however, I have listed several more modern critiques and interpretations as to why this perceived defect is detrimental and how it might be fixed.

Urging readers to heed the importance of a balanced budget amendment in his book, *The Freedom Agenda: Why a Balanced Budget Amendment is Necessary to Restore Constitutional Government*, Mike Lee tells us that politicians “spending money is a double-edged sword.”⁶⁸ Lee expands on this statement, reminding readers that, even though “many people benefit from federal programs enabled by huge deficit spending,” there are many others who need to “sacrifice much to pay for those programs,” including many who are “not yet born.”⁶⁹ He points out further that, despite the benefits of spending on government programs, money might also prove to yield “greater benefits if left in the hands of the people who earned it.”⁷⁰ Later on, Lee attributes Congress’s consistently excessive spending on the fact that no spending limit exists which leads politicians to “become accustomed to spending on such a large scale that tend to lose

⁶⁵ Alexander Hamilton and James Madison, “Federalist #58,” in *The Federalist Papers*, (New York: Prometheus Books, 2000), 380.

⁶⁶ Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford (New York: The Knickerbocker Press, 1899), 28.

⁶⁷ *Ibid.*, 31.

⁶⁸ Mike Lee, *The Freedom Agenda: Why A Balanced Budget Amendment is Necessary to Restore Constitutional Government* (Washington, DC: Regnery Publishing Inc., 2011), 56.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

perspective.”⁷¹ Lee ultimately makes the connection that a legislature that has the ability to spend money unlimitedly also has the capability to rule unlimitedly which, as he points out, is the opposite of what the Framers intended when they sought to protect our liberties via a “constitutionally limited government.”⁷²

Accordingly, Lee outlines five elements in his proposal for a balanced budget amendment. First, Congress would be prohibited from “spending more during any fiscal year than the federal government ‘earns’ during that year by collecting tax and other revenue.”⁷³ Second, during any fiscal year, Congress may not spend more than a fixed percentage of the previous year’s GDP, which Lee averages out to about 18%.⁷⁴ Lee believes this would effectively prevent Congress from exploiting revenue estimates. The third element would allow Congress to bypass either of these two barriers solely through a majority vote, with Lee personally favoring a two-thirds requirement (the same majority required of Congress when proposing constitutional amendments).⁷⁵ Four, Congress would need to secure a supermajority vote in order to raise any debt-ceilings, an improvement over the current simple-majority vote required.⁷⁶ Lastly, Congress would also need to secure a super-majority vote in order to “approve any new tax increases.”⁷⁷ Lee believes that this an amendment containing at least some of these elements would make significant progress towards ameliorating the federal government’s financial situation, though all five would “resolve our fiscal crisis permanently.”⁷⁸

⁷¹ Ibid., 59.

⁷² Ibid., 17.

⁷³ Ibid., 66-67.

⁷⁴ Ibid., 67.

⁷⁵ Ibid., 68-69.

⁷⁶ Ibid., 70.

⁷⁷ Ibid., 72.

⁷⁸ Ibid., 66.

Concurring on the urgency of a balanced budget, Sabato argues for a more generalized amendment than Lee, wherein “federal expenditures in any given fiscal year could not exceed federal revenues in that same year.”⁷⁹ However, Sabato appear to differ from Lee when he to argues for a balanced budget amendment under the premise that only “a simple majority of both House and the Senate” would be required to “suspend the balanced budget requirement,” during time of war or recession (as opposed to Lee’s proposed supermajority).⁸⁰ Like Lee, Sabato’s advocacy for a balanced budget amendment arises from the potential consequences that future generations face as a result of unchecked spending, which he refers to as “staggering.”⁸¹ For example, he notes that in 2007 our national debt was “\$8.8 trillion, which is equivalent to more than \$29,000 of debt for every American citizen, adult and child,” and a result of our debt “growing at a rate of more than \$2 billion *per day*.”⁸² Due to spending on such a large scale, “the annual interest payments on the debt constitute the third largest expenditure in the federal budget,” he adds, revealing how serious America’s spending problem has become.⁸³

In 2009, constitutional critic and scholar, Randy Barnett, published an article titled, “A Bill of Federalism”. In his article, Barnett proposes ten amendments aimed at limiting federal powers. The motivation for his proposed set of amendments came from the perception that “the Congress of the United States has exceeded the legislative powers granted in the Constitution thereby usurping the powers that are ‘reserved to the states respectively,’” which is a violation of the 10th amendment.⁸⁴ In his eighth proposal, he outlines his idea of an ideal balanced budget

⁷⁹ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 56-57.

⁸⁰ *Ibid.*, 57.

⁸¹ *Ibid.*, 55.

⁸² *Ibid.*

⁸³ *Ibid.*, 54.

⁸⁴ Randy Barnett, “A Bill of Federalism,” *Forbes*, www.forbes.com (accessed 15 Mar. 2013).

amendment, which states that the United States budget will be considered “unbalanced whenever the total amount of the public debt of the United States at the close of any fiscal year is greater than the total amount of such debt at the closing of the preceding fiscal year,” and that in such circumstances, the President would be granted the ability to “separately approve, reduce or disapprove any monetary amounts in any legislation that appropriates or authorizes the appropriation of any money drawn from the treasury.”⁸⁵ Barnett believes this would create a strong incentive for Congress to produce a balanced budget, for not doing so would give the President “a temporary line item veto power over any appropriation in the budget.”⁸⁶

Above I have mentioned just four proposed amendments that have appeared in various socio-legal texts. Though there exist many more proposed amendments of this kind, detailing the types of changes the American people *ought* to want in their Constitution (e.g. generalized line-item vetoes, campaign finance reform, gerrymandering regulations, etc.), I believe the list provided does a sufficient job at establishing the fact that there are indeed numerous amendments that are widely agreed upon by constitutional critics and legal scholars. Furthermore, they prove that a specific type of change is warranted- that which, to some degree, limits Congress’s power. Next I will reveal what the American public’s opinions and sentiments on these proposed amendments are by providing statistical data compiled by various polls. By bridging the normative view of what legal scholars believe we *ought* to change to our Constitution to the social perspective of what the American people actually *want* to change, it will hopefully become more obvious that our low amendment rate is not indicative of America’s satisfaction towards the current Constitution. Rather, as the statistics provided below show, Americans are

⁸⁵ Ibid.

⁸⁶ Ibid.

far from content with the status quo and strongly support the proposed amendments mentioned previously.

Data

Scholar Arthur H. Taylor teamed with research firm, Harris Interactive, in 2005 to test “where the American people stand on assorted amendment possibilities,” by surveying 1,000 adults (18+) subjects.⁸⁷ In his survey, Taylor provided subjects with a list of proposed amendments and then asked them to indicate whether they favored or opposed a specific amendment. Next, he gauged how strongly subjects favored or opposed an amendment (e.g. strongly favor; somewhat favor; strongly oppose; somewhat oppose). Out of the thirteen hypothetical amendments Taylor proposed to participants, two of them focused on amendments discussed earlier in this section: Congressional term limits and a balanced budget. Regarding term limits, Taylor’s findings show that 71% of the public was in favor of “[placing] term limits on how long U.S. Senators or members of Congress can serve,” with only 23% opposing (these percentages represent the total amount of both strong and weak dispositions).⁸⁸ A 2013 poll conducted by Gallup reaffirms his findings: a study consisting of 1,103 Americans surveyed over the phone indicated that, with 95% confidence, 75% of “national adults” would vote in favor of term limits (+/- 4%).⁸⁹ When asking subjects whether they favored “the U.S. Congress... to always adopt a balanced budget,” Taylor found that an astounding 76% were in favor and only 18% opposed.⁹⁰ Perhaps further supporting the notion that Americans largely favor a

⁸⁷ Arthur H. Taylor, “Fear of an Article V Convention,” *BYU Journal of Public Law* 20, no. 2 (2006): 419.

⁸⁸ *Ibid.*, 430.

⁸⁹ Lydia Saad, “Americans Call For Term Limits, End to Electoral College,” *Gallup*, <http://www.gallup.com/home.aspx> (accessed: 19 Mar. 2013).

⁹⁰ Arthur H. Taylor, “Fear of an Article V Convention,” *BYU Journal of Public Law* 20, no. 2 (2006): 432.

balanced budget amendment is the fact that all fifty states currently require their state legislatures to maintain a balanced budget.⁹¹

Larry Sabato also conducted a survey of his own in order to gauge “whether Americans are sufficiently open to new ideas, or fed up with the unworkable aspects of the current system.”⁹² Working with the public opinion firm, Rasmussen Reports, in September of 2006, Sabato conducted a telephone survey comprising of “981 Americans on the topic of potential changes to the Constitution.”⁹³ As in Taylor’s survey, Sabato asked question regarding specific changes to the Constitution and then asked respondents to rank their reactions to each proposal (“strongly favor” to “strongly oppose”).⁹⁴ Amongst his findings, he found some strong evidence supporting the normative suggestions listed earlier. For instance, 66% of respondents said they were in favor of Congressional term limits and 30% were opposed.⁹⁵ In addition, 69% of those surveyed were in favor of direct election of the president; interestingly, only a mere 37% were in favor of creating a more representative Electoral College.⁹⁶ This means that, out of the two amendments altering the Electoral College that Sabato proposed earlier, the public is more receptive to the one that abolishes it altogether, though there are good amounts of people who prefer to simply make it more representative. He backs this finding by informing us that a 2004 Gallop poll conducted via phone and consisting of a random sample of 1,012 adults showed that 61% of Americans are in favor of abolishing the Electoral College altogether when the

⁹¹ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 57.

⁹² *Ibid.*,

179.

⁹³ *Ibid.*, 180.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 182.

⁹⁶ *Ibid.*

alternative was electing the president through popular vote.⁹⁷ Several studies conducted by Gallup, that have been composited by CQ Researcher journalist, Kenneth Jost, show us that this kind of support for popular vote has been consistent since the 1940s.⁹⁸

The fact that public sentiment aligns so closely with the suggestions posited by learned legal scholars and critics, proves that Americans *do* agree on the flaws of our Constitution and want to fix them via an amending process. Further, Americans appear to strongly favor the types of proposed amendments that would hurt or limit the power and scope of Congress. However, the fact that people want and agree on specific changes is not enough alone to prove that Article V is defective. In the next section, therefore, I will outline the inherent flaws contained in Article V that actively serve as obstacles in the democratic process and have prevented these changes from ever materializing.

Part 2: Obstacles Within Article V Preventing Desired Change

As mentioned in the opening of this paper, Article V consists of a proposal stage and a ratification stage, with each stage allowing for two different ways to propose or ratify amendments, respectively, thus providing several avenues for adding amendments to the Constitution.⁹⁹ For the purposes of this paper, however, the following section will focus on the proposal stage of the amending process only. It is within this stage that we can come to see how exactly Article V is defective.

⁹⁷ *Ibid.*, 297.

⁹⁸ Kenneth Jost, "Re-examining the Constitution: Are Major Changes Needed?" *CQ Researcher Online*, <http://library.cqpress.com/cqresearcher/index.php> (accessed 26 Feb. 2013).

⁹⁹ Although the avenues provided for in Article V are widely considered to be the only ways to amend the Constitution, Yale law professor, Akhil Reed Amar, has famously posited that there are extra-constitutional ways to amend the Constitution, such as popular vote. See Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V," *The University of Chicago Law Review* 55, no. 4 (1988).

Again, in regards to the proposal process, Article V states that “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application to the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.”¹⁰⁰ Therefore, an amendment must be proposed by either two thirds of both the House and the Senate or by a convention applied for by two thirds of the states, which currently equals thirty-four. While the current layout of Article V doesn’t prevent all change to our constitution (we have had seventeen amendments added since its drafting) it does prove to be an impenetrable barrier to the types of amendments discussed in the previous section- specifically, those that limit Congress’s powers. Article V is flawed, therefore, in the sense that it does not provide viable options for adding *all* the kinds of amendments Americans wish to make to the Constitution.

In the following section I will separately examine each of the amendment-proposing avenues (i.e. Congress and a Constitutional Convention) and reveal how they are each ineffective means for enacting the kinds of amendments discussed above. I will begin by outlining the motivations preventing Congress from successfully proposing said amendments and then support the claim that they are unlikely to ever do so by providing data on our national legislators’ unsuccessful attempts to propose them in the past. Next, I will discuss the uncertainties that plague an Article V Convention that have historically prevented the required amount of states to call for one, as well as provide some data on unsuccessful movements for a convention in the past. These barriers to change that stem directly from Article V further indicate that certain types of amendments, no matter how widely supported by the American public, are most unlikely to ever be adopted into our Constitution.

¹⁰⁰ U.S. Const. Art. V.

In general, it has been recognized that “Congress has proven to be a dependable graveyard for constitutional reform.”¹⁰¹ *CQ Weekly* pointed out that Congress has proposed over three thousand amendments since 1964 with only six making it to the states for possible ratification.¹⁰² For those seeking change, this is certainly a disheartening statistic. Given the low rate of successfully proposed amendments overall, one can only imagine how unlikely the chances are of an amendment being passed that would limit the power of those in Congress. And certainly, the few amendments I have already mentioned, and others like it, do indeed limit the power and scope of our federal legislators. Again, getting rid of the Electoral College or state equality in the Senate means taking away the advantage that smaller states have in Congress and the Electoral College since lightly populated states benefit from having an equal amount of voting power to the larger states in the Senate and presidential elections. While this fact may not affect every state negatively, the members of Congress representing smaller states would be unlikely to ever vote in favor of such an amendment. Additionally, “a balanced budget amendment would make it more difficult for members of Congress to use government spending to benefit their constituents in exchange for political support,” while “term limits would limit the tenure of members of Congress and force many of them out of office.”¹⁰³ Likewise, a campaign finance reform amendment would limit how much politicians were able to spend on elections, limiting the advantage many incumbents have over their running mates; a line-item veto amendment would allow the president to veto certain aspects of a proposed bill without rejecting the whole thing, therefore giving the President more power over what kind of legislation

¹⁰¹ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 8.

¹⁰² “Amendments: Thousands Proposed, Few Ratified,” *CQ Weekly*, <http://www.cqpress.com/gethome.asp> (accessed 18 Apr. 2013).

¹⁰³ James Kenneth Rogers, “The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process,” *Harvard Journal of Law & Public Policy* 30, no. 3 (2007), 1020-1021.

Congress passes; etc. However, in order to prove the fact that these specific types of amendments face strong opposition, which prevent them from likely ever being proposed by Congress, is more than just mere speculation, I will provide some data revealing the hardships they've had in the past at the congressional level.

Despite Taylor's findings that 76% of Americans are in favor of a balanced budget amendment, attempts to successfully propose such an amendment have faced numerous oppositions in the past. Though many claim balanced budget proponents stem back as far as Thomas Jefferson, movements supporting a balanced budget amendment did not gain much momentum until the twentieth century (specifically, in 1921 when the Bureau of the Budget was created).¹⁰⁴ From the list I've mentioned, this makes it one of the more recent amendments that have been introduced into Congress. One of the most recent endeavors to propose a balanced budget amendment that has had significant backing occurred in mid-1992.¹⁰⁵ Presented to the House of Representatives by Charles W. Stenholm, the potential amendment stated that, "total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifth of the whole number of each House of Congress" votes otherwise, and "the limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House" votes otherwise.¹⁰⁶ Essentially, the proposed amendment was very similar to the one advocated by Mike Lee. On the day the amendment was voted on in the House to see whether it would advance to the Senate for approval, "433 Representatives were on the floor, only one short of perfect attendance."¹⁰⁷ Eventually, the amendment was voted down with 280 votes for and 153 votes against, just 9 votes shy of the two-thirds requirement established by

¹⁰⁴ Richard B. Bernstein, *Amending America* (New York: Times Books, 1993), 183.

¹⁰⁵ *Ibid.*, 181.

¹⁰⁶ *Ibid.*, 181-182.

¹⁰⁷ *Ibid.*, 185.

Article V.¹⁰⁸ In his Congressional Research Service report, Thomas H. Neale discusses several more failed proposals. For instance, in the 97th Congress (1981-1982), the Senate approved a balanced budget amendment titled S.J.Res. 58 by a margin of 69-31.¹⁰⁹ When it entered the House for voting as H.J. Res. 350, however, it also failed to reach the two-thirds requirement only securing 236 votes in favor opposed to 187 against.¹¹⁰ Similarly, the House of Representatives passed H.J.Res. 1 in the 104th Congress, which would “have led to a balanced federal budget,” but when the vote reached the Senate in March 1995, it again failed to reach the two-thirds requirement with a vote of 65 in favor and 35 against, 2 votes short of a victory.¹¹¹ Two similar incidents also occurred in 1986 and 1990 when “Congress attempted to write a balanced budget amendment... but each time the vote fell short of the two-thirds requirement specified in Article V.”¹¹² Larry Sabato mentions that, just as recently as 2003, a new draft of the amendment was introduced to the House only to die after “a single day of hearings before the House Subcommittee on the Constitution, featuring a mere four witnesses.”¹¹³ Neale claims that, “amendments to propose a balanced federal budget continue to be introduced in every Congress,”¹¹⁴ and Richard B. Bernstein writes in his book, *Amending America*, that some years see multiple proposals: “more than thirty versions were introduced in the One Hundredth Congress Alone.”¹¹⁵

¹⁰⁸ Ibid.

¹⁰⁹ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 13.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Richard B. Bernstein, *Amending America* (New York: Times Books, 1993), 184.

¹¹³ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 57.

¹¹⁴ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 14.

¹¹⁵ Richard B. Bernstein, *Amending America* (New York: Times Books, 1993), 184.

In regards to amendments limiting Congressional term limits, Labunski shows us that there is a similar trend wherein Congress votes down such proposals, notwithstanding their popularity with the American public. According to him, “over the years, at least 200 proposals for Constitutional amendments have been introduced in Congress to alter House or Senate terms,” with none gathering the requisite two-thirds approval from both houses.¹¹⁶ He notes that these amendments range from calling for House members to be reelected on a yearly basis to shortening a Senator’s term to three or four years.¹¹⁷

Even more proposals have been introduced in Congress regarding democratic equality, or, more specifically, abolishing the Electoral College. By one count, there have been “at least 850 proposals... introduced in Congress to end the Electoral College system and replace it with one of several alternatives.”¹¹⁸ It has been further noted that the most commonly advocated alternative is a direct election of the president, with a majority of plans proposing a “runoff election if no candidate receives 40 percent or more of the vote.”¹¹⁹ Bernstein claims the number of proposals introduced by Senators and Representatives may even be in the thousands.¹²⁰ He credits this large estimate to the fact that recommendations for altering the Electoral College are as old as the Constitution itself and were very common especially from 1790 and 1860.¹²¹ The related, recommended amendment concerning democratic equality, Senator apportionment, would likely face just as much, if not more, difficulty being proposed in Congress. Since the Constitution makes it nearly impossible, and perhaps unrealistic, to alter equal suffrage in the

¹¹⁶ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 361.

¹¹⁷ Ibid.

¹¹⁸ Ibid., 373.

¹¹⁹ Ibid.

¹²⁰ Richard B. Bernstein, *Amending America* (New York: Times Books, 1993), 151.

¹²¹ Ibid., 225.

Senate, the topic would understandably receive little discussion time in Congress. Again, Article V states, “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”¹²² In other words, as scholar Akhil Amar points out, the Constitution “modifies the ordinary ratification rule of Article V for amendments dealing with Senate apportionment by requiring unanimous consent among states instead of approval by three quarters of state legislatures or convention.”¹²³ Amar says this proviso of Article V raises tricky questions such as, “[could] the ‘equal suffrage’ rules ... be easily evaded by two successive ‘ordinary’ amendments, the first of which repealed the equal suffrage rules themselves, and the second of which reapportioned the Senate?”¹²⁴ In the face of such uncertainty and difficulty surrounding Senate reapportionment, it would be unreasonable to expect Congress to ever propose such an amendment.

Considering the facts, two conclusions should be clear: one, Congress is generally unsuccessful in proposing amendments to be ratified by the states, regardless of the consequences. Two, when it comes to amendments that have the potential to negatively impact Congress, a proposal’s chance of gaining the requisite two-thirds vote in both houses is next to none. As the data above suggests, such amendments, despite their popularity with the public, have continuously been shot down by Congress and are unlikely to ever stand a real chance at passing the proposal stage through this avenue. Given that Congress is unreceptive to the fact that many, if not most, Americans favor these amendments, one would expect them to be proposed through the other avenue provided in Article V- a Constitutional Convention applied for by two-thirds of the states. However, this method is not as viable as it may seem. The

¹²² U.S. Const. Art. V.

¹²³ Akhil Reed Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V,” *The University of Chicago Law Review* 55, no.4 (1988), 1069.

¹²⁴ Akhil Reed Amar, “The Consent of the Governed: Constitutional Amendment Outside Article V,” *Columbia Law Review* 94, (1994), 461.

prospect of a Constitutional Convention is riddled with uncertainties and fear that have kept it from ever being applied for by the required amount of states and leave future prospects bleak as well. Below I will discuss why so much confusion exists regarding an Article V Convention and outline a few of those uncertainties and fears as well.

Article V was one of the last sections of the U.S. Constitution that was given consideration during the 1787 Constitutional Convention.¹²⁵ Though it had been discussed periodically throughout the Convention, it wasn't until September 10th, “a week before the Constitution was signed and the Convention adjourned”, that the Framers gave due consideration to the article.¹²⁶ The long summer had left most delegates anxious to return home; therefore Article V was rushed and given inadequate attention in order to allocate more consideration to other topics such as how the Constitution was to be ratified.¹²⁷ Thus, just two days before the Convention was over, the Framers had deemed Article V complete.¹²⁸ Due to the lack of consideration given to this aspect of the Constitution, it is no wonder there is so much confusion behind an Article V Convention. Madison himself “remarked on the vagueness of the terms, ‘call a Convention for the purpose,’” and claimed that that phrase alone was “‘sufficient reason’ for reconsidering the previously decided article.”¹²⁹ Madison voiced some of his concerns regarding future conventions such as, “‘How was a Convention to be formed? by what rule decide? what force of its acts?’”¹³⁰ Alas, Madison’s wise concerns about the vagueness of Article V went

¹²⁵ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 63.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, 65.

¹²⁸ *Ibid.*, 68.

¹²⁹ *Ibid.*, 64.

¹³⁰ *Ibid.*

unheeded by the delegates that summer and to this day continue to provide confusion on the workings of a second convention.

On top of Madison's concerns, there remains a plethora of other uncertainties regarding an Article V convention that have prevented states from enacting one. Laurence Tribe, professor of constitutional law at Harvard Law School, has assembled a list of many of these uncertainties. Their number and scope strongly suggest that an Article V convention is unlikely to ever occur. While I will not discuss each one in detail, I will provide the list below in order to display the numerous confusions involved and then explain some of the arguments behind a few of the more salient issues to further demonstrate the many uncertainties.¹³¹

1. The Application Phase

- a. Must both houses of each state legislature take part in making application for a convention to Congress?*
- b. By what vote in each house of a state legislature must application to Congress be made? Simple majority? Two-thirds?*
- c. May a state governor veto an application to Congress?*
- d. When, if ever, does a state's application lapse?*
- e. May a state insist in its application that Congress limit the Convention's mandate to a specific amendment?*
- f. Must a state's application propose a specific amendment, or may a state apply to revise the Constitution generally?*
- g. By what criteria are applications proposing related but slightly different subjects or amendments to be aggregated or set apart?*
- h. May a state rescind its application? If so, within what period and by what vote?*
- i. What role, if any, could a statewide referendum have in mandating or forbidding an application or a rescission?*

2. The Selection and Function of Delegates

- a. Who would be eligible to serve as a delegate?*

¹³¹ Laurence H. Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment," *Pacific Law Journal* 10 (1979), 638-640.

- b. *Must delegates be specially elected? Could Congress simply appoint its own members?*
- c. *Are the states to be equally represented, as they were in the 1787 Convention, or must the one-person, one-vote rule apply, as it does in elections for all legislative bodies except the United States Senate?*
- d. *Would delegates be committed to cast a vote one way or the other on a proposed amendment? Could they be forbidden to propose certain amendments? Would delegates at a Convention enjoy immunity parallel to that of members of Congress?*
- e. *Are delegates to be paid? If so, by whom?*
- f. *Could delegates be recalled? Could the Convention expel delegates? On what grounds?*

3. *The Convention Process*

- a. *May the Congress prescribe any rules for the Convention or limit its amending powers in any way?*
- b. *How is the Convention to be funded? Could the power to withhold appropriations be used by Congress to control the Convention?*
- c. *May the Convention remain in session indefinitely? May it agree to reconvene as the need arises? May it choose not to propose the amendment for the purpose of which it was convened?*

4. *Ratification of Proposed Amendment*

- a. *To what degree may Congress, under its Article V power to propose a “Mode of Ratification,” or ancillary to its Article V power to “call a Convention,” or pursuant to its Article I power under the Necessary and Proper Clause, either refuse to submit to the states a proposed amendment for the ratification or decide to submit such an amendment under a severe time limit? What if Congress and the Convention disagree on these matters?*
- b. *May Congress permit or prohibit rescission of a state’s ratification vote? May the Convention? What if Congress and the Convention disagree?*

The sheer size of this list makes it pretty clear that an Article V Convention is anything but certain. Many scholars have attempted to argue one way or another on how these uncertainties should be addressed, adding to the already widespread confusion. While there have been no conclusive answers to any of these concerns as of yet, the questions remain critical for determining how a Convention would play out. A few of the most salient and widely debated

issues are: limited vs. unlimited Convention and the related fear of a runaway convention; the role of Congress; and time limits on proposals. Below, I will discuss more of what these three concerns entail in order to shed some light on what have proved to be a few of the biggest deterrents standing in the way of a second Constitutional Convention.

Scope of Convention/Fear of a Runaway Convention

Perhaps the biggest concern surrounding an Article V Convention is that of its scope.¹³² More specifically, is a Convention limited to address just a specific amendment, or is it open to address any concerns delegates have? A common fear is that a limited Convention would give rise to a “runaway convention,” wherein “the convention might propose an amendment that ignores the limitation and propose a nonconforming amendment.”¹³³ Michael Rappaport suggests this is not an unlikely scenario, given the Philadelphia Convention met the same fate.¹³⁴ He further states that an amendment that was ratified after being proposed by a runaway convention would create numerous problems such as the uncertain legal status of such an amendment.¹³⁵

Another key concern regarding limited conventions is whether two-thirds of the states need to apply for a “specifically worded” application in which all applications contain verbatim the same wording, or whether amendments need only be “substantially similar.”¹³⁶ If applications only need to be similar to one another, how is Congress to know whether the requisite amount of applications have been submitted if they are “similar but not identical

¹³² Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” *Virginia Law Review* 96, no. 7 (2010), 1533.

¹³³ *Ibid.*, 1528.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, 1529.

¹³⁶ Congressional Research Service, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress* (2012), 16.

subjects?”¹³⁷ An example Rappaport provides is, what does Congress do if “one state... [seeks] a convention on a balanced budget amendment, whereas another might seek one on a balanced budget and tax limitation amendment”?¹³⁸ Congress would then have to determine whether the convention should revolve “on solely a balanced budget amendment” or whether the second state’s application should “authorize a convention” if the “other subject” it introduces “is reasonably related” to that of other applications¹³⁹.

Role of Congress

Due to the confusion involved in the application process, another common concern is, to what extent would Congress play a role in an Article V Convention process. Specifically, “on what grounds could Congress decline to call a convention?”¹⁴⁰ What factors in an application may be used against it and deem it invalid? Some believe that Congress is not required to call for a convention even if the requisite thirty-four states apply because there is nothing “compelling” them to do so.¹⁴¹ Thomas Neale doubts that “the Supreme Court would issue an order compelling Congress to carry out a duty... or... take it upon itself to prescribe the procedures for a convention.”¹⁴² A similar historical event occurred when, in 1920, Congress failed to “carry out its constitutionally mandated duty to reapportion the House of Representatives.”¹⁴³

¹³⁷ Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” *Virginia Law Review* 96, no. 7 (2010), 1522.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, 1523.

¹⁴⁰ Congressional Research Service, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress* (2012), 9.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 10.

¹⁴³ *Ibid.*, 9.

Time Limits

Another factor given a lot of consideration is that concerning the time limit of a state's proposal. At the moment, there is no accepted consensus as to whether applications lose their validity after a certain number of years, though many have made convincing arguments in support of their take on the matter. Many scholars, such as Michael Paulsen, appear to believe there is not.¹⁴⁴ Paulsen believes that "unless an application itself contains a sunset, there is no reason to assume that a state legislative enactment of this form... dissolves after some (unspecified) period of years."¹⁴⁵ Paulsen believes the only way a state's application may become "extinguished" is if a convention had been called, delegates met, and the convention adjourned.¹⁴⁶ Similarly, he assumes that if Congress were ever to propose an amendment in order to avoid a convention, the states' applications would still remain valid since Congress's proposed amendment might be "a poor substitute for the state's true desire."¹⁴⁷ This theory, however, seems to have some backing beyond Paulsen's speculations. For instance, the Twenty-Seventh amendment, proposed in Congress in 1789, did not become ratified by the states until 1992.¹⁴⁸ Paulsen asserts that this is due to the fact that the proposal was never "repealed by the authority with the power to enact it."¹⁴⁹ Since there are evidently no time limits on amendments proposed by Congress, Paulsen extends this to mean that there should also be no limits on state applications, especially since none are specified in the Constitution.¹⁵⁰

¹⁴⁴ Michael Stokes Paulsen, "How to Count to Thirty-Four: The Constitutional Case For a Constitutional Convention," *Harvard Journal of Law & Public Policy* 34, no. 3 (2011), 852.

¹⁴⁵ *Ibid.*, 853.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *Ibid.*, 854.

To show that these fears play out in reality, and not just in theory, I turn now to the many unsuccessful previous attempts to initiate an Article V Convention. I will also consider why future applications are unlikely to reach the requisite vote to initiate a convention or spur Congress to call for one themselves. Thomas Neale states that, “proposals for an Article V Convention are as old as the republic.”¹⁵¹ Summarizing statistics collected by the organization, Friends of the Article V Convention, Neale points out that, “the first of more than 700 [proposals] was filed in 1789, the same year government under the U.S. Constitution was established.”¹⁵² This essentially means that, despite never happening, people have long been in favor of a second Constitutional Convention. Therefore, there must be something to the notion that an Article V Convention is not a viable option. Neale continues, describing an Article V Convention as a “20th century phenomenon,” due to the fact that “697 of the 743 applications recorded... were filed between 1900 and 1999.”¹⁵³ On their personal website, Friends of Article V Convention calculate that “704 Article V applications from all 50 states between years 1789 and 2008 (rescissions excluded),” have been submitted.¹⁵⁴ The scope of these applications has included both calls for general conventions as well as specific amendments “in an estimated 47 issue areas.”¹⁵⁵

Given these large estimates of applications by the states over the years, it seems peculiar that a convention has never been called. Many have attributed this anomaly to the numerous fears and uncertainties regarding a second convention listed above. For example, does Congress

¹⁵¹ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 8.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, 9.

¹⁵⁴ “Article V Amendment Applications Tables,” *Friends of an Article V Convention*, <http://foavc.org/> (accessed 23 Apr. 2013).

¹⁵⁵ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 9.

have to call a convention just because at least 34 applications have been filed? Do all applications count, or only those that call for a general convention? What about those that call for a convention to discuss a specific amendment? Do the old applications ever expire? The list of unrelenting uncertainties continues to deter some states from applying for a convention and leads to confusion as to what would happen next should one be called. Despite the confusions, however, we have come extremely close to calling for a convention a few times in our history.

The two most successful movements for an Article V Convention involved the issues of “apportionment in the state legislatures and an amendment requiring a balanced federal budget,” both of which closely neared the thirty-four state constitutional requirement, but came up short as a result of the many uncertainties involved in a convention process.¹⁵⁶ For example, Larry Sabato points out that in the early 1990s, the first substantial movement in favor of a balanced budget amendment led thirty-two states to apply for a convention to address such an amendment, two shy of the requirement.¹⁵⁷ Sabato states, “the fervor waned as states faced up to the great unknown of a convention, and no more states made application for a Balanced Budget Amendment.”¹⁵⁸ Scholar James Rogers agrees with Sabato, and credits “[fear] that a convention could not be limited to a single subject,” as one of the reasons that the state requirement was not met.¹⁵⁹ This movement eventually led Congress to propose a balanced budget amendment, but,

¹⁵⁶ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 10.

¹⁵⁷ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 57.

¹⁵⁸ *Ibid.* 204.

¹⁵⁹ James Rogers, “The Other Way to Amend the Constitution: The Article V Constitutional Amendment Process,” *Harvard Journal of Law and Public Policy* 30, no. 3 (2007), 1010.

as mentioned earlier, the effort died when, in 1995, the Senate failed to secure the requisite number of votes needed to advance the proposal to the states.¹⁶⁰

Similarly, Sabato mentions that in the 1960s, the states had rallied together “after Supreme Court rulings required ‘one person, one vote’ in state legislative elections,” and thirty-two applied for a convention to “return to the status quo,”¹⁶¹ (Rogers puts the number of states at thirty-three).¹⁶² Again, regardless of which scholar’s account is accepted, it was still less than the number of states required. Sabato believes that “the remaining state legislatures got cold feet, mainly about the undefined idea of a convention.”¹⁶³ Again, Rogers concurs, stating a “likely [reason] for the failure of this attempt to call a convention,” was that, as the number of states applying neared thirty-four, fear of an uncontrollable, or runaway, convention soared.¹⁶⁴

In his article, “How to Count to Thirty-Four: The Constitutional Case For A Constitutional Convention,” Michael Paulsen devises several formulations for calculating how many states currently have a valid application for a Constitutional Convention pending. If a state meets all his requirements, Paulsen considers that state to have their light “on”, indicating that they have a valid application.¹⁶⁵ Further, Paulsen states that once thirty-four states have their lights turned on, an Article V convention should be held.¹⁶⁶ His criteria for valid applications consist of the following: a state application must not request a convention for the purposes of a

¹⁶⁰ Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 13.

¹⁶¹ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 203.

¹⁶² James Rogers, “The Other Way to Amend the Constitution: The Article V Constitutional Amendment Process,” *Harvard Journal of Law and Public Policy* 30, no. 3 (2007), 1009.

¹⁶³ Larry J. Sabato, *A More Perfect Constitution* (New York: Walker Publishing Company, Inc., 2007), 203.

¹⁶⁴ *Ibid.*

¹⁶⁵ Michael Stokes Paulsen, “How to Count to Thirty-Four: The Constitutional Case For a Constitutional Convention,” *Harvard Journal of Law & Public Policy* 34, no. 3 (2011), 854

¹⁶⁶ *Ibid.*

specific amendment- only applications whose purpose is “not conditioned on the convention being limited constitute valid applications for a general constitutional convention;” applications for limited conventions do not nullify any previous valid applications; if a state wishes and expresses for its light to be turned “off” it will be; likewise, if a state only wants its light “on” in the event of a specific convention, it will be (though it won’t count); applications collect over time and “across topics;” and, finally, applications “do not die of their own force; it takes something to kill them,” meaning there are no deadlines for convention applications unless specified in the text of the application itself.¹⁶⁷ Pooling from “nearly 400 constitutional convention applications that had been submitted up to” 2011,¹⁶⁸ Paulsen has concluded that, “thirty-three states are currently in a condition of validity applying for a ‘general’ Article V convention- just one state short of the total needed to trigger Congress’s obligation to call such a convention.”¹⁶⁹ It is unlikely that the required thirty-four will be met anytime soon though, he maintains, since “state by state rescissions of prior convention calls- a dozen of them in the last decade- have pushed the number of states applying for a convention just below the tipping point.”¹⁷⁰ This disheartening fact, on top of the general concerns mentioned earlier, paint a bleak future for the possibility of a Constitutional Convention. Even if the required number of applications *were* met, Paulsen continues, there would still be a plethora of problems to address, such as: what happens if “Congress refuses to call the convention as required?” could the courts compel Congress to call a convention? can Congress prescribe the rules of a convention under

¹⁶⁷ Ibid., 854-855.

¹⁶⁸ Ibid., 855-856.

¹⁶⁹ Ibid., 857-858.

¹⁷⁰ Ibid., 858.

the Necessary and Proper Clause?¹⁷¹ These questions increase the likelihood that a convention will never be held.

Some scholars believe, however, that strong efforts by states to apply for conventions, while not *directly* effective, are in a sense *indirectly* effective because they serve a “prodding effect” that pressures Congress to “take the initiative” to propose the amendment itself.¹⁷² The one strong example of Congress proposing an amendment that ostensibly limited its own powers after a movement for a convention on the same topic is that of the Seventeenth Amendment.¹⁷³ Thomas Neale states that, “the campaign for direct election of Senators arguably provides the first example of an organized campaign for an Article V Convention.”¹⁷⁴ Neale claims that, in the late nineteenth century, the U.S. Senate was jeopardized by “lengthy vacancies, as politically deadlocked state legislatures proved unable to agree on candidates for the office,” as well as the increasingly strong influence of “corporate and monopoly interests” on Senators.¹⁷⁵ This led the American public and pro-reform groups to look towards “direct popular election as a remedy for these conditions.”¹⁷⁶ From 1899 to 1909, twenty-five states took action by applying for a convention until, in 1912, “the Senate joined the House in proposing what became the 17th amendment to the Constitution.”¹⁷⁷ It is Neale’s belief that this growing movement towards a convention addressing an amendment requiring the direct election of Senators is what prodded

¹⁷¹ Ibid., 858-890.

¹⁷² Congressional Research Service, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress* (2012), 10.

¹⁷³ Ibid.

¹⁷⁴ Ibid., 9.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., 10.

Congress to propose the Seventeenth Amendment and, therefore, proving to be “the most successful example of the prodding effect to date.”¹⁷⁸

Michael Rappaport believes, however, that “the evidence for the threat effect is weak” in this example.¹⁷⁹ Rappaport acknowledges that, under some counts, the number of state applications for a convention to address the issue of Senators “reached one below the necessary two-thirds for a convention when Congress passed the amendment in 1912,” but states that “it is unlikely that the... 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.”¹⁸⁰ He believes that, because some applications were undoubtedly worded differently from one another, the Senate could have just rejected them and claimed they were invalid for calling a convention.¹⁸¹ He justifies the amendment’s proposal as a “systematic political strategy for securing congressional support for amendments.”¹⁸² What he means essentially is that, around 1901, many states began to employ the “Oregon system” of elections for their Senators, which yielded the same consequences as an amendment requiring popularly elected Senators.¹⁸³ Thus, when the Seventeenth Amendment was passed, somewhere between fifty-eight to seventy-seven percent of the states were elected by popular vote.¹⁸⁴ These Senators’ elections were therefore the result of popular support and thus, the Seventeenth Amendment was merely a “way to promote that support through a constitutional amendment,” meaning that it was nothing more

¹⁷⁸ Ibid.

¹⁷⁹ Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” *Virginia Law Review* 96, no. 7 (2010), 1536.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid., 1537.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

than a self-serving political strategy and not a response to the possibility of a convention.¹⁸⁵

Rappaport concludes, then, “there is very little evidence that there is any significant threat effect under Article V.”¹⁸⁶

Rappaport further explains that the threat effect of a convention is inefficient in general. He reasons that the states’ fears of a runaway convention effectively allow Congress to ignore a convention threat.¹⁸⁷ He cites the thirty-two states that applied for a convention to address a balanced budget amendment in the 1980s, as well as the thirty-three states that applied for a convention in the 1960s to address issues on state apportionment, as examples where strong movements for a convention did not lead to Congress passing any amendments.¹⁸⁸ He describes the process of “the number of state legislative applications [approaching] the requisite two-thirds” as “a game of chicken,” wherein “state legislatures [hope] that Congress will pass the amendment and Congress [hopes] that the last few state applications will not be issued.”¹⁸⁹ He notes that in recent years, Congress has consistently won this game as they “[refuse] to take action” leading state legislatures to stop issuing applications.¹⁹⁰ Congress’s advantage, he claims, comes from the fact that, if two-thirds of the states did actually apply for a convention, Congress could simply refuse to call a convention on the grounds that some applications were invalid “either because they did not match the other applications or for some other reason,” while hoping in the meantime that some state legislatures could be persuaded to rescind their applications.¹⁹¹ But, Rappaport reasons, if Congress did feel goaded enough to call a convention, “it would then

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., 1535.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., 1535-1536.

¹⁹⁰ Ibid. 1536.

¹⁹¹ Ibid.

have time enough to pass the amendment.”¹⁹² Once again, Rappaport conclusion that “the threat effect of the convention method seems largely nonexistent,” seems to be justified.¹⁹³

Touching on a critical counterexample, Rappaport states that the Bill of Rights and the Twenty-Seventh Amendment (originally included in the Bill and proposed to the states in 1789, but not ratified until 1992) are “[exceptions] that [prove] the rule.”¹⁹⁴ These amendments clearly “[restrain] Congress’s powers, preventing Congress from exercising authority it might otherwise have chosen to pursue.”¹⁹⁵ Rappaport describes the state legislatures around the time the Bill of Rights was enacted as “not [fearing] a national convention,” because they had hoped a convention would be called, providing them with the opportunity to “rewrite a Constitution that they believed was too nationalistic and that had been enacted without their approval.”¹⁹⁶ Since a second Constitutional Convention was a distinct possibility, Congress was fearful enough to pass the Bill of Rights, therefore reaffirming the self-interested nature of Congress.¹⁹⁷

Part 3: Implications of A Defective System & Conclusion

So far this paper has been mostly descriptive. I have argued that Article V is defective for several reasons: one, a Constitutional Convention is not a viable option for proposing amendments or provoking Congress into doing so, which means that the Congressional method is the only realistic means for amendments to be proposed. Second, as I have pointed out earlier, Congress is unwilling to propose amendments that limit its powers meaning that, not all amendments, even those largely favored by Americans, stand a real chance of becoming

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid., 1541-1542.

¹⁹⁵ Ibid., 1542.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

integrated into our Constitution. I will now detail a few implications and negative consequences of such a defective amending system that exist and are likely only to become exacerbated unless Article V is somehow corrected to effectively do the job it was designed for.

Labunski notes that Framers George Mason feared that, “it would be improper to require the consent of the Natl Legislature [to propose an amendment], because they may abuse their power, and refuse their consent on that very account,” even if it the amendment was popularly supported.¹⁹⁸ Such a system, he reasoned, would be ““utterly subversive of the fundamental principles of the rights and liberties of the people.””¹⁹⁹ Thus, as mentioned earlier, while the Constitution was designed to be difficult to amend and, despite the fact that Article V was not given nearly enough attention in the design process as it should have, the Framers made it clear that our amending process was not intended to be exclusively under Congressional initiative. However, that is exactly what it has become. Since its ratification, Congress has proposed all twenty-seven amendments to the Constitution, while the chance of an amendment being proposed via an Article V Convention remain virtually impossible. Our current system, then, clearly does not conform to what the Framers had hoped for when they designed Article V.

Michael Rappaport argues that Mason’s fears of an oppressive federal legislature and threatened American liberties have materialized and may continue to grow and worsen. Maintaining that, “Congress has a veto on [all] amendments,” Rappaport believes our Constitution has failed, and will continue to fail at being “reflective of popular views,” and has

¹⁹⁸ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 61.

¹⁹⁹ Richard E. Labunski, *The Second Constitutional Convention: How the American People Can Take Back Their Government* (Versailles: Marley and Beck Press, 2000), 67.

therefore become “less desirable.”²⁰⁰ Because Congress is “unlikely to allow the Constitution to be amended to limit its power,” he continues, “one would expect the Constitution to become increasingly distorted normatively,” meaning “less checks on Congress... but additional limitations on the states.”²⁰¹ Over time, this would lead to a Constitution that is no longer “federalist,” but “more nationalist.”²⁰² Rappaport’s argues that Article V’s failure to ensure that popularly supported amendments, such as a “balanced budget, and term limits,” become part of the Constitution, is what is responsible for us now facing a increasingly nationalist government, very different from the federal structure the Founders had intended.²⁰³ He warns that we are destined for a “unidirectional constitutional history,” as our current amending process continues to “[distort] the... Constitution in favor of Congress and against the states,” which is only further aggravated by the faulty “constitutional interpretations” our current amending system gives rise to.²⁰⁴

Political psychologists, E. Allan Lind and Tom R. Tyler, also point out some potential negative consequences that might occur as a result of a defective constitutional system. In their joint research, they found that, “procedures that provide high process control... tend to enhance procedural fairness.”²⁰⁵ Tyler expands on this, stating, “the normative perspective on procedural justice views people as being concerned with aspects of their experience and not linked only to

²⁰⁰ Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” *Virginia Law Review* 96, no. 7 (2010), 1539.

²⁰¹ *Ibid.*

²⁰² Michael B. Rappaport, “Renewing Federalism by Reforming Article V: Defects in the Constitutional Amendment Process and a Reform Proposal,” *Policy Analysis*, no. 691 (2012), 6.

²⁰³ Michael B. Rappaport, “Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them,” *Virginia Law Review* 96, no. 7 (2010), 1538.

²⁰⁴ *Ibid.*, 1554.

²⁰⁵ E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice*, (New York: Plenum Press, 1988) 94.

outcomes.”²⁰⁶ In other words, people’s perceptions of fairness and justice are not determined solely by the outcome of events, but also by the process in which the outcome is produced. Further, Lind and Tyler elaborate that, “knowledge of the outcome did not change [people’s] perceptions.”²⁰⁷ In addition to “control over process and decision,”²⁰⁸ they found that “the opportunity to express one’s opinions and arguments... is a potent factor in the experience of procedural justice.”²⁰⁹

The negative consequences of a perceived lack of procedural justice, they cite, is less severe if what the people oppose is “incumbent authorities” because “they can work within the system to remove and replace them.”²¹⁰ If, on the other hand, what people oppose is the political and/or governmental system, they are likely to “change the system itself,” by “working outside [it] to disrupt and destroy it.”²¹¹ Lind and Tyler cite the Civil War as perhaps the biggest example of “major efforts to change the political system,” but also note that other “acts of violence, such as riots,” are common as well.²¹² Ultimately, the threat presented by a lack of perceived procedural justice in the political system is “discontent with the political system,” itself, which Lind and Tyler maintain is “[a] true threat to political stability.”²¹³ According to Levi, Tyler, and Sacks, this loss of stability manifests itself through the decline of voluntary actions such as “voting... military service... compliance with taxes,” etc.²¹⁴

²⁰⁶ Tom R. Tyler, *Why People Obey the Law*, (New Haven: Yale University Press, 1990), 7.

²⁰⁷ E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice*, (New York: Plenum Press, 1988) 94.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*, 101.

²¹⁰ *Ibid.*, 150.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ Margaret Levi, Tom Tyler, and Audrey Sacks, “The Reasons For Compliance With Law,” Yale University (2008), 3.

Looking back to Article V, it appears to lack the elements needed to provide the American people with a sense of procedural justice, ensuring the long-term political stability mentioned. The Constitution has created a system in which Article V effectively cushions Congress from enacting any change that would limit its powers while, at the same time, depriving the American people of their ability to express their support for favored amendments by establishing what has proved an ineffective convention method for proposing such amendments. According to the evidence provided by Lind and Tyler, people may be more accepting of the fact that strongly favored amendments were not being proposed if they at least felt that they had more a more active voice or control in the amending process. The inability of Article V to allow for such a role, according to Lind and Tyler's theory, will continue to result in the perception that there is little justice behind our Constitutional amending system, which, they warn, potentially could result in the American political system losing its stability. There are likely other negative consequences resulting from our defective amending system. However, the point is that they add fuel to the idea that Article V of our Constitution is flawed and in need of change. Besides the current problems presented by Article V, such as the inability to make popularly supported changes to the Constitution, our entire political structure could be jeopardized unless our amending provision is fixed.

While it is beyond the scope of this paper to offer or list potential solutions to our amending problem, I hoped to have helped expose the many defects of Article V in an attempt to show that it *is* in need of repair. America's notoriously low amendment rate is not indicative of the American public's consent towards the current Constitution. The more likely explanation is that Americans have acquiesced to the defected and distorted amending system ingrained in our Constitution, which has continuously prevented certain types of changes from ever taking place.

Article V of the Constitution was composed in a rushed manner with little consideration given to the implications and importance it would have for our country. As a result, many aspects of the article are vague and riddled with uncertainties. These uncertainties have deterred many states from applying for a Constitutional Convention, though some strong movements have occurred in the past. However, these movements all proved to be ineffective in calling for a convention, or pressuring Congress into proposing the supported amendment itself. Because of the unlikely nature of an Article V Convention, Congress has had the de facto power of proposing all amendments. Further, Congress has been unwilling to propose those amendments that limit its powers, despite wide public support for such amendments. Article V is defected then, as it does not truly allow for all types of amendments to be added to the Constitution.

Further, it has been noted that this unilateral amending process is only likely to worsen if not corrected. The current amending system is increasingly pushing our Constitution away from being a federalist document and more towards a nationalist one. In addition, if the American public comes to perceive that there is little procedural justice within the amending process (as a result of lack of control over, or say in the process) then there may be dire consequences for not only our Constitution, but our entire political structure as well. These potential consequences only add to the list of reasons of why Article V is defective. Thus, given the current and possible future ramifications of our amending process, it is clear that it is time to mend Article V before it has a chance to cause any more harm to the public, the American political system, or to itself.

Works Cited

- Amar, Akhil R. "The Consent of the Governed: Constitutional Amendment Outside Article V." *Columbia Law Review* 94 (1994): 457-508. Print.
- Amar, Akhil R. "Philadelphia Revisited: Amending the Constitution Outside Article V." *The University of Chicago Law Review* 55.4 (1988): 1043-104. Print.
- Amendments: Thousands Proposed, Few Ratified*. Rep. CQ Weekly, 28 Feb. 2004. Web. 18 Apr. 2013.
- "Article V Amendment Application Tables." *Friends of the Article Five Convention*. N.p., n.d. Web. 23 Apr. 2013.
- Barnett, Randy. "A Bill of Federalism." Editorial. *Forbes* 20 May 2009: 1-4. Print.
- Bernstein, Richard B., and Jerome Agel. *Amending America: If We Love the Constitution so Much, Why Do We Keep Trying to Change It?* New York: Times, 1993. Print.
- Dahl, Robert A. *How Democratic Is the American Constitution?* New Haven, Conn: Yale Nota Bene, 2003. Print.
- Jay, John, and James Madison. "No. 58 & No. 78." *The Federalist*. By Alexander Hamilton. New York: Prometheus, 2000. 377+. Print.
- Jefferson, Thomas, and Wayne Franklin. *The Selected Writings of Thomas Jefferson: Authoritative Texts, Contexts, Criticism*. New York: W. W. Norton &, 2010. Print.
- Jefferson, Thomas. *The Writings of Thomas Jefferson*. Ed. Paul L. Ford. New York: Knickerbocker, 1899. Print.

Jost, Kenneth. "Re-examining the Constitution: Are Major Changes Needed?" *CQ Researcher*. N.p., 7 Sept. 2012. Web. 26 Feb. 2013.

<<http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2012090700>>.

Labunski, Richard E. *The Second Constitutional Convention: How the American People Can Take Back Their Government*. Versailles, KY: Marley and Beck, 2000. Print.

Lee, Mike. *The Freedom Agenda: Why a Balanced Budget Amendment Is Necessary to Restore Constitutional Government*. Washington, D.C.: Regnery Pub., 2011. Print.

Levi, Margaret, Tom Tyler, and Audrey Sacks. *The Reasons for Compliance With Law*. Diss. Law, 2008. N.p.: n.p., 2008. Print.

Levinson, Sanford. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. Oxford: Oxford UP, 2006. Print.

Lind, E. Allan, and Tom R. Tyler. *The Social Psychology of Procedural Justice*. New York: Plenum, 1988. Print.

Lutz, Donald S. "Toward a Theory of Constitutional Amendment." *The American Political Science Review* 88.2 (1994): 355-70. Print.

McGinnis, John O., and Michael B. Rappaport. "Majority and Supermajority Rule: Three Views of the Capitol." *Texas Law Review* 85 (2007): 1115-183. Print.

Neale, Thomas H. *The Article V Convention for Proposing Amendments: Historical Perspectives for Congress*. Rep. no. R42592. N.p.: n.p., 2012. Print.

Neale, Thomas H. *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues For Congress*. Rep. no. R42589. N.p.: n.p., 2012. Print.

- Paulsen, Michael S. "How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention." *Harvard Journal of Law & Public Policy* 34.3 (2011): 837-72. Print.
- Rappaport, Michael B. "Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them." *Virginia Law Review* 96.7 (2010): 1509-581. Print.
- Rappaport, Michael B. *Renewing Federalism by Reforming Article V: Defects in the Constitutional Amendment Process and a Reform Proposal*. Executive Summary. 691st ed. Washington, D.C.: Cato Institute, 2012. Print.
- Rogers, James K. "The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process." *Harvard Journal of Law & Public Policy* 30.3 (2007): 1005-022. Print.
- Saad, Lydia. "Americans Call for Term Limits, End to Electoral College." *Gallup*. N.p., 18 Jan. 2013. Web. 19 Mar. 2013.
- Sabato, Larry. *A More Perfect Constitution: 23 Proposals to Revitalize Our Constitution and Make America a Fairer Country*. New York: Walker &, 2007. Print.
- Taylor, Arthur H. "Fear of an Article V Convention." *BYU Journal of Public Law* 20.2 (2006): 407-38. Print.
- Tribe, Laurence H. "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment." *Pacific Law Journal* 10 (1979): 627-40. Print.
- Tyler, Tom R. *Why People Obey the Law*. New Haven: Yale UP, 1990. Print.
- U.S. Const. Art. V*. N.d.
- Will, George F. *Restoration: Congress, Term Limits, and the Recovery of Deliberative Democracy*. New York: Free, 1992. Print.