

THE ARTICLE V CONVENTION THREAT AWAKENS: LOOKING WITHIN, ABROAD, AND AHEAD

Willow Hasson*

INTRODUCTION	903
I. ARTICLE V OF THE CONSTITUTION	905
II. THE RIGIDITY OF THE U.S. CONSTITUTION	906
III. ANALYSIS: THE MODERN ARTICLE V MOVEMENT AND COUNTERMOVEMENT	908
A. <i>Pro-Convention: “Convention of States”</i>	908
1. COS: Obstacles to Success	912
B. <i>Anti-Convention: Common Cause</i>	912
IV. HISTORICAL CONTROVERSY	916
V. ARTICLE V’S VAGUENESS	917
A. <i>Congress’s Lack of Power Over a Convention</i>	918
B. <i>Federal Courts’ Potential to Resolve Convention Issues</i>	918
VI. CONTEXT: A NEED FOR REFORM	921
VII. RECOMMENDATION: SUBCOMMITTEE PROPOSAL	924
A. <i>Subcommittee Studies: State Constitutions</i>	925
B. <i>Subcommittee Studies: International Perspective</i>	927
1. International Perspective: Counterargument	930
VIII. RECOMMENDATION: THE SUBCOMMITTEE’S CHARGE	931
CONCLUSION	932

INTRODUCTION

James Madison argued in 1788 that the Constitution should be entrenched and not amended too often because otherwise, “[t]he PASSIONS, therefore, not the REASON, of the public would sit in judgment. [And] it is the reason, alone, of the public, that ought to control and regulate the government.”¹ Today, Americans are experiencing a new age of polarization and gridlock in Congress, recent splits from stare decisis by the Supreme Court, continued reeling under the lingering impacts of the COVID-19 pandemic, and the aftermath of January 6th and its subsequent

* JD Candidate, 2025, William & Mary Law School; BA, The George Washington University, 2022. Thank you to the staff of the *William & Mary Bill of Rights Journal*, the activists whose interviews deepened my research, and my former colleagues at the International Institute for Democracy and Electoral Assistance who inspired me to write about this topic. I would also like to thank my sister, Grace, and parents for their endless support. Even as political forces reshape around us, we can find a better way forward together.

¹ THE FEDERALIST NO. 49 (James Madison).

investigations. This turmoil has ignited resentment in the nation, especially leading up to the 2024 presidential election, with the “PASSIONS”² Madison describes increasing daily. A rising movement called the “Convention of States” aims to ease this tension through radical change and has started periodically hosting simulations for amending the Constitution.³ Having frequent constitutional amendment processes, like those used by many democratic countries globally,⁴ is generally assumed to be a *progressive* effort to make constitutions more modern, but this U.S. group offers a sharp contrast. Convention of States advocates for using Article V of the Constitution to call an unprecedented convention to turn back time and weaken the federal government as we know it.

The Convention of States (COS) movement likely represents the passionate factions that Founders, like Madison, warned against⁵ and should thus be taken seriously. COS is now practicing its Article V Convention simulations every few years so that when it reaches its threshold of captured state legislatures, its processes will be fine-tuned, and there will be no going back. Not only could COS one day succeed, as evidenced by their supporters reaching new heights of politics,⁶ but their concerns are also worth focusing on as they point to an American constitutional

² *See id.*

³ For the Convention of States’ description of the most recent simulation in Williamsburg, Virginia, see Brianna Kraemer, *Official Proposals Passed at the Simulated Article V Convention*, CONVENTION OF STATES ACTION (Aug. 8, 2023), <https://conventionofstates.com/news/official-proposals-passed-at-the-simulated-article-v-convention> [<https://perma.cc/YP98-4AH6>].

⁴ For examples of recent global (democratic and undemocratic) constitutional changes, see Sharon P. Hickey, *In the World of Constitution-Building in 2023*, INT’L IDEA: CONSTITUTIONNET (Jan. 31, 2023), <https://constitutionnet.org/news/voices/world-constitution-building-2023> [<https://perma.cc/WZS2-8A3W>].

⁵ *See* RUSS FEINGOLD & PETER PRINDIVILLE, *THE CONSTITUTION IN JEOPARDY* 127–28 (2022) (making the analogy that the factional interests of the Convention of States movement resemble those that the Founding generation feared); *THE FEDERALIST* NO. 10 (James Madison) (“Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice.”).

⁶ The Convention of States reached a new height of politics in having an official endorser, Governor Ron DeSantis, be a major contender during the 2024 Republican presidential primaries. *See* Convention of States Action, <https://conventionofstates.com/> [<https://perma.cc/U2MA-XDB5>] (last visited Feb. 19, 2025); Gram Slattery et al., *Ron DeSantis Ends 2024 Campaign, Endorses Trump Over Haley*, REUTERS (Jan. 21, 2024, 10:54 PM), <https://www.reuters.com/world/us/trump-haley-duke-it-out-new-hampshire-ahead-critical-primary-vote-2024-01-21/> [<https://perma.cc/A39S-QTGE>]. Another accomplishment for COS is Donald Trump’s choice of JD Vance as his running mate, as COS claims that JD Vance is also a supporter. Convention of States Project, *HUGE: Vice President, Nominee J.D. Vance is #conventionofstates Supporter #jdvance*, CONVENTION OF STATES ACTION (July 18, 2024), <https://conventionofstates.com/videos/huge-vice-president-nominee-jd-vance-is-conventionofstates-supporter-jdvance> [<https://perma.cc/6CZK-YV7A>].

flaw. Their frenzy for change is misdirected, and they aim for changes that only align with one extreme of one political party.⁷ Instead, the American call for change, as highlighted by COS, should be addressed through the formal amendment process and a new “Subcommittee on Constitutional Change” that uses a national and international sharing of ideas to amend Article V’s procedures.

I. ARTICLE V OF THE CONSTITUTION

Article V of the Constitution sets the procedure for formally approving amendments while also including an avenue for a convention:

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.⁸

In other words, “[t]he U.S. Constitution formally provides for its own amendment . . . by a two-thirds vote to amend in both chambers of Congress *or* by a constitutional convention called by application of two-thirds of the state legislatures.”⁹ However, the text of Article V is starkly vague as it leaves open fundamental aspects of the convention process.¹⁰ For example, there are no written guidelines for the time limits on an amendment’s pendency, substantive limits on an amendment’s subject matter, a role for “the President and state governors in the amendatory process,” or about “the respective roles . . . of Congress and the [federal] courts in deciding whether an amendment has been validly adopted.”¹¹

⁷ See FEINGOLD & PRINDIVILLE, *supra* note 5.

⁸ U.S. CONST. art. V (emphasis added).

⁹ Paul Rando, Note, *Reconstituting the United States: Could an Article V Convention Prevent the Next January 6?*, 91 U. CIN. L. REV. 562, 575–76 (2022). See generally U.S. CONST. art. V.

¹⁰ See David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2321 (2021).

¹¹ *Id.*

While details like pendency are left open for the first formal method, this has not kept it from leading to twenty-seven amendments. Alternatively, the second method of amending the Constitution is even more vague than the first and has remained unused. The second method “requires two-thirds of the states’ legislatures to submit an ‘application’ to Congress to call a ‘convention for proposing amendments.’”¹² “The resulting convention would meet, draft, debate, deliberate, and potentially produce an amendment or amendments,” which “would then be sent to the states for ratification by three-fourths of either the legislatures of the states or by three-fourths of the state conventions, depending upon the method specified by Congress.”¹³ Despite the presence of this convention method in the Constitution and numerous attempts to have a convention, a national constitutional convention for amendments has never taken place.¹⁴ There is a historical precedent of movements calling for a convention as a *threat* to gain momentum.¹⁵ Groups like the Convention of States, even if they cannot reach their thirty-four state threshold for a convention,¹⁶ could be the next group to weaponize this threat to gain factionalist ends.

II. THE RIGIDITY OF THE U.S. CONSTITUTION

The U.S. Constitution is the oldest constitution still in effect globally and one of the least amended—partially “because it is one of the most difficult to amend.”¹⁷ The Supreme Court has a long history of informally amending the Constitution through judicial review, sometimes creating “[m]ajor doctrinal shifts . . . without any change in constitutional text.”¹⁸ However, the Constitution has only been formally amended twenty-seven times since it was first ratified in 1788.¹⁹ Many scholars view this process of legislatively enacting constitutional change as almost impossible to

¹² William Woodruff, *Caution and the Constitution: Should There Be an Article V Convention for Proposing Amendments?*, 17 CHARLESTON L. REV. 25, 35 (2022); see U.S. CONST. art. V.

¹³ Woodruff, *supra* note 12, at 35.

¹⁴ *Id.*

¹⁵ See Robert G. Natelson, *Is the Constitution’s Convention for Proposing Amendments a “Mystery”? Overlooked Evidence in the Narrative of Uncertainty*, 104 MARQ. L. REV. 1, 5 (2020).

¹⁶ See CONVENTION OF STATES ACTION, <https://conventionofstates.com/> (last visited Feb. 19, 2025).

¹⁷ Rando, *supra* note 9, at 576; see also Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022) (“There have been roughly 12,000 attempts to amend the United States Constitution since its creation 235 years ago. Of those thousands of amendment proposals, only 27 have become official—an extraordinarily low rate of success drifting near 0.002%.”).

¹⁸ Rando, *supra* note 9, at 576 (quoting Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443, 443 (2013)).

¹⁹ See Albert, *supra* note 17, at 2007.

reach today.²⁰ “The most recent *newly-proposed* amendment, the Twenty-Sixth Amendment, took effect over half a century ago in 1971 as a response to the Vietnam War.”²¹ Additionally, “much of the ratification process for the Twenty-Seventh Amendment occurred when it was first introduced by James Madison in 1789.”²² This history speaks to the lack of a modern precedent for the proposal and adoption of more amendments and a viable way to change the Constitution to reflect the current age.

Since the Constitution was ratified in 1788,²³ “roughly 11,000 amendments have been proposed.”²⁴ Although the only successfully adopted twenty-seven amendments were ratified through the congressional method of ratification, “some scholars estimate that there have been hundreds of proposed resolutions for Article V conventions. It is also estimated that forty-two states currently have Article V applications pending that encompass a variety of subject matters, ranging from campaign finance to right to life/abortion.”²⁵ “In 2017, approximately 175 applications had been submitted” to state legislatures nationwide.²⁶ These unrealized applications and the lack of formal amendments since the Twenty-Seventh Amendment prove the difficulty in enacting formal constitutional change.

The Constitution could also be assumed as unamendable today based on the struggles of significant amendment movements. For instance, the Equal Rights Amendment (ERA) has faced political and procedural hurdles for over a century.²⁷

²⁰ Rando, *supra* note 9, at 576–77; Jill Lepore, *The United States’ Unamendable Constitution*, NEW YORKER: ANNALS OF INQUIRY (Oct. 26, 2022), <https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution> [<https://perma.cc/G89H-JGV3>] (arguing amending the Constitution has become more difficult because “[t]he Framers did not anticipate two developments that have made the double supermajority required of Article V almost impossible to achieve: the emergence of the first political parties . . . and the establishment of a stable two-party system”).

²¹ Rando, *supra* note 9, at 577; see also “*Old Enough to Fight, Old Enough to Vote*”: *The WWII Roots of the 26th Amendment*, NAT’L WWII MUSEUM: NEW ORLEANS (Oct. 28, 2020), <https://www.nationalww2museum.org/war/articles/voting-age-26th-amendment> [<https://perma.cc/E3AZ-7VM7>] (arguing that the main roots of the Twenty-Sixth Amendment began in WWII, but admitting this amendment did not reach widespread public support until the mid-1960s when the public “became disillusioned by the lengthy and costly war in Vietnam”).

²² Rando, *supra* note 9, at 577. The Twenty-Seventh Amendment addresses Congressional salaries. U.S. CONST. amend. XXVII.

²³ NCC Staff, *The Day the Constitution was Ratified*, NAT’L CONST. CTR. (June 21, 2024), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/M6R7-QHGK>].

²⁴ Emily M. Padgett, *Constitutional Conventions: Power to the People or Pandora’s Box?*, 65 LOY. L. REV. 195, 202 (2019).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Rando, *supra* note 9, at 578; Pozen & Schmidt, *supra* note 10, at 2323 (observing the ERA has yet to be accepted by the legal community as part of the Constitution “because

Congress has also proposed five other amendments, which have yet to be ratified by enough states.²⁸ Another way to view these attempts, though, would be that formal amendments *have* been passed through the *threat* of a convention when conventional methods failed. This was the case in three significant movements for a convention: for adopting a bill of rights, for directly electing Senators, and for imposing a two-term limit on the president.²⁹ Each movement “ended when Congress proposed the sought-for amendments.”³⁰ Thus, the *threat* of a convention can be seen as a more successful avenue for constitutional changes than movements for formal amendments, even without the convention needing to take place.

III. ANALYSIS: THE MODERN ARTICLE V MOVEMENT AND COUNTERMOVEMENT

A. Pro-Convention: “Convention of States”

The current movement for an Article V Convention is spearheaded by the growing COS organization that claims that “Article V of the U.S. Constitution gives states the power to call a convention to propose amendments” with thirty-four states.³¹ COS is a grassroots campaign that aims to compel Congress to call a convention that would “only allow” the discussion of amendments that “limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials.”³² COS also describes itself as “an organization of more than 5 million active grassroots volunteers representing every state legislative district in the nation, focusing on restoring a culture of self-governance in America.”³³ COS was established in 2013, and has now been endorsed by nineteen out of the thirty-four

several state ratifications occurred after a deadline imposed by Congress, among other complications, even though the amendment seems to have checked all of the boxes for validity indicated on the face of Article V”). *See generally* Katharine Jackson, *U.S. Equal Rights Amendment Blocked Again, a Century After Introduction*, REUTERS (Apr. 27, 2023, 4:15 PM), <https://www.reuters.com/legal/government/us-equal-rights-amendment-blocked-again-century-after-introduction-2023-04-27/> [https://perma.cc/D2AE-GBRV].

²⁸ Pozen & Schmidt, *supra* note 10, at 2323.

²⁹ *See* Natelson, *supra* note 15, at 5; *see also* FEINGOLD & PRINDIVILLE, *supra* note 5, at 97 (explaining that during the Progressive era, “[t]he potent possibility of a successful convention call—one more state!—played a significant, perhaps decisive, role in waking up Article V and revitalizing formal amendment in the public square”).

³⁰ Natelson, *supra* note 15, at 5.

³¹ CONVENTION OF STATES ACTION, *supra* note 16.

³² *Id.*

³³ *COS Action President Mark Meckler Responds to Gov. Gavin Newsom’s Call for Article 5 Convention to Add Gun Control Amendment to Constitution*, CONVENTION OF STATES ACTION (June 9, 2023), <https://conventionofstates.com/cos-action-president-mark-meckler-responds-to-gov-gavin-newsom-s-call-for-article-5-convention-to-add-gun-control-amendment-to-constitution> [https://perma.cc/8AT6-QBEJ].

states it claims are needed to call a convention.³⁴ COS's methods include a one state, one vote process to bring power to the states and away from the federal government.³⁵ The leadership and endorsers of the organization are overwhelmingly conservative, with public support from Ben Shapiro, Vivek Ramaswamy, Governor Greg Abbott, Mark Meadows, Sarah Palin, Senator Marco Rubio, Senator Rick Santorum, the Honorable Jeb Bush, and more.³⁶ Governor Ron DeSantis's endorsement reads:

I've spent years fighting the D.C. Swamp, and as a candidate for Governor of Florida, I know the states need to use Article V to take the power away from D.C. The permanent bureaucracy will never voluntarily give up an ounce of its power. Florida was the second of twelve states that have already passed the Resolution [to approve a convention], and I encourage all other state legislatures to support the Convention of States Project and pass the resolution today.³⁷

Governor Ron DeSantis was a major candidate for the Republican primary for the 2024 presidential election,³⁸ showing how high up the political power chain COS's influence has gone. Trump's 2024 running mate and Vice President, Senator JD Vance, also shows how much national political power COS supporters are able to achieve. Although his endorsement has not yet been published as a full statement like DeSantis's has, in July 2024, right after Vance accepted the vice presidential nomination, COS used images of Vance on their website to recruit new members³⁹ and refers to him as an "official supporter" from conversations that their leadership allegedly had with him.⁴⁰ Now that Donald Trump has won the 2024 election, Vance, DeSantis, and their fellow COS supporters could inherit the Republican party from Trump and continue the COS agenda. Although COS has not officially adopted the agenda, the rise of Project 2025⁴¹ could also represent a new coalition

³⁴ The nineteen states include the Deep South and states like West Virginia, Wisconsin, Nebraska, Utah, and Alaska. CONVENTION OF STATES ACTION, *supra* note 16; John F. Kowal, *Is a New Constitutional Convention a Good Idea?*, BRENNAN CTR. JUST. (Aug. 10, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-constitutional-convention-good-idea> [<https://perma.cc/9ZWW-DA8T>].

³⁵ See CONVENTION OF STATES ACTION, *supra* note 16.

³⁶ *Id.* (scroll to see full list of named endorsers).

³⁷ *Id.*

³⁸ Slattery et al., *supra* note 6 ("Early last year, DeSantis was considered a top presidential contender and a natural heir to Trump due to his combative style and deeply conservative views. He led several head-to-head polls against Trump.").

³⁹ See generally *id.*

⁴⁰ Convention of States Project, *supra* note 6.

⁴¹ Amber Phillips, *What is Project 2025?*, WASH. POST (July 12, 2024, 1:19 PM), <https://www.washingtonpost.com/politics/2024/07/12/project-2025-summary-trump/> [<https://perma.cc/9ZWW-DA8T>].

of power that could cooperate with COS as a new avenue for radical conservative change.⁴²

COS is working to have connections in every state house in the country to advance its states' rights agenda forward—even though many supporters may still consider their organization as non-partisan.⁴³ When asked about the critique of COS's conservative-lean, a representative of COS Virginia answered with a different narrative that he sees his state's unit of COS as a constitution-focused organization and not a political-party-focused one.⁴⁴ He said that COS does not “pick the party, the party chooses whether they're for the Constitution or not. [And] Art V is part of it. . . . We will support the Democrats that support Art V.”⁴⁵ The representative emphasized that his organization emphasizes kindness and the ability to have “conversations without animosity”—seeing an Article V Convention as a peaceful way to quell national anxieties about a “loss of liberties” to the federal government's control.⁴⁶ This messaging seems highly persuasive to its base with the prospect of enacting change to soothe tensions that have run high in the United States because of the COVID-19 pandemic, the January 6th insurrection, the lawsuits and investigations involving President Trump, and the 2024 election. The fact that a candidate like DeSantis can rise to national prominence while ardently supporting COS and that JD Vance could become vice president as an “official general supporter”⁴⁷ shows that the movement should not be underestimated, and this should sound alarms for those who view this movement as a significant danger.

COS had its most recent mock convention in August of 2023, where delegates from forty-nine states met in Williamsburg, Virginia, to practice for a future, genuine Article V convention.⁴⁸ At the simulated convention, six amendments were accepted, each with multiple parts.⁴⁹ The first simulation-amendment sets federal term limits for members of Congress to no more than nine terms in the House, no more than three terms in the Senate, and twenty-four total years for any member of Congress.⁵⁰

.cc/QG3D-WTBT] (describing Project 2025 as “a comprehensive plan by former and likely future leaders of a Trump administration to remake America in a conservative mold while dramatically expanding presidential power and allowing Trump to use it to go after his critics”).

⁴² See Dana Cosley, *Project 2025: A Proposal or a Problem?*, CONVENTION OF STATES ACTION (Aug. 7, 2024), <https://conventionofstates.com/news/projected-projects> [<https://perma.cc/6QK9-VCV8>].

⁴³ See Interview with John Dahmen, State Director, Convention of States Virginia (Nov. 3, 2023) (on file with the author).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Convention of States Project, *supra* note 40.

⁴⁸ Kraemer, *supra* note 3.

⁴⁹ *Id.*

⁵⁰ *Id.*; see Interview with John Dahmen, *supra* note 43.

This proposal also limits the Supreme Court to nine seats, which seems like it could be bipartisan on the surface but has a conservative tilt in how it responds to the recent liberal push to expand the Court so that it would not have a majority of justices chosen by Republican presidents.⁵¹ COS also adopted an amendment that would grant each state standing to bring action against the constitutionality of any action by the Executive Branch or enactment by Congress, along with a proposed amendment to grant state legislatures the authority to “abrogate *any* action of Congress, President, or administrative agencies of the United States.”⁵² Other proposals require a balanced budget of Congress, restricting its commerce clause power and restricting the federal government’s claim to land.⁵³ These proposals imagine a strong picture of states’ rights and a gutted federal government that resembles the Articles of Confederation’s positioning of states over the federal government.⁵⁴

Despite the Virginia COS representative’s insistence that the organization is non-partisan,⁵⁵ “[t]he movement operates through partisan networks, is funded by partisan megadonors, receives almost exclusively partisan support in legislatures, and cultivates a popular base using the aggressive, factious political rhetoric common among the modern hard right,” all while proclaiming that it could control any convention with a bare minimum of states’ support.⁵⁶ However, Americans should not only fear the COS movement because of its potential to increase factionalism. COS proponents also seek to overthrow federal power for further-empowered states in a way that would pull the foundation and support out from numerous national safety net programs that Americans have come to rely on, like Medicare and regulatory regimes like the Clean Air Act.⁵⁷ Even those critical of the enlarged federal government should ask themselves how much faith they have in the states’ abilities to uphold the programs and rights of federal programs that could be reduced to fifty states to the bottom.

⁵¹ See Kraemer, *supra* note 3; see also Paige Moskowitz, *Democrats Reintroduce Bill To Expand U.S. Supreme Court*, DEMOCRACY DOCKET (May 16, 2023), <https://www.democracydocket.com/news-alerts/democrats-introduce-bill-to-expand-u-s-supreme-court/> [<https://perma.cc/7D2Q-RKR2>]. “On Tuesday, May 16, a group of U.S. Senate and House Democrats reintroduced the Judiciary Act of 2023, . . . [originally introduced in 2021, which] would add four seats to the U.S. Supreme Court” because, according to Senator Ed Markey (D-Mass), “Republicans have hijacked the confirmation process and stolen the Supreme Court majority—all to appeal to far-right judicial activists who for years have wanted to wield the gavel to roll back fundamental rights.” Moskowitz, *supra*.

⁵² Kraemer, *supra* note 3 (emphasis added).

⁵³ *Id.*

⁵⁴ See *id.*; Woodruff, *supra* note 12, at 30 (“The Articles preserved the autonomy of the states and granted the central government limited powers . . . [that were] not adequate to address [commerce and cooperation issues].”).

⁵⁵ See Interview with John Dahmen, *supra* note 43.

⁵⁶ FEINGOLD & PRINDIVILLE, *supra* note 5, at 165.

⁵⁷ See *id.* at 139.

1. COS: Obstacles to Success

Despite COS's representatives' wishes that more progressives would join the movement, COS has little to no appeal for those who are not conservative, as evidenced by their lack of any significant Democrat proponents. This conservative movement only serves one party (or arguably "factionalist" interest), potentially capitalizing on how the majority of U.S. state legislatures lean Republican.⁵⁸ According to Ballotpedia, as of "October 14th, 2024, Republicans controlled 54.86% of all state legislative seats nationally, while Democrats held 44.22%."⁵⁹ Despite this, a 2022 Gallup poll has found that "political independents (41%) greatly outnumber Republican (28%) and Democratic (28%) identifiers," showing how conservative-leaning the state legislatures are, potentially misaligned with voter preferences.⁶⁰ Movements for any constitutional convention also face the high obstacles of the Constitutional thresholds and a lack of precedence. This historical uncertainty and lack of bipartisan support could potentially doom COS's goals to an unviable future. Still, opponents of COS should not overlook this movement's objectives as foolish or impossible, as it has gained support in nineteen states, displaying the movement's ability to convince legislatures to join its cause.⁶¹ COS represents a force to be watched as it could also gain part of its agenda through other measures, like pushing only one issue forward or threatening a convention when its margin increases.⁶² Even without meeting the necessary threshold, COS's threat could one day force the hand of Congress toward enacting similar amendments, just as historical threats of conventions have proven successful.⁶³

B. Anti-Convention: Common Cause

COS and its factionalist approach to constitutional change are not without organizational enemies. One of the most prominent opponents of COS is Common

⁵⁸ See *Partisan Composition of State Legislatures*, BALLOTPEDIA, https://ballotpedia.org/Partisan_composition_of_state_legislatures [<https://perma.cc/BUR4-ZDXP>] (last visited Feb. 19, 2025).

⁵⁹ *Id.* ("Republicans held a majority in 56 chambers, and Democrats held the majority in 41 chambers. Two chambers (Alaska House and Alaska Senate) were organized under multi-partisan, power-sharing coalitions.").

⁶⁰ Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, GALLUP (Jan. 12, 2023), <https://news.gallup.com/poll/467897/party-preferences-evenly-split-2022-shift-gop.aspx> [<https://perma.cc/JFS2-FF5E>].

⁶¹ *Progress Map: States That Have Passed the Convention of States Article V Application*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/states-that-have-passed-the-convention-of-states-article-v-application> [<https://perma.cc/8NTU-6LTK>] (last visited Feb. 19, 2025) (showing that nineteen out of thirty-four states have allegedly passed COS initiatives).

⁶² See Natelson, *supra* note 15, at 5; FEINGOLD & PRINDIVILLE, *supra* note 5, at 97.

⁶³ See Natelson, *supra* note 15, at 5; FEINGOLD & PRINDIVILLE, *supra* note 5, at 97.

Cause, self-described as a “nonpartisan, grassroots organization dedicated to upholding the core values of American democracy” that was “[f]ounded with 4,000 core members in 1970 to serve as a people’s lobby” and today includes over a million members and supporters, with a presence in thirty states.⁶⁴ The founder, John Gardener, was a Republican who started Common Cause in 1970 and used the organization to push against the Vietnam War.⁶⁵ Today, the organization has been described as a “progressive advocacy group focusing on campaign finance law, so-called ‘fair redistricting,’ and general liberal policy,” as it has an independent focus but a soft left-lean.⁶⁶ When asked about the political leaning of the organization, a Common Cause representative answered that she sees the organization as truly nonpartisan because it pushes for voter registration in general and holds politicians accountable no matter which party they’re affiliated with.⁶⁷ For its 50th anniversary, the current president has emphasized the current threat to democracy as “white supremacy,” which she said was what motivated the January 6th attack on the United States Capitol and President Trump’s “Big Lie” about the 2020 presidential election being “stolen,” focusing the organization on more race-based and equity issues in the future.⁶⁸ This focus will likely remain substantial through Donald Trump’s second term and beyond.

One primary way that Common Cause works to fulfill its goals of “upholding democracy” is by directly working against COS and similar movements.⁶⁹ According to a representative in the “Constitutional Convention and Protect Dissent Programs,” Common Cause’s main strategy to block COS’s progress involves a “rescind and defend” strategy of removing old calls for conventions that are still “on the books” and defending against COS’s bills for conventions when they are introduced.⁷⁰ Convention and COS proponents, like constitutional scholar Robert Natelson, argue that a call for a convention can use past bills to push COS’s agenda

⁶⁴ *About Common Cause*, COMMON CAUSE, <https://www.commoncause.org/about-us/> [<https://perma.cc/UY6N-4LX4>] (last visited Feb. 19, 2025).

⁶⁵ *See 50 for 50: Celebrating Our 50th Anniversary 1970–2020*, COMMON CAUSE 2 (2020) [hereinafter *50 for 50*], https://www.commoncause.org/wp-content/uploads/2021/09/50for50_LowRes.pdf [<https://perma.cc/7DHH-Y2AA>]; *About Common Cause*, *supra* note 64; *Non-Profit: Common Cause*, INFLUENCE WATCH, <https://www.influencewatch.org/non-profit/common-cause/> [<https://perma.cc/J2WF-JHVQ>] (last visited Feb. 19, 2025) (describing that John Gardner was the only Republican to serve in President Lyndon B. Johnson’s presidential cabinet and was instrumental in implementing Johnson’s “Great Society” programs).

⁶⁶ *See Non-Profit: Common Cause*, *supra* note 65.

⁶⁷ Interview with Viki Harrison, Director of Constitutional Convention and Protect Dissent Programs, Common Cause (Nov. 8, 2023) (on file with the author).

⁶⁸ *50 for 50*, *supra* note 65, at 1.

⁶⁹ *See Stopping a Dangerous Article V Convention*, COMMON CAUSE, <https://www.commoncause.org/our-work/constitution-courts-and-democracy-issues/article-v-convention/> [<https://perma.cc/SYF4-DAZH>].

⁷⁰ Interview with Viki Harrison, *supra* note 67; *see also* Interview with John Dahmen, *supra* note 43.

forward,⁷¹ so Common Cause has been recalling these bills to prevent this use of past attempts to aggregate support.⁷² The Common Cause representative said her team is primarily focused on the “runaway convention” argument that, even if a convention was able to pass amendments that Common Cause would support (like overturning *Citizens United*),⁷³ the convention itself would still pose too significant a risk of completely changing the Constitution with no watchdog or limiting provisions available.⁷⁴ Common Cause’s website echoes this sentiment, describing the COS movement as meaning that “the group of people convening to rewrite our Constitution could be totally unelected and unaccountable” with nothing preventing them from taking away “cherished rights—like our right to peaceful protest, our freedom of religion, or our right to privacy.”⁷⁵ Common Cause also warns that COS and the Constitution offer nothing to prevent corporations from using money to influence a constitutional convention process.⁷⁶

Many constitutional law scholars have agreed with Common Cause’s conception that COS’s aims are high risk, arguing that “even if a constitutional convention were convened with a single and specific amendment in mind, once convened, delegates could pursue any array of amendments they desired”—as the Founders did when they were initially meant to amend the Articles of Confederation.⁷⁷ To these “runaway”

⁷¹ See Interview with John Dahmen, *supra* note 43; Robert G. Natelson, *Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?*, FEDERALIST SOC’Y (May 9, 2018), <https://fedsoc.org/fedsoc-review/counting-to-two-thirds-how-close-are-we-to-a-convention-for-proposing-amendments-to-the-constitution> [<https://perma.cc/9NWX-VMKZ>] (“This article argues that, in aggregating applications from states to call a convention for proposing amendments under Article V of the U.S. Constitution, Congress should count plenary (unlimited) applications toward a limited-subject convention.”).

⁷² See Interview with Viki Harrison, *supra* note 67; *Constitutional Chaos The Shadow Campaigns Aiming to Unravel Our Freedom*, COMMON CAUSE (Apr. 21, 2022), <https://www.commoncause.org/resources/constitutional-chaos-the-shadow-campaigns-aiming-to-unravel-our-freedom/> [<https://perma.cc/ZY36-7VCU>] (explaining how “the leaders of the pro-convention movement are attempting to mainstream a fringe legal theory put forward by Rob Natelson in 2018 . . . [that] allows plenary (or generic) calls for a convention to be combined with existing COS . . . convention calls”).

⁷³ See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010). The *Citizens United* case held that corporations (and other outside groups) could spend relatively unlimited money on elections—something Common Cause and many scholars have seen as what made politics more money-based than democracy-based. For more discussion, see *Stopping a Dangerous Article V Convention*, *supra* note 69; Tim Lau, *Citizens United Explained*, BRENNAN CTR. JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/LA4Y-Q2AC>].

⁷⁴ See Interview with Viki Harrison, *supra* note 67.

⁷⁵ *Stopping a Dangerous Article V Convention*, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ Russ Feingold, *Warning: A “Convention of States” Is Practicing to Rewrite the Constitution*, THE NATION (July 14, 2023), <https://www.thenation.com/article/politics/convention-states-constitution/> [<https://perma.cc/RJN7-VJXM>]. Russ Feingold is a former Wisconsin senator who serves as president of the American Constitution Society. *Id.*

fears, COS members and pro-convention proponents would likely point to how this original “runaway” convention proved necessary, however. Other pro-convention arguments also push back on the “runaway” fear by explaining how Congress has the ultimate power to call the convention and could potentially refuse to adopt the provisions made by the convention.⁷⁸ When asked about this argument, the Common Cause representative countered that “[n]othing in the Constitution can stop it from being a runaway convention, and once Congress calls it, nothing in the Constitution grants Congress a role in it.”⁷⁹ This controversy encircles how the vagueness of Article V makes it unclear if and how the convention could be restrained.

Common Cause’s efforts are against any form of an Article V Convention, including information on its website about the “four major campaigns for an Article V Convention: the Balanced Budget Amendment (BBA) campaign, the Convention of States (COS) campaign, the Wolf-PAC campaign, and the term limits campaign.”⁸⁰ Common Cause notes that each movement has different goals and stresses that these movements have, in total, convinced *twenty-eight* states to call for a convention—alarmingly close to the thirty-four threshold.⁸¹ Common Cause agrees that the Constitution needs amending but instead calls for the traditional method to be used for bipartisan ends, like passing an amendment to overturn the *Citizens United* holding. Common Cause pushes for the *formal* method because of its predictability and the stable history that the convention part of Article V does not share.

The Common Cause representative emphasized that, although the Constitution was written “by old white men 250 years ago,” amending it now through an unprecedented convention is too risky, and the COS push to go back in time to a weaker federal government is an inaccurate nostalgia since it wasn’t good for everyone—especially not for marginalized groups of Americans.⁸² Donald Trump has still made it back to the presidency for a second term even after numerous indictments and state objections,⁸³ though, so the right-wing nostalgia continues to be persuasive to Americans who think that modern politics have gone too far. If “Make America Great Again” has united conservatives and convinced independents in the past, then COS’s similar rhetoric of radical regressive change could be similarly persuasive.

⁷⁸ See Kowal, *supra* note 34.

⁷⁹ Interview with Viki Harrison, *supra* note 67.

⁸⁰ *Stopping a Dangerous Article V Convention*, *supra* note 69.

⁸¹ *Id.* (emphasis added).

⁸² Interview with Viki Harrison, *supra* note 67.

⁸³ For indictment information, see Amy O’Kruk & Curt Merrill, *Donald Trump’s Criminal Cases, in One Place*, CNN (June 5, 2024), <https://www.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases/> [<https://perma.cc/3G4D-B6WK>]. For the objection by Colorado’s Supreme Court, see *Trump v. Anderson*, 144 S. Ct. 539 (filed Jan. 5, 2024); *Trump v. Anderson*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/trump-v-anderson/> [<https://perma.cc/6M4D-DFE3>] (last visited Feb. 19, 2025). See Max Matza, *Donald Trump Blocked from Maine Presidential Ballot in 2024*, BBC NEWS (Dec. 29, 2023), <https://www.bbc.com/news/world-us-canada-67837639> [<https://perma.cc/69MM-MQ5N>].

IV. HISTORICAL CONTROVERSY

The Founders of the Constitution ultimately included this “Article V Convention” to amend it, but using the article’s existence as an originalist argument for its use is unclear. Article V’s convention part was highly controversial even when it was added. Framers like James Madison feared its use, saying that “[h]aving witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a Second.”⁸⁴ This apprehension follows from the context of how the convention only to *amend* the Articles of Confederation became a convention for the writing of an entirely new Constitution in its place.⁸⁵

The Articles of Confederation formalized the weak cooperative arrangement of the thirteen colonies after they declared independence from Great Britain in 1776.⁸⁶ To address the government’s weakness, “[o]n February 21, 1787, Congress passed a resolution calling for a convention for the ‘sole and express purpose of revising the Articles of Confederation.’”⁸⁷ The delegates who attended this convention widened the scope of their task and “crafted the Constitution without supervision, oversight, or control by either Congress or the state legislatures,” and ongoing coordination from state legislatures or Congress was foreclosed.⁸⁸ Overall, the precedent for a constitutional convention is that the delegates wrested power from Congress to form a new government. Hence, to its skeptics, a push for a new convention today risks another “runaway” convention—but one that does not end well.⁸⁹

James Madison suggested an Article V without a convention method, granting “the national legislature ‘sole authority to propose amendments whenever it would deem necessary, or on the application of two thirds of the Legislatures of the several States.’”⁹⁰ Other Founders, like George Mason, a Virginian plantation owner “wary of a powerful federal government, feared that an oppressive Congress would be unlikely to call a convention using” the formal method. Mason advocated for returning some power to the states by allowing them to convene “upon two-thirds

⁸⁴ Woodruff, *supra* note 12, at 26 (quoting Letter from James Madison, to G.L. Turberville (Nov. 2, 1788) (on file with NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0243> [<https://perma.cc/E2L4-ZUHD>])).

⁸⁵ *See id.* at 30–34.

⁸⁶ *Id.* at 30.

⁸⁷ *Id.* at 31 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559–86 (M. Farrand ed., rev. ed. 1911)).

⁸⁸ *Id.* at 33.

⁸⁹ *See* Padgett, *supra* note 24, at 198–99.

⁹⁰ *Id.* at 199–200 (quoting James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1007 (2007)).

of their legislatures' (thirty-four states) demands. Despite this back-and-forth, Mason ultimately prevailed."⁹¹ The Constitution included language for an Article V convention.⁹² Modern proponents of an Article V Convention and members of the COS movement argue that the Constitution's authors, like George Mason, felt that the states, as "the originators of the Constitution," should "play the primary role in amending the document" and that "[t]he Framers expected the states to use that power to protect the people from the centralized federal government."⁹³ The COS movement models some of George Mason's visions of amending the Constitution with a states' rights focus, but not all the Founders agreed with this focus. The hesitancy of Founders, like Madison,⁹⁴ in using Article V for a convention is furthered by current constitutional scholars who argue that "the founding generation simply did not confront or decide one way or another" whether ratification of constitutional amendments via state legislatures would be a legitimate representation of popular sovereignty.⁹⁵

V. ARTICLE V'S VAGUENESS

Some constitutional scholars believe that Article V's convention method includes a "poison pill" of its vagueness and that this amendment process was purposefully made unclear to frustrate the use of the convention method and leave Congress as the sole body with the authority to propose amendments,⁹⁶ as Madison had initially proposed.⁹⁷ Some scholars also point to the language being a "convention for proposing amendments" instead of a "convention of the states" as a purposeful distinction and further choice of vagueness.⁹⁸ The COS movement has oppositely capitalized on this word choice by using "states" in their name to be states-rights-focused⁹⁹ and not model the ambiguity of the original text.¹⁰⁰ As much as modern advocacy groups that push for an Article V Convention claim knowledge of how best to implement a convention, many questions of procedure and applicability of the Article V Convention remain unanswered by the Constitution. Looking at the Framers' intentions also leaves the path unclear, as the wishes of Madison and Mason alone

⁹¹ *Id.*

⁹² *See id.*

⁹³ Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL'Y 1, 4 (2016).

⁹⁴ *See* Padgett, *supra* note 24, at 199–200.

⁹⁵ *See* Carlos Gonzalez, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1380 (2005).

⁹⁶ *See* Woodruff, *supra* note 12, at 50.

⁹⁷ *See* Padgett, *supra* note 24, at 199.

⁹⁸ Woodruff, *supra* note 12, at 43.

⁹⁹ *See, e.g.*, CONVENTION OF STATES ACTION, *supra* note 16.

¹⁰⁰ *See* FEINGOLD & PRINDIVILLE, *supra* note 5, at 127–28.

diverged enough to grant potentially opposite views of the convention's inclusion. The compromise was made, though, including a dual method of amending the Constitution to satisfy "those who feared an oppressive national government" and "those who believed the national legislature" would "address problems arising under the new [Constitution's] structure."¹⁰¹ The question remains whether the inclusion of the convention method will ever lead to its full implementation.

A. Congress's Lack of Power Over a Convention

No matter how the amendments are created, Congress's power to affirm the amendments is still being debated. This power was partially addressed by the Supreme Court in *Coleman v. Miller* in 1939.¹⁰² In June 1924, Congress proposed an amendment to the Constitution, known as the Child Labor Amendment, which the Legislature of Kansas rejected.¹⁰³ The Supreme Court held in *Coleman* that "Congress has the power to 'promulgate' or 'proclaim' constitutional amendments after ratification."¹⁰⁴ Many commentators have criticized *Coleman* on textual and historical grounds, but others argue that Congress can resolve the status of new amendments more quickly and democratically than the Court.¹⁰⁵ Having Congress be part of a constitutional convention's change could be counterintuitive, though, since this part of Article V was created to offer an alternative to relying only on Congressional power for change.¹⁰⁶ If COS succeeds in starting an Article V Convention, Congress's power over the convention would be unclear under the Framers and Court; thus, the "runaway" risk remains.

B. Federal Courts' Potential to Resolve Convention Issues

The Constitution is silent on resolutions for amending issues and leaves open whether the federal courts could remedy these disputes. COS proponents often

¹⁰¹ Woodruff, *supra* note 12, at 39.

¹⁰² See generally 307 U.S. 433 (1939).

¹⁰³ See *id.* at 435.

¹⁰⁴ Pozen, *supra* note 10, at 2324 (citing *Coleman*, 307 U.S. at 450).

¹⁰⁵ See *id.* at 2324 ("Congress, we suggest, is the branch best suited for this task [of amending the Constitution]"); see FEINGOLD & PRINDIVILLE, *supra* note 5, at 153 ("The *Coleman* holding has been criticized by scholars for many decades. A treatise on the amendment process, published three years after the Court's decision, noted that it was 'uncertain' to which phases of the Article V process the political question doctrine applied. A contemporary scholar has gone so far as to call the decision 'bad law.' Yet *Coleman* remains the law of the land, the centerpiece in a confusing legal quilt enveloping Article V.").

¹⁰⁶ See Woodruff, *supra* note 12, at 35 (observing the Convention method was added "to address the concerns of the anti-federalists that an oppressive national government would not be inclined to amend the Constitution to rein in the government's expanding and oppressive powers").

downplay the unanswered concerns and point to cases where courts were willing to hear other aspects of Article V's application as proof that the courts could also adjudicate convention disputes.¹⁰⁷ Some scholars point to Founders' views as favoring this form of judicial check, as James Madison suggested that "[i]t could lie with the federal courts as the bodies responsible for interpreting the Federal Constitution" and Justice Marshall said that it "is emphatically the province and duty of the judicial department to say what the law is," which provide originalist support for judicial review of Article V issues.¹⁰⁸

The threshold question is whether federal courts would have jurisdiction over potential issues in Article V ratification, including the validity of each state's ratification or later rescissions.¹⁰⁹ To address the jurisdiction issue, Article III of the Constitution limits federal courts to hearing "cases" and "controversies," with plaintiffs bearing the burden of establishing their standing.¹¹⁰ The prominent constitutional scholar and COS supporter, Professor Rob Natelson,¹¹¹ has argued that Article V questions are "freely justiciable," citing a 1933 North Carolina Supreme Court advisory opinion that found "two proposed bills on convening a state convention" as sufficient to ratify the Twenty-First Amendment under North Carolina's constitution.¹¹² However, this advisory opinion does not directly address the kind of justiciability issues that Article V would bring up, and the cases that he uses to further support this claim also could lack significant authority to assure federal court jurisdiction for national convention amendment issues.¹¹³

Natelson furthers his "freely justiciable" claim by using *Dyer v. Blair* as evidence, but this case still leaves many Article-V-specific questions unanswered.¹¹⁴ In *Dyer*, the Illinois Northern District Court determined that Illinois's state constitution's requirement of a three-fifths majority of the state legislature for ratification of the Equal Rights Amendment was not a valid restriction on the state legislature's ability to establish its own rules for voting on national constitutional amendments.¹¹⁵ The court's willingness to take this case could signify the power of the federal courts

¹⁰⁷ See *id.* at 63.

¹⁰⁸ Danaya C. Wright, *Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifications*, 12 U.C. IRVINE L. REV. 1019, 1037 (2022).

¹⁰⁹ Woodruff, *supra* note 12, at 63.

¹¹⁰ *Id.* See generally U.S. CONST. art. III, § 2.

¹¹¹ Brian Kraemer, *Natelson Affirms Congress's Power Over Article V Convention Strictly Limited*, CONVENTION OF STATES (Apr. 21, 2023), <https://conventionofstates.com/news/natelson-affirms-congress-s-power-over-article-v-convention-strictly-limited> [<https://perma.cc/4QVS-HGRX>].

¹¹² Woodruff, *supra* note 12, at 64–65 (discussing ROBERT G. NATELSON, THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS § 3.5 n.62 (2020)).

¹¹³ See Woodruff, *supra* note 12, at 65 (discussing NATELSON, *supra* note 112, § 3.5 n.62).

¹¹⁴ *Id.* (discussing NATELSON, *supra* note 112, § 3.5 n.62); *Dyer v. Blair*, 390 F. Supp. 1291, 1299–300 (N.D. Ill. 1975).

¹¹⁵ See *Dyer*, 390 F. Supp. at 1308–09.

to assess amendment procedures for the Constitution.¹¹⁶ In *Dyer*, the court addresses the “political question” issue for jurisdiction and states that the “text of the Constitution does not expressly direct Congress, rather than the judiciary, to interpret the word ‘ratified’ as it is used in [A]rticle V, or to decide whether a particular state has taken action which constitutes ratification of a proposed amendment.”¹¹⁷ In other words, the court here is deciding that amendment ratification procedures, since they are not addressed clearly in the Constitution, can be addressed by the courts after they are established by that state’s current legislature.¹¹⁸ The Ninth Circuit Court of Appeals and Supreme Court have not overruled this 1975 case.¹¹⁹ *Dyer* only goes so far, though, as it does not hold that *all* Article V issues—especially broader issues of procedure or “runaway” risks—are “freely justiciable.”¹²⁰ For example, even though *Dyer* clarifies that the federal courts can affirm that state legislatures determine the ratification procedures for amendments to the Constitution, whether a federal court could denounce the changes made by a radical delegate at an Article V convention has yet to be answered.¹²¹

Essentially, the opposite holding of *Dyer* was found in a separate federal court case from Massachusetts, *Equal Means Equal v. Ferriero*, where the court dismissed an action by a social welfare organization, an organization of high school students, and individual female assault victim against the Archivist of the United States.¹²² The court found that the plaintiffs lacked jurisdiction and failed to state a claim because those who were deprived of the ratification of the ERA were not found to have cognizable injuries that were both “concrete and particularized” enough to establish standing.¹²³ The court distinguishes the holding of *Equal Means Equal* from *Dyer*, explaining that *Dyer* “considered the states’ legislative actions in an attempt to determine the ‘will of the people of those states.’”¹²⁴ Whereas this case asks for one state court’s actions to overtake the rescission efforts of other states without a state as a party to the litigation.¹²⁵ Thus, ratification issues are likely justiciable for that

¹¹⁶ Woodruff, *supra* note 12, at 65; see *Dyer*, 390 F. Supp. at 1309 (explaining that *Dyer*’s conclusion that the Illinois General Assembly did not ratify this amendment, because the required number of votes was not reached, still allows the Illinois General Assembly to “determine for itself the number of affirmative votes which will be required to ratify a proposed amendment to the Constitution of the United States”).

¹¹⁷ *Dyer*, 390 F. Supp. at 1300.

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ Woodruff, *supra* note 12, at 66.

¹²¹ See *Dyer*, 390 F. Supp. at 1308–09.

¹²² 478 F. Supp. 3d 105, 110–14 (D. Mass. 2020), *aff’d*, 3 F.4th 24 (1st Cir. 2021).

¹²³ *Id.* at 125 (referencing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), to reiterate that the Court has “made it clear time and time again that an injury in fact must be both concrete and particularized”).

¹²⁴ *Id.*

¹²⁵ See *id.*; see also *Dyer*, 390 F. Supp. at 1308–09.

state's courts and would need individual court actions for a collective change to the Article V methods, as one state so far cannot decide the validity of *another* state's amendment ratification.

Further support for federal court power over Article V issues per state can be found in *Idaho v. Freeman*, in which the state of Arizona asked the Ninth Circuit Court of Appeals to “declare that Idaho’s rescission of its ratification of the Equal Rights Amendment was valid and that Congress’s extension of the ERA ratification deadline was invalid.”¹²⁶ In *Freeman*,¹²⁷ the Ninth Circuit reversed the federal district court’s denial of the motion by the women’s rights organization to intervene, finding the plaintiffs had standing and that the case was not barred by the political question doctrine, making “Congress’s extension of the deadline . . . null and void.”¹²⁸ Thus, a circuit court has furthered that federal district courts can adjudicate issues of ratification of amendments even going against the actions of Congress.¹²⁹ Overall, if federal courts have jurisdiction over Article V issues, this strengthens the COS movement and could help limit the Convention’s “runaway” potential. Ultimately, this check is weak in precedent and would likely lead to different findings across courts and states that may not be enough to keep the factionalist interests of a COS convention within reasonable boundaries.

VI. CONTEXT: A NEED FOR REFORM

Since the Constitution was last amended in 1992, the United States has seen dramatic change and distress in the political order. Recent events could signal constitutional reform as the remedy. Specific incidents like the *Loper Bright Enterprises v. Raimondo* decision that overruled the *Chevron* doctrine for federal agencies’ legislative interpretations;¹³⁰ the *Trump v. United States* decision that created some presidential criminal immunity;¹³¹ *Dobbs v. Jackson Women’s Health Organization* holding that overturned *Roe v. Wade* and ended the protection of abortion rights;¹³² the insurrection on January 6th, 2021, that prompted investigation of

¹²⁶ Woodruff, *supra* note 12, at 66–67; *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980).

¹²⁷ *Freeman*, 625 F.2d at 887.

¹²⁸ Woodruff, *supra* note 12, at 66–67.

¹²⁹ See *Freeman*, 625 F.2d at 887.

¹³⁰ Amy Howe, *Supreme Court Strikes Down Chevron, Curtailing Power of Federal Agencies*, SCOTUSBLOG (June 28, 2024, 12:37 PM), <https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailling-power-of-federal-agencies/> [<https://perma.cc/FFE4-XMD8>].

¹³¹ Amy Howe, *Justices Rule Trump Has Some Immunity from Prosecution*, SCOTUS BLOG (July 1, 2024, 12:16 PM), <https://www.scotusblog.com/2024/07/justices-rule-trump-has-some-immunity-from-prosecution/> [<https://perma.cc/D8JY-Y7P7>].

¹³² See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

participants and Donald Trump;¹³³ the election dispute of *Trump v. Anderson*,¹³⁴ Trump's ongoing indictments;¹³⁵ and general continued reeling from the effects of the COVID-19 pandemic,¹³⁶ have all brought about and been signs of instability. The question remains: Does this instability represent the future context for the next amendment frenzy? President Biden seems to think so, at least for one new constitutional change in the formal way, with his proposal of a "No One Is Above the Law Amendment."¹³⁷ Whether his proposal spurs small or drastic change remains to be seen.

Almost all of the constitutional amendments, including the Bill of Rights, the "Second Founding" after the Civil War that outlawed slavery, the Progressive era amendments that helped reform the government, and the mid-twentieth-century reform period of 1961–1971, were ratified in bursts of change or "moments of amendment fervor."¹³⁸ Constitutional scholars Russ Feingold and Peter Prindiville proposed in their book in 2022 that this history reflects that Article V's functioning as a whole sits in "silent slumber" until it is awakened—"seemingly out of the blue, taking most by surprise and demanding rapid response."¹³⁹ Movements like COS are attempting to use this potential to their advantage and push for a convention. Is this modern disposition enough to spur the next "amendment fervor"?¹⁴⁰ COS's rise, the enduring prominence of figures like Ron DeSantis and Donald Trump who endorse states' rights agendas, and the right wing's continued political stronghold make this answer creep closer to a warning "yes."

Some scholars point to citizen disillusionment with the political system and Supreme Court as unusually intense currently and thus lending itself to the next era of Constitutional change. "Polling indicates a stunning lack of approval—or 'confidence'—in our basic institutions. Even the Supreme Court, which usually scores highest in such polls, is now below 50%, largely because of its remarkable recent decisions regarding abortion, guns, . . . the environment[,] . . . [and] affirmative

¹³³ Alanna D. Richer & Michael Kunzelman, *Hundreds of Convictions, But a Major Mystery Is Still Unsolved 3 Years After the Jan. 6 Capitol Riot*, AP NEWS (Jan. 5, 2024, 1:52 PM), <https://apnews.com/article/capitol-riot-jan-6-criminal-cases-anniversary-bf436efe760751b1356f937e55bedaa5> [https://perma.cc/PH8S-WFLP].

¹³⁴ *Trump v. Anderson*, 144 S. Ct. 539 (filed Jan. 5, 2024); *Trump v. Anderson*, *supra* note 83.

¹³⁵ See O'Kruk & Merrill, *supra* note 83.

¹³⁶ See generally *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG., <https://www.who.int/europe/emergencies/situations/covid-19> [https://perma.cc/D5JW-PE69] (last visited Feb. 19, 2025).

¹³⁷ See Joe Biden, *Opinion: Joe Biden: My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024, 5:00 AM), <https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/> [https://perma.cc/5E2P-LVB7].

¹³⁸ FEINGOLD & PRINDIVILLE, *supra* note 5, at 4.

¹³⁹ *Id.* at 64.

¹⁴⁰ See generally *id.* at 90–95.

action.”¹⁴¹ Some historians could argue that today’s divisiveness pales in comparison to eras of the past, like during the Civil War or Civil Rights era when “cities were burning across the United States; a sitting president, two presidential candidates, and the leader of the civil rights movement were assassinated.”¹⁴² Still, today’s Supreme Court’s rejection of stare decisis and stark conservative-lean¹⁴³ with Trump’s indictment for criminal prosecution,¹⁴⁴ and some states’ following rejection of his candidacy on the ballot,¹⁴⁵ are robust markers of destabilizing political scenes the populace has yet to learn how to grapple with.

Others could point to today as the next age ripe for “amendment fervor”¹⁴⁶ because of Congressional stagnation that demands a new way forward for policy to advance. To most, party polarization has “‘tied Congress in knots . . . [and] reduc[ed] . . . legislative productivity’ Political parties are growing ‘more ideologically coherent and distinctive, headed by institutionally stronger leaders inside government, and bolstered by committed activists and large networks of party-allied organizations outside government.’”¹⁴⁷ This polarization has sustained gridlock, making passing appropriations bills into onerous tasks.¹⁴⁸ For example, House Republican and Senate Democratic leaders only reached agreement “on bills and resolutions they sent to the president’s desk 34 times during the first year of the 118th Congress—making [2023] the least productive [session] in decades.”¹⁴⁹ The “correct perception of a gridlocked Congress” can lead to voter disillusionment or presidential and judicial overreach as candidates and parties seek to fulfill the promises of enactment they made in their elections when there exists little to no chance of passage under the present system.¹⁵⁰

¹⁴¹ Sanford Levinson, *Bring on a New Constitutional Convention!*, N.Y.U. J. LEGIS. & PUB. POL’Y (2023), <https://nyujlpp.org/quorum/levinson-bring-on-a-new-constitutional-convention/> [https://perma.cc/9GC9-Z3YK].

¹⁴² William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 308 (2008).

¹⁴³ Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [https://perma.cc/Z97R-H5TY] (explaining the current Supreme Court “produced more conservative decisions this term than at any time since 1931, according to statistics compiled by professors . . . [at] Washington University in St. Louis . . . [and] the University of Michigan. In an astounding 62% of the decisions, conservatives prevailed, and more importantly, often prevailed in dramatic ways”).

¹⁴⁴ See O’Kruk & Merrill, *supra* note 83.

¹⁴⁵ See Matza, *supra* note 83.

¹⁴⁶ See FEINGOLD & PRINDIVILLE, *supra* note 5, at 90.

¹⁴⁷ Rando, *supra* note 9, at 575.

¹⁴⁸ See *id.*; Jennifer Shutt, *Congress Was Full of Postponements in 2023. Now 2024 Could Be Even Less Productive*, NEB. EXAM’R (Jan. 4, 2024, 5:45 AM), <https://nebraskaexaminer.com/2024/01/04/congress-was-full-of-postponements-in-2023-now-2024-could-be-even-less-productive/> [https://perma.cc/A6UP-239S].

¹⁴⁹ Shutt, *supra* note 148.

¹⁵⁰ Levinson, *supra* note 141.

Voters also seem disinclined to decrease the polarization within themselves, as studies have shown that political polarization among Americans has grown more rapidly in the last forty years than in Canada, the United Kingdom, Australia, or Germany.¹⁵¹ Congress itself has mirrored the population's polarization and cohesion of parties to themselves and away from the ideology of the other.¹⁵² This polarization and gridlock could be seen as a time too contentious for reform—for better or worse. It could also be seen as an opportunity to usher in change that leads to voters feeling a sense of political action to meet the modern obstacles that the Founders could not have foreseen and created Article V for. COS knows that Americans could be ready to embrace the next age of convention fervor, so they are running simulations every few years now to offer their version of the convention method as the solution to society's ills. There are other ways to address this context of disillusioned and polarized voters, though, that do not risk a right-wing faction rewriting the Constitution.

VII. RECOMMENDATION: SUBCOMMITTEE PROPOSAL

The unrest in the nation should not be left unchecked. The Framers sensed that the Constitution would need to change with society, as Thomas Jefferson said: “[T]he earth belongs in usufruct to the living,” and encouraged peaceful periodical reform.¹⁵³ I would recommend promoting the *formal* amendment process with new fervor. I would expand on the proposal that Feingold and Prindiville made in their book, *The Constitution in Jeopardy*, as COS has only grown more powerful and organized since these authors warned readers about the movement in 2022.¹⁵⁴ Feingold proposed the creation of a congressional bipartisan commission on reforming Article V with members that include “the public, constitutional scholars, state legislative leaders, and members of Congress to discuss the future of formal constitutional change.”¹⁵⁵ I would propose a new bipartisan “Subcommittee for Constitutional Change” that expands on this idea. This subcommittee would function like the past Senate Judiciary Subcommittee on Constitutional Amendments of the 1960s–1980s that functioned under Senator Birch Bayh’s leadership.¹⁵⁶ Under Senator Bayh, that

¹⁵¹ Jill Kimball, *U.S. Is Polarizing Faster Than Other Democracies, Study Finds*, BROWN UNIV. (Jan. 21, 2020), <https://www.brown.edu/news/2020-01-21/polarization> [<https://perma.cc/DTY3-R5AY>]; see also *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/E7X2-NZ2K>].

¹⁵² Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/2JLF-VGTL>].

¹⁵³ FEINGOLD & PRINDIVILLE, *supra* note 5, at 196.

¹⁵⁴ See *id.* at 192–94.

¹⁵⁵ *Id.* at 192–93.

¹⁵⁶ See *id.* at 100 (explaining that Senator Birch “Bayh holds the estimable position of being the only non-Founding generation American to have authored multiple constitutional

subcommittee encouraged debate and new amendment proposals like the Equal Rights Amendment (after authoring the Twenty-Fifth and Twenty-Sixth Amendments).¹⁵⁷ This Committee could also gain new support through and facilitate President Biden's proposed "No One Is Above the Law" Amendment.¹⁵⁸ My proposed Subcommittee for Constitutional Change should study the formal amendments with the most voter support currently, the procedures that state constitutions use for amendments, and run international studies or collaborate with international constitutional law groups to find the best practices for updating U.S. constitutional law.

A. Subcommittee Studies: State Constitutions

My proposed new Subcommittee for Constitutional Change would study how the states are already consistently updating their constitutions. "The current constitutions of the 50 states have been amended around 7,000 times."¹⁵⁹ Even the *least* amended state constitution of Vermont (measured by the number of amendments divided by the document's age) has had 54 amendments since 1793, which is twice as many as the federal Constitution.¹⁶⁰ The three major ways amendments are proposed and put on the ballot in most states are through the legislature, citizen signature petitions (eighteen states allow this method), and constitutional conventions.¹⁶¹ The democratic element of these changes is upheld by how almost every state requires voter input for these amendments through direct referendums for ratification.¹⁶² This process has enacted change, too, as between 2006 and 2022, voters approved a total of 804 changes out of the 1,116 proposed amendments.¹⁶³ Thus, Americans are more used to constitutional amendments than it may appear. Additionally, constitutional conventions already have precedents at the state level.¹⁶⁴ By studying how the states change their constitutions, the new Subcommittee can better understand new processes that could be used to ensure that the People feel connected to any newly proposed amendments or procedures for amendments, ratification, and rescision.

The Subcommittee could also help propose the procedure for a constitutional convention so that if one occurred, some limits would be ensured. The ratification of

provisions—the Twenty-Fifth (presidential succession and disability) and the Twenty-Sixth (eighteen-year-old vote)").

¹⁵⁷ *Id.*

¹⁵⁸ See Biden, *supra* note 137.

¹⁵⁹ John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [<https://perma.cc/7YSS-FT3B>].

¹⁶⁰ FEINGOLD & PRINDIVILLE, *supra* note 5, at 191.

¹⁶¹ *Amending State Constitutions*, BALLOTEDIA, https://ballotpedia.org/Amending_state_constitutions [<https://perma.cc/HVE4-6MYZ>] (last visited Feb. 19, 2025).

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.*

those new procedures could require approval from the state legislature or federal court. No matter how new procedures should look, the new Subcommittee should also study how state constitutional conventions have functioned as an option and watch closely as they continue to be offered to voters. In some states, constitutional conventions are expected every few years—at least as an option.¹⁶⁵ As products of movements during the Progressive era, fourteen states still automatically ask voters whether a state should hold a constitutional convention to revise the constitutional regime at specific intervals.¹⁶⁶ In New York, for example, a convention has been called directly three times, in 1866, 1886, and 1936, but in the last four intervals, this option has been struck down, mainly by those who argue that convention risks runaway changes or capture by special interests.¹⁶⁷ In the last two decades, eight other states have struck down this option for state constitutional reform by convention.¹⁶⁸ This voter distaste for conventions is not confined to New York. Since 1992, no state has held a constitutional convention.¹⁶⁹ Still, in the current era of deep polarization and controversial candidates like President Trump on the ballot—more voters could be looking for state change to protect their rights. “Over the next decade, voters in Rhode Island, Michigan, Connecticut, Hawaii, Illinois, Iowa, Maryland, Montana, Alaska, New Hampshire, and Ohio will all consider whether to call a constitutional convention,” as each state’s required interval passes.¹⁷⁰ The new Subcommittee should play a close role in learning from any conventions that take place if they become popular.

The amendments adopted in state constitutions should be studied as inspiration for potential national amendments (through the formal process). State constitutions are a place for change directly from the voters, as in eighteen states, “voters can bypass [their] state legislatures to place constitutional amendments directly on the ballot through the initiative process.”¹⁷¹ Some movements for rights yet to be realized at the national level have seen success at the state level; for example, as of 2022, California, Vermont, and Michigan, voters passed ballot measures to add rights to reproductive freedom to their state’s constitutions.¹⁷² Other recently enshrined rights

¹⁶⁵ See FEINGOLD & PRINDIVILLE, *supra* note 5, at 190.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. LEGIS. & PUB. POL’Y (Apr. 18, 2023), <https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments/> [<https://perma.cc/LGH7-QYJL>].

¹⁷¹ *Id.*

¹⁷² See Amanda Powers, *Op-Ed: In the United States, Voters Amend State Constitutions to Enshrine New Rights*, INT’L IDEA: CONSTITUTIONNET (Nov. 17, 2022) [hereinafter *Op-Ed: In the United States*], <https://constitutionnet.org/news/op-ed-united-states-voters-amend-state-constitutions-enshrine-new-rights> [<https://perma.cc/H7VG-UM82>]; see also Amanda Powers, *Voters Amend State Constitutions to Enshrine New Rights*, STATE CT. REP. (Nov. 16, 2022)

confined to specific states vary from the Michigan constitutional “fundamental right to vote” to the newly explicit Iowan right to bear arms.¹⁷³ New state amendments (or potential future conventions) can reach national influence, too. State constitutional amendments have been used historically to “directly support campaigns for federal constitutional amendments [by] building public support and establishing proof of concept.”¹⁷⁴ The next movement for state constitutional change could become the subsequent amendment that rallies the national public into having the next national formal amendment. Some scholars ideate that state constitutional amendments could play “an even more significant role: from reforming state supreme courts as a precursor to federal court reform to passing state-level amendments” as checks on Supreme Court cases.¹⁷⁵ Whether their role is minor or significant nationally, states constitutional changes would need to be considered by my proposed Subcommittee to understand the aspirations of the public.

Although state constitutional conventions have not been utilized in the last decade, they could be an avenue to develop procedures and best practices—or to learn about their risks—as the movement for a federal constitutional convention continues to grow.¹⁷⁶ Movements like COS could seize upon these ballot initiatives for state conventions in the next decade to prove that their faction can be successful at this state level and increase its goals’ viability. Alternatively, as the aftermath of the 2024 election passes and likely increases political salience and polarization, state amendment initiatives could be part of a movement for formal amendments at the national level to satiate the American need for change in the current era—without the high risks groups like COS pose with a national convention. Either way, my proposed new Subcommittee on Constitutional Change should monitor the recent amendments that have become commonplace in state constitutions and the procedures that make these changes so that the Subcommittee can improve the procedure of the formal and convention method of Article V and avoid the risky goals of COS becoming reality.

B. Subcommittee Studies: International Perspective

Many foreign democratic constitutions function like the constitutions of the individual U.S. states with consistent and modern changes. My proposed Subcommittee should ensure that any proposed changes through or new procedures for Article V are informed by an international study of contemporary global constitution-making. According to a survey of global constitutional longevity, constitutions in Western

[hereinafter *Voters Amend State Constitutions*], <https://statecourtreport.org/our-work/analysis-opinion/voters-amend-state-constitutions-enshrine-new-rights> [<https://perma.cc/6QVN-5VT3>].

¹⁷³ *Op-Ed: In the United States, supra* note 172; *Voters Amend State Constitutions, supra* note 172.

¹⁷⁴ Bannon, *supra* note 170.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Europe and Asia typically last thirty-two and nineteen years, respectively—more similar to Thomas Jefferson’s idea that “constitutions and laws should expire every nineteen to twenty years, the average duration of a generation.”¹⁷⁷

The American originalist perspective that the Constitution should essentially never change would be unthinkable to the nations that regularly undergo constitutional change. Current global examples of constitutional amending point to the normalcy of routine national change. For instance, just in 2023, Luxembourg finished modernizing its constitution after a lengthy multiphase process from 2021 to 2022 that resulted in a fully new text.¹⁷⁸ Significant amendments have also been passed in Bulgaria and Uzbekistan, among others.¹⁷⁹ Many of these updates help make the constitution reflect that country’s current values. In the Netherlands, the prohibited grounds of discrimination were expanded to cover disability and sexual orientation.¹⁸⁰ At the same time, Ireland has committed to holding a referendum to amend outdated provisions for more gender equality.¹⁸¹ Small changes are often made, too, as in 2023, South Africa and Moldova passed language-related reforms.¹⁸² This cycle of change continues, too, as the next phases of constitutional reform will likely continue in countries like Barbados, Botswana, Tanzania, and Wales.¹⁸³

In today’s globalized world, the internationalization of commerce via the internet and the notion of human rights via globalization means that the United States likely should look abroad when planning for the future. Studies of international constitutional statistics have found that enduring constitutions share three essential characteristics: (1) emergence under conditions of an open, participatory process that encourages enforcement of constitutional terms, (2) coverage of “a wide range of topics, inducing the parties to reveal information and to invest in the negotiation process,” and (3) *flexibility* and providence of “reasonable mechanisms by which to amend and interpret the text to adjust to changing conditions.”¹⁸⁴ For this first

¹⁷⁷ FEINGOLD & PRINDIVILLE, *supra* note 5, at 196 (“Thomas Jefferson disagreed, remarking that ‘the earth belongs in usufruct to the living.’ Drawing from actuarial tables, he concluded that constitutions and laws should expire every nineteen to twenty years, the average duration of a generation. ‘If it is enforced longer, it is an act of force, and not of right.’ Each successive generation should be empowered to craft the governing regime anew, he believed.”).

¹⁷⁸ Hickey, *supra* note 4; see Jérôme Wiss, *In Luxembourg, Modernized Constitution Comes Into Force*, INT’L IDEA: CONSTITUTIONNET (July 3, 2023), <https://constitutionnet.org/news/luxembourg-modernized-constitution-comes-force> [<https://perma.cc/A6BX-4QTQ>].

¹⁷⁹ Hickey, *supra* note 4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (describing a gender equality referendum to amend “outdated” provisions in the Irish Constitution relating to families and stereotypes of women’s “place in the home”).

¹⁸² *Id.* (“South Africa’s constitutional amendment recognized sign language as the twelfth official language, and Moldova passed a reform to replace ‘Moldovan language’ with ‘Romanian language’ in all laws and the Constitution, illuminating its pro-European orientation and distancing from Russian influence.”).

¹⁸³ *Id.* (“We additionally anticipate continuing debates and the potential for significant constitutional reform processes in Lesotho, Nigeria, the Philippines and Türkiye.”).

¹⁸⁴ Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, U. CHI. L. (Oct. 15,

characteristic, the United States could encourage a participatory process¹⁸⁵ to remedy its current crisis/pre-crisis by looking abroad to ideas like citizen's assemblies¹⁸⁶ or citizen-led constitutional convention¹⁸⁷—for inspiration of the nation's values if not for direct principles. For the second characteristic, the Constitution already covers a wide range of topics,¹⁸⁸ and more can be left to state constitutions to test out new principles and their potential for change that could increase in the next decade. Still, the negotiation process has been eroded by partisanship, potentially exacerbated by the echo chambers of the viral age. Constitutional reform could be an opportunity to choose a commission of bipartisan scholars and political scientist experts instead of those serving specific interests and their election cycles. The final need for flexibility¹⁸⁹ evidently can only be addressed by allowing the change embedded in the Constitution to pass, but not necessarily by allowing groups like COS to overtake the process when more democratically safe processes can be developed. This third factor¹⁹⁰ is further statistical proof that it is not worth hoping in ignorance that the status quo is enough.

If Americans want true constitutional change or institutions for future change, this ideation does not have to be created in a vacuum when the world holds thousands of successful (and failed) attempts at constitutional change that the United States (through the new Subcommittee) can learn from. Organizations like The European Commission for Democracy through Law (better known as the “Venice Commission”) and International IDEA conduct research and advise countries worldwide on the best practices for constitution-building.¹⁹¹ The Venice Commission works to “provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European

2009) (emphasis added), <https://www.law.uchicago.edu/news/lifespan-written-constitutions> [<https://perma.cc/2GH9-YV9G>].

¹⁸⁵ See *id.*

¹⁸⁶ See *What Is a Citizens' Assembly?*, CITIZENS' ASSEMBLIES, <https://citizensassemblies.org/> [<https://perma.cc/D5TU-E7J6>] (last visited Feb. 19, 2025); Hickey, *supra* note 4. “Early in 2023, Ireland’s Citizens’ Assembly on Biodiversity Loss produced recommendations for the Irish government. Comprised of 99 randomly selected citizens, the Assembly proposed a constitutional referendum” that was not part of its original mandate. Hickey, *supra* note 4. Still, “the Irish government integrated the key points into its new National Biodiversity Action Plan” of 2024. *Id.*

¹⁸⁷ See Eoin Carolan, *Ireland’s Constitutional Convention: Behind the Hype About Citizen-Led Constitutional Change*, INT’L J. CONST. L. (Nov. 14, 2015), <https://academic.oup.com/icon/article/13/3/733/2450810> [<https://perma.cc/472J-A3WJ>] (describing a recent example of a citizen-led constitutional convention).

¹⁸⁸ See Ginsburg, *supra* note 184.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ *The Venice Commission of the Council of Europe*, VENICE COMM’N, https://www.venice.coe.int/WebForms/pages/?p=01_Presentation [<https://perma.cc/X3PD-JPEU>] (last visited Feb. 19, 2025).

standards and international experience in the fields of democracy, human rights and the rule of law” and also has member states from around the world.¹⁹² The United States does not have to copy *European* standards, but working with these organizations could help inform the Subcommittee of how concepts and specific provisions are best written into updated constitutions.

1. International Perspective: Counterargument

The clear counter to the recommendation to “look abroad” when constitution-building is that all nations are distinct, and changing a document that has endured through the centuries risks chaos or confusion. Many countries that change their constitutions are often closer to the geographic size of individual states and not the whole United States.¹⁹³ It is also true that many constitution-amendment processes have failed abroad—but these can be lessons for the United States to learn from. If the United States reaches its next era of amendments (through its formal process, the convention route, or a new formal way), the new “Founders” would have to strike the same balance of change that countries worldwide have attempted through the centuries. For example, a convention or formal process that enacts *too many* amendments can cause more problems than it solves. The Ecuadorian constitution, with its ninety-nine enumerated rights—the most in the world—was drafted by a constituent assembly in 2008 and unintentionally enacted more aspirational than actionable rights.¹⁹⁴ For Americans, rights are meant to be brought to court when they are violated, not assumed as dreams to hope for. However, only through studying the extremes of constitution-making can the United States learn how to amend its Constitution in a way that is democratic but realistic. This way, even if a group like COS succeeds one day, it will not just be that group that is prepared for the convention. Instead, the Subcommittee would be ready to ensure a fair process that potentially includes new democratic changes (like referendums) inspired by its states and limits crafted through an understanding of global constitutional conventions.

If the United States has a constitutional convention or the next era of formal amendments, it will be better for the nation to be prepared with a process for the

¹⁹² *Id.* (“The Commission has 61 member states: the 46 Council of Europe member states and 15 other non-European members (Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). . . . The Commission also cooperates closely with the European Union, OSCE/ODIHR and the [Organization] of American States (OAS).”).

¹⁹³ For example, countries like Luxembourg and the Netherlands are geographically smaller than most individual U.S. states.

¹⁹⁴ FEINGOLD & PRINDIVILLE, *supra* note 5, at 185 (“The Ecuadorian constitution’s 494 articles, drafted by a constituent assembly in 2008, contains the most enumerated constitutional rights in the world: ninety-nine. Among them are rights to ‘a safe and healthy habitat’ and ‘a decent life’ as well as ‘to have goods and services of the highest quality.’ Bolivia’s (2009) and Serbia’s (2006) constitutions rank second, with eighty-eight enumerated rights each.”).

change its citizens demand. The international perspective shows that originalism does not have to be absolute—as it has never been with legal changes through the Supreme Court and ever-changing values and meaning within the nation. Lawmakers should seek inspiration from nations that find stability by changing with the times. This inspiration should go hand-in-hand with heeding the warnings of failures abroad that can be avoided only if they are understood.

VIII. RECOMMENDATION: THE SUBCOMMITTEE'S CHARGE

The U.S. Constitution is a static outlier abroad, and the instability its society has faced through increasing polarization and spikes of conflict, like the January 6th insurrection that continues to haunt its electoral system, suggests that constitutional reform *should* be on the horizon. Policymakers should be looking ahead instead of back. Movements like the Convention of States only adopt the façade of the constitutional reform that founders like Madison and Washington endorsed as COS represents a factionalist approach to change.¹⁹⁵ My proposed new Subcommittee on Constitutional Change, which builds on Feingold's proposed bipartisan subcommittee,¹⁹⁶ would use its studies of state and foreign constitution-building to enact proposals for procedural reform of Article V. For example, this commission could work to pass legislation to decide that Congress counts the applications for conventions and that states are allowed to rescind their applications within a two-year statute of limitations. Congress could require topic-limiting for potential future conventions and regulations that could prevent a runaway convention.¹⁹⁷

I agree with Feingold's inclusion that anything significant passed by this commission should be subject to ratification by a nationwide popular referendum and a majority of states.¹⁹⁸ The United States should not risk unregulated change when procedures can be implemented and approved by referendum to ensure chaos never comes to pass. Checks and balances could be added, as Feingold recommends requiring approval for changes in multiple sessions of Congress in both houses; meanwhile, the change could be bolstered by lower thresholds for congressional constitutional amendment proposals.¹⁹⁹ I would expand on Feingold's proposal of requiring the national referendum on passage of any Article V changes by trying to align the future referendum with the same voting day of a national presidential election to encourage voter turnout.²⁰⁰ I would also promote educational institutions, like universities and law schools, along with media outlets to work to inform the public of the changes proposed.

¹⁹⁵ See FEINGOLD & PRINDIVILLE, *supra* note 5, at 187, 196, 202.

¹⁹⁶ See *id.* at 192–93.

¹⁹⁷ *Id.* at 193.

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

Voters do not just have to wait for lawmakers to enact change. The increasing consistency of COS's practice conventions shows how powerful activist organizations can be. Other groups, like Common Cause, should not be overlooked as starting points for different forms of safe and formal constitutional reform. It could take just one movement's success or one push in Congress that brings people across the aisle to reign in a period like the Progressive era that awakens Article V from its silent slumber.²⁰¹ "Most amendments have been the result of movements that used the political process and Article V's own mechanism to force Congress to act [A]ttempts to awaken Article V through convention applications have often played decisive roles in sparking amendment fervor," which is "why amendment moments often arise so suddenly" and take those at the top of the political process by surprise.²⁰² COS is not just starting—it is practicing—and those in Congress or activists organizing for a more democratic system should ensure that a prepared amendment process is in place or that other formal avenues are viable as alternatives and convention-presentation measures.

The Constitution is undergoing a shock of its own in the aftermath and continued anxiety of the COVID-19 pandemic; January 6th, Supreme Court cases that have overthrown precedents, and *Trump v. Anderson*, which all show that the Founders could not predict our current system and we should listen to their endorsement of change. They included an amendment procedure in vague terms, potentially under a similar belief to George Washington's statement when he said, "I do not think that [the Founders] are more inspired, have more wisdom, or possess more virtue, than those who will come after us."²⁰³ Thus, the amendment procedures are left up to the current generation to choose how its system should function in the unforeseen age of interconnected technology, polarization, and globalization. Still, the formal procedure should be the focus—rather than the convention method—not because it is impossible but because it would likely fall to factionalism today.

CONCLUSION

The COS movement's goals may or may not be realistic today. What matters is that the movement has the potential to be a force to be reckoned with tomorrow. A second Trump presidency or future DeSantis presidency may lead to an executive endorsement of the project. Americans could watch as the movement is taken up by

²⁰¹ See *id.* at 92–93 (noting the Progressive Era's popular amendment fervor and national fear of a convention "awakened the machinery of Article V following a long slumber" and provides a "historical record from which to glean insights into the meaning of Article V today" and that "[o]ne must be careful not to carelessly attribute historical certainty to what one's own reading of the past might mean for the present," but with "a cautious approach, one can draw a few important lessons" for the modern era).

²⁰² *Id.* at 72–73.

²⁰³ *Id.* at 187.

Trump's or DeSantis's base as the faction captures legislatures across the country. Congress should be watching this movement and not dismiss it as impossible. Legislators nationwide should see COS's 2022 simulation as the warning that it is—and not wait until the emergency is at its doorstep. If COS gains more states in its arsenal, opponents will be unable to do more than hope that the federal courts can enact boundaries for a factionalist Article V convention of "PASSIONS."²⁰⁴ Instead of waiting, Congress should refine the formal path to amendments, making its guidelines more stable (e.g., defining time limits, etc.) to ensure that the next writers of history are the future Founders meant to form constitutional moments²⁰⁵ and not those who would serve as the detriment to national progress.

The federal government and American voters should not allow the blinders of today to leave the nation blindsided in a future where leaders like DeSantis and Trump take office and endorse COS, plummeting the United States into factionalism, which it has yet to see. Instead, the United States should take up its role as a world leader by learning from the experiences of other countries and correcting the flexibility of its Constitutional design. Otherwise, the United States could risk becoming the next global example of a fragile constitution that succumbs to its inability to grow with its people.

²⁰⁴ See THE FEDERALIST NO. 49 (James Madison).

²⁰⁵ See generally Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) (creating the theory behind the phrase "constitutional moment").