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## Fear of an Article V Convention

*Arthur H. Taylor*

### I. INTRODUCTION

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 . . . .<sup>1</sup>

As is well known, there are two ways provided to amend the United States 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.”<sup>2</sup>

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.

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1. U.S. CONST. art. V.

2. *Id.*

## II. AMENDMENT PROCESS

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: to “amend” the Constitution via decision by the United States Supreme Court.

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 the equivalent. 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.

Two points are useful before giving further review to amendments through the judiciary. First, it is conceded that judicial amendments, unlike Congressional or convention-based ones, must first find their basis in some existing Constitutional language. An amendment proposed in Congress or in a convention needs no prior Constitutional reference point to justify its proposing. While this distinction is real, over time it has less and less significance. Judicial amendments tend to be accretive—that is one leads to yet another. So the Constitutional reference point required for judicial amendments can be the Constitutional text itself, or as is more commonly the case now, a prior Supreme Court interpretation of the Constitution. Over time, therefore, the body of potential reference points for judicial amendments grows very large. While the judicial amending process can tend to be both slower and less noticeable, it is every bit as potent. The end result can be essentially identical as though an amendment were made into the text of the Constitution itself through an Article V Congressional or convention amendment. In fact, in one regard a judicial amendment is of even greater authority than a Congressional or convention amendment given that the latter must survive a first round of judicial interpretation before the basic meaning is fully known, whereas a judicial amendment has already endured that process at the time of its birth.

Second, the difference in scope of what may thus be proposed as an amendment through Congress or a convention compared to the judiciary is hypothetically large, but practically insignificant. The equalizer of the two is the political climate of the time. Both means of amendment are ultimately dependent on some political support for their position. A

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Congressional or convention amendment will depend upon the support of the people, expressed through various representatives. A judicial amendment will depend upon the support of the judges, drawn from the citizenry of the country, but generally independent and unaccountable. All amendments will require some fundamental popular support. Amendments through the judiciary are least dependent on support of the people and may actually precede to some degree full societal acceptance. Viewed in this context then, the scope of judicial amendments may be considered broader than those possible through Congress or a convention, rather than the other way around.

The central point, however, is that the mere hypothetical difference in the amending scope of the two processes is largely irrelevant, given the political underpinning required of either. An amendment seeking birth is far more dependent on finding a “will” than it is on finding a “way.” When the “will” or political support is found, the “way” through Congress, the States (convention) or the Judiciary can be created.

In summary then, the requirement that a judicial amendment be founded in Constitutional text is minimized as the successive, multiple interpretations over time provide ample reference points for the proposing of the next judicial amendment. While this might slightly decrease the range of amendments which can viably be proposed, the less burdensome requirement of popular support necessary for a judicial amendment tends to equalize if not more than offset such a constraint. Since the Constitution can only be amended through a compound process, that is, an amendment to be effective must be both “proposed” and “ratified,” the relative ease or difficulty of doing so through one process versus another can accurately be assessed only on a compound basis as well.

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

### III. AMENDMENT FILTERS

The amendment process might be viewed as one of legal filtering of political ideas. Viewed under this model, there are two primary filters established before a democratic amendment becomes law. The first filter is the amendment proposal. Absent a vote to propose an amendment,

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there is no authority for any democratic process to approve it and thus it cannot 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 separately. Either can prevent a political idea from becoming a part of the Constitution. They are designed as a dual check and balance against ultimately unwise or otherwise harmful amendments with momentary popular support.

A judicial amendment, however, is structured so as to enable individual citizens to propose amendments, without filtering. 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 idea.

#### IV. 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.<sup>3</sup> In fact, through the Bill of Rights they immediately proceeded to make such amendments. While undoubtedly it can be argued that the Constitution should not be amended frequently or easily, it is equally clear that the amendment process was intended to be available when and as needed. For the purposes of this comment, and for convenience, instead of attempting to cite actual, specific, attempted amendments and whether or not those amendments should or should not have been adopted, I will simply refer to theoretically appropriate amendments as “necessary amendments” and theoretically inappropriate amendments as “adverse amendments.”

An analysis of the filtering process will identify two kinds of risk—the over- and under-filtering of proposed amendments. Over-filtering is when necessary amendments are either not proposed or not ratified. That is, they are filtered out by one or both of the two filters. Similarly, under-filtering should be understood as a state where adverse amendments are

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3. *See, e.g.,* THE FEDERALIST NO. 85 (Alexander Hamilton).

both proposed and ratified. The remaining two scenarios, in which necessary amendments are both proposed and ratified, or adverse amendments are prevented by either filter, are of no consequence for this discussion since that is as one would hope it to be. Only the risk of over-filtering (preventing a necessary amendment), or under-filtering (failing to prevent an adverse amendment) are of significance for our purposes.

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 necessary judicial amendment that fails, or an adverse judicial amendment that is enacted by the Supreme Court are of the same moment as over- or under-filtered democratic amendments, 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, my focus is 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.

#### V. UNDER-FILTERING, A COMPOUND EVENT RISK, AND PROBABILITY THEORY

The under-filtering risk of a democratic amendment is a joint probability risk. That is, the risk of an adverse democratic amendment not being filtered out is the result of two related but 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 be realized. Mathematical probability theory can be employed to better explain the true scope and dynamics of this process.<sup>4</sup>

Probability theory indicates that the likelihood of any event ( $e_3$ ) occurring, which is the necessary and sufficient result of two other events,  $e_1$  and  $e_2$ , is the product of the same. Where the second event occurring is dependent or conditional on the first having already occurred, the joint probability is expressed as follows:  $P(e_3) = P(e_1) \times P(e_2|e_1)$ . Here,  $P(e_3)$  represents the under-filtering risk of an adverse democratic amendment becoming law,  $P(e_1)$  represents the risk of an

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4. Mathematical probability theory can here be used to better clarify the comparative amendment risks, and specifically identify and measure the added risk, if any, associated with the convening of a convention of the states. It should be remembered that the purpose for its use is to define and measure the risk of an adverse amendment becoming law in the event a convention "runs away." This is the predominant fear expressed regarding a convention. Carefully applied probability theory can both define and measure how great this risk really is.

adverse democratic amendment being proposed, and  $P(e_2)$  represents the risk of an adverse democratic amendment being ratified. Put into words, this means the probability of an adverse amendment becoming law ( $P(e_3)$ ) is equal to the probability that an adverse amendment will be proposed ( $P(e_1)$ ) multiplied against the probability that such an amendment, if proposed, will then be ratified. This is the mathematical equation for the under-filtering risk of an adverse democratic amendment (“Under-filtering Risk Equation”). Probability theory also states that  $P(e_n) \leq 1$ , where  $e_n$  represents any event.<sup>5</sup> Empowered by this knowledge of probability, we can mathematically measure the impact of a “runaway convention” on the overall under-filtering risk of an adverse democratic amendment becoming law.

A “runaway convention,” as defined here, shall refer to a convention which fails to filter any adverse democratic amendment. In the extreme, it represents a scenario where all the delegates of the convention agree to vote for each others’ proposed amendments without limitation or qualification of any kind. There is no chance that an adverse amendment will not be voted worthy of proposal to the States. In terms of the math, then, the probability of an adverse amendment being proposed in a runaway convention is necessarily equal to one ( $\text{Lim } P(e_1) = 1$ ).

This, however, only defines the limit to the probability of that first event ( $\text{Lim } P(e_1)$ ), the runaway convention’s proposal to the States of an adverse democratic amendment. To determine the impact of a runaway convention on  $P(e_3)$  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:  $\text{Lim}_{(\text{convention runs away})} P(e_3) = \text{Lim}_{(\text{convention runs away})} P(e_1) \times \text{Lim}_{(\text{convention runs away})} P(e_2 / e_1)$ . To simplify the notation, we will use “Law” as a substitute notation for “ $e_3$ ”, “Prop” (proposed) for “ $e_1$ ”, and “Ratf” (ratified) for “ $e_2 / e_1$ ”. To restate our Under-filtering Risk Equation then, we have  $\text{Lim}_{(\text{convention runs away})} P(\text{Law}) = \text{Lim}_{(\text{convention runs away})} P(\text{Prop}) \times \text{Lim}_{(\text{convention runs away})} P(\text{Ratf})$ . Because  $P(\text{Ratf})$  is already defined as an event conditioned upon the happening of  $e_1$ , changes in the probability of  $e_1$  do not impact the probability of  $P(e_2 / e_1)$ . Thus the  $\text{Lim}_{(\text{convention runs away})} P(e_2 / e_1)$  simply equals the  $P(e_2 / e_1)$ , or  $P(\text{Ratf})$ , and is unaffected by the fact that the convention ran away. In layman’s terms, the running away of a convention does not have an impact on the probability of an amendment being ratified once proposed.

Simplifying the under-filtering risk equation with the limit of both sides as a convention runs away therefore yields the following:  $\text{Lim}_{(\text{convention runs away})} P(e_3) = 1 \times P(e_2 / e_1)$ . Simplifying further,  $\text{Lim}_{(\text{convention$

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5. In other words, the probability of an event’s occurrence is no higher than 100%.

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$P(e_3) = P(e_2 / e_1) = P(\text{Ratf})$ . This reveals to us the obvious, that the probability of an adverse amendment becoming law in the event a convention “runs away” is the probability that the amendment is then ratified.

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  $P(\text{Ratf})$ , which is the probability that it is then ratified.

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. To be sure, this vote may require several separate actions by the Supreme Court, such as granting certiorari, supporting standing, and ultimately ruling favorably on the merits.

In summary, then, the under-filtering risk of an adverse democratic amendment—with a runaway convention—is measured as  $P(e_2 / e_1)$ , or  $P(\text{Ratf})$ , 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 runaway, then the under-filtering risk of an adverse democratic amendment remains at  $P(e_1) \times P(\text{Ratf})$ , where  $P(e_1)$  remains the probability of an adverse democratic amendment being proposed by a convention.)

A couple of examples will highlight the comparative risks of  $P(\text{Ratf})$  and  $P(e_4)$ . Let us assume that the recent decision in *Lawrence v. Texas*<sup>6</sup> constitutes an adverse judicial amendment establishing a U.S. Constitutional right to engage in private, consensual sodomy.<sup>7</sup> This, then, was an amendment proposed by *Lawrence* without filtering.<sup>8</sup> The risk,

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6. 595 U.S. 558 (2003).

7. “Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” *Id.* at 575 (2003).

8. The openness of the courts to judicial constitutional amendments based on a single individual’s “search for greater freedom” couldn’t have been stated more plainly than it was in *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). “Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

As indicated earlier, some argue that the scope of an adverse amendment, where only interpretive

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before the Supreme Court actually decided that such a judicial amendment would be approved, is denoted as  $P(e_4)_{(\text{private, consensual sodomy protected})}$ . Assuming a runaway convention at the extreme, and that a private, consensual sodomy amendment, equal in scope and content as the *Lawrence* holding, is approved at the convention, then the risk that this democratic amendment would be approved is  $P(\text{Ratf})_{(\text{private, consensual sodomy protected})}$ . The key question in this example, assuming a runaway convention, then, becomes this: which risk is greater,  $P(e_4)_{(\text{private, consensual sodomy protected})}$ , or  $P(\text{Ratf})_{(\text{private, consensual sodomy protected})}$ ? 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 runaway convention.

What if we take a hypothetical that has not yet been decided? What of a U.S. 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,  $P(e_4)_{(\text{gay and lesbian marriage protected})}$ , or the risk that three-fourths of state legislatures would approve such an amendment proposed by a runaway convention  $P(\text{Ratf})_{(\text{gay and lesbian marriage protected})}$ ?

In both cases one would probably conclude that the current risk of an adverse judicial amendment is much higher than the risk of an adverse democratic amendment, even with a runaway convention that filters no amendments of any kind. Of course, if the convention did filter some amendments—if it was not a runaway convention—then the comparative risk of an adverse judicial amendment would be even greater.

The whole point is that the significance of a runaway convention, assuming that one should ever occur, has been vastly overstated. Practically speaking, a runaway convention means at the extreme that one of two filters is eliminated, and that the risk of an adverse democratic amendment has increased—at the very most—to equal the risk that the States would ratify such an amendment. 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

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changes are being made, is less than the scope of an adverse amendment where the text itself may be changed. The perimeter of interpretive changes however, is self-expanding. As *Lawrence* demonstrates, one interpretation enables another and yet another. Given ample time, the perimeters have opportunity to be essentially equal in scope. The real difference, then, is not the scope of potential amendments that can be made, whether through the democratic or judicial process, but whether one can be made quickly in a few years through a democratic amendment, or more slowly but ever as surely given decades of accretive judicial decisions.

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amendments “proposed” through the judiciary have the same characteristics of a runaway 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 rational fear, if any, 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. Conversely, 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 misrepresented as consisting of either the retention or abandonment of the first filter to prevent the proposal 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 versus non-filtered process for proposing amendments is clearly outdated. The process for proposing amendments to the U.S. Constitution is now wide-open. The typical 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, however, 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 changes.

The real debate then is not one regarding *what* a convention could or would propose, but *who* should effect 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 principally of two groups: (1) those who actually prefer the Supreme Court as the amendment ratifying body, and (2) those who oppose judicial activism, but seem to be in political and legal denial, hoping for some undefined and undeveloped resolution of their fears of judicial activism. This latter group, while opposing a convention of the states, nonetheless proffers no practical solution to the problem of judicial amendments. Conversely, those favoring an Article V convention are either (1) those who prefer the States as the appropriate ratifying body, or (2) those who criticize, yet concede that the Supreme Court has now become the Supreme Branch.

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This second group also maintains that an Article V convention is the only remaining check provided to the States against a runaway Federal government. Under our current system of constitutional jurisprudence, the rational fear, if any, of an Article V convention should be predominantly *political*, not legal.

The unwitting consequence of this fear, regardless of its origin, is to provide support for the political base preferring preservation of the current ratification authority of the Supreme Court. Whether clothed in political opposition, or unreasoned denials of current Constitutional reality, fear of an Article V convention inadvertently *strengthens* the power of the Supreme Court, and *lessens* the power of the States.

#### VI. DEFINITION OF ADVERSE AMENDMENT

The notion of an “adverse amendment” deserves further discussion. While I have developed the term and referenced it for a purpose, I should now discuss just what such a phrase means and the significance of its use. To whom is an “adverse amendment” adverse? 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 determining an amendment to be “adverse,” then what democratic amendment, ratified by three-fourths of the state legislatures, can or should rightly be termed adverse in any instance? Unanswered questions in this arena abound. If it is adverse even when ratified by three-fourths, is it still adverse if ratified by four-fifths, or by every state legislature? It seems that the line between individual rights and democratic rule was determined by the early framers to be at a three-fourths level of ratification. Under a republican government, 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, for the people, and of the people” remain democratic when constitutional action taken by the States and the people, such as an Article V Convention, is not only restrained, but also loathed? Is a democracy that appeals to the government to protect the Constitution from the people safer than one that appeals to the people to protect the Constitution from the government? Rarely is any government in better form than are its people in their character, but there

are many occasions when the people are much better than their current form of 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 be segregated, since the implications are significant and inescapable on both substantive and procedural fronts.

#### VII. FEAR OF ANY 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 necessary amendments which would then be ratified by three-fourths of the States. The cause of this fear, however, is in the definition of a “necessary amendment.” To this group, no amendment is necessary. 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 weaknesses in this position are that it is (1) substantively blind, (2) inherently contradictory, and (3) rationally inconsistent with the existence of judicial amendments. 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. On the one hand they favor judicial application of original intent to evolving circumstances in a conservative but elastic way, while on the other hand they eschew judicial amendments as having gone too far. Thus they hold an unrealistic expectation that original intent should be applied, but at the same time original intent must be stretched to accommodate a changing nation and society (e.g., revolutions in telecommunications, transportation, and technologies). Yet they hold that in no case should the Constitution actually be amended, either

democratically or “judicially.”

Furthermore, the religious belief some espouse is internally 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 an Article V convention itself. Consequently, in their view, the document is inspired, but with exceptions, namely Article V, and the Bill of Rights. Everything else, in their view, was definitely inspired.

Those who advocate opposition to all democratic amendments in the face of judicial amendments defy reason. Even if it is believed that 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 desired by those who initially reject 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.

The religious opposition to an Article V convention is often masked behind other grounds, ostensibly more acceptable to defend. The emptiness of the view is 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 which, in reality opposes all amendments all the time regardless of how proposed.

#### VIII. FEAR OF THE PEOPLE

Lastly, there are those who selectively favor amending the Constitution, who prefer it to be done democratically, but fear the people. The sum of their position is that 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 limited to the methods described in Article V and excludes the possibility of “judicial amendment.” The filterless ability of the Supreme Court to amend the Constitution renders this track of analysis moot. The choice is not whether to preserve a two-filter system, which no longer exists. Rather, the choice is between which body should have ratifying authority over 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

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in the face of the Supreme Court's apparent ability to ratify myriad litigant-proposed amendments.

Still, some choose this course of reasoning because in the end they conclude that the wisdom of the Supreme Court justices really is preferable to the gullibility of the American people.<sup>9</sup> However, a simple survey of the American people's view of potential amendments will give a clear indication of just how "gullible" they are, or are not. These survey results<sup>10</sup> directly challenge the assumption that a convention could lead to a radical restructuring of the Bill of Rights. The argument is simply political fiction, but has for years been a powerful rallying point for those opposing a convention. The survey shows a current snap-shot view of where the American people stand on assorted amendment possibilities, and leave to those questioning the voters' intelligence to explain how and when a sudden dramatic shift will occur.

#### IX. SURVEY OF AMERICAN VIEWS ON U.S. CONSTITUTIONAL AMENDMENTS

While the survey, scientific in its exposé 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 their state legislators are even remotely likely to vitiate cherished constitutional rights. If such far-fetched fears are not extinguished, at a minimum the burden of proof powerfully shifts to the fearful to provide any credible evidence their cherished phobia is rooted in reality. The fear itself seems to entirely discount our vibrant free-speech society which would adamantly oppose such changes. Furthermore, it affronts the basic underpinnings of Anglo-American constitutional government as expressed by George Washington, "[t]he Constitution—its only keepers, the People." When the voice of the people is feared, democracies die. In the end, the Constitution is as much about the people and the process as it is about any particular provision. The importance of people choosing in a democracy was warned of by statesman Ezra Taft Benson, who said, "To all who have discerning eyes, it is apparent that the republican form of government established by our noble forefathers cannot long endure once fundamental principles are abandoned . . . . The issue is . . . will men be free to determine their own course of action or must they be coerced?"<sup>11</sup>

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9. See Appendix A.

10. See Appendix A.

11. EZRA TAFT BENSON, *THE CONSTITUTION: A HEAVENLY BANNER* 31 (1986).

## X. FEAR OF A POWER SHIFT

Given that the Constitution is the “highest law of the land,”<sup>12</sup> any change in the amendment process potentially shifts significant power. The convening of an Article V convention would significantly rupture the current allocation of governmental powers. 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.<sup>13</sup> The Tenth Amendment, not surprisingly, has been whittled throughout this process to a mostly hollow shell,<sup>14</sup> devoid of anything 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 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 would inevitably lead to a major shift in constitutional power from the federal government to the States—both immediately and prospectively as the States reenter the negotiations on 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 on constitutional issues. 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, while safely protected on their political flank by a minority of senators, will be stripped forever.

The net effect of an idling Article V state-based convention authority has been to feed an ever-growing federal government by shifting significant authority from the states to Washington. This has also created,

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12. U.S. CONST. art. VI, cl. 2.

13. See KENNETH R. THOMAS, FEDERALISM, STATE SOVEREIGNTY AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER (Congressional Research Service 2005), available at <http://www.fas.org/sgp/crs/misc/RL30315.pdf> (last visited Apr. 6, 2006).

14. See, e.g., *id.* at 21 (reviewing recent Supreme Court decisions strengthening state sovereignty).

greater distance between decisions of democracy and the people, and enabled judicial activism to take root, bloom, and grow *unchecked* by the ultimate authority and right of the people and the states to self government. Article V was intended to *prevent* just such a runaway federal government and its many attendant evils.<sup>15</sup>

This inevitable shift in power has been predictable and remains a certain basis for fear—political fear—of an Article V convention. However, few if any affected are likely to articulate their fear in terms of a power loss. As with those who oppose any amendment, the rationale of those in power who fear the States' exercise of their Article V amendment power should be viewed with suspicion. So likewise should those who seem particularly dependent on judicial amendments as a substitute for political success in the traditional democratic process be suspect.

#### XI. EXTRA-ARTICLE V CONVENTION FEARS

The fears discussed so far relate to an Article V convention. Some fears, however, are more appropriately classified as “common law convention fears.”<sup>16</sup> That is, they represent fears of what a convention might or might not have authority to do notwithstanding the language of Article V. Given the probability analysis above, however, fears regarding how a convention might act and propose amendments is rendered largely inconsequential. That is, accepting and measuring the risks of a runaway convention has already been factored in.

The only fear not already considered or measured is the fear that a convention, despite the clear language of Article V, might change the ratification requirements, thus rendering the above analysis incomplete.<sup>17</sup>

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15. See, e.g., THE FEDERALIST NO. 85 (Alexander Hamilton) (highlighting this check and balance between the state and the federal governments).

16. This phrase is intended to capture fears attributed to the inherent power of a convention that may be either not spoken to or directly contradicted by Article V. This mostly undefined body of authority is often cited as a basis to fear a convention even when Article V specifies means or limits preventing the evil hypothesized.

17. See, e.g., *CON CON: Playing Russian Roulette with the Constitution*, PHYLLIS SCHLAFLY REP., Dec. 1984, available at <http://www.eagleforum.org/psr/1984/dec84/psrdec84.html> (“None of [the eight postulated] ‘checks’ [to prevent a runaway constitutional convention] stands up as a safeguard in which we can place any confidence. . . . [The eighth safeguard is that t]hirty-eight states must ratify. That is not necessarily true. A runaway [constitutional convention] could change the ratification requirements (as the 1787 Constitutional Convention did). Also, Article V gives Congress the power to specify that state ratifications must take place by conventions, thereby bypassing the State Legislatures altogether.”); see also Robert W. Lee, *Battling for the Constitution*, JOHN BIRCH SOCIETY, Apr. 26, 1999, [http://www.jbs.org/artman/publish/article\\_194.shtml](http://www.jbs.org/artman/publish/article_194.shtml) (quoting the 1911 assertion of Senator Heyburn of Idaho that “[w]hen the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal

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.<sup>18</sup> 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 require only nine. It is not 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. In his final speech to the Convention, Benjamin Franklin plainly referred to the fact that their action was subject both to congressional approval and ratification by the states.<sup>19</sup> The subsequent debate in Congress evidenced the same view as well.<sup>20</sup>

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every section of it because they are the peers of the people who made it.”). Senator Heyburn, like many others, clearly confuses the power to *propose* changes with the power to *make* changes. *Id.* There is no American experience with the latter, and recorded history shows the former was clearly contingent on both affirmative congressional and state action.

18. See INDEX: JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (Kenneth E. Harris & Steven D. Tilley eds., 1976). The *Journals of Congress* record the debate that ensued September 26 and 27, 1787, when the Constitution was reported back by the original convention to the Continental Congress for action. The record clearly shows that (1) no one suggested that the convention's draft of the Constitution was an authoritative change to the Articles of Confederation—all recognized it as merely a proposal; (2) no one suggested that the convention action was authoritative and binding without Congressional action—all the debate centered around the decision of whether Congress should vote to pass the draft Constitution onto the states, and whether to do so with or without an affirmative or negative endorsement; (3) there was debate threatening to vote against such action; and (4) there was consideration of whether the convention properly had authority to propose a change in the ratification requirements.

The debate centered around two distinguishable propositions: (1) should the Congress endorse, disapprove, find the lacked authority to do either, or remain silent regarding their own view of the merits of the new Constitution; and (2), should they vote to transmit the new Constitution to the states for ratification in its entirety, part by part as they saw fit, with or without additional amendments, whether such amendments would be advisory only, and whether Congress must act upon identical language to that of the Convention. In the end, issues were resolved by rejecting all options except to remain silent, and transmit the new Constitution to the States for ratification, only in the whole, without any amendments, and with the identical language of the Convention left in place. These decisions, embodied in the final resolution which passed, caused an earlier proposed finding that Congress lacked authority to either endorse or oppose the draft Constitution because of the change in ratification requirements to fail. And no amendment of any kind, including one which might change back the ratification requirement from nine to thirteen, to ever be offered or considered.

19. James Madison, *Monday Sept. 17, 1787*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 641 (Max Farrand ed., 1966).

20. James Madison specifically hypothesized the result of any congressional amendment to the draft, arguing that while the Convention directly represented the People, a Congressional amendment would fatally destroy prospects for ratification. He suggested that Congress had the authority to do so, but that an amendment “excludes [the] Convention entirely” because the result

So the Convention didn't change the ratification requirement, it simply proposed a change to Congress, who authorized consideration of the change to the States<sup>21</sup> where nine states ultimately agreed.<sup>22</sup> So the scope of the fear based on precedence should not be that a convention itself might change the ratification requirements, but that Congress might endorse a proposed change in such requirements.

Furthermore, Article V retains Congressional control over the ratification procedure itself. 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—or at least incomplete—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 . . . .<sup>23</sup>

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.

There is no judicial precedent to suggest that the States, already bound by constitutional agreement one to another, have the authority to abrogate that agreement by their own action without the consent of the Congress. Congress consented then, and it would have to consent now, to

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would then not be a dual act of both groups, and the result would “[confine] the House in the trammels of the Confederation.” See THE FOUNDER'S CONSTITUTION, Vol. 1, Ch. 6, Doc. 12 (Univ. of Chicago Press), at <http://press-pubs.uchicago.edu/founders/documents/v1ch6s12.html>.

This very negative assessment seems to foreclose the obvious alternative of simply bypassing Congress altogether and submitting the draft Constitution directly to the States, should that in fact have been an option. No one directly or indirectly suggested it was. This apparent view of Madison matches with the representation of Richard Henry Lee, that “It is admitted and [a] fact that this [Constitution] was to be sent to Congress . . . .” See *id.* In all the rough and tumble of debate, no one suggested in either word or deed that the Convention had a direct route to state ratification bypassing Congress. At every step of the way Congressional action transmitting the new Constitution to the States for ratification, with or without endorsement, was considered a required step and became the object of substantial debate.

21. See INDEX: JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (Kenneth E. Harris & Steven D. Tilley eds., 1976).

22. Eleven states, all but North Carolina and Rhode Island, actually ratified the Constitution before Congress acted upon the ratifications on September 13, 1788, and began forming the new government.

23. U.S. CONST. art. V.

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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 the authority, granted by the language of Article V to reject fully any change in the ratification process.

The fear, if any, should then rightfully be directed towards Congress, which, given the significant loss of exclusive power to propose democratic amendments, is unlikely to appease generously any such change proposed by the States. The fear that a convention would change the ratification requirements thus neglects the evidence of history, defies the express language of Article V, and is based on an un-cited and unprecedented view of common law convention authority never before exercised in our nation's history.

In fact, to be historically accurate, 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.<sup>24</sup> So in any instance the debate is moot. The real issue, is the validity of the Constitution between the time it was ratified by New Hampshire (the ninth) and Rhode Island (the thirteenth).

## XII. CONGRESSIONAL ACTION

While the Convention did not act unilaterally or change the ratification requirement itself, there remains a related but different question of whether Congress had the authority to do what it did—both in sending the draft Constitution to the states for ratification, and in forming the new government once nine states had ratified the same.

Whether Congress, upon recommendation of the Convention and the approval of nine states, had authority to change the ratification requirement under Article XIII of the Articles of Confederation was itself a justiciable constitutional issue, subject to the review of the highest court in the land. The highest court in the land at the time could decide with finality, once and for all, whether such action was constitutional under the Articles of Confederation or not. According to Article XIII itself, however, the highest judicial body, or court of law, was the Congress itself: “Every State shall abide by the determination of the

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24. ARTICLES OF CONFEDERATION art. XIII.

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United States in Congress assembled, on all questions which by this confederation are submitted to them.”<sup>25</sup> In addition to exercising their legislative authority to review the proposed ratification change by the Convention, the Congress could—and did—act as judge and jury on the issue in exercise of their plenary judicial authority as well.

The motion and charge against the ratification change was made by Richard Henry Lee, and seconded by Melancton Smith. The question submitted to the Congress was whether it had authority under the Articles of Confederation, Article XIII, to facilitate creation of a new confederacy of nine states, or whether its authority was limited to merely amending the Articles by the unanimous approval of all thirteen states. Specifically, the Congressional Court was asked to “find that the said Constitution in the thirteenth article thereof limits the power of Congress to the amendment of the present Confederacy of thirteen states, but does not extend it to the creation of a new confederacy of nine states.”<sup>26</sup>

With whatever limited debate that occurred, those arguing in favor of the congressional power to facilitate a confederacy of just nine states by state ratification made a motion to effectively dismiss the case by postponing its consideration. They prevailed, and the motion and charge against the ratification requirement change was lost.

That position of the Congressional Court was followed later when Congress, upon ratification by nine states and further joined in the debate interim by two more states, exercised the very authority questioned by Lee and Smith. Thus on September 13, 1788, Congress proceeded to form the new government under the new Constitution.<sup>27</sup>

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25. *Id.* Without separate branches of government, the Articles vested Congress with both legislative and judicial responsibility and authority.

26. INDEX: JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (Kenneth E. Harris & Steven D. Tilley eds., 1976) (citing PAPERS OF THE CONTINENTAL CONGRESS, No. 36, III, at 377 (September 26, 1787 notes of Richard Henry Lee)).

27. The resolution authorizing the formation of the new government, following months of debate (mostly over where the new government should be headquartered) was finally approved by Congress on September 13, 1788, as recorded in the Journals of Congress: “So it was resolved as follows,

Whereas the Convention assembled in Philadelphia pursuant to the resolution of Congress of the 21st of Feby, 1787 did on the 17th of Sept of the same year report to the United States in Congress assembled a constitution for the people of the United States, whereupon Congress on the 28 of the same Sept did resolve unanimously ‘That the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of Delegates chosen in each state by [The following resolution on the organization of the government under the Constitution was entered by Benjamin Bankson in Ratifications of the Constitution, pp. 180-181. Broad-sides of this resolution, signed by Charles Thomson, are in Papers of the Continental Congress, Broad-sides.] the people thereof in conformity to the resolves of the convention made and provided in that case’ And whereas the constitution so reported by the Convention and by Congress transmitted to the several legislatures has been ratified in the manner therein declared to be sufficient for the establishment of the same and such

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The judgment rendered by the Congressional Court was clearly permissive of the ratification change, notwithstanding the contrary motion of Lee and Smith. Whether the decision was a well-reasoned interpretation of Article XIII or an overt act of judicial activism can still be fodder for ongoing debate. What should not be the subject of dispute, however, is that Congress was vested by the Articles of Confederation with plenary judicial authority to decide the issue with finality, and that they did so.<sup>28</sup>

The Founding Fathers were obviously 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.

### XIII. RATIFICATION REQUIREMENT SUMMARY

In review, the Convention merely proposed the ratification change—they did nothing more. Congress, who had authority to reject it, with either its legislative or judicial authority, instead enabled and ultimately endorsed it as an exercise of both. Even if the judicial authority of Congress under Article XIII were somehow challenged, the outer edge of those arguing against the ratification is that the Congress, who was revolutionary in 1776, was in a slight degree still so in 1788, and that the revolution was actually two-step as opposed to one-step. None of these positions imperil or impugn the authority or actions of the Convention then, nor provide a basis for fearing the actions of another convention today.

Finally, 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? Why

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ratifications duly authenticated have been received by Congress and are filed in the Office of the Secretary therefore Resolved That the first Wednesday in Jany next be the day for appointing Electors in the several states, which before the said day shall have ratified the said constitution; that the first Wednesday in feby next be the day for the electors to assemble in their respective states and vote for a president; and that the first Wednesday in March next be the time and the present seat of Congress the place for commencing proceedings under the said constitution.

28. Those challenging this result have mistakenly turned their focus on the Convention itself for proposing the change, rather than on Congress for at least twice enabling if not endorsing the ratification change; and in no case have those objecting to the result challenged Congress' judicial authority under Article XIII to determine with finality the question.

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 us 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 their inability to secure the final four ratification votes is most likely to be ascertained.

Not only would a proposed change in the ratification standard 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.

#### XIV. CONCLUSION

There are several fears of an Article V convention, but only one—a straight forward political fear—appears rational. The most predominant fear is that it will “run away,” but as indicated and measured with probability theory above, 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 those who criticize an Article V convention out of concern that, in fact, it could succeed, even to the extent of opposing democratic amendments simply reversing judicial amendments. It is feared by those who 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. They premise their position, even in the advent of free speech, talk radio, internet, and multiple electronic and paper media outlets, upon the idea that the wisdom of the Supreme Court is more secure 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 reminiscent of 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 a 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 its 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, and ultimately fully satisfying the requirement of unanimous ratification anyway.

The likelihood of a change in ratification requirements today is quite remote given the gap in interests between the States and Congress and the Supreme Court which would, by precedent, be the necessary determiners of the question. Furthermore, Congress can simply veto the submission to the States of 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 thus formidable.

There is, however, one supportable reason to oppose an Article V convention—if one prefers the political leaning of the judiciary to that of the States. This is the only rational reason under the current circumstances. Conversely, those who favor vesting or exercising the already vested amendment power in the States, and those 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, more manageable, and somewhat more likely to succeed than attempting to push it through Congress.”<sup>29</sup>

It behooves all scholars, governmental officials, and citizens to re-

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29. See Appendix B (Letter from Richard Wirthlin to Arthur H. Taylor, the author, dated June 6, 2005).

examine long-held fears of a convention in light of changed circumstances and identify those that are rational or irrational, and further distinguish those which are legal from those which are primarily political in their underpinnings.

## APPENDIX A

**National Survey on Constitutional Change\***

N=1,000 U.S. adults 18+

Conducted October 28 – November 1, 2005

1. As you may know, a Constitutional Amendment is a change to the constitution of a nation or a state. Over the years many issues have been discussed as possible topics for a U.S. Constitutional Amendment. I am going to read you a number of topics and after each one, please tell me if you FAVOR or OPPOSE the proposed Constitutional Amendment. The first one is . . .

A. To place term limits on how long U.S. Senators or members of Congress can serve

**71% FAVOR (NET)**

46% Strongly favor

25% Somewhat favor

**23% OPPOSE (NET)**

12% Strongly oppose

11% Somewhat oppose

6% Not sure/Refused

B. To ban abortion except to save the life of the woman

**41% FAVOR (NET)**

30% Strongly favor

12% Somewhat favor

**52% OPPOSE (NET)**

39% Strongly oppose

13% Somewhat oppose

7% Not sure/Refused

C. To define marriage in all states to be a union between a man and a woman

**64% FAVOR (NET)**  
56% Strongly favor  
8% Somewhat favor  
**32% OPPOSE (NET)**  
22% Strongly oppose  
10% Somewhat oppose  
4% Not sure/Refused

D. To specifically permit prayer at school meetings and ceremonies

**67% FAVOR (NET)**  
49% Strongly favor  
18% Somewhat favor  
**29% OPPOSE (NET)**  
18% Strongly oppose  
11% Somewhat oppose  
4% Not sure/Refused

E. To allow non natural-born citizens to become President if they have been a citizen for 20 years

**39% FAVOR (NET)**  
14% Strongly favor  
25% Somewhat favor  
**55% OPPOSE (NET)**  
37% Strongly oppose  
18% Somewhat oppose  
7% Not sure/Refused

F. To specifically allow Congress to regulate the amount of personal funds a candidate for public office can spend in a campaign

**65% FAVOR (NET)**  
44% Strongly favor  
21% Somewhat favor  
**29% OPPOSE (NET)**  
15% Strongly oppose  
14% Somewhat oppose  
6% Not sure/Refused

## G. To ban the burning of a U.S. flag

**49% FAVOR (NET)**  
40% Strongly favor  
9% Somewhat favor  
**45% OPPOSE (NET)**  
32% Strongly oppose  
13% Somewhat oppose  
6% Not sure/Refused

## H. To lower the drinking age to 18 years old

**23% FAVOR (NET)**  
12% Strongly favor  
10% Somewhat favor  
**75% OPPOSE (NET)**  
64% Strongly oppose  
11% Somewhat oppose  
2% Not sure/Refused

## I. To require the U.S. Congress and President to always adopt a balanced budget

**76% FAVOR (NET)**  
49% Strongly favor  
27% Somewhat favor  
**18% OPPOSE (NET)**  
8% Strongly oppose  
11% Somewhat oppose  
6% Not sure/Refused

## J. To limit or prohibit citizens from owning certain types of guns

**52% FAVOR (NET)**  
36% Strongly favor  
16% Somewhat favor  
**44% OPPOSE (NET)**  
31% Strongly oppose  
13% Somewhat oppose  
5% Not sure/Refused

- K. To prohibit Congress from passing any laws affecting state governments unless they provide the funding required to pay for those laws

**69% FAVOR (NET)**  
42% Strongly favor  
27% Somewhat favor  
**22% OPPOSE (NET)**  
10% Strongly oppose  
12% Somewhat oppose  
9% Not sure/Refused

- L. To require that judges interpret the laws and not write them

**74% FAVOR (NET)**  
56% Strongly favor  
18% Somewhat favor  
**20% OPPOSE (NET)**  
11% Strongly oppose  
9% Somewhat oppose  
7% Not sure/Refused

- M. To replace the Bill of Rights with an internationally recognized set of citizen standards

**13% FAVOR (NET)**  
5% Strongly favor  
8% Somewhat favor  
**78% OPPOSE (NET)**  
61% Strongly oppose  
16% Somewhat oppose  
9% Not sure/Refused

2. Which ONE of these topics do you FAVOR the MOST?

14% Permit school prayer  
14% Ban abortion  
13% Protect marriage between a man and a woman  
10% Gun ownership restrictions  
9% Require a balanced Federal budget  
7% Require judges to interpret the laws and not write them  
5% Lower the drinking age to 18 years old

- 4% Make Congress fund the laws they pass that affect state governments
- 4% Congressional term limits
- 4% Ban flag burning
- 4% Campaign finance limits
- 2% Allow foreign-born citizens to become President
- 2% Replace the Bill of Rights
- 8% NOT SURE/NONE OF THESE/REFUSED

3. Which ONE of these topics do you OPPOSE the MOST?

- 18% Ban abortion
- 18% Lower the drinking age to 18 years old
- 14% Replace the Bill of Rights
- 9% Allow foreign-born citizens to become President
- 8% Gun ownership restrictions
- 8% Protect marriage between a man and a woman
- 4% Ban flag burning
- 3% Require judges to interpret the laws and not write them
- 3% Permit school prayer
- 2% Make Congress fund the laws they pass that affect state governments
- 2% Require a balanced Federal budget
- 1% Congressional term limits
- 1% Campaign finance limits
- 8% NOT SURE/NONE OF THESE/REFUSED

4. As you also might know, there are two different methods of approaching a U.S. Constitutional Amendment. One way is for a bill to pass both the U.S. Senate and House of Representatives. The second method is for a Constitutional Convention to be called by the state legislatures, and for that Convention to propose one or more amendments.

Regardless of which of the two methods are used, the amendment still must be approved by three-fourths of the states. If you favor an amendment do you prefer that it is proposed by Congress, by a Convention, or does it not matter to you?

- 60% No preference/Does not matter
- 23% Prefer Congress

- 12% Prefer Convention
- 5% Not sure/Refused

5. As you may know, a Constitutional Convention to amend the U.S. Constitution has never previously been called. Just based on this information, do you FAVOR or OPPOSE a Convention or does this information make no difference?

- 61% Makes no difference
- 17% Favor
- 17% Oppose
- 4% Not sure/Refused

6. Still thinking about a Convention, I am going to read you the opinions of two people, let's call them Smith and Jones. After I read both statements, please tell me which ONE comes CLOSEST to your own opinion.

Smith is concerned that a Convention will take up controversial or extreme issues and allow the participants to propose any amendment with just over a 50 percent vote of support among participants. For this reason he OPPOSES a Convention.

Jones says that it doesn't matter what topics are discussed or what amendments are proposed because any amendment still requires the vote of three-fourths of the state legislatures in order to become law. He FAVORS a Convention as the only way to allow important and needed Constitutional Amendments to be voted on by the states.

Is your opinion closer to . . .

- 54% Jones, you favor a Convention
- 36% Smith, you oppose a Convention
- 10% Not sure/Refused

7. Recalling that three-fourths of the state legislatures must still approve any amendment to the U.S. Constitution before it actually becomes law, do you still OPPOSE a Convention, are you more undecided, or do you now FAVOR a Convention?

Base: Oppose Convention (Smith) (n=361)

44% Still oppose a Convention

43% More undecided

9% Now favor a Convention

5% Not sure/Refused

## APPENDIX B



6 June 2005

Arthur H. Taylor  
17130 Military Rd.  
Bennington, NE 68007

Dear Art,

I appreciated our conversation today. I recognize the shared commitment of so many to see that a U.S. Constitutional amendment preserving marriage between a man and a woman is proposed for ratification by the states. As you know, there are two processes available to pass a constitutional amendment: 1) Congressional action or 2) convention of the states

**Congressional Action**

For such an amendment to be proposed by Congress, it will require, as you know, a two-thirds vote by both the House and the Senate. Last year such an amendment fell short in both chambers by wide margins. The prospects, currently, for the passage of such an amendment appear to me to be highly unlikely.

**Convention of the States**

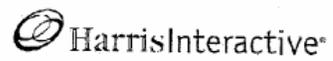
For such an amendment to be proposed by a convention of the states, a convention would first need to be called by two-thirds, or 34 of the state legislatures. A convention, once convened, however, could propose such an amendment with a simple majority vote.

In either case, the amendment would then need to be ratified by three-fourths of the states, as you are well aware. The ratification of an amendment by three-fourths, or 38, of the states is certainly viable.

I believe the prospects of Congress proposing and passing the call for an amendment preserving marriage with the stipulated margins are not at all likely. However, in my judgment, obtaining the requisite number of states to call for a convention and then to propose an amendment preserving marriage, while extremely difficult, offers a more realistic political option than relying on Congressional action.

**Note that:**

- This issue is already on a large number of states' legislative agendas. In the last year or so, one or more bills against same-gender marriages were introduced in 70% of state legislatures; 16 were enacted into law.
- If all of these states favored a call for a constitutional amendment, 18 more states would be required to trigger the amendment process.



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In sum, dealing with this issue at the state level that would lead to a constitutional amendment is cleaner, more manageable, and somewhat more likely to succeed than attempting to push it through Congress.

Note, Art, that today Pope Benedict, in his first clear pronouncement on gay marriages since election, condemned same-sex unions as fake and expressions of "anarchic freedom" that threatened the future of the family.

Regards,

A handwritten signature in black ink, appearing to be "Richard B. Wirthlin". The signature is stylized with a large, looping initial "R" and a horizontal line extending to the right.

Richard B. Wirthlin

RBW/gb