

STATE CALLS FOR AN ARTICLE FIVE
CONVENTION: MOBILIZATION AND
INTERPRETATION

*Gerard N. Magliocca**

The Congress . . . on the Application of the Legislatures of
two thirds of the several States, shall call a Convention for
proposing Amendments¹

Article V of the United States Constitution

The threat is stronger than the execution.²

Chess aphorism

Liberals and conservatives are sharply divided about how
the Constitution should be interpreted, but one thing they do
agree on is that pursuing their goals through the amendment
process set forth in Article Five would be a waste of time.³
The reasoning behind this conclusion is straightforward—it is
just too hard to get the required supermajorities.⁴ Congress

* Professor of Law, Indiana University – Indianapolis. Many thanks to the
Roosevelt Study Center in Middelburg, The Netherlands, which hosted me as I
worked on this paper during my sabbatical.

¹ U.S. CONST. art V.

² Several different chess grandmasters, ranging from Jose Raul Capablanca to
Aron Nimzowitsch, are given credit for this observation. See EDWARD WINTER,
CHESS FACTS AND FABLES (2005) (tracing the origin of this quote).

³ See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737,
1741 (2007) (“We are now in the midst of great debates about abortion and religion,
about federalism and the war powers of the presidency. But nobody expects a
constitutional amendment to resolve these issues”); Stephen B. Presser, *Some
Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell
Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 125 (2003)
(explaining that the goal of overturning *Roe v. Wade* should not be sought through
Article Five because it “is now almost impossible to pass Constitutional
Amendments”).

⁴ See U.S. CONST. art. V. (requiring two-thirds of each house of Congress and
three-quarters of the states to ratify a constitutional amendment); SANFORD

has not sent an amendment to the states since the 1970s, and that textual silence coincides with the emergence of increasingly complex (and, at times, incomprehensible) interpretive theories that try to justify desirable change without an amendment.⁵ Perhaps Article Five, like the Guarantee Clause, is now just one of the many federal constitutional clauses that are no longer operative.⁶

This Essay challenges the view that Article Five is not a practical device for changing constitutional law by focusing on the power of two-thirds of the state legislatures to summon a successor to the 1787 Philadelphia Convention.⁷ Achieving reform through a new convention is basically a fantasy

LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 160 (2006) (“Article V constitutes what may be the most important bars of our constitutional iron cage precisely because it works to make practically impossible needed changes in our polity.”); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 211 (2008) (“My own inclination is to regard the possibility of formal constitutional amendment as generally remote.”).

⁵ See, e.g., Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 619 (2008) (“Article V’s stringency is a potential explanation for creative judicial ‘interpretation’ of the text in a pinch, and an impetus for theories that that validate sources of supreme law not reflected in an Article V victory.”). *But see* LEVINSON, *supra* note 4, at 164 (“[T]he central thesis of this book is that there are limits to what even the most imaginative Congress, president, or Supreme Court can do to alleviate the deficiencies of the Constitution composed in 1787 and only infrequently formally amended thereafter.”). The last amendment sent to the states would have granted full voting rights to the District of Columbia. See George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 834–35 (1992) (“For purposes of representation in the Congress, election of the President and Vice-President, and article V of this Constitution, the District [of Columbia] . . . shall be treated as though it were a State.”). The current hibernation of Article Five is not unprecedented. For instance, there were no amendments proposed by Congress between 1804 (the Twelfth) and 1861 (a failed proposal to make slavery permanent), or between 1870 (the Fifteenth) and 1912 (the Sixteenth). See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 336–47, 354, 395–409 (2005) (describing these amendments).

⁶ See generally Gerard N. Magliocca, *Huey Long and the Guarantee Clause*, 83 TULANE L. REV. 1 (2009) (exploring the last time that the Guarantee Clause was taken seriously—in the 1930s).

⁷ This Essay draws on the excellent (though sparse) scholarship on this portion of Article Five. See RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* (1988); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995* (1996) (discussing attempts to use both procedures in Article Five); David Castro, Note, *A Constitutional Convention: Scouting Article Five’s Undiscovered Country*, 134 U. PA. L. REV. 939 (1986); James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POLY 1005 (2007); see also Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 733–61 (1993) (discussing the conventions option as part of a general discussion of Article Five).

because everybody (except for Sandy Levinson and a few others) is terrified by what may emerge.⁸ Nevertheless, the process of calling for such a conclave could be a powerful tool for mobilizing support and influencing the Justices, in part because the threat posed by a new convention is so unclear.⁹ While there is now keen scholarly interest in how social movements reshape the constitutional culture by changing views and putting different judges on the bench, not enough attention is given to how direct appeals to Article Five can influence Congress and the Court.¹⁰

Putting federal constitutional questions to the voters through state elections or referenda on a convention petition would enhance democratic participation in a positive fashion.¹¹ During the last few election cycles, both parties sought to energize supporters by placing enticing state law initiatives (*e.g.*, banning same-sex marriage, raising the minimum wage) on the ballot in key states.¹² This

8 See LEVINSON, *supra* note 4, at 9 (calling for a new constitutional convention to correct structural defects in the text); LARRY J. SABATO, A MORE PERFECT CONSTITUTION: WHY THE CONSTITUTION MUST BE REVISED 8–9 (2008) (making a similar proposal); see also CAPLAN, *supra* note 7, at viii (quoting Justice Brennan’s statement that “I honestly doubt there’s any prospect we want to go through the trauma of redoing the Constitution” and that it would be “the most awful thing in the world”).

9 One thing that makes a constitutional convention so frightening is that nobody has a clue how it would be organized. See AMAR, *supra* note 5, at 291 (setting forth the unanswered questions about this process). For instance, how would the delegates be chosen and what voting rules would prevail? Would Congress or the states have the final word on that question? Would judicial review apply to any of these decisions?

10 A significant exception, which this Essay spends time contemplating, is the movement for gender equality and the Equal Rights Amendment. See, *e.g.*, Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323 (2006); see also *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (explaining how the passage of the ERA by Congress supported the application of heightened scrutiny for gender discrimination).

11 Just as there are many open questions about how a new constitutional convention would operate, there are many puzzles about the legal effect of state action under Article Five. See Castro, *supra* note 7, at 940 (“The application of state legislatures for a constitutional convention raises a number of perplexing constitutional problems: . . . whether a state’s application may lapse; whether an application must be specific or general; whether state referendums [sic] in favor of convention requests are valid; whether a state can rescind its application.” (footnote omitted)). A state referendum on an Article Five issue is not binding and cannot impose any limits on the deliberations of state legislators, but it can be instructive in revealing public opinion. See generally Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislators in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000) (providing a fine overview of this question).

12 See Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L.

coordination between national campaigns and local elections might strike some as an abuse of federalism, but in an Article Five context it is a perfectly appropriate way of structuring a debate on vital issues. Due to the intense interest that surrounds many constitutional questions, both parties stand to reap significant benefits (depending on the state or question involved) in higher turnout by using the petition process. Similar decisions on a given issue across a number of states would also send a clear signal about the wishes of the electorate; a signal that history shows may force Congress's hand before a bandwagon for a new convention becomes irresistible.¹³ In other words, Article Five can generate more involvement by citizens in constitutional law, which is contrary to the usual reading of that text as the ultimate barrier to popular opinion.

Furthermore, a substantial number of state petitions for a new convention should—consistent with Supreme Court precedent—be considered persuasive authority in some constitutional cases.¹⁴ In a series of decisions involving the death penalty and the Due Process Clause, the Justices have looked to the actions of state legislatures for interpretive guidance on contemporary values.¹⁵ There is no reason why calls for a convention by those same legislatures should be treated any differently.¹⁶ Formal reasons aside, the Court is just as likely as Congress to feel the heat from a looming convention and revise its views if enough states send a signal that a certain decision was erroneous. In this sense, the

REV. 431, 463–72 (2005) (explaining how Republican activists arranged for anti-same-sex marriage ballot propositions in 2004); John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1467 (2007) (noting that Democrats used the same tactic with respect to the minimum wage in 2006).

¹³ See, e.g., AMAR, *supra* note 5, at 290 (“This alternative—a federal convention—might never need to be deployed in order to have its desired effect. Its mere potential availability might suffice to pry needed amendment proposals from a Congress desirous of maintaining control over the amendment agenda.”).

¹⁴ One example that leads to the qualification of “some” rather than “all” cases involves the efforts of malapportioned state legislatures to overturn the line of authority begun by *Baker v. Carr*. See Rogers, *supra* note 7, at 1009 (describing this movement); *infra* text accompanying notes 30–42.

¹⁵ See *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Lawrence v. Texas*, 539 U.S. 558, 570–73 (2003); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002). Needless to say, originalists may not be impressed by this method of interpretation. See generally Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006) (criticizing the recent Eighth Amendment cases as inconsistent with the Framers’ design).

¹⁶ There are differences between a state statute and a legislative resolution calling for an Article Five convention, but Part III argues that these distinctions are immaterial for a judicial inquiry. See *infra* text accompanying notes 74–75.

threat of a convention may indeed be stronger than its execution.

In this Essay, Part I reviews prior attempts to use the Article Five petition procedure and shows that, when enough state legislatures join the cause, Congress usually provides a remedy to halt the march to a convention. Part II looks at how putting federal constitutional issues before the voters in state races can increase the quality and quantity of citizen participation. Part III explains why a critical mass of state petitions should be taken into account by courts when they are faced with related constitutional issues.

I BRANDISHING THE ULTIMATE WEAPON

This Part outlines the history of state efforts to call for a new constitutional convention under Article Five.¹⁷ At the dawn of the Republic, petitions by Anti-Federalist legislatures in New York and Virginia for a conclave to consider amendments on personal liberties put pressure on Congress to pass the Bill of Rights.¹⁸ Following that brief (though important) debut, the petition procedure fell into disuse for more than one hundred years.¹⁹ In the twentieth century,

¹⁷ This inquiry draws on the fabulous appendix put together by Michael Stokes Paulsen in 1993, in which he gathered every state convention application in one place for the first time. See Paulsen, *supra* note 7, at 764–89. Since 1993, most states have, if anything, been trying to withdraw prior applications. See SABATO, *supra* note 8, at 210 (“Since Paulsen’s work was published, three states (Arizona, Idaho, and Utah) have passed resolutions explicitly rescinding all their previous applications for a Constitutional Convention . . .”).

¹⁸ See AMAR, *supra* note 5, at 290 (“[T]his is precisely what happened with the Bill of Rights, which the First Congress drafted largely to silence cries for a new convention.”); CAPLAN, *supra* note 7, at 165–68 (reproducing the petitions by the Virginia and New York legislatures for a convention to amend the 1787 text). In essence, these petitions were a formal expression of the bargain struck in certain ratifying conventions whereby the Federalists won over skeptics by pledging to add a Bill of Rights as soon as possible. See KYVIG, *supra* note 7, at 70–74 (making this point in a discussion about the ratification conventions).

¹⁹ According to the Paulsen Appendix, there were only seven convention petitions between 1788 and 1893. The first came from Georgia in 1832, while the second was issued a year later by Alabama and was probably related to South Carolina’s attempt to nullify a federal tariff. See Paulsen, *supra* note 7, at 765, 769; see also GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION* 59–60 (2007) (describing the nullification issue). The other five petitions came in 1861 (from Indiana, Illinois, Kentucky, Ohio, and Virginia) and did not specify a topic, though it is obvious from the timing that secession and slavery were involved. See Paulsen, *supra* note 7, at 770, 772, 781, 787; cf. 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 371 (The Lawbook Exchange, Ltd., 1996) (1803) (predicting that an

though, there were three occasions in which the States came close to invoking the supreme constitutional authority.²⁰

A *The Seventeenth Amendment*

Without question, the most successful invocation of Article Five by the states involved the Seventeenth Amendment, which provided for the direct election of Senators.²¹ Though this amendment passed the House of Representatives several times between 1894 and 1912, the Senate emphatically rejected any efforts to change its makeup.²² Stymied by this self-dealing, supporters of the amendment appealed to state legislatures and got an overwhelming response.²³

Not only did thirty-one states—one short of the total required at the time—issue requests for a new convention, but these acts were coordinated.²⁴ When Pennsylvania joined the

Article Five convention “will probably never be resorted to, unless the federal government should betray symptoms of corruption, which may render it expedient for the states to exert themselves in order to the application of some radical and effectual remedy”).

²⁰ Some other noteworthy (but long-forgotten) calls for a constitutional convention involved: (1) a ban on polygamy, which was backed by twenty-six states; (2) a limitation on the federal government’s post-Sixteenth Amendment power to tax incomes, which was supported by almost twenty states; (3) an amendment overturning *Roe v. Wade*, which got the support of 19 states. See CAPLAN, *supra* note 7, at 66, 69, 71–72 (describing these petition drives); KYVIG, *supra* note 7, at 190–91, 336, 449 (same). The Paulsen Appendix lists each state’s applications on these and other issues.

²¹ See U.S. CONST. amend. XVII; KVIEG, *supra* note 7, at 208–09 (providing the background for this change).

²² See Walter Clark, *The Next Constitutional Convention of the United States*, 16 YALE L.J. 65, 72 (1906) (“Five times has a bill, proposing such amendment to the Constitution, passed the House of Representatives by a practically unanimous vote, and each time it has been lost in the Senate; but never by a direct vote. It has always been disposed of by the chloroform process of referring the bill to a committee, which never reports it back, and never will.”); see also KYVIG, *supra* note 7, at 210 (“States had applied for a convention before but on no occasion in influential numbers.”).

²³ Since state legislatures elected Senators under the original Constitution, one might wonder why they were receptive to giving up this power. Part of the answer is that public demands for direct elections were increasing, but there was also the problem that legislatures often deadlocked over Senate choices and were paralyzed for weeks or sometimes months as a result. See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1059–60 (2008) (“One reason for the Seventeenth Amendment was that many states experienced deadlock in the election of senators when one party controlled one state legislative chamber and a different party controlled the other.”).

²⁴ See CHRISTOPHER HYDE HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 149 (1995) (“[T]he majority of states were willing to risk opening Pandora’s Box for the sake of securing the popular

call around 1900, the Legislature sent its resolution to every other state as a model and urged them to vote yes.²⁵ And by 1906 the clamor for change was so great that an interstate meeting was held under the leadership of the Governor of Iowa to establish a lobbying group dedicated to this one constitutional reform.²⁶ Writing in the *Yale Law Journal* that year, the Chief Justice of the North Carolina Supreme Court declared “[i]t is high time that we had a Constitutional Convention,” in part because “[i]t is too much to expect that the great corporations which control a majority of the Senate will ever voluntarily transfer to the people their profitable and secure hold upon supreme power.”²⁷

Faced with these emphatic statements by the very legislatures that elected them and with the real prospect of a second convention, the Senate backed down in 1912.²⁸ At least one Senator, Weldon B. Hayburn of Idaho, expressly stated that the convention threat was credible and dangerous because it could lead to almost anything:

[Article Five] does not contemplate that any constitutional convention shall assemble with a limitation on it to deal with a particular question. When the constitutional convention meets it is the people, and it is the same people who made the original Constitution, and no limitation in the original Constitution controls the people when they meet again to consider the Constitution.²⁹

election of senators.”); *see also* CAPLAN, *supra* note 7, at 63–64 (recounting these events). To be fair, there were some disputes about the precise count because not all of the states used the same language in their resolutions. Nevertheless, the consensus seems to be that thirty-one states were on record in support of a convention by the time the Seventeenth Amendment was ratified.

²⁵ *See* RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 193 (2001) (stating that “[i]n 1900, the Pennsylvania legislature took the decisive step of suggesting to the states a coordinated effort to demand a convention; believing that the Senate would not act until two-thirds of the states forced it to do so, it sent to all the states a copy of its convention petition and encouraged them to submit one as well”); CAPLAN, *supra* note 7, at 63 (stating that the Pennsylvania legislature formed a standing committee to pursue this goal).

²⁶ *See* HOEBEKE, *supra* note 24, at 149 (“In 1906, Governor Albert Cummins . . . called a meeting of delegates from the several states to discuss strategies for getting the Congress to call a federal convention, resulting in the formation of a national lobby organization dedicated specifically for the purpose.”).

²⁷ Clark, *supra* note 22, at 72.

²⁸ *See* ROSSUM, *supra* note 25, at 194 (“The fear of a ‘runaway’ constitutional convention, along with the fact that most senators represented states whose legislatures were on record as favoring direct election of the Senate, proved decisive.”); *cf.* CAPLAN, *supra* note 7, at 62 (noting that by this time both the Democratic National Convention and President Taft supported the change).

²⁹ 46 CONG. REC. 2769 (1911) (statement of Sen. Heyburn). Just as an aside, the Confederate Constitution expressly addressed the possibility of “runaway” bodies by

While this fear of a runaway convention probably helped spur the Senate to act on the Seventeenth Amendment, the debates do not reveal anything definitive on that point. Nonetheless, what is clear that state legislative action under Article Five played a critical role is informing the Senate that their process of election no longer retained the support of the American people.

B *State Legislative Apportionment*

The next major use of Article Five petitions also involved structural reform and self-dealing, but during the 1960s it was the state legislatures themselves who were the bad actors as they tried to reverse the Supreme Court's view that they were unconstitutionally apportioned.³⁰ Following the "one-person, one-vote" decision in *Baker v. Carr*,³¹ outraged state legislatures responded by endorsing a series of amendments to protect states' rights.³² The only one that gathered steam was an amendment that would permit one house of a state legislature to be apportioned on a basis other than population.³³ Thirty-three states—one short of the magic number—sent petitions to Congress, and the Senate Republican leader, Everett Dirksen, sought to move the amendment through Congress.³⁴

providing that a convention could only consider specific amendments proposed by the States. See CONF. CONST. art. V, § 1 (stating that a convention shall "take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time the said demand is made").

³⁰ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring equal apportionment of seats in state legislatures so that different districts have roughly equal populations); CAPLAN, *supra* note 7, at 73–78 (exploring the controversy following the decision).

³¹ 369 U.S. 186 (1962).

³² See CAPLAN, *supra* note 7, at 73. One of these proposals would have let two-thirds of the state legislatures propose and ratify amendments without any action by Congress. See Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L. J. 957, 958 (1963) ("Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress."); see also William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 529–85 (2002) (undertaking a thorough analysis of this proposal and others made by the states at the time).

³³ See CAPLAN, *supra* note 7, at 74; see also KYVIG, *supra* note 7, at 374 (stating that these petitions asked for an amendment providing that the states could use "any criteria as in its wisdom may be in its individual best interest").

³⁴ See Rogers, *supra* note 7, at 1009 ("By 1969, thirty-three states had submitted

Once lawmakers realized that another convention could be at hand, a debate broke out over whether malapportioned legislatures could legitimately invoke Article Five on an issue of direct concern to them.³⁵ Senator Robert F. Kennedy said that Congress “must possess power to rule upon the validity of the submitted resolutions,” while another Senator declared that any resolution from a malapportioned legislature should be rejected.³⁶ Of course, it was not at all clear that Senators had this power, since Article Five states that Congress shall call a convention if two-thirds of the states apply, and at least some of the Framers said that there was no discretion on the issue.³⁷ A federal district court held Utah’s petition invalid because its legislature was not in compliance with the Court’s apportionment decisions, but that did not clearly resolve the issue.³⁸

In any event, most contemporary observers were convinced that the amendment’s supporters, most notably Senator Dirksen, were only using the convention threat to prompt congressional action.³⁹ As *The Wall Street Journal* explained:

Most Dirksen-watchers agree he doesn’t really want a Constitutional Convention. The idea rather is to terrorize liberal Senators with the thought of a runaway convention that would start tinkering with the Bill of Rights. To avoid such a calamity, the reasoning goes, Congress itself would

applications calling for a convention to address the apportionment issue, one short of the thirty-four needed.”); *see also* 112 CONG. REC. 8580–81 (1966) (statement of Sen. Dirksen) (“[T]his issue will not die. Neither will it fade away, believe me.”).

³⁵ There is an analogy here to the problem presented during Reconstruction about whether a Congress that excluded southerners could propose an Article Five amendment or whether the states that were excluded could ratify one. *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 101–19 (1998) (examining these issues). It is worth noting that after *Baker* Congress had no problem letting the same malapportioned legislatures ratify the Twenty-Fourth and Twenty-Fifth Amendments.

³⁶ 113 CONG. REC. 10105 (1967) (statement of Sen. Kennedy); *see id.* at 10102 (statement of Sen. Tydings) (offering a lengthy defense of Congress’s power to control the amendment process).

³⁷ *See* THE FEDERALIST NO. 85, at 526 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The words of this article are peremptory. The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body.”).

³⁸ *See* *Petuskey v. Rampton*, 307 F. Supp. 235, 252 (D. Utah 1969), *rev’d on other grounds*, 431 F.2d 278 (10th Cir. 1970) (quoting Senator Ribicoff’s position that this would allow “the rotten boroughs to decide whether they should continue to be rotten”); *see also* KYVIG, *supra* note 7, at 377 (“Dirksen scoffed at such objections. Neither the drafters of Article V nor the Congress in 180 years ever talked about the form of petitions, he pointed out; content and purpose were what mattered.”).

³⁹ There is no indication that the Justices considered backing down from their apportionment decisions, though it is not clear that any opportunity to do so was available.

propose to the states for ratification a Constitutional amendment.⁴⁰

Dirksen's sudden death in 1969 took some of the air out of this campaign, and states that had endorsed a new convention began rescinding their applications.⁴¹ This was driven partly by a fear of a runaway convention, but also by the more practical explanation that by then some of these legislatures were reapportioned and no longer interested in going back to the old system.⁴²

Thus, the reapportionment debate, unlike the Seventeenth Amendment example, offers a cautionary tale about Article Five. It suggests that petitions from the states run the risk of thwarting the popular will if they become nothing more than a tool for legislators to protect their privileged status. Fortunately, this is the only instance of such behavior and does not cast doubt upon the idea of using this procedure in other contexts.

C *The Balanced Budget Amendment*

The most recent attempt to initiate a constitutional convention involved a proposed federal Balanced Budget Amendment. Drawing support from the growing conservative movement, this call gathered the support of thirty states by 1980 despite opposition from President Carter and Senator Goldwater, who warned of dire consequences if a convention were called.⁴³ With the enthusiastic backing of President Reagan, the Senate passed the amendment by more than the required supermajority, but the House of Representatives rejected the idea.⁴⁴ This motivated Missouri to join the convention drive, which brought the count to thirty-two—just

⁴⁰ Arlen J. Large, *Dirksen's Crusade*, WALL ST. J., June 2, 1969, at 1.

⁴¹ See CAPLAN, *supra* note 7, at 76 (discussing Dirksen's death and the about-face by North Carolina).

⁴² See *id.* ("Republicans emerged as the major beneficiaries of reapportionment, as they picked up seats in newly drawn suburban districts. Seeing that one-person/one-vote was not necessarily inimical to rural interests, a majority of the state began to comply with reapportionment, and support for the amendment waned."); SABATO, *supra* note 8, at 203 ("The remaining state legislatures got cold feet, mainly about the undefined idea of a convention.").

⁴³ See 125 CONG. REC. 3159 (1979) (statement of Sen. Goldwater) (calling a convention "very foolhardy" and a "tragic mistake"); CAPLAN, *supra* note 7, at 81–82 (quoting President Carter's statement to the Speaker of the Ohio House of Representatives that a convention "might do serious, irrevocable damage to the Constitution").

⁴⁴ See Rogers, *supra* note 7, at 1009; see also KYVIG, *supra* note 7, at 435 (describing Reagan's support for the Balanced Budget Amendment).

two short of the magic number.⁴⁵

In response to these demands for action, Congress enacted the Gramm-Rudman-Hollings Act, which mandated automatic spending cuts if the budget deficit exceeded a certain level.⁴⁶ While this did indicate that the Article Five petitions were having an impact on Congress, many members clearly hoped that the statute would halt the momentum for a constitutional remedy.⁴⁷ That strategy proved successful, as other state legislatures considering petitions backed off, partly because of the usual fear of a runaway convention and partly because of Gramm-Rudman-Hollings.⁴⁸

Undaunted by this resistance, Ronald Reagan became the only sitting President to ask undecided states to put a convention request over the top. While rejecting suggestions that he should include this plea in a State of the Union, he did write letters to state legislators, such as this one to a state senator in Montana:

I . . . believe that further action by the States, and particularly by the Montana Legislature, in petitioning Congress to call for a constitutional convention for the sole purpose of writing a balanced budget amendment will go far towards convincing Congress to pass and submit to the States an amendment for this purpose. If your effort is successful, Montana would be the 33rd State to pass such a resolution, just one short of the 34 required to call a constitutional convention. I believe this may finally

⁴⁵ See CAPLAN, *supra* note 7, at 83; KYVIG, *supra* note 7, at 440.

⁴⁶ See Balanced Budget and Emergency Deficit Control Act of 1985, Pub L. No 99-177, 99 Stat. 1037, *invalidated in part by* *Bowsher v. Synar*, 478 U.S. 714 (1986); E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1098 (stating that “Gramm-Rudman-Hollings was passed in part to stave off the drive to call a constitutional convention”).

When a portion of the Act was challenged on separation-of-powers grounds, the Comptroller General told the Supreme Court that accepting this claim might assist the convention movement. See Brief of Appellant Comptroller General of the United States at 14, *Bowsher v. Synar*, 478 U.S. 714 (1986), Nos. 85-1377, 85-1378, 85-1379 (“If the Constitution we have is ruled too inflexible to accommodate the experiment of the 1985 Act, . . . the result may be to add momentum to a convention and to unwise constitutional amendments that would take much longer to reverse.”). The point was not mentioned in the Court’s opinion, probably because the challenge was relatively minor and severable from the rest of the statute.

⁴⁷ See CAPLAN, *supra* note 7, at 84–85 (“In March 1986 the Republican Senate failed by one vote to approve a balanced-budget constitutional amendment; Gramm-Rudman, as a palatable excuse to oppose the convention or its object, was given credit for the defeat.”); KYVIG, *supra* note 7, at 442 (“In part, the 1986 defeat appeared to be due to the recent passage of ordinary legislation to limit deficits.”).

⁴⁸ See SABATO, *supra* note 8, at 203–04 (“Just as with reapportionment, the fervor waned as states faced up to the great unknown of a convention, and no more states made application for a Balanced Budget Amendment.”); see also CAPLAN, *supra* note 7, at 83–84 (describing some of these setbacks).

convince Congress to act on an amendment of its own, which has always been my goal.⁴⁹

As with Senator Dirksen, Reagan's support for a convention was revealed here as a bluff designed to pry a constitutional amendment out of Congress. In spite of this aggressive jawboning, though, no other state answered Reagan's call.

In sum, the limited history of state action to call a constitutional convention suggests that, while there are some pitfalls, this is a sound way of forcing issues onto the national agenda that would otherwise be ignored. While one may disagree with the substance behind some of these initiatives, their effort to engage our citizens in a serious and widespread debate about constitutional issues deserves more careful consideration from political activists, legislators, and judges.

II ENGAGING THE ELECTORATE

This Part assesses the merits of using Article Five petitions as a tool for mobilizing voters and influencing the constitutional culture.⁵⁰ In essence, there are two questions raised by the analysis. First, why might the use of Article Five be superior as a general matter to other methods of altering constitutional law?⁵¹ Second, why is the Article Five petition procedure better than going straight to Congress for a textual amendment?

A *Direct Action and the Equal Rights Amendment*

The most thoughtful discussion about the value of making a direct appeal to Article Five, rather than relying solely on litigation to achieve constitutional reform, came from the

⁴⁹ CAPLAN, *supra* note 7, at 86–87.

⁵⁰ Perhaps the most perceptive commentary on the importance of shaping the constitutional culture comes from Reva Siegel. See Siegel, *supra* note 10, at 1325 (defining constitutional culture as “the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning”).

⁵¹ Obviously, this discussion excludes structural amendments (such as the equality of states within the Senate) that can only be addressed through Article Five. See LEVINSON, *supra* note 4, at 23 (“One cannot, as a practical matter, litigate the obvious inequality attached to Wyoming’s having the same voting power in the Senate as California.”).

women's movement of the 1960s and 1970s.⁵² Leaders of that cause argued that their best strategy involved waging a grass-roots campaign for the ERA while simultaneously pressing courts to give heightened scrutiny to gender distinctions under the Equal Protection Clause.⁵³ As Mary Eastwood of the National Organization for Women (NOW) said:

[E]ven if the ERA fails to pass, vigorously pushing for it will show women are demanding equal rights and responsibilities under the law by the most drastic legal means possible—a constitutional amendment. The effect, provided we make clear we think [the] 14th [amendment] properly interpreted should give women [the] same unqualified protection, would be to improve our chances of winning the 14th amendment cases.⁵⁴

Despite the ERA's failure to get ratified by a sufficient number of states, the fight for that amendment was successful in the sense that the Supreme Court used the resources developed in that debate as a justification in cases invalidating gender discrimination.⁵⁵

The "failure" of the ERA is a reminder that the merits of the Article Five process should not be judged exclusively on whether an amendment is produced. Under that test, Article Five looks useless because of the high threshold necessary to achieve success. Instead, the question should be whether Article Five can be an effective tool for changing constitutional attitudes when used in conjunction with other means. The answer to that question is yes for two reasons.

⁵² Another significant example involved the campaign to overturn the Supreme Court's decision holding that a federal income tax was almost always unconstitutional. See *Pollock v. Farmers' Home Loan & Trust Co.*, 158 U.S. 601, 618 (1895) (holding that the income tax must be consistent with the Direct Tax Clause). In that instance, reformers pressed for the Sixteenth Amendment and for tax legislation that would challenge the Justices to overrule their precedent. See KYVIG, *supra* note 7, at 201–07 (discussing this debate).

⁵³ See Mayeri, *supra* note 10, at 791 ("With NOW's embrace of the ERA [in 1967], feminism had taken a momentous step toward a dual constitutional strategy, one that would combine litigation under the Fourteenth Amendment with active advocacy for the ERA.")

⁵⁴ Siegel, *supra* note 10, at 1368.

⁵⁵ See *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (stating that the passage of the ERA by a supermajority in Congress meant that "classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 9 (1996) (footnote omitted) (stating that the Justices "did not invalidate a single law on sex discrimination grounds until 1971—that is, not until *after* the explosion in social and political support for the women's movement in the late 1960s"); see also Siegel, *supra* note 10, at 1334 (quoting Justice Ginsburg's view that "[t]here is no practical difference between what has evolved and the ERA").

First, a litigation strategy (modeled on the one used by the NAACP to attack segregation) that lacks a political component is fragile because of its reliance on elite opinion. While lawsuits do raise public awareness about controversial issues, they do not engage ordinary citizens in any meaningful way. This void not only harms the legitimacy of any resulting constitutional change, but it opens the door to reasonable charges that the courts are simply imposing their values on society in a way that voters might well reject if given the chance.⁵⁶ That conclusion is more difficult to draw when voters have expressed substantial support for similar ideas in the political realm through legislation or a proposed constitutional amendment—even if those efforts are not successful.⁵⁷

Second, the expression of this support through Article Five sends a clear signal that ordinary politics cannot match.⁵⁸ Consider for a moment how constitutional preferences are usually conveyed. There are presidential and, to a lesser extent, congressional elections, but so many issues are wrapped up in an election that it rarely can be read as making an unambiguous point about a constitutional issue. Judicial confirmation hearings are another significant forum for these discussions, but in that context decorum usually precludes a nominee from answering questions about the controversial matters that most people want to hear about. Thus, these mediating institutions simply do not elicit the kind of direct citizen participation and feedback on constitutional matters that an appeal to Article Five does.⁵⁹

⁵⁶ See Siegel, *supra* note 10, at 1343 (“Popular debate about the Constitution forges relations among citizens and officials, promoting forms of attaching and enabling forms of steering that enhance the public’s confidence that the Constitution is theirs.”); see also Klarman, *supra* note 12, at 475 (“[J]udicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions.”).

⁵⁷ A contrary argument can be made, and was made during the ERA fight, that an active debate on a constitutional amendment should preclude a judicial reexamination of precedent. See *Frontiero*, 411 U.S. at 692 (Powell, J., concurring) (“[T]he Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.”). In other words, a decision to seek an amendment could be read as a concession that existing practice is constitutional. While this is a serious objection, it ultimately falls short. See *infra* text accompanying notes 75–76.

⁵⁸ Civil disobedience, which cannot really be characterized as normal politics, can send a powerful message on these subjects, but engaging in that sort of direct action is costly. See Siegel, *supra* note 10, at 1355 (“At crucial junctures of American constitutional development, groups have effectively employed civil disobedience to advance claims about the meaning of the United States Constitution.”).

⁵⁹ Just to be clear, I am not saying that social movements cannot successfully bring about constitutional change without using Article Five. Indeed, I wrote an

B *The Petition Process and Bringing Voters to the Polls*

Once Article Five is seen as an attractive way of influencing the legal culture rather than a provision that makes it nearly impossible to produce constitutional text, the next question is whether the best use of that process involves lobbying Congress or state legislatures. The answer is that state petitions are better because they are more likely to give voters a chance to voice their opinions.⁶⁰

One distinction between invoking the Article Five convention option and seeking a constitutional amendment is that getting at least some states to take up the call is much easier than getting the relevant committees of Congress interested. No matter what change is on the table, supporters will always be able to find a few outlier states that will offer enthusiastic support. The beauty of our federal system is that those who want to start a drive to ban same-sex marriage can find a haven in Mississippi while those who want a constitutional right to health care can look to Vermont. Moreover, in these states the issue can be placed before voters or legislators quickly to build support for an issue across the nation.⁶¹ Jumpstarting this sort of effort in Congress, by contrast, is harder because the threshold for getting

entire book about one movement—Jacksonian Democracy—that did exactly that. See MAGLIOCCA, *supra* note 19. The point is that the advantages of using Article Five—especially the petition procedure—are underestimated.

⁶⁰ This is a good place to discuss the question of whether a convention request can be limited to a specific subject. See Paulsen, *supra* note 7, at 737–49 (reviewing the competing arguments and concluding that no such limit may be imposed). Needless to say, the clarity of the information that an Article Five petition gives to other governmental bodies would be undermined if the states could make only a general call for a convention. Furthermore, based on the actions of the 1787 Convention, which went far beyond its mandate to “amend” the Articles of Confederation, see KYVIG, *supra* note 7, at 42–46, it seems clear that a constitutional conclave can propose any amendments that it deems appropriate no matter what the originating state legislatures might say.

This does not mean, however, that topic limitations in an Article Five petition are invalid or without value. A convention that sought to exceed its instructions would face significant criticism and would have to justify its acts once its proposals became available. See SABATO, *supra* note 8, at 206 (“[F]rom a purely practical vantage point, there is little doubt that a convention would be guided by its mandate from Congress and the states.”). More important, the whole point of this Article is how the Article Five process can contribute to legal change without the actual summoning of a convention, thus I am not especially concerned about the effect of the petitions on a convention.

⁶¹ The votes in these early states are also easy to get because they are not fraught with concern that the threshold needed for holding a convention is near. In other words, legislators in the fifth state to ask for a convention have a much freer vote than the ones in the thirtieth state.

something on its radar screen is a lot higher.⁶² Congress has a more crowded agenda than the average state legislature, and in any event supporters of an amendment need a large base of support to overcome the inertia within the congressional committee system.

Another advantage of using Article Five petitions is that they can piggyback on the initiative and referendum procedure in many states and bypass the resistance that might be found within a legislature. While a referendum requesting a convention is not binding on a state legislature, a yes vote would probably exert a powerful influence on local officials considering such a petition.⁶³ An even more important point, though, is that it is easier in many states to get an initiative on the ballot than it is to get action through the legislature, and that is especially true as compared to getting action from Congress. There is no federal equivalent to a state referendum, which makes it difficult for outsiders to get Congress to move an amendment unless they turn to the states for leverage.

Finally, there is a nuts-and-bolts benefit that comes from using Article Five petitions, and that is that they represent a lure for voter turnout that political professionals of all stripes can use. When asked to explain the key to politics, Abraham Lincoln allegedly said, "Find 'em and vote 'em."⁶⁴ Giving people a chance to vote on constitutional questions that they feel strongly about is a fantastic way to identify supporters, whether they are conservative or liberal, and get them to the polls. In part, that is due to the sheer magnitude of these issues, but another reason is that voters are not often asked for their views on these matters and are probably eager to give them.⁶⁵ As noted earlier, both parties are already employing this tactic through state constitutional amendments, and the

⁶² There are certainly outlier members of Congress who will support most any amendment, but that is less likely to lead to anything meaningful than the action of legislatures in outlier states. The latter creates a public record and can garner significant public attention. The former will disappear into obscurity.

⁶³ *See supra* note 11. In a sense, this is the same point that was just made about the effect of the Article Five petitions on a constitutional convention. *See supra* note 60.

⁶⁴ I am unable to trace the original source of this quote, which leads me to think that it may be one of the many false statements attributed to Lincoln. In any event, the point expressed by the quote is still useful.

⁶⁵ This could be done either through a referendum or by making an Article Five petition a key issue in state legislative elections. Of course, one might say that these are just symbolic votes until the two-thirds threshold is in sight. Then again, politics is often about symbolism.

same logic applies to Article Five petitions.⁶⁶ Finally, this approach is especially attractive for a political party that is out of power at the national level, as is currently true for Republicans, as the states may be the only place where its ideas can gain traction.

C *Runaway Train?*

Although there are many persuasive reasons for political activists to use the convention procedure to awaken the electorate, this tactic is probably not the choice of first resort because of the fear of what would happen if a convention were actually convened.⁶⁷ In each of the precedents discussed in Part I, the prospect of a runaway body that would tear the Constitution limb from limb was a factor in either spurring congressional action or leading undecided states to reject the petition option. Nevertheless, this concern is exaggerated and should not unduly restrain the use of the Article Five process.

The trepidation about using the convention threat parallels the criticism about mutually assured destruction (MAD) during the Cold War. Nuclear deterrence was great at keeping the peace, but what if the bluff of retaliation was actually called? While this was a valid point, the reality was that the uncertainty surrounding the outcome of a nuclear war was so great that no rational (or irrational) leader ever wanted to take that risk. A constitutional convention is the ultimate legal weapon, and in that context one must ask whether policymakers would really allow a convention to happen or would blink (as they have on every previous occasion when the two-thirds threshold was near). Put another way, the numerous advantages of invoking the Article Five process outweigh the risks posed by the tiny probability that a convention would be summoned.

Furthermore, the analogy between nuclear deterrence and a constitutional conclave is imperfect because a convention, unlike an ICBM, can only propose changes rather than impose them. Though a convention would be free to establish almost

⁶⁶ Furthermore, the Article Five path is more conservative as a mobilization tool than using state law. After all, state law ballot initiatives almost always have concrete results. A constitutional petition, on the other hand, has no effect within a state unless many other states join the call and compel Congress to act.

⁶⁷ Another explanation for the lack of convention petitions is a dearth of resources. A great advantage of using litigation for public interest law is that it can be done a shoestring budget. Putting the same question to voters, even in the states, may be prohibitively expensive.

any ratification process that it wanted based on the precedent of 1787, voters would still have the final word on the delegates' work product.⁶⁸ Accordingly, even in the extremely unlikely event that a convention came to pass, its runaway quality would be constrained by the need to get majority support in any subsequent ratification proceedings.

In my view, the central insight of the women's movement is still a powerful one—a direct appeal to Article Five is an excellent, if underutilized, way of mobilizing support for constitutional change. The Article Five petition process offers specific advantages for those seeking reform and for those who want to harness the energy that such an effort can unleash. And as the next Part explains, these advantages are not confined to the political arena.

III A TALLY OF STATES AT THE COURT

This Part explores how the Article Five petition process can influence judicial interpretation. First, a call by a significant number of states for a convention is evidence on contemporary constitutional standards that the Supreme Court deems relevant in many doctrinal areas when the same states pass legislation. Second, the Justices are just as susceptible as Congress to pressure from a possible convention and may be induced to back down from an unpopular decision if the threat is strong enough.

The argument for a connection between Article Five petitions and judicial interpretation is simple: there is no material difference between the consensus revealed by state legislation on a particular topic, which the Court deems persuasive authority in at least some contexts, and a consensus revealed when the same state legislatures pass convention petitions. As a result, the adoption of Article Five resolutions in a critical mass of states ought to count in the formal deliberations of the Court on some constitutional questions.⁶⁹

⁶⁸ See *THE FEDERALIST* NO. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961) (explaining the Convention's decision to depart from the unanimity rule of the Articles of Confederation for amendments).

⁶⁹ More specifically, I am saying that these petitions should be taken into account to the same extent that state legislation would count. It would be hard to say that the petitions are relevant if state legislation is clearly not. On the other hand, while Article Five petitions can reach any subject, state legislation may be absent with respect to certain topics due to federal preemption or prior judicial decisions that foreclose state action. No such barrier confronts the petitions.

On subjects ranging from the Eighth Amendment to the Due Process Clause, the Justices look to the actions of state legislatures to assess current standards or traditions.⁷⁰ For example, with respect to what constitutes cruel and unusual punishment, the Court holds that state statutes give the “clearest and most reliable objective evidence of contemporary values.”⁷¹ Indeed, the cases in that area often tally the number of states that permit a particular application of the death penalty as part of a determination of its validity.⁷² Likewise, many substantive due process decisions on highly sensitive issues, such as assisted suicide, consensual sodomy, and abortion take stock of state legislation to determine whether something is a fundamental right.⁷³

Putting aside the controversy about how much weight these state acts should receive when deciding federal

⁷⁰ The Court’s recent Second Amendment opinion also nodded in that direction by suggesting that the scope of the individual right to possess guns would be determined, in part, by looking to traditional restrictions defined by state law. See *District of Columbia v. Heller*, 128 S.Ct. 2783, 2816–17 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

⁷¹ *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); see *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (stating that “[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction”). One could say that the Eighth Amendment represents a special case because the use of the word “unusual” in the text compels courts to look at modern standards in a way that is not true for other constitutional provisions. See *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988) (plurality opinion) (“Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is ‘unusual’ depends, in common usage, on the frequency of its occurrence or the magnitude of its acceptance.”).

⁷² See *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2651–52 (2008) (noting that only six states permitted the execution of a child rapist who did not kill the victim); *Roper*, 543 U.S. at 563 (“30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (surveying state practice before invalidating capital punishment for the mentally retarded); *Enmund v. Florida*, 458 U.S. 782, 792 (1982) (observing that just eight states allowed the execution of someone convicted under the felony-murder rule); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (striking down the death penalty for an adult rapist and pointing out that only one state authorized this sentence).

⁷³ See *Lawrence v. Texas*, 539 U.S. 558, 570–73 (2003) (examining state statutes and noting that only nine states banned same-sex relations); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (observing that assisted suicide is banned in every state); *Roe v. Wade*, 410 U.S. 113, 139–40 (1973) (noting a liberalizing trend in state abortion statutes); see also *Poe v. Ullman*, 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting) (observing that the Connecticut statute banning artificial contraception under most circumstances (and later struck down in *Griswold v. Connecticut*) was the only one of its kind in the nation).

constitutional issues, the question is whether Article Five petitions approved by the state legislatures should get a similar level of respect.⁷⁴ Two distinctions between a state law and a state convention petition that could justify different treatment can be easily dismissed. First, a state petition may not be vetoed by the Governor, which makes it easier to enact than a statute.⁷⁵ Second, a call for a new conclave lacks the concrete impact of most state statutes, and thus can be viewed as nothing more than symbolic vote. Neither of these distinctions, however, diminishes the fact that these petitions come from elected bodies and (especially when the number of states involved gets high enough) represent a considered judgment by the electorate about constitutional values.

The more substantial objection to viewing state statutes and Article Five petitions as interpretive equivalents is that the latter are essentially conceding that the Constitution must be changed to reach the meaning they seek. Put another way, judges could say that the fact that thirty states want a convention on some issue confirms that a contrary holding of the Court on the same question correctly reads the present text. But there are at least two significant problems with this argument. First, it is just as plausible to say that a convention call is seeking to restore the true meaning of the Constitution from a false judicial construction, which would not make these petitions a concession at all. Second, it must be said that state statutes that ban a specific practice (such as capital punishment for juvenile offenders) do not necessarily say anything about the constitutionality of that practice, but the Court still claims that they do.⁷⁶ As a result, it is rather hard to insist that a close nexus must exist between a state petition and that legislature's reading of the Constitution. The more logical reading of the Court's cases using legislative

⁷⁴ At least one commentator contends that the Article Five standard for ratifying an amendment should be used to determine whether state legislation represents a consensus. See Clark, *supra* note 15, at 1200 ("Because Article V requires the approval of three-fourths of the states to amend the Constitution, construing ambiguous constitutional provisions to authorize courts to invalidate punishments based on the views of fewer than three-quarters of the states would arguably contradict the spirit, if not the letter, of Article V."). As Professor Clark concedes, however, the Court's recent cases do not apply such a rigorous test. See *id.* ("As discussed, twenty states continued to authorize the juvenile death penalty when the Court invalidated the punishment as 'cruel and unusual.'").

⁷⁵ See CAPLAN, *supra* note 7, at 103–05 (summarizing the argument against the veto of a petition). To be fair, this is an unsettled point, but for purposes of discussion I will assume that no veto is possible.

⁷⁶ State laws permitting a questionable practice, by contrast, do offer useful guidance by putting those states on the record that the practice is constitutional.

sentiment is that the issue is whether enough states take a position on the question at hand to say something about contemporary mores, and that can be done via a statute or through the Article Five process.

While the formal arguments for the authority of Article Five petitions are well grounded in the cases, there is also the intangible effect that a serious convention drive might have on the Court. It is doubtful that the Justices are any more excited about a convention than Congress, which raises the question of whether—on an issue that is justiciable—the Court might back down rather than stand fast with a position that is fueling discontent.

The historical record does not provide a clear answer on this point. With respect to the apportionment petitions discussed earlier, the Court did not retreat from its “one-person, one-vote” holdings, although Chief Justice Warren did take the unusual step of publicly criticizing the convention petitions.⁷⁷ On the other hand, the Court certainly has caved to institutional pressure before, most notably in the wake of Franklin D. Roosevelt’s landslide victory in 1936.⁷⁸ At a minimum, it is fair to say that the Court could not totally ignore the implications of a possible convention if a case before it spoke directly to the question being discussed by the public.

In sum, the Article Five petition mechanism can memorialize the constitutional views of the public in a form that is easily cited and recognizable to judges. Moreover, the threat posed by a convention would act as a thumb on the scales of justice just as it does in the halls of Congress. In this case, politics and law compliment each other.

CONCLUSION

It is only natural for lawyers to focus more on interpretation than on creation. The case method in law school teaching and the veneration of past constitutional achievements tend to stunt thoughts about institutional design and innovation.⁷⁹ Nevertheless, there are plenty of people who keep the flame of

⁷⁷ See KYVIG, *supra* note 7, at 372–73 (describing Warren’s speech to the American Law Institute, in which he stated that the package of states’-rights amendments “could radically change the character of our institutions”).

⁷⁸ See generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938) (providing a riveting account of the “switch-in-time”).

⁷⁹ Indeed, this is one of Sandy Levinson’s most powerful points in his criticism of the Constitution as “undemocratic.” See LEVINSON, *supra* note 4, at 16–20 (discussing the need to overcome veneration).

change alive and are working to bring their legal vision (conservative or liberal) into the document. This Essay argued that their best approach may involve seeking Article Five convention petitions from the state legislatures. Practical political realities, not formalities, suggest that the petition procedure offers a wealth of resources that public interest lawyers should exploit.⁸⁰

Preferred Citation

Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 46, available at http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=108:magliocca200974.

⁸⁰ Even if these petition efforts failed, that would not be harmful because one could always say that the rejection was procedural in nature (“We don’t like the idea of a convention”) rather than a criticism of the proposed convention topic.