REPUBLIC, LOST

The Corruption of Equality and the Steps to End It

Revised Edition

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Lawrence Lessig

TWELVE

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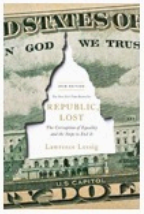

This ebook is an excerpt from Republic, Lost v2.0.
The preface introduces the excerpt.

Preface

A year ago, I had the idea to write a small book on a question that was then becoming increasingly heated — namely, whether state legislatures should use their power to call for "a Convention for proposing Amendments," as the Constitution describes it, to the Constitution.

My publisher was eager that I do more than a small book. He persuaded me to revise my 2011 book, Republic, Lost, more generally. I was happy to do that, and last fall, in the middle of my (unscheduled) campaign for President, Republic, Lost, v2 (2015) was released. That book is a substantial revision of the 2011 edition (more than 70% different). It addresses a much broader range of issues than constitutional reform.

But recent events have driven us both back to the idea that the Article V question deserves more highlighted attention. I am therefore grateful that Twelve has agreed to release this free version of the chapter in *Republic, Lost, v2* (2015) that discusses the Article V convention option. As at least one leading candidate for President, Marco Rubio, has endorsed the idea of a convention, and state legislatures continue to pass resolutions in support, I am hopeful this work might put that important question into a larger context.

Unlike most from my political persuasion (liberal), I am convinced that an Article V convention is an essential step if we're to remedy the crippled and corrupted Congress that now rules. But unlike too many on the other side, I believe that the only politically viable way that an Article V convention might happen is if it is removed from the partisan frame that now defines it.

We need a serious and balanced chance to consider proposals for revising our Constitution — one neither controlled by Congress, nor captured by one side or the other. Such proposals would just be proposals: To have any effect, they would need to

be ratified by 38 states. But we need a chance to begin serious consideration of such reform, whether from the Right or the Left. This chapter makes the "argument for the Article V convention as that opportunity, as well as a series of shadow conventions, crafted as deliberative polls, to warm America to the idea that Americans can actually govern themselves.

I recognize that having fallen into the vortex of partisan spin, it is now unlikely that argument is going to have much effect on this debate. The current signal from the leaders on the Left is that the convention is to be feared, and therefore avoided. In a time when partisan loyalty stands above almost anything else, this is therefore a hard position to argue against.

But at the very least, I hope this chapter provides the resources to resist some of the more extreme mistakes that now haunt this debate. There has been enormous academic progress in understanding the origin and meaning of the convention clause in Article V since the last time the convention was prominent topic in the 1980s. Arguments against the convention should at least account for that work. So far, they have not.

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Chapter 13

A Proposing Convention

When our grandchildren look back at our time, they will be taught about something that too few of us even see: that we were living in the middle of a constitutional moment.

On the Left and the Right, there are vibrant and growing movements demanding fundamental change to our fundamental law. Movements demanding *amendments* to the Constitution.

These movements are in the background of politics just now. But literally millions have joined them in their different forms—some by signing a petition, others by organizing meet-ups, others still by supporting organizations that are pushing for constitutional change. In some form or another, a growing slice of America is now convinced that something in our fundamental law must change—even if they don't yet agree about what that change actually is.

These different movements have different strategies. But as currently deployed, I fear these strategies are destined to fail. Not because they must fail. I am not someone who believes that it is impossible to amend our Constitution. But instead because the

leaders of these different movements are trapped on a partisan field. They believe that they can achieve constitutional change without questioning the logic of that partisan field. And so they do their work of constitutional politics while accepting the frame of partisan politics.

But here is the fundamental truth about constitutional change: With just one exception, it has always been cross-partisan. Constitutional reform is never about the Democrats beating the Republicans, or never about the Republicans beating the Democrats. With one exception, it has always been about us, as citizens, rising above the partisan fray to demand fundamental reform. Indeed, after this one exception, there is not a single amendment that was passed when one of the two parties opposed it.[1]

That one exception was the bloodiest war in American history: the Civil War. Following that war, the victors were (rightly) impatient. They insisted on their reforms before peace would be allowed. Today we recognize their changes as among the most important ideals inscribed within our Constitution. But except for the Thirteenth Amendment (abolishing slavery), we should remember that it was a century before those ideals had any of their intended effects on American law or society. The Civil War Amendments are the one exception to the cross-partisan rule of constitutional change. But unless we're willing to launch another civil war, that exception should prove the rule: We change the Constitution through amendment only when we approach that change as citizens, not as partisans.[2]

To say that the leaders of these movements have not yet left a partisan field is not to criticize them. Good leadership is all about recognizing just how far you can move your followers. And the truth is that we, the followers, are as trapped by the partisanship of today as are our leaders. We increasingly live within partisan bubbles. We reject those who question those bubbles. Patriotism has morphed into love of party, not country. "Traitor" predicates not of those who violate the Constitution (and there are plenty of those), but of those who question their tribe's partisan truths.

So I get the urge to partisanship. But unless we can get beyond it, no constitutional change will be possible. And then the lesson our grandkids will be taught is not just that we lived in a constitutional moment, but that we failed in our constitutional moment. That we failed to rise above the pettiest within us; that we failed to inspire leaders to inspire us to be citizens.

Don't get me wrong: To argue against partisanship in constitutional law is not to argue against partisanship. Political parties are an important part of a healthy democracy. On this issue, George Washington was wrong. And I don't think the differences between the two major parties are tiny or insignificant. To the contrary, they are real and substantial, and depending upon your values, inescapable. To argue against partisanship is not to imagine a grand kumbaya, or to insist that it turns out, we all agree.

But it is to say that these differences notwithstanding, we must find a way to craft an understanding beyond partisanship. Or maybe, before partisanship. Before we were Republicans, or before we were Democrats, or before we were committed

Independents, we were citizens. And it is as citizens that we must approach the question of whether there are parts of our Constitution that must change.

The Movement on the Left

The movement on the Left ties to the subject of this book—the corrupting influence of money in politics. It gets born in its modern form with a gift from the Supreme Court: *Citizens United v. FEC* (2010).

Citizens United was hated at its birth, by citizens from across the political spectrum. The *Washington Post* reported opposition to the decision ranging from 76 percent among Republicans to 85 percent among Democrats.[3] But the movement against Citizens United has been distinctly from the Left. Groups such as People for the American Way and MoveToAmend.org started pushing hard to build support for a constitutional amendment to overturn the decision. Very quickly, an umbrella group called United4ThePeople.org formed to coordinate these reform efforts. United4thePeople.org now lists more than 155 cooperating organizations. At a Senate Hearing about *Citizens United* in 2012, it delivered almost 2 million signatures of Americans demanding constitutional reform.

But though many in this movement think of themselves as radical, the constitutional strategy of the anti–*Citizens United* movement is actually quite conservative.

The Constitution outlines two modes by which our fundamental law might be changed. One is for Congress to propose amendments to the Constitution; the other is for the states to call on Congress to convene a "Convention for proposing Amendments" to the Constitution.

In the 226 years since the Constitution was adopted, we have only ever ratified an amendment proposed in the first way—by Congress. Thus the conservative path to amending the Constitution: getting Congress to do the proposing, which the states then ratify.

And this is the path that practically all of the organizations within this movement have followed as well. [There is just one critical exception—Wolf-PAC—which I will discuss (and effusively praise) below.] Thousands of volunteers from scores of affiliated groups have worked incredibly hard to get resolutions passed—by state legislatures, by local governments, by civic organizations across the country—that call on Congress to propose an amendment to deal with the corruption induced by *Citizens United*.

What precisely that amendment should say is a source of controversy. Some want an amendment to declare that corporations are not persons, and that money is not speech. Others want an amendment simply to secure to Congress the power that *Citizens United* seemed to deny. But regardless of the details—a question we'll return to later—the strategy is to rely upon Congress. The strategy is to hope that Congress will save us—at least if we demand it loudly and powerfully and politely enough.

But the sense of "demand" here is very specific. If every state legislature passed a resolution "demanding" that Congress propose an amendment, legally speaking, that would do nothing. Those resolutions would impose absolutely no legal obligation on Congress. Resolutions by the states are requests. They are the equivalent of a fancy "please, sir." But "please" has no legal force. Congress is free to ignore both "please" and "thank you."

That's not to say that a resolution strategy could never make sense for constitutional reformers. State resolutions are a valuable strategy to get Congress to do something that it is able to do or that it wants to do. But for the strategy to make sense, we have to have a reason to believe that Congress can actually act upon it. We have to believe, in other words, that the institution of Congress is capable of taking such a step—both politically, and institutionally.

Yet this is precisely what no reasonable person could possibly believe. There is exactly zero chance that the United States Congress is going to pass by a two-thirds vote an amendment to effectively reverse *Citizens United*.

Zero.

And this is absolutely clear for one obvious and undeniable reason: The Democrats have rendered this issue essentially partisan, and unless we invade Canada (and thereby gain a bunch more liberals in the Senate), there is zero chance that the Democrats will hold sufficient super-majorities in both Houses of Congress to propose an amendment anytime soon.

The Democrats have made this partisan in a thousand ways, but no example is clearer than what Harry Reid, the former Majority Leader of the Senate, did in the fall of 2014. Eight weeks before the election, Reid brought to the floor of the Senate a resolution for an amendment to overturn *Citizens United*. That particular proposal is flawed in a hundred ways—which is why even the liberal ACLU opposes it. But even if it were perfect, Reid's action is just the latest in a series guaranteed to assure that no Republican in Washington will ever support such an amendment. Reid's purpose was not to pass the amendment. His purpose was to embarrass the Republicans, and thereby raise desperately needed campaign funds for the Democrats. *Citizens United* is catnip to the Democratic base. And so millions flowed to Democratic candidates because of a resolution designed to end the influence of money in politics. (Talk about embracing the irony.)

I don't blame Harry Reid. Neither do I blame a lion for slaughtering a gazelle. It is in the nature of DC politics that every issue must be framed in a partisan way. And so obviously a strategy that depends upon DC is a strategy that depends upon a partisan spin.

But as I've said, constitutional reform cannot survive the partisan spin. And thus in its current form, this movement from the Left is ultimately sterile. It has enormous energy and endless good faith; it has called into life a kind of progressive activism that has

been absent from the Left for too much of the past century—an activism focused on an equality of citizens as well as an equality of persons.

Yet as it is currently constituted, it is a movement that will produce no real constitutional change. Scores of reform organizations will be funded by the passion that this movement has engendered. E-mail lists will grow. But not a single comma of the Constitution will be altered.

The Movement on the Right

The constitutional movement on the Right is different. Its focus is different. And more important, its method is very different.

Its focus is more substance, and less process. The constitutional activists on the Right believe the federal government regulates too much. They believe it taxes too much. They believe it spends too much. These beliefs have led some on the Right to push for a balanced budget amendment, some to push to shift regulatory power from DC to the states, and some to give back to the states (either the state legislatures or the state governors) the power to select senators in the United States Senate.

But the Right is not pushing these proposals through the same process embraced by the Left. They've tried—for many years—to get Congress to propose their most fundamental change—a balanced budget amendment. They've learned that Congress is not going to pass any such thing.

So the Right has embraced the Framers' second mode by which amendments to the Constitution can be proposed to the states for ratification—"a convention." If thirty-four states make applications demanding that Congress call a convention, then by (constitutional) law, Congress is required to call a convention.

It has never happened before (though we've come close), and the rules for how it would happen in the future are notoriously vague (like much within the Constitution), but many on the Right believe that a convention is the best chance they have to get their ideas before the states, and to give the states the chance (finally) to vote them up or vote them down.

Thus the Right is pushing for conservative constitutional reform through historically innovative constitutional means. And thus the oddness of our age: The (substantive) liberals are the (procedural) conservatives; and the (substantive) conservatives, the (procedural) liberals.

But so what's the problem, then, with conservatives being innovative? And why is a convention a "dead end"?

Depending on how you count, there are between twenty and thirty active and recent resolutions by state legislatures calling on Congress to call an Article V convention. Almost all of those would limit the convention to considering topics pushed from the Right. If you talk to the leaders of these conservative movements, they're quite

confident that within a year or two at the most, they'll have thirty-four states in their column. And then they'll start pressing Congress to respond to that call, by convening a convention limited to the issues that were identified by those thirty-four states.

Thus will the Right win the battle. Thus will they get their convention. And thus will we all lose the war.

For if the Right succeeds in getting Congress to call for an Article V convention limited to issues that the Right cares about alone, that will be the biggest fund-raising gift to the Democratic Party since the Iraq War.

Indeed, you can almost see the finance chairmen of the Democratic Party licking their collective chops. "The Tea Party Convention" will give FUD a new meaning. Thousands will be rallied to raise the money needed to "stop this assault on our Constitution." Women will be told they're going to lose the rights that Roe v. Wade secured to them. Gays will be told that the equal right to marry will be abolished. The right to bear arms will become an obligation to bear arms. Unions will be deemed unconstitutional.

The fear mongering will be vast—and absurd. False and absurd. As I'll explain below, there's exactly zero chance that any amendment would ever be ratified that is not squarely in the center of American political thought—and obviously, none of those hypothetical amendments are.

But who could blame the fund-raisers for doing their job well? If it were the other way around—if there were a convention called for liberal purposes, you can be sure the same game would be played by the other side. And anyway, the fund-raisers would be quite right to reason that since there is zero chance of passing any amendment coming out of a partisan convention, there's little harm in milking the opportunity for all the money it will yield.

As a Democrat, I get this. Integrity has never been what the "i" in politics has stood for.

But as an American who believes that we need a way to address our fundamental problems, this all has the feelings of a tragedy. We are in the middle of an incredibly important constitutional moment. There is an urgency from both the Left and the Right to deliberate at least about how our Constitution could be improved. But the strategy of the Left is stillborn, and the strategy of the Right is self-defeating. Neither side will get what they want—which will make the defenders of the status quo quite happy.

What's needed is a way to bridge the gap between these two movements. The Left has got to move beyond its Oliver Twist–like "please, sir, more" strategy. It's got to embrace the only mechanism that has a chance to evade the control of Washington—a convention.

But the Right has got to lighten up on its restrictions for the scope of a convention. It needs to at least tolerate a convention—or a series of conventions—where ideas from the Left can be addressed as well.

If that's going to happen, the Right and the Left both need a good reason not to fear—each other, and the convention.

We need, in other words, a conception of the convention that no one has any reason to fear, and that no one can credibly say has been hijacked for the partisan views of any one side.

To get such a creature, we need to step back and understand a bit more the nature of this thing—"a convention." We need to rescue this most critical clause of our Constitution from the confusions imposed upon it by generations of ignorance (or worse).

"A Convention"

After the Revolutionary War, America formed itself into a nation under a Constitution. That Constitution is not the one that governs us today. The "Articles of Confederation" purported to be "perpetual." They were not. They were also much stricter about modifications than the ones that govern us today—they required that any amendment be unanimous:

> And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

But that's not how the Articles of Confederation were, in fact, amended. In 1787, delegates from twelve states met in Philadelphia (Rhode Island stayed home). They drafted our Constitution. They then proposed that Congress send the draft to state conventions to be ratified—not, as the Articles of Confederation required, "state legislatures." And they stated, in the Constitution itself, that it would be "sufficient for the Establishment" of the Constitution that nine state conventions ratify it.

Even for lawyers, this is pretty clear: "Conventions" are not "legislatures"; "nine" is not "thirteen."

Thus the "convention" that gave us our Constitution contradicted the plain terms of the Constitution it was purporting to amend. The Constitution (of 1787) was thus adopted by violating the Constitution (of 1781).

These facts are not in controversy. How they should be interpreted is.

Some say there was nothing wrong with what our Framers did, since their "convention" was a "constitutional convention," which, as we know from constitutional theory, has the power to alter or abolish any Constitution at will. This was the theory of many about constitutions at the framing. Remember the words of the Declaration of Independence, announcing to the world "self-evident" "truths":

> that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it.

The Framers, under this theory, were actually being quite restrained. They had effectively abolished the old Constitution, but they sought ratification for the new from the people (represented in conventions) directly.

Others are less sanguine about the history of the 1787 convention. In their view, what this history proves is the danger of "a convention." The 1787 convention was conceived, the argument goes, within certain limits. The delegates to that convention exceeded those limits. In the language of this field, the 1787 convention thus "ran away." And this single precedent shows us exactly why we should fight like hell today, these skeptics insist, to avoid another "convention." For it, too, they warn, could "run away." And before you know it, we'd have the constitution of Soviet Russia. (The sounds like hyperbole, I understand, but in fact, it is precisely the argument advanced by the John Birch Society.[4])

Endless ink has been spilled by academics and activists arguing over what the 1787 convention was. Was it a runaway convention? Or was it a constitutional convention? Did it have the authority it exercised? Or did it exceed its authority?

But here's the critical bit that these arguments miss: The convention referred to in Article V of our Constitution has nothing to do with the convention of 1787. Whatever that convention was, an Article V convention is not that.

It doesn't take a law degree to see this. Nor does it require a PhD in history. This point is obvious to anyone who can read English. The only puzzle is why so many have fought this conclusion for so long.

In the language of the Framers, a "convention" was "a meeting, an act of coming together, used to refer to all sorts of assemblies, especially formal assemblies, convened for deliberation on important matters, whether ecclesiastical, political, or social."[5] These "meetings" were many—there are "records of about twenty conventions among colonies before Independence in 1776 and of eleven additional ones among states through 1787"[6]—and could have different purposes. Those purposes set the scope of the meeting's power. And while any particular convention might try to grab power beyond its scope, such power grabs fail.

For example, we all understand what a convention of the Democratic Party is. That means as well that we all understand what it is not. A Democratic convention has the power to adopt a platform for the Democratic Party. It obviously has no power to adopt a platform for the Republican Party. Sure, the convention might "run away." After completing its work on its own platform, it might well decide to draft one for the Republicans, too. And it might even adopt that Republican platform—as the platform of the Republican Party—in a final vote of the convention. But I doubt that anyone—certainly no Republican—has any fear about this possibility coming to fruition. Or if it did, any fear about its having any effect. A Democratic convention is for Democrats. In its very conception, that restricts the scope of its (increasingly modest) power.

The same is true about the "convention" spoken of in our Constitution.

Our Constitution sets out the power to convene a convention in Article V. Here is what it says:

> 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.… [7]

Notice first the words that are not in that text. Congress is not given the power to convene "a constitutional convention," or a "plenipotentiary convention."[8] It is given the power to convene "a Convention for proposing Amendments." This is a proposing convention, not a constitutional convention.[9] And to make it crystal clear, Article V goes on to say "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." Which means, by implication, that they are not valid for any intent or purpose until they are so ratified. The product of a convention—if indeed it has any product—is a set of proposed amendments to the Constitution. It is not an amended Constitution. The products are then to be sent to the states for ratification. Only if three fourths of the states—thirty-eight—ratify those proposals will they have any effect on the Constitution.

If the English language has any meaning, then the convention spoken of in Article V has no power to change the Constitution. Its only power would be to propose changes to the Constitution. It likewise would have no power to change the mode by which amendments to the Constitution are ratified, since the mode by which amendments are ratified is itself part of the Constitution. All the convention of Article V can do is to give to the states proposals which the states then have the power to approve—or not. It is just a different path by which the states can be given a chance to change the structure of our Constitution.

But if this is all the convention can do, why is it there? What purpose did it have? Why not just leave the amending process to Congress, rather than this elaborate (and underspecified) "convention"?

That indeed was the original plan. As the Constitution approached its final draft, the amending clause within that draft gave Congress the exclusive power to propose amendments. But on September 15, George Mason of Virginia rose to a raise a pretty obvious question: What if Congress is the problem? As he put it: "No amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive."[10]

Had The Simpsons been a part of late-eighteen-century American culture, we can imagine someone sputtering "D'oh!" at this point. Mason's objection led the convention of 1787 to add "a convention" to the Constitution's amending clause. If Congress was the problem, there would be a way of amending the Constitution that Congress couldn't control—the convention. No doubt, they were hopeful that such a remedy would never be needed. But if it were needed, the Constitution now had this safety valve: If Congress was the problem, then state legislatures, and hence state legislators, were the solution. If Congress went nuts, if it failed to propose the kind of constitutional reforms that (at least the legislatures deemed) necessary, then the Framers gave state legislatures a way to step in.

And not a way, but an obligation. State legislators have a duty under our Constitution to step up, and to act—at least if, as Mason put it, you believe that Congress has "abuse[d] their power, and refuse[s] their consent on that very account."[11] No other regular body of government has this power. Only state legislatures can force an amendment that Congress doesn't support onto the constitutional stage. And so if such an amendment is necessary, it is state legislators who must act to make it happen. It is their duty. It is their responsibility. They are the safety net for our constitutional tradition.

Okay, so the Constitution has a safety valve. If Congress goes nuts, the states are to step up. Through the procedure outlined in Article V, they are to make applications to Congress to call a convention. By the logic of "a convention," and by historical practice of hundreds of conventions, both at the founding, and at the state level throughout our history, we know that those applications can specify the convention's purpose, or the topics the convention can consider. That's all an Article V convention can do—to consider proposals within the scope of those topics, and recommend to the states specific amendments within that scope that the states might then ratify.

"But what if," the skeptic insists, "the convention exceeds those limits? What if it acted beyond the scope of its mandate? And indeed, what if it didn't get this memo, and acted as if it were a constitutional convention? What if, these promises grounded in reason notwithstanding, it exercised constitutive power?"

The Risk in the "Runaway"

Here is the answer: If the convention clause of Article V is a safety valve, then there is a safety valve within this safety valve. When you do the math, an obvious safety valve. But we need to work through some alternatives before we will see the protective potential of this safety valve.

Safety Valve 1: Limits on the Convention

There are proponents of a convention who argue that there's nothing to fear, because Congress can constrain the convention. Congress can specify precisely the topics that the convention can consider. And any effort to reach beyond what Congress specifies would thus be illegitimate.

There's something to this argument—something that's true, conceptually, legally, and practically.

Conceptually, because again, the very idea of "a convention" is "a meeting, an act of coming together, used to refer to all sorts of assemblies, especially formal assemblies, convened for deliberation on important matters, whether ecclesiastical, political, or social"[12]—so that purpose certainly can constrain what the convention can do. There is no such thing as a convention *unrelated* to a particular purpose. There are only and always bodies convened to serve some purpose, and then to terminate. An Article V convention *could be* no different.

Legally, if you look at the long history of state conventions—conventions called to modify or rewrite state constitutions—all of those conventions were limited in precisely this sense. Those limits were generally effective. As a recent analysis of state conventions over the past fifty years concludes:

> The state conventions show (as does the 1787 national convention) that a runaway convention is not impossible. But a runaway convention in most cases seems to produce either results that people like anyway (as with the 1787 national convention and the 1973 Rhode Island convention) or fails to result in constitutional change (as with the 1975 Arkansas convention, the 1963–68 Rhode Island convention, and the 1967 New York convention).[13]

Limits were respected. The conventions proved trustworthy in carrying out their charge, and only their charge. None of them "ran away" in the fundamental sense feared by convention opponents.

"But what about our founding convention? The one that gave us our Constitution? Didn't that convention 'run away'?"

In the words of Ronald Reagan, "There you go again.…" As I've already argued, the convention that gave us our Constitution was not convened pursuant to a clause that gave Congress the power to "call a Convention to propose Amendments." *It was not called pursuant to any power in the Articles of Confederation at all.* It was a convention exercising a latent power then generally acknowledged to be part of any free government—the power of the people to summon representatives to "alter or abolish" a Constitution. Whether or not that power continues to exist in America today—and I doubt that it does—that is *not* what a proposing convention under Article V could do.

"Yes, but the point is that Congress specified the scope for that convention, and the convention ignored that specification. Isn't that a precedent for the next federal convention, constitutional or not, ignoring Congress again?"

It isn't a *precedent* unless the convention you're talking about is the same sort of convention—a constitutional convention. And the reason is made clear by a pretty obscure bit of the history that gave rise to our own constitutional convention, the convention of 1787.

At the time our Framers began thinking about forming a new government, it was clear to almost all of them that the existing government had failed. Congress couldn't pay its bills because it had no power to tax. Congress could barely even meet, because it couldn't get a quorum to show up. The ship of state was sinking. And the leaders who gave us our Constitution stepped up to do something to save it.

What they did was to begin to organize the meeting that would eventually produce our Constitution. Virginia and New Jersey started the process.[14] Fairly quickly, a critical number of leaders agreed in principle with the idea of gathering to map out what would be next.

They did all this prearranging without the authority of Congress. They did it as citizens beginning to think through precisely how one exercised the "unalienable right" to "alter or abolish" their government.

When Congress got word of this effort, it moved quickly to respond. As Natelson describes:

> After most of the states already had accepted the invitation to participate, Congress passed a weak resolution expressing the "opinion" that the convention be limited to amending the Articles. All but two states disregarded this "opinion," but many writers have confused it with the convention call.[15]

Congress wasn't acting to give the group forming the meeting any authority it didn't already have. Its purpose was to avoid its own irrelevance. Congress could see that men convinced of its own impotence were mobilizing to think about what's next. It didn't want that conversation to happen independently of it. So it quickly passed a resolution, effectively endorsing the meeting, but defining it in a way that would limit its potential or significance.

How exactly should we think about that resolution?

Well, consider a hypothetical but historically grounded parallel. In 1912, there was a deep rift in the Republican Party between supporters of Teddy Roosevelt and supporters of the incumbent, William Howard Taft. When things broke down at the Republican Convention, Roosevelt's supporters left to hold a meeting to discuss whether they should leave the party and form a party of their own. They did eventually leave. A month later, they met as the "Bull Moose Party." But despite their passion, their move split the Republicans, and led to the election of neither Roosevelt nor Taft, but instead, Woodrow Wilson.

Now imagine just as the Roosevelt supporters were organizing to leave and to meet to discuss whether to form a new party, the Republican leadership passed a resolution that said:

> We approve of the decision by the supporters of Roosevelt to meet to discuss their future within the party, and we endorse and support that conversation. But

> we forbid those participating from discussing the idea of leaving the Republican Party. They are free to propose changes to our platform; they are not free to form a new party.

What would the significance of that resolution have been? Would it have bound TR's supporters? Would it be right to say that they had "ignored their instructions" when they subsequently created the Bull Moose Party?

The answer to those questions depends upon the loyalty one swears by being a member of a political party. I would think it is obvious that one is free at any point to leave a party if one disagrees with it. And if one is so free, then obviously the hypothetical resolution of the Republicans is irrelevant. The Republicans cannot bind members of the party to stay. So its resolution purporting to bind members of the party to stay is irrelevant. And if irrelevant, then it would be just wrong to say that the Republicans who formed the Bull Moose Party "acted outside the scope of their authority." They did not. They acted within their authority—to form whatever party they thought best.

The same analysis applies to the men who formed the convention that gave us the Constitution. If you believe, as they did, that it was an "unalienable right" of the people to "alter or abolish" their government, then they were free to meet to do that whenever they wished. Remember, this was a "right." It was a right they thought "unalienable." And if they had begun the process of meeting to discuss precisely how, Congress could no more bind them than the Republican Party could bind TR's supporters. The Congress of 1787 was free to jump on the bandwagon. But they had no right to steer. That right—that "unalienable right"—was the people's, and the leaders who crafted our Constitution were stepping up to help guide the People.

So the constitutional convention that gave us our Constitution did not "run away" from anything. Or more precisely, it did not "run away" from any *legitimate* restriction that had been imposed upon it. Congress's wish for its own self-preservation was just that—a wish. Good for us that its wish was ignored.

The framing convention is thus again not a precedent for a proposing convention under Article V. Instead, I submit, the precedent for a proposing convention is all the state conventions that have been convened pursuant to their own constitutional provisions.

Because again: A proposing convention draws its authority from Article V. The framing convention drew its authority from the Creator, who Jefferson said, "endowed us with certain unalienable rights." The rules and structure of Article V constrain the proposing convention; only the Creator can constrain a constitutional convention. Under the rules and structure of Article V, Congress can specify the scope of the convention. If it does, the convention is bound to respect those limits, regardless of 1787.

This argument, however, excites opponents from the other direction. "Really? In setting the terms of an Article V convention, is there no limit on what Congress can do?

There *is* a limit to what Congress can do. Congress's power under Article V is specified—it has the power to "call a Convention" and the power to then specify how any amendments proposed by that convention get ratified. And pursuant to what's called the "Necessary and Proper Clause," Congress also has the power to "make all Laws which shall be necessary and proper for carrying into Execution… all other Powers vested by this Constitution"—including the powers of Article V.

But that power is limited to laws "which shall be necessary and proper." And what that should mean is that Congress is not free to do whatever it wants, but instead is free to do only what is "proper." It would be "proper" for Congress to restrict the scope of a convention to the issues identified by the states calling for a convention. It would not be proper for Congress to ignore those restrictions, or to add restrictions, or topics, that are outside the scope of the applications. Congress is to act like a good lawyer, carrying into effect the will of its client—the Constitution, and the state legislatures. The whole purpose of this clause was to remove Congress from the driver's seat.

So Congress is empowered, but its power is limited. It can enact limits on the scope of the convention, but those limits must be "proper" in light of what the state legislatures have done. If they are proper, then those limits must be respected by the convention. The convention has no power to exceed proper limits imposed on it by Congress.

In this sense, then, these "limits" are a first safety valve on the safety valve of the proposing convention clause.

Safety Valve 2: The Courts

But now every lawyer reading what I've said so far is chafing at the bit. "Sure," they want to scream, "the Constitution says that Congress can only impose 'proper' limits. And sure, in theory, those limits must be respected. But what happens if those limits are ignored? [Lawyers get emotional about this sort of thing.] Who's going to stop Congress from imposing 'improper' limits? And who's going to discipline a convention to stick to the script?"

The answer, unfortunately, is no one. Though the Supreme Court is increasingly unpredictable about this—see, e.g., Bush v. Gore (2001)—in my view, there is exactly zero chance the Court would step in to invalidate a limit imposed by Congress and zero chance that the Court would step in to discipline a convention that exceeded proper limits. Indeed, the Supreme Court has almost said as much, as it has repeatedly insisted that the amending process is a "political question," meaning that it, the Court, will stay out of it.[16] So as much I regret a fact that makes my argument harder to make, I believe it is true. We can't count on the Supreme Court to save us, or to save the convention. Whatever is right or wrong, right and wrong won't be judicially determined or enforced.

But so what?

Imagine Congress imposes an improper restriction on a convention. No one will force the convention to respect it. If thirty-four states had passed applications calling on

Congress to convene an Article V convention "to consider proposals to reduce the power of the federal government," it would be completely inappropriate for Congress to forbid that convention to consider "proposals to reduce the power of the federal government." A convention would therefore be free to consider such proposals, Congress's instruction notwithstanding. And whether it passed any proposal to reduce the power of the federal government or not, it would, in my view, be perfectly legitimate for the convention to consider them.

But this fact seriously undermines the significance of Safety Valve 1. Because if Congress could get away with exceeding its power, the convention could get away with exceeding its power, too. For example, if Congress had properly restricted the convention to three issues only, the convention could ignore that restriction, and consider five issues instead. The "limits" would be worth no more than the paper they were printed on. And so again, those fearful of the convention can fairly ask, "What's to stop the convention from doing something insane? What's the guarantee it won't wreck the Constitution?

Safety Valve 3: The Safety Valve Itself

So here's where we are:

The power to demand a convention was intended by the Framers as a safety value—a way around a corrupted Congress; a way to fix what Congress itself wouldn't.

But that safety valve is uncertain: What's to guarantee it won't blow up? How can we protect the Constitution from crazy changes? What's to assure some minimal stability in the face of a "runaway" convention?

The answers to these questions depend first on being clear about just what's at stake. If—and there really is *no* "if" about it—"a convention" called pursuant to Article V is not a "constitutional convention," then if it "runs away," *the most it can do* is propose some crazy change. It can't change the Constitution itself; it can't change the way the Constitution gets amended. All it can do is to put on the table something that it wasn't supposed to address. Or put differently, the only risk a so-called runaway creates is the risk of a proposal to amend the Constitution that obviously—given the mix of interests in the United States—is insane.

To minimize this risk, the safety valve itself needs a safety valve. But so far, we've not found one that's slam-dunk certain. Congress can certainly limit the scope of a convention—either properly or not. That should be a strong guarantee, since practically every state convention called pursuant to a state constitution in the past fifty years has obeyed its limits.[17] But as I've said, I don't believe the Courts will second-guess Congress, and neither do I believe that any Court is going to regulate a convention. So in principle, there's a right and a wrong here. But in practice, there's no cop on the beat who will enforce what's right by stopping what's wrong.

Which leaves us in need of an ultimate safety valve: What can guarantee, or come as close to guaranteeing, that craziness won't happen?

Leave the Lawyers, Return to Real Politics

To answer this question, we need to approach it in the right way. This debate has been too much dominated by lawyers and theoreticians. It needs the splash of reality—of political reality, a practical political understanding of what the risks here actually are.[18]

For let's first remember the next bit of Article V—after it establishes the ability of two thirds of the state legislatures to call on Congress to convene "a convention for proposing Amendments." After defining how amendments are to be proposed, the Constitution then describes specifically how they are to be adopted. As Article V states:

> [The proposals] 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;

Let's make this very simple: The only way a proposed amendment gets to be part of the Constitution is if three fourths of the states—either legislatures or state conventions, as Congress may choose—ratify it.[19]

Three fourths. Or thirty-eight states. To become part of our Constitution, an amendment needs the affirmative vote of thirty-eight states—which means that the vote of one house in thirteen states could block it.

So this becomes the crucial safety valve question: Is there any "crazy amendment"—an amendment that one side views as fundamentally repugnant to their values or beliefs—that could be ratified under our Constitution, if the vote of one house in thirteen states is enough to block it?

The answer to that question depends upon how America is divided—specifically, which political parties control which state governments, and how that division relates to the magic number 13.

As of this writing, there are thirty-one double-red states in America—meaning states where the Republican Party controls both houses in the state legislature.

And as of this writing, there are eleven double-blue states in America—meaning states where the Democratic Party controls both houses in the state legislatures.

And as of this writing, there are eight states with one house controlled by each party.

Adding these three categories of states together, this means that there are thirty-nine potential Republican vetoes on any proposed amendment to the Constitution (since an amendment can be stopped in a state with the vote of one house only). There are nineteen potential Democratic vetoes on any amendment to the Constitution.

And again all it takes to stop an amendment is the negative vote of thirteen houses.

So the precise political question becomes whether there is any amendment that would outrage Republicans that could not muster the opposition of thirteen houses in the thirty-nine Republican houses.

And likewise, the precise political question is whether there is any amendment that would outrage Democrats that could not muster the opposition of thirteen of nineteen Democratic houses.

Let's think about this practically: Republicans (and many Democrats but let's make this as hard for my argument as it can be) support the Second Amendment. Imagine a runaway convention that proposed abolishing the Second Amendment. Is it even remotely possible that thirteen houses in the thirty-nine Republican houses would not vote to block that repeal? Is it even conceivable, *politically conceivable*, that even if you got all eleven double-blue states to vote for the repeal of the Second Amendment, you'd also get *twenty-seven GOP states*—whether from the thirty-one double-red, or the remaining eight where the GOP controls at least one house?

Or think about it the other way round. Democrats (and many Republicans, but again, let's make this as hard for my argument as we can) believe in marriage equality. They believe the Constitution should ban discrimination on the basis of sexual orientation. Imagine a runaway convention proposed an amendment to forbid gay marriage, and to forbid the Constitution protecting the GLBT community against discrimination. Is it even remotely possible that thirteen of the nineteen Democratic houses would not vote to block that change?

The answer to these questions should be obvious. There is no chance that thirty-eight states would ratify what I've called a "crazy" amendment. Because it is precisely when an amendment becomes "crazy"—meaning, precisely when an amendment triggers some strong partisan reaction—that it becomes impossible for such an amendment to be ratified. To be "crazy" means to be not long for the amending world.

The same argument applies for a proposal that's not crazy, but just unauthorized.

Imagine thirty-four states applied to Congress to call a convention to consider a balanced budget amendment. Imagine Congress called such a convention, "limited to considering proposals for amending the Constitution to require a balanced budget." And imagine finally, a convention were held, but that the convention exceeded its mandate, and proposed an amendment to abolish the Electoral College as well. That proposal isn't crazy. Indeed, it might even make good sense. So what would happen to that proposed amendment?

Well, first, Congress might decide not to send the amendment to the states to be ratified. Following the applications, Congress would have properly restricted the scope of the convention. If the convention exceeded its authority, Congress could well decide not to send the ultra vires amendment to the states. The proposal would get lots of attention. It might even persuade Congress to propose such an amendment itself. But

under this scenario, it would die in Congress, because it was produced beyond the scope of the convention's power.

That outcome assumes a Congress with a backbone. Imagine we didn't have such a Congress. (It's possible.) Imagine instead that Congress felt bound to send to the states whatever amendment the convention proposed. So that indeed Congress did permit the states to consider the amendment abolishing the Electoral College.
But so how would such an amendment fare in the states? Because, of course, the states would have a very strong incentive to reject that amendment, solely because it was passed in contravention to the states' own directives. Or at least, contrary to the directive of thirty-four states. At least among those thirty-four, there would be a very strong reason for at least thirteen to discipline the convention for violating its orders. Without such a discipline, the convention becomes less reliable. With such a discipline, the convention becomes a more reliably usable device for the states to put on the constitutional table proposals for constitutional reform.

This alone should be incentive to enough for states to block the ultra vires amendment.

But imagine it isn't. Imagine the limits of the convention are ignored, and an amendment beyond those limits is proposed; imagine Congress sends that amendment to the states; and imagine thirteen states don't block it. Instead, imagine thirty-eight states ratify that amendment, its shameful and dishonorable birth notwithstanding.

Here then is the real question: *So what?* What would the real harm be, if an idea was good enough to earn ratification by thirty-eight states? We have a system where the states representing 5 percent of population have the ability to block constitutional change.[20] If that power notwithstanding, thirty-eight states expressed their desire for constitutional change, what *democratic reason* is there to resist it? Or put differently, in a democracy, what really is the harm when a supermajority ratifies a constitutional change, even if that constitutional change was born in sin?

In the end, this is the Framers' true safety valve. It isn't fancy. It doesn't require high theory. And it is built right into the Constitution's text.

The reason not to fear a runaway convention (meaning a convention that proposed amendments beyond its mandate, not a runaway in the sense of a convention that changed the rules, because that is not on the table) is not because we could stop a convention from running away. It is instead because it wouldn't matter if it did run away.
If a convention ran away, and proposed a series of crazy amendments, that would be a waste. But it wouldn't be a tragedy.

If a convention ran away, and proposed a sensible change, so sensible that thirty-eight states ratified it, the original sin notwithstanding, that would be a good thing. It would represent a consensus of political values practically never seen in American politics today.

The worst that could happen is that we ratify an amendment. What possible bad could come from that?

Risk

Every day, we take risks. World-changing (for us at least) risks. Rather than walk, we bundle our kids into a car and drive them to school. Or to get ice cream. When we do that, we expose them to a risk—the probability that we'll have an accident, and that our children will be killed. Nothing in the world could be worse for a parent. I know. I've seen it. Yet we take the risk that the worst possible thing will happen, to avoid the extra ten minutes it would take to walk.

That is a case of risk. I'm not saying the risk is worth it. Or that the risk is not worth it. My point in rehearsing what is familiar is that we don't—fortunately—live life the way a lawyer would recommend. We don't—fortunately—live life so as to eliminate all risk. The question we ask in life—in everyday life, every day of our lives—is not whether there's a risk. It's whether the risk outweighs the benefit. Or more dramatically, whether the risk outweighs the certain harm.

So imagine you're in a house. The fire alarm goes off. You determine the fire is in the kitchen—the room just below you. And you determine you could likely leave your room, run down the hall, and escape through the back stairs.

In that calculation, certainly, one could point out risks. It's certainly possible that the floor of the hall will collapse because the fire has spread to the beams. It's certainly possible that smoke will have escaped into the hall, making it impossible for you to breathe. And it's certainly possible that as you race down the back stairs, the fire in the kitchen will come through the wall and trap you. It's certainly possible, in other words, that your escape will fail.

But it takes a certain kind of craziness to leap from that possibility—that your escape might fail—to the conclusion that you should stay in your room. Because whether or not you are harmed while trying to escape, you are certainly going to be harmed if you stay in the room above a raging fire. There is no risk-free option in this hypothetical. Either way, you face risks.

The same in life: Doing anything—including doing nothing—has a risk. And the calculation we all make all the time weighs the risk of doing nothing against the risk of doing something. Or again, all the time, we recognize that even if there is a risk from doing something, that could easily be outweighed by the risk from doing nothing.

All this applies in an obvious way to the debate about whether the state legislatures should petition Congress to call "a convention."

The single argument most frequently made by state legislators opposing an Article V convention is the risk that "the convention will run away."

I've spent many pages trying to show that risk is small. But let's assume, contrary to my genuine belief, that small is not zero. Let's assume there's a risk that if we do something, something bad might happen.

What is the risk if we do nothing?

If you're drawn to the idea of a convention to allow the states to consider a balanced budget amendment, you have a clear sense of the risk if we do nothing. You think our nation is fiscally bankrupt, and you believe that there is nothing in politics today that can stop our slide to an even greater bankruptcy. And because you think about the costs of that bankruptcy for our kids, and for our economy, you believe those costs are high. Incredibly high. And so when a state legislator says she's doesn't want to take the "risk" of the Second Amendment being repealed, you need to say to her: What of the certainty of fiscal bankruptcy?

Or if you're drawn to the Article V convention because you believe the federal government has gotten too big, and has displaced self-government by the states in all those contexts in which that makes sense, then you also believe there's little in the current structure of federal government incentives to block this road to centralism. Neither Congress nor the president has enough incentive to disempower the federal government. The costs of that, you believe, are enormous. And so when a state legislator tells you he doesn't want to take the "risk" of the Second Amendment being repealed, you need to say to him: What about the certainty of all the other liberties that the federal government has or will take from us? You're worried about the one that seems to have an effective posse. What about the others without a posse that will certainly disappear as the federal government becomes more and more dominant?

Or if you're drawn to the Article V convention—as I am—because you believe our Congress has become fundamentally corrupted, not through bribery or criminality, but through a corruption of a system we use to fund campaigns; and if you believe—as I do—that that corruption has made governing impossible; that it has incentivized the business model of hate and polarization, and made it absolutely impossible for Congress to address any important issue sensibly—whether that is climate change, or Wall Street regulation, or health care, or the tax system, or food safety, or education, or the debt, or even copyright regulation—then the costs of this problem are, you believe with me, astronomical. If you believe, as I do, like this, the issue isn't the "risk" that something will go wrong. The issue is the certainty. And so when a state legislator tells you she doesn't want to take the "risk" of gay marriage being abolished, you need to say to her: What about the practical certainty that our government will fail? What about climate change? And health care? And unemployment? And inequality? What about all the issues our government is certainly incapable of addressing sensibly now, given the current system of corruption that is our political system?

The point in all three cases should be obvious, and we need to make it more strongly than we have: The question isn't, "What is the risk?" The question is, "What are the risks?" There may be a tiny risk—really tiny—of constitutional craziness. But against that tiny risk, again depending on your perspective, there is almost certainty of a calamity of much greater proportions.

And so to talk about the "risk" is not to justify doing nothing. To the contrary: For a state legislator to point to the risk as a reason to do nothing is like an ambulance driver who refuses to rescue a drowning child because she fears she "might" get in an car accident along the way. We don't call that "prudence." We call it cowardice. Talk of risk in this context is simply a way to obscure a more fundamental duty. Yes, there is a risk. But there is also a duty.

It is the duty of state legislators to step up and rescue this nation, if Congress itself has become the problem. That was the Framers' plan. Congress has become the problem. So it the duty of state legislators to step up to the constitutional obligation.

I get that this idea is unfamiliar to state legislators. I understand they like to think about local matters—water regulation, or how to get great schools in their state. But in the design of our Constitution, state legislators were given a critically fundamental duty: to be the ultimate safety value for a corrupted government. This is their job, even if this fact has become buried in 225 years of history.

To many, this is a scary thought. Congress is bad enough. We're supposed to rely on state legislators? Congressmen-wanna-be's?

But as I've watched states, and seen their governments up close, I've come to have enormous respect for state governments, at least in small(er) and less corrupted states. To watch the Delaware or Vermont legislature sit through committee meetings is an inspiration. To see the full 400 representatives in the New Hampshire legislature sit through debates, and deliberate about legislation, is to see what our forebears imagined representative democracy could be. The truth is, the vast majority of state legislators do what they do for the best possible reason. There's no K Street to cash out to. There's no limousine waiting to take them to work. They serve because they believe good government is needed. And indeed, if you compare the work they do to the "work" that Congress does, they are a credit to our Republic, at least as compared to an institution—Congress—that is essentially bankrupt.

I am genuinely glad that the Framers gave these citizens the obligation to backstop our democracy. Better them than unelected judges. But whether you like it or not—or more important, whether they like it or not—it is their job. The Framers chose them to rescue us from a corrupted and failed Congress.

That is where we are. They need to step up.
And if they don't step up, you need to hold them responsible. You need to say to each of them: If you don't get this, then study it. And if after you've studied it, you're still not ready to do the duty George Mason gave you, then step aside, and give your seat to someone who will. There is no more important obligation given to state legislators within our constitutional design. It's time they live up to it.

One Way Forward

Our government is broken. It may well take constitutional reform to fix it. This much many on the Right and many on the Left have come to believe. Let's call these two "many's" "constitutional reformers."

What constitutional reformers don't agree upon—yet, at least—is how. How are we going to achieve constitutional change?

Practically everyone in this movement believes that the essential step will involve thirty-eight states ratifying one or more amendments to the Constitution.

The only disagreement is how best to get those amendments before the states. How, in other words, to get those amendments "proposed." Should Congress do the proposing, or should a proposing convention?

I say "practically everyone" believes this, because not everyone does. Some in this movement want revolutionary reform. A new Constitution. Or a constitutional convention with constituent power. Or a process that at least invokes Jefferson's promise—that we retain the "unalienable right" to "alter or abolish" our Constitution—so that the process remains unconstrained by the eighteenth-century limits of Article V.

I am a constitutional reformer. I am not a revolutionary. I believe our existing Constitution gives us precisely the power to solve the problems that we face, precisely because it was intentionally crafted in light of the kinds of problems that we face.

The Proposing Convention Clause of Article V was written for us. And if we could get leaders from both sides to recognize the potential that Article V offers, we might actually get to a place where real change is possible.

Neither side can get there alone. A convention called for conservative causes alone will be a boon for liberal fund-raisers. A convention called for liberal causes alone would be a boon for conservative fund-raisers. Each side, in a sense, must take the other side hostage, if this process is to avoid the inevitable buzz saw of partisan politics.

So how could that be done? What would a plan look like? What precisely should state legislators be calling for, if they're to succeed in securing a convention with the political capacity to actually achieve something? What should the deal be? How could it be crafted?

The key is a simple compromise: We get to consider our proposals if you get to consider yours. A convention, that is, or a series of conventions, considering the core topics now being seriously pressed, covering both the Right and the Left politically.

Fair Deals

If you survey the range of plausible constitutional reforms now being pressed by activists on all sides, they fall, roughly, into three buckets: fiscal responsibility, electoral integrity, and states rights.

The fiscal responsibility proposals try to craft constitutional restrictions on a perceived inability of Congress to behave responsibly fiscally. These include balanced budget amendments, but could include ideas such as a line-item veto (giving the president the power to enforce fiscal discipline). Some even include monetary reform, to drive the Federal Reserve to behave (as they perceive it) more responsibly—or at least, not as "politicians."[21]

The electoral integrity proposals respond to the issues described in this book. The primary political motivator for these proposals is *Citizens United*. But they include all the ideas described here to assure equal citizens, by establishing a representative democracy.

States rights proposals strive to carve back on federal power. These include proposals for restricting the scope of federal regulatory power, by returning regulatory power to the states now held by the federal government.

While there is support for each of these topics from the Left and the Right, the first and the third are understood to come from the Right. The fiscal responsibility movement has had long ties to conservative Republicans; the (modern) states rights movement (as distinct from the racist states rights movement of the pre–civil rights era) is the creation of some of the founders of the Tea Party. The second, electoral integrity, comes primarily from the Left.

As I've said, any of the three on its own would excite fatal political opposition—fatal to the product of the convention, if not the convention itself. The solution to this obvious political problem is to bundle the topics, so a convention, or a series of conventions, could fairly cover the full range.

But the challenge for that idea is that practically none of the recent applications for a convention are tolerant of different topics. Practically all of them make the mistake of forcing the convention to consider just its topic—again ignoring the partisan danger a single-topic convention would raise.

This problem, however, could be cured. Each of the states that have made an application for a convention could cure this partisan problem by passing a resolution that fit their application to the idea of multi-topic convention, limited to these three domains. Not an unlimited convention, but one fitting within the scope of these three topics. Thus a state having already passed a call for a convention would pass another resolution, similar to this:

> RESOLVED, that any prior restriction notwithstanding, the State of _____ hereby reaffirms its application for a convention pursuant to Article V of the Constitution to address the topic of _____, as well as topics _____ and _____.

If there were thirty-four such resolutions ratified, then the convention that was thereby convened could consider these three topics, either in a single convention, or in a series convened one after the other.

If states began to do this, then no doubt, there would still be opposition to a proposing convention. But it would more difficult for that opposition to be purely partisan. And by shifting the debate from a partisan field, we would have a chance to address it with sense.

And then to this cross-partisan mix, I would add one more part: the people.

The convention is an ad-hoc legal body. Its only power is the power to recommend.

But still, it is unprecedented at the national level; it raises serious anxiety among sensible people. I've tried to allay that anxiety in the many pages of this incredibly long chapter. But fear doesn't yield to an argument. To battle fear, we must show, not tell.

So to this mix, I would add one more recommendation: a series of shadow conventions, each with advisory, not legal, authority, and each populated by a random and representative mix of ordinary Americans. In the language of political science, this would be a series of deliberative polls, drawn from America as a whole, spread out over a year at least, considering the topics that might populate a convention.

I realize that, to most, this idea of bringing "the people" into the mix won't allay any anxiety about a convention. An ad hoc political body is bad enough; but a body of ordinary Americans?

I understand the anxiety. But ironically enough, the fear about the ignorance of ordinary Americans is itself grounded in ignorance. We fear "the people" because we have not seen "the people" adequately informed and fairly represented. Activists and public opinion polls are scary to most, but each suffers from each of these flaws. The most prominent activists on both the Left and the Right don't represent America; and the flash survey asking difficult questions asks those questions of a public that hasn't had the opportunity to understand the issues, or discuss them.

Deliberative polls solve both problems.[22] The participants in a deliberative poll are randomly selected; the body they join is thus representative of the public. There are just as many moderates as in the public generally. There are just as many women, etc.

More important, once the body is selected, it meets together, and is given the material necessary to understand and deliberate about the questions at issue. These are not ignorant people; they are informed people. They are not the fringes of the people; they are representative of the public.

These deliberative polls would be conducted over an extended period. Their results would be published, as would their deliberations. And if they succeeded as they have in many radically different contexts over the past twenty years, they would provide one final safety valve on the convention process. For whatever else a convention does, it must ultimately produce results that America, properly informed and represented, could embrace. There is no other way to understand what that America believes. Nor is there a better way to capture and represent it.

Because in the end, this is my bias. I love the idea of a representative Congress. I've not known one in my lifetime. I am enormously impressed by the integrity of at least small state governments. Yet even they must too often yield to politics. I work among scholars and academics. But professors are the last people in the world I would turn to to govern.

None of these ordinary entities of authority inspire. But the people, properly constituted, would. Not always: Juries can make terrible mistakes. And not every deliberative poll produces a result that makes sense.

But if I had to trust one entity to at least frame the issues that should govern a convention, I would without doubt trust the wisdom that could be inspired from ordinary citizens, properly constituted. Since I am a tenured professor at an elite university, that may make me a traitor to my kind. But if education teaches us anything —even an "elite education"—it is the dangers of any system that trusts to an elite the power over the rest.

In a sense, that has always been reality. But history does not yet give us an example of elites doing good, even if elites do well. We should try something different. Not direct democracy—none of us has the time for that.23 But a system that at least admits the ideas of a reflective public, constituted in a way that guarantees representativeness, and practiced in a way that assures understanding. It is not rocket science. Or if it's made to seem like it is, someone is lying.

Notes

The published book uses link numbers for URLs. Those links are listed on the book's webpage, and are associated there with a perma.cc permanent link. In this excerpt, I have linked to the perma.cc link directly.

Chapter 13. A Proposing Convention

1. See Matt Skurnik, "Partisan Platforms for Constitutional Amendments," Feb. 15, 2015, available at link #297 (research conducted for this book).

2. From Professor Bruce Ackerman's perspective, this claim is wrong for the most important amendments. In the three critical moments of constitutional amendment—the founding, the Civil War, and the New Deal—partisanship certainly dominated the latter two. But I've excepted the Civil War from my claim, and while I understand the

sense in which the New Deal changes can be viewed as "constitutional," they are of a different (not lesser) kind from the changes reflected in the text of the document.

3. Dan Eggen, "Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing," Washington Post, Feb. 17, 2010, available at link #298.

4. "Article V Convention for a Balanced Budget," Mike Church, SiriusXM Patriot, Apr. 27, 2013, available at link #299, linking to Stalin.

5. Gordon S. Wood, The Creation of the American Republic, 310. See also Robert G. Natelson, "State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters," The Independence Institute, Apr. 6, 2014, 22, available at link #300. Judge Thomas E. Brennan has effectively surveyed the arguments in The Article V Amendatory Constitutional Convention: Keeping the Republic in the Twenty-First Century (Lanham, MD: Lexington Books, 2014).

6. Natelson, "A Guide," 22.

7. "Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. Const. Art V, sec. 1.

8. Natelson, "A Guide," 26. "A plenipotentiary convention is one with an unlimited mandate, or at least a mandate that is very broad. The term comes from international diplomatic practice. During the Founding Era, the in-state conventions that managed their governments in absence of the legislature enjoyed plenipotentiary authority. However, the Constitution does not authorize any plenipotentiary conventions."

9. Natelson, "A Guide," 28–29. "Unlike the Constitutional Convention, which was called by the states in their sovereign capacity, a convention for proposing amendments is called pursuant to the Constitution." Ibid., 25. "A proposing convention is charged only with proposing solutions to prescribed problems.

10. Russell L. Caplan, Constitutional Brinksmanship: Amending the Constitution by National Convention (New York: Oxford University Press, 1988), 27–29, quoting Max Farrand, ed., The Records of the Federal Convention of 1787, 4 vols. (New Haven, CT: Yale University Press, rev. ed., 1937), 1:22, 202–3, 629.

11. Ibid.

12. Wood, The Creation of the American Republic, 310.

13. Charles M. Roslof, "Should We Fear a 'Runaway Convention'? Lessons from State Constitutional Conventions," working paper (May 15, 2015), available at link #301.

14. Natelson, "A Guide," 27.

15. Ibid.

16. Coleman v. Miller, 307 U.S. 433 (1939).

17. Charles M. Roslof, "Should We Fear a 'Runaway Convention'? Lessons from State Constitutional Conventions," working paper (May 15, 2015), available at link #302.

18. This is the thrust of the truly great book by Paul J. Weber and Barbara A. Perry, Unfounded Fears: Myths and Realities of a Constitutional Convention, Contributions in Legal Studies, 55 (Santa Barbara, CA: Praeger, 1989). As they argue, we should approach the question of an Article V convention not as lawyers, but pragmatically. Weber and Perry's book radically changed how I thought about Article V. I am grateful for their work.

19. Akhil Amar has famously argued that, in fact, Americans could amend the Constitution outside of the Article V procedure—at least if one believes the original Constitution was properly ratified. See Akhil Reed Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V," Columbia Law Review 94 (1994): 457, 457. "We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V."

20. As little as 4 percent of the population "can veto amendments if scattered throughout enough states." Peter Suber, "Population Changes and Constitutional Amendments: Federalism Versus Democracy," Michigan Journal of Law Reform 20 (1987): 409, 412, available at link #303.

21. Stephen D. King, When the Money Runs Out (New Haven, CT: Yale University Press, Kindle Edition, 2013), Kindle Location 1347.

22. The device was developed by Stanford Professor James S. Fishkin. See, e.g., James S. Fishkin, The Voice of the People: Public Opinion and Democracy (New Haven, CT: Yale University Press, 1995). For a related device, see Mark E. Warren, "Two Trust-Based Uses of Minipublics in Democracy," paper prepared for the American Political Science Association Annual Meeting (Sept. 2009), available at link #304. Deliberative polls are not necessarily inconsistent with the reform pluralism described by Cain. As he describes, properly informed, they can balance the weaknesses of direct democracy. And unlike the more difficult contexts he considers—redistricting, for example—the level of expertise necessary for the questions framed here is appropriate. See Cain, Democracy More or Less, 81–85.

23. Or even the capacity, at least when not properly constituted. See Cain, Democracy More or Less, 195–97.