Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments

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On November 3, 1992, voters in fourteen states turned the hourglass on their congressional delegations. Ballot issues imposing term limits of twelve years upon Senators and six or eight years upon House members were approved by landslide majorities in most of these states.¹ And these victories were only a single wave in an ongoing tide of reform. In 1990, voters in Colorado had approved an amendment to their state constitution that limited congressional terms.² In November 1994, congressional term limits activists expect to have their cause on referendum ballots in seven more states.³ If past experience and opinion polls are any guide, the proposals should pass easily.⁴ If so, they would add another 26 House members and 14 Senators to the 156 House members and 30 Senators already under the clock.

1. The results in the fourteen states were as follows (stated as percentage of votes in favor of term limits): Arizona—74%; Arkansas—60%; California—63%; Florida—77%; Michigan—59%; Missouri—74%; Montana—67%; Nebraska—68%; North Dakota—55%; Ohio—66%; Oregon—69%; South Dakota—63%; Washington—52%; Wyoming—77%. Robert Reinhold, *The 1992 Elections: The States—The Ballot Issues*, N.Y. TIMES, Nov. 5, 1992, at B8.

2. Term limits were endorsed by a 71% majority. Robert Pear, *The 1990 Elections: Ballot Proposals*, N.Y. TIMES, Nov. 8, 1990, at B1.

3. Alaska, Idaho, Maine, Massachusetts, Nevada, Oklahoma, and Utah. Term limits activists also expect the issue to be on the Mississippi ballot in 1995. Interview with Paul Jacob, Executive Director of U.S. Term Limits, in Washington, D.C. (Dec. 1, 1993).

4. The only state in which the vote on a congressional term limits issue was even close in 1992 was Washington, where a slim majority of 52% approved the imposition of limits. Reinhold, *supra* note 1, at B8. A similar issue had failed on the popular ballot in Washington in 1991—the only time state referendum voters have ever rejected term limits. The 1991 proposal failed largely because it contained no grandfather clause; instead, it applied immediately and retroactively to sitting members of Congress, including Speaker of the House Tom Foley. See Ladonna Lee, News Conference at National Press Club, Washington, D.C. (Nov. 5, 1992), in *U.S. Term Limits News Conference Concerning Term Limits*, Fed. News Serv., Nov. 5, 1992, available in LEXIS, News Library, Fednew File. Survey data at the national level have consistently indicated that substantial majorities favor term limits. A 1993 survey conducted by the Hart and Teeter Research Companies found that 76% of the public favored limits on the number of terms served by Senators and members of Congress. Pub. Opinion Online, Nov. 15, 1993, available in LEXIS, Market Library, Rpoll File. Another 1993 survey, conducted by Fabrizio, McLaughlin & Associates, indicated that this support cuts across party lines: in favor of term limits were 75% of Democrats, 79% of Republicans, and 76% of independents. Paul Jacob, *From the Voters with Care 1* (Dec. 1, 1993) (unpublished manuscript, on file with author), presented in *The Politics and Law of Term Limits* (C-SPAN television broadcast, Dec. 2, 1993).

The ultimate objective of term limits proponents is an amendment to the U.S. Constitution.⁵ Should this goal be achieved, the amendment will have followed a legally anomalous path, one which was trodden twice during the Progressive era—first by the campaign to bring about the popular election of Senators with the Seventeenth Amendment, and then by the suffragists in their struggle for the Nineteenth Amendment.⁶ These earlier amendments conformed to the letter of Article V in meeting the formal requirements for becoming part of the Constitution.⁷ However, in both cases the structure of the amendment process was very different from that described in Article V and contemplated by the Framers, because passage of the amendments depended crucially on direct popular action in state-level referendums. The term limits movement now seeks to follow the same route of constitutional transformation.

In the following analysis, I retrace the steps of the campaigns that brought about the passage of the Seventeenth and Nineteenth Amendments. I argue that the path of constitutional change that these campaigns followed was structurally different from that anticipated by the Framers in 1787, even though it met the formal requirements of Article V. As a nation, we effectively reconceived the amendment process during the Progressive era, implicitly endorsing a new route of transformation under the rubric of Article V. Although this alternative route of constitutional change diverges from the intentions of the Framers, it is nonetheless a positive development because it compensates for a manifest flaw in the design of Article V.

This Note begins by exploring the similarities between the current term limits campaign and the two earlier movements. It then turns to the anomalous nature of this particular method of constitutional transformation, explaining how it differs from the Framers' conception of the amendment process. Finally, it considers the consequent implications for constitutional theory: this distinctive route of constitutional change has become a necessary supplement

5. See Paul Jacob, News Conference at National Press Club, Washington, D.C. (Nov. 5, 1992), in *U.S. Term Limits News Conference Concerning Term Limits*, *supra* note 4.

6. Here, I intentionally borrow the terminology of Bruce Ackerman in his discussion of "legally anomalous lawmaking forms." I believe that the mechanism of constitutional transformation that led to the Seventeenth and Nineteenth Amendments fits well under this label. Faced with seemingly insurmountable congressional hostility and the bleak prospects of calling a constitutional convention under Article V, amendment proponents initiated a "self-conscious breach with preexisting constitutional forms." See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1060-63 (1984).

7. The full text of Article V is 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 for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

to a mechanism of transformation that otherwise tends to preserve institutional arrangements in which Congress has a direct stake.

I. THE DRIVE FOR CONGRESSIONAL TERM LIMITS

The campaign to establish congressional term limits has not been a collection of disparate state movements content to impose limits merely upon their own congressional delegations. Rather, it has been a unified national effort to bring about an amendment to the federal Constitution. Three national interest groups have coordinated the state-by-state campaign: U.S. Term Limits, the Term Limits Legal Institute, and Americans Back in Charge.⁸ These organizations have deliberately abandoned the predominant route of constitutional transformation under Article V, whereby Congress initiates the formal amendment process by proposing an amendment, which is in turn ratified either by state legislatures or by state conventions.⁹ Yet term limits activists have not undertaken the hopeless quest for a national convention to propose an amendment, the second route charted by Article V.¹⁰ Instead, they have pursued a path of incremental amendment that formally alters the constitutional structure of the nation without waiting for Congress to propose a constitutional amendment. It is only at the very end of this path, once the national transformation is a virtual *fait accompli*, that the proposal and ratification mechanisms of Article V come into play. The primary motivation behind the adoption of this strategy has been the continued hostility of both houses of Congress to the idea of term limits for their members. To date, more than 150 bills to limit congressional terms have been introduced in Congress—the vast majority since the mid-1970's—but only one has ever reached a floor vote. The vote took place in the Senate in 1947, when the proposal was defeated 82 to 1.¹¹ This hostility is not the expression of mere

8. See Cleta Mitchell, News Conference at National Press Club, Washington, D.C. (Nov. 5, 1992), in *U.S. Term Limits New Conference Concerning Term Limits*, *supra* note 4.

9. See generally *id.* Technically, Article V stipulates four different routes by which the Constitution may be amended. There are two proposal mechanisms: proposal by two-thirds of both houses of Congress or proposal by a national convention called by two-thirds of the state legislatures. These combine with the two ratification mechanisms to yield a total of four amendment paths. The state conventions ratification mechanism has been used only once, with the Twenty-First Amendment's repeal of prohibition. For the sake of simplicity, I merge these four paths into two general routes distinguished by the national body that proposes the constitutional change: amendment via congressional proposition versus amendment via a national constitutional convention.

10. On 399 occasions, state legislatures have called for a national proposing convention. Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the 27th Amendment*, 103 *YALE L.J.* 677, 736 n.199 (1993). However, no campaign to call such a convention has ever succeeded. Two fruitless campaigns in recent decades have garnered a significant number of state calls: 32 (of a necessary 34) state applications for a balanced budget amendment and 19 for an amendment banning abortion. Francis J. Flaherty, *Constitutional Parley Is Two States Away*, *NAT'L L.J.*, Oct. 10, 1983, at 28. Several of these applications were later withdrawn. Paulsen, *supra*, at 765, 768, 773. For further discussion of this as-yet unsuccessful mechanism, see *infra* notes 148-54 and accompanying text.

11. See SULA RICHARDSON, *CONGRESSIONAL TERMS OF OFFICE AND TENURE* 45 (Congressional Research Service Report for Congress No. 91-880 GOV, 1991); SULA P. RICHARDSON, *TERM LIMITS FOR*

political opposition to term limits. Rather, it reflects Congress' inherent structural interest in prolonging the tenure of its sitting members.

The strategy that term limits proponents are employing now is virtually identical to that which led to the adoption of the Seventeenth and Nineteenth Amendments.¹² In all three instances, an alternative amendment process was necessary because the direct stake that members of Congress had in the existing institutional arrangement made it impossible to persuade two-thirds of both houses to propose the relevant amendment. There is, however, an essential prerequisite for taking this path of constitutional change: a reform similar in effect to the desired national amendment must be possible through independent state action. The reform must be in an area where state and national powers either overlap or are not precisely delineated by the Constitution. This allows the states to pursue a process of incremental amendment, whereby one state after another enacts the alteration in the structure of the national government.

Assuming that this precondition of overlapping authority is met, the campaign for the amendment is carried through four successive stages. First, proponents circulate petitions to place the question on the ballot in states that provide for statutory or constitutional initiatives. At present, voters have this right in twenty-three states.¹³ After referendum victories are achieved in these states, the second stage begins, in which reformers lobby state legislatures to make the change in non-initiative states. Typically, such reforms require an amendment to the state constitution, and in forty-nine of the fifty states, amendments to the state constitution must be approved via referendum.¹⁴ The third stage takes place when the weight of such state-level reforms leaves members of Congress little option but to capitulate and endorse an amendment to the U.S. Constitution. This compulsion may stem from the fact that members of Congress elected in states that have made the change find that self-interest and constituent pressure force them to act, or it may arise from a desire to create equal conditions among the various states.¹⁵ In this way, the

FEDERAL AND STATE LEGISLATORS 2 (Congressional Research Service Report for Congress No. 93-122 GOV, 1993). In 1991, the Senate indirectly considered the term limits issue when voting on an amendment to a Senate finance reform bill that would have limited Senators who received public campaign financing to two consecutive terms. The motion to table the amendment passed by a vote of 68 to 30. See SULA RICHARDSON, CONGRESSIONAL TERMS OF OFFICE AND TENURE 45 (Congressional Research Service Report for Congress No. 91-880 GOV, 1991).

12. See *infra* Parts II-III.

13. Most of these states adopted the initiative device between 1898 and 1912. KRIS W. KOBACH, THE REFERENDUM: DIRECT DEMOCRACY IN SWITZERLAND 236 (1993); see also Austin Ranney, *The United States of America*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 67, 71-72 (David Butler & Austin Ranney eds., 1978).

14. The one exception is Delaware. KOBACH, *supra* note 13, at 251 n. 38.

15. This compulsion is considerably more powerful than that generated by a typical movement for constitutional amendment. For example, when members of Congress first formally proposed the Equal Rights Amendment in 1972, they were responding to the demands of a broad popular movement. However, the individual member of Congress was not compelled to vote for the amendment to a greater degree than he was compelled to vote for any popular piece of legislation. In contrast, when a state takes action of a

process of incremental amendment at the state level produces a structural inducement in Congress to pursue the reform. Finally, the fourth stage occurs, with formal ratification by the states under the terms of Article V. This stage has minimal practical significance in the many states that have already deliberated and made the change during the first or second stage. For much of the country, formal ratification becomes little more than a belated rubber stamp for a transformation that has actually been embraced long beforehand.

The term limits movement is presently between the first and second stages. Most of the initiative states have already been won, and the campaign is proceeding to states where legislative action is required before the voters may pass judgment. Term limits activists have also made preliminary moves in anticipation of stage three by collecting pledges from members of Congress to support a formal amendment to the U.S. Constitution.¹⁶ However, their path is not without obstacles. Complaints challenging the constitutionality of state-imposed congressional term limits were filed in federal courts in Washington, Florida, and Arkansas shortly after the 1992 referendums.¹⁷ In February 1994, the district court in Washington state ruled on the merits of the claim and held unconstitutional the state's congressional term limitation measure.¹⁸ The issue is virtually certain to end up before the Supreme Court, and a lively constitutional debate is already underway.¹⁹

constitutional nature and ratifies the reform via referendum, two powerful factors are added to the political calculation of a Senator or Representative from that state. First, the opinion of his constituents on the matter becomes not only clear, but compelling. Unlike opinion polls which may be inaccurate or may reflect lightly held opinions, referendum results are unmistakable and usually represent a more solemn commitment of the voter. Ignoring them is politically dangerous. Second, members of Congress elected under a particular framework (say, one in which *both* women and men vote) will develop a personal stake in preserving and entrenching that framework.

16. *U.S. Term Limits News Conference Concerning Term Limits*, *supra* note 4.

17. See Susan B. Glasser, *Lawsuits in Three States Now Challenging Constitutionality of Hill Term Limitations*, ROLL CALL, Dec. 21, 1992, available in LEXIS, News Library, Rollcl File; Elizabeth Willson, *Term Limits Quickly Land in Court*, ST. PETERSBURG TIMES, Nov. 5, 1992, at 1B.

18. *Thorsted v. Gregoire*, No. C92-1763WD (W.D. Wash. Feb. 10, 1994). The court declared Washington Initiative Measure 573 unconstitutional and enjoined state officials from enforcing its provisions. *Id.*, slip op. at 36. The court relied primarily on the argument that the Qualifications Clauses in Article I, Sections 2 and 3, of the Constitution should be construed as exclusive and that state-imposed term limits impermissibly add another qualification for serving in Congress. *Id.*, slip op. at 13-23, 26-27. It also accepted the plaintiffs' claim that term limits burden voters' and candidates' First and Fourteenth Amendment rights of free association. *Id.*, slip op. at 24-26. The court rejected the defendants' contention that term limits should be regarded as a state-imposed time, place, or manner regulation of elections, permitted by Article I, Section 4. *Id.*, slip op. at 22-29. It also rejected the argument that the power to impose term limits is reserved to the states by the Ninth and Tenth Amendments. *Id.*, slip op. at 29-31.

19. The substantive arguments for and against state-imposed congressional term limits already have been deployed extensively elsewhere; such claims are beyond the scope of this analysis. For articles arguing that state-imposed term limits are constitutional, see, e.g., Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 TEX. L. REV. 865 (1993). For articles arguing that state-imposed term limits are unconstitutional see, e.g., Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155 (1991); Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992); Joshua Levy,

This Note addresses neither the merits of state-imposed congressional term limits, nor their constitutionality *per se*. Rather, it focuses on the *process* of amendment that is being used and its historical antecedents. However, the outcome of the constitutional challenge to state-imposed congressional term limits will have a direct bearing on whether the term limits movement can pursue this alternative path of transformation to a successful conclusion. If the Supreme Court rules that the Constitution prohibits states from imposing term limits upon their representatives in Congress, then the prerequisite for taking this path of transformation—the overlap of state and national authority—would no longer be satisfied, and the process would be derailed. Proponents of term limits would be forced either to give up their struggle or to attempt one of the traditional routes of constitutional transformation. The final section of this Note offers a process-based argument against such judicial invalidation of state-imposed congressional term limits—regardless of the substantive validity of term limits. Judicial action barring state-imposed congressional term limits would block a vital, alternative path of constitutional change.²⁰ This alternative path remedies a significant defect in the Framers' design of the amendment process: the ability of Congress to obstruct institutional reforms that threaten the inherent interests of its sitting members. This is precisely the barrier that confronted proponents of woman suffrage and the popular election of Senators in the late nineteenth century.

II. POPULAR ELECTION OF SENATORS AND THE SEVENTEENTH AMENDMENT

The drive to bring about the popular election of Senators faced seemingly insurmountable congressional hostility from the outset. Although the House of Representatives responded favorably to early calls for a constitutional amendment, the Senate was firmly opposed to the idea of replacing selection by state legislatures with popular election. Senators who had successfully attained national office through masterful maneuvering among state political hacks were disinclined to see if they could do as well stumping before the voters. For most of the nineteenth century, resolutions calling for the proposal of a constitutional amendment died quietly in committee.²¹ It appeared that the Senate establishment had little to fear from proponents of popular election.

Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913 (1992).

20. See *infra* Part VI.B.

21. During the first 80 years of the republic, only nine resolutions were introduced in Congress to amend the Constitution to provide for the popular election of Senators, the first in 1826. All nine died in committee. In the 1870's and 1880's, the number of resolutions increased. Most were submitted in the House, which was considerably more receptive to the reform than the Senate. However, none of these resolutions was allowed to reach the House floor until 1892. 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 96-97 (1938).

However, in the closing decades of the century, public support for popular election began to grow. Numerous cases of senatorial corruption involving bribery greatly impaired the reputation of the chamber.²² Deadlocks in state legislatures attempting to select their Senators further fueled public discontent. From 1891 to 1905 there were forty-five deadlocks in twenty different states.²³ Often, this political trench warfare in the state legislatures could be resolved only through the selection of a compromise candidate who was less fit for office than either of the party favorites. Some of the more acrimonious debates even led to violence.²⁴

The publicity accorded such episodes further intensified demands for popular elections. The Populist Party made the popular election of Senators one of its flagship issues. In the Midwest, agrarian interests became convinced that only popular election could weaken the power that railroads and other corporate interests had over the Senate and end the economic discrimination against the region.²⁵ Finally, in 1892, the House leadership allowed a resolution proposing a constitutional amendment to reach the House floor. It passed by a two-thirds majority in early 1893, only to be buried in committee in the Senate.²⁶ As sympathetic as the House of Representatives was to a constitutional amendment, Senate hostility showed no signs of abating. Four more times between 1894 and 1902 the House voted overwhelmingly in favor of the popular election of Senators, and in each instance the Senate refused even to allow the proposed amendment to come to a vote.²⁷ As is currently the case with term limits, there was no way that two-thirds of both houses of Congress would take the lead in proposing the amendment.

But the states could. Starting in 1901, various states passed resolutions calling for a national convention to propose an amendment in accordance with the second proposing mechanism of Article V. However, like every effort before and since, the campaign for a national proposing convention was unsuccessful. Meanwhile, more promising steps toward the popular election of Senators had been taken within state parties. Between 1890 and 1900, parties in numerous states began holding direct primaries, in which voters could indicate the candidate they supported for U.S. Senator. State legislators from the party then bound themselves to support the winner of the popular primary vote when it came time to select a Senator. However, this system could only make the popular vote truly decisive in states where one party held an

22. *Id.* at 91.

23. *Id.* at 86-88.

24. In Kentucky in 1896, the Governor was compelled to summon the militia, and the troops maintained order in the legislative chamber for three days. In Missouri in 1905, the legislative session involving senatorial selection dissolved into a fistfight on the chamber floor. *Id.* at 90-91.

25. See Larry J. Easterling, *Sen. Joseph L. Bristow and the Seventeenth Amendment*, 41 KAN. HIST. Q. 488, 492-93 (1975).

26. HAYNES, *supra* note 21, at 97 n.1.

27. See *id.* at 97 & n.1.

overwhelming majority in the state legislature. Thus, it was in the Democrat-controlled South that the direct party-primary system first served to bring about the effective popular election of Senators.²⁸

A more decisive innovation came during the following decade. In 1904, citizens in Oregon petitioned for and approved a popular initiative instituting a system that would soon be copied throughout the country. The law, endorsed by a three-to-one majority in the Oregon referendum, provided that candidates for the U.S. Senate had to be nominated by voter petitions. In the election preceding the state legislature's selection of a Senator for Congress, citizens would be allowed to vote for their choice for Senator. However, the U.S. Constitution required state *legislatures* to choose the Senators.²⁹ Thus, a method was needed to bind state lawmakers to select the choice of the people. Accordingly, the Oregon system provided that candidates for the state legislature could sign one of two public statements. By signing "Statement No. 1," the aspiring state legislator promised to vote "for that candidate for United States Senator in Congress who has received the highest number of the people's votes . . . , without regard to my individual preference."³⁰ In contrast, "Statement No. 2" indicated that the legislator would "consider the vote of the people for United States Senator . . . as nothing more than a recommendation, which I shall be at liberty to wholly disregard if the reason for so doing seems to me to be sufficient."³¹ Not surprisingly, few politicians were willing to risk signing Statement No. 2, particularly when citizens were circulating petitions on which they promised not to vote for any candidate who failed to sign Statement No. 1. It so happened that the first Oregon legislature elected after the enactment of this law had to select two Senators. It took only twenty minutes for the legislature to select the two winners of the popular vote,³² demonstrating to the nation that the popular election of Senators could be achieved before the federal Constitution was formally amended.

A clear message was also sent to proponents of a federal constitutional amendment: the transformation could be made state by state until the weight of such changes induced Congress to act. State after state copied what became known as the "Oregon system." Between 1905 and 1908, it was adopted in fifteen states.³³ By the end of 1908, twenty-eight states had some mechanism

28. See *id.* at 99-100.

29. "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

30. HAYNES, *supra* note 21, at 101.

31. *Id.*

32. *Id.* at 102.

33. Illinois, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Washington, and Wisconsin all adopted mandatory, statewide, direct systems. Mississippi and Wisconsin amended mechanisms that had been enacted prior to Oregon's. For a full list of state actions taken to bring about the popular election of Senators, see 45 CONG. REC. 7109-20 (1910) (statement of Sen. Owen).

in place by which Senators were effectively popularly elected.³⁴ This transformation proved to be the most influential in finally winning a formal amendment to the U.S. Constitution. Senators who had in fact been elected by the people of their states were loath to flaunt the will of their constituencies. In 1911, as the Senate debate on the issue reached a turning point, the most persistent advocates of a federal constitutional amendment were Senators who had been popularly elected.³⁵ As Idaho's Senator William E. Borah, one of the most prominent supporters of popular election, proclaimed: "I should not have been here if it had not been practiced . . . and I have great affection for the bridge which carried me over."³⁶

Thus, the first and second stages of this path of constitutional transformation were completed. Through incremental state action, the structure of the Senate had been transformed. Consequently, enough senatorial support existed to etch into the formal constitutional text what was already a reality in nearly two-thirds of the forty-six states. All that remained were the final two stages—congressional proposition and state ratification—which would convert this incremental amendment into a normal constitutional amendment and impose it uniformly across the country. The Senate's endorsement of the change, which had seemed all but impossible at the turn of the century, was within reach by the end of 1908. This dramatic reversal was the result of the state-by-state alterations of the structure of the federal government.

Finally, on June 12, 1911, two-thirds of the Senate approved an amendment to the U.S. Constitution providing for the popular election of its own members.³⁷ On May 13, 1912, after an eleven-month stalemate in the House-Senate conference committee, the House accepted the Senate version of the amendment, and it went to the states for formal ratification.

34. Senator Owen listed 37 states that had adopted measures allowing popular input in the selection of U.S. Senators. Of these, 28 provided for direct nomination by the people. *Id.*

35. HAYNES, *supra* note 21, at 107-08.

36. 46 CONG. REC. 3,2647 (1911) (statement of Sen. Borah). William Van Alstyne has suggested an alternative theory as to why the Senate ultimately capitulated and endorsed the Seventeenth Amendment. Noting that numerous states had called for a national proposing convention to address the issue, he argues that the possibility of the necessary two-thirds of the states eventually making such a call pushed the Senate into action. William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 943 (1984). However, he offers no historical evidence that the fear of a convention motivated the Senate. Indeed, several times during the 1900-1905 period, there had been a flurry of state calls for a convention, often by states that had already made such a call. Yet none of these spurts produced a Senate response. Although these calls may have had some weight in the Senate's eventual acquiescence, they could never be as decisive as the electoral interests of the Senators from the 28 states that had already effectively adopted popular election. These Senators had a vested interest in supporting the reform endorsed by the voters of their states and entrenching it on a national level. Thus, the adoption of the Oregon system brought pressure to bear in a much more direct way than that suggested by Van Alstyne.

37. Passage in the Senate was delayed by a prolonged dispute on the peripheral issue of whether the amendment should include a provision to bar federal regulation of congressional elections, a question with weighty implications for the racially biased electoral practices common in Southern states. For an account of this dispute, see Easterling, *supra* note 25, at 505-09.

The extent to which formal state ratification had become a virtual rubber stamp was evident in the unusual rapidity with which the states voted to ratify the amendment. There was little deliberation; the decisive state-level debates had occurred years earlier. Less than eleven months after the amendment's formal submission by Congress, Connecticut became the thirty-sixth state to ratify, and the Seventeenth Amendment became part of the U.S. Constitution.³⁸

III. WOMAN SUFFRAGE AND THE NINETEENTH AMENDMENT

Just as the curtain was closing on the struggle for the Seventeenth Amendment, the suffragist movement was starting to gain momentum on the same path of transformation. Like the former, the latter campaign began many decades before the constitutional amendment was achieved. It originated at a meeting on July 19-20, 1848, in Seneca Falls, New York. The participants drafted a "Declaration of Sentiments" protesting the political, social, and economic inferiority of women. The Declaration also included the first public demand for extending the franchise to women. It was the first of many such conventions in the nascent women's rights movement, and virtually all of the activists in the cause were abolitionists as well.³⁹ The Civil War and the subsequent amendments to the Constitution brought an extended hiatus to the woman suffrage movement, as national attention was focused on the abolition of slavery and the extension of political rights to African-Americans. Suffragists were unable to tie their cause to the racial issue and failed in an attempt to prevent the enfranchisement of African-Americans without the granting of the same rights to women. However, the passage of the Civil War Amendments did further the suffragist cause in one sense: it defined an objective for the movement that had previously seemed unattainable—an amendment to the U.S. Constitution.⁴⁰

Accordingly, in January 1878, suffragists persuaded Senator A.A. Sargent of California to introduce a suffrage amendment in Congress. However, the movement was soon presented with seemingly insuperable barriers preventing congressional proposition. As with the popular election of Senators, an inherent structural interest in Congress made the proposal of a constitutional amendment virtually impossible under the existing institutional framework—sitting Congressmen were unwilling to risk their seats by trying their luck with an electorate that included women. The amendment was buried in committee for nine years, and when the full Senate finally considered it in 1887, it was

38. *See id.* at 509. Connecticut ratified on April 8, 1913. The ratification of 36 states was required after Arizona and New Mexico entered the Union in 1912. *Id.*

39. *See* AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 1-2 (W.W. Norton & Co. 1981) (1965).

40. CARRIE C. CATT & NETTIE R. SHULER, *WOMAN SUFFRAGE AND POLITICS* 228 (1926).

defeated by a vote of sixteen to thirty-four. It would not come to a vote again in the Senate until 1914 and was not voted on at all in the House during this period.⁴¹ Faced with unyielding congressional inaction, suffragists turned to the states and embarked on the same path of incremental amendment used by proponents of the popular election of Senators. All along, their primary objective would remain a federal constitutional amendment.⁴²

Shortly after the proposed amendment disappeared into the congressional morass in 1878, the leaders of the woman suffrage movement formulated their state-by-state strategy, commencing a series of state-level campaigns to win the ballot for women.⁴³ In virtually every state, the extension of the franchise to women would require the passage of a constitutional amendment, which depended upon winning a majority of the male electorate in a referendum. Over the next fifty-two years, the suffragists would wage fifty-six referendum campaigns⁴⁴ in twenty-nine different states and territories.⁴⁵ Initially, the effort to win the states proceeded slowly and yielded few successes. The first referendum on the subject had already been held in Kansas in 1867, where the suffragists lost. However, this defeat had been balanced in 1869 and 1870 by minor victories in the territories of Wyoming and Utah. In each, the territorial legislature had voted to enfranchise women. Referendums were not required.⁴⁶

The campaign to bring woman suffrage into existence state by state accelerated in the 1880's and 1890's. Between 1882 and 1898, the question was placed on eleven state referendum ballots in nine different states.⁴⁷ However, it passed in only two—Colorado in 1893, and Idaho in 1896. Opponents of the suffrage movement found it easy to exploit the fact that many suffragists were also active in the prohibition movement, a connection which aroused the antagonism of the "wets."⁴⁸

41. *Id.* at 229-34. The most adamant opposition came from Southern Democrats. *Id.* at 229-33.

42. *Id.* at 230-31.

43. At this point, there were two national organizations behind the movement, the National Woman Suffrage Association and the American Woman Suffrage Association. They united in 1890 to become the National American Woman Suffrage Association. KRADITOR, *supra* note 39, at 3-4. Interestingly, although the suffragists did not realize their ultimate goal until seven years after adoption of the Seventeenth Amendment, they actually settled upon the same strategy of constitutional transformation well before advocates of popular senatorial election did so.

44. See CATT & SHULER, *supra* note 40, at 107; KRADITOR, *supra* note 39, at 5.

45. See CATT & SHULER, *supra* note 40, at 110-342.

46. In Wyoming, the presence of a few politicians who argued fervently for woman suffrage had a major impact in the small territorial legislature, as did the expectation that such a step would dramatically advertise the territories to the rest of the nation. *Id.* at 75-78. In Utah, the bill was urged by opponents of polygamy, who assumed incorrectly that the enfranchisement of women would lead to its elimination. Seventeen years later, in 1887, opponents of polygamy in Congress voted to disenfranchise women in Utah, thinking that the blow would persuade advocates of polygamy to capitulate. Nevertheless, the territory later included woman suffrage in its proposed state constitution; when Utah was finally granted statehood in 1896, women were again allowed to vote. See *id.* at 127-28.

47. California, Colorado, Idaho, Kansas, Nebraska, Oregon, Rhode Island, South Dakota (twice), and Washington (twice). *Id.* at 108-20.

48. *Id.* at 133-59.

At the turn of the century, the state-by-state fight of the suffragists reached its nadir. During the eleven-year period of 1899-1909, proponents of woman suffrage were able to persuade the legislatures of only two states to place the issue on the ballot—once in New Hampshire (1902) and three times in Oregon (1900, 1906, 1908).⁴⁹ In none of these referendums was suffrage approved. The overall strategy, however, was not abandoned. In 1908, Theodore Roosevelt counseled the movement to "Go, get another state."⁵⁰ The aging Susan B. Anthony was of the same view:

I don't know the exact number of States we shall have to have, . . . but I do know that there will come a day when that number will automatically and resistlessly act on the Congress of the United States to compel the submission of a federal suffrage amendment. And we shall recognize that day when it comes.⁵¹

The tide was soon to turn in the suffragists' favor. In 1910, they pulled off a surprise victory in a state referendum in Washington.⁵² And in 1911, a California legislature under the sway of progressives in both major parties agreed to submit a state woman suffrage amendment to the voters. It passed by a narrow margin of only 3587 votes.⁵³

These two victories had a momentous impact on the rest of the nation. In November 1912, suffrage amendments went before voters in six states, winning in three.⁵⁴ Soon, additional states fell into line. In total, during the period from 1910 to 1918, twenty-four states held a total of thirty-one referendums on the question. Of these, eleven states voted for woman suffrage. By the end of 1918, the movement had achieved referendum victories in thirteen states.⁵⁵ In addition, the two territories to adopt suffrage had been admitted to the Union, making a total of fifteen states in which women could vote in elections at every level of government. Suffragists anticipated that their moment had come. Already in the 1916 election, women in eleven states had

49. *Id.* at 124-26.

50. *Id.* at 227.

51. As paraphrased by Carrie Chapman Catt and Nettie Rogers Shuler. *Id.* at 227.

52. *Id.* at 174.

53. Yes—125,037; No—121,450. *Id.* at 176.

54. Woman suffrage won in Arizona, Kansas, and Oregon and lost in Michigan, Ohio, and Wisconsin. In Arizona and Oregon, the issue came before the electorate as a popular initiative. In Ohio, it was submitted to the electorate by a constitutional convention held in 1912. In the other three states, the issue was placed on the ballot by the legislatures. *Id.* at 176-88, 196-201.

55. The record of state referendums on woman suffrage is as follows. "Y" indicates that voters adopted woman suffrage; "N" indicates that it was rejected. Arizona 1912-Y; California 1896-N, 1911-Y; Colorado 1877-N, 1893-Y; Idaho 1896-Y; Iowa 1916-N; Kansas 1867-N, 1894-N, 1912-Y; Louisiana 1918-N; Maine 1917-N; Massachusetts 1915-N; Michigan 1874-N, 1912-N, 1918-Y; Missouri 1914-N; Montana 1914-Y; Nebraska 1882-N, 1914-N; Nevada 1914-Y; New Hampshire 1902-N; New Jersey 1915-N; New York 1915-N, 1917-Y; North Dakota 1914-N; Ohio 1912-N, 1914-N; Oklahoma 1910-N, 1918-Y; Oregon 1884-N, 1900-N, 1906-N, 1908-N, 1910-N, 1912-Y; Pennsylvania 1915-N; Rhode Island 1887-N; South Dakota 1890-N, 1898-N, 1914-N, 1916-N, 1918-Y; Texas 1919-N; Washington 1889-N, 1898-N, 1910-Y; Wisconsin 1912-N; West Virginia 1916-N. *Id.* at 54-58, 107-226, 292-315.

voted for presidential electors, allowing them to claim that Woodrow Wilson could not have won reelection without the women's vote. To these eleven were added states in which legislative action alone could empower women to vote for presidential electors (though not for members of Congress).⁵⁶ By the time of the next presidential election, women would be voting for president in thirty states.⁵⁷ Congress was beginning to feel the pressure too in 1918, as the growing number of Senators and Representatives elected by women asserted the interests of their new constituents.

On January 10, 1918, the House of Representatives proposed a federal constitutional amendment with the required two-thirds majority. However, the resistance of Southern Democrats in the Senate delayed a vote in the second chamber until October 1, when the amendment failed by two votes. After falling short again on February 10, 1919, the suffrage amendment was finally approved by the Senate on June 4, 1919. As with the Seventeenth Amendment, the ratification of the Nineteenth Amendment proceeded astonishingly quickly. The real debates were already over; most of the states had deliberated extensively on the issue long before Congress had even come close to formally proposing the amendment. Within one month, eleven states had ratified the amendment. Within six months, twenty-two states had done so.⁵⁸ On August 24, 1920, Tennessee became the thirty-sixth and final state to ratify. The Nineteenth Amendment became part of the U.S. Constitution.⁵⁹

In winning ratification of the Nineteenth Amendment, the suffragists successfully completed the same route of constitutional transformation that had been travelled by advocates of the popular election of Senators a few years earlier. Both amendments posed an inherent and direct threat to the reelection of sitting members of Congress; accordingly, there was little chance that Congress would exercise its proposing function unless compelled to do so. Consequently, proponents of reform used the states to usurp this function. Effectively, individual states were proposing and ratifying an incremental transformation in the structure of Congress. The circumstances surrounding the current campaign for congressional term limits are virtually the same.

56. Illinois was the first to do so, in 1913, after which other states followed. *Id.* at 189-95.

57. JOHN S. BASSETT, *EXPANSION AND REFORM: 1889-1926*, at 322 (1926).

58. *Id.* at 350, 371.

59. Nine Southern states remained adamantly opposed to the amendment to the very end, and woman suffrage stood no realistic chance of approval in these states. Thus, the fact that ratification occurred in 36 states, out of a total available pool of 39 non-Southern states, in only 14 months is particularly noteworthy. This entrenched resistance to woman suffrage in the South meant that incremental, state-by-state amendment probably would not have extended the franchise in Southern states for years. In this respect, the completion of stages three and four, resulting in a formal amendment to the U.S. Constitution, had an important effect: it compelled the Southern states to make reforms which brought them into step with the rest of the country—reforms that they otherwise would not have adopted for years.

IV. DEFYING THE FRAMERS: AMENDMENT THROUGH DIRECT VOTER ACTION AT THE STATE LEVEL

This Note has described three different movements to bring about a constitutional amendment, each of which followed, or is presently following, a strikingly similar path. It is now necessary to consider the relationship between this path and that charted by the Framers in Article V. The constitutional positivist will have little difficulty rendering such an assessment, at least as far as the Seventeenth and Nineteenth Amendments are concerned.⁶⁰ Viewed through positivist lenses, these two transformations are like any of the other amendments to the Constitution. In both cases, Congress and the states jumped through all of the hoops stipulated by Article V, and so we recognize the amendments as part of the Constitution. The events that took place beforehand might be interesting, but they are ultimately inconsequential for the legality of the amendment process.

Viewed through structuralist lenses, however, the three amendments are less easily reconciled with the route of constitutional change envisioned by the Framers and described in Article V.⁶¹ The Framers stipulated two specific mechanisms for amending the Constitution, the structural characteristics of which were delineated in the text of Article V,⁶² as well as in their recorded statements. Both mechanisms share two fundamental structural characteristics—characteristics that do not describe the alternative route of amendment discussed above. These are: (1) representative bodies, rather than the citizens themselves, deliberate and act on proposed amendments; and (2) amendments are proposed at the national level, either by Congress or by a

60. Given the considerable confusion surrounding the meaning of legal positivism, it may be necessary to define what I mean by a "positivist" approach to constitutional interpretation. Legal positivism, a variant of ethical positivism, insists upon a distinction between what the law is and what the law ought to be. It supposes that there are a finite set of criteria for determining what (positive) law is, setting law apart from mere moral standards. More often than not, such identifying criteria are framed in procedural terms; for example, a statute may be defined as a norm that is passed by the legislature and approved by the executive according to certain procedures. Positivist constitutional jurisprudence seeks to formulate unambiguous rules of recognition for identifying constitutional law. Accordingly, the positivist approach to Article V seeks clear procedural criteria which must be satisfied for a norm to be recognized as constitutional law, and it emphasizes those criteria that can be extracted unambiguously from the text. For a more complete explanation of positivism in its various guises, see Owen M. Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007 (1981).

61. Perhaps even more than the term "positivist," the term "structuralist" conjures up a host of meanings and implications, many of which are wholly unrelated to the present endeavor. This Note uses the term "structuralist" to refer to the school of thought that holds that, in order to divine the full meaning of any text, the interpreter must comprehend the underlying structure, which can only be described partially by any particular set of words. This approach also stresses that the individual elements of any legal structure can only be defined in relation to all of the other elements in the structure; every rule is a product of the surrounding rules. Accordingly, the specific text of a law must comport with the larger framework in which the law functions. Thus, a structuralist approach to Article V might regard the specific rules described in the text as only a partial description of a larger amending structure. A similar use of the term is employed in Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988).

62. See *supra* note 9.

national convention, and they are then ratified at the state level, again either by existing legislatures or by conventions. The following analysis explores these structural aspects of Article V in greater detail and demonstrates that the path of amendment followed with the Seventeenth Amendment, the Nineteenth Amendment, and now term limits diverges considerably from the expectations of the Framers. Acceptance of this view does not render the Seventeenth and Nineteenth Amendments unconstitutional, for clearly both met the formal requirements of Article V. Despite this formal compliance, however, the amendment process was significantly rerouted during the Progressive era. There is now a third path of amendment, one which was not envisioned by the Framers and probably would not have been acceptable to them in 1787.

A. *Action by Representative Assemblies*

The first, and perhaps the most important, structural characteristic of the amendment process laid out in Article V is that it embraces deliberative action by representative bodies, rather than direct action by citizens. The text refers only to action through representative assemblies, be they ongoing (Congress and the state legislatures) or temporary (a national proposing convention and state ratifying conventions). The omission of avenues of direct popular action was deliberate; the intent of the Framers is clear on this issue.

Considerable evidence indicates that the Framers strongly rejected any direct participation of citizens in the amendment process. During the debates of the 1787 Constitutional Convention, direct popular consideration of constitutional amendments was never even discussed as an option.⁶³ Instead, careful deliberation by legislative assemblies was extolled.⁶⁴ The closest that “the People” would come to participating in the amendment process would be through ratification by state conventions, which were seen by the Framers as organs expressing the views “of the people themselves.”⁶⁵ This understanding that a convention was “in a special manner the epitome of the People” had emerged in the colonies during the 1775-1776 period and was well established by the time of the 1787 Convention.⁶⁶ Indeed, during the 1787 debates, Madison explicitly equated state ratifying conventions with “the supreme

63. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) [hereinafter CONVENTION RECORDS]; Jonathan L. Walcott, Note, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525, 1528-30, 1537 (1985).

64. See Walcott, *supra* note 63, at 1529.

65. See THE FEDERALIST No. 39, at 192 (James Madison) (Garry Wills ed., 1982); see also *Constitutional Convention Procedures: Hearings on S. 3, S. 520, and S. 1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 194 (1979) (statement of Charles L. Black).

66. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 337 (1969) (quoting the *Pennsylvania Packet* (Philadelphia), Sept. 17, 1776). For a thorough description of how the convention device emerged and gained acceptance by 1787, see *id.* at 306-43.

authority of the people."⁶⁷ "The people" were thought to speak in such conventions, but only through their elected delegates. Popular involvement through *direct voting* on amendments was out of the question.

This elitist aversion to direct popular consideration of political questions pervades the records and writings of the Framers. James Madison, writing in defense of the Constitution in *The Federalist*, was particularly explicit about the Framers' disdain for direct participation by the people in the processes of government. It was thought that such a "pure Democracy" could "admit of no cure for the mischiefs of faction." Representative government was much preferred: "A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking."⁶⁸ Madison expressly rejected the idea of referring *constitutional* questions to popular votes, particularly those questions which involved disputes between branches of government. In *The Federalist*, he raised the possibility of doing so, either on a frequent or infrequent basis, and concluded that there were "insuperable objections against the proposed recurrence to the people."⁶⁹ He feared that it would foster social instability: "The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society."⁷⁰ Furthermore, decisions by the people would inevitably be misguided. Parties and demagogues would excite the enthusiasm of a credulous public. Their decision "could never be expected to turn on the true merits of the question. . . . The *passions* . . . not the *reason*, of the public, would sit in judgment."⁷¹

Such sentiments were widely shared at the 1787 Convention. The delegates betrayed their distrust of popular judgment in a variety of contexts. For example, Elbridge Gerry offered the following words of caution:

[T]he evils we experience flow from the excess of democracy. The people do not want virtue; but are the dupes of pretended patriots. In [Massachusetts] it has been fully confirmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men⁷²

67. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 70 (W.W. Norton & Co. 1987) (1840).

68. THE FEDERALIST No. 10, at 46 (James Madison) (Garry Wills ed., 1982).

69. THE FEDERALIST No. 49, at 255 (James Madison) (Garry Wills ed., 1982). In making this point, Madison felt the need to account for the fact that the state constitutions of Massachusetts and New Hampshire had been put to a popular vote. He explained that these were unique cases, coming at a time when the British military threat inspired an unusual rationality in popular decisionmaking. See *infra* notes 103-05 and accompanying text.

70. *Id.* at 256.

71. *Id.* at 258.

72. 1 CONVENTION RECORDS, *supra* note 63, at 48 (speaking against popular election of Congress).

Edmund Randolph voiced a similar concern that the “evils” which stem “from the turbulence and follies of democracy” be checked.⁷³ Alexander Hamilton, whose distrust of the masses was well-known, noted candidly in a 1777 letter to Gouverneur Morris that direct, popular decisionmaking would result in “error, confusion and instability.”⁷⁴ He remained just as skeptical of the people’s acumen in 1788. He wrote that, “the people commonly *intend* the PUBLIC GOOD,” but they do not “always *reason right* about the *means* of promoting it.”⁷⁵

By 1787, the levelling impetus of 1776 had long since given way to profound elite suspicion of popular action. Crusades for paper money, the tender laws, the confiscation of property, and the suspension of ordinary means for the collection of debts had occurred in the intervening years. Such schemes were deemed by the Federalists an “open and outrageous . . . violation of every principle of justice.”⁷⁶ They regarded government as “a complicated science,” which “requires abilities and knowledge, of a variety of other subjects, to understand it.”⁷⁷ Gordon Wood summarizes the Federalists’ deep mistrust of popular decisionmaking as follows: “To the Federalists the greatest dangers to republicanism were flowing not, as the old Whigs had thought, from the rulers or from any distinctive minority in the community, but from the widespread participation of the people in the government.”⁷⁸ As James MacGregor Burns describes it, Madison’s objective at the Convention of 1787 was to create “barricade after barricade against the thrust of a popular majority.”⁷⁹ He believed that the “diseases” of popular government could only be remedied in a properly constructed, large republic.⁸⁰ The definitive element of such a republic was *representation*. Madison stated that the “true distinction” of American government “lies in the total exclusion of the people in their collective capacity from any share” in the government.⁸¹ Thomas Paine agreed: the American polity was based “wholly on the system of

73. *Id.* at 51 (arguing that a smaller Senate would be better insulated against such dangers).

74. WOOD, *supra* note 66, at 225 (quoting letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777) (asserting the superiority of representative democracy over direct democracy)).

75. THE FEDERALIST No. 71, at 363 (Alexander Hamilton) (Garry Wills ed., 1982). He also expressed wonder as to why the people did not err more often, beset as they were “by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate; by the artifices of men, who possess their confidence more than they deserve it, and of those who seek to possess, rather than to deserve it.” *Id.*

76. WOOD, *supra* note 66, at 404 (quoting ST. GAZETTE OF S.C., Mar. 5, 1787).

77. *Id.* at 508 (quoting CONN. COURANT, Nov. 20, 1786).

78. *Id.* at 517.

79. JAMES M. BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 20 (1963).

80. See THE FEDERALIST No. 10, at 42, 46-49 (James Madison) (Garry Wills ed., 1982).

81. THE FEDERALIST No. 63, at 322 (James Madison) (Garry Wills ed., 1982).

representation."⁸² Accordingly, no direct popular role was included in the amendment process.⁸³

Further evidence of the Framers' intention to exclude the people from direct involvement in the amendment process is supplied by comparison with contemporary state models. In fashioning the U.S. Constitution, the Framers often lifted phrases and sections from the state constitutions that existed at the time. Although Article V copied none of the state models exactly, it came closest in form to the constitutions of Georgia and Massachusetts, in which localities were empowered to apply for constitutional conventions.⁸⁴ However, the Framers made one important omission in following the Georgia and Massachusetts examples: they did not include a provision for direct popular involvement in the calling of conventions.⁸⁵ This omission reflects the conscious rejection of direct democracy in the amendment process.

Akhil Amar has argued for an opposing point of view on this issue. Maintaining that the overall structure and context of the Constitution allows for direct democracy in the amendment process, Amar contends that it is possible to read between the lines of the Constitution and find an unenumerated right of the people to amend the Constitution by a simple majority vote in a national referendum. His argument is based on the so-called "first principle" of the American Revolution that underlies the Declaration of Independence: that the people are sovereign and that they always retain the right to alter their form of government as they see fit.⁸⁶ However, Amar is unpersuasive in claiming that the Framers would have accepted amendment by national referendum either as wise or as constitutionally valid.

There are three basic flaws in Amar's argument. First, he argues that popular sovereignty rhetoric in the state constitutions of 1776-1780 may be transposed into the later federal Constitution, and that such rhetoric should be

82. THOMAS PAINE, *The Rights of Man*, pt. 2, in *POLITICAL WRITINGS* 49, 168 (Bruce Kuklick ed., 1989).

83. Given their disdain for popular participation in normal government decisionmaking, it is likely that most Federalists held the same view with regard to popular involvement in the amendment process. Indeed, had they felt that the people were somehow more competent to make constitutional decisions, they would have certainly pointed this out. Vernon Parrington summarized the Federalist position with regard to both regular government and the amendment process: "An honest appeal to the people was the last thing desired by the Federalists, and the democratic machinery of recalls and referendums and rotation in office, which had developed during the war, was stigmatized as factional devices which in the end must destroy good government." 1 VERNON L. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 286 (1927).

84. GA. CONST. of 1777, art. LXIII, reprinted in 2 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 443, 449 (William F. Swindler ed., 1973) [hereinafter *CONSTITUTIONS*]; MASS. CONST. of 1780, pt. II, ch. VI, art. X, reprinted in 5 *CONSTITUTIONS, supra*, at 92, 108-09.

85. See Walcoff, *supra* note 63, at 1532.

86. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter *Amar, Philadelphia Revisited*]; Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter *Amar, The Consent of the Governed*]. Although Amar's right to amend via referendum is not specifically enumerated, he attempts to give a textual basis by grounding it in the wording of the Preamble and the First, Ninth, and Tenth Amendments. *Id.* at 462, 489-94.

understood as both proclaiming a preexisting right of the people to alter their form of government and implying that ballot issues approved by the national electorate would be valid constitutional amendments.⁸⁷ However, the validity of his textual transposition is undermined by the fact that many of the state constitutions accompanied such platitudes with *specific provisions* allowing for direct popular involvement in the amendment process.⁸⁸ The Framers of the federal Constitution included neither the platitudes, nor the provisions.⁸⁹

Second, Amar overlooks the massive shift in attitude that occurred between the Revolutionary War period and 1787.⁹⁰ He suggests that the concepts of popular sovereignty underlying the Declaration of Independence and the state constitutions of 1776-1780 may be regarded as part and parcel of the U.S. Constitution.⁹¹ However, as Gordon Wood concluded in his canonical history

87. See Amar, *Philadelphia Revisited*, *supra* note 86, at 1049-56, 1060-65; Amar, *The Consent of the Governed*, *supra* note 86, at 458-59, 477-81.

88. GA. CONST. of 1777, art. LXIII, *reprinted in* 2 CONSTITUTIONS, *supra* note 84, at 443, 449 (requiring that amendment proposals gain signatures from majority of voters in majority of counties); MASS. CONST. of 1780, pt. II, ch. VI, art. X, *reprinted in* 5 CONSTITUTIONS, *supra* note 84, at 92, 108-09 (requiring affirmative vote of two-thirds of all voters in order to call amending convention); N.H. CONST. of 1784, pt. II, para. 86, *reprinted in* 6 CONSTITUTIONS, *supra* note 84, at 344, 357 (requiring proposed amendment to win two-thirds majority in referendum); PA. CONST. of 1776, § 47, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1540, 1548 (B. Perley Poore ed., Washington, Gov't Printing Off., 2d ed. 1878) (providing expressly for popular instruction of delegates attending future conventions to amend constitution); VT. CONST. of 1777, ch. II, § XLIV, *reprinted in* 9 CONSTITUTIONS, *supra* note 84, at 487, 495 (same). With the one exception of Delaware, those state constitutions which did not include such specific provisions in their original form were amended later to provide for direct voting on proposed amendments. See *supra* note 14 and accompanying text.

89. Amar also argues that support for his view can be found in the two unamendable provisions of the Constitution stipulated in Article V, because if Article V had been viewed by the Framers as the exclusive mode of amendment, then the people would have alienated their inalienable right to amend in these areas—a logical impossibility. See Amar, *Philadelphia Revisited*, *supra* note 86, at 1068-69. This argument is a weak one. The two entrenched provisos merely imply that, short of abandoning the entire Constitution (which is in no way prohibited by Article V), the specified elements may not be omitted. In other words, while piecemeal amendment is prohibited, a total overhaul is still allowed. Therefore, the people did not alienate an inalienable right. Complete abandonment of the Constitution may be meaningfully distinguished from piecemeal amendment in two important respects: the former signals to the public a complete change of governmental regime, and it arguably results in sovereignty reverting to the people of the states (as opposed to the people of the nation).

90. Amar discusses an “evolution” of popular sovereignty principles between 1776 and 1789, whereby revolutionary violence was replaced by peaceful, lawful processes. Amar, *The Consent of the Governed*, *supra* note 86, at 462-64. However, this assessment fails to recognize what was actually a *rejection* of many of the populist political theories of 1776-1780.

91. See Amar, *The Consent of the Governed*, *supra* note 86, at 457-64, 475-88; Amar, *Philadelphia Revisited*, *supra* note 86, at 1049-54. Amar's suggestion that the ideas of the Declaration of Independence were incorporated into the Constitution is particularly shaky, given that the ratifiers of the Constitution evidently did not think so. Among the amendments to the Constitution proposed by the Virginia ratifying convention was one which paraphrased the Declaration: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” Additions Proposed by the Virginia Convention (June 27, 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 219 (Ralph Ketcham ed., 1986). Clearly, the ratifiers in Virginia did not regard the doctrines underlying the Declaration as implied or assumed in the Constitution; if they had, they would have felt no need to propose such an amendment.

of the Founding, the Constitution of 1787 was in a very real sense a "[r]epudiation of 1776."⁹² In drafting the Constitution, the Federalists consciously rejected the radical political theories that had been popular during the Revolutionary War and proposed instead "a startling strengthening of the rulers' power at the expense of the people's participation in the government."⁹³ Amar cites Wood selectively,⁹⁴ but neglects to mention the historian's overall conclusion, one that seriously weakens Amar's thesis.

Third and most important, Amar relies heavily on a litany of quotations from the Founding period that affirm, in general terms, the right of "the people" to alter their form of government.⁹⁵ He asserts that we may extrapolate from this language of popular sovereignty an endorsement of amendment via direct popular vote.⁹⁶ However, the vast majority of the passages cited by Amar actually refer to the people *as represented by a constitutional convention*, not the people voting directly.⁹⁷ Amar's use of certain quotations is particularly misleading. For example, he quotes Madison in *The Federalist* as follows: "the 'Constitution is to be founded on the assent and ratification of the people of America . . . [and] derived from the supreme authority in each State—the authority of the people themselves.'"⁹⁸ Here, Amar's ellipsis conceals, among other things, the important qualifying clause: "given by deputies elected for the special purpose."⁹⁹ When the Framers referred to constitutional amendment by "the people," they were speaking of constitutional conventions.¹⁰⁰ Amar's reference to the speeches of James Iredell at the North Carolina ratifying convention is similarly misleading. Attempting to demonstrate that the ratifiers recognized a broad popular right to alter government—a right that encompassed amendment via

92. See WOOD, *supra* note 66, at 519.

93. *Id.* at 523.

94. See Amar, *The Consent of the Governed*, *supra* note 86, at 459 n.6, 460 n.8, 474 n.56, 475 n.61, 476 nn.64-65, 479 n.77, 483-84 nn.92-97, 494 n.140, 507 n.178.

95. See, e.g., *id.* at 470-71, 475-80, 491-93.

96. See Amar, *Philadelphia Revisited*, *supra* note 86, at 1044-45, 1048 n.13, 1065; Amar, *The Consent of the Governed*, *supra* note 86, at 457-59.

97. The only Framers whose references to "the people" in this sense might actually have encompassed the people acting directly is James Wilson, upon whom Amar relies heavily. See Amar, *The Consent of the Governed*, *supra* note 86, at 473-75, 490. However, Wilson's remarks are ambiguous; and Amar offers no example in which direct popular action via referendum is clearly endorsed. In his 1988 article, Amar acknowledges that a "major difference" between ratification at the Founding and ratification in his proposed scheme is the latter's replacement of conventions with referendums, but he declines to explore the distinction. Amar, *Philadelphia Revisited*, *supra* note 86, at 1064. In 1994, he merely notes that modern communications technology may allow referendum campaigns to be as deliberative as conventions. Amar, *The Consent of the Governed*, *supra* note 86, at 502-03.

98. Amar, *The Consent of the Governed*, *supra* note 86, at 473 (quoting THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961)).

99. THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961). In addition, Amar's ellipsis conceals Madison's explanation that "this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." *Id.*

100. See *supra* notes 65-67 and accompanying text.

referendum—Amar offers an ambiguous passage from Iredell: “The same authority that created can destroy; and the people may undoubtedly change the government”¹⁰¹ However, Amar neglects to point out that during the same convention Iredell stated precisely how the people would make such changes: “That power which created the government can destroy it. Should the government, on trial, be found to want amendments, those amendments can be made in a regular method, in a mode prescribed by the Constitution itself.”¹⁰² Iredell contemplated amendment through the mechanism stipulated in the text, not through an unenumerated right of referendum based on the theory of popular sovereignty. The Framers and the Federalists clearly endorsed amendment through state- and national-level conventions acting on behalf of the people. Just as clearly, they rejected amendment through direct popular votes.

There is, however, another possible objection to this Note’s conclusion that the Framers rejected popular involvement in the amendment process: this reading of the Framers would be anachronistic if referendums were not even part of the political vocabulary in 1787. If the Framers had really considered referendums, one might argue, then they surely would have endorsed them. This objection is easily answered. The Framers were familiar with referendums in three contemporary contexts. First, constitutional referendums at the state level had already occurred by the time of the 1787 Convention,¹⁰³ and the Convention delegates were undoubtedly familiar with these votes. In fact, Madison mentioned the use of the referendum in the adoption of existing state constitutions in *The Federalist*, when he insisted that the reference to the people of constitutional questions regarding the proper bounds of government institutions was generally “neither a proper nor an effectual provision.”¹⁰⁴ He excepted the earlier cases because they came at a time when a revolutionary spirit and the British menace had served to focus the public mind.¹⁰⁵

101. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 230 (Salem, N.H., AYER Co. reprint ed. 1987) (Jonathan Elliot ed., New York, Burt Franklin 1888) [hereinafter ELLIOT’S DEBATES] (statement of James Iredell), *quoted with unindicated omissions*, in Amar, *The Consent of the Governed*, *supra* note 86, at 476.

102. 4 ELLIOT’S DEBATES, *supra* note 101, at 130 (statement of James Iredell).

103. In Massachusetts, state legislators had placed a newly drafted state constitution before the people in 1778 (when it was defeated overwhelmingly) and 1780 (when a revised version passed). KOBACH, *supra* note 13, at 236; *see also* Ranney, *supra* note 13, at 68-69. Similarly, New Hampshire voters had participated in constitutional referendums in 1779 and 1783. Ranney, *supra* note 13, at 69.

104. THE FEDERALIST No. 49, at 258 (James Madison) (Garry Wills ed., 1982).

105. In Madison’s words:

[T]he experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

Id. at 256.

The Framers also knew that the very document they were drafting might face a referendum in one or two states. Early during the debates of 1787, Alexander Hamilton drew the delegates' attention to the fact that the Senate of New York had nearly adopted a proviso whereby no act of the Constitutional Convention could be binding until it was referred to and ratified by the voters of the state. The New York motion had failed by only one vote.¹⁰⁶ In the end, only Rhode Island subjected the proposed federal constitution to a popular vote.¹⁰⁷ Defying the convention mechanism stipulated in Article VII,¹⁰⁸ the General Assembly of that state called for a referendum on the document in March 1788, when it was defeated overwhelmingly by a vote of 237 for and 2708 against ratification.¹⁰⁹

Finally, in an early effort at comparative political science, many of the Framers had done their homework before coming to the Convention by studying the various forms of government existing in Europe. For centuries, several Swiss cantons had operated successfully under the *Landsgemeinde* system, whereby decisions of the cantonal governments were required to win popular consent in direct votes.¹¹⁰ The Framers were well aware of the Swiss model.¹¹¹ In sum, the referendum device was not overlooked by the Convention delegates of 1787. Thus, their omission of direct democracy from the amending process was almost certainly deliberate. The people were deemed too ill-informed and passionate to play a direct role in proposing or ratifying constitutional change.

It is against this backdrop that we must view the process that led to the adoption of the Seventeenth and Nineteenth Amendments and that may eventually lead to a federal constitutional amendment imposing congressional term limits. Contrary to the Framers' plan, the direct consent of voters played a crucial role in the passage of the Seventeenth and Nineteenth Amendments.

106. MADISON, *supra* note 67, at 130.

107. Ralph Ketcham, *Antifederalist Essays and Speeches: 1787-1788*, in *ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED* 381, 383 (Stephen L. Schechter ed., 1990). Federalists in the major towns of Newport and Providence boycotted the referendum. *See id.* at 382-83.

108. "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." U.S. CONST. art. VII.

109. Or 8% in favor. Only two towns, Bristol and Little Compton, saw a majority in favor of the new federal constitution. The polling of eligible Rhode Island freemen and freeholders took place at town meetings held throughout the state on the fourth Monday of March in 1788. 10 *RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND* 271-75 (John R. Bartlett ed., Providence, Providence Press Co. 1865). The U.S. Constitution took effect without the approval of Rhode Island, a situation which engendered considerable uncertainty and mistrust between the First Congress and that state. Eventually, a Rhode Island ratification convention was called to assemble in April 1790. Debating for nearly a month, the delegates finally decided to ratify the Constitution by a two-vote margin, 34-32. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 531 (1992).

110. KOBACH, *supra* note 13, at 16-17.

111. Indeed, during the Convention debates, George Mason, Alexander Hamilton, James Madison, James Wilson, Luther Martin, and Charles Pinckney all made reference to aspects of the Swiss political system. *See* 1 *CONVENTION RECORDS*, *supra* note 63, at 112, 285-86, 307, 317, 343, 454; 3 *id.* at 115.

In a very real sense, popular consent *was* required. The people voting in state referendums passed *decisive* judgment on both amendments. Neither would have been adopted at the time in the absence of strong popular endorsement through the referendum mechanism. Furthermore, Congress would never have “proposed” either amendment if the necessary restructuring of Congress had not been achieved through direct voter action in state referendums. Similarly today, Congress will never “propose” a term limits amendment unless voters succeed in imposing term limits on their state delegations through amendments to their state constitutions, and such amendments require approval by referendum.¹¹² Thus, there now exists an alternative to the amendment routes envisioned by the Framers, one in which direct voter consent is essential.

The development of this alternative path should be viewed in the context of the larger cultural and institutional environment. The incremental amendment process that led to the popular election of Senators and to woman suffrage was part of a significant political metamorphosis of the republic which occurred in the wake of populism and during the reign of progressivism. By 1918, voters in twenty-three states were armed with either the right to initiate state legislation directly or the right to overrule legislative acts or both.¹¹³ The almost exclusively representative democracy of the Framers had given way to a system with a mix of representation and direct democracy. The franchise had been broadened markedly; the various property qualifications that existed in the states in 1787 had been eliminated by 1856.¹¹⁴ And with the ratification of the Fifteenth Amendment in 1870, universal manhood suffrage had become a (legal) reality. Combined with the weakening of class structures and the expansion of public education, these developments created an environment in which it was only natural that citizens should enjoy a direct role in the process of constitutional amendment.

Nevertheless, the Supreme Court, on the few occasions in which it has considered the direct involvement of citizens in the federal amendment process, has consistently preserved the Framers’ intentions. In the middle of the nineteenth century, the Court confirmed Article V’s exclusion of direct popular action in *Dodge v. Woolsey*.¹¹⁵

[The Constitution] is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both houses shall propose them; or where the

112. See *supra* notes 13-14 and accompanying text.

113. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 50-54 (1989).

114. CHARLES A. BEARD & MARY R. BEARD, *A BASIC HISTORY OF THE UNITED STATES* 213 (1944).

115. 59 U.S. 331 (1855).

legislatures of two thirds of the several States shall call a convention for proposing amendments¹¹⁶

The Court reiterated this understanding of the amendment process in 1920 in *Hawke v. Smith*,¹¹⁷ a case brought in Ohio by proponents of the Eighteenth Amendment (establishing Prohibition). The voters of Ohio had previously amended the state constitution to require a referendum approving any decision of the state legislature to ratify a federal constitutional amendment. If the voters rejected the amendment, the legislature's decision to ratify would be void. Twenty-two states had similar laws at the time.¹¹⁸ As it happened, the people of Ohio had narrowly rejected their legislature's decision to ratify the Eighteenth Amendment.¹¹⁹ The Court ruled that the state of Ohio had no authority to require that ratification be subject to popular approval because the state's power of ratification was derived from the federal Constitution and was not susceptible to modification at the state level.¹²⁰ The Court's opinion reflected the notion that ratification by "Legislatures," as provided in Article V, does not include ratification by a legislature acting under the direction of a binding referendum. Justice Day took the opportunity to dispel any illusions about the role of referendums in the amendment process: "The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation."¹²¹

The only direct popular role in the amendment process that has been sanctioned formally by the Supreme Court is that of the nonbinding, "advisory" referendum. In *Kimble v. Swackhamer*, Justice Rehnquist, acting as Circuit Justice, refused to enjoin Nevada's advisory referendum on the ratification of the Equal Rights Amendment.¹²² However, he justified his action by referring to the nonbinding character of the plebiscite. Since it imposed no obligation upon the legislature to follow the will of the voters, he regarded it as the equivalent of communication between legislators and their constituents and therefore within the boundaries of Article V.¹²³

116. *Id.* at 348.

117. 253 U.S. 221 (1920).

118. CATT & SHULER, *supra* note 40, at 366.

119. The ratification decision was rejected by a margin of less than 500 votes. *Id.* at 414.

120. 253 U.S. at 230-31.

121. *Id.* at 227. The California Supreme Court applied the same logic to applications for a constitutional convention in 1984 when it held that "a state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action. Under Article V, the legislators must be free to vote their own considered judgment." *AFL-CIO v. Eu*, 686 P.2d 609, 622 (Cal. 1984).

122. 439 U.S. 1385 (1978) (Rehnquist, Circuit Justice).

123. *Id.* at 1387-88.

Judicial interpretations of Article V have consistently rejected any decisive popular involvement in the amendment process. Yet, the passage of the Seventeenth and Nineteenth Amendments depended upon direct popular involvement at several stages. In the majority of states, voters deliberated at length and passed judgment on the amendments to be enacted in their respective states. These actions eventually altered the structural interests of Congress so that it would endorse the amendments. In many states where citizens retained the power of initiative, voters not only passed judgment on the amendments as applied in their state, they also raised them to the agenda in the first place. While the final stages of formal ratification proceeded according to the letter of Article V, it can hardly be argued that the process that led to the amendments' adoption reflected the principle of representation stressed by the Framers. Ironically, the courts have acted to affirm this principle both during the Progressive era and in recent years—even while contemporary events were rendering it largely irrelevant.

B. *Agreement Between National-Level and State-Level Majorities*

A second structural characteristic of Article V, in addition to its exclusion of direct voter action, is the way it combines proposal of amendments at the national level and ratification at the state level. At both levels, the assent of a majority (in most cases, a supermajority) is required.¹²⁴ The Constitution may not be unilaterally altered either by Congress or by a group of state legislatures, no matter how numerous. Rather, the Framers required a concurrence of interests between state- and national-level assemblies (legislatures or conventions). Each tier would be free from constraint by the other, and each would possess the power to defeat reforms sought by the other. Writing in defense of Article V, Madison stressed this blending of state and national functions:

If we try the Constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established Government. Were it wholly federal on the other hand, the

124. The one instance in which Article V does not expressly require a supermajority is in the decisions of a national proposing convention. The Framers included in Article V no explicit guidance as to the procedural rules that such a convention should follow in offering amendment proposals to the states. This omission probably reflects the Framers' own experience at the Convention of 1787, which set its own procedural rules. Decisions were made by simple majority, with each state's delegation entitled to cast one vote. 1 CONVENTION RECORDS, *supra* note 63, at 2, 7-11.

concurrence of each State in the Union would be essential to every alteration that would be binding on all.¹²⁵

It could be argued that the Framers did not require meaningful involvement at the national level in those instances when a proposing convention would be called. But this kind of argument would regard the national convention as little more than a proxy for the state governments, bound to propose whatever amendment the states might stipulate in their calls for a convention or in their subsequent instructions to convention delegates. This view of the proposing convention as being "limited" by the specific state resolutions that called it into being is highly contested and divides the legal academe sharply.¹²⁶ The idea of a limited convention is particularly dubious in light of the fact that the delegates to the 1787 Convention rejected the concept with regard to their own endeavor. Rather than merely propose amendments to the Articles of Confederation, the delegates in Philadelphia took it upon themselves to draft an entirely new system of government. Rather than observe the Articles' requirement of unanimity between the states in the adoption of amendments, they asserted the validity of the proposed constitution upon the assent of only nine states.¹²⁷

It is unlikely that the Framers would have endorsed any amendment mechanism that allowed state-level representatives to dominate the process, given their overt disdain for state legislators. The Federalists described state legislators in derogatory terms—"men of no genius or abilities" who were doing a poor job of running "the machine of government."¹²⁸ Alexander Hamilton expressed this sentiment openly in the 1787 Convention when he rejected the suggestion that all amendments be initiated by state legislatures: "The State Legislatures will not apply for alterations but with a view to increase their own powers— The National Legislature will be the first to

125. THE FEDERALIST No. 39, at 194-95 (James Madison) (Garry Wills ed., 1982). Modern writers have also drawn attention to the two-tiered character of the amendment process. See, e.g., MARCIA L. WHICKER ET AL., THE CONSTITUTION UNDER PRESSURE: A TIME FOR CHANGE 106-07 (1987).

126. See, e.g., RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP 95-101 (1988) (conventions may be limited); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972) (petitions for limited conventions are invalid); Walter Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979) (petitions for limited conventions are invalid, and conventions may consider any agenda they wish); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1 (1979) (petitions for limited conventions are valid, but conventions are not bound to limit themselves to terms of such petitions); William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (petitions for limited conventions are valid).

127. James Madison openly conceded that the Convention delegates had "departed from the tenor of their commission." THE FEDERALIST No. 40, at 199 (James Madison) (Garry Wills ed., 1982). But he maintained that such a departure was permissible, arguing that "if they had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America." *Id.* at 202.

128. WOOD, *supra* note 66, at 507 (quoting GAZETTE OF THE STATE OF SOUTH-CAROLINA, Jan. 3, 1785).

perceive and will be most sensible to the necessity of amendments”¹²⁹ Patrick Henry noted this prejudice of the Federalists when he spoke before the Virginia ratifying convention: “The Constitution reflects in the most degrading and mortifying manner on the virtue, integrity, and wisdom of the state legislatures; it presupposes that the chosen few who go to Congress will have more upright hearts, and more enlightened minds, than those who are members of the individual legislatures.”¹³⁰

Accordingly, the Framers reserved the task of conceiving and drafting proposed amendments to a national-level assembly, be it Congress or a convention. They reasoned that there was a limited number of statesmen who (like themselves) were sufficiently wise, educated, and civic-minded to grapple with the issues involved in proposing alterations to the Constitution. The problem, as Jonathan Jackson saw it, was how to convey “authority to those, and those only, who by nature, education, and good dispositions, are qualified for government.”¹³¹ The solution that the Federalists arrived at was to widen the electoral base of those who would govern. While unprincipled, obscure, and narrow-minded individuals might win election to local office or to the state legislatures, elections to national representative assemblies would filter out such candidates.¹³² Similarly, the Framers envisioned that persons elected to a national convention would be the most qualified to draft amendments to the Constitution and the most able to promote broad, national interests.¹³³ In sum, it is doubtful that the Framers intended to empower the states to alter the Constitution absent the guidance of Congress or a national convention.

Now we come to the Seventeenth and Nineteenth Amendments. The novel path of constitutional change that these amendments followed is difficult to align with the Framers’ preference for concurrence between state- and national-level assemblies. The incongruity is evident in two respects: in the effective transformation of the constitutional framework without any national-level assent during the initial stages of incremental amendment, and

129. 2 CONVENTION RECORDS, *supra* note 63, at 558.

130. Patrick Henry before the Virginia ratifying convention, in 3 ELLIOT’S DEBATES, *supra* note 101, at 167.

131. WOOD, *supra* note 66, at 510 (quoting JONATHAN JACKSON, THOUGHTS UPON THE POLITICAL SITUATION (1788)).

132. As John Jay argued, “more general and extensive reputation for talents and other qualifications, will be necessary to recommend men to offices under the national government—especially as it will have the widest field for choice, and never experience that want of proper persons, which is not uncommon in some of the States.” THE FEDERALIST No. 3, at 11 (John Jay) (Garry Wills ed., 1982).

133. The one contemporary exception was the proposal of 12 amendments by the First Congress in 1789, 10 of which became the first 10 amendments to the Constitution. Congress selected these 12 from a large pool of amendment proposals submitted by various states. However, unique circumstances surrounded the states’ suggestion of these amendments. Numerous state convention debates on the ratification of the Constitution had reached an impasse, with Federalists arguing that the Constitution should be ratified as it stood and Anti-Federalists insisting on various changes as a precondition for ratification. Finally, a compromise was reached at the Massachusetts convention in February 1788 and copied in other states. Recommended amendments would be submitted along with a state’s ratification, and the Federalists would agree to support their proposal by the First Congress. See Bernstein, *supra* note 109, at 513.

in the practical constraints which the states place upon Congress' subsequent deliberations through the process of incremental amendment. Consider the first respect. The process of incremental amendment produces substantial structural transformation at the national level without *any* congressional assent. Indeed, with the Seventeenth and Nineteenth Amendments, the state-by-state modifications of the electoral basis of members of Congress were adopted in the face of overt congressional hostility to the reforms.¹³⁴ By the time Congress "proposed" the amendments, Congress itself had already been transformed significantly. In the case of the Seventeenth Amendment, voters in twenty-eight states were already effectively electing their Senators by the time Congress assented to the change. As for the Nineteenth Amendment, Congressmen from fifteen states were being elected by women, and women in thirty-one states were able to vote for President. The system of national government had already been significantly reconstituted. The same is true with state-imposed congressional term limits. Assuming that the state actions are held to be constitutional, the clock has already started running on the congressional delegations of fifteen states. For 156 House members and 30 Senators, term limits are a constitutional reality even though Congress has taken no action in favor of the reform. The concurrence of state- and national-level majorities has not been necessary in order to amend the Constitution incrementally.

These state-initiated changes also bind Congress in the later stages of the alternative amendment path. When Congress finally capitulates and considers seriously the proposal of an Article V amendment (in the third stage of the process), it finds itself significantly constrained in two ways. It has already been *restructured* in favor of the proposed reform; many members of Congress have been elected under the new rules and vested with an inherent interest in their continuance.¹³⁵ Moreover, when Congress finally takes action in stage three of this alternative amendment route, the terms of the debate have already been set and cannot be altered easily. In these circumstances, Congress effectively loses the power to *propose* amendments and can only *assent* to them. For example, in 1918 Congress could not have proposed realistically that suffrage be extended only to women meeting a minimum educational

134. Bruce Ackerman has suggested that the passage of the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments illustrates the "vibrancy of the Congressionally led modes of constitutional transformation during the period." 1 BRUCE ACKERMAN, *WE THE PEOPLE* 85 (1991). However, this was clearly not the case with the Seventeenth and Nineteenth Amendments; Congress opposed both reforms for decades, coming around only in the final hour. See *supra* Parts III-IV.

135. The pressure generated by this structural bias is of a greater magnitude than that created by routine reelection concerns. For example, a Congressman in a state that had recently adopted woman suffrage faced powerful pressures compelling him to support the proposal of the Nineteenth Amendment. By voting against it, he risked alienating the female voters in his constituency, and he took a position contrary to that favored by the male voters in a recent referendum. Furthermore, if he felt that the new arrangement in his state imposed any burden or cost upon him, he presumably wished to equalize the situation across the country by imposing the same burden upon all other members of Congress.

requirement. That was not what the states had endorsed. They had adopted a proposal to enfranchise women on the same terms as men. It was too late in the debate for Congress to propose a different amendment. Rather, Congress was relegated to a position in which it could only accept or reject a proposal already adopted by a large number of states.

V. THE PROBLEM OF CONGRESSIONAL SELF-INTEREST

This alternative path of amendment emerged to overcome an overwhelming structural barrier to amending the Constitution in a way that conflicts with the inherent self-interest of members of Congress. Because Congress' opposition to such reforms is structural, rather than merely partisan or ideological, this opposition cannot be defeated simply by electing new members to Congress. Instead, *Congress itself* must first be restructured to eliminate its innate institutional bias against the reform.

The problem of Congressional resistance to such amendments is not a new or unforeseen one. The Framers considered this very issue in their deliberations over the amendment process. On the third day of the Convention, Edmund Randolph broached the issue when he presented the Virginia Plan, a collection of resolutions that became the foundation of the Convention's work. The thirteenth resolution of the Plan stated simply "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."¹³⁶ Virginia's George Mason was a strident advocate of this approach; he stressed that "[i]t would be improper to require the consent of the Nat[ional] Legislature, because they may abuse their power, and refuse their consent on that very account."¹³⁷ This concept of an amendment process without decisive congressional involvement survived basically intact in the second proposal on the subject—Article XIX of the Report of the Committee of Detail, which stated that: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."¹³⁸

Eventually, James Madison directly challenged this proposal and the basic premise of the Virginia Plan's amendment scheme. He offered his own plan, under which Congress would propose all amendments "whenever two thirds of both Houses shall deem [it] necessary, or on the application of two thirds of the Legislatures of the several States."¹³⁹ Enactment would require the

136. 1 CONVENTION RECORDS, *supra* note 63, at 22. Charles Pinckney responded to this plan by questioning the necessity of any provision for amendment. *Id.* at 121; *see also* MADISON, *supra* note 67, at 69.

137. 1 CONVENTION RECORDS, *supra* note 63, at 203.

138. 2 *id.* at 188.

139. 2 *id.* at 559.

assent of three-fourths of the state legislatures or state ratifying conventions, as specified by Congress.¹⁴⁰ Under the Madison plan, all routes would pass through Congress—the only body entitled to propose amendments. This plan drew criticism from several quarters, but the most vehement disparagement came from George Mason. On the penultimate day of the Convention, Mason predicted that under Madison's framework "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive," which he "verily believed would be the case."¹⁴¹

A compromise was offered by Elbridge Gerry and Gouverneur Morris as a modification of the Madison plan. Their alteration allowed for proposal either by Congress or by a national convention at the request of two-thirds of the states.¹⁴² Madison felt that the change was unnecessary and pointed out that difficulties might arise in determining the procedural rules governing such a convention.¹⁴³ Nonetheless, the modification was accepted; the amended Madison plan would be incorporated into the Constitution as Article V.

Mason ultimately refused to sign the Constitution in part because he believed that even the revised Madison plan gave Congress too much control over the amendment process.¹⁴⁴ He described the potential power of Congress to obstruct amendments as "a Doctrine utterly subversive of the fundamental Principles of the Rights [and] Liberties of the people."¹⁴⁵ Mason's fear that Congress might prove unwilling to reform itself was echoed in the ratification debates of 1787-1788. George Bryan, a leading Pennsylvania Anti-Federalist, stated the problem plainly in 1787:

[W]e shall never find two thirds of a Congress voting or proposing any thing which shall derogate from their own authority and importance, or agreeing to give back to the people any part of those privileges which they have once parted with—so far from it; that the greater occasion there may be for a reformation, the less likelihood will there be of accomplishing it. The greater the abuse of power, the more obstinately is it always persisted in.¹⁴⁶

140. *Id.*

141. 2 *id.* at 629.

142. *Id.*

143. Nonetheless, Madison opposed the inclusion of more specific provisions in the text because he felt that such detailed stipulations "in Constitutional regulations ought to be as much as possible avoided." 2 *id.* at 630.

144. This and other aspects of the evolving text prompted Mason to insist, along with Edmund Randolph, that the state ratifying conventions be allowed to proffer changes to the proposed Constitution. Such changes would then be considered by a second constitutional convention. Unless this concession was made, the two men would refuse to sign the Constitution. Their effort at brinkmanship failed. Willing to part with the two Virginians' support, the Convention voted unanimously against allowing the state conventions to offer revisions for the consideration of a second national convention. See 2 *id.* at 629-33.

145. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 270 (James H. Hutson ed., 1987).

146. George Bryan et al., *An Old Whig*, INDEPENDENT GAZETTEER, Oct. 12, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 122, 123-24 (Bernard Bailyn ed., 1993).

Hamilton was well aware of this apprehension regarding Article V. He presented his response in the final paper of the *Federalist* series:

In opposition to the probability of subsequent amendments, it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. . . . I think there is no weight in the observation just stated. . . . The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents.¹⁴⁷

History has not vindicated Hamilton's optimistic expectations. On many occasions, members of Congress have had a direct stake in an aspect of the status quo threatened by a proposed amendment. In such instances, their unwillingness to agree to the reform has been monumental. Mason's ghost continues to haunt the Constitution; indeed, his warnings are more relevant today than ever.

The Gerry-Morris compromise embodied in Article V attempted to correct this problem by providing a second road of amendment free from congressional obstruction.¹⁴⁸ Unfortunately, this endeavor failed; the convention road has proven impassable. There have been nearly four hundred attempts to set the convention mechanism of Article V in motion.¹⁴⁹ Yet, none has succeeded.¹⁵⁰ Pervasive fears of a "runaway" convention meddling with hallowed parts of the Constitution have made it politically impossible to persuade two-thirds of the states to demand a convention on a particular issue.¹⁵¹ On numerous occasions, the number of applications has come within three or four states of reaching the two-thirds mark. Yet each time the process has ground to a halt. Opposition to the substance of a sought-after amendment solidifies and combines with ubiquitous dread of a runaway convention.¹⁵²

147. THE FEDERALIST No. 85, at 448 (Alexander Hamilton) (Garry Wills ed., 1982).

148. Of course, even the national constitutional convention route runs through Congress in a limited sense, since Congress alone is empowered to "call" the convention. U.S. CONST. art. V.

149. There have been 399 applications to date. Paulsen, *supra* note 10, at 736 n.199.

150. More than 70 of the 399 applications were intended to bring about the direct election of Senators. See Frank J. Sorauf, *The Political Potential of an Amending Convention*, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 113, 114 (Kermit L. Hall et al. eds., 1981). No doubt, these repeated failures were instrumental in driving advocates of direct election to explore the alternative route which ultimately led them to their intended destination. Michael Paulsen has argued recently that, in light of the Twenty-Seventh Amendment's ratification over a period of 203 years, Congress should reassess the counting rules and cumulate the hundreds of valid state applications for a constitutional convention. He maintains that Congress must call a convention now. See Paulsen, *supra* note 10, at 735-37.

151. See Sorauf, *supra* note 150, at 118. It should be noted that the Constitutional Convention of 1787 was just such a runaway convention.

152. See *id.* at 115-16.

Such fears are not the only barrier to a convention. Congress has employed its own tactics to place the mechanism further out of reach, thus ensuring its monopoly over the power to propose amendments. Chief among these is its consistent refusal to pass an implementation bill defining valid petitions from the states, setting time limits on when the two-thirds mark must be reached, and detailing the procedures of a convention.¹⁵³ Beginning in 1971 with a bill proposed by Senator Sam Ervin, every attempt to define rules for a potential convention has been defeated by members of Congress unwilling to encourage convention applications by removing the veil of uncertainty. These obstacles make it unlikely that a national convention will *ever* occur.¹⁵⁴

Thus, insurmountable barriers have effectively rendered the national constitutional convention route useless. As a result, Congress must approve any successful amendment under Article V—even one meant to address structural defects in the constitution of Congress itself. As demonstrated by the nation's experience with the popular election of Senators, woman suffrage, and now term limits, members of Congress will act to defeat amendments that threaten their structural interests. Herein lies the fundamental importance of the alternative amendment path. It provides a mechanism by which the states may effectively enact an amendment state by state and thereby restructure Congress itself. In this way, Congress' refusal to reform itself can be overcome.

VI. A RECONCEPTUALIZATION OF THE AMENDMENT PROCESS

The proposal and ratification of the Seventeenth and Nineteenth Amendments were clearly not unconstitutional. The formal requirements of Article V were satisfied: two-thirds of Congress did something which it called "proposing," and three-fourths of the state legislatures voted to "ratify" the amendments. From a purely positivist point of view, there is nothing unusual about these amendments. But the structural incongruities refuse to disappear. The amendment process in these two instances proceeded by a route dramatically different from that envisioned by the authors of Article V.¹⁵⁵

These structural incongruities may be resolved by recognizing that Article V has evolved as America has changed. The elitist notions of the Framers reflected the world in which they lived. Their conception of the American citizenry is no longer descriptively correct. Now, the great majority of the nation's population possesses a basic education, and whatever one thinks of the performance of state legislatures, their members are selected from much larger and more educated pools. Direct popular involvement in government decisionmaking has long existed at the state level. And although direct

153. *See id.* at 117-23.

154. *Id.* at 126.

155. *See supra* Part IV.

democracy has its deficiencies, it is difficult to claim that the citizenry remains incompetent to pass judgment on national constitutional amendments.¹⁵⁶ These changes in the nature of American society contributed directly to the vigor of the Populist and Progressive movements. Repudiating the Framers' conception of elite-led democracy, Americans embraced the participation of ordinary citizens in fundamental political decisions. Consequently, a reconceptualization of the amendment process occurred, in which citizens pushed their way through the doors that had previously been closed to them. Using devices of direct democracy recently adopted at the state level, citizens paved an alternative route of amendment, one which was enough like Article V on the surface to pass constitutional muster but was very different underneath. This reconceptualization of higher lawmaking allowed a greater role for direct citizen participation within the formal boundaries of Article V.¹⁵⁷

The fact that we now recognize the Seventeenth and Nineteenth Amendments as valid invites us to consider the broader implications of this procedural innovation. Although these amendments were not enacted in the spirit of Article V as envisioned by the Framers, they did conform to the letter of the text. Consequently, the uncontested validity of these amendments legitimates an alternative understanding of the structural requirements of Article V. We should now put this alternative structural understanding to work by reinterpreting Article V to allow both direct popular voting on proposed amendments and state-level leadership in incremental transformations. To do otherwise is to deny the history of the Seventeenth and Nineteenth Amendments. In this way, a synthesis of the amendment mechanism conceived in the Founding era and the amendment practice developed in the Progressive era can be achieved.

The judiciary should recognize that a broad reconceptualization of the amendment process has occurred. Judicial understandings of Article V that reflect the elitist prejudices of the Framers, who held direct popular involvement in amending the Constitution to be dangerous, are not essential for a meaningful interpretation of the Article. The formal amending rules of

156. See CRONIN, *supra* note 113, at 60-62, 87-89; KOBACH, *supra* note 13, at 244-45.

157. It should be noted that the Seventeenth and Nineteenth Amendments were not the only constitutional amendments enacted in a legally anomalous fashion. The Thirteenth and Fourteenth Amendments were also advanced in ways that did not conform with the spirit of Article V. Ratification of the former was achieved through outright coercion: amnesty for Southerners participating in the rebellion was conditioned upon support for the Thirteenth Amendment. See Bruce Ackerman, *We the People: Transformations* 113-25 (1969) (unpublished manuscript on file with Bruce Ackerman, Yale Law School). Ratification of the latter also occurred under duress: martial law was not rescinded and the Southern congressional delegations were not seated until the conventions in the Southern states voted in favor of the amendment. See *id.* at 254-65. The procedural irregularities of the Civil War amendments differed greatly, however, from those of the Seventeenth and Nineteenth Amendments and the campaign for term limits. A peculiar set of circumstances engendered this naked coercion of recalcitrant states; consequently, this course is unlikely to be followed again. In contrast, the proponents of the Seventeenth and Nineteenth amendments produced a more enduring procedural innovation that reflected fundamental changes in American society.

Article V may be retained even if the structure of the amending process is acknowledged to be very different today. In other words, a fair reading of Article V can accommodate direct and decisive popular involvement.

This view is particularly compelling when it is recognized that the decision of the Supreme Court in *Hawke v. Smith*,¹⁵⁸ the leading case in the area, relied in part upon a *flawed* understanding of the history of the Seventeenth Amendment. In attempting to construct a strong dichotomy between the action of a legislature and the action of citizens voting in a referendum, Justice Day drew an analogy to the popular election of Senators, which he understood to be “entirely distinct from legislative action” to select Senators.¹⁵⁹ Day demonstrated his unfamiliarity with the then-recent history of the Seventeenth Amendment when he wrote: “It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.”¹⁶⁰ This assessment was, of course, gravely mistaken. The Oregon system and similar schemes adopted prior to the passage of the Seventeenth Amendment demonstrated that making the office of Senator elective by the people *could* be effectively accomplished by a referendum vote.¹⁶¹ Thus, the example cited by Day actually undermines rather than supports his claim that normal legislative action may be clearly distinguished from legislative action in response to a referendum. The question whether a legislature acting under the direction of a binding referendum is a “legislature” in the Article V sense does not have an obvious answer. Nevertheless, Justice Day’s reading seems to strain the text of Article V in order to satisfy the structural expectations of the Framers.

In *Kimble v. Swackhamer*,¹⁶² Justice Rehnquist attempted to clarify the murky distinction between a legislature acting as a legislature and a legislature acting to adopt the results of a popular referendum. Justice Rehnquist refused to enjoin Nevada’s *advisory* referendum concerning the Equal Rights Amendment because the referendum would not bind the legislature to follow the will of the voters in deciding whether or not to ratify.¹⁶³ However, this ruling only muddled matters further by relying upon another questionable distinction—that between a binding referendum and an advisory referendum. In practice, there is little difference between the two. Governments almost

158. 253 U.S. 221 (1920) (holding that state ratification of federal constitutional amendments may not be made subject to popular approval in a referendum).

159. *Id.* at 228.

160. *Id.*

161. *See supra* text accompanying notes 28-33.

162. 439 U.S. 1385 (1978) (Rehnquist, Circuit Justice) (refusing to enjoin a Nevada advisory referendum on ratification of the federal Equal Rights Amendment).

163. *Id.* at 1387-88.

never defy the popular verdicts expressed in advisory referendums.¹⁶⁴ Indeed, the success of the Oregon system in the early years of the twentieth century illustrates how the formally expressed will of a voting electorate can bind legislators even if there are no legal constraints on their decisionmaking.

The Court should in the future reconsider the position taken in *Hawke* and relied upon in *Swackhamer*. A perfectly plausible interpretation of the text of Article V is that the states may impose whatever deliberative or procedural constraints they wish upon their own decisions to ratify or not to ratify. Only if such a constraint contradicts the express requirements of Article V can it be regarded as unconstitutional.¹⁶⁵ Accordingly, the decision of a state legislature to ratify only if the voters endorse ratification in a statewide referendum is not in conflict with Article V's requirement that amendments be ratified by state "legislatures."¹⁶⁶ The use of legislative power to affirm the result of a popular referendum does not transform that power into something else; rather, it represents a legal commitment to channel legislative power toward the ends identified by voters in formal referendum proceedings.¹⁶⁷

It is particularly important that the Court recognize just how *decisive* direct democracy was for both the proposal and the ratification of the Seventeenth and Nineteenth Amendments. The impact of the referendum outcomes was felt not only during the stages of incremental amendment and during the stage of congressional "proposal," but also during the final stage of formal ratification in accordance with Article V. When the legislatures in states which had already adopted the reforms prior to congressional "proposition" swiftly ratified

164. In their comparative study of referendums around the world, David Butler and Austin Ranney point out that such instances of referendum results being ignored are few and far between. *See REFERENDUMS*, *supra* note 13, at 17, 227-46.

165. This theory of Article V is laid out in detail in Paulsen, *supra* note 10, at 731-32.

166. A federal district court upheld a similar self-imposed procedural constraint in *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court). The Illinois Constitution required that proposed amendments to the U.S. Constitution win a three-fifths supermajority in both houses of the state legislature for ratification. The proposed Equal Rights Amendment received only a simple majority in favor. The plaintiffs challenged the Illinois requirement as a violation of Article V. The court, which granted summary judgment for the defendants, reasoned that the three-fifths requirement was a permissible constraint imposed by the state's own legislative rules. *Id.* at 1306, 1309.

167. A possible objection to this argument is the following: if the advisory referendums apparently allowed by *Swackhamer* have the same practical effect as binding referendums, then the Court has already inadvertently opened the door to decisive popular participation in the amendment process. There are, however, two reasons why the distinctions of *Hawke* and *Swackhamer* should be abandoned and decisive popular involvement in the amendment process openly embraced. First, the prohibition of binding referendums remains. This entails a risk that future courts may reject "advisory" referendums if they are too "binding" in nature. Second, the two rulings send unclear signals to state legislatures regarding the types of referendums that are permissible. Considerable confusion has already resulted in Idaho. In 1975, the Idaho legislature adopted a statute requiring itself to defer any action to ratify an amendment until after an "advisory" referendum at a regularly scheduled general election. IDAHO CODE § 34-2217 (1975). In 1986, the Idaho attorney general issued an opinion concluding that the referendum statute was in violation of Article V in light of *Swackhamer*. 1986 Op. Att'y Gen. 51,54 (1986). However, the Idaho legislature disagreed and deferred its vote on the congressional pay amendment until after a referendum in November 1988. Bernstein, *supra* note 109, at 539. The constitutional status of the Idaho referendum scheme remains in question. Unequivocal acceptance by the Supreme Court of all state referendums on ratification issues, binding on the legislatures' decisions or not, would end such needless confusion.

the amendments, they were effectively constrained by the referendum results. Voting against ratification was untenable, for it meant defying the explicit will of the people as expressed only a few years earlier. In a very real sense, the Seventeenth and Nineteenth Amendments were adopted by referendum. Nonetheless, the Supreme Court in *Hawke* narrowly construed a "legislature" to be a deliberative body unfettered by direct popular constraints on its decisions. In the wake of the Progressive era's embrace of direct democracy and in the knowledge of how the Seventeenth and Nineteenth Amendments actually came about, this construction seems particularly hollow.

The judiciary should also recognize that the alternative amendment path has served to preserve what little federalism remains in the process of constitutional transformation. A vast amount of constitutional change has been driven by shifts in judicial interpretation produced by changes in the composition of the Court. In the twentieth century, and particularly since the constitutional transformations embodied in the New Deal, this sort of constitutional politics has taken place exclusively at the national level.¹⁶⁸ Such informal "amendment" of the Constitution has occurred without any meaningful opportunity for the states to reject or support the proposed changes. This minimization of the states' role in constitutional transformation strikes at the very heart of the federal framework of government. In contrast, the alternative path of incremental amendment is initiated and led by the states. Proposal effectively becomes a state function, and ratification is shared between the states and Congress. Consequently, this alternative path has stemmed the erosion of the states' power to authorize constitutional change.¹⁶⁹

VII. CONCLUSION

Consider again the current debate over the constitutional validity of state-imposed congressional term limits. There are plausible textual arguments on both sides of the issue; deciding the constitutionality of state-imposed term limits will not be an easy or straightforward decision for the judiciary. But the constitutional arguments thus far have focused almost exclusively on the *substantive* provisions of the Constitution relating to congressional elections

168. Ackerman describes this trend while setting forth his theory of structural amendment. See ACKERMAN, *supra* note 134, at 288.

169. There is a drawback to the state-led aspect of this amendment mechanism: while the mechanism offers considerable power to the states, it does not distribute this power evenly. Citizens in states that allow popular initiatives possess significant advantages over citizens in other states. Furthermore, when the transformation has been enacted in some states and not in others, U.S. citizens from different states may possess different political rights vis-à-vis the federal government. However, these inequalities are self-imposed. The states without the initiative device can adopt it if they chose, and the states that lag behind in the incremental amendment process can still enact the reform. This latter inequality is also tolerable because it is designed to be temporary; the ultimate goal of the incremental amendment process is a federal constitutional amendment.

and the scope of federal and state powers.¹⁷⁰ There is, however, a much larger, *procedural* matter at stake. Because the convention path of Article V has proven impassable, all amendments following a traditional Article V route must pass through Congress, which has thereby been empowered to block any amendments that threaten its inherent, structural interests. It is therefore imperative that the alternative path of incremental amendment be kept open to protect the viability of Article V in the face of congressional intransigence. Keeping it open entails maintaining the necessary overlap of state and federal authority. Consequently, the Court should presumptively favor the states' assertion of the power of incremental amendment. If other constitutional considerations are roughly equal, the Court should rule in favor of state-imposed term limits in order to protect this important alternative route of constitutional transformation. It has been used twice in the past to usher in important changes in the structure of the federal government, changes that Congress otherwise could have obstructed. No doubt there will be future movements, unforeseen at this point, that require an alternative amendment path enabling them to overcome the vested institutional interests of Congress.

The continued availability of this path is absolutely essential to the effectiveness of Article V as a mechanism for constitutional transformation. If the integrity of Article V is to be preserved, the structural self-interest of Congress must not be allowed to defeat constitutional change. George Mason was correct;¹⁷¹ historically, Congress has been reluctant to endorse constitutional reforms targeted at itself. In this respect, the amendment mechanism crafted by the Framers has proven to be flawed. Fortunately, the incremental amendment process can serve to correct the problem. If the term limits movement eventually succeeds in formally amending the U.S. Constitution, that success will demonstrate the continued availability of the Progressive era's alternative path of constitutional transformation. It will also confirm an important pattern. All three amendments involved the congressional representation of citizens, and all three were stubbornly opposed by one or both houses of Congress, mainly because the changes threatened to make reelection more difficult or impossible. The Framers never intended that Congress possess the ability to block amendments that threaten its own members. Article V stipulated only two aspects of the Constitution that were to be entrenched, not three. Fortunately, the emergence of the alternative amendment path has denied Congress the power to veto changes in the congressional institution itself. Such constraints are crucial in a system of limited government. For this reason, a legal anomaly has become a constitutional necessity.

170. See *supra* notes 18-19.

171. See *supra* notes 137-46 and accompanying text.