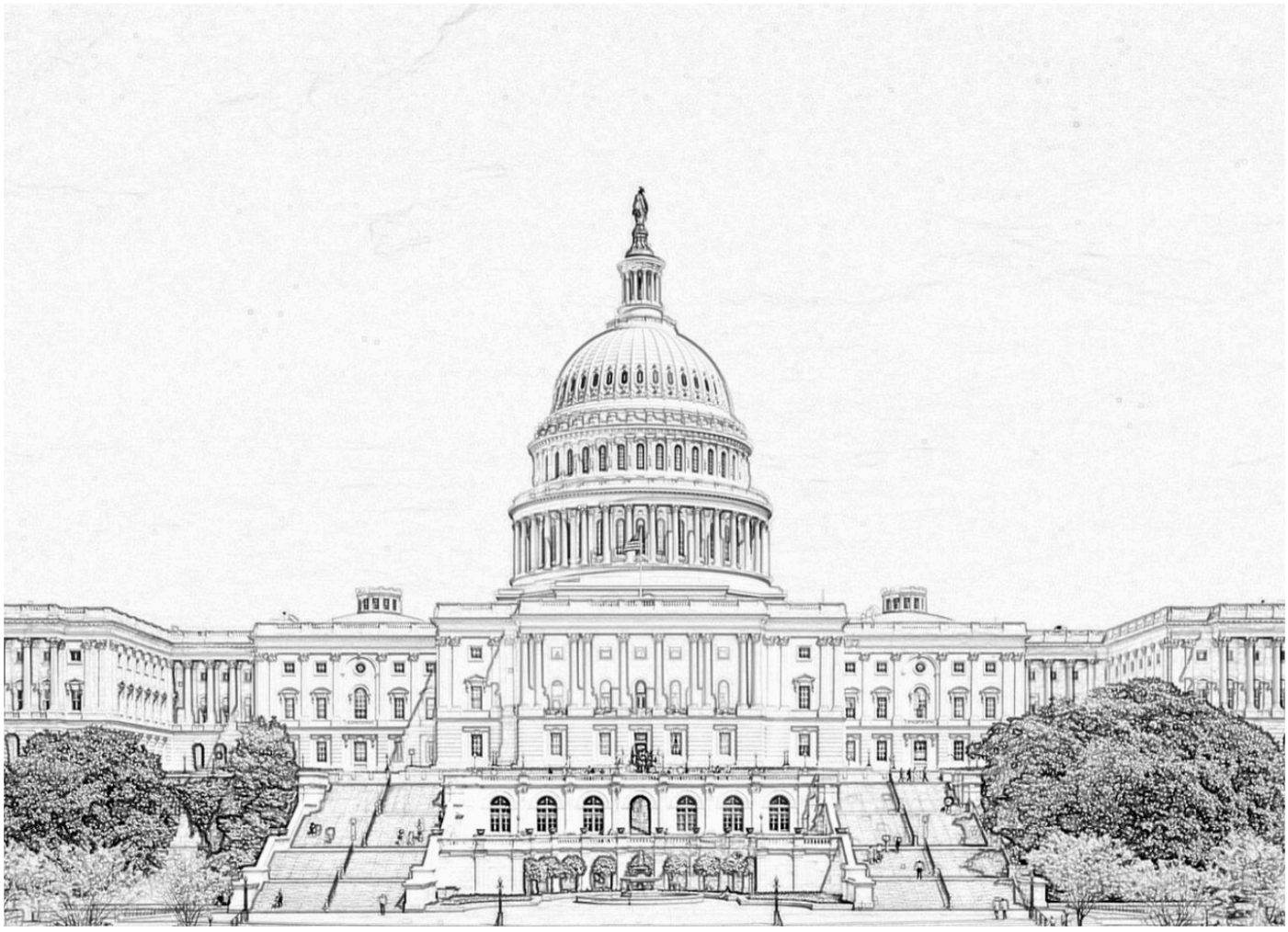
State Solutions:

Let the States Propose Constitutional Amendments and Voters Ratify Them in a National Referendum



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" 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

Section 1. Replacing the Unused Convention Model

My suggestion for replacing the Article V convention is simple. It should be replaced by giving two-thirds of the states the same authority to propose amendments as is now the prerogative of two-thirds of Congress. It will be a "state parity" amendment.

1.1 The New State Role: From Indirect to Direct

Currently, the states have an indirect role in amending the Constitution and the extent of their indirect role is unclear. The states decide if and when to resort to the convention alternative to Congressional proposals. But, as with so much about the convention alternative, it is unclear whether the states can limit the scope of a convention to discreet topics or define the process for reaching convention decisions.

1.1.1 The Original Sin: Inadequate Guidance. The Philadelphia convention in 1787 was established by the Continental Congress without providing funding, saying how delegates would be selected, or establishing rules or procedures. The delegates *ad libbed* and blatantly ignored the few instructions of the Continental Congress. Perhaps this is why Article V is so unhelpful in providing guidance for a future convention. The Article V requirement for the calling of a convention at the request of two-thirds of the states, without guidance on process, structure or scope, is the original sin of the "runaway" convention of 1787.

One example of the present consequences of the original sin is the controversy and litigation that will be required to determine whether the convention's membership should be based on population or should give each state equal representation. The 1787 convention gave each state a single vote - equal state representation. That was the same as the states' equal representation in the Continental Congress. State equality made sense in the context of amending the Article of Confederation and in consideration of the need for state ratification.

Equal weight for each state does not make sense in the context of a convention to amend the Constitution. Congressional authority is divided between a Senate, in which each state is equal, and a House of Representative based on population. The President is chosen by an electoral college that gives partial weight based on population and partial weight based on state equality. Should a convention to amend the Constitution follow the one-state, one-vote precedence of the 1787 convention to amend the Articles of Confederation, or should (must) it reflect the fact that

California has over 68 times the population of Wyoming? Should there be a bicameral convention to reflect the current structure of the legislative branch and the election of the President under the Constitution? Congress will never agree on this fundamental question. A convention will never get off the ground.

1.1.2 A Parity Amendment for the States. The states already grant their legislatures the authority and responsibility for proposing amendments to the state's constitution. This is precedent for the states' legislatures assuming the same role in the amendment of the federal constitution. Like two-thirds of Congress, two-thirds of the states could propose amendments. Like the convention alternative it replaces, it avoids a Congressional monopoly. It also gives the sovereign state governments parity with the sovereign federal government.

1.2 Persuading Congress to Amend Article V

Congress may not welcome the competition, but it can be persuaded to accept state parity. All that is required is for 34 states to adopt a concurrent resolution (§ 3, infra.) that request a convention, but which also contains a provision for automatic rescission of the convention request in the event that Congress proposes the state parity amendment. In other words, the price for avoiding a convention is Congress giving the states the same right to propose amendments.

1.2.1 The Path of Least Resistance. Given the current inability of Congress to agree on almost anything of substance, it is likely that Congress will take the path of least resistance. It will not be able to solve the myriad issues that will accompany the call for a convention and will not want to fail. As soon as they appreciate the dilemma confronting them, they will want to replace the unused and unusable convention model with any viable alternative. Empowering the states is the only viable alternative.

1.2.2 If Congress Calls a Convention. Despite the improbability, it is useful to ask what will happen if Congress either decides to call a convention or is required to call a convention. The latter is far more probable. There are already discussions among several state attorneys general about bringing a suit to compel a convention on the basis of the number of request that have been submitted for a balanced budget amendment or arguing that any call for a convention, irrespective of conditional language that attempts to narrow the scope of the convention, count towards the two-thirds requirement. (One advantage of this essay's state parity proposal is that it will moot any such litigation.)

If Congress is forced to call a convention, or chooses to call one, it will be a disaster. In the unlikely event that the procedural issues are resolved, the nation's current ideological rift will assure

chaos and failure. Congress will then appreciate the need to replace the convention model and will, belatedly, propose the state parity amendment.

Section 2. Voter Ratification to Maximize Legitimacy

Adequate legitimacy results in substantial voluntary compliance with the law and is the least expensive way to govern. Governance without adequate legitimacy is either chaotic or despotic. For the ratification phase of the constitutional amendment process, state legislatures should be replaced by the ultimate source of democratic legitimacy, voter ratification in a national referendum.

In determining the threshold for voter 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 for three-fourths of the state legislatures to ratify. The current ratification threshold is excessive and assures that only anodyne proposals will ever be ratified.

Section 3. A (Draft) Concurrent Resolution

It is important that the request for a convention to amend Article V be expressed consistently by the 34 required states and that all 34 of the state requests for a convention also include a clause that allows Congress to short circuit the convention option by proposing the amendment to replace the convention model with state parity in proposing amendments. To that end, a draft of the concurrent resolution follows:

Concurrent Resolution Asking Congress to Call a Constitutional Convention or, in the Alternative, For Congress to Propose a Constitutional Amendment That Both Replaces the Article V Convention Option With Authority For States to Propose Constitutional Amendments and Provides for the Ratification of All Proposed Amendments in a National Referendum

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 state legislatures, and

Whereas Article V provides, as the sole alternative to congressional proposals, that two-thirds of the states can request a constitutional convention to propose amendments, which 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 original intent to avoid a monopoly and has resulted in the failure to address critical constitutional issues, and

Whereas the best way to end the Congressional monopoly is to replace the convention option with a provision that gives the states the authority to propose amendments, in parity with Congress, thereby ending the Congressional monopoly while avoiding either a run away convention or a failed convention, and

Whereas, if an amendment to grant the states parity with Congress also provides for voter ratification it will, for the first time, give voters a direct voice in amending their federal Constitution, giving successful amendments the ultimate democratic legitimacy:

Now Therefore Be It Resolved That the Sovereign State of_____, pursuant to Article V of the U.S. Constitution, does hereby request a constitution convention for the sole purpose of amending Article V, by adding a new amendment that reads substantially as follows:

> "The provision in Article V for the holding of a constitutional convention when requested by two-thirds of the states is hereby revoked. In addition, the current provisions in Article V with respect to ratification by three-quarters of the state legislatures is hereby revoked. They are replaced by a grant of authority for two-thirds of the states to propose constitutional amendments. Any proposed amendments, whether proposed by two-thirds of Congress or by two-thirds of the states, shall be valid for all intents and purposes as a part of this Constitution when ratified by 60% of the votes cast on the ratification question in a national referendum to be held in conjunction with the first Presidential election after an amendment is duly proposed."

Be It Further Resolved That should Congress, pursuant to the Article V, propose an amendment substantially the same as the preceding proposal, then this request for a convention shall be deemed null and void, *ab initio*, by 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.

Section 4. Overcoming Congressional Inertia, Dysfunction and 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 acknowledge some of the more popular[1] proposals for constitutional changes that Congress is

[1] In a recent poll, over 80% of Republicans, nearly 80% of Democrats and over 75% of Independents supported a Balanced Budget Amendment. At about the same time, a different poll found 87% support for Congressional term limits and 74% support for a Congressional maximum age limit. The same percentage also favored a maximum age limit for members of the Supreme Court.

blocking by inaction. For individuals and organizations supporting these proposals, amending Article V will increase the chance of their proposals being adopted.

4.1 Two Fiscal Responsibility Proposals

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

4.1.1 A Balanced Budget With Appropriate Exceptions. At least twenty-eight states are asking Congress for an Article V convention to propose a "Balanced Budget Amendment." The title has the virtue of simplicity, but may be too narrow. I prefer to call it a "Fiscal Responsibility Amendment." The revised title suggests more creative drafting, which will be helpful and may be necessary. For example, a Fiscal Responsibility Amendment might provide that, before passing a *tax reduction* or any *spending bill*, either of which can add to the deficit, Congress is required to find, in a roll call vote on a resolution that precedes the vote on the tax reduction or spending bill, that specific exigent circumstances require adding to the deficit. The resolution must specify the nature, expected duration, and scale 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.)*
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> *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 want to reduce federal debt but that they didn't have that option because "passing the budget was essential." This avoids responsibility. The vote on a preceding resolution that declares the nature, duration, and scale of the exigent circumstances would provide accountability. Members supporting a resolution that lacked adequate justification would be accountable at the next election. Congress needs to start looking closely at the actual performance and cost/benefit ratios of the government operations and programs which they

fund, not merely fund them based on inertia and the good intentions that motivated their initial establishment.[2]

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.

4.1.2 Sequestration, Impoundment, or Recision. Many state Governors have the authority, with various qualifications, to not spend all of the money that was appropriated by the legislature. 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 legislatures, which are *required* to balance their state budget and must deal with gubernatorial sequestrations, to balance the interests between the federal executive and legislative branches? Such an amendment could provide a clear and clearly limited basis for Presidential sequestration of appropriated funds (sometimes called impoundment or recision.)

4.2 Five Congressional Reform Proposals

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.

4.2.1 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

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[2] 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.

disruptive and the loss of seasoned veterans will be offset by the arrival of new talent.[3] Renewal is as important as continuity. The state legislatures 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 strong 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 prior oil change. 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 the term limit. In 1977, I introduced a bill to establish a *modest* term limit for Hawai'i 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. Even such 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 retain the district or state's disproportionate benefits derived from its legislator's seniority.)

4.2.2 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 responsibilities allocated to the states. This would clarify that the states can refuse to redistrict the House of Representatives, resulting in Congress needing to provide for the reapportion of its House of Representatives.

Redistricting at the state level has allowed members of the House of Representatives, who are among the most powerful members of their state's political class, to Gerrymander indirectly while maintaining plausible deniability. Ending the state level redistricting of the U.S. House of Representatives will reduce the influence of individual House members. U.S. House members are few and thus important at the state level. But, because there are 435 members of the U.S. House the influence of any member at the federal level will be relatively insignificant. This fact is key to ending Congressional gerrymandering. The removal of redistricting from the states to a bipartisan or

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

nonpartisan national commission will reduce every U.S. House member's ability to distort the redistricting process for an unfair advantage.

Congress has more than five years to take responsibility for redistricting prior to 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 national redistricting commission. Under the brighter lights of national media 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)

4.2.3 Single Subject Bills, Honest Titles and Original Purpose. State legislators understand this proposal. 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 and 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 elements. Entirely new and unrelated provisions are added or deleted at any point - even at the last minute. Members of Congress do not even have time to read some of these monstrosities before they must 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. Raising taxes, providing health insurance and enacting programs to address climate change, whatever their other merits, do not reduce inflation. Another example is the *Clear Skies Act of 2002* which *weakened* the Clean Air Act. A year later the *Healthy Forest Initiative* (2003) increased timber

company access to federal lands, including old growth forest, allowing logging under the guise of fuel reduction. 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.

4.2.4 Limiting Outside Interests and Ending Conflicts of Interest. This is a complex topic, but that should not prevent state legislators 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 seeking public office by these limits will not be missed.

4.2.5 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 the 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 is undemocratic when it does not respect the voters' choices in the preceding Presidential election.[4] Delay in the confirmation of cabinet members can also impair the ability of a new administration to respond to acute problems and challenges - foreign and domestic. There are legitimate national security concerns with the current system.

4.3 Three Judicial Reform Amendments

Both the fact and the perception of government impartiality need to be enhanced. 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: 1) term limits or a mandatory retirement age, 2) regular vacancies in non-election years, and 3) an enforceable code of ethics.

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[4] 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 and a Senate majority of the other party.

4.3.1 Judicial 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 states' proposal is the only way this will happen.

4.3.2 Regular Supreme Court 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 prevents 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 still be eligible for appointment to a full term.

4.3.3 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 state legislators can draft a constitutional amendment that is sufficient but not too restrictive.

Section 5: Overcoming the Federal "Homogenization" Problem

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" homogenization that is a defining characteristic of federal 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)

5.1 The 1st Amendment[5]: Reconsidering *Citizens United v FEC*

There is no right more important in a democracy than freedom of speech. Consequently, when a conflict arises between free speech and a properly functioning 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 their contributions are often transactional.

The Supreme Court removed all limits on "independent" political contributions and 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* as have four hundred municipalities. Three states (California, Illinois and Vermont) have even called for an Article V convention for this purpose. An amendment proposed by the states and 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

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[5] The First Amendment would not actually be amended directly, as shown in the box. Rather, a new amendment would be added. The example is illustrative of the relationship between the new amendment and the First Amendment. The same is true for the Second Amendment illustration in § 5.2.

[6] In 2024, Elon Musk donated ≈ $275 million dollars and Tim Mellon, another billionaire, donated almost $200 million. *Two people gave almost half a billion dollars!*

to attract large donors. Unless they court big donors and obtain their transactional donations, 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 with 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. Many votes in Congress are subject to an all too common consideration: Will my vote upset a big donor? In many cases, the incumbent is able to vote the way the big donor wants without their constituents even being aware of a possible 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.

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.)

5.2 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."
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> 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 some 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 urban 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.

5.3 Abortion: Making the *Dobbs v Jackson* Decision Stick

The case of *Dobbs v Jackson* gave states the authority to regulate abortions, 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 confirmation role.

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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.

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 much needed calming effect on Congress. Second, a state may choose to enact its abortion rules as either a constitutional amendment, which is very "sticky," or as a statute, which is more easily amended. 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 community's values and preferences. Future ideological 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.

"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 6: 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 states to propose solutions that require constitutional amendments and allows voters to ratify the solutions to problems that are less tractable at the national level.

Recognizing Our Diversity. I've lived in six states: Hawai'i, California, Florida, Virginia, Maryland and New York. I've seen enough diversity in just these few states to be able to appreciate

[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 narrow the federal courts' jurisdiction could actually make matters worse. There would be constant pressure on Congress to modify or repeal the legislation that limited the federal courts' jurisdiction.

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 geographic distance suggests. The same 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*!

Once the states have parity with Congress, proponents of specific amendments can bypass our too often dysfunctional or self-interested Congress. So, the proponents of diverse and even contradictory amendments should temporarily put aside their specific objectives and work across the partisan and ideological divides to change the process. Then, everyones' ideas can receive equal and fair consideration. The first step must be to end Congress's *de facto* monopoly. Can Republicans and Democrats agree to take the first step together? Can your state legislature lead the nation by being the first state to adopt the necessary concurrent resolution?

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.

As a Honolulu Deputy Prosecuting Attorney in the Appellate Division, I responded on behalf of the State to appeals from 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 learned to appreciation the crucial role of our federal and state constitutions in establishing the process legitimacy of democratic governance. This essay arose from a simple insight: *fix the process first*. Only when the process is optimized are optimal outcomes possible. The amendment proposed in this essay will give both conservatives and progressives an equal opportunity to present their case to the voters and will let the voters make the final decision. That's democracy!

"The best time to plant a tree is 20 years ago.
The second best time is now."