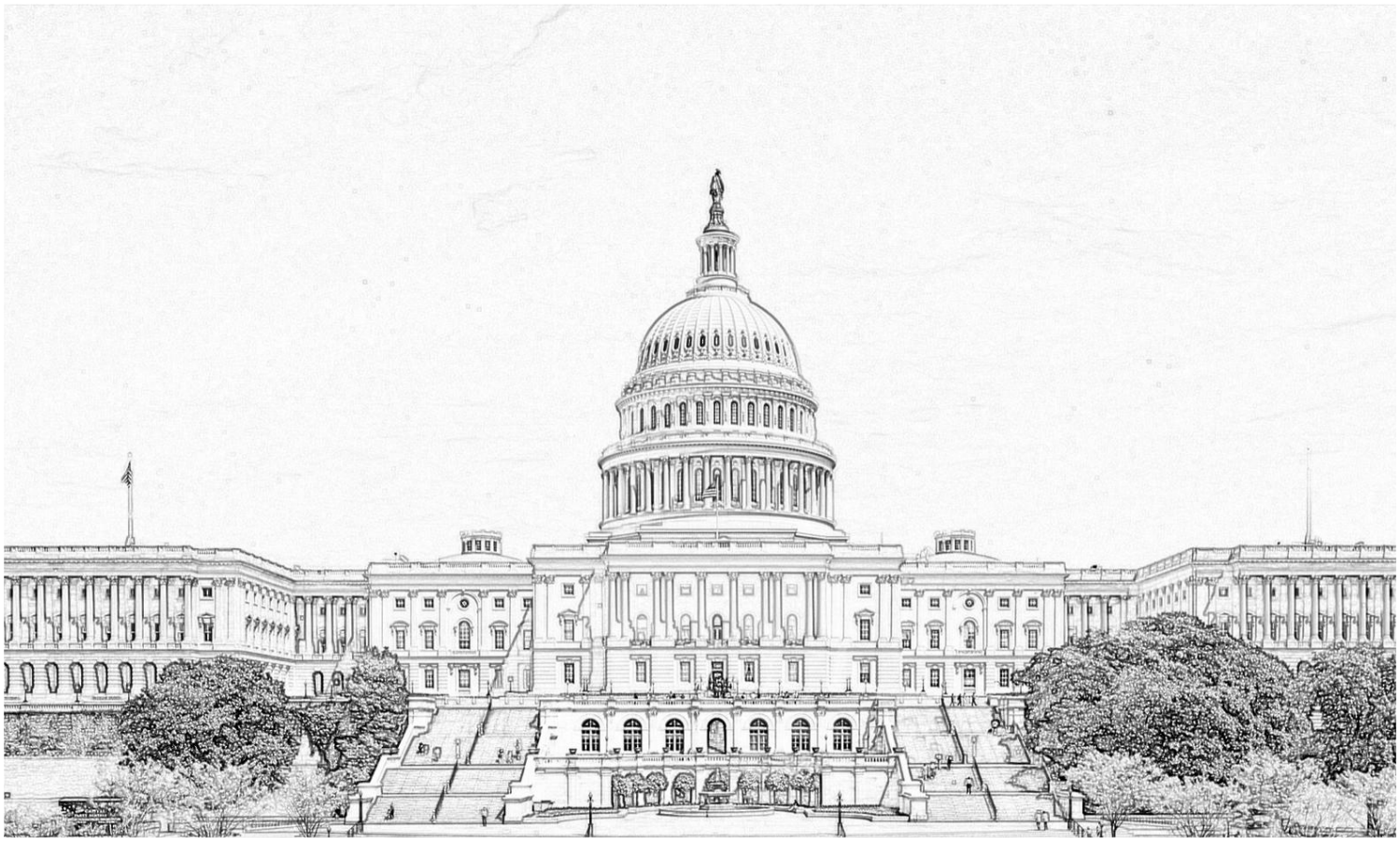
State Solutions:

The Governors Propose Constitutional Amendments and Voters Ratify Them in a National Referendum



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Disclaimer: The author does not support any political party, ideology or candidate. This essay attempts to be non-partisan or bi-partisan. It focuses on increasing the legitimacy of the federal government through process reform. When the democratic process gives everyone both fair and frequent opportunities to convince others, voters accept the outcome as legitimate - even if they don't agree with it. A good process allows the unsuccessful to concede gracefully and try again.

Contents

"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: Amending the Article V Constitutional Convention

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 decline and, in the absence of major reforms, the 2026 and 2028 elections will make things worse.

We need to change the processes 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 and voters.

Section 1 explains how the unused convention alternative for proposing constitutional amendments can be modified to end the *de facto* congressional monopoly. As amended, two-thirds of the states would still be needed to call for a convention. The delegates to the convention would be the fifty state's Governors, instead of electing convention delegates. The Governors would be able to propose constitutional amendments in accordance with such rules as they adopted. The convention's proposals would be ratified, in a national referendum, if 60% of the voters approved.

Section 2 discusses reforms that are currently impossible due to the combination of Congress's monopoly on proposing amendments and conflicts of interest on specific reforms.

Section 3 discusses 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 our diversity while acting as the "laboratories of democracy."

"… what country can preserve its liberties if their 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. Reversing Washington's democratic decline requires outside of the Beltway leadership from our elected Governors and the democratic legitimacy only possible with voter ratification.

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 1
A Concurrent Resolution to End the Congressional Monopoly

Congress is overly invested in a failing system and has a conflict of interest with respect to any proposal to overturn its *de facto* monopoly on proposing Constitutional amendments. After Article V is amended to end Congress' *de facto* monopoly, two-thirds of the state legislatures can request a convention at which the Governors will give proponents of specific reforms the opportunity to present their case. Reforms that are currently frustrated by Congress's conflicts of interest (Section 2) will have a forum. The states can also extricate Congress from the homogenization trap[1] (Section 3). Voter ratification by a 60% supermajority in a national referendum will provide the ultimate in political legitimacy to successful proposals.

"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)

1.1 Congress's Monopoly on Proposing Constitutional Amendments. There are two ways to amend the U.S. Constitution: 1) two-thirds of Congress can propose an amendment and it becomes part of the Constitution if and when ratified by 38 state legislatures, or 2) 34 states can call for a constitutional convention and any convention proposal becomes part of the Constitution if and when it is ratified by 38 state legislatures. All thirty-three amendments to the Constitution were proposed by Congress.

There is uncertainty over whether the states or Congress can limit or even influence a convention. This uncertainty has precluded conventions, because they are perceived to be either too dangerous or doomed to failure. In light of the requirement for ratification, fear of a runaway convention is exaggerated. The real problem is that a convention could easily become an ideological brawl and fail miserably. Failure would make our current political problems worse. The result is that

[1] 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.

there has been a *de facto* congressional monopoly for nearly 250 years. To end the monopoly, we need to fix the convention alternative.

" 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

1.2 Amending Article V to Fix the Convention Model. My two suggestion to fix the convention model are simple: 1) the Philadelphia convention of 1787 gave each state one vote. The amended Article V should designate the 50 state governors as the delegates for all future conventions. This avoids the cost and time required to elect delegates, who may lack adequate and necessary experience in governance. Duly elected and highly qualified Governor's are much less likely to fail and are available as soon as a convention is called, and 2) an amended Article V can let the voters ratify all proposals, whether of Congressional or Gubernatorial convention origin, in a national referendum. Under the current Article V, voters only participate indirectly, through ratification by their state's legislature. Voter ratification provides the ultimate legitimacy.

A convention of Governors would allow acknowledged leaders from both parties to: 1) work out necessary compromises, such as the length of Congressional term limits, and 2) submit "conjoined" and "alternative" proposals. Republicans will prioritize a Fiscal Responsibility Amendment (Balanced Budget) and Democrats will prioritize a reversal of *Citizens United. v FEC.* While both of these proposed amendments have strong support in both parties, excessive partisanship could result in both failing to be proposed. Instead, the Governors could agree to propose both - as conjoined proposals. Conjoined proposals would, of course, be ratified or rejected independently.

The Governors could also propose alternative amendments: one from each party. Neither alternative could afford to take an extreme position, for fear of loosing to its alternative form. Conjoined proposals and alternative proposals will give voters more opportunities to settle important and controversial issues. Desirable or even essential changes will fail if the thresholds for action are too high. It has been proposed that Article V be amended to lower both the requirement for proposing amendments and the requirement for ratification. My proposal uses a two-thirds requirement for proposals, whether proposed by Congress or a Governors' convention. Conjoined and alternative proposals will make the threshold for proposals achievable. For ratification, I considered the thresholds used by states in ratifying amendments to their own constitutions. Ratification generally requires a simple majority. In most of the other states,

ratification requires a 55% or 60% supermajority. My proposal uses the high figure of 60%, which is still an improvement over the current requirement.

1.3 The Concurrent Resolution(Draft). It is important that the initial call for a convention to amend Article V be consistent in the 34 required states and that all include a clause that allows Congress to shorten the process by proposing the specified amendment..

Concurrent Resolution Asking Congress to Call a Constitutional Convention or, in the Alternative, For Congress to Propose a Specific Amendment to Article V

Whereas Article V of the U.S. Constitution provides that two-thirds 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 constitutional convention to propose amendments, which also become effective when ratified by three-quarters of the states legislatures, and

Whereas the current Article V creates a *de facto* monopoly for Congress, due to 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 a viable alternative to the congressional proposal of amendments deviates from the clear intention off the Constitution and has resulted in the failure to address critical constitutional issues, and

Whereas the best way to end the congressional monopoly is to reform the convention alternative, and

Whereas the best way to prevent either a runaway convention or a hyper-partisan convention is to designate the 50 state governors as the convention's delegates, and

Whereas, if the amendment also establishes voter ratification it will, for the first time, provide successful amendments with the ultimate democratic legitimacy by giving voters a direct voice in the amendment of their federal Constitution:

Now Therefore Be It Resolved That the Sovereign State of_____, pursuant to Article V of the U.S. Constitution, does hereby call for a constitution convention for the purpose of amending Article V to read substantially as follows:

"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 **of the States' Governors** for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by **60% of** the **[**Legislatures**]** **voters** of **[**three fourths of**]** the

several States **[**, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article**]**; and **provided** that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

(material to be deleted is **[**bracketed**]** and new material is in **bold** font).

Be It Further Resolved That should Congress, pursuant to the current Article V, propose an amendment substantially the same as the preceding proposal, then this call for a convention shall be deemed null and void, *ab initio*, under its own terms, and

Be it Finally Resolved That certified copies of this Concurrent Resolution 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 each member of the Congress of United States.

"The visible dysfunction in politics are 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 2
Saving Washington from Itself: Ending the 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 constitutional changes. For individuals and organizations supporting these proposals, amending Article V will increase the chance of their proposals being adopted.

2.1 Two Fiscal Responsibility Amendments

There are two proposals for constitutional amendments to increase Congress's fiscal discipline which deserve consideration: 1) a balanced budget with appropriate exceptions and 2) proposed amendments for sequestration, impoundment, or recision.

2.1.1 A Balanced Budget With Appropriate Exceptions. Twenty-eight states have asked Congress for an Article V convention to propose a "Balanced Budget Amendment."[2] The title has the virtue of simplicity, but may be too restrictive. I prefer to call it a "fiscal responsibility amendment." The revised title suggests more creative thinking, which will be helpful and may be necessary. For example, a Fiscal Responsibility Amendment might provide that, before passing a tax reduction or a spending bill, either of which can add to the deficit, Congress is required to find, in a roll call vote that precedes the vote on the tax reduction or spending bill, that exigent circumstances require adding to the deficit. The finding must 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 tax cut or spending bill that adds to the federal debt and then plausibly argue to their constituents that they wanted a balanced budget but that they

[2] In a recent poll, 83% of Republicans, 79% of Democrats and 76% of Independents expressed support for a Balanced Budget Amendment.

didn't have that option because "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 provide 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 actual performance and cost/benefit ratios of the government agencies and operations which they fund, not merely fund them based on inertia and the good intentions that motivated their initial establishment.[3]

As long as members of 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 too long - especially for the welfare of our progeny, whose futures are being mortgaged for current consumption.

2.1.2 Sequestration, Impoundment, or Recision. Many state Governors have the authority, with various qualifications, to not spend money appropriated by the legislative branch. In concert with a balanced budget/fiscal responsibility amendment, a companion amendment to grant the President some flexibility in sequestering appropriations may be warranted. To prevent the President from becoming too powerful, there would need to be qualifications and process requirements. Who better than the 50 state Governors, who are required to balance their state budgets, to balance the interests between the executive and legislative branches? Such an amendment would provide a clear and clearly limited basis for Presidential sequestration of appropriated funds (sometimes called impoundment or recision.)

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[3] Any increase in spending for oversight will more than pay for itself. My own experience was at the state level. At various times I was the Chair of the Consumer Protection and Commerce Committee in both the House and 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 an advocate for strong consumer protection laws, I cut the budget of the office 30% by adopting a more cost effective approach.

2.2 Five Congressional Reform Amendments

There are at least five proposed amendments to reform Congress which deserve consideration: 1) congressional term limits, 2) ending congressional district gerrymandering 3) mandating single subject bills with honest titles, 4) limiting outside interests and ending conflicts of interest, and 5) ending excessive delays in the Senate's confirmation of Presidential nominees.

2.2.1 Congressional 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. Enacting legislation 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.[4] State Governors 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 reflection on the "termed out" incumbents performance than a periodic oil change is a repudiation of the old oil. 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 a *modest* term limit for Hawai'i's legislators. (It still 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. Even a modest limit would 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 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.)

2.2.2 Ending Congressional District Gerrymandering. The states' Governors 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

[4] There is an old joke about progress occurring "one funeral at a time."

the House of Representatives, resulting in Congress needing to provide for the reapportion the House of Representatives.

Redistricting at the state level allows members of the House of Representatives, 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 House of Representatives will reduce the influence of individual members of the House. While individual members are important 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 national commission will facilitate public and media scrutiny and reduce every House member's ability to distort the process for an unfair advantage.

Congress has more than five years to take responsibility for 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 redistricting commission. Under the brighter lights of national attention, a federal redistricting commission will have little opportunity or motive to Gerrymander on behalf of individual members of the House of Representatives.

"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)

2.2.3 Single Subject Bills, Honest Titles and Original Purpose. State legislators and Governors 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 that uses 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 these monstrosities before they vote.

"…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)

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.

2.2.4 Limiting Outside Interests and Ending Conflicts of Interest. This is a complex topic, but that should not deter the Governors from exercising their informed judgement. Serving in Congress is an honor which comes with great authority and responsibility. There should be no opportunity for private gain in holding a public office. Politicians are no more immune to temptation than other humans, so the system must support their better nature by removing temptations. Those who are deterred from public office by these limits will not be missed.

2.2.5 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 sixty days, 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.[5]

2.3 Three Judicial Reform Amendments. 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

[5] 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, either party could find itself in the less fortunate position of a partisan split between its party's President's and a Senate majority of the opposite party.

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.

2.3.1 Term Limits. 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 gubernatorial convention is the only way this will happen.

2.3.2 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.

2.3.3 An Enforceable 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 Governors can draft a constitutional amendment that is sufficient but not too restrictive.

2.4 Impeachment and Removal of Federal Officials

The impeachment by elected officials of persons holding high federal office, including the impeachment of other elected officials, is potentially subject to partisanship. With the impeachment of President Bill Clinton and President Donald Trump, the possibility of political motivations for impeachment and removal from office and the political consequences of partisan impeachment have become clearer. One suggestion is for the impeachment phase to be conducted by both legislative chambers, with a dual *majority* requirement for passage of the articles of impeachment. The subsequent "trial" for removal could be conducted by the U.S. Supreme Court. This change, to reduce the potential for partisanship, would require a constitutional amendment that sets out a clear statement of the legitimate grounds for removal and the standard of proof to be applied by the

court. The standard of proof should be "clear and convincing evidence," a concept well developed in the common law. It seems more appropriate than either the less stringent civil standard of "a preponderance of the evidence" or the more stringent criminal standard of "proof beyond a reasonable doubt."

"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 3
Rescuing Washington From the Homogenization Trap

This section looks at Constitutional amendments to resolve three especially contentious federal controversies: guns, abortion, and campaign financing. In each case, the amendment would shift the controversy from the federal to the state level. At the state level there is no need for the "one-size-fits-all" solution (homogenization trap) that is a defining characteristic of "Washington 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)

3.1 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 damaging consequences of failing to find a proper balance are 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[6] and they may do so based on self-interest, making 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, post-election, on elected officials.

Members of 16 state legislatures have already called for a Constitutional amendment to reverse *Citizens United v FEC*. Four hundred municipalities and three states (California, Illinois and

[6] 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!*

Vermont) have even called for an Article V convention for this purpose. A gubernatorial proposed amendment, ratified by 60% of the voters, would permit our 50 state "laboratories of democracy" to experiment with a variety of solutions to the balancing of free speech and democratic governance. Diverse approaches in the fifty states may yield an optimal balance in one or more states, which would 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 v FEC* 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 interests. Incumbents are, therefore, able to kill legislation on behalf of big donors and, because their responsibility is easily 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 temptation 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 v FEC,* are reconsidered by a gubernatorial convention.

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.)

3.2 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 real issue is not a controversial 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). Previously, 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 only applied to Congress, not the states.

"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.[7] What's right for rural Montana isn't right for Chicago. 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.

3.3 Abortion: Making the *Dobbs v Jackson* Decisions Stick. The case of *Dobbs v Jackson* has given the authority to regulate abortions to the states, but abortion 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.[8] First, if such an amendment is unambiguous, it will entirely remove the federal government from the process - with a calming effect on federal politics. Second, a state may choose to enact its abortion rules as either a constitutional amendment, which is very "sticky," or as a statute. There are arguments for and against both approaches. Each state can decide for itself.

At some point, after sufficient debate and compromises, most voters will accept that its state's 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.

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[7] 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.

[8] 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 4
Conclusion: A More Balanced Federalism

Since the middle of the 20th century and for a variety of reasons, some more valid than others, authority and responsibility for governance 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) is on full display and the result is a top-down homogenization. State governments are fettered and their capacity to exercise authority and responsibility has atrophied. The solution is to restore some of the lost balance in our federalism by allowing the Governors and voters 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. While there can be great diversity within a single state, there is far more diversity across the 50 states. *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 our national politics.

Closing Comment: 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 a candidates exclusion from consideration in the primary election. These dynamics are antithetical to a functioning democracy.

Please ask your State Senator and House Member to support the Concurrent Resolution proposed in § 1.3, calling for a revision of Article V. Help make 2025 the best year for democracy since 1787.

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Appendix: About the Author

Many of the ideas in this essay are controversial, but all of them deserve thoughtful debate. Ideas have (or lack) utility, logic and legitimacy independently of their source. Nonetheless, it is human nature to be curious about sources. This page is my 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 legal challenges to the actions of other elected officials, even when they were friends, over constitutional issues 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 our federal and state 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 Article V amendment proposed in this essay will give both conservatives and progressives an equal opportunity to present their proposed solutions to the voters and publicly debate their merits - letting the Governor propose and letting the voters make the final decision.