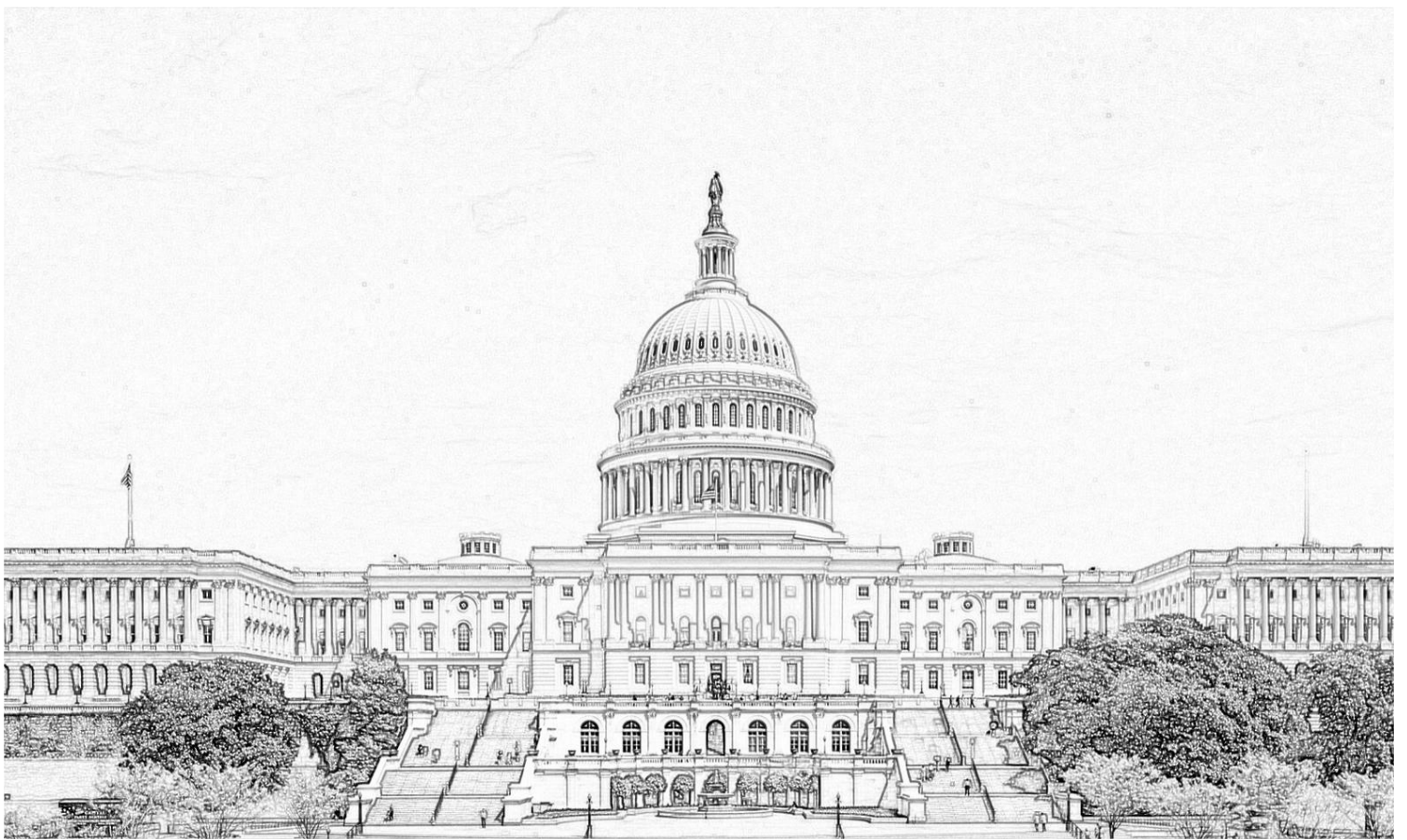


# State Solutions:

State Initiated Amendments as an Alternative to  
Calling an Article V Constitutional Convention



Russell Blair

## Contents

Introduction: All That Is Required Is a Concurrent Resolution

Section 1. The Concurrent Resolution

Section 2. Ending the Congressional Monopoly

- 2.1 Congress's Monopoly on Proposing Constitutional Amendments
- 2.2 Allowing State Initiated Constitutional Amendments
- 2.3 New Requirements for Future Amendments
- 2.4 Uniform Procedures for State Proposed Amendments

Section 3. Rescuing Washington From Its Conflicts of Interest

- 3.1 A Fiscal Responsibility Amendment (Balanced Budget)
- 3.2 Term Limits: Changing the Engine Oil
- 3.3 Single Subject Bills With Honest Titles
- 3.4 Restoring Public Confidence in Federal Institutions
- 3.5 Ending Congressional District Gerrymandering

Section 4. Rescuing Washington From the Homogenization Trap

- 4.1 The Second Amendment: Respecting Our Diversity
- 4.2 The First Amendment: Reconsidering *Citizens United v FEC*
- 4.3 *Dobbs v Jackson*: Making State Decisions Stick

Section 5. Conclusion: A More Balanced Federalism

Appendix: About the Author

Copyright © Russell Blair 2024

All rights are reserved, other than for review purposes or pursuant to the fair use doctrine. Under copyright law, no part of this publication (except for the Concurrent Resolution in Section 1, which is in the public domain by the author having waived all rights) may be reproduced, stored, or transmitted in any form or by any means, including mechanical, photocopying, or recording, without the prior written permission of the author. Full acknowledgement of the author and source must be given for any use. **Copies of this essay can be downloaded, free of charge, at [blairessays4free.com](http://blairessays4free.com). Noncommercial distribution is permitted, as long as the document is not modified and is reproduced in full.**

"But we are deluding ourselves if we believe that winning elections is enough to overcome the deficiencies of the American political system."

S. Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (2006)

## Introduction: All That Is Required Is a Concurrent Resolution

Congressional dysfunction is so severe that even critical problems are not being addressed. Instead, we have perpetual campaigning, hyper partisanship, and zero-sum politics that preclude the compromises which are essential to a functioning democracy. The quotation at the top of this page is over 18 years old. The last nine elections have done nothing to reverse the democratic decay and, in the absence of major reforms, the 2026 and 2028 elections will be no different.

We need to reform the system that produced the current dysfunction and is unable to reverse it. Looking for that change to come from inside of the Beltway is delusional. The leadership to make the essential changes and avoid a further decline in civil society must come from the states.

Section 1 is the first draft of a concurrent resolution that, if adopted by 34 state legislatures, will force Congress to propose a constitutional amendment that permits the states to initiate their own constitutional amendments, in place of their current right to call for a constitutional convention. This reciprocity is the essential first step in overcoming congressional dysfunction.

Section 2 explains a state level pathway to rehabilitate a federal political system that has stopped working. That pathway is state reciprocity in the initiation of amendments to the U.S. Constitution. Once that new pathway is established, multiple important reforms will be possible.

Section 3 addresses reforms that are currently impossible due to the combination of Congress's monopoly on proposing amendments and its conflict of interest on specific reforms. Section 4 addresses reforms that are currently impossible due to the combination of Congress's monopoly on proposing amendments and the incompatibility of Congress's "one-size-fits-all" legislation with the diversity of our country. The states can better reflect this diversity while acting as the "laboratories of democracy."

"... what country can preserve its liberties if their (sic) rulers are not warned from time to time that their people preserve the spirit of resistance? "

Thomas Jefferson in an 1878 letter to William S. Smith, John Adams' son-in-law

To my knowledge, there are no similarly comprehensive and robust proposals. The current situation cannot be allowed to fester. Cynicism and pessimism can become a self-fulfilling prophecy

of failure. Reversing Washington's democratic decline requires outside of the Beltway leadership. It requires leadership from our state legislatures.

## Section 1 The Concurrent Resolution

Concurrent Resolution Calling for Congress to Propose an Amendment to the U.S. Constitution to Grant the States the Right to Propose Amendments to the U.S. Constitution or, in the Alternative, for an Article V Convention for the Same Purpose

**Whereas** Article V of the U.S. Constitution provides that two-thirds of both chambers of Congress can propose amendments to the Constitution which become effective when ratified by three-quarters of the states legislatures, and

**Whereas** Article V provides, as the sole alternative to congressional proposals, that two-thirds of the states can call a national constitutional convention to propose amendments, which must subsequently be ratified by three-quarters of the states, and

**Whereas** the U.S. Constitution does not provide an option for the states to propose a constitutional amendment, requiring instead that the states initiate a constitutional convention, and

**Whereas** the current Article V creates a *de facto* monopoly for Congress, due to the legitimate concern that a constitutional convention would be either too dangerous (a runaway convention) or doomed to failure (a hyper-partisan convention), and

**Whereas** the lack of an alternative to the congressional initiation of Constitutional amendments has resulted in the failure to address critical issues, and

**Whereas** the best way to end the congressional monopoly is to allow the states reciprocity with Congress in the initiation of amendments, and

**Whereas** the states can "motivate" Congress, by using the current Article V, to propose a convention to provide the states with the reciprocal power to initiate constitutional amendments, but with a provision that the call for the constitutional convention is nullified if Congress proposes an amendment to grant the states the power to propose amendments, and

**Whereas**, through voter ratification, state initiated amendments to the U.S. Constitution would, for the first time, give citizens a direct voice in the amendment of their federal Constitution:

**Now Therefore Be It Resolved That** the State of \_\_\_\_\_, pursuant to Article V of the U.S. Constitution, does hereby call for a constitution convention for the purpose of proposing a constitutional amendment to Article V of the Constitution to permit the states to initiate amendments on the same basis as Congress, and

**Be It Further Resolved That** should Congress, pursuant to the current Article V, propose an amendment granting the states reciprocal power to initiate constitutional amendments, then this call for a convention shall be deemed null and void, *ab initio*, under its own terms, and

**Be it Further resolved That** the Governor, in consultation and concert with like minded governors in other states, is requested to devise and propose common procedures to coordinate state proposals for federal constitutional amendments, and

**Be it Further Resolved That** such coordinated and multi-state process include provisions that allow for *composite proposals*, but independent ratification, of more than a single amendment, so that voters will have the ability to resolve more of the problems which seem intractable under the existing processes, and

**Be it Finally Resolved That** certified copies of this Concurrent Resolution shall be sent to the Governors of all 50 states, the Senate President or President *Pro Tem* in all 50 States, the Speaker of the House in all 50 states, the President of the United States, and to all members of the Congress of United States.

## Article V

"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 ....

## Section 2 Ending the Congressional Monopoly

Elections are not solving our political gridlock and they are increasing our polarization. We need fundamental changes with an updating of our nearly a quarter of a millennium old Constitution. Congress will not propose these changes. It is overly invested in the failing system and has a conflict of interest with respect to any proposal to overturn its *de facto* monopoly on proposing Constitutional amendments. The states, in a bipartisan display of leadership, can easily force Congress to propose an amendment to Article V that permits the states to propose constitutional amendments. How they can do this is explained in this section.

Once Article V is amended to end Congress' *de facto* monopoly, the states can use their new authority to provide an opportunity for proponents of specific reforms which are currently frustrated by Congress's conflicts of interest (Section 2). The states can also extricate Congress from the homogenization trap<sup>1</sup> (Section 3).

"Constitutions say who is in charge. Amendments remind politicians that it is not them. The capacity to change a constitution respects a truth in any democracy that the people hold the ultimate reins of power."

Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (2022)

2.1 Congress's Monopoly on Proposing Constitutional Amendments. Thirty-three proposed amendments to the U. S. Constitution have been submitted to the states and ratified. All of them were initiated by Congress. But Congress has become dysfunctional and is no longer able to propose essential constitutional changes.

There are currently two ways to amend the U.S. Constitution: 1) two-thirds of Congress can propose an amendment and any such proposal becomes part of the Constitution when ratified by

---

<sup>1</sup> The homogenization trap is the tendency for federally initiated changes to use a "one-size-fits-all" solution that does not reflect the diversity of the American people. Homogenization is often counterproductive and can prevent state level solutions that reflect the regional differences in our diverse society.

38 states, or 2) 34 states can call for a constitutional convention and the convention's proposed amendments become part of the Constitution if and when they are ratified by 38 states.<sup>2</sup>

" Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I should tremble for the results of a second ...."

James Madison, in a letter to G.L. Tuberville dated November 2, 1788

The crucial point is that neither option gives the states the power to proposed amendments. While a convention can be triggered by the states, there is great uncertainty about the degree to which either the states or Congress can influence the process or restrict the product of a convention.<sup>3</sup> This effectively precludes conventions as an option, because they are perceived to be either too dangerous or doomed to failure. In light of the requirement for ratification by 38 states, fear of a runaway convention is overwrought. The real problem is that a convention would become a partisan brawl and would fail miserably. Such a failure would make matters worse rather than better. The result is a *de facto* congressional monopoly. We need to replace the unused convention model with a process for state initiated constitutional amendments.

2.2 Allowing State Initiated Constitutional Amendments. Because the states have the power to call a convention, they can tell Congress that the price of avoiding an open convention is for Congress to propose an amendment to Article V that replaces the states' convention calling role with reciprocity between the states and Congress in the power to propose amendments. An example of what this might look like is shown in the following text box.

#### Example of a New Article V

Congress, by a 60% supermajority of each House, or the sovereign states, by the concurrence of not less than 30 states, may propose amendments to this Constitution. In the case of congressional proposals, ratification shall require the consent of not less than 30 states in accordance with the process adopted in each state for that purpose. In the case of proposals initiated by the states, ratification shall require the consent of a majority of the votes cast in ratification referenda in not less than 30 states.

---

<sup>2</sup> At the discretion of Congress, ratification can be either by a state's legislature or by a ratifying convention. The latter was used only for ratification of the 21st amendment, which repealed prohibition.

<sup>3</sup> Given the precedent of the first and only convention, in 1787, any constitutional convention could become an unrestricted convention.



This effort will not be seen by Congress as a bluff. Twenty-eight states have petitioned Congress for an Article V convention to propose a balanced federal budget amendment. Three have called for an Article V convention to overturn *Citizens United* and sixteen have called for Congress to propose such an amendment.

The call for an Article V convention *to amend Article V* can and should be conditional, such that the adoption of a Congressional proposal to amend Article V to allow the states to propose amendments would nullify the call for a convention. (See Section 1.)

Citizens Ratify by Referendum. Once the state legislatures are allowed to propose amendments, it would be redundant for them to ratify their own proposals. Instead, amendments initiated by the states should require a ratification vote by citizen referendum. *The voters will decide the ultimate fate of state initiated amendments.* Under the current Article V, voters only participate indirectly, through ratification by their state legislature.

2.3 New Requirements for Future Amendments. It has been proposed that the current Article V be amended to lower the requirement for proposing amendments from 2/3 to 3/5 and the requirement for ratification, from 3/4 to either 2/3 or 3/5 of the states. The example given above uses 3/5 for both proposing and ratifying by either route. Desirable or even essential changes will fail if the threshold for proposing or ratifying amendments is too high. In choosing the threshold for ratification, it is worth considering that the thresholds used by states in amending their own constitutions. Generally, ratification requires either a simple majority or a 3/5 supermajority.

"We have entered an age of fantasy politics - when candidates from both parties parade promises for a better future before a public that recognizes, somewhere deep down, that it is all really just a show. A ritual. A way to get the blood flowing. No one believes the premises anymore."

L. Lessing, *Republic Lost: The Corruption of Equality and the Steps to End It* (2016 Edition)

Section 2.4 Uniform Procedures for State Proposed Amendments. In the case of proposals from Congress, the drafting process is the same as for its regular legislative business. There is nothing comparable in the case of future proposals from the states. This difference needs to be addressed. *By concurrent resolution of both legislative chambers, the states should instruct their Governors, perhaps with assistance from the National Governors Association, to establish a mechanism to coordinate state proposals for Constitutional amendments.*

An agreement on the proposal process could be formalized as a uniform state law or an interstate compact. As soon as the number of states required for a states sponsored amendment

under a revised Article V agreed, the uniformity process would become operative. Additional states could join at their convenience.

Important Point. *Significantly, a co-ordinated, multi-state process would allow Democratic majority states and Republican majority states to agree on composite proposals: Republican states may prioritize a Fiscal Responsibility Amendment (Balanced Budget) and the Democratic states may prioritize a reversal of Citizens United. Each of these reforms has substantial support in both parties, but either separately could fail to be proposed. States using a uniform procedure could agree to propose both for ratification and let the voters decide. Voter ratification would, of course, be on each part of the composite proposal as a separate vote. Composite proposals would simply be a way to facilitate the process of giving voters more opportunities to decide on important and controversial issues. This would be a huge boost for democracy.*

Composite proposals would encourage advocates of diverse proposals to draft them from a less partisan perspective. Compromises could also be reached, through consultation procedures, on individual proposals such as for an amendment to establish Congressional term limits, where there are diverse specific preferences as to the term length.<sup>4</sup>

---

<sup>4</sup> In a 2023 Pew Research Center Poll, 87% favored term limits for members of Congress. 79% also favored an age limit for members of Congress and 74% favored an age limit for members of the Supreme Court. However, the questions were generic. No specific age limit was used in the survey.

"The visible dysfunction in politics are (sic) dismissed as temporary aberrations or explained away, cynically, as the way things always were. The reluctance and evasion are understandable: some unwanted truths are too painful to face."

W. Greider, *Who Will Tell the People: The Betrayal of American Democracy* (1997)

### Section 3

## Rescuing Washington from Conflicts of Interest

My initial interest was simply in proposing an amendment of Article V to end the *de facto* Congressional monopoly on proposing amendments. But, to be persuasive, the essay also needs to explore some of the more popular proposals for new constitutional provisions. Four examples are included in this section. For individuals and organizations supporting these proposals, adding state reciprocity to Article V will increase the chance of their proposals being adopted.

3.1 A Fiscal Responsibility Amendment (Balanced Budget). Twenty-eight states have asked Congress for an Article V convention to propose a "Balanced Budget Amendment."<sup>5</sup>The title has the virtue of simplicity, but it is too restrictive. I prefer to call it a "fiscal responsibility amendment." The revised title allows for more creative thinking, which will be helpful and may be is necessary. For example, a Fiscal Responsibility Amendment might provide that, before passing any budget bill that adds to the deficit, Congress is required to find, in a roll call vote that precedes the vote on the budget, that exigent circumstances require adding to the deficit. The finding should specify the nature and extent of the exigent circumstances.

"PWBM estimates that ... financial markets cannot sustain more than the next 20 years of accumulated deficits projected under current U.S. fiscal policy. Forward-looking financial markets are, therefore, effectively betting that future fiscal policy will provide substantial corrective measures ahead of time. *If financial markets started to believe otherwise, debt dynamics would "unravel" and become unsustainable much sooner. (Emphasis added.)*

*When Does Federal Debt Reach Unsustainable Levels?* Penn Wharton Budget Model (PWBM), University of Pennsylvania, October 6, 2023

Today, a member of Congress can vote for a budget that adds to the federal deficit and then plausibly argue to their constituents that they wanted a balanced budget but that they didn't have that option and "passing a budget was essential." This avoids responsibility. The vote on a preceding resolution that declares the nature and scale of the exigent circumstances would establish accountability. Members supporting a resolution that lacked adequate justification would be vulnerable in the next election. As a result, Congress would need to start looking closely at the

---

<sup>5</sup> In a recent poll, 83% of Republicans, 79% of Democrats and 76% of Independents expressed support for a Balanced Budget Amendment.

actual performance and cost/benefit ratios of the government agencies and operations which they are funding, not merely fund them based on inertia and the good intentions that motivated their initial establishment.<sup>6</sup>

As long as Congress can avoid making hard choices by running deficits in the normal course of business, not just in response to legitimately exigent circumstances, Congress will perpetually over rely on borrowed money. Congress has "kicked the can down the road" for far too long - especially for the welfare of our progeny, whose futures are being mortgaged for current consumption.

3.2 Term Limits: Changing the Engine Oil. I found legislative service intellectually and emotionally rewarding and stayed for two decades. But, as colleagues came and went, it became clear that that no individual legislator was essential or even particularly important. Politics is a team sport with very few superstars. Reasonable term limits will not be disruptive and the loss of seasoned veterans will be offset by the arrival of new talent. Renewal is as important as continuity.<sup>7</sup> The states can better determine the proper balance for members of Congress than can the members of Congress, as the latter have an obvious conflict and a consequent bias towards inaction.

At the individual level, term limits are no more a condemnation of termed out incumbents than a periodic oil change is a repudiation of engine lubrication. We change our car's engine's oil periodically as a proactive and prophylactic measure. We don't wait for the engine to seize up before we change the oil. (Congress has seized up.)

That said, reasonable people can disagree on the length of maximum terms. In 1977, I introduced HB 316 to establish modest term limits for Hawai'i's legislators. (It did not pass.) It provided for a maximum of 12 years in the House and 8 years in the Senate. At the federal level, as an example, members of Congress could be limited to 10 years in the House and 12 in the Senate. This modest limit would still open up substantially more House seats in every election and would also prevent geriatric legislators from serving until their senility was too obvious and embarrassing for their colleagues to continue to ignore. An age limit, though necessarily subjective, could also be

---

<sup>6</sup> Any increase in spending for oversight will more than pay for itself. My own experience was at the state level. For years I was the Chair of the Consumer Protection and Commerce Committee in either the House or the Senate. This gave me the first pass on the budget of the State Office of Consumer Protection. Legislative oversight was inadequate, as neither I nor the Chair of the Finance or Ways and Means Committee had the time or the staff to look beyond the information provided by the Administration. Years later, when I was appointed Director of the State Office of Consumer Protection, I got a much closer look. Although a Democrat and an advocate for strong consumer protection laws, I cut the budget of the office 30% by adopting a more cost effective approach.

<sup>7</sup> There is an old joke about progress occurring "one funeral at a time."

included. (Under the current system, voters reelect impaired legislators with high seniority in order to preserve the disproportionate benefits that are derived from that legislator's seniority.)

"...the Consolidated Appropriations Act of 2021 - which included a Covid-19 relief package - more than 5000 pages... Buried in the bill were provisions for horse racing, approvals for two new Smithsonian museums, and a section on foreign policy regarding Tibet.

Neil Gorsuch, Supreme Court Justice, *Over Ruled: The Human Toll of Too Much Law* (2024)

3.3 Single Subject Bills With Honest Titles. State legislators will understand this amendment. They live with these requirements during every legislative session. Nearly all state constitutions require that bills introduced in the legislature be limited to a single subject, expressed in its title and that the sponsors use a descriptive title, rather than a public relations title or an intentionally misleading title. Governors veto the rare bills that do not comply. In contrast, Congress uses misleading "public relations" titles and packs huge omnibus bills with wildly diverse legislation. Members of Congress do not even have time to read some of them before they vote.

"The clear-title rule requires the subject of each bill to be expressed plainly in its title. The single-subject requirement ensures that each bill enacted by the legislature contains just one subject. The original-purpose requirement requires a final bill to line up with the stated purpose of the original bill. These limitations grew naturally out of a preoccupation of the Jacksonian era, curbing special interests. The US Constitution does not place comparable restrictions on Congress."

Judge Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* (2021)

For example, the *Inflation Reduction Act of 2022* contained climate change provisions, allowed greater access to Obama care, and set a 15% minimum tax on corporations that make over \$1 billion in profit. Another example is the *Clear Skies Act of 2002* which *weakened* the Clean Air Act. A year later the *Healthy Forest Initiative* increased access to federal lands by timber companies looking to cut down forests. Federal legislators can choose any name they want. Truth in advertising does not apply. State legislatures draft and enact legislation on a more honest and transparent basis and there is no reason why Congress cannot do the same.

3.4 Restoring Public Confidence in Federal Institutions. Both the fact and the perception of government impartiality need to be restored. For example, the Supreme Court is seen, fairly or not, as having been infected by the partisan incivility and distaste for compromise that pervades Washington, D.C. This perception is magnified by the partisanship in the U.S. Senate during the confirmation process. To reverse the appearance of judicial partisanship, constitutional changes are needed. Three amendments have been suggested: term limits or a mandatory retirement age, regular vacancies, and an enforceable code of ethics. A fourth suggestion to restore public confidence in the

federal government is to end excessive delays in Senate confirmations of key judicial and executive appointments.

Term Limits and/or a Mandatory Retirement Age. State supreme court justices are subject to term limits or to a mandatory retirement age. Congress, because of its objection to either term limits or a mandatory retirement age for itself, is not going to propose either for the Supreme Court. To establish either term limits or a retirement age, Article II, Section 2 and Article III, Section 1 both need to be amended and a states initiated amendment is the only way this will happen.

Regular Vacancies. A major advantage of term limits is that they permit the staggering of vacancies. With term limits, Supreme Court vacancies could be spaced so that one vacancy occurred in each *odd numbered* year. Using odd numbered years excludes election year confirmations. A justice appointed in year 1 would be "termed out" in year 19 - a term limit of 18 years. In the event of a death, disability, or retirement, a replacement justice could serve out the remaining term and remain eligible for appointment to a full term.

Code of Ethics. The Supreme Court has been embarrassed by ethical lapses, but resists the public's call for reform by pretending it is capable of policing itself - despite overwhelming evidence to the contrary. An *enforceable* code of ethics that applies to all federal judges and justices sounds good to me, but the devil is in the details. Nevertheless, I am confident that the collective wisdom of the state legislatures can draft a constitutional amendment that is sufficient but not too restrictive.

Ending Excessive Delay in Senate Confirmations. It has been proposed that the Constitution be amended to set time limits on the confirmation process for judicial nominees and executive branch nominees who require Senate confirmation. After two to three months, or some other reasonable time period, if the Senate has not acted a nominee would be automatically confirmed. Unwarranted delay has become part of a broken system. Sometimes a delay is a way to limit presidential discretion without acknowledging a political motive. Sometimes a delay is a way for a key Senator to obtain an unrelated, unwarranted and undisclosed favor.

Delay in the confirmation of cabinet members can impair the ability a new administration to respond to acute problems and challenges - foreign and domestic. There are legitimate national security concerns with the current system. Unwarranted delay is undemocratic when it does not respect the voters' choices in the preceding Presidential election.<sup>8</sup>

---

<sup>8</sup> It may be less of a concern when, as now, a single party elects both the President and a majority of the Senate. In the future, both parties could be in the less fortunate position of a partisan split between the President's party affiliation and the Senate majority.

3.5 Ending Congressional District Gerrymandering. The states could propose an amendment to Article I, Section 4 of the Constitution (the Elections Clause) to specify that the redistricting of the House of Representatives was not included in the "time, place and *manner*" of elections, which are allocated to the states. This would clarify that the states can refuse to redistrict the House of Representatives, resulting in Congress needing to reapportion the House of Representatives.

Redistricting at the state level has allowed members of the House, who are among the most important members of each state's political class, to Gerrymander indirectly while maintaining plausible deniability. Ending state level redistricting of the U.S. House of Representatives will reduce the influence of individual members of the House. While individual members are key players at the state level, because there are 435 members of the House their influence federally will be a tiny fraction of their influence at the state level. This fact is key to ending Congressional gerrymandering. The removal of redistricting from the states to a bipartisan or nonpartisan commission at the national level will facilitate public and media scrutiny while reducing every House member's ability to distort the process for an unfair advantage.

Congress has over five years to take responsibility for its own redistricting, before the 2030 census and the subsequent reapportionment and redistricting. The federal government already has all of the necessary capacity. The Bureau of the Census generates the data that is now used by the states and a small fraction of the peak load employment added for the 2030 census can meet the staffing needs of a federal redistricting commission. All Congress has to do is establish a superstructure - a nonpartisan or bipartisan national reapportionment and redistricting commission. Under the brighter lights of national attention, a federal redistricting commission will have little opportunity or motive to engage in gerrymandering on behalf of individual members of the U.S. House of Representatives.

"The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security."

James Madison (Publius), Federalist No. 45, January 26, 1788

## Section 4

### Rescuing Washington From the Homogenization Trap

This section looks at using state initiated Constitutional amendments to resolve three especially contentious political controversies: guns, abortion, and campaign financing. At the state level there is no need for a "one-size-fits-all" solution (homogenization trap) that is a defining characteristic of "Washington solutions." Please keep in mind that these are only examples and, even under the less stringent requirements proposed in Section 1, amending the Constitution will require 30 state legislatures to agree on any proposal and for the citizens' of 30 states to ratify the proposal.

#### An Amended 2nd Amendment

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed by Congress. Unless restrained by their own constitutions, state legislatures may limit and regulate the ownership and use of Arms, except those which are authorized by the militia laws of the United States. (New material is underlined.)

4.1 The 2nd Amendment: Respecting Our Diversity. The Second Amendment is an enumerated right. The U.S. Supreme Court is therefore free to interpret it. The issue is not the interpretation of the 2nd Amendment, but its application to the States ("incorporation"). The 2nd Amendment was not fully incorporated until the relatively recent case of *McDonald v City of Chicago*, 561 U.S. 742 (2010).

"Might the regulation of weapons generate a different reading in a Supreme Court of the state with a large rural population from one with a large suburban and urban population?... It may be more appropriate to tolerate 51 imperfect solutions rather than to impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live with in a certain area."

Jeffrey S. Sutton, *51 Imperfect Solutions* (2018)

Giving authority and responsibility for reasonable regulation, short of a ban, to the diverse states would allow each state to address its own citizens' needs and preferences. Red states could minimize the requirements, perhaps giving urban areas more leeway. Blue states, inversely, could impose stricter requirements, perhaps giving rural areas leeway to impose fewer requirements.



Compromise at the state level will not be easy, but it will be possible.<sup>9</sup> What's right for rural Montana isn't right for Chicago. In *Presser v. Illinois*, 116 U.S. 252 (1886), the U.S. Supreme Court held that, "Unless restrained by their own constitutions, state legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations except those which are authorized by the militia laws of the United States." The Second Amendment was only applied to Congress, not the states. An amendment to restore *Presser*, which worked well for 124 years - would allow the states to address the controversy with diverse and locally appropriate solutions.

#### An Amended 1st Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. However, each state may enact legislation to limit contributions to candidates or to individuals or organizations which support or oppose a candidate." (new material is underlined)

4.2 The 1st Amendment: Reconsidering *Citizens United v FEC*. There is no right more critical to a democracy than freedom of speech. Consequently, when a conflict arises between free speech and a functional democracy, the consequences of failing to find a proper balance can be enormous. *Citizens United v FEC* conflated money with speech, creating just such a conflict. Wealthy individuals and entities can and do give hundreds of millions of dollars to influence the outcome of elections<sup>10</sup> and they do so based on self-interest. They make transactional contributions. The Supreme Court removed all limits on "independent" political expenditures. As a result, unlimited money from corporations, unions and ultra wealthy individuals, when funneled through an ostensibly independent organization, is currently deemed an acceptable way to exert influence on both candidates and elected officials.

A state initiated constitutional amendment could permit our 50 state "laboratories of democracy" to experiment with a variety of solutions to the balancing of free speech and

---

<sup>9</sup> As the chair of Hawai'i's Senate Judiciary Committee, in 1981-82, the author drafted such a compromise. It would have been very useful to have had greater leeway to reflect the very different conditions between highly urbanized O'ahu and the much less urbanized Neighbor Islands.

<sup>10</sup> In 2024, Elon Musk donated \$277 million dollars and Tim Mellon, another billionaire, donated almost \$200 million. Two people gave almost half a billion dollars.

democratic legitimacy. A variety of approaches may yield an optimal balance in one or more states, which can be models for other states to consider.

"[Citizens United] ... obscures the very real injustice and distortion entailed in the phenomena of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose."

Professor Lawrence Tribe, SCOTUS blog (January 24, 2010).

The basis for the concerns raised by *Citizens United* was clearly shown at a 2024 rally in Atlanta. Presidential candidate Donald Trump, who earlier opposed support for electric vehicles in favor of internal combustion engines, said: "I am for electric cars. I have to be, you know, because Elon Musk endorsed me very strongly." Such unfiltered candor is rare in politicians, but the potency of large campaign contributions is universally acknowledged. Contributions from voters are not trivial, but potential candidates are not taken seriously unless and until they demonstrate a capacity to attract large donors. Without big donors, otherwise exceptional candidates don't survive the first cut.

"The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your election."

D. Kirkpatrick, New York Times Editorial (January 21, 2010).

The threat to democracy from unlimited money in politics does not begin and end in the campaign season. It continues 365 days a year - every year. Congressional incumbents solicit contributions throughout their term of office, as they prepare for the next election. Votes in Congress are subject to an all too common consideration: Will my vote upset big donors? In most cases, an incumbent is able to vote the way the big donors want without their constituents being aware of any conflict with the public interest.

Big donors are often more interested in stopping legislation than in passing legislation. The *status quo* already serves their needs. Incumbents are, therefore, able to kill legislation on behalf of big donors and, because their responsibility is hidden, there are no consequences. Reelection funds will flow from special interests who appreciate the maintenance of the *status quo*.

"Thursday was a bad day for democracy. The Supreme Court's decision in *Citizens United v. the Federal Election Commission* paves the way for unlimited corporate and union spending in elections, and the drowning out of the average citizen's voice in our public policy debates."

Common Cause President Bob Edgar, *Supreme Court's Campaign Ruling: a Bad Day for Democracy* (January 22, 2010)

While there are many politicians who resist most of the time, there are few who resist all of the time. We cannot expect our elected officials to be saints. We must change the environment in which candidates campaign and legislators legislate, so that mere mortals can more easily behave ethically. Democracy will not be adequately robust until the Supreme Court's campaign financing cases, from *Buckley v Valeo* to *Citizens United*, are replaced by a state proposed Constitutional amendment to rebalance the interests. Members of 16 state legislatures have already called for a Constitutional amendment to reverse *Citizens United*. Four hundred municipalities and three states (California, Illinois and Vermont) have even called for an Article V convention for this purpose.

4.3 *Dobbs v Jackson: Making State Decisions Stick*. The case of *Dobbs v Jackson* has given the authority to regulate abortions to the states, but it remains a divisive issue at the federal level. Since it was the Supreme Court that made the decision, the President remains in the fight due to the role of nominator and Congress remains in the fight due to the Senate's role in the confirmation process.

The potential benefit of a state initiated Constitutional amendment that makes abortion rights and restrictions a state-by-state decision is two-fold.<sup>11</sup> First, if such an amendment is unambiguous, it will entirely remove the federal government from the process. Second, a state may choose to enact its abortion rules as either a constitutional amendment, which is very "sticky," or as by statute. There are arguments for and against both approaches. Each state can decide for itself.

At some point, after sufficient debate and compromises, most state's voters will accept that its legislature's decision adequately reflects the preferences of its citizens. Future conflict will be limited to a handful of "purple" states. In our highly diverse country, state legislatures are a better venue for finding an acceptable compromise and, once that happens, the issue will be substantially detoxified. Massachusetts and Mississippi can agree to disagree.

---

<sup>11</sup> Article 3 Section 2 of the Constitution gives Congress the authority to modify the jurisdiction of the federal courts: "...with such Exceptions, and under such Regulations as the Congress shall make." But, using this authority to eliminate federal jurisdiction could actually make matters worse. There would be constant pressure on Congress to modify or repeal the legislation that limited federal court jurisdiction.

"Not at the margins but at the core: the institution governing us—a democracy—lacks the basic integrity of such an institution: that the people rule... For a democracy to favor the elite over the people is to add insult to suffering. It is to betray the very promise at the core of the institution."

Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy* (2019)

## Section 5

### Conclusion: A More Balanced Federalism

Since the middle of the 20th century and for a variety of reasons, authority and responsibility has shifted from the states to the national government. In the process, important advantages of local decision making have been lost, including flexibility and the greater capacity of 50 jurisdictions to innovate. Currently, flexibility and innovation are suppressed because homogenization is incentivized with federal grants and coerced with the threat of withholding federal money. The golden rule (the one with the gold writes the rules) has been on full display and the result has been a top-down homogenization. State governments were fettered and their capacity to responsibly exercise authority and responsibility atrophied. The solution is to restore some of the lost balance in our federalism by allowing the states to solve problems that are less tractable at the national level.

Recognizing Our Diversity. I've lived in six states: Hawaii, California, Florida, Virginia, Maryland and New York. I've seen enough diversity in just these few states to be able to appreciate that we are not and cannot be politically homogenized. Even within the larger states there is great diversity. It takes seven hours to drive from Miami to Tallahassee and the cultural differences are even greater than the distance suggests. The same range of diversity exist between coastal California and its Central Valley - separated by only an hour or two in an automobile. *We are a diverse country!*

"... you could put half of Trump's supporters into what I call the basket of deplorables."

Hillary Clinton, September 9, 2016

Respecting Our Diversity. One of the more shocking things I ever heard in political discourse was the Democrat's 2016 candidate for President refer to one-quarter of the nation's population as "a basket of deplorables." What made it ironic in addition to shocking was that her campaign slogan was *Better Together*. Party loyalists did not bat an eyelash at their party's nominee expressing contempt for the tens of millions of citizens who preferred her opponent's policies. The Republican Party had the same problem with an equally divisive candidate. Neither candidate was the ultimate problem, which was and still is the zero-sum nature of national politics.

Since 2016, things have gotten worse. America is split into two combative political tribes that demonize each other. The effects of gerrymandering and the consequent hyper-polarization of primary elections assures that the middle of the political spectrum - both moderate and independent voters - is excluded. Politics has become a zero-sum competition and candidates who respect the fact that compromise is necessary for a democracy to function properly are branded as heretics. A willingness to compromise is sufficient grounds to warrant exclusion from consideration in the primary election. These dynamics are antithetical to a functioning democracy.

Closing comment: I only ask that you, as a legislator from a sovereign state, provide the "outside of the Beltway" leadership that is needed to rehabilitate our dysfunctional national government. The best and perhaps the only way to do that begins with amending Article V of the U.S. Constitution to provide reciprocity in the initiation of amendments. *Amazingly, it only requires the adoption of a simple Concurrent Resolution by 34 state legislatures (no Governor's signature is required).* Once that occurs, Congress must propose an amendment to Article V to avoid a federal constitutional convention. After the Article V proposal is ratified by the states' legislatures, state proposed amendments can harness the legitimacy of voter ratification to resolve some of our most intractable and divisive controversies.

Please ask the majority and minority caucuses to jointly introduce and pass a Concurrent Resolution calling for a federal constitutional convention to revise Article V. The resolution should also ask the Governor to support a multi-state process for drafting and submitting states initiated amendments.

Thank you and best wishes for a very successful 2025 legislative session. Please help make 2025 the best year for democracy since 1787.

Russell Blair  
blairessays4free.com

## Appendix: About the Author

Some of the ideas in the essay are controversial, but all of them warrant thoughtful debate. Ideas have (or lack) utility, logic and legitimacy independently of their source. Nonetheless, it is human nature to be curious about the source. This page is an attempt to provide the relevant biographic information and, hopefully, to reduce *ad hominem* distractions.

I was a constitutional law practitioner, but not an academic. As a state legislator, from 1974 to 1993, I proposed several amendments to the Hawai'i State Constitution that were enacted by the legislature and ratified by the voters.

In addition, I filed *pro se* legal challenges to the actions of other elected officials, even when the defendants were friends, over constitutional questions concerning legislative redistricting, failure to strictly follow the constitutional requirements for proposing an amendment, and application of a "resign to run" requirement when an elected official runs for a new office during their current term.

As a Honolulu Deputy Prosecuting Attorney in the Appellate Division, I responded to the appeal of criminal convictions. These often alleged violations of a defendant's constitutional rights. Later, as a Honolulu District Court Judge, I ruled on the occasional constitutional arguments that were raised in cases assigned to me.

As a legislator, a lawyer and a judge, I gained an appreciation for the crucial role of Constitutions in establishing process legitimacy. This essay arose from a very simple insight: *fix the process first*. Only when the process is optimized are optimal outcomes possible. The proposal gives both conservatives and progressives an equal opportunity to present their proposed solutions to the voters and publicly debate the merits and demerits of the proposals - letting the voters make the final decision.

