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Ronald D. Rotunda
Stephen J. Safranek

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AN ESSAY ON TERM LIMITS AND A CALL FOR A CONSTITUTIONAL CONVENTION

RONALD D. ROTUNDA* AND STEPHEN J. SAFRANEK**

I. INTRODUCTION

While term limits on state officials are quite common,¹ and raise no serious federal constitutional problems,² term limits on federal legislators are a different matter.³ In United States Term Limits v. Thornton,⁴ the Supreme Court, by a five to four majority, declared unconstitutional an Arkansas law limiting ballot access for incumbent U.S. Senators and Representatives after Senators had served two terms or Representatives three terms.⁵

The Thornton majority held that state efforts to impose term limits

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* The Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law.
** Associate Professor of Law, University of Detroit Mercy, School of Law. He is indebted to Diana Azzopardi for her extensive help on this article.
² See, e.g., Legislature v. Eu, 816 P.2d 1309 (Cal. 1991) (rejecting free speech and equal protection claims to term limits imposed on state legislative officials).
⁵ Thornton, 115 S. Ct. at 1845.
on federal legislators are unconstitutional because allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V.6

It should be no surprise that term limit proponents are now pressing for a constitutional amendment using the Article V provisions that authorize amendment by constitutional convention. Our Constitution has added twenty-seven amendments since it was first ratified by the states. Yet, the convention method has never been used in any of these instances to amend the Constitution.7 Does the disuse of the convention method indicate that it is too dangerous a process to pass an amendment? Or is the convention method a useful safety valve?

The framers of our Constitution foresaw many things. One was the fact that the Constitution would need to be amended from time to time. To make that process easier,8 and to guard against a Congress unwilling to allow change,9 Article V of the United States Constitution provides for two methods for proposing amendments. The first method allows Congress, “whenever two thirds of both Houses shall deem it necessary,” to propose amendments and send them to the states for ratification.10

6. Id. at 1871 (footnote omitted).
7. See, e.g., Walter E. Dellinger, The Recurring Question of the “Limited” Constitutional Convention, 88 YALE L.J. 1623, 1623 (1979) (“Thus far in the history of the republic, no such convention has been called.”).
8. See Donald J. Boudreaux & A.C. Pritchard, Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process, 62 FORDHAM L. REV. 111-13, 113 n.7 (1993). There is evidence that the framers intended to make Article V the “remedy to the overly difficult amendment process under the Articles of Confederation.” Id. at 113. Alexander Hamilton stated at the Constitutional Convention that “[i]t had been wished by many, and was much to have been desired, that (in fact) an easier mode of introducing amendments had been provided by the Articles of Confederation.” Id. at 113 n.7 (citing 5 DEBATES ON THE ADAPTATION OF THE FEDERAL CONSTITUTION 531 (Jonathon Elliot ed., 2d ed. Philadelphia, J.B. Lippincott, photo. reprint 1941) (1845)).
10. Article V provides:
   The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this
The second method authorizes the states to apply to Congress to call a convention. When two-thirds of the states apply, Congress "shall call a Convention for proposing Amendments."11

Whether amendments are proposed by Congress or by a constitutional convention—the proposed amendments must then be ratified by three-fourths of the states before they can become part of the Constitution. Over the last two centuries, Congress proposed all twenty-seven amendments that have become part of our Constitution.12 The states have never used the constitutional convention method, though its threat has been very useful in prodding a reluctant Congress to act.13

During this same time period, Congress also proposed various amendments that were not ratified by the requisite number of states.14 For example, in 1861, Congress proposed an amendment that purported to forbid any future constitutional amendment that would outlaw slavery.15 This unusual proposal never became part of our Constitution because the states refused to ratify it. Instead, in 1865, the states added

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Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress . . . .

U.S. CONST. art. V (emphasis added).

11. Id. (emphasis added).


13. See, e.g., Dellinger, supra note 7, at 1623. In 1979, thirty states submitted applications asking Congress to call a convention to consider a mandatory balanced federal budget amendment. Id. Congress was purportedly brought "to the brink of calling a constitutional convention" because only four more applications were required. Id. (quoting NAT'L L.J., Mar. 5, 1979 at 1, col. 2).

14. Although Congress has proposed numerous amendments to the Constitution, the states have only ratified 27 amendments and failed to ratify six amendments. RICHARD B. BERNSTEIN & JEROME ANGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 169 (1993). Unratified amendments proposed by Congress have dealt with various subjects, such as calculating representation in the House of Representatives, losing citizenship if a citizen accepts a title of nobility, outlawing child labor, prohibiting sex discrimination, and treating the District of Colombia as if it were a state. See Boudreaux & Pritchard, supra note 8, at 152 n.201; 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (app.M) 779-82 (2d ed. 1992) (adapted from THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 92-82, at 51-52 (2d Sess. 1973)).

15. 4 ROTUNDA & NOWAK, supra note 14, app.M at 780. The amendment stated, "[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." Id. See also Eric Grant, Responding to Imperfection: The Theory and Practice of Constitutional Amendment, 13 CONST. COMMENTARY 125, 126-27 n.6 (1996) (book review).
the Thirteenth Amendment, which forever abolished slavery.\textsuperscript{16}

Supporters of term limits for Congress are now considering the enactment of a constitutional amendment to provide term limits.\textsuperscript{17} Recognizing that Representatives and Senators are generally unwilling to give up the perks of long-time incumbency,\textsuperscript{18} the term limit proponents are now considering the resurrection of the Article V convention method to ratify the amendment. This article will provide a brief analysis of the convention method for amending the Constitution.

Critics of the convention method have argued that it is an untried process and, therefore, must be dangerous.\textsuperscript{19} They argue that a convention could "run away" beyond its mandate, rewrite the entire Constitution, and even repeal the Bill of Rights.\textsuperscript{20} Such charges are not only unfounded, but they also show a strong distrust of democracy and a fear of the voter's judgment. Although the claims that a convention will repeal the Bill of Rights, or other similar behavior, are groundless, their constant repetition gives people qualms. Thus, this issue deserves detailed analysis.

Once the parameters of Article V are understood, it is apparent that fear of its use is unjustified. The framers anticipated problems by requiring that any proposed amendment offered by a convention, just as any proposal that Congress offered, be ratified by three-quarters of the states.\textsuperscript{21} It is no more likely today that three-quarters of the states will

\begin{itemize}
  \item \textsuperscript{16} 4 Rotunda & Nowak, supra note 14, app.N at 798.
  \item \textsuperscript{17} Schlam, supra note 12, at 33.
  \item \textsuperscript{18} In a study evaluating the possible success of a term limit amendment, Professors Boudreaux & Pritchard conclude that the amendment has "little prospect of success, because Congress is unlikely to restrict its own ability to extract money and votes." Boudreaux & Pritchard, supra note 8, at 157; see also Schlam, supra note 12, at 36-37.
  \item \textsuperscript{19} Laurence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 Pac. L.J. 627, 628 (1979) (calling a convention for proposing a balanced budget amendment "a needless and perilous undertaking . . . likely to invite division and confrontation where unity and cooperation are critical, one likely to thwart rather than vindicate the will of the American people and damage rather than mend the Constitution.").
  \item \textsuperscript{20} For a sampling of the academic debate regarding a constitutional convention as a means of amending the Constitution, see, Michael Stokes Paulsen, A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, 103 Yale L.J. 677, 733 n.194 (1993). See also Paul Reidinger, et al., We the People: Is the Constitution Out of Date?, A.B.A. J., Sept. 1, 1987, at 52, 54 (presenting a debate between two prominent legal academics on Constitutional Conventions in which Derrick Bell of Harvard Law School state, "[i]t's certainly a possibility that a constitutional convention might repeal the Bill of Rights.").
  \item \textsuperscript{21} The language of Article V is crystal clear. See U.S. Const. art. V, supra note 10. Justice Story expressed no concern about the power of the states to call for a constitutional convention. He treated both methods of constitutional amendment equally, and noted, in his
\end{itemize}
ratify a bizarre constitutional amendment than it was likely in 1861 that three-quarters of states would ratify an amendment to protect the immoral practice of slavery. The framers' fail-safe system in Article V of the Constitution worked in 1861, and it will work today.

Constitutional conventions, like constitutional amendments proposed by Congress, should not be taken lightly. However, the convention method does not threaten constitutional rights as feared by critics. The convention method is a necessary and integral part of the Constitution that must remain available to state legislators, and the people they serve, to ensure that Congress serves the people, rather than its own self-interest. As Abraham Lincoln noted in his first inaugural address:

I will venture to add that, to me, the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take, or reject, propositions, originated by others, not especially chosen for the purpose, and which might not be precisely such, as they would wish to either accept or refuse.22

The convention method of amendment is a critical component of the constitutional balance of power because it acts as a safety valve for proposing amendments. Congress has proposed numerous constitutional amendments and some of these amendments have directly limited state power.23 However, none of the proposed amendments have directly limited congressional power. The framers of the Constitution anticipated that Congress would be reluctant to make proposals that would reduce its own powers.24 Thus, the framers created the convention method as influential treatise:

Congress, whenever two thirds of each house shall concur in the expediency of an amendment, may propose it for adoption. The legislature of two thirds of the states may require a convention to be called, for the purpose of proposing amendments. In each case, three fourths of the states, either through their legislatures, or conventions, called for the purpose, must concur in every amendment, before it becomes a part of the constitution.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 959, at 680 (1833) (emphasis added).

23. See, e.g., U.S. CONST. amends. XIII, XIV, XVII, XX.
24. Patrick Henry, From the Virginia Convention, in THE THEORY AND PRACTICE OF CONSTITUTIONAL CHANGE IN AMERICA 102-03 (John R. Vile ed., 1993) ("Let us suppose—for the case is supposable, possible, and probable—that you happen to deal those powers to unworthy hands; will they relinquish powers already in their possession, or agree to amendments?... If one third of these be unworthy men, they may prevent the application for amendments.")
an important safety valve to propose needed amendments when federal lawmakers impede reform. Indeed, history has shown that even the looming possibility of a convention can be enough to force Congress to act. Without this safety valve, the Seventeenth Amendment, providing for the direct popular election of Senators, might never have come to be.25

II. THE DRAFTING OF ARTICLE V

Congress proposed all twenty-seven amendments that are now part of our Constitution.26 The absence of a single Article V convention would have surprised the framers of the Constitution because they thought that Congress and conventions would be equally viable mechanisms in the amending process.27 In fact, many of the framers preferred the convention method.

The first suggestion for an amendment provision at the Constitutional Convention of 1787 did not include any role for Congress.28 The Virginia Plan, one of the major proposals that led to our Constitution, simply stated that “provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required . . . .”29 This approach was hardly surprising because it merely paralleled the current state practices. In 1787, of the eight states with an amendment process, only three provided a role for their legislatures.30 Thus, when the Philadelphia Convention’s “Committee of Detail” first drafted Article V, the sole method of amending the Constitution was the convention method.31 There was no role at all for Congress.

Several delegates to the Constitutional Convention objected to the

26. See Boudreaux & Pritchard, supra note 8, at 152 n.201.
28. Id. at 1-2.
31. Id. at 17-20.
Committee’s first draft because they feared it would give the states excessive power at the expense of Congress.\textsuperscript{32} A major factor that lead to the Constitutional Convention was that the Articles of Confederation created a weak central government.\textsuperscript{33} The drafters recognized this problem and did not wish to repeat the mistakes that existed under the Articles.\textsuperscript{34} The delegates of the Constitutional Convention compromised and settled on what became Article V, which authorized \textit{both} the states and Congress to play an equal role in proposing amendments.\textsuperscript{35}

This two-pronged method for proposing amendments ensured that no single institution could block important amendments. As George Mason of Virginia declared, it would be improper to require congressional approval of amendments "because they may abuse their power, and refuse their consent on that very account."\textsuperscript{36} And James Madison later emphasized that Article V "equally enables the general and the State governments to originate the amendment of errors . . . ."\textsuperscript{37}

\textbf{III. PAST USES OF THE CONVENTION CLAUSE}

No convention has ever been called to propose amendments under Article V. Since the turn of this century, most convention applications have been limited to specific issues that Congress refused or failed to address.\textsuperscript{38} Five times during this century, more than half of the states have requested a convention to deal with a particular issue.\textsuperscript{39}

The Article V Convention Clause was most effectively used during the campaign for the direct election of U.S. Senators.\textsuperscript{40} With the rise of the Progressive movement in the 1890s, sentiment grew for the direct, popular election of U.S. Senators, as opposed to the election of Senators by state legislatures, as the Constitution originally provided.\textsuperscript{41} Between

\textsuperscript{33} Id.
\textsuperscript{34} See generally Vile, \textit{supra} note 25, at 66-67.
\textsuperscript{35} Id. at 73-74.
\textsuperscript{36} OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, LIMITED CONSTITUTIONAL INTERVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION 7 (Sept. 10, 1987).
\textsuperscript{37} THE FEDERALIST PAPERS No. 43, at 284 (James Madison) (Isaac Kramnick ed. 1987).
\textsuperscript{38} See WEBER \& PERRY, \textit{supra} note 32, at 55-75.
\textsuperscript{39} Id. at 61-75.
\textsuperscript{40} ROTUNDA \& NOWAK, \textit{supra} note 14, at 771-72 (2d ed. 1992).
\textsuperscript{41} JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 7 (1993).
1894 and 1902, the House of Representatives passed several resolutions proposing a constitutional amendment requiring direct election. However, the Senate refused to vote on the issue because many of its members would have lost their jobs if they had to win popular support.

The states turned to the convention provision of Article V to force Congress's hand. Between 1893 and 1911, some thirty states called for a convention to propose an amendment requiring direct election, only one short of the thirty-one needed to trigger the convention process. In addition to widespread state approval, many more Senators favored electoral reform because they themselves were the product of direct elections in which reform minded state legislatures promised voters that it would select the candidates who had won unofficial direct elections. On May 13, 1912, the Senate finally approved the direct election amendment to avoid the prospect of a convention. It was sent to the states for ratification, where it easily obtained approval of three-fourths of the states and became the Seventeenth Amendment to the Constitution in 1913. Thus, no convention was called because Article V served its purpose as a safety valve by removing the congressional roadblock to the amending process and serving as the impetus to force Congress's hand.

Supporters of the current campaign for a convention to propose a term limit amendment think that a similar institutional roadblock exists today. Like Senators in the early 1900s, current members of Congress naturally oppose term limits because such limits restrict their tenure—particularly Representatives, who are often protected by gerryman-

42. Weber & Perry, supra note 32, at 61.
43. See Vile, supra note 41, at 7.
44. There were forty-six states in the Union in 1911. Some commentators claim that thirty-one states in fact did request a convention. However, the exact number of applications remains unsettled because of the inconsistent way in which the applications were recorded. See A.B.A., supra note 30, at 60-63.
46. 37 Stat. 646 (1912).
48. Indeed, Congress never passed the tenth item in the Republican Party's Contract with America. See 141 Cong. Rec. H182-04 (daily ed. Jan. 11, 1995) (statement of Rep. Fox) (“In the next 93 days we will vote on the following 10 items . . . . [including] Congressional term limits to make Congress a citizen legislature.”).
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ordered congressional districts. Therefore, it is natural to turn to the Article V convention mechanism to mandate electoral reform.

IV. MYTH OF THE RUNAWAY CONVENTION

The most common question surrounding the Article V Convention Clause is whether a convention's mandate could legally be limited to address only certain subjects, or whether it would be free to rewrite the entire Constitution, as was done with the Articles of Confederation in 1787. The experience with the Constitutional Convention of 1787 was a successful one: it led to our present Constitution, which has given us freedom without license and stability without dictatorship. Yet, critics of a convention, oddly enough, cite the Convention of 1787 as something to fear.

Opponents of the convention method argue that a convention, by its nature, cannot be limited and that the delegates, if they were so inclined, could revise the entire Constitution, including the Bill of Rights. These fears, however, are unwarranted because a convention cannot revise anything, it can only propose. Numerous restraints, political as well as practical, make it impossible for a convention to rewrite the Constitution against the wishes of the American people.

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49. Lincoln J. Connolly, Case Note, Mowing Down a Grass Roots Movement But Protecting the Crabgrass: Congressional Term Limits Are Constitutional, 50 U. MIAMI L. REV. 661, 705 (noting that both South Dakota (in 1989) and Utah (in 1990) have petitioned Congress for a constitutional convention regarding a term limits amendment).
50. Id. at 703.
51. See Paulsen, supra note 20, at 742.
52. Id.; Reidinger, supra note 20, at 54. The fears may arise from the fact that Article V was created as a peaceful alternative to a revolution. Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amending Process, 97 HARV. L. REV. 431, 438 (1983) ("The formal amending process set forth in Article V represents a domestication of the right to revolution.").
53. See Arthur E. Bonfield, The Dirksen Amendment and the Article V Convention Process, 66 MICH. L. REV. 949, 998 (1968) (noting that a "runaway convention is no real danger since the power of the states and Congress [to limit the scope of a constitutional convention] . . . is based on a sound legal and practical basis."
A. Legal Limitations on Conventions Under Article V

A convention under Article V need not have a broad scope. Article V does not refer to a convention for the purpose of rewriting or even revising the Constitution, but actually offers a more modest alternative. Article V specifically refers to "a Convention for proposing Amendments." Therefore, a convention does not have the power to repeal the Constitution; it can only propose amendments or alterations to the Constitution, i.e., "modifications" or "revisions".

The Framers did not fear an Article V Convention. For instance, Alexander Hamilton, in The Federalist Papers, stated that "every amendment to the Constitution, if once established would be a single proposition . . . . There can, therefore, be no comparison between the facility of effecting an amendment and that of establishing, in the first instance, a complete Constitution." Specific amendments, rather than a comprehensive rewrite of the Constitution, are what the Framers would have expected.

B. Limiting the Convention's Mandate

Despite Alexander Hamilton's view, commentators today often disagree whether a convention could, in fact, be legally prohibited from considering amendments on more than one subject. Some commentators argue that neither Article V, nor the Constitution in general, answers the question of whether a convention's scope may be limited.

In 1974, a special committee of the American Bar Association (ABA), after a two-year study, concluded that the Constitution allows limitations on the scope of conventions. The committee based its determination on several factors. It noted that early drafts of Article V indicated that conventions were to be limited to particular subjects. The Committee of Detail's initial draft of Article V provided, "[o]n the application of the Legislatures of two-thirds of the States of the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."

54. U.S. CONST. art. V.
55. See id.
56. The Federalist Papers No. 85 (Alexander Hamilton), supra note 37, at 485.
57. See Paulsen, supra note 20, at 737, 737 n.202.
58. See A.B.A., supra note 30, at 15.
59. Id.
60. Id. at 12.
The ABA committee concluded that the phrase "for that purpose" indicates an intent that conventions would only be called for certain discrete purposes without authority to conduct a general review of the Constitution. Moreover, limited conventions were in line with the standard practice among state constitutional conventions at that time. Most of the state constitutions that provided for conventions explicitly stated that the conventions could be limited to particular issues.61

The ABA committee also concluded that sound policy reasons support the view that states should be able to call limited conventions. The convention method of proposing an amendment was meant to be a workable alternative to proposing an amendment by Congress.62 However, states may not employ this option if the convention agendas are not limited to particular proposals. In addition, the Committee found a limited convention to be more consistent with democratic principles because the voters would be better able to exercise their franchise if they knew the subject matter to be considered before electing delegates. If the range of topics to be addressed were known and limited, the public would be better able to exercise an informed judgment when choosing among different candidates.

Other commentators have disagreed and claimed that neither Congress, nor the states, can limit the specific topics to be addressed at a convention.63 Indeed, some have even argued that a state application for anything other than a "general" convention is invalid.64 Under this view, the application of every individual state to Congress might have to be phrased identically, each one calling for a convention with no limits to its jurisdiction.65

This view is illogical. Regardless of whether the states can impose

61. Id. at 15.
62. See supra note 8.
63. See Paulsen, supra note 20, at 736-37.
64. See Schlam, supra note 12, at 38 n.152. See also Charles L. Black, Jr., Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189 (1972); Dellinger, supra note 7, at 1623 (arguing that while a convention should be influenced in its choice of agenda by the grievances that led the states to apply for its convocation, the authority to determine the agenda and draft the amendments to be proposed should rest with the convention, rather than with Congress or the state legislature); Walter E. Dellinger, Who Controls a Constitutional Convention?—A Response, 1979 Duke L.J. 999 (1979) [hereinafter Who Controls a Convention]; Francis H. Heller, Limiting a Constitutional Convention: The State Precedents, 3 Cardozo L. Rev. 563 (1982) (arguing that states may not limit a convention).
limits on their call for a convention, it is hard to find language in Article V requiring that the applications use identical language. If the Framers wanted only certain incantations to be used, they would have provided the appropriate language—which they did when they wrote other sections of the Constitution.\textsuperscript{66}

Those who believe that neither the states nor Congress can limit the jurisdiction of a convention also argue that the language in Article V referring to "a Convention for proposing Amendments" authorizes "a convention for proposing such amendments as that convention decides to propose."\textsuperscript{67} Under this view, once a convention is summoned, it is a "free agent," authorized to ignore the reasons that led to its creation.\textsuperscript{68} These commentators believe that even if the convention were called for a specific purpose, and Congress limits the mandate to proposing amendments that address that specific purpose,\textsuperscript{69} Congress is still bound to submit to the states whatever proposals the convention formulates for ratification, even if the convention consciously rejected the mandate that led to its creation.\textsuperscript{70}

This argument makes two assumptions. First, when Article V refers to "proposing amendments," it does not limit a convention to proposing amendments; indeed a runaway convention could propose to throw away the whole Constitution and start from scratch.\textsuperscript{71} Second, although the states and Congress intended to limit the convention to a particular matter and the convention might be lawless in ignoring those limits, Congress must be a mere conduit and it must respect the work of the convention, even when the convention violated the rules that created it.

Even if one accepts the scenario of a runaway and lawless convention, Article V imposes several significant checks on the convention. These safeguards may help explain why President Lincoln did not fear

\textsuperscript{66} See U.S. Const. art. II, § 1, cl. 8 (referring to the requirements for oath of office).
\textsuperscript{67} Paulsen, supra note 20, at 738 (footnote omitted).
\textsuperscript{69} John T. Noonan, Jr., The Convention Method of Constitutional Amendment— Its Meaning, Usefulness, and Wisdom, 10 PAC. L.J. 641 (1979) (asserting that the convention cannot go beyond what Congress has specified).
\textsuperscript{70} Paulsen, supra note 20, at 738.
\textsuperscript{71} A few scholars claim that a convention would cause chaos in an otherwise orderly government. See, e.g., Goldberg, supra note 65, at 2 (calling the convention system "uncharted and volatile"); Tribe, supra note 19, at 632 (calling the convention system "exceedingly unsound").
the convention method, but actually preferred it.\textsuperscript{72} Let us turn now to these safeguards.

\textbf{C. The Ratification Requirement}

The first significant check on the convention method of amendment is that all proposed amendments must be ratified by three-fourths of the states before they become part of the Constitution. Article V makes this requirement explicit and no other interpretation is possible. Therefore, the critics' fear of a runaway convention is unfounded. Even if a runaway convention violated its mandate, the convention can only \textit{propose} amendments and these amendments then must go through the arduous state-by-state ratification process.

The historical evidence demonstrates that gaining support in thirty-eight states is not an easy task, even for amendments with broad popular support. The last two amendments proposed by Congress, the popular equal rights amendment and an amendment to provide the District of Columbia with representation in Congress, both failed in their bids for ratification. The convention proposals face a difficult ratification process even when a majority of the states support the proposal because the constitution requires a three-quarters super-majority.\textsuperscript{73} Therefore, a drastic rewriting of the Constitution could occur only if an overwhelming majority of the American people wanted such a rewrite.

\textbf{D. The Ratification Process}

If a convention still strayed and proposed constitutional amendments outside of its designated subject matter, despite the political restraints imposed in the delegate selection process, those amendments would face a second obstacle: Congress. Article V explicitly gives Congress the sole power to control the method of ratification. Congress decides whether the ratification process of three-fourths of the states occurs through state

\textsuperscript{72} Abraham Lincoln stated, "I should, under existing circumstances, favor, rather than oppose, a fair opportunity [sic] being afforded the people to act upon it." Lincoln, First Inaugural Address, \textit{reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra} note 22, at 269.

\textsuperscript{73} One commentator has stated, "the dominant function of Article V ... is not to facilitate, but to clog ... ." Van Alstyne, \textit{supra} note 68, at 1299. \textit{See State ex rel. Harper v. Waltermire, 691 P.2d 826, 830-31 (Mont. 1984) (discussing the nature of supermajority voting and the specific means by which a constitutional convention can be called). See also Myers v. United States, 272 U.S. 52 (1926) (Brandeis, J., dissenting); Kathleen M. Sullivan, \textit{Constitutional Constancy, Why Congress Should Cure Itself of Amendment Fever, 17 CARDOZO L. REV. 691 (1996).}
If Congress requires the states to use ratifying conventions, the people will have to elect delegates to represent them in the conventions. These elections will provide the people with a greater power to control the results of the amending process. The state conventions are called for the specific purpose of deciding whether to ratify particular proposed amendments. As a result, the people will know where the delegates stand on the issue of ratification at the time they select the convention delegates. If Congress provides for ratification by three-quarters of the state legislatures, the state representatives and senators will decide whether to ratify the proposed amendments. However, these representatives and senators have already been elected and were not chosen to decide whether to accept a proposed amendment. The people will not know where the representatives stand on the issue of ratification and, thus, they cannot control the results of the amending process.

Congress's power to choose the method of ratification also serves as an obstacle against the runaway convention by limiting the convention's ability to submit proposed amendments. Under Article V, a convention may not submit amendments to the states for ratification until Congress chooses the "Mode of Ratification." This limitation gives Congress the power to control how amendments that exceed the convention's charge will be ratified. Some have even argued that Congress could simply decline to choose a method of ratification if the proposed amendments extend beyond the legal scope of the convention. If this occurs, the proposed amendments would not be able to go any further.

However, Congress should only exercise this option if the proposed amendments were outside the legal scope of the convention. Congress could not, consistent with the Constitution, block validly adopted proposals. While a determination of the convention's scope of legal authority in each case would be difficult, the real danger facing the people, given Congress's interest in the matter, is that the convention

74. Congress exercises control over ratification. See Coleman v. Miller, 307 U.S. 433 (1939); Dillon v. Gloss, 256 U.S. 368 (1921); see also AMERICAN ENTERPRISE INST., A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? 22-23 (1979); STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION 11-16 (Comm. Print 1961). The Court in Hawke v. Smith, stated that the framers' intent was clear; the use of "legislatures" within the ratification process called for an "action by deliberative assemblages representative of the people . . . ." Hawke v. Smith, 253 U.S. 221, 227 (1920).

75. OFFICE OF LEGAL POLICY, supra note 36, at 43.
would be circumscribed too much, not too little.  

E. Election of Delegates

If Congress chooses to have the proposed amendment ratified by convention in each of the states, the procedures for the election of these delegates to the conventions will have to be decided. Article V does not specify how or when delegates to a convention would be chosen. Congress, which is given the responsibility to call the convention, should also have the final power to specify the election procedures. Congress might decide to defer to state procedures, or enact its own procedures. Thus, while Congress has no choice but to call a convention once the requisite number of valid state applications has been received, the power to "call" should give it an opportunity to craft the process by which delegates will be selected.

Using this power, Congress could create an election process that would maximize the public debate on the issue and ensure the accountability of the delegates. Congress could also provide for adequate debate by establishing a longer campaign period. The campaign would probably generate intense media and public interest because it would be the first convention that has ever been held to ratify an amendment. The increased media exposure would draw political parties and interest groups into the campaign and ensure a spirited discussion of the issues.

During the campaign, the convention candidates would have to express their position on the relevant issues, such as whether they would attempt to lead the convention away from its defined subject matter. Thus, delegates would have to commit themselves to a position on the

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77. See Jonathon L. Wolcoff, Note, The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions, 85 Colum. L. Rev. 1525 (1985); see also Dellinger, Who Controls a Convention, supra note 64, at 999. In Leser v. Garnett, the Supreme Court stated that the process is a federal function; accordingly it is to be "derived from the Federal Constitution...it transcends any limitations sought to be imposed by the people of a State." Leser v. Garnett, 258 U.S. 130, 137 (1922).

78. U.S. Const. art. V.

79. Id.

80. "The mandatory language of Article V is inescapable: upon application of the requisite number of states, Congress 'shall call a Convention for proposing Amendments.'" Paulsen, supra note 20, at 756 (citing U.S. Const. art. V).


question of a runaway convention before they were elected. While the delegates' promises would not be any more legally binding than the promises of any other politician, the public scrutiny of the candidates would impose difficult, if not insurmountable, barriers on any efforts to lead the convention beyond its legal scope.

Some people fear that because the convention method has never been tried, its use will lead to chaos. However, the history of the ratification process for the Twenty-First Amendment shows that such fears are invalid. This history starts with the Eighteenth Amendment which enacted National Prohibition. After the people sobered up, they ratified the Twenty-First Amendment to repeal the Eighteenth.

Prior to the Twenty-First Amendment, all amendments had been ratified by state legislatures. However, Congress chose a different vehicle to ratify the Twenty-First Amendment: state conventions. To this day, the Twenty-First Amendment is the only amendment that has been ratified by state conventions.

One of the most important issues through the ratification process was the method by which the people would elect convention delegates to the state conventions that would vote on the Twenty-First Amendment. This question centered on whether delegates would be chosen by state-wide or local elections. At the time, Congress made no decision on this issue. Consequently, the states stepped into the vacuum. About half of the states had provisions in their state constitutions regarding state constitutional conventions, but none of them addressed a federal convention. The absence of a clear rule in Article V did not lead to chaos. On the

83. See Weber, supra note 47, at 61-63; WEBER & PERRY supra note 32, at 75-77, for a more detailed discussion of the profitable nature of a convention delegate campaign.

84. See Schlam, supra note 12, at 38-39, regarding delegates to a national constitutional convention.

85. See, e.g., Reidinger, supra note 20, at 54.

86. U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.

87. U.S. CONST. amend. XXI.

88. See Dellinger, supra note 7, at 1623.

89. Noel T. Dowling, A New Experiment in Ratification, 19 A.B.A. J. 383 (1933). Dowling wrote that the Twenty-First Amendment was projected into a perfectly clear legal field: not a constitutional provision, not a statute, not a decision—nothing specifically in point—either to guide or to warn. Something more was involved than the repeal of the Eighteenth Amendment. Here was the beginning of a new experiment in government, perhaps of great significance for the future operation of the American system. A different method of amending the Constitution was to be tried out.

Id. at 383.

90. See id.
contrary, states simply proceeded according to the provisions and procedures in the state constitutions. Despite the novelty of the state convention method, "a clear demonstration has been given of what can be accomplished, even in legislation of a novel character, when the objective is definite and the public insistent."91

F. Review by the Courts

Any proposed amendments that exceed a convention's powers would invite a legal challenge. There has been considerable controversy regarding the Court's jurisdiction in these matters. In 1939, in Coleman v. Miller,92 the Court, when asked to decide whether Kansas had validly ratified a proposed child labor amendment to the federal Constitution, treated the case as nonjusticiable.93 It declined to rule on the issue, stating that questions regarding the amendment process were "political questions" and should be decided by Congress and the President without judicial intervention.94 Commentators have differed on the question of whether the modern Supreme Court would, or should, decide questions dealing with the constitutionality of amendments to the Constitution.95

V. CONCLUSION

Given the numerous safeguards built into the convention method of amending the Constitution under Article V, fears regarding the use of this method are unfounded. In fact, the convention method provides greater protection than the Congressional method. The convention method, favored by people such as President Lincoln,96 is subject to many constraints, but Congress may propose an amendment to the states at any time with no limits on the subject matter of those amendments.

While Congress is unlikely to propose a term limits amendment,
thirty-four state legislatures may well petition Congress to convene a
convention. Proponents of this action maintain that Congress is
incapable of limiting its own terms, therefore, a convention is necessary.
Opponents fear any use of conventions, even though Article V specifical-
ly approves of this method. They claim that convention delegates might
mount an assault on the Constitution. However, the convention method
of amendment is not only a safe method of amendment, it is also an
integral part of the constitutional system of checks and balances. The
Framers wisely intended the convention method to be a vital counter-
weight against Congress' power to block amendments. As the campaign
for direct elections to the U.S. Senate demonstrated, the threat of a
convention is sometimes necessary to force consideration of amendments
that challenge the self-interest of Capital Hill lawmakers.

The convening of a convention is, of course, a serious and complex
matter. It should not be taken lightly. Americans and their representa-
tives in state legislatures and in Congress should not allow misinformation to divert them from employing this wisely crafted provision. When Congress fails to propose needed constitutional amendments, policy makers should not hesitate to use the convention method of amendment.