

FEAR OF AN ARTICLE V CONVENTION

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Article V of the U.S. Constitution provides that,
“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....”

As is well known, there are thus two ways provided to amend the Constitution. The first is to propose the amendment by the two-thirds vote of both the House and the Senate. The second is for two-thirds of the states to call for a convention, with the convention then proposing the amendment. In either case, Article V provides that any amendment, before effective, shall first be,

“ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”

All the amendments to the Constitution to date have been proposed through Congress. A convention of the states has never been convened. Because the second method of proposing amendments has lain dormant for over two centuries now, and given some of the legal questions surrounding its use, there has grown a substantial fear of an Article V convention.

This paper examines those fears, identifies their substantive content, and then attempts to provide a practical assessment of the real risk associated with an Article V convention.

I. Amendment Process

As just indicated the Constitution expressly provides for two means of amendment. There is also a third method, however, which while not expressly provided for has become a central part of the U.S. Constitutional process. That method is by decision of the U.S. Supreme Court. Lower courts may also amend the Constitution, but only for a limited area of jurisdiction.

No formal method is required to propose an amendment through the Supreme Court. Any litigant may do so. Upon the majority vote of the justices, the amendment becomes the “highest law of the land”. While the process of changing the Constitution through the judiciary is not termed by participants as an amendment, it is substantively identical to an amendment. Currently there is no real challenge to the Court’s authority to so act, and all the branches of government, both state and federal, yield to and support the changes in the Constitution by the Supreme Court thus enacted.

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The first two methods of amendment—through Congress and through a convention of the states—shall be referred to as “democratic amendments”, since they are subjected to the American democratic process. The third method of amendment shall be referred to as “judicial amendments”, since they are proposed and enacted by judges without the vote of elected representatives of the people.

II. Amendment Filters

The amendment process might be viewed as one of legal filtering of political ideas. There are two primary filters established before a democratic amendment becomes law. The first filter is for an amendment to be proposed. Absent a vote to propose an amendment, there is no authority for any democratic process to approve it. It can't become law. Either Congress or a convention of the states must act first before any democratic amendment can be enacted.

The second filter is the States. Whether voiced through the vote of the state legislature or a state convention, the assent of three-fourths of the states is required for a democratic amendment under Article V.

These two filters act independently. Either can prevent a political idea from becoming a part of the Constitution. They are designed as a dual check and balance against an adverse amendment gaining momentary support to the long-term detriment of the people.

A judicial amendment is structured so as to enable individual citizens to propose any amendment. There is no filter in place to prevent any litigant from arguing for a change in the Constitution. Judicial amendments thus effectively have but one filter of any kind in place—the majority vote of the Supreme Court. While this is not a democratic filter, it prevents any proposed amendment from becoming law unless the judgment of those appointed to serve as Supreme Court justices agree that it is a good political idea.

III. Risks of Over- or Under-Filtering

The democratic amendment filters by their nature and design make it more difficult for an amendment to be proposed and passed. Over time, these filters may tend to over- or under-restrict the volume and kind of political ideas which can pass through them. The Founding Fathers felt it essential that the Constitution be capable of amendment. In fact, with the Bill of Rights they immediately proceeded to do so. While it can be successfully argued that the Constitution should not be frequently or easily amended, it can also very much be argued that the amendment process was unquestionably intended to be available when and as needed. Without defining which amendments should be enacted over the course of time, and when they should be enacted, for convenience I will simply refer to those set of undefined amendments over the course of time considered as appropriate as “necessary amendments”. Those not so considered shall for shorthand purposes be referred to as “adverse amendments”.

An analysis of the filtering process will identify two kinds of risk—the over-filtering of amendments, and the under-filtering. Over-filtering should be defined as a state where needed amendments are either not proposed or not ratified. That is, they are filtered out by either or both of the two filters. Similarly, under-filtering should be understood as a state where adverse amendments are both proposed and ratified. The case where needed amendments are both proposed and ratified, or adverse amendments are prevented by either or both filters is of no consequence for this discussion, since that is as we would hope it to be. Only the risk of over-filtering (preventing a needed amendment), or under-filtering (failing to prevent an adverse amendment) are of significance.

Of course, all this discussion so far relates only to democratic amendments. But the risk of over- or under-filtering, at least as described so far, is measured by the result, not the process. Thus a needed judicial amendment which is prevented, or an adverse judicial amendment which is enacted by the Supreme Court are of the same moment, at least without regard to the proper process or role, democratic or otherwise, for the creation of Constitutional amendments.

While opposite sides of the same coin, the risk of over- and under-filtering are in fact significantly different. For now, however, our focus will be on the risk of under-filtering, that is, the failure to prevent enactment of an adverse amendment, since this is the predominant fear of an Article V convention.

IV. Under-Filtering, a Compound Event Risk, and Probability Theory

The under-filtering risk of a democratic amendment is a compound risk. That is, the risk of an adverse democratic amendment not being filtered out is the result of two distinct and separate risks—the risk of an adverse democratic amendment being proposed and the risk of an adverse democratic amendment being ratified. Both events must occur for the risk to become reality. The events are mutually exclusive but collectively sufficient to produce the danger contemplated. This will permit of useful mathematical theory to better understand the true scope and dynamics of the process.

Probability theory indicates that the likelihood of an event, e_1 , occurring which is the necessary and sufficient result of two other independent events, e_2 and e_3 , is the product of the same. That is, $p(e_1) = p(e_2) \times p(e_3)$. This is the mathematical equation for the under-filtering risk for an adverse democratic amendment (“Under-filtering Risk Equation”). Probability theory also states that $p(e_n) \leq 1$. If we allow $p(e_1)$ to represent the under-filtering risk of an adverse democratic amendment becoming law, and $p(e_2)$ to represent the risk of an adverse democratic amendment being proposed, and $p(e_3)$ the risk of an adverse democratic amendment being ratified, then we can measure the impact of a “run away convention” on the overall under-filtering risk of an adverse democratic amendment becoming law.

A “run away convention”, as defined here, shall refer to a convention which breaks down and prevents all filtering of any adverse democratic amendment. In the extreme, it represents a scenario where all the delegates of the convention agree to vote

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for each others' proposed amendments without limitation or qualification of any kind. However, because $p(e_n) \leq 1$ for all e_n , then the limit of $p(e_2)$ in a run away convention is necessarily equal to one ($\text{Lim } p(e_2) = 1$).

This, however, only defines the $\text{Lim } p(e_2)$, that is, the mathematical probability limit of a run away convention proposing an adverse democratic amendment. To determine the impact of a run away convention on $p(e_1)$ we need to take the limit of both sides of the Under-filtering Risk Equation as an Article V convention "runs away", which yields the following: $\text{Lim}_{(\text{convention runs away})} p(e_1) = \text{Lim}_{(\text{convention runs away})} p(e_2) \times \text{Lim}_{(\text{convention runs away})} p(e_3)$. Because e_2 and e_3 are independent events, the $\text{Lim}_{(\text{convention runs away})} p(e_3) = p(e_3)$. That is, the probability of an adverse democratic amendment being ratified, assuming one is proposed, is the same whether the convention ran away or not. Returning to the limit equation, and substituting the value 1 for the $\text{Lim}_{(\text{convention runs away})} p(e_2)$, and $p(e_3)$ for $\text{Lim}_{(\text{convention runs away})} p(e_3)$, we obtain $\text{Lim}_{(\text{convention runs away})} p(e_1) = 1 \times p(e_3)$. Simplifying the equation we obtain $\text{Lim}_{(\text{convention runs away})} p(e_1) = p(e_3)$.

So, through use of probability theory and limits we can measure the under-filtering risk of an adverse democratic amendment becoming law, assuming that a convention runs away, as equal to $p(e_3)$.

By comparison, the judicial under-filtering risk of an adverse amendment is simply $p(e_4)$, where e_4 represents the event of the Supreme Court deciding in favor of an adverse judicial amendment to the Constitution. This is so because there is no filter with the Supreme Court in terms of what can be proposed as a judicial amendment. Anything can be proposed, but it will have no impact unless the Supreme Court decides to adopt the amendment.

In summary, then, the under-filtering risk of an adverse democratic amendment—with a run away convention—is measured as $p(e_3)$, the likelihood that the States will ratify an adverse amendment, while the under-filtering risk of a judicial amendment is measured as $p(e_4)$, the likelihood that the Supreme Court will decide in favor of an adverse judicial amendment. (Of course, if a convention does not run away, then the under-filtering risk of an adverse democratic amendment remains at $p(e_2) \times p(e_3)$, where $p(e_2)$ remains the probability of an adverse democratic amendment being proposed by a convention.)

Perhaps a couple of examples will highlight the comparative risks of $p(e_3)$ and $p(e_4)$. Let's assume that the recent decision in *Lawrence v. Texas* constitutes an adverse judicial amendment establishing a U.S. Constitutional right to engage in private, consensual sodomy. This then was an amendment proposed by Lawrence without filtering. The risk, before the Supreme Court actually decided, that such a judicial amendment would be approved has been denoted as $p(e_4)_{(\text{private, consensual sodomy protected})}$. Assuming a run away convention at the extreme, and that a private, consensual sodomy amendment is approved at the convention, then the risk that this democratic amendment would be approved is $p(e_3)_{(\text{private, consensual sodomy protected})}$. The key question in this example then, is—even assuming a run away convention—which risk is greater, $p(e_4)_{(\text{private, consensual sodomy protected})}$ or $p(e_3)_{(\text{private, consensual sodomy protected})}$.

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consensual sodomy protected), or $p(e_3)$ (private, consensual sodomy protected)? Is it more likely the Supreme Court would approve such an amendment, or three-fourths of the States? Of course, in this case we have the benefit of hind-sight to conclude that it is probably substantially more likely that the Supreme Court would approve such an amendment than would the States, even with a run away convention.

What if we take a hypothetical that hasn't yet been decided? What of a US Constitutional amendment ensuring gays and lesbians the right to marry? Which seems greater, the risk that the Supreme Court would approve such an amendment proposed by litigants, $p(e_4)$ (gay and lesbian marriage protected), or the risk that three-fourths of State legislatures would approve such an amendment proposed by a run away convention $p(e_3)$ (gay and lesbian marriage protected)?

In both cases we would probably conclude that the risk of an adverse judicial amendment is much higher than the risk of an adverse democratic amendment, even with a run away convention that filters no amendments of any kind. Of course, if the convention did filter some amendments, than the comparative risk of an adverse amendment between the two methods would be even much greater.

The whole point is that the significance of a run away convention, even assuming, *arguendo*, that one should occur, has been vastly overstated. Practically speaking, a run away convention means at the extreme that one of two filters has not functioned, and that the risk of an adverse democratic amendment has gone up—at the very most—to equal the risk that the States would ratify such an amendment, regardless of how it was proposed. This risk in the current political climate is—depending on one's political view and definition of an adverse amendment—still, by comparison, substantially lower than the risk of an adverse judicial amendment. Furthermore, because amendments through the judiciary have the same characteristics of a run away convention (i.e., any and all amendments may be proposed) the convening of a modern-day convention will do little more to put the Constitution at risk than the advent of modern-day judicial activism has already done. Said another way, *through judicial activism we already have all the risks of a convention but none of the benefits*. Only if one believes it is more likely that three-fourths of the states will ratify an adverse democratic amendment than it is that five justices will approve an identical adverse judicial amendment should there exist a fear of a convention.

The rationale fear of a convention should be reduced to this: Those who believe three-fourths of the States are more likely than the Supreme Court to approve an adverse amendment should legitimately fear an Article V convention. While those who believe three-fourths of the States are more likely than the Supreme Court to approve needed amendments should favor an Article V convention. The debate to date has been miscast as the retention or abandonment of the first filter to prevent the proposing of an adverse amendment. That debate ignores the fact that our system already includes a wide-open amendment proposing process through the judiciary. Continuing the debate of a filtered verses non-filtered process for proposing amendments is to indulge in modern-day fictional analysis. The process for proposing amendments to the U.S. Constitution is now

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wide-open, unfettered in any way whatsoever. This way of analyzing an Article V convention is premised upon the explicit two-pronged method for amending the Constitution set forth in Article V. The amendment process through the judiciary is just as real and widely accepted (that is, legally followed). *Once one concedes that there are three legal means of amending the Constitution, the analysis of an Article V convention dramatically shifts.*

The real debate then is not a legal one regarding what a convention could or would propose, but a political one regarding who should do the ratification of any amendment, the Supreme Court or three-fourths of the States. Those relentlessly holding to their fears of an Article V convention are thus of two groups—(1) those who actually prefer the Supreme Court as the amendment ratifying body, or (2) those who are in denial, both politically and legally, and hopelessly wish, if not criticize, the Supreme Court for their long and engrained activist pattern. Conversely, those favoring a convention are either (1) those who prefer the States as the appropriate ratifying body, or (2) those who criticize, but nonetheless concede that the Supreme Court has now become the Supreme Branch, but also hold an Article V convention as the only remaining check and balance provided to the States against a run away Federal government. Under our current system of constitutional jurisprudence, the rationale fear of an Article V convention is solely political.

Other fears are inherently altruistic or uninformed—and in either instance of impractical value except to those who share the fear from a political perspective. The unwitting consequence of this fear, regardless of its reason, is to provide support for the political base preferring preservation of the current unfettered ratification authority of the Supreme Court. *Whether clothed in political opposition, or unreasoned and altruistic denials of current Constitutional reality, fear of an Article V convention strengthens the power of the Supreme Court, and lessens the power of the States.*

V. Definition of Adverse Amendment

The whole notion of an “adverse amendment” deserves further discussion. While we have developed the term and referenced it for a purpose, we should now question just what such a phrase means and the significance of its use. Just who is an “adverse amendment” adverse to? It is certainly adverse to those who oppose it. Is it adverse to Congress, or to the Supreme Court? Is it adverse to the Federal government or to the States? Or is it in fact adverse to the people themselves? Should an amendment be termed “adverse” based on its political content, or more based on the process that enabled it to come into being?

If political ideology itself is not the basis for terming an amendment “adverse”, then what democratic amendment ratified by three-fourths of the state legislatures can rightly be termed adverse in any instance? In a democracy, which amendments favored by a super-majority of the people should the people be allowed to have? Have we now moved to a system of jurisprudence not only acquiescing to judicial amendments but actually favoring them? How can a system of Constitutional government “by the people,

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for the people, and of the people” remain democratic when Constitutional action by the States and the people is not just restrained but loathed? Is democracy safer which appeals to the government to protect the Constitution from the people, or when it appeals to the people to protect the Constitution from the government?

Without delving into a detailed review of minority and majority rights, the point is that depending on the definition of an “adverse amendment”, one may favor an Article V convention for political values more aligned with the substantive view of the States and the people, or for political values more aligned with the procedural view of self-government. Those defining any “adverse amendment” as one not consistent with simple notions of self-government, albeit with appropriate respect for minority rights, are likely to find substantially higher risk of an adverse amendment through the judiciary than with the States and the people. In either case, whether one’s view is primarily substantively or procedurally based, the precise reason for individuals fearing or favoring an Article V convention should thus be more distinctly set forth, since the implications are significant and inescapable on both substantive and procedural fronts.

VI. Fear of an Amendment

Another fear of an Article V convention comes from those who are afraid it would succeed. That is, they believe it would successfully propose needed amendments which would then be ratified by three-fourths of the States. The cause of the fear, however, is in the definition of a “needed amendment”. To this group, no amendment is needed. This position is taken irrespective of the substance of the amendment. It is a blind, total rejection of any amending of the Constitution. It is sometimes advocated even on religious grounds.

The obvious weakness in this position is that it is (a) substantively blind, (b) inherently contradictory, and (c) rationally inconsistent with the existence of judicial amendments. While the position is held by many, its weaknesses are quickly apparent.

First, to reject all amendments regardless of substance is to presuppose a static nature to society, technology, and the world itself. Those opposing an Article V convention as but one means of opposing any amendment assume that the original language can be stretched and applied to fit all evolving circumstances. They on the one hand favor judicial application of original intent to evolving circumstances in a conservative but elastic way, while on the other hand eschew judicial amendments as having gone too far. They therefore espouse an unrealistic combination of expectations—apply original intent, but at the same time stretch original intent for a changing nation and world (i.e., for revolutions in telecommunications, transportation and technologies), but in no case actually amend the Constitution either democratically or judicially.

Furthermore the religious zeal, if not belief, some espouse is inconsistent as well. Holding the Constitution to be divinely inspired, they nonetheless reject all provisions and purposes within the Constitution for its amendment, as well as any possible virtue to

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an Article V convention itself. In their view, the document is thus inspired—with exceptions. Article V is an exception. And so is the entire Bill of Rights. Everything else, however, was definitely inspired.

Lastly, to oppose all democratic amendments in the face of judicial amendments defies reason. Even if the Constitution should *never* be amended, if it is amended, one would expect a desire to *change it back*. Most judicial amendments can only be changed, if ever, by a democratic amendment. The second, democratic amendment simply reverses the effect of the judicial amendment—actually drawing closer to the position of those who initially rejected all amendments. *Opposing democratic amendments, including those from an Article V convention, in the face of regular and ongoing judicial amendments, comports with no rationally consistent set of beliefs. It simply defies all reasoning.*

This opposition to an Article V convention may be masked on other grounds ostensibly more acceptable to defend. The emptiness of the position is most easily revealed, however, by first identifying whether any amendment for any reason whether judicial or democratic is acceptable. If not, then the alleged fear of an Article V convention can be easily dismissed as simply a redecorated position lacking intellectual integrity which in reality opposes all amendments all the time.

VIII. Fear of the People

Lastly, there are those who selectively favor amending the Constitution, who prefer it be done democratically, but fear the people. The sum of their position is this. An Article V convention should not be held because the first Congressional filter is essential. As already discussed, this position only makes sense, if at all, when the amendment process is two-pronged, not three-pronged. The filter-less ability of the Supreme Court to amend the Constitution renders this analysis silly. The choice is not between preserving a two-filter system which no longer exists. It is between which body should have ratifying authority of any amendment—the Supreme Court or the States. If an Article V convention also restricts some undesirable amendments from being voted on, then all the better. But if not, the result is inconsequential in the face of the Supreme Court's ability already to ratify a myriad of litigant-proposed amendments.

Still, some trapped in this analysis remain there because, in the end, they conclude that the wisdom of the Supreme Court justices is preferable to the gullibility of the American people. The survey results included in the Appendix challenge the presumed level of American ignorance and gullibility. It shows the current snap-shot view of where the American people stand on assorted amendment possibilities, and leaves to those questioning if not insulting the voters' intelligence to explain how and when a sudden dramatic shift will occur.

While the survey, scientific in its expose of where the voters currently stand, certainly does not foreclose shifts in voter sentiments, it does nonetheless reveal as largely political fear-mongering the position of those suggesting American voters and

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their state legislators are even remotely likely to vitiate cherished Constitutional rights. Their burden of persuasion against such long odds in a free-speech society is practically insurmountable. Furthermore, it affronts the basic underpinnings of constitutional government as expressed by George Washington, “The Constitution—its only keepers, the People.”

IX. Fear of a Power Shift

Given that the Constitution is the “highest law of the land”, any development in the amendment process potentially shifts significant power. The convening of an Article V convention, for the first time in over 200 years, would thus significantly rupture the current power allocations. The activation of a State-based method of amending the Constitution strips Congress of what, in practice, has been its exclusive domain. The power shift over the years from the States to the Federal government has been gradual but significant. The Tenth Amendment, not surprisingly, has been whittled throughout this process to a mostly hollow shell, devoid of any thing near the reservation of power to the States and the People its language intuitively implies.

The Supreme Court is openly acknowledged as the Supreme Branch. The relationship which has evolved between the Judiciary, Legislative, and Executive branches has resulted in almost no post-facto check and balance on decisions by the Court. While the Supreme Court’s constitutional authority is not completely unfettered, in combination with a meaningful minority in the Senate it is practically so.

The convening of a convention of the States would thus rupture long-standing and respected allocations of core power in this country. It will inevitably lead to a major shift in power from the federal government to the States—both immediately and prospectively as the States will reenter the negotiations on all future constitutional issues. The power of a minority of senators will become limited, and particularly less significant in matters of deep emotional interest to the People. Most of all the Supreme Court will lose its untouchable status. While it is unclear whether a convention would deal only with substantive issues important to the States and the people, or will address the core judicial activism issue itself, in either instance the power of the Supreme Court to amend the Constitution in a very unpopular way protected on their political flank by a minority of senators will be stripped forever.

These shifts in power are predictable and a certain basis for fear—political fear—of an Article V convention. Few if any affected, however, are likely to voice their fear as fear of a power loss. Similar to those who oppose any amendment, the ardent wisdom of those in power fearing the States exercise of their Article V right should be viewed with suspicion to say the least. So likewise should the view of those who seem particularly dependent on judicial amendments as a substitute for political success in the traditional democratic process.

X. Extra-Article V Convention Fears

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The fears discussed so far relate to an Article V convention. Some fears, however, are more appropriately classified as common law convention fears. That is, they represent fears of what a common law convention might or might not have authority to do. Given the probability analysis earlier, however, fears regarding how a convention—whether under the authority of Article V or common law—might act and propose amendments is rendered largely inconsequential. That is, accepting and measuring the risks of a run away convention has already been factored in.

The only fear not already considered would be a fear that a convention, even one under Article V, might change the ratification requirements, thus rendering the above analysis incomplete. Even these fears, however, when examined with greater scrutiny reveal their weak underpinning. There are several reasons why.

First, the suggestion that the founding convention changed the ratification requirements is unwarranted. It would be more accurate to say that they proposed that Congress change the ratification requirements. There is nothing in the action of the convention which presumed to unilaterally, without Congressional action, alter the ratification requirement of the Articles of Confederation from unanimous approval by the thirteen states to only require nine. It isn't that Article VII of the drafted constitution didn't make a change—it did. It's that in doing so the Convention fully recognized that only Congress could with authority present the change in ratification to the States.

So the Convention didn't change the requirement, they simply proposed it to Congress, who authorized consideration of the change to the States where nine states ultimately agreed. So the scope of the fear based on precedence is not that a convention might change the ratification requirements itself, but that Congress might endorse a proposed change in such requirements.

The fear that Congress might endorse a change is substantially different from the poorly enunciated, if not implied, fear that the convention would do so itself unilaterally. Article V retains Congressional control over the ratification process. Again it is typically suggested that Congress chooses the mode of ratification, whether it be by state legislature or by state convention. This also is inaccurate, however, since Article V states, in relevant part, that,

“The Congress...shall propose amendments to this Constitution, or...shall call a convention for proposing amendments, which, in either case, shall be valid...when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress....”

The authority given Congress is not only to specify whether state legislatures or state conventions ratify an amendment, but whether “legislatures of three fourths of the several states” or “conventions in three fourths thereof” shall perform the ratification. Congress not only specifies the body to ratify, but the required level of ratification as well—set at three fourths.

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There is nothing in precedence, or common law, to suggest that the States already bound by constitutional agreement have the authority to abrogate that agreement by their own action without the consent of the Congress. Congress consented then and they would have to consent to any future change. In fact, Congress could choose to withhold specification of the means of ratification until after an Article V convention actually proposes an amendment. While they must specify a means, there is no requirement that they do so in advance, nor have they done so in advance of proposing amendments themselves. By withholding specification of the ratification method until after an amendment is proposed, they thus retain authority, based upon both precedence of the original Constitution, the language of Article V, and without any contrary common law view, to fully reject any change in the ratification process. The fear should then rightfully be directed towards Congress who given the significant loss of exclusive power to propose democratic amendments is unlikely to generously appease any such change from the States.

The fear that a convention would change the ratification requirements under-examines history, defies the express language of Article V, and is based on an uncited and unprecedented view of common law convention authority never before exercised in our nation's history.

In fact, to be fair to history, the proposed Constitution together with the Bill of Rights was ultimately ratified by all thirteen States—just as required by Article XIII of the Articles of Confederation. So in any instance the debate is moot. The real issue, when there was one, is the validity of the Constitution between the time it was ratified by New Hampshire (the ninth) and Rhode Island (the thirteenth).

This issue while perhaps justiciable could only be resolved by the highest judicial authority at the time, which according to Article XIII of the Articles of Confederation was then the Congress itself:

“Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them.” So the real question is whether the interpretive judicial power of Congress under Article XIII of the Articles was superior to the plain subsequent text of Article XIII requiring ratification by all thirteen states. Once the original convention reported the draft Constitution back to Congress, including the proposed ratification revision in Article VII, it was Congress who then by forwarding the document to the States both assented to its terms as required under Article XIII, and by judicial fiat, perhaps as one of the first acts of judicial activism, impliedly amended the Articles to enable ratification by only nine states. The Founding Fathers were fortunate to gain such cooperation from a Congress serving as both the legislative and judicial branch of government, whereas proponents of a convention today would be politically foolish to count on such similar support from either, much less both, the Congress and the Supreme Court.

In summary therefore, the original convention did not *change* the ratification process, they *proposed a change* to Congress, which as the highest legislative and judicial body on such issue assented to such a change with full authority under Article

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XIII to determine “all questions...submitted to them”. The argument is really moot, however, since ultimately all thirteen states did ratify the Constitution.

Lastly, it is important to note that the impetus for even proposing a change in the ratification process is vastly different from then until now. All democratic constitutions historically are based on the notion of super-majority consent. Changing ratification from 100% to 75% still accepted the premise of a required super-majority. To what would a convention today change the standard? To fifty one percent? To two thirds? And why would they consider doing so at the risk of having Congress deny even submitting the amendments to the states under its Article V authority requiring that they specify the mode of ratification by three fourths; or at the expense of a successfully constructed challenge to the amendment’s validity presented to a Supreme Court most disgorge of power by the process? All this—as well as the potential scorn of the States and the people themselves—would be engaged merely to reduce the ratifying requirement from, let’s suppose, 38 (three fourths) to 34 (two thirds), and necessarily undertaken at the very outset of the amendment process rather than at the tail end when they are most likely to ascertain their inability to secure the final four votes.

Not only would a proposed change in the ratification requirement require the assent of both Congress and the Supreme Court, but it would also entail a political gamble vastly more risky than that encompassed in the actions of the original convention.

XI. Conclusion

There are several fears of an Article V convention, but only one that passes the rationale test. The most predominant fear is that it will “run away”, but as indicated above and measured with probability theory such an event is inconsequential given the reality of our three-pronged method for amending the Constitution. It is feared by those who do not want to see any amendment to the Constitution and thus criticize an Article V convention out of concern that in fact it could succeed, but blind to the necessity of democratic amendments reversing judicial amendments. It is feared by those do want to amend the Constitution as needed, but believe the gullibility of the American people is such that cherished Constitutional freedoms would be lost. This group ignores current political reality as shown in Appendix A that no such public sentiment is anywhere on the horizon, and premise their position, even in the advent of free speech, talk radio, internet, and multiple electronic and paper media outlets, that the wisdom of the Supreme Court is more trustworthy than the heart of the American voter. They premise their defense of democracy and Constitutional rights not in the people but in its highest instruments of government—a patronizing, parental, and insulting approach to democracy eerily sounding like theories underlying governments of remarkably less freedom. There are those who fear an Article V convention because of the shift in power it will inevitably produce away from the federal government and particularly the Supreme Court back to the States. There are also those who oppose the convention, whether Article V or otherwise, because of the prospect that the ratification requirements might be changed in convention contrary to the specific language of Article V. In doing so, however, they misread convention history as changing the ratification standard unilaterally as opposed to recommending that Congress and the States do so. The Congress in exercise of both

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it's legislative and judicial powers under the Articles of Confederation to determine "all questions...submitted to them", including this one, decided to assent to the change being considered and voted upon by the states—all of whom over time ratified both the change as well as the Constitution thus fully satisfying the requirement of unanimous ratification anyway. The likelihood of a similar change today is quite remote given the gap in interests between the States and Congress and the Supreme Court who would, by precedence, by the necessary determiners of this question today. Furthermore, Congress can simply veto submitting to the States an amendment with a purported change in ratification standards under existing Article V language. The legal and political barriers to such a change today are formidable.

There is one good reason to oppose an Article V convention—if you prefer the political leaning of the judiciary to that of the States. This is the only rationale reason under current circumstances. Conversely, those who favor vesting—or exercising that which is already vested—Constitutional power in the States or who prefer and trust their political leanings more than those of the judiciary should be among an Article V convention's greatest advocates. They clearly have the most to gain.

One thing is for certain. An Article V convention will produce political winners and political losers. It will be a monumental battle for authority and power in this country. It can reshape the future course of our nation, and the Constitution as we now know it. It seems to have predictable and persuasive potential for favoring states rights and the more conservative state agendas. It is practically speaking the only viable means of checking judicial activism. Richard Wirthlin, long-time political strategist and aid to President Ronald Reagan calls the Article V convention approach—as it relates to the issue of a federal marriage amendment—"cleaner and more manageable" and "somewhat more likely to succeed".

It behooves all scholars, governmental officials, and citizens to reexamine long-held fears of a convention in light of current circumstances and identify those that are rationale or irrational, and those which are legal or inherently political in underpinning.

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