ROADMAP FOR A CONVENTION OF THE STATES

The Honorable Kevin M. Smith[*]

TABLE OF CONTENTS

INTRODUCTION

"*The tree of liberty must be refreshed from time to time with the blood of patriots [and] tyrants.*"

— Thomas Jefferson[1]

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[1] Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 5 THE WORKS OF THOMAS JEFFERSON 360, 362 (Paul Leicester Ford ed., 1904) (emphasis added).

The wounds of the revolution were raw and barely healed when Thomas Jefferson wrote those words in 1787.[2] The following year, the states ratified the Constitution that resulted from the Constitutional Convention, which was originally tasked with amending the Articles of Confederation.[3] Fast forward almost 250 years. Today, the threat to our liberty is not England or a foreign power. It is our own political leaders and judges, the ones we elected to office or who were appointed to their positions for life.

Some claim Congress and the president (including all previous administrations) have exceeded their enumerated powers as defined in the Constitution.[4] Namely, Congress passes bills claiming they are "necessary and proper" to enumerated powers or uses its Tax-and-Spend Power to force States to impose federal mandates on citizens, and presidents affirm these actions by either not vetoing or by signing the bills.[5] With each decade, the federal reach expands into areas theretofore

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[2] *Id.* at 360, 362; *see, e.g.*, Forrest R. Black, *The Termination of Hostilities*, 62 AM. L. REV. 248, 248–49 (1928) ("The Revolutionary War was terminated by the Treaty of Paris, September 3, 1783 . . . .").

[3] *E.g.*, George Gordon Battle, *The Ratification of the Constitution*, 64 U.S. L. REV. 576, 578–79 (1930) (detailing that the Constitution was ratified on June 21, 1788); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 863–66 (2020) (noting how the Philadelphia Convention's original purpose was to revise the Articles of Confederation, not create the Constitution).

[4] *See, e.g.*, Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 177 (2002) (stating that Congress frequently exceeds its enumerated powers through the conditions it imposes on the receipt of federal funds); Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 979 (2011) (noting States claimed Congress exceeded its enumerated powers by imposing an individual mandate for health insurance); Joel Griffith, *3 Ways Trump Is Overstepping His Bounds Amid Pandemic*, HERITAGE FOUND. (Oct. 22, 2020), https://www.heritage.org/the-constitution/commentary/3-ways-trump-overstepping-his-bounds-amid-pandemic (claiming President Trump exceeded his enumerated powers); *see also* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510 (2008) (explaining the difficulty in determining whether a president has exceeded his authority and how public expectations of expanded executive power correlates with a president's expanding power).

[5] *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1500A(a), 124 Stat. 119, 244 (2010) (codified as amended at 26 U.S.C. § 5000A) (creating an individual mandate to purchase and maintain healthcare); *Obama Signs Historic Health Care Legislation*, NPR (Mar. 23, 2010, 10:57 AM), https://www.npr.org/2010/03/23/125058400/obama-signs-historic-health-care-legislation (covering President Obama's signing of the law which required individuals to purchase and maintain healthcare); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 547, 558 (2012) (opinion of Roberts, C.J.) ("The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. . . . [It] contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an 'integral part of a comprehensive scheme of economic regulation' . . . ." (quoting Brief for Petitioners (Minimum Coverage Provision) at 24, *Sebelius*, 567 U.S. 519 (No. 11-398))); Act of July 17, 1984, Pub. L. No. 98-363, 98 Stat. 435, 437–39

untouched.[6] Further, federal judges, appointed to serve as long as they want with little accountability, uphold such actions.[7] Our elected leaders also lack the will or desire to limit spending.[8] Indeed, they propose spending for "bridges to nowhere"[9] and other frivolous programs as rewards for financial support of their reelection campaigns.[10] One need merely consider the seemingly exponential increase in deficit spending and our total national debt as proof that elected leaders are out of control. In 1981, our national debt was approximately $998 billion; in 1991, $3.6 trillion; in 2001, $5.8 trillion; in 2011, $14.7 trillion; and in 2021, $29.6 trillion.[11] This debt is staggering in its amount and annual increases. At

(codified as amended at 23 U.S.C. § 158) (conditioning the receipt of federal funds on States implementing a minimum drinking age of twenty-one); Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, at A15, https://www.nytimes.com/1984/07/18/us/reagan-signs-law-linking-federal-aid-to-drinking-age.html (covering President Reagan's signing of the law requiring States to implement a national minimum drinking age of twenty-one to receive federal funding); South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("[Regarding 23 U.S.C. § 158], Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking age.").

[6] *See, e.g.*, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2113, 2116, 2124–31 (2019) (detailing the expansion of the federal judiciary into areas of law previously under state courts' jurisdiction); *infra* Section I (detailing the expansion of the legislative and executive branches into areas of law previously regulated by the States through the Commerce Power and the Tax-and-Spend Power).

[7] *E.g.*, *Sebelius*, 567 U.S. at 574 (upholding the individual mandate of the Affordable Care Act as a valid use of the Tax-and-Spend power); *Dole*, 483 U.S. at 212 (upholding legislation designed to compel a national minimum drinking age as a valid use of the spending power); *see* U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behavior . . . ."); Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59, 59–60, 75 (questioning the limited accountability of federal judges, who essentially enjoy a "life tenure subject to impeachment").

[8] *See, e.g.*, S. REP. NO. 104-5, at 3 (1995) (noting Congress's habit of excessive spending despite its financially devastating effects).

[9] *E.g.*, Jessica Wehrman & Ryan Kelly, *Lawmakers Happily Embrace Return of Earmarks to Highway Bill*, ROLL CALL (May 14, 2021, 7:00 AM), https://rollcall.com/2021/05/14/lawmakers-happily-embrace-return-of-earmarks-to-highway-bill/ (recounting an Alaskan representative's proposal for the infamous "Bridge to Nowhere," which would have spent 557 million dollars of federal funds to build a bridge from Ketchikan, Alaska, to Gravina Island, Alaska).

[10] *See* Matthew D. Dickerson, *Earmarks Represent Corruption, Waste, and the Swamp. The Ban on Them Should Stay in Place.*, HERITAGE FOUND. (Mar. 19, 2021), https://www.heritage.org/budget-and-spending/commentary/earmarks-represent-corruption-waste-and-the-swamp-the-ban-them (identifying several corrupt practices that are utilized by special interest groups to secure earmarks, including the making of campaign contributions to members of Congress).

[11] Kimberly Amadeo, *U.S. National Debt by Year*, BALANCE, https://www.thebalance.com/national-debt-by-year-compared-to-gdp-and-major-events-3306287 (Oct. 4, 2022).

some point, it will come due, and the fear is that debt payments will burden our children's and our children's children's future opportunities.[12]

To rein in the brigands in Washington, D.C., and on the Supreme Court, advocates for a bloodless coup propose a Convention of the States ("Convention") to discuss amendments that "impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress."[13] For those unfamiliar with a Convention, it is a gathering where state delegates consider and propose amendments to the United States Constitution.[14] After a Convention has been seated, any resulting amendments must be presented to the States for ratification.[15] If three-fourths of the States ratify the amendments, they become part of the Constitution.[16]

A few years ago, I published an article critical of a Convention.[17] My two objections were that (1) today's delegates will not have the same intellectual excellence or life experiences as the Founders and will be incapable of proposing changes on par with the Founding Fathers' Constitution, and (2) the risk of a runaway Convention altering the Constitution to our detriment is greater than it sticking to a limited mandate.[18] Since then, I still see more risk than reward. However, the reasons for calling a Convention have not abated, and it appears that unless our political leaders get the wake-up call that only a Convention can deliver, the bridge to nowhere may lead us off a cliff of doom.

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[12] *See, e.g.*, Luke Repici, *Taxation Without Gestation: The Constitutionality of Our $13+ Trillion National Debt*, 2 CHARLOTTE L. REV. 445, 474, 476 (2010) ("[The national] debt burden will significantly limit rising and future generations' abilities to allocate their own resources as they see fit."); Neil H. Buchanan, *What Do We Owe Future Generations?*, 77 GEO. WASH. L. REV. 1237, 1265–67 (2009) (describing the debate concerning the impact of deficits and fiscal policy on the welfare of future generations); Daniel Shaviro, *The Long-Term U.S. Fiscal Gap: Is the Main Problem Generational Inequity?*, 77 GEO. WASH. L. REV. 1298, 1356–57 (2009) (noting the unsustainable nature of the United States budget and its anticipated disproportionate effect on future generations).

[13] *Application for a Convention of the States Under Article V of the Constitution of the United States*, CONVENTION STATES ACTION, https://conventionofstates.com/files/model-convention-of-states-application/download (last visited Oct. 6, 2022); *see* Alexa Scherzinger, *McClain to Introduce Convention of States Resolution*, ADVERTISER-TRIB. (Jun. 2, 2021, 7:00 AM), https://advertiser-tribune.com/news/323858/mcclain-to-introduce-convention-of-states-resolution/ (detailing activity taken to initiate a Convention intended to limit the power of the federal government).

[14] *E.g.*, RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION, at viii–ix (1988).

[15] U.S. CONST. art. V; CAPLAN, *supra* note 14, at ix (highlighting how the proposed amendments may be ratified by either the state legislatures or "specially held state conventions").

[16] U.S. CONST. art. V; CAPLAN, *supra* note 14, at ix.

[17] Kevin M. Smith, *A Case Against a Convention of the States*, 80 ALB. L. REV. 1523 (2017).

[18] *Id.* at 1527, 1533, 1535.

This Article discusses why we need a Convention, what amendments the States' resolutions should expressly authorize to prevent the Convention from degrading our freedoms and liberties, and what procedural safeguards the resolutions should include to ensure Congress does not interfere with the process. But first, what caused this mess?

I. THE ROOTS OF UNFETTERED FEDERAL POWER

To understand why many good, patriotic Americans want to change our Constitution, it is critical to understand what happened to move us down this precarious path. The Constitution is, by its nature, a limiting document.[19] Prior to the Civil War Amendments,[20] we were a republic of independent States.[21] Each State was responsible for regulating the health and welfare of its citizens,[22] while the federal government, via the Constitution, was responsible and empowered to deal with matters of common interest such as national defense, treaty power, and interstate commerce between the several states.[23] Moreover, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [were] reserved to the States respectively, or to the people."[24] The Constitution, by its nature and explicit intent, restrained the federal government's power and jurisdiction to prevent it from interfering with the States' management of local interests and the citizens' unalienable rights.[25]

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[19] *See, e.g.*, *Intro.6.2.4 Individual Rights and the Constitution*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.6-2-4/ALDE_00000033/ (last visited Oct. 6, 2022) ("[T]he Constitution limits and diffuses powers of the federal and state governments to check government power, [and] it also expressly protects certain rights and liberties for individuals from government interference.").

[20] *See generally, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (referring to the Thirteenth, Fourteenth, and Fifteenth Amendments as the "Civil War Amendments").

[21] *See* Bellia & Clark, *supra* note 3, at 938–40 (explaining that, under the Constitution, States were equal sovereigns and immune from direct federal regulation, but noting that immunity from federal regulation was, in part, surrendered when the Civil War Amendments were adopted).

[22] *See* W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC'Y 359, 381–83 (1900) (noting that, prior to the Civil War Amendments, Supreme Court holdings considered the power to regulate health and welfare through the police power something reserved to the States); Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 850 (1994) (highlighting the argument that the Civil War Amendments created a federal police power that encroached on the States' traditional right to regulate citizens).

[23] *See* U.S. CONST. art. I, § 8 (enumerating powers of Congress, including matters of national defense and commerce between the states); *id.* art. II, § 2 (giving the president the power to make treaties).

[24] U.S. CONST. amend. X.

[25] *E.g.*, CONST. ANNOTATED, *supra* note 19.

A. Marbury v. Madison

The first degradation of the Constitution's protections against a behemoth federal government seemed to be a restraint on Congress's legislative powers, which appeared to be a good thing. In *Marbury v. Madison*, the Supreme Court considered whether Congress had the power to expand the Court's powers beyond Article III's provisions.[26] Specifically, the question was whether Congress could legislatively empower the Court to order the executive branch to deliver the prior administration's appointments absent such a power within Article III itself.[27] The Court found that Congress did not have such power.[28] More importantly, the Court held that it had the power of judicial review of *all* legislative and executive actions, effectively designating itself as the final arbiter on the legality of actions of the other two branches of the federal government.[29]

As to the long-term consequences of *Marbury*, the Court misused its power of judicial review to expand and restrict legislative intent, create rights the Founding Fathers never intended the Constitution to protect, and expand and restrict other explicit unalienable rights.[30] Ironically, the most impactful consequence of *Marbury* was not these obvious usurpations but how this awesome power compelled a president to force the Court to approve his and his party's previously unconstitutional

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[26] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173, 176–78 (1803).

[27] *See id.* at 173, 176 ("[I]t only remains to be enquired[] [w]hether [the writ of mandamus] can issue from this [C]ourt. . . . The authority, therefore, given to the [S]upreme [C]ourt, by the act establishing judicial courts of the United States, to issue writs of mandamus to public officers, appears to not be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised. The question[] [is] whether an act[] repugnant to the constitution[] can become the law of the land . . . ."); U.S. CONST. art. III, § 2 (defining the original and appellate jurisdiction of the Supreme Court).

[28] *Marbury*, 5 U.S. (1 Cranch) at 176.

[29] *Id.* at 177–78; *see, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[The *Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

[30] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012) (opinion of Roberts, C.J.) (noting the Court's obligaton to interpret statutes as constitutional, wherever possible, to avoid striking them down); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discovering a constitutional right to privacy within the "penumbras[] formed by emanations" of other explicitly granted rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (asserting the Constitution protects "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285 (2022); Town of Greece v. Galloway, 572 U.S. 565, 604–06 (2014) (Thomas, J., concurring) (noting how the Court's modern Establishment Clause jurisprudence, which applies the First Amendment's prohibition on the establishment of a religion against the States, is wayward and too expansive because a historical analysis of the First Amendment indicates the Founding Fathers' intent to enforce its dictates only against the federal government and not the States).

enactments,[31] which set America up for the constitutional crisis that Convention of the States advocates are trying to solve today.[32]

B. *President Franklin Delano Roosevelt and the Judicial Procedures Reform Bill of 1937*

Possibly the most misused enumerated power is the power to regulate interstate commerce.[33] Article I, Section 8, Clause 3 of the Constitution empowers Congress "[t]o regulate Commerce . . . among the several States,"[34] which is commonly understood as concerning *inter*state commerce (commerce between the states) and not *intra*state commerce (commerce wholly within a particular state).[35] For the first 149 years after the Constitution's ratification, there was a clear understanding of what "commerce" and "among the several States" meant.[36] Thomas Jefferson observed that "[a]griculture, manufactures, commerce, and navigation, the four pillars of our prosperity, are the most thriving when left most free to individual enterprise."[37] Commerce occurred only when agricultural or manufactured products were bought and sold.[38] Commerce was not

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[31] *See infra* notes 45–56 and accompanying text (discussing President Franklin D. Roosevelt's "court packing plan" as a response to the Court's unfavorable use of judicial review).

[32] *See* Mike Harper, *Clear and Present Constitutional Crisis*, CONVENTION STATES ACTION (Aug. 16, 2021), https://conventionofstates.com/news/clear-and-present-constitutional-crisis (attributing a modern "[c]onstitutional [c]risis" to the executive branch's disregard of our nation's foundational law); Edward Douglas Thompson, *FDR's Court-Packing Scheme: Mission Accomplished*, CONVENTION STATES ACTION (Sept. 20, 2020), https://conventionofstates.com/news/fdr-s-court-packing-scheme-mission-accomplished (discussing how Franklin Roosevelt's court-packing plan paved the way for the judicial abuse and disregard for the Constitution, which currently drives the desire for a modern Constitutional Convention).

[33] *See, e.g.*, Fred'k. H. Cooke, *The Use and the Abuse of the Commerce Clause*, 10 MICH. L. REV. 93, 107 (1912) ("[The Commerce Clause's] actual application has been largely useless and superfluous, even mischievous."); Vanue B. Lacour, *The Misunderstanding and Misuse of the Commerce Clause*, 30 S.U. L. REV. 187, 188–89, 202, 206, 260 (2003) (detailing the divergence of the Court's interpretation of the Commerce Clause from the original meaning); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388, 1454–55 (1987) (arguing that the Supreme Court's interpretation of the Commerce Clause is far broader than was intended by the drafters).

[34] U.S. CONST. art. I, § 8, cl. 3.

[35] *See* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702–05, 702 n.53 (1996) (describing how the Founding Fathers understood commerce to mean the interchange of goods between states).

[36] *See generally* Battle, *supra* note 3 (detailing that the Constitution was ratified on June 21, 1788); LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 811–12 (3d ed. 2000) (noting how the Court abruptly changed its Commerce Clause jurisprudence in its decision in *NLRB v. Jones & Laughlin Steep Corp.* in 1937).

[37] Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 1, at 321, 339.

[38] *See* Berger, *supra* note 35, at 702–03 (arguing that the Founders' understanding of commerce required the exchange or trade of goods).

considered interstate, or "among the several States," unless the items were sold to entities in other states.[39] Indeed, not until *Gibbons v. Ogden* in 1824 did the Supreme Court expand the common meaning of interstate commerce to encompass more than the sale of goods across state lines.[40] There, it added transportation across state lines to the definition.[41] This minor expansion makes sense because it involves the means necessary to engage in interstate commerce.[42] Even still, the scope of the Commerce Power at the time of *Gibbons* only included the ability to regulate conduct that was both interstate and connected to the sale of goods (unlike farmed or manufactured products that were merely transported out of the state but not subject to a sale or transaction).[43]

This classical definition of interstate commerce, along with the transportation expansion, was largely undisturbed until the Great Depression and the Presidency of Franklin Delano Roosevelt.[44] Roosevelt

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[39] *Id.* at 702–04 (describing that the Founders understood "among the states" to mean, at its fundamental level, between states).

[40] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

[41] *See id.* ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'").

[42] *See id.* at 229 (Jackson, J., concurring) ("I do not regard [navigation] as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it . . . .").

[43] *Id.* at 189–90 (majority opinion) (defining "commerce" as "commercial intercourse"); *cf.* THE FEDERALIST NO. 34, at 165 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting that agriculture and manufacture are concerns of the States).

[44] *Compare Gibbons*, 22 U.S. (9 Wheat.) at 189–90, 194 (reasoning that commerce must involve the interaction of States, rather than purely intrastate activities), United States v. Dewitt, 76 U.S. (9 Wall.) 41, 45 (1869) (holding that the federal government cannot regulate solely intrastate commerce), United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895) ("Commerce succeeds to manufacture, and is not a part of it. . . . Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact an article is manufactured for export to another State does not itself make it an article of interstate commerce . . . ."), The Lottery Case, 188 U.S. 321, 346, 354 (1903) ("It is not intended to say that these words comprehend . . . commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."), Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding that a regulation of purely intrastate matter was an unconstitutional use of the Commerce Clause), *and* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that intrastate activities which only indirectly impact interstate interests cannot be regulated by use of the Commerce Clause), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–38 (1937) ("[The Commerce Power] is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect

believed in government intervention in economic matters, especially at the lowest points of the Great Depression.[45] His Democrat-controlled Congress was at his beck and call, sending multiple unconstitutional bills to Roosevelt's office for signature.[46] These were popular initiatives notwithstanding their unconstitutionality.[47] For example, according to historian William Leuchtenburg, "[i]n 1933 workers and businessmen marched in spectacular parades to demonstrate their support for the National Recovery Administration (NRA), Roosevelt's agency for industrial mobilization, symbolized by its emblem, the blue eagle. Farmers were grateful for government subsidies dispensed by the newly created Agricultural Adjustment Administration (AAA)."[48] These were followed by a "cavalcade of [other] alphabet agencies," all claiming they were necessary and proper exercises of the Commerce Clause power.[49] Leuchtenburg also notes, "In a second burst of legislation in 1935, Roosevelt had introduced the welfare state to the nation with the Social

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that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (citations omitted) (quoting The Second Employers' Liability Cases, 223 U.S. 1, 51 (1912))).

[45] *See* H.R. DOC. NO. 540, at 225–28 (1952) (recording Franklin Roosevelt's belief in the use of government power to intervene during the "critical days" of the Great Depression); SUSAN E. HAMEN, THE NEW DEAL 7–8, 29–32 (2011) (discussing governmental economic interventions taken under Roosevelt's direction).

[46] *See, e.g.*, Kimberly Amadeo, *New Deal Summary, Programs, Policies, and Its Success*, BALANCE, https://www.thebalancemoney.com/fdr-and-the-new-deal-programs-timeline-did-it-work-3305598 (Mar. 29, 2022) (naming the Agricultural Adjustment Act and the National Industrial Recovery Act as enactments passed under Franklin Roosevelt's administration); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 549–51 (holding the National Industrial Recovery Act as an unconstitutional use of federal power); United States v. Butler, 297 U.S. 1, 74–75, 78 (1936) (holding the Agricultural Adjustment Act to be an unconstitutional exercise of federal power); *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Oct. 7, 2022) (indicating a majority Democratic split in the 73rd and 74th United States Senate); *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES OFF. HISTORIAN & OFF. ART & ARCHIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Oct. 7, 2022) (indicating a majority Democratic split in the 73rd and 74th United States House of Representatives).

[47] *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ (noting how Roosevelt's New Deal initiatives contributed to his popularity despite some acts later being held unconstitutional).

[48] *Id.*

[49] *Id.*; *see* PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 129–31 (1972) ("[Roosevelt's national] legislation rested upon vague constitutional theories and imprecise legal foundations. Such framers [of the legislation] turned to the alternate set of broad commerce clause and taxing power precedents . . . . If no other constitutional base could be contrived, the World War I-spawned 'doctrine of emergency powers' was thrown in as an excuse for constitutional experimentation."). *See generally* U.S. CONST. art. I, § 8, cls. 3, 18 (providing Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," which includes the Commerce Power).

Security Act, legislating old-age pensions and unemployment insurance."[50] Unfortunately for Roosevelt, the Supreme Court's four solidly conservative justices—Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter—had no intention of departing from the classical definition of commerce, and they secured the support of a swing vote, Owen Roberts.[51] Prior to 1937, this majority struck down many of Roosevelt's economic recovery programs as unconstitutional exercises of federal power.[52]

Roosevelt responded by proposing the Judicial Procedures Reform Bill of 1937, which provided a mechanism to potentially appoint six additional justices and thus negate the majority's hold on the Court.[53] The

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[50] Leuchtenburg, *supra* note 47.

[51] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297–310 (1936) ("[T]he effect of the labor provisions of the [Bituminous Coal Conservation Act of 1935] . . . primarily falls upon production and not upon commerce; and confirms the further resulting conclusions that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce."); *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Oct. 7, 2022) (confirming that Justices Butler, McReynolds, Sutherland, Van Devanter, and Roberts were on the Court in 1936 when *Carter* was decided); Leuchtenburg, *supra* note 47 (noting that Roberts's swing vote, combined with the votes of the Four Horsemen, created a conservative majority).

[52] *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–64 (1996) (noting the Supreme Court's tendency to strike down New Deal programs between 1935 and 1937).

[53] The Bill's text, in pertinent part, provided:

> (a) [W]hen any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate and, by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned . . . .
>
> (b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. . . . [No judge shall] be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States . . . .

S. 1392, 75th Cong. § 1(a)–(b) (1937).

The Supreme Court in 1937, as now, was comprised of nine justices. *See The Court as an Institution,* SUP. CT. U.S., https://www.supremecourt.gov/about/institution.aspx (last visited Oct. 7, 2022) (noting the Court has had nine members since 1869). Thus, under the Bill's scheme, Roosevelt could have added up to six justices and not violated the fifteen-justice cap. *See* S. 1392(b). He would have been able to do so almost immediately (if not for the Bill's six-month waiting period) as six justices were over the age of seventy in 1937, each with over ten years of experience as a federal judge. *See* S. 1392(a); *Louis D. Brandeis, 1916–1939*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/louis-d-brandeis-1916-1939/ (last visited Oct. 7, 2022) (noting that Justice Brandeis was born in 1856, meaning he was eighty-one in 1937, and that he joined the Court in 1916); *Willis Van Devanter, 1911–1937*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-

Bill is commonly referred to as the "court-packing plan."[54] Shortly after this proposal, it became evident that the "Four Horsemen," as the press referred to the four conservative justices, had lost their swing vote; the Court changed its course, even sustaining the National Labor Relations Act and the Social Security statute.[55] Moreover, three of the Four Horsemen either died or retired within three years of the court-packing plan's proposal, and Roosevelt appointed three justices that he thought would affirm his programs, which they did.[56]

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justices/willis-van-devanter-1911-1937/ (last visited Oct. 7, 2022) (noting that Justice Van Devanter was born in 1859, meaning he was seventy-eight in 1937, and that he joined the Court in 1910); *Charles Evans Hughes, 1930–1941*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/charles-evans-hughes-1930-1941/ (last visited Oct. 7, 2022) (noting that Chief Justice Hughes was born in 1862, meaning he was seventy-five in 1937, and that he served as associate justice from 1910 to 1916 and as chief justice from 1930 to 1941); *James Clark McReynolds, 1914–1941*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/james-clark-mcreynolds-1914-1941/ (last visited Oct. 7, 2022) (noting that Justice McReynolds was born in 1862, meaning he was seventy-five in 1937, and that he joined the Court in 1914); *George Sutherland, 1922–1938*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/george-sutherland-1922-1938/ (last visited Oct. 7, 2022) (noting that Justice Sutherland was born in 1862, meaning he was seventy-five in 1937, and that he joined the Court in 1922); *Pierce Butler, 1923–1939*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/pierce-butler-1923-1939/ (last visited Oct. 7, 2022) (noting that Justice Pierce was born in 1866, meaning he was seventy-one in 1937, and that he joined the Court in 1922). As such, the Bill paved the way for Roosevelt to secure a liberal-leaning majority. *See* Shepherd, *supra* note 52, at 1562–63 (explaining how the conservative majority on the Supreme Court treated New Deal legislation and noting that Roosevelt's court-packing plan was intended to overcome this majority); Lesley Kennedy, *This Is How FDR Tried to Pack the Supreme Court*, HISTORY, https://www.history.com/news/franklin-roosevelt-tried-packing-supreme-court (Sept. 18, 2020) (explaining that Roosevelt proposed the Judicial Procedures Reform Bill of 1937 to alter the Court's composition and secure favorable rulings).

[54] Kennedy, *supra* note 53.

[55] *See* Leuchtenburg, *supra* note 47 (noting the common use of "the Four Horsemen" as a nickname for the four conservative justices and pointing out that Justice Roberts, who had voted with the Four Horsemen starting in 1935, began voting against them in 1937); Shepherd, *supra* note 52, at 1563 (showing that Justice Roberts swung to cast his vote with the liberal justices again in 1937 and noting the Court's subsequent upholding of the National Labor Relations Act and Social Security Law). However, Roosevelt's court-packing plan was not necessarily the cause of the Supreme Court's shift as Roberts's switch to the liberal side of the court began before Roosevelt's plan was proposed. *See id.* (explaining the timeline of the infamous "Switch in Time that Saved Nine").

[56] *See* Josiah M. Daniel, III, *"What I Said Was 'Here Is Where I Cash In'": The Instrumental Role of Congressman Hatton Sumners in the Resolution of the 1937 Court-Packing Crisis*, 54 UNIV. ILL. CHI. JOHN MARSHALL L. REV. 379, 423 tbl.1 (2021) (showing the retirements of Justices Van Devanter and Sutherland and the death of Justice Butler occurred within three years of February 1937 and the subsequent appointments of Justices Hugo Black, Stanley Reed, and Frank Murphy, respectively); Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 12–15, 28 n.146 (2013) (recounting how President Roosevelt wanted to compose the Court in a way that ensured liberal interpretation of the Constitution, which he believed would result in more New Deal programs being upheld, and listing New Deal initiatives upheld by the Supreme Court after 1937).

This culminated in 1942 in *Wickard v. Filburn*, when the Court considered whether the Agricultural Adjustment Act of 1938's (AAA) restriction of privately farmed and used wheat was a legitimate use of the Commerce Clause power.[57] Filburn farmed twenty-three acres of wheat and exceeded the AAA's allotment.[58] He argued that wheat grown for personal use as feed for livestock and food for his family was not interstate commerce.[59] The Court held that because the impact of self-use farmers, viewed in the aggregate, substantially affected costs and therefore impacted interstate commerce, the AAA was a legitimate use of the Commerce Clause power.[60]

Wickard and its "substantial effect" provision opened the floodgates to Commerce Clause legislation.[61] From 1937 to 1995, the Court did not invalidate a single legislative enactment enacted pursuant to the Commerce Clause.[62] Subsequent cases held as long as legislation contained sufficient findings that the underlying activity "substantially affected" interstate commerce, the Court would uphold the legislation, and

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[57] Wickard v. Filburn, 317 U.S. 111, 113–14, 119–20 (1942).

[58] *Id.* at 114–15 (stating that Filburn sowed twenty-three acres of wheat, which exceeded his 11.1-acre allotment, and harvested 239 bushels from his excess acreage).

[59] Brief for the Appellee on Re-Argument at 3–15, *Wickard*, 317 U.S. 111 (No. 59) ("[T]he indisputable facts remain that a vast amount of the frozen 1941 (and 1942) harvest[] was raised and was needed for feed, seed and food on the farms where it was produced; that none of it can plausibly be considered available for market; and that by depriving the farmers of the use of their own product, compelling them to go into the market and purchase what they need for their own consumption, is an unwarranted regulation of production; deprives the producer of his right to use and enjoy the fruits of his labor; and is violative of the Constitution. . . . [N]either intrastate nor interstate commerce, nor a commingling of the two, is here concerned. The wheat that the farmer may consume on his own farm as feed, seed or food at no time moves into commerce between the States nor into intrastate channels—because it is never marketed."); *see also Wickard*, 317 U.S. at 114, 119 (observing that although the "intended disposition of the crop here involved [was] not . . . expressly stated," by and large, Filburn used the wheat for various purposes on his farm and that Filburn argued the AAA was an unconstitutional "regulation of production and consumption").

[60] *Wickard*, 317 U.S. at 127–29.

[61] *See id.* at 128–29 (discussing the "substantial effect" consumption of homegrown wheat could have on commerce); Diane McGimsey, Comment, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1690–91 (2002) (explaining how the Court's holding in *Wickard* set a low bar for determining if an activity had a substantial effect on commerce); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 82–84 (1999) (noting how a great many statutes were upheld under the Commerce Clause in the years after *Wickard*).

[62] *See* TRIBE, *supra* note 36, at 811–17 (discussing the Court's expansion of the Commerce Power between 1937 and 1995, resulting in its inability to strike down legislation under the Commerce Clause); Nelson & Pushaw, *supra* note 61, at 83–86 ("In the half-century following *Wickard*, every one of the vast number of statutes enacted under the Commerce Clause survived judicial review.").

all such enactments apparently did.[63] However, in *United States v. Lopez*, the Court more narrowly construed the term "interstate commerce," as well as activities that substantially affected commerce.[64]

In *Lopez*, the Court considered whether the Gun-Free School Zones Act of 1990 was a legitimate exercise of the Commerce Clause power.[65] The Act barred the possession of firearms within a school zone.[66] In support of the Act, the Government argued that possessing a firearm in a school zone could negatively impact economic behavior.[67] The Court disagreed and struck down the Act as an impermissible exercise of the Commerce Clause power.[68]

Does the Court's backtracking on the Commerce Clause indicate that restraining this particular power is no longer necessary? No. For proof, consider a much more recent legislative scheme intended to pull a huge sector of the economy—healthcare—under the jurisdiction of the federal government.[69] In *National Federation of Independent Business v. Sebelius*, the Court considered whether certain provisions of the Patient Protection and Affordable Care Act of 2010 (ACA) were constitutional exercises of federal power.[70] Evaluating the ACA's merits, the Court first considered whether the individual mandate was a legitimate exercise of the

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[63] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59, 261–62 (1964) ("Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect on that commerce. . . . The only questions [for the Court] are: (1) whether Congress had a rational basis for finding that [the local activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (upholding the Civil Rights Act of 1964 as a valid use of the Commerce Clause because Congress's determination that racial discrimination in the restaurant industry substantially affected interstate commerce "had a rational basis").

[64] *See* United States v. Lopez, 514 U.S. 549, 561, 567–68 (1995) (stating that regulation of firearm possession in school zones could not be upheld under the Commerce Clause because it was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," thereby declining to expand the Court's "great deference to congressional action" any further).

[65] *Id.* at 551.

[66] *Id.*

[67] *Id.* at 563–64.

[68] *Id.* at 551–52, 561, 564, 567–68.

[69] *See* Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FIU L. REV. 29, 32–33 (2010) (discussing the government's attempt to bring healthcare under its control by passing the Patient Protection and Affordable Care Act); *Healthcare Sector*, INVESTOPEDIA, https://www.investopedia.com/terms/h/health_care_sector.asp (Oct. 31, 2021) (describing the healthcare industry in America as "one of the largest and most complex in the U.S. economy"). To examine the federal government's forays into healthcare, see generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[70] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530–32 (2012).

Commerce Clause power.[71] Chief Justice Roberts criticized Congress's liberal exercise of this power and went so far as to state that the ACA's individual mandate might be an unconstitutional exercise of this power.[72] Regarding the ACA's individual mandate, which imposed a penalty on Americans who did not have health insurance,[73] the Chief Justice observed that "Congress has never attempted to rely on [the Commerce] [P]ower to compel individuals not engaged in commerce to purchase an unwanted product."[74] He then went through mental gymnastics by opining that it was the Court's "duty" to find a way to "construe a statute to save it, if fairly possible."[75] Thus, he, along with Justices Ginsburg, Breyer, Sotomayor, and Kagan, renamed the mandate a "tax" and thereby upheld the ACA as a legitimate exercise of the Congress's power to tax and spend for the general welfare,[76] which leads to another often-abused enumerated power: the tax-and-spend power.

C. *Unemployment Insurance, Seat Belts, and Motorcycle Helmets, Oh My!*

Article I, Section 8 of the United States Constitution provides, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[77] This is commonly known as the "tax-and-spend power."[78] Congress lacks the power to directly regulate

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[71] *Id.* at 547. *See generally id.* at 585–87 (discussing whether the ACA's Medicaid expansion was a valid use of Congress's spending power).

[72] *See id.* at 552–55 (opinion of Roberts, C.J.) (highlighting the logical extremes of Congress's argument that it could compel commerce under the Commerce Power and opining it "[was] not the Country the Framers of our Constitution envisioned"); *id.* at 574–75 (stating that the ACA could not stand under the Commerce Clause).

[73] Patient Protection and Affordable Care Act § 1500A(b)(1) (creating an individual mandate to purchase and maintain healthcare with a penalty for non-compliance). Several years later, the ACA was amended to essentially eliminate the penalty by reducing it to zero dollars. *See* Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A(c)).

[74] *Sebelius*, 567 U.S. at 549 (opinion of Roberts, C.J.). Justices Scalia, Kennedy, Thomas, and Alito agreed the individual mandate was not a valid exercise of the Commerce Clause power, but they did not join Chief Justice Roberts's opinion. *See id.* at 646–47, 650–60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[75] *Id.* at 574 (opinion of Roberts, C.J.).

[76] *Id.* (majority opinion).

[77] U.S. CONST. art. I, § 8, cl. 1.

[78] *E.g.*, *Sebelius*, 567 U.S. at 648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Mario Loyola, *Trojan Horse: Federal Manipulation of State Government and the Supreme Court's Emerging Doctrine of Federalism*, 16 TEX. REV. L. & POL. 113, 132 (2011); *see also* Patrick T. Gillen, *A* Winn *for Originalism Puts Establishment Clause Reform Within Reach*, 21 WM. & MARY BILL RTS. J. 1107, 1122 (2013) ("tax and spend power"); United States v. Butler, 297 U.S. 1, 75 (1936) ("taxing and spending power"); Valley Forge Christian Coll.

health and welfare within a state (unless the regulation is necessary and proper under the enumerated powers, such as Richard Nixon's 55-mile-per-hour speed limit that was allegedly "necessary and proper" under the Commerce Clause as it was intended to preserve gas in response to the OPEC embargo).[79] For example, Congress cannot mandate that drivers wear seatbelts or even motorcycle helmets, nor can it impose national unemployment insurance premiums on incomes.[80] However, it may withhold millions of dollars in federal funds (pursuant to the tax-and-spend power) from States that refuse to enact laws it finds to be beneficial to citizens within those states.[81] For example, States could receive a portion of $500,000,000 in federal funds if they enacted mandatory

v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982) ("power to tax and spend").

[79] Bond v. United States, 572 U.S. 844, 854 (2014) (noting that the federal government possesses limited and enumerated powers while the States alone possess the police power); Nevada v. Skinner, 884 F.2d 445, 450–52 (9th Cir. 1989) (upholding the 55-mile-per-hour limit under the Commerce Clause because it "[was] rationally related to the Congressional goals . . . underl[ying] the Highway Act," which "f[e]ll within the purview of the Commerce Clause").

[80] *See* Snyder Mines, Inc. v. Indus. Comm'n, 217 P.2d 560, 565 (Utah 1950) ("[T]his court announced that the unemployment compensation law was enacted under and as an exercise of the police power of the state and that its purpose is remedial to protect the health, morals, and welfare of the people by providing a cushion against the shocks and rigors of unemployment. . . . [*U*]*nlike the federal government, the states under their police powers can impose and collect contributions*." (emphasis added) (citing Singer Sewing Mach. Co. v. Indus. Comm'n, 134 P.2d 479 (Utah 1943))); *cf., e.g.*, *Bond*, 572 U.S. at 854 ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it' . . . ." (citations omitted) (first quoting United States v. Lopez, 514 U.S. 549, 567 (1995); and then quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))); State v. Hartog, 440 N.W.2d 852, 859–60 (Iowa 1989) ("We hold that passage of [Iowa's mandatory seatbelt law] was a proper exercise of the state's police power . . . ."); State v. Folda, 885 P.2d 426, 427–28 (Mont. 1994) ("An individual's ability or privilege to operate a motor vehicle on public roads is '[a]lways subject to reasonable regulation by the state in the valid exercise of its police power.'" (alteration in original) (quoting State v. Skurdal, 767 P.2d 304, 307 (1988))); People v. Kohrig, 498 N.E.2d 1158, 1163 (Ill. 1986) (collecting cases from multiple jurisdictions which hold that "motorcycle-helmet laws are a valid exercise of the State's police power"); Love v. Bell, 465 P.2d 118, 122 (Colo. 1970) (en banc) ("[T]he helmet requirement represents a valid exercise of the police power of the state.").

[81] VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER 1, 3–4 (2021).

seatbelt laws.[82] When such strings are attached, States may feel pressure to agree to the conditions to secure federal funds.[83]

What is the net effect of the aforementioned expansions of federal powers? Laws and regulations have proliferated so much that one would be hard pressed to *not* be in violation of some federal law at one point or another, especially business owners engaged in any of the four pillars of economic activity: agriculture, manufacturing, commerce, and navigation.[84] Adam Millsap, a contributor at *Forbes*, notes,

> From 1970 to 2017, the number of words in the Code of Federal Regulations (CFR) nearly tripled from 35 million to over 103 million. This increase in regulation reduced economic growth and lowered

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[82] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Pub. L. No. 109-59, § 2005(a), 119 Stat. 1144, 1524–27 (2010) (codified as amended at 23 U.S.C. § 406) (repealed 2012); *see* Sarah Harney, *Big Bucks to Buckle Up*, GOVERNING (Sept. 3, 2010), https://www.governing.com/archive/big-bucks-buckle-up.html (explaining that States would receive a portion of $500 million in federal funding for enacting mandatory seatbelt laws under the 2010 law).

[83] *See Seat Belt Laws by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/seat-belt-laws-by-state (last visited Oct. 9, 2022) (stating that failing to wear a seat belt is illegal in every state except one); *With Eye on Federal Monies, More States Adopting Primary Seat Belt Laws*, INS. J. (Mar. 9, 2006), https://www.insurancejournal.com/news/national/2006/03/09/66257.htm (discussing how Mississippi passed a seatbelt law, at least in part, because Congress offered an incentive). The Supreme Court has noted that such pressure, if sufficiently coercive, can render conditional grants unconstitutional. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that federal conditional grants do not exceed the limits of the Spending Power when "the enactment of such laws remains the prerogative of the States not merely in theory but in fact"); *Sebelius*, 567 U.S. at 581–82, 588 (plurality opinion) (holding that the Medicaid expansion provision of the ACA violated the Constitution because "the financial 'inducement' Congress ha[d] chosen [was] much more than 'relatively mild encouragement'—it [was] a gun to the head" because "[t]he threatened loss of over [ten] percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion"); *id.* at 681, 689 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing that the Medicaid expansion violated the "anticoercion rule" and noting seven justices agreed it was not a constitutional exercise of the tax-and-spend power).

[84] *See* Adam Uzialko, *Surprising Laws That May Apply to Your Small Business*, BUS. NEWS DAILY, https://www.businessnewsdaily.com/11106-surprising-laws-business.html (June 29, 2022) (providing examples of federal laws that business owners must be careful to avoid violating); Jefferson, *supra* note 37 (observing that agriculture, manufacturing, commerce, and navigation are "the four pillars of our prosperity"); John Kiriakou, *Three Felonies a Day*, INST. FOR POL'Y STUD. (June 10, 2015), https://ips-dc.org/three-felonies-day/ ("Harvard University professor Harvey Silverglate estimates that daily life in the United States is so over-criminalized, the average American professional commits about three felonies a day."); Ilya Somin, *Why the Rule of Law Suffers When We Have Too Many Laws*, WASH. POST: THE VOLOKH CONSPIRACY (Oct. 2, 2017, 10:25 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/01/why-the-rule-of-law-suffers-when-we-have-too-many-laws/ (noting that most, if not all, Americans unknowingly commit crimes).

> Americans' incomes, and now new evidence shows that regulation has especially harmful effects on the country's low-income residents.[85]

How do we stop the bureaucratic behemoth from crushing American innovation and entrepreneurism? Will Congress and presidents wake up and realize what they are doing to "the People" and scale back on federal government encroachments? When such a tack means *not* doing what big-money donors demand them to do,[86] doubtful. Thus, calling an Article V Convention of the States may be our only hope.

II. PROCESS FOR CALLING A CONVENTION OF THE STATES

There are two ways to amend the Constitution:

> 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.[87]

There have been calls for amendments under Article V's congressional power.[88] From 1789 to January 3, 2019, Congress proposed approximately

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[85] Adam A. Milsap, *How Too Much Regulation Hurts America's Poor*, FORBES (July 23, 2019, 8:47 AM), https://www.forbes.com/sites/adammillsap/2019/07/23/how-too-much-regulation-hurts-americas-poor/?sh=2c6f1e81271f.

[86] *See Influence of Big Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money (last visited Oct. 9, 2022) (discussing how big money "drown[s] out the voices of ordinary Americans" and creates an aura of impropriety because politicians receive tens of millions of dollars from Super PACs and "dark money groups"); *see also* Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won with It in 2020.*, N.Y. TIMES (Jan. 29, 2022), https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html (discussing how dark money in political funding infests both sides of the political aisle and is "reshaping American politics"); Scott Bland & Maggie Severns, *Documents Reveal Massive 'Dark-Money' Group Boosted Democrats in 2018*, POLITICO (Nov. 19, 2019, 7:06 PM), https://www.politico.com/news/2019/11/19/dark-money-democrats-midterm-071725 (discussing how large donations can be used to pressure politicians towards particular stances on policy issues).

[87] U.S. CONST. art. V.

[88] *See Measures Proposed to Amend the Constitution*, U.S. SENATE, https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm (last visited Aug. 6, 2022) (noting there have been many attempts to amend the Constitution).

11,848 amendments to the Constitution.[89] Brenda Erickson of the National Conference of State Legislatures observes, "To date, Congress has submitted [thirty-three] amendment proposals to the states, [twenty-seven] of which were ratified."[90] While the Twenty-Seventh Amendment prevents Congress from granting itself a raise to take effect in the current session,[91] and the Twenty-First Amendment repealed the Eighteenth Amendment's prohibition of alcohol,[92] other successful amendments did not curtail federal power—rather, they expanded it and congressional power specifically.[93] This is the inherent flaw in waiting for Congress to propose and pass amendments to the States. Congress seems unwilling, as a collective body, to restrain itself. Hence, Convention supporters are convinced that the only way to rein in federal powers is for the States to apply for a Convention and have any resulting amendments submitted to the States for ratification.[94]

There has never been an Article V Convention to propose amendments.[95] The closest we had to an Article V Convention was the original Constitutional Convention in 1787, which was convened by the founding States as a result of regional conventions and growing

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[89] *Id.*

[90] Brenda Erickson, *Amending the U.S. Constitution*, NAT'L CONF. STATE LEGISLATURES (Aug. 2017), https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx.

[91] U.S. CONST. amend. XXVII; Erickson, *supra* note 90.

[92] U.S. CONST. amend. XXI.

[93] *See, e.g.*, U.S. CONST. amend. XIV (including the Due Process Clause, the Privileges and Immunities Clause, and the Equal Protection Clause and giving Congress the power to enforce them); *id.* amend. XVI (giving Congress the power to tax income); s*ee also* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 132 n.80 (1993) (noting that the latter seventeen amendments, unlike the Bill of Rights, do not place substantive limits on governmental action).

[94] *See, e.g.*, Jakob Fay, *Prof. Rob Natelson Exposes Origins of Anti-Convention Talking Points*, CONVENTION STATES ACTION (Apr. 29, 2022), https://conventionofstates.com/news/prof-rob-natelson-exposes-origins-of-anti-convention-talking-points ("Whether they realize it or not, those who wish to restrain the federal government and yet oppose Article V[] have already accepted the premises of their political opponents. By using arguments contrived by corrupt politicians, they do a favor for those very politicians who care only to protect their own best interests. The Swamp wants us to believe that a convention would be a threat to our liberties because, in reality, a convention would actually be a threat to the Swamp itself."); CONVENTION STATES ACTION, https://conventionofstates.com (Mar. 29, 2022) (advocating for a Convention to limit federal power); *Application for a Convention of the States Under Article V of the Constitution of the United States*, AM. LEGIS. EXCH. COUNCIL, https://alec.org/model-policy/article-v-convention-of-the-states/ (Sept. 4, 2015) (providing a model application for the calling of a Convention of the States to limit the federal government); *see also* Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 3–5, 8–10 (2016) (insisting States should "play the primary role" in the amendment process and that "untrustworthy federal officials" will not provide solutions to a wayward federal government).

[95] Erickson, *supra* note 90.

dissatisfaction with the inherent weaknesses of the Articles of Confederation.[96] The principal weakness of the Articles of Confederation was the lack of centralized power to compel the States to assist the national government in addressing issues of common concern such as treaties with foreign powers, raising revenue, and national defense.[97] All the States but Rhode Island sent delegates to the first and only Convention.[98] While its original purpose was to strengthen the Articles, it ended up proposing its replacement, the United States Constitution,[99] which was ratified on June 21, 1788.[100]

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[96] *See Creating the United States: Road to the Constitution*, LIBR. CONG., https://www.loc.gov/exhibits/creating-the-united-states/road-to-the-constitution.html#skip_menu (last visited Oct. 10, 2022) ("Once peace removed the rationale of wartime necessity the weaknesses of the 1777 Articles of Confederation became increasingly apparent. . . . Nationalists, led by James Madison, George Washington, Alexander Hamilton, John Jay, and James Wilson, almost immediately began working towards strengthening the federal government. They turned a series of regional commercial conferences into a national convention at Philadelphia in 1787."); *see also* Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J.L. & PUB. POL'Y 61, 63–80 (2017) (explaining the history, methodology, and charge of the Constitutional Convention and how the Annapolis Convention, which was only attended by five States, was a causal force in its calling); *The Constitution: How Did It Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution/how-did-it-happen (last visited Oct. 9, 2022) ("[A] Grand Convention of state delegates . . . work[ed] on revising the Articles of Confederation.").

[97] *See* James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 IUS GENTIUM 5, 12 (2003) ("Most analyses of the Articles of Confederation stress the weaknesses that compelled adoption of the United States Constitution to cure. Those weaknesses were: 1) no central government authority to act directly on individuals and the states; 2) no central government authority to enforce treaties and central government laws; 3) no amendment of the Articles of Confederation without the unanimous consent of the states; 4) no proportional representation of the population in the central government; 5) no power in the central government to tax; 6) no power in the central government to print money; 7) no central government authority to regulate trade among the states; and 8) no central government courts or executive."); Printz v. United States, 521 U.S. 898, 945 (1997) (Stevens, J., dissenting) ("Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly. Thus, it raised an army and financed its operations by issuing requisitions to the constituent members of the Confederacy [i.e., the States], rather than by creating federal agencies to draft soldiers or to impose taxes. That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient.").

[98] Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1712 (2012).

[99] *See id.* at 1711 (explaining how the Convention proposed the Constitution, followed by the Constitution's ratification); LIBR. CONG., *supra* note 96 (explaining that the deficiencies in the Articles of Confederation led to the creation of the Constitution).

[100] *See, e.g.*, Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001) ("On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution."); *U.S. Constitution Ratified*, HISTORY, https://www.

Therein lies the dilemma. Americans are frustrated with a federal government grabbing more power over time,[101] and they cannot rely on Congress to consider their proposals to curtail federal power.[102] Those who want to retain aspects of the Founding Fathers' Constitution—namely, its limits on federal power (if all three branches of the government respect its original language) and its reiterations of the foundational, unalienable rights (i.e., the Bill of Rights)[103]—have legitimate fears that a Convention, not properly restrained, might replace the Constitution instead of merely adding amendments to curtail federal power (just as the prior Convention abandoned the Articles of Confederation).[104] We are damned if we do and damned if we do not.

III. TODAY'S RESOLUTION FOR CALLING A CONVENTION OF THE STATES

"Our convention would only allow the states to discuss amendments that[] 'limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials.'"[105] This is the general language today's advocates of a Convention endorse, with some

history.com/this-day-in-history/u-s-constitution-ratified (June 16, 2022) ("June 21, 1788: New Hampshire becomes the ninth and last necessary state to ratify the Constitution of the United States, thereby making the document the law of the land.").

[101] *See* Art Swift, *Majority in U.S. Say Federal Government Has Too Much Power*, GALLUP (Oct. 5, 2017), https://news.gallup.com/poll/220199/majority-say-federal-government-power.aspx (finding that 55% of Americans were of the opinion that the federal government was too powerful); Steven Webster, *Angry Americans: How Political Rage Helps Campaigns but Hurts Democracy*, CONVERSATION (Sept. 10, 2020, 7:48 AM), https://theconversation.com/angry-americans-how-political-rage-helps-campaigns-but-hurts-democracy-145819 (discussing how Americans' frustration with the federal government has caused trust in the government to decline for sixty years); Frank Newport, *Americans' Views on Federalism as States Take on More Power*, GALLUP (July 15, 2022), https://news.gallup.com/opinion/polling-matters/394823/americans-views-federalism-states-power.aspx (noting that, compared to 56% of Americans in 1936, 37% of Americans preferred a concentration of power in the federal government in 2016).

[102] *See* Jeffrey H. Anderson, *A Limited Government Amendment*, 5 NAT'L AFFS. 105, 105–06, 115–16, 119 (2010) (noting the expansion of federal power over time and that the responsibility to diminish such power lies with American citizens).

[103] *See* Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 593, 594 (2017) (expressing that the founding generation, from 1787–1791, understood the need for a Bill of Rights). *See generally infra* text accompanying notes 111–116 (listing several passages of the Constitution that limit the power of the legislature, the executive, and the judiciary).

[104] *See* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1512, 1528–30 (2010) (noting how the Philadelphia Convention went beyond the initial intent of amending the Articles of Confederation, recognizing that constitutional amendments restricting congressional or federal power do not typically succeed because of Congress's self interest in maintaining its power, and stating that a constitutional convention could turn into a runaway convention which would create undesirable consequences).

[105] *What's a Convention of States Anyway?*, CONVENTION STATES ACTION, https://conventionofstates.com (last visited July 21, 2022).

variation from State to State.[106] Even so, the three primary objectives of "limit[ing] the power and jurisdiction of the federal government, impos[ing] fiscal restraints, and plac[ing] term limits on federal officials" are reflected in most state legislatures' resolutions.[107] Indeed, a valid convention under Article V should address these objectives. My own state of Kansas recently attempted to pass such a resolution. It reads,

> The legislature of the state of Kansas hereby applies to the Congress of the United States, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government and limit the terms of office for officials of the federal government and members of the Congress of the United States.[108]

The Kansas House of Representatives failed to obtain the required two-thirds majority with just seventy-six "yeas" and forty-six "nays."[109] This resolution is consistent with the national organization's stated objectives, which are consistent with the resolutions either already passed or being considered by other States.[110]

IV. WHAT IS WRONG WITH THE CURRENT RESOLUTIONS?

What is wrong with the current Convention resolutions? To answer this question, one must first understand what the United States Constitution is:

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[106] *See, e.g.*, S. Res. 736, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014) ("Georgia hereby applies . . . for the calling of a convention of the states limited to proposing amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress."); S.J. Res. 4, 2016 Leg., Reg. Sess. (Okla. 2016) ("A Joint Resolution making two separate applications . . . to call a convention of the states under Article V of the United States Constitution for the purpose of proposing amendments to the United States Constitution related to balancing the federal budget, imposing fiscal restraints on the federal government, limiting the power and jurisdiction of the federal government and limiting the terms of office for its officials and for members of Congress . . . .").

[107] CONVENTION STATES ACTION, *supra* note 105; *Progress Map: States That Have Passed the Convention of the States Article V Application*, CONVENTION STATES ACTION [hereinafter *Progress Maps*], https://conventionofstates.com/states-that-have-passed-the-convention-of-states-article-v-application (last visited July 23, 2022) (showing that nineteen States have passed a Convention of States resolution).

[108] H.R. Con. Res. 5027, 89th Leg., Reg. Sess. (Kan. 2022).

[109] *HCR 5027*, KAN. LEGISLATURE, http://kslegislature.org/li/b2021_22/measures/vote_view/je_20220309112241_486856/ (last visited July 21, 2022).

[110] *See* sources cited *supra* note 106; *Progress Maps*, *supra* note 107 (stating that nineteen States have passed a resolution calling for an Article V Convention of States with language that the convention will "limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials" and that other States are currently considering such a resolution).

> A chief aim of the Constitution as drafted by the Convention was to create a government with enough power to act on a national level, but without so much power that fundamental rights would be at risk. One way that this was accomplished was to separate the power of government into three branches, and then to include checks and balances on those powers to assure that no one branch of government gained supremacy.[111]

In addition to checks and balances provided by three branches of government,[112] Article I, Section 8 enumerates the limited powers of the federal legislative branch;[113] Article II, Section 2 enumerates the executive branch's power;[114] and Article III, Section 2 defines the scope of the judicial branch's power.[115] Moreover, Amendments One through Nine define the unalienable rights of the people that the federal government cannot infringe upon, and the Tenth Amendment reserves to the States all powers not given to the federal government through the Constitution.[116] In summation, the Constitution's purpose is to (1) define the jurisdiction of the federal government and (2) limit its power.

Thus, when considering the prong of the resolution that calls for "limit[ing] the power and jurisdiction of the federal government," it seems to be an explicit mandate to rewrite the Constitution from top to bottom via the amendment process.[117] There is no limit to how far the Convention may take this mandate.

Those who claim that the fear of a runaway convention under the current resolution's provisions is unfounded (excluding the fiscal restraint and term limits provisions, which are specific) [118] either have not studied what the Constitution is or have not considered what their mandate demands. As the late Justice Antonin Scalia said, "A constitutional convention is a horrible idea. This is not a good century to write a

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[111] *The Constitution*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Oct. 8, 2022).

[112] *See* U.S. CONST. arts. I–III (creating the legislative branch in Article I, the executive branch in Article II, and the judicial branch in Article III, while enumerating certain powers and limitations of each); 16A AM. JUR. 2D *Constitutional Law* § 235, Westlaw (database updated Aug. 2022) (noting that reserving limited, distinct authority to each branch prevents a potentially dangerous "accumulation of all powers . . . in the same hands").

[113] U.S. CONST. art. I, § 8.

[114] *Id.* art. II, § 2.

[115] *Id.* art. III, § 2.

[116] *Id.* amends. I–X; *see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (stating that the Bill of Rights exists to protect the fundamental rights of the people from government interference); United States v. Darby, 312 U.S. 100, 123–24 (1941) (noting that the Tenth Amendment serves as a perfunctory reminder that powers not given to the federal government are reserved to the States).

[117] CONVENTION STATES ACTION, *supra* note 105.

[118] *See Progress Maps*, *supra* note 107 (stating the language of the current general resolution).

constitution." [119] Convention proponents respond to this quote by claiming that the Convention will merely propose amendments while a constitutional convention must be called to rewrite the Constitution.[120] This is semantics. One amendment could be worded to negate all federal power, negate jurisdiction of any or all branches of government, or even eliminate any or all of the first ten amendments, which have proven time and again to be necessary for preserving citizens' unalienable rights.[121] A limiting amendment may be more expansive than the status quo.

Distinguishing between an Article V Convention and a constitutional convention ignores the peril of unleashing a contemporary bunch of zealots, left- or right-wing, to amend the Constitution to their hearts' content. Indeed, three former Supreme Court Justices called for the elimination or restraint of the Second Amendment's right to keep and bear arms![122] The fact is that amendments can negate, expand, or restrict any right or enumerated power depending on the goals of the Convention's delegates.[123] While a number, and perhaps even a majority, of the delegates may be grounded in the same moral and religious beliefs as the Founders, in a post-modern world where moral relativism seems to dominate the American psyche and soul,[124] it is impossible to conceive of

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[119] Kim Wehle, *It's Very Difficult to Change the Constitution—On Purpose*, HILL (Nov. 5, 2018, 11:30 AM), https://thehill.com/opinion/immigration/414897-its-very-difficult-to-change-the-constitution-on-purpose/; Kevin Mooney, *Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free*, DAILY SIGNAL (May 11, 2015), https://www.dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/.

[120] *See* Abbott, *supra* note 94, at 35–40 (arguing that the Founders intended for an Article V convention to be limited to certain topics).

[121] Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 726–27, 730–31 (1981) (arguing that the Founders intended for all parts of the Constitution to be subject to amendment and even an amendment abolishing the Senate would be held valid under a holistic constitutional interpretation); *see, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958) (right to travel); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (expressive association); Texas v. Johnson, 491 U.S. 397 (1989) (symbolic speech); Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (free press); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (just compensation for takings); District of Columbia v. Heller, 554 U.S. 570 (2008) (bear arms).

[122] *See* McDonald v. City of Chicago, 561 U.S. 742, 911 (2010) (Stevens, J., dissenting) (arguing that the Second Amendment should be restricted and not incorporated against the States); *id.* at 922 (Breyer, J., dissenting) (stating, alongside former Justice Ginsburg, that the Second Amendment should not be incorporated against the States).

[123] *See* Linder, *supra* note 121, at 723, 732 (asserting that the "will of the people cannot be bound," and, therefore, the "law will eventually come to reflect the will of the people" as "constitutional decisionmaking always involves choices among ultimate values and goals").

[124] *See* William Lyons, *Why Postmodernism Is Poisoning American Politics Today*, KNOX NEWS. (May 11, 2022, 6:01 AM), https://www.knoxnews.com/story/opinion/2022/05/11/democracy-america-postmodernism-poisoning-politics-today/9716898002/ (noting that postmodernism is prevalent in today's society); *Americans Are Most Likely to Base Truth on Feelings*, BARNA (Feb. 12, 2002), https://www.barna.com/research/americans-are-most-

a scenario where almost all will. Why did Justice Scalia, an avowed textualist who applied the law consistently with the original public meaning of the Constitution in almost all of his opinions and resisted the expansion of federal powers,[125] believe that a constitutional convention was a horrible idea? Perhaps it was because the men and women who would represent the states could stray from the Founders' intentions.

Sadly, it seems the only way to assuage Convention proponents is to have faith that current and future politicians will respect the purpose of a limited, republican government. However, as we see increasing deficits, an exponentially growing national debt, and the claws of federal government digging deeper into people's personal, financial, professional, and even spiritual lives,[126] it is clear that we cannot sit back and do nothing.

So, what is the solution? It is a Convention called to draft very specific and limited amendments to restrain the most egregious encroachments on Americans' freedoms and liberties with safeguards to prevent it from exceeding the people's mandate. This begins with revising the resolution to specifically address the Convention's goal to restrict federal powers.

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likely-to-base-truth-on-feelings/ (indicating that 75% of people between the ages of eighteen and thirty-five and 60% of people aged thirty-six and older embrace the concept of moral relativism); David L. Holmes, *The Founding Fathers, Deism, and Christianity*, ENCYC. BRITANNICA (Dec. 21, 2006), https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214 (stating that most Founding Fathers were Christian); *Faith on the Hill*, PEW RSCH. CTR. (Jan. 4, 2021), https://www.pewresearch.org/religion/2021/01/04/faith-on-the-hill-2021/ (reporting that 88% of Congresspeople and 65% of the general public are Christian).

[125] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999) (discussing Scalia's dedication to a textualist and originalist judicial philosophy); Noel J. Francisco, *Justice Scalia: Constitutional Conservative*, 84 U. CHI. L. REV. 2169, 2169–70 (2017) (stating that Scalia believed in a separation of powers, which reduced the possibility of expanding federal power).

[126] *See* Amadeo, *supra* note 11 (demonstrating an overall increase in national deficit since 1929); Graph of U.S. National Debt over the Last 100 Years, *in Understanding the National Debt*, FISCALDATA.TREASURY.GOV, https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/ (last visited Oct. 10, 2022) (indicating that the national debt has an exponential growth rate); DIANE KATZ, FEDERALISM IN CRISIS: URGENT ACTION REQUIRED TO PRESERVE SELF-GOVERNMENT 16 (2021) ("The number and scope of private-sector mandates have grown without restraint for decades . . . ."), https://www.heritage.org/conservatism/report/federalism-crisis-urgent-action-required-preserve-self-government.

V. FIXES FOR VAGUENESS—FEDERAL POWERS THAT NEED TO BE STRICTLY DEFINED AND RESTRAINED

A. A Balanced Budget Amendment Is a Terrific Idea!

Our representatives in Washington, D.C., are spending money like drunken sailors.[127] Or, as Ronald Reagan put it, "[W]e could compare the big spenders in Congress with a drunken sailor out on a spree—but that would really be unfair to the sailor, because at least he's spending his own money."[128] The year Reagan was elected, the federal debt was $908 billion with a debt-to-gross-domestic-product (GDP) ratio of 32%.[129] By the end of 2021, the debt had increased exponentially to more than $29 *trillion* with a debt-to-GDP ratio of 124%.[130]

Measured against the size of the economy, the debt was around 61% of the GDP before the Great Recession of 2007–2009[131] and had risen to nearly 107% of the GDP right before the COVID-19 Pandemic.[132] By the end of the 2020 fiscal year, the debt was around 129% of the GDP.[133] While the debt-to-GDP ratio has moderately improved,[134] barring change in tax or spending policy, it will likely rise to levels never before seen in U.S. history. (The record—prior to the COVID-19 Pandemic—was set in 1946, after World War II, at 119% of the GDP.)[135]

To add to Ronald Reagan's observation, a drunken sailor also stops spending money when his wallet is empty. Perhaps a better analogy is that we are on the path of a runaway freight train pulling radioactive materials and poison gas without brakes or a conductor. A balanced-budget amendment may be the only way to stop the train before it runs

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[127] *See* Amadeo, *supra* note 11 (highlighting the increase in government spending over the years).

[128] Ronald Reagan, President, Remarks to the Students and Faculty at St. John's University in New York, New York (Mar. 28, 1985), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1985, at 356, 358 (1988).

[129] Amadeo, *supra* note 11; *see, e.g.*, *The Reagan Presidency*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, https://www.reaganlibrary.gov/reagans/reagan-administration/reagan-presidency (last visited Oct. 10, 2022) ("Ronald Reagan was elected President of the United States on November 4, 1980.").

[130] Amadeo, *supra* note 11.

[131] *Id.*; Anne Field, *What Caused the Great Recession? Understanding the Key Factors That Led to One of the Worst Economic Downturns in US History*, BUS. INSIDER, https://www.businessinsider.com/personal-finance/what-caused-the-great-recession (Aug. 8, 2022, 3:56 PM) (indicating that the Great Recession lasted from 2007 to 2009).

[132] *See* Amadeo, *supra* note 11 (stating that the debt-to-GDP ratio was 107% in 2019); Proclamation No. 9994, 3 C.F.R. 56 (2021) (declaring a pandemic in March 2020).

[133] Amadeo, *supra* note 11.

[134] *Id.* (reporting debt-to-GDP ratios of 124% and 123% in 2021 and 2022, respectively).

[135] *Id.*; Matt Phillips, *The Long Story of U.S. Debt, from 1790 to 2011, in 1 Little Chart*, ATLANTIC (Nov. 13, 2012), https://www.theatlantic.com/business/archive/2012/11/the-long-story-of-us-debt-from-1790-to-2011-in-1-little-chart/265185/.

off the track and takes out anyone and everything in its path.[136] The fiscal-restraint- or balanced-budget-amendment prong of the current resolution is, therefore, a terrific idea.

B. *An Amendment Defining Commerce and Interstate Commerce*

As previously stated, the terms "commerce" and "interstate commerce" have been twisted, manipulated, and expanded to the point where there is no practical limit to what Congress can do, and there is little that the Supreme Court will do to stop it.[137] Hence, the resolution should include an amendment that expressly defines these terms to mean what the Founders and even the Supreme Court in *Gibbons v. Ogden* defined them to mean: commerce is the sale or purchase of goods,[138] and interstate commerce is the sale or purchase of goods across state lines.[139] All commerce that is not across state lines, regardless of its "substantial economic effect," is not interstate commerce.[140] This definition excludes all agriculture and manufactured goods that never leave their states, and it allows businesses within the states to carry on their *intrastate* business

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[136] *See* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1106–07 (noting that supporters of a balanced-budget amendment believe in balancing the federal budget and thereby limiting spending through "[a] constitutional precommitment to balanced budgets"); *Balanced Budget Amendment: Pros and Cons*, PETER G. PETERSON FOUND., https://www.pgpf.org/budget-basics/balanced-budget-amendment-pros-and-cons (last visited Oct. 10, 2022) (explaining that a balanced-budget amendment will make annual budget deficits unconstitutional); Theodore P. Seto, *Drafting a Federal Budget Amendment That Does What It Is Supposed to Do (and No More)*, 106 YALE L.J. 1449, 1458, 1460, 1463 (1997) (naming three goals of a balanced-budget amendment, which include avoiding national bankruptcy, being fair to future generations, and remaining economically prudent).

[137] *See* Jason J. Heinen, *How the Constitution Draws A "Line in the Sand" for the Extent of Federal Control over Non-Navigable Waterways*, 5 LIBERTY U. L. REV. 115, 118, 120, 122–23, 129, 137 (2010) (explaining the immense expansion of federal power under the Commerce Clause); *supra* notes 36–43 and accompanying text (discussing how the term "commerce" was defined conservatively at the time of the founding); *supra* notes 57–63 and accompanying text (discussing the change in Commerce Clause jurisprudence since the Supreme Court's decision in *Wickard v. Filburn*).

[138] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (defining commerce as buying and selling or the interchange of commodities); *see* Berger, *supra* note 35, at 702–03 (explaining that the Founders understood commerce to mean trade and the interchange of goods between states).

[139] *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 194–95 (noting that interstate commerce must involve traffic that crosses a state's boundary line); Berger, *supra* note 35, at 703–04 (explaining that the Commerce Clause regulates trade crossing state lines).

[140] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1448 (1987) (critiquing the Supreme Court's conflation of intrastate transactions with instrumentalities of interstate commerce); *Gibbons*, 22 U.S. (9 Wheat.) at 194–95 (explaining commerce which does not affect or extend to another state cannot be regulated by the federal government as interstate commerce). *But see* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding Congress can regulate an activity under its interstate Commerce Power "even if [the] activity be local and though it may not be regarded as commerce").

without federal-government interference or subjection to federal tariff or taxation hurdles.[141]

C. *An Amendment Eliminating the Power to Tax and Spend for the General Welfare*

The federal government should not have the power to blackmail state legislatures into imposing health and welfare conditions as conditions precedent to recapturing their citizens' tax dollars from the federal coffers. Redistributing revenues to States must be limited to those necessary for other enumerated powers.[142] These existing expansive powers include the power to do the following:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
>
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
>
> To establish Post Offices and post Roads;
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
>
> To constitute Tribunals inferior to the supreme Court;

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[141] *See* United States v. Lopez, 514 U.S. 549, 585–86, 591 (1994) (Thomas, J., concurring) (explaining that the Founders' understanding of commerce did not include agriculture and manufacturing); United States v. E.C. Knight Co., 156 U.S. 1, 13–15 (1895) (noting that the wholly intrastate production of goods is not regulable under the Commerce Clause); Kidd v. Pearson, 128 U.S. 1, 21 (1888) ("If it be held that the term ['commerce'] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future . . . . [t]he result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."); United States v. Butler, 297 U.S. 1, 69 (1936) ("The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. 'Congress is not empowered to tax for those purposes which are within the exclusive province of the States.'" (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 199)); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 140 (1868) (holding that the Import-Export Clause only applies to foreign goods and not goods from other states, meaning States can impose uniform taxes on sales within their boundaries regardless of the state of origin of the goods and the merchant, and that Congress may only "interpose, by the exercise of [the Commerce Clause] power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another").

[142] *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 n.3 (1988) (explaining that James Madison interpreted the Spending Clause "to authorize Congress to spend only for those purposes that fell within [certain other enumerated powers]").

> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.[143]

Representative government exists in part to distribute funds for States to spend on health and welfare issues. People elect representatives and senators to ensure their representation in Congress.[144] Therefore, distribution of funds from the federal pocketbook should have no strings attached, and the resolution should include an amendment that eliminates the power to tax and spend for the general welfare. This leads to perhaps the most important amendment that, had the Founding Fathers' vision of republican government been honored, would have negated the need for a Convention in the first place.

D. *Repeal the Seventeenth Amendment!*

The United States is not a pure democracy—it is a republic.[145] This means that there is not one sovereign government but fifty-one: a federal

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[143] U.S. CONST. art. I, § 8, cls. 3–18.

[144] *See id.* art. I, §§ 1–2 (establishing that the U.S. House of Representatives is composed of members chosen from each state); *id.* amend. XVII (showing that the U.S. Senate is composed of members chosen from each state).

[145] *E.g.*, Todd Zywicki, *Repeal the 17th Amendment and Restore the Founders' Design*, J. FEDERALIST SOC'Y PRAC. GRPS., Sept. 2011, at 88, 88.

government that legislates and governs matters of common concern to the States and fifty sovereign States authorized to legislate and regulate the health and welfare of their citizens.[146] In this vein, the Tenth Amendment reserves to the States all powers not delegated by the Constitution to the federal government.[147] The Founders knew what would happen if individual states were engulfed into the federal government collective: the federal government would assert its oversized power resulting from a larger population over smaller, less populous states.[148] To prevent this engulfment, there are two houses in Congress: the House of Representatives, which provides for representation of the people by increasing the number of representatives in more populous states (a total of 435 people proportionally distributed based on population),[149] and a Senate, which consists of two senators from each state (currently a total of 100 people) who were originally supposed to be selected by their respective state legislatures.[150]

The Founders were brilliant. This scheme disincentivized senators from voting for measures that clashed with States' rights.[151] If a senator voted or threatened to vote against his State's instructions or interests, his State's legislature, while lacking the ability to immediately recall and

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[146] *See* Alden v. Maine, 527 U.S. 706, 714–15 (1999) (explaining that the Founders designed the American system of government to retain State sovereignty); THE FEDERALIST NO. 17, *supra* note 43, at 80–81 (Alexander Hamilton) (distinguishing between powers allotted to the national government for common concerns and powers allotted to the States for local concerns); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824) (stating that States have the power to provide for citizens' health); Stone v. Mississippi, 101 U.S. 814, 817–18 (1879) (stating that a State's police power includes the power to protect public health and morals).

[147] U.S. CONST. amend. X.

[148] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 511–12 (1997) (explaining that the Founders understood the States' need for protection from federal encroachment); THE FEDERALIST NO. 10, *supra* note 43, at 45 (James Madison) (describing that factions exist, so successful government must prevent the majority from oppressing the minority).

[149] U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 (explaining that representation in the House of Representatives is based on population, so more populous states have more representatives); *House of Representatives*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/House_of_Representatives_vrd.htm (last visited July 16, 2022) (stating that there are 435 voting members of the House of Representatives).

[150] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."), *amended by* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ."); *Senators*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm (last visited July 16, 2022) (stating that there are currently 100 senators in the Senate).

[151] *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 172–73 (1997) (explaining the checks on senators, like forced resignations and refusal to reelect, that discouraged voting against state interests).

replace him, could refuse to reelect him, and some senators chose to resign instead.[152]

The Seventeenth Amendment changed this provision by stripping state legislatures of the ability to appoint, instruct, and refuse to reelect senators: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote."[153] Hence, after the ratification of the Seventeenth Amendment, senators were elected in the same way as representatives, which made it impossible for state legislatures to not reelect senators when they voted for legislative enactments contrary to States' instructions or interests.[154] To make matters worse, senators serve six-year terms, so the people are stuck with senators three times longer than representatives and two years longer than the president.[155]

The original purpose of the Senate was to give the States veto power over laws that encroached on States' rights with the specters of non-reelection and forced resignation hanging over senators' heads when they considered voting against their States' interests.[156] This balance of power was eliminated by the Seventeenth Amendment and must be restored if we are to have any hope of scaling back federal powers. Repealing the Seventeenth Amendment will restore our republic and diminish the threat of "tyranny of the majority."[157]

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[152] *See id.* (explaining that States could control wayward senators by refusing to reelect them or forcing their resignations); Bybee, *supra* note 148, at 519, 526–27, 530 (describing how States could influence senators to follow instructions with the pressure of resignation or refusal to reelect).

[153] U.S. CONST. amend. XVII.

[154] *See* Bybee, *supra* note 148, at 535–36, 557 (explaining that state legislatures lost considerable control over senators on the passage of the Seventeenth Amendment); Zywicki, *supra* note 151, at 175 (stating that senators were not accountable to state legislatures after the passage of the Seventeenth Amendment); U.S. CONST. art. I, § 2, cl. 1 (noting that state representatives are elected by the people of the state).

[155] U.S. CONST. amend. XVII (stating that senators' terms last six years); *see id.* art. I, § 2, cl. 1 (stating that Representatives in the House serve two-year terms); *id.* art. II, § 1, cl. 1 (stating that presidents' terms last four years).

[156] *See* THE FEDERALIST NO. 62, *supra* note 43, at 320 (James Madison) (stating that the purpose of the state selection of senators was to secure state power and protect the federal system by providing a check on federal power); *see also* Zywicki, *supra* note 151, at 172–73 (explaining that the Senate was designed to give States a voice in the federal government and that States could protect their rights through the instruction of senators and the looming threats of forced resignation or refusal to reelect); Bybee, *supra* note 148, at 516 (explaining that the Senate gave States a negative veto to protect against encroachment of the federal government).

[157] *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 239–41 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chi. Press 2000) (1992) (1835) (using the phrase "tyranny of the majority" to explain how the will of the majority can oppress the minority).

E. *Congress Should Have the Same Power to Check the Court as the Court Has to Check Congress and the President Has to Check Congress*

The first impact of *Marbury v. Madison*, negating an unconstitutional exercise of power by Congress,[158] was valid and necessary. However, the final impact, giving the Court the final say on the constitutionality of legislative and executive powers,[159] was the catalyst for many of the problems we face with an encroaching federal government. Once the Court deems a law unconstitutional, the ability to scale back such decisions is very limited.[160] While Congress may enact legislation in response to the Court's decisions on statutory interpretation, reversing constitutional decisions requires either a constitutional amendment or a new Supreme Court ruling.[161] When a constitutional amendment is necessary, the Court's decision is final because Congress's exercise of its Article V amendment authority often fails.[162] Most concerning is the fact that Supreme Court Justices are appointed for as long as they choose to remain on the Court.[163] The people cannot vote them out of office.[164] Congress may impeach them, but no Supreme Court Justice has ever been removed from

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[158] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 176–77, 180 (1803).

[159] *Id.* at 166, 177–78, 180 (claiming that the essence of the Court's duty is to resolve conflicts between laws and the Constitution); *see* John DiPippa, Marbury v. Madison*: A Sovereign People Governed by Law*, ARK. LAW., Summer 2003, at 8–9 (explaining that *Marbury v. Madison* gave the judiciary the final say on the constitutionality of executive powers and legislative actions).

[160] *See* Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1177–79 (2009) (explaining that the Supreme Court's constitutional decisions are the most difficult to change); Michael Paisner, Note, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 539–41 (2005) (describing Congress's intention to correct the Court's constitutional decision in *Employment Division v. Smith* by passing RFRA and the Court's subsequent use of its power to decide constitutional issues by striking down RFRA in *City of Boerne v. Flores*).

[161] *The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited July 21, 2022); *see* Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1099 (1993) (noting the ease with which Congress enacted statutes overturning "sixteen Supreme Court decisions interpreting civil rights statutes").

[162] *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427–29 (1983) (explaining that Congress's proposed amendments rarely receive sufficient votes to be sent to the States).

[163] *See* U.S. CONST. art. III, § 1 (stating that Supreme Court Justices serve during good behavior); Abrams, *supra* note 7, at 75 (noting that "good behavior" describes a "life tenure subject to impeachment").

[164] *See* U.S. CONST. art. III, § 1 (explaining that Supreme Court Justices serve during good behavior); *id.* art. II, § 2, cl. 2 (providing for presidential appointment of Supreme Court Justices); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 809 (2006) ("[T]he only democratic control over the Supreme Court beyond the selection and removal of its members is the very remote possibility that its decisions will be overturned by constitutional amendment.").

the bench via the impeachment process,[165] although Abe Fortas resigned in 1969 over the threat of impeachment.[166]

The Convention should include in its mandate an amendment that empowers Congress to reverse Supreme Court decisions with a super-majority vote of both houses, such vote being the final word on whatever issue is addressed by the Court's opinion and resulting vote. This will restore the balance of power contemplated by the Founders. Each branch will have the ability to check the others, and the final word will be given by representatives elected by the people and not appointed for life. Moreover, this amendment should address the Court's power to determine whether an emergency exists justifying emergency spending that results in a deficit. Only Congress should have the authority to define "emergency" and set budgets for federal spending.

F. *Term Limits*

Our Founding Fathers envisioned a government composed of "citizen legislators" who serve their country for a time after building successful careers and then return to the private sector to live under the laws they made while serving.[167] As Benjamin Franklin put it, "In free governments, the rulers are the servants, and the people their superiors . . . . For the

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[165] *See* J. Stephen Clark, *Senators Can't Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 362 (2017) (explaining that the Founders understood the impeachment clauses in the Constitution to apply to Supreme Court Justices as well as the president); THE FEDERALIST NO. 79, *supra* note 43, at 409–10 (Alexander Hamilton) (stating that the House and Senate's powers of impeachment apply to Supreme Court Justices); Calabresi & Lindgren, *supra* note 164, at 810 ("In 217 years of American constitutional history, not a single Justice has ever been successfully impeached and removed from office by the Senate.").

[166] Elizabeth Nix, *Has a U.S. Supreme Court Justice Ever Been Impeached?*, HISTORY, https://www.history.com/news/has-a-u-s-supreme-court-justice-ever-been-impeached (Apr. 7, 2022).

[167] *See* Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 630–31 (1996) (describing the idea of a citizen legislator as an ordinary citizen who leaves the private sector for a few years to serve in Congress before returning to his ordinary life); Bybee, *supra* note 148, at 532–34 (describing various Founders' statements that senators should serve for limited durations); Paul Jacob, *From the Voters with Care*, *in* THE POLITICS AND LAW OF TERM LIMITS 27, 34–35 (Edward H. Crane & Roger Pilon eds., 1994) (identifying the wishes of various Founders, including Thomas Jefferson and James Madison, for those holding public office to be subject to term limits, making them citizen legislators).

former, therefore, to return among the latter, was not to *degrade*, but to *promote*, them."[168] We are far removed from this ideal.[169]

Consider three of the most prominent politicians in the United States today. Most of President Joe Biden's private-sector experience consists of his time practicing law after graduating from law school in 1968.[170] He was elected to the Senate in 1972.[171] He served in the Senate for thirty-six consecutive years until he became vice president to President Barack Obama in 2009.[172] He served in that capacity through January 2017.[173] He became president in 2021.[174] Thus, Biden has been an elected politician for almost forty-six of his fifty-four years following law school graduation.[175] Moreover, Biden worked as a public defender following law school.[176] He has been a public servant—totally dependent on government largesse—for the majority of his career.[177] President Biden was born November 20, 1942, and is eighty years old at the time of publication.[178]

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[168] Statement of Benjamin Franklin, Debates in the Federal Convention (July 26, 1787), *in* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 368, 369 (Jonathan Elliot ed., Philadelphia 1891) (emphasis added).

[169] *See* Bybee, *supra* note 148, at 534–35 (explaining that there was high turnover in the early Senate because senators did not consider political office as a career).

[170] Brian Duignan, *Joe Biden*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Joe-Biden (July 21, 2022) (noting Biden practiced law after graduating from law school in 1968 and began serving in politics in 1970).

[171] *Id.*

[172] *Joe Biden*, BIOGRAPHY, https://www.biography.com/us-president/joe-biden (May 3, 2021) (explaining that Biden's Senate career ended in 2009 when he became vice president); *Longest-Serving Senators*, U.S. SENATE (Aug. 25, 2022), https://www.senate.gov/senators/longest_serving_senators.htm (showing Joe Biden served over thirty-six consecutive years in the Senate, beginning in January 1973 and ending in January 2009).

[173] *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/ (last visited Aug. 18, 2022).

[174] Duignan, *supra* note 170.

[175] *See Joe Biden*, BALLOTPEDIA, https://ballotpedia.org/Joe_Biden (last visited Aug. 14, 2022) (illustrating that Biden graduated law school fifty-four years ago and has served as an elected politician for nearly forty-six of those years).

[176] Steven Levingston, *Joe Biden: Life Before the Presidency*, MILLER CTR., https://millercenter.org/joe-biden-life-presidency (last visited July 24, 2022).

[177] *See id.* (explaining that Biden created the Biden Foundation and the Biden Cancer Initiative after leaving the Vice Presidency in 2017 before suspending operations in 2019 to run for president); Henry J. Gomez, *Joe Biden's Time as a Public Defender Was a Brief Line on His Resume. Now It's a Virtue Signal for His Campaign*, BUZZFEED NEWS (July 25, 2019, 9:29 AM), https://www.buzzfeednews.com/article/henrygomez/joe-biden-public-defender (explaining that Biden started work as a public defender January 1, 1969); JULES WITCOVER, JOE BIDEN: A LIFE OF TRIAL AND REDEMPTION 51–56 (2019) (explaining the work Biden did before being elected to the Senate).

[178] Levingston, *supra* note 176.

Nancy Pelosi is a U.S. Representative from California.[179] She is also Speaker of the House of Representatives.[180] Speaker Pelosi graduated with an undergraduate degree from Trinity College in 1962, and she has never held a job in the private sector.[181] She was involved in California politics for years before her run for Congress in 1987, the year she was first elected.[182] She has served in Congress continuously since 1987, going on eighteen terms, or thirty-five years, so far.[183] Speaker Pelosi was born on March 26, 1940, and is eighty-two years old at the time of publication.[184]

Mitch McConnell is a U.S. Senator from Kentucky.[185] He has made a career of public service in various capacities: intern for Senator John Sherman Cooper on Capitol Hill, chief legislative assistant to Senator Marlow Cook, Deputy Assistant Attorney General to President Gerald Ford, and judge-executive of Jefferson County, Kentucky, between 1978 and 1985, when he began his Senate term.[186] He has served as senator for thirty-seven consecutive years.[187] He has been Senate Majority Leader and has continuously served as Republican Leader of the Senate since

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[179] *Nancy Pelosi*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Nancy-Pelosi (Aug. 2, 2022); *Full Biography*, CONGRESSWOMAN NANCY PELOSI, https://pelosi.house.gov/biography-0 (last visited Aug. 13, 2022).

[180] ENCYC. BRITANNICA, *supra* note 179; CONGRESSWOMAN NANCY PELOSI, *supra* note 179.

[181] *See* ENCYC. BRITANNICA, *supra* note 179 (stating that Nancy Pelosi graduated from Trinity College in 1962); Molly Ball, *Nancy Pelosi Doesn't Care What You Think of Her. And She Isn't Going Anywhere*, TIME (Sept. 17, 2018), https://time.com/magazine/us/5388333/september-17th-2018-vol-192-no-11-u-s/ (explaining that Pelosi was a stay-at-home mom before getting involved in politics and eventually running for office in 1987); *Nancy Pelosi: How She Rose to the Top – and Stayed There*, BBC (Aug. 2, 2022), https://www.bbc.com/news/world-us-canada-55518870 (mentioning that Pelosi became involved in politics beginning in 1976); *Nancy Pelosi*, BALLOTPEDIA, https://ballotpedia.org/Nancy_Pelosi (last visited Aug. 13, 2022) (noting Pelosi's years volunteering with the Democratic Party before being elected in a special election in 1987).

[182] *See* Ball, *supra* note 181 (noting Pelosi became involved in politics after receiving a call from Joseph Alioto in 1975); BBC, *supra* note 181 (explaining that Pelosi comes from a political family and first became involved in politics in 1976); BALLOTPEDIA, *supra* note 181 (stating that she was the chair of the California State Democratic Party from 1981–1983 and the finance chairman of the Democratic Senatorial Campaign Committee before being elected to the House in 1987).

[183] Patrizia Rizzo, *How Long Has Nancy Pelosi Been in Office?*, U.S. SUN, https://www.the-sun.com/news/2107627/house-speaker-nancy-pelosi-government-career-california/ (Jan. 26, 2022, 11:14 AM); *Representative Nancy Pelosi*, CONGRESS.GOV, https://www.congress.gov/member/nancy- pelosi/P000197?q=%7B%22sponsorship%22%3A%22sponsored%22%7D (last visited Aug. 18, 2022).

[184] ENCYC. BRITANNICA, *supra* note 179.

[185] *Mitch McConnell*, BALLOTPEDIA, https://ballotpedia.org/Mitch_McConnell (last visited Aug. 12, 2022).

[186] *Biography*, U.S. SENATOR MITCH MCCONNELL, https://www.mcconnell.senate.gov/public/index.cfm/biography (last visited July 11, 2022).

[187] *Longest-Serving Senators*, U.S. SENATE, https://www.senate.gov/senators/longest_serving_senators.htm (Aug. 25, 2022).

2007.[188] Senator McConnell was born on February 20, 1942, and is eighty years old at the time of publication.[189]

The lengths of service for the above seem extreme, especially considering that it is highly unlikely any of these people will ever return to work in the private sector given that they are already octogenarians.[190] Yet such extreme lengths of service are not the exception for modern politicians but the rule. Consider the top five lengths of service for Senators:

1. Robert C. Byrd (D-WV) 51 years, 5 months, 26 days
2. Daniel K. Inouye (D-HI) 49 years, 11 months, 15 days
3. Strom Thurmond (D-SC) 47 years, 5 months, 8 days
4. Patrick J. Leahy (D-VT) 47 years, 7 months, 22 days
5. Edward M. Kennedy (D-MA) 46 years, 9 months, 19 days[191]

The U.S. House of Representatives is similar:

1. John Dingell, Jr. (D-MI) 59.06 years
2. Jamie L. Whitten (D-MS) 53.17 years
3. John Conyers, Jr. (D-MI) 52.92 years
4. Carl Vinson (D-GA) 50.17 years
5. Emanuel Celler (D-NY) 49.84 years[192]

The term "career politician" seems more appropriate than "citizen legislator."

Opponents of term limits argue that the more seniority a representative or senator has, the more advantages he has in negotiating legislation to benefit his constituents.[193] They also argue that the best way to work up to a leadership position is through seniority. The more

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[188] *See* Chelsey Parrott-Sheffer, *Mitch McConnell*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Mitch-McConnell (Sept. 1, 2022) (stating that McConnell has served consecutively as Republican majority or minority leader since 2007); *Complete List of Majority and Minority Leaders*, U.S. SENATE, https://www.senate.gov/senators/majority-minority-leaders.htm (last visited Aug. 23, 2022) (listing McConnell as majority or minority leader from the 110th Congress through the 117th Congress).

[189] Parrot-Sheffer, *supra* note 188.

[190] *See generally* Roxanne Roberts, *This Senate Is the Oldest in American History. Should We Do Anything About It?*, WASH. POST (June 2, 2021, 6:00 AM), https://www.washingtonpost.com/lifestyle/2021/06/02/senate-age-term-limits (discussing the advanced ages of many senators).

[191] U.S. SENATE, *supra* note 187. Senator Leahy is the only one still serving. *Id.*

[192] *Members with 40 Years or More House Service*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Seniority/40-Years/ (Mar. 21, 2022).

[193] *See, e.g.*, ORRIN HATCH, CONGRESSIONAL TERM LIMITS, S. REP. NO. 104-158, at 7–11, 20–21, 23 (1995) (documenting statements from Senators Hatch, Biden, and Leahy opposing or expressing serious concern over a term-limit amendment to the Constitution because it would destroy the seniority system which allows states, especially small ones, to benefit from the advantages of senior Congressmen, including power, influence, and track record).

seniority one has, the more leadership roles one earns.[194] The more leadership roles a person has, the more he can impact legislation.[195] Again, longer service means better deals for constituents.[196]

However, with term limits, such roles would likely go to representatives and senators with more qualifications and thus be based on merit—not service length.[197] Smarter and more capable people would fill leadership roles instead of those more entrenched in a system that rewards corruption and abuse.[198] More importantly, term limits are needed to remind legislators of the Founding Fathers' belief in the concept

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[194] *See id.* at 10 (documenting Senator Hatch's statement that the seniority system "provid[es] a clear basis for leadership selection"); James K. Pollock, Jr., *Seniority Rule in Congress*, 222 N. AM. REV. 235, 235–36 (1926) (noting that both parties generally make important committee assignments based on seniority); Garrett, *supra* note 167, at 662–64 (explaining that the seniority system is entrenched in both houses of Congress as "the over-riding consideration in the appointment of committees and congressional leaders").

[195] *See* Rebecca S. Natow, *The Importance of Congressional Leadership for Higher Education Policy*, ROCKEFELLER INST. GOV'T (Jan. 4, 2021), https://rockinst.org/blog/the-importance-of-congressional-leadership-for-higher-education-policy (discussing the powers and importance of congressional leadership in policy decisions); *cf.* Christopher R. Berry & Anthony Fowler, *Cardinals or Clerics? Congressional Committees and the Distribution of Pork*, 60 AM. J. POL. SCI. 692, 693, 705 (2016) (finding that chairs and ranking members of congressional appropriation committees secure more money for their constituencies than non-leadership members).

[196] *See* Natow, *supra* note 195 (noting that congressional leaders carry great influence in the Senate); Casey Burgat, *Five Reasons to Oppose Congressional Term Limits*, BROOKINGS (Jan. 18, 2018), https://www.brookings.edu/blog/fixgov/2018/01/18/five-reasons-to-oppose-congressional-term-limits/ (arguing that constituents lose the expertise and experience of their congressmen if term limits are imposed).

[197] *Frequently Asked Questions*, Answer to *Will Congressional Term Limits Hurt My State?*, U.S. TERM LIMITS, https://www.termlimits.com/frequently-asked-questions (last visited Aug. 8, 2022); *see* DAN GREENBERG, HERITAGE FOUND., BACKGROUNDER NO. 994, TERM LIMITS: THE ONLY WAY TO CLEAN UP CONGRESS 9–10 (1994) (noting that term limits would make leadership positions merit based rather than seniority based).

[198] *See* GREENBERG, *supra* note 197 (noting that term limits would cause leadership positions to be assigned by merit and provide less opportunity for abuse of power). While corruption may not be overtly seen in Congress, there are many indicators of corrupt practices. *See, e.g.*, Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 675 (2004) (finding that senators outperform the stock market by large margins); Lynn Stuart Parramore, *Alexandria Ocasio-Cortez Is Right About Corruption in Congress*, NBC NEWS (Mar. 4, 2019, 9:02 AM), https://www.nbcnews.com/think/opinion/alexandria-ocasio-cortez-right-about-corruption-congress-ncna975906 (reporting that Senators outperform Warren Buffett in their investments); Jon Thurber, *Bobby Baker, Protege of Lyndon Johnson Felled by Influence-Peddling Scandal, Dies at 89*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/local/obituaries/bobby-baker-protege-of-lyndon-johnson-felled-by-influence-peddling-scandal-dies-at-89/2017/11/17/ffb7ce04-cc06-11e7-b0cf-7689a9f2d84e_story.html (recounting (1) how a staffer for Senate leadership, who later became then-Senator Lyndon Johnson's aide, would take advantage of some legislators' vices, such as cash or alcohol, in brokering agreements for pet legislative projects, (2) how senators would accept gifts from patrons who had "special axes to grind," and (3) how senators would use their positions to gain loans or credit they probably could not otherwise obtain).

of citizen legislators: "[W]hen politicians know they must return to ordinary society and live under the laws passed while they were in government, at least some of them will think more carefully about the long-term effects of the programs they support."[199]

Consider just a few of the laws Congress has passed that representatives and senators have been (and in some cases still are) exempt from:

- In 1938, when the Fair Labor Standards Act established the minimum wage, the forty-hour workweek, and time and a half for overtime, Congress was exempted.[200] As a result, for decades, congressional employees were left without the protections afforded to Americans working in private industry.[201]
- Congress exempted itself from compliance with the Civil Rights Act of 1964, which outlawed discrimination based on "race, color, religion, sex or national origin."[202]
- Congress doubled down on discrimination exemption by exempting itself from the Civil Rights Act of 1991.[203]
- At least in application, Congress exempted itself from some provisions of the Affordable Care Act.[204]

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[199] Lawrence W. Reed, *Why Term Limits?*, FOUND. ECON. EDUC. (May 1, 2001), https://fee.org/articles/why-term-limits/ (summarizing Benjamin Franklin's perspective on the citizen legislator); *see supra* note 167 and accompanying text; *see also, e.g.*, Statement of George Mason, Debates in the Federal Convention (July 26, 1787), *in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, *supra* note 168, at 368, 368–69 (stating that government officials ought to return to citizen life "in order that they may feel and respect those rights and interests which are again to be personally valuable to them" while proposing a singular, seven-year term limit on the Presidency).

[200] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 3, 6–7, 52 Stat. 1060, 1060, 1062–63 (current version at 29 U.S.C. §§ 203, 206–207) (excluding originally "the United States or any State or political subdivision of a State" from the definition of "employer").

[201] *See* Congressional Accountability Act of 1995, Pub. L. No. 104-1, §§ 102(a)(1), 203(a)(1), 109 Stat. 3, 5, 10 (current version at 2 U.S.C. §§ 1301(a)(1), 1313(a)(1)) (making the Fair Labor Standards Act of 1938 applicable to the legislative branch of the Federal Government more than fifty years after its original passage).

[202] Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 703(a), 78 Stat. 241, 253–55 (codified as amended in 42 U.S.C. §§ 2000e(b), 2000e-2(a)) (excluding branches of the United States government from its definition of "employer" under the Act).

[203] Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101(c), 102, 105 Stat. 1071, 1072–73 (codified as amended at 42 U.S.C. §§ 1981(c),1981a(b)(1)) (exempting government entities from liability for punitive damages in cases of intentional employment discrimination).

[204] *See* Michael F. Cannon, *Congress Is Getting a Special Exemption from Obamacare—and No, It's Not Legal*, FORBES (Apr. 15, 2016, 12:26 PM), https://www.forbes.com/sites/michaelcannon/2016/04/15/congress-is-getting-a-special-exemption-from-obamacare-and-no-its-not-legal/?sh=514fe3377823 (alleging that federal administrative workers gave Congress an exemption from ObamaCare); 42 U.S.C.

- Finally, while a person would ordinarily face prison time for violating the Security and Exchange Commission's rules against insider trading,[205] members of Congress are mostly free to buy and sell stocks based on their knowledge that laws will be passed that increase or decrease stock prices.[206]

Thus, the concern of some Founding Fathers that professional politicians would remain in office as long as they profited from their public service and never return to the private sector where they would be subject to their own laws is valid.[207] The list of politicians who entered office as middle-class Americans and left office worth tens of millions of dollars is too numerous to exhaustively list here.[208] The only way to reset our governing

§ 18032(d)(3)(D) (stating that members of Congress and congressional staff are only eligible for plans created under the Act); Gregory Korte, *Why Congress Is (or Isn't) Exempt from Obamacare*, USA TODAY, https://www.usatoday.com/story/news/politics/2013/09/27/is-congress-exempt-from-obamacare/2883635 (Sept. 27, 2013, 6:44 PM) (noting that congressional personnel have access to a subsidy that offsets the cost of purchasing health insurance under the Affordable Care Act).

[205] *See* 17 C.F.R. § 240.10b-5 to 240.10b5-1 (2021) (prohibiting insider trading); 15 U.S.C. § 78ff(a) (authorizing criminal penalties for natural persons up to $5,000,000 or twenty years in prison for violating securities laws); *Insider Trading*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/what-is-insider-trading/ (Jan. 22, 2022) (naming one of the penalties for insider trading as twenty years of imprisonment).

[206] *See* Rey Mashayekhi, *Blind Trusts, Inside Information, and the 'Mosaic Theory': Why Charging Members of Congress with Insider Trading is So Fraught*, FORTUNE (Apr. 23, 2020, 8:30 AM), https://fortune.com/2020/04/23/congress-senators-insider-trading-stocks-kelly-loeffler-richard-burr-stock-act-laws-blind-trusts-mosaic-theory/ (noting that the applicability of federal securities laws to Congress had been a "legal gray area" prior to the STOCK Act); Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, FORBES (May 26, 2020, 9:28 PM), https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges/?sh=d74bd827ba60 (noting that no member of Congress has ever been prosecuted under the STOCK Act); Danielle Caputo et al., *Part 2 – The STOCK Act: The Failed Effort to Stop Insider Trading in Congress*, CAMPAIGN LEGAL CTR. (Feb. 18, 2022), https://campaignlegal.org/update/part-2-stock-act-failed-effort-stop-insider-trading-congress (noting how the STOCK Act suffers from a lack of enforcement).

[207] *See* Bybee, *supra* note 148, at 532–34 (discussing the Founding Fathers' general support for regular rotation of legislators); *see also, e.g.*, Reed, *supra* note 199 (quoting Benjamin Franklin's opinion that a government official's return to "the people" constituted a promotion, not a degradation).

[208] *See, e.g.*, Sarah Rosier, *Changes in Net Worth of U.S. Senators and Representatives (Personal Gain Index)*, BALLOTPEDIA (July 24, 2014), https://ballotpedia.org/Changes_in_Net_Worth_of_U.S._Senators_and_Representatives_(Personal_Gain_Index) (calculating that freshmen members of the 112th Congress saw their net worth go up by an average of fifty percent over three years); Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress Are Millionaires*, OPENSECRETS (Apr. 23, 2020, 9:14 AM), https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires (noting that Representative Collin Peterson's net worth grew from $125,500 to $4.2 million, Representative Judy Chu's net worth grew from less than six figures to $7.1 million, Senator Roy Blunt's net worth grew from $602,000 to $10.7 million, and that more than half of all members of Congress are millionaires).

bodies to reflect the people's interests and not their own is to impose term limits on national office-holders. It is good enough for the president,[209] so why not Congress? The number of terms that is ideal is up for debate,[210] but the only body willing to consider this issue and put it before the people via a constitutional amendment would be a Convention. Suffice it to say, we cannot count on Congress to limit its ability to profit from decades of congressional service.

To summarize, resolutions of the States should expressly state *what* amendments the Convention will debate and consider and not permit the Convention to gut the checks and balances already contained within the Constitution. These amendments should be limited to:

1. *A balanced-budget amendment;*
2. *An amendment defining commerce and interstate commerce;*
3. *An amendment eliminating the power to tax and spend for the general welfare;*
4. *An amendment repealing the Seventeenth Amendment (the most important);*
5. *An amendment giving Congress power to check the Supreme Court via super-majority votes in both houses; and*
6. *An amendment setting term limits in both houses of Congress.*

VI. PROCEDURAL SAFEGUARDS ON THE CONVENTION—WAYS TO PRESERVE ITS INTEGRITY AND PREVENT CONGRESS FROM MEDDLING

Now that we have considered how to restrain the Convention to specific amendments and thereby prevent a runaway Convention, we must consider how to ensure that the purpose of the Convention—to rein in a runaway federal government—is preserved. To start, let us consider the pertinent part of Article V: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[211]

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[209] *See* U.S. CONST. amend. XXII, §1 (placing term limits on the office of the president); *see also* Gideon Maltz, *The Case for Presidential Term Limits*, 18 J. DEMOCRACY 128, 131 (2007) (discussing how an alternation of power avoids a monarchy and prevents a president from becoming dangerously powerful).

[210] *See, e.g.*, Mark P. Petracca, *In Defense of Congressional Term Limits*, 3 DIGEST: NAT'L ITALIAN AM. BAR ASS'N L.J. 75, 83–84 (1994–1995) (suggesting a two-term limit for the Senate and a four-term limit for the House of Representatives); Ashley Oravetz, Comment, *Congressional Term Limits: The Right Idea, the Wrong Numbers. A Proposal in Favor of Increased Term Limits for Congress*, 46 U. DAYTON L. REV. 55, 70 (2020) (suggesting a three-term limit for the Senate and a five-term limit for the House, although implicitly accepting the possibility of congressional victories via write-in campaigns); John David Rausch, Jr., *When a Popular Idea Meets Congress: The History of the Term Limit Debate in Congress*, 1 POL. BUREAUCRACY & JUST. 34, 34 (2009) (chronicling term-limit proposals by members of Congress over the years).

[211] U.S. CONST. art. V.

What is most curious about the Convention option in Article V is that it lacks direction for the resulting Convention; there are no procedural rules or even a mode of determining such rules.[212] Will the number of delegates sent to the Convention be proportionate to population? If so, we will have the same problem our Founders sought to prevent by implementing equal state representation in the Senate and election of the president via the Electoral College, which was and is essential to prevent "tyranny by majority."[213] What constitutes a quorum? Must all States' delegates be present for votes on amendments? May the Convention vote on proposed amendments without at least one delegate of each State present? What if some States include in their resolutions provisions that recall delegates if the Convention discusses amendments that even the bottomless "jurisdiction and power" provision does not cover? There is nothing in Article V to dissolve the Convention if the number of participating States drops below two-thirds of the States, so we could end up with proposed amendments that were not passed by a Convention representing two-thirds of the States.

All of these considerations, seriously considered, might not compel staunch supporters of the Convention movement to rethink their positions. However, there is one that should.

The national resolution and the several States' resulting resolutions are silent on all of the above procedural safeguards.[214] Hence, in the event the current resolutions are passed by two-thirds of the States, the plain

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[212] *Id.*

[213] While the phrase "tyranny by majority" appears to have never been used by the Founders in connection directly with the electoral college or equal representation in the Senate, the Founders' intention that the raw, democratic will of the populace be tempered with the representation of individual States is evident. *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 43, at 197 (James Madison) (noting that the ratio of electoral college votes per state represents the States partially as equals and partly by population); THE FEDERALIST NO. 60, *supra* note 43, at 311 (Alexander Hamilton) (arguing that the varied modes of selection for the House of Representatives, the Senate, and the presidency hedge against government partiality since there is "little probability of a common interest"); Amanda Onion, *How the Great Compromise and the Electoral College Affects Politics Today*, HISTORY, https://www.history.com/news/how-the-great-compromise-affects-politics-today (Mar. 21, 2019) (describing how the Founders created the Senate to prevent the more populous states from dominating over less populous states); Debates in the Federal Convention (July 18, 1787), *in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, *supra* note 168, at 362, 365–67 (recording the discussions of various Framers during the Constitutional Convention who, while considering the mode for electing the President, were concerned that larger States would dominate over smaller ones if there was an election by the people).

[214] *See* CONVENTION STATES ACTIONS, *supra* note 13 (providing a national model resolution); *Model Article V Term Limits Convention Application*, U.S. TERM LIMITS, https://www.termlimits.com/model-article-v-term-limits-convention-application (last visited Aug. 4, 2022) (similar); *see also, e.g.*, H. 3205, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2022) (providing the text of the South Carolina convention petition); Legis. Res. 14, 107th Leg., 2d Session (W. Va. 2022) (providing the text of the West Virginia convention petition).

language of Article V seems to imply that Congress will set such parameters. Consider again the pertinent part: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[215] Hence, although two-thirds of the States apply to Congress for a Convention, it is Congress that calls "a Convention for proposing Amendments."[216] Consequently, Congress will set all procedures for the resulting Convention.[217]

If Congress considers the current bare-bones resolutions, Congress will have a mandate to:

- Determine whether delegates are proportional to population (similar to how congressional representatives are apportioned) or per state (such as senators, an equal number for eachregardless of population or size).
- Allow votes and debate on amendments without delegates from all states present.
- Determine what constitutes a quorum, which could result in debates and votes on amendments without input from all state delegates. (Assuming Congress would not dare consider a majority of a quorum, which could be less than the majority of all delegates, sufficient to pass a proposed amendment.)
- Permit the Convention to continue if States withdraw support to below two-thirds of States *after* Congress calls a Convention and it begins deliberations.
- Decide whether the Convention may consider issues not stated in the resolutions or define what the resolutions' provisions mean.

Although any involvement of Congress in the Convention process will anger Convention proponents given their motivations, namely, Congress's unwillingness to propose limiting amendments itself,[218] failure of the

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[215] U.S. CONST. art. V.

[216] *Id.*

[217] While this is a subject of some debate, Congress has historically interpreted calling a convention to encompass setting procedures. *See* THOMAS H. NEALE, CONG. RSCH. SERV., R42589, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 19 (2016) (noting that Congress has considered bills that would set procedures for a convention). *But see Five Myths About an Article V Convention of States*, CONVENTION STATES ACTION (July 17, 2017), https://conventionofstates.com/news/five-myths-about-an-article-v-convention-of-states (claiming that certain basic procedures are established by historical precedent, but the delegates decide "the more detailed, parliamentary rules" at the convention).

[218] *See, e.g.*, Article V Patriot, *Rick Roberts: Term Limits Is the Only Way To Regain Control of the Federal Government*, CONVENTION STATES ACTION (Jan. 19, 2021), https://conventionofstates.com/news/rick-roberts-term-limits-is-the-only-way-to-regain-control-of-the-federal-government ("Congress will never vote to term limit itself. That's why . . . we need to call the first-ever Article V Convention of States."); *Frequently Asked Questions*, Answer to *Will Congress Ever Impose Term Limits on Itself?*, U.S. TERM LIMITS, https://

resolution to include these parameters will likely lead to Congress setting them.[219] Failure of the Convention to follow Congress's procedures could lead to judicial interference.[220] One motivation of Convention proponents for calling a Convention is concerns regarding judicial power,[221] believing that such interference will lead to devastating consequences including civil unrest of a kind not seen since the Boston Tea Party.

Imagine a Convention convened to rein in Congress which is itself reined in by Congress and the Supreme Court. The people will not be happy, to say the least.

The resolutions passed by the several States must include all the procedures enumerated above so Congress cannot interfere with the Convention's mission to rein in all branches of the federal government. Such procedural safeguards should include the following:

- The Convention must have equal participation and representation from all states. As with the Senate, each state shall have two delegates appointed by the State's legislature for a total of 100 delegates.
- Each resulting amendment must receive a majority vote of all delegates (no less than fifty-one) to pass. Only upon receiving a majority will an amendment be presented to Congress and then to the States for ratification.

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www.termlimits.com/frequently-asked-questions (last visited Aug. 8, 2022) (likening Congress passing term limits on itself to turkeys voting for Thanksgiving and noting that it is through Article V that States can get around this problem). Many of the amendments Congress proposed that the States have ratified explicitly expand Congressional authority. *See* U.S. CONST. amend. XIII, § 2 ("The Congress shall have power to . . . ."); *id.* amend. XIV, § 5 (same); *id.* amend. XV, § 2 (same); *id.* amend. XVI (same); *id.* amend. XVIII, § 2 (similar); *id.* amend. XIX (similar); *id.* amend. XXIII, § 2 (same); *id.* amend. XXIV, § 2 (same); *id.* amend. XXVI, § 2 (same). Looking further to the amendments Congress has proposed but that have not been ratified, only one can truly be characterized as limiting Congressional power—an 1861 proposition that would have prohibited future constitutional amendments from giving Congress the power to interfere with slavery in any state in which it was lawful. *See Intro.3.2 Proposed Amendments Not Ratified by the States*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.3-2/ALDE_00000026 (last visited Oct. 11, 2022) (listing the amendments that were submitted to the States but never ratified).

[219] *See* NEALE, *supra* note 217, at 19 (noting that Congress has considered bills for convention procedures in the past).

[220] This would not be the first time that litigation ensued over constitutional amendment issues, underscoring concerns of judicial involvement. *See, e.g.*, Idaho v. Freeman, 529 F. Supp. 1107, 1116, 1121, 1123, 1146, 1152 (D. Idaho 1981) (holding that Idaho's attempt to rescind its ratification of the Equal Rights Amendment was justiciable and that Congress could not change the period for ratification of an amendment at a later time), *vacated as moot,* Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982).

[221] *See The Government Follows a 3000-Page Constitution*, CONVENTION STATES ACTION (July 17, 2017), https://conventionofstates.com/news/the-government-follows-a-3000-page-constitution (expressing support for using a convention to "establish new limits on the Supreme Court"); Jeffrey Brown, *The Supreme Court Has Limits?*, CONVENTION STATES ACTION (Jan. 12, 2022), https://conventionofstates.com/news/the-supreme-court-has-limits (calling for a convention to provide a check on the Supreme Court's power).

- Each proposed amendment shall receive its own vote and be presented separately to Congress for presentation to the States for ratification.
- If a sufficient number of petitioning States recall their delegates to reduce the number of participating petitioning States to under two-thirds, the Convention shall cease deliberations and the Convention be dissolved.
- Delegates must vote "yea" or "nay" on all final amendment votes. They may not abstain. Any delegate that abstains from an amendment's final vote shall be immediately disqualified as a delegate and his or her State shall appoint a replacement forthwith. All Convention deliberations shall cease until said replacement is appointed and seated at the Convention.
- The Convention shall continue deliberations until it considers and votes on all amendments proposed by the resolution.
- The Convention may not consider amendments not expressly proposed by the resolution. Any delegate that proposes such amendments shall be immediately disqualified as a delegate and his or her State shall appoint a replacement forthwith. All Convention deliberations shall cease until said replacement is appointed and seated at the Convention.

CONCLUSION

America is at a crossroads. To this point in our history, we rebelled against the usurpations of King George III and the British Parliament, which included taxation without representation,[222] stripping us of our right to keep and bear arms,[223] and a litany of due process of law

[222] *See* THE DECLARATION OF INDEPENDENCE, para. 17 (U.S. 1776) (including "imposing Taxes on us without our consent" as grounds for declaring American independence from England); Resolutions of the Stamp Act Congress (Oct. 19, 1765), *in* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 313, 314 (William MacDonald ed., London, MacMillan & Co. 1899) (naming taxation without representation as a grievance held with Britain); Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 777–78 (2001) (noting how the Declaration of Independence was designed to prevent tyranny by the King through Parliament's legislation).

[223] For example, the Declaration on Taking Arms detailed the account of British soldiers killing many colonists in unprovoked attacks during their occupation of Concord. The British then deceived the people of the town by asking the townspeople to deposit their arms for a later return in order to quell the hostility. When the townspeople had done so, the British immediately forfeited all the weapons and detained every person in the town except for a few who managed to escape. This was one of many reasons the Second Continental Congress called for the taking of arms against Great Britain, a year before the Declaration of Independence. Declaration on Taking Arms, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 150–51, 154–55 (Worthington Chauncey Ford ed., 1775). *See generally* U.S. CONST. amend. II (protecting the right to keep and bear arms).

violations;[224] we sacrificed more than 600,000 American lives in the Civil War to extend the Bill of Rights to enslaved blacks;[225] we fought against fascism and tyranny in two world wars;[226] and we engaged in self-reflection of our faults and past sins on multiple occasions, culminating in constitutional amendments, statutory enactments, and Supreme Court decisions that extended the American dream to those not previously blessed with the bounty of this great nation.[227] Even with our flaws, mistakes, and sins, the foundational pillars that undergird our constitutional system are key to its survival. Our republican form of government, wherein each State regulates the health and welfare of its citizens and the federal government regulates those issues common to all

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[224] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 15, 18, 19 (U.S. 1776) (listing mock trials for British soldiers, deprivation of trial by jury, and extradition to England for trial as causes for declaring the States independent from Great Britain); Larson, *supra* note 222 (noting how the Declaration of Independence was designed to prevent tyranny by the king through Parliament's legislation).

[225] Bob Zeller, *How Many Died in the American Civil War?*, HISTORY (Jan. 6, 2022), https://www.history.com/news/american-civil-war-deaths (estimating Civil War deaths at around 650,000 and 850,000); *see also* Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* 2 ABRAHAM LINCOLN: COMPLETE WORKS COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 656, 657 (John G. Nicolay & John Hay eds., 1894) ("All knew that [slavery] was somehow the cause of the war."); U.S. CONST. amends. XIII–XV (abolishing slavery and protecting the rights of all Americans regardless of race); Jonathan Kieffer, Comment, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601, 610–11 (noting that these the Thirteenth, Fourteenth, and Fifteenth Amendments formed the Civil War Amendments).

[226] *The Great Crusade: World War I and the Legacy of the American Revolution*, AM. REVOLUTION INST., https://www.americanrevolutioninstitute.org/exhibition/the-great-crusade (last visited Aug. 6, 2022) ("The United States entered World War I to defend freedom and democracy against tyranny and oppression, inspired by the ideals of the American Revolution and the memory of the Revolutionary War."); Franklin Delano Roosevelt, Fireside Chat on the State of the War (July 28, 1943), *in* NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT 1932–1945, at 369, 369–71 (B.D. Zevin ed., 1946) (discussing America's fight against fascism and tyranny during World War II).

[227] *See generally* Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 217 (James Melvin Washington ed., 1986) (reflecting that African Americans were, at that time, still "on a lonely island of poverty in the midst of a vast ocean of material prosperity," but recognizing that the Constitution and the Declaration of Independence guaranteed all men "the unalienable rights of life, liberty and the pursuit of happiness"); U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV, §1 (ensuring the right to due process and equal protection of laws for all citizens); *id.* amend. XV (enabling all citizens to vote); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. §§ 2000a–2000h-6) (enforcing the constitutional right to vote, empowering federal district courts "to provide injunctive relief against discrimination in public accommodations," and protecting constitutional rights in public education); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "separate but equal" race-segregated public schools were "inherently unequal" and in violation of the Fourteenth Amendment).

States,[228] is key, as is separation of powers where each branch of government sticks to its duties and checks the others. The original model of the Constitution enshrined these pillars.[229] But, over time, Congress, the president, and the courts have chipped away at protections meant to limit federal power and jurisdiction and ensure local control of most matters, as well as prevent more populous states from dominating the less populous.[230]

While Article V of the Constitution provides for an amendment process to address these problems,[231] Congress is unwilling to propose amendments that limit its or other federal branches' control over the peoples' lives. We need a Convention of the States to consider:

1. *A balanced-budget amendment;*
2. *An amendment defining commerce and interstate commerce;*
3. *An amendment eliminating the power to tax and spend for the general welfare;*
4. *An amendment repealing the Seventeenth Amendment (the most important);*
5. *An amendment giving Congress power to check the Supreme Court via super-majority votes in both houses; and*
6. *An amendment setting term limits in both houses of Congress.*

Moreover, resolutions from all States calling for a Convention must include procedural safeguards to prevent Congress from interfering with the Convention's essential, constitutional duty. The alternatives are to (1) wait for Congress to propose limits to its power and authority, or (2) do nothing. Either is unacceptable if we hope to leave the American dream to our posterity.

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[228] *See* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 827–28 (2008) (explaining how, under the Articles of Confederation, States retained power to govern their respective local affairs, and that when the Constitution was proposed, States were assured they would "retain a substantial degree of their sovereign independence"); THE FEDERALIST NO. 17, *supra* note 43, at 80–82 (Alexander Hamilton) (noting that the powers necessary for "[c]ommerce, finance, negotiation, and war" should be governed by the national government, whereas the "ordinary administration of criminal and civil justice" belongs to state governments). *See generally* U.S. CONST. art. I, § 8 (enumerating specific powers for the federal government that are of common concern to the States, such as the power to regulate commerce with foreign nations and the power to coin money); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Atl. Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (noting that States have the power "to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community").

[229] *See* U.S. CONST. art. I, § 1 (vesting all legislative power in Congress); *id.* art. II, § 1 (vesting all executive power in the President); *id.* art. III, § 1 (vesting all judicial power in the Supreme Court and other Federal courts); *supra* notes 22–23 and accompanying text.

[230] *See* discussion *supra* Parts I, V.D.

[231] U.S. CONST. art. V.