

March 2000

The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?

Vikram David Amar

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037 (2000), <https://scholarship.law.wm.edu/wmlr/vol41/iss3/4>

THE PEOPLE MADE ME DO IT: CAN THE PEOPLE OF THE STATES INSTRUCT AND COERCE THEIR STATE LEGISLATURES IN THE ARTICLE V CONSTITUTIONAL AMENDMENT PROCESS?

VIKRAM DAVID AMAR*

INTRODUCTION

For me, there is no place more exciting than California. Where else can you find earthquakes, mudslides, internet boom and bust stories, *and* Jerry Brown back in politics? Amid all this unpredictability, however, it is nice to know that some constants remain. For instance, one thing you can always count on in the Golden State is that every year the voters will enact an initiative that gets struck down in court. And this last year was no exception. In 1998, California voters enacted Proposition 225,¹ a fascinating law that implicates a host of deep constitutional issues—namely, federalism, popular sovereignty, congressional term limits, and the federal constitutional amendment process. As expected, last summer the California Supreme Court invalidated the measure as violating Article V of the United States Constitution.²

But this past year's story did not fit the usual mold in two ways. First, unlike other California propositions of recent years, Proposition 225 was not on the cutting edge. Voters in a number

* Professor of Law, University of California, Hastings College of the Law. A.B., University of California at Berkeley, 1985; J.D., Yale Law School, 1988. I wish to thank Dipanwita Amar, Akhil Amar, Larry Tribe, Jesse Choper, Walter Dellinger, Elizabeth Garrett, Bruce Cain, Mike Paulsen, David Levine, Bill Wang, David Jung, Evan Lee, Calvin Massey, Joe Grodin, Reuel Schiller, David Reis, Joel Paul, Ash Bhagwat, Alan Brownstein, Jim Pfander, Eugene Volokh, and participants in the University of Illinois College of Law Faculty Workshop Series for their input on earlier versions of this Essay. Special thanks are owed to Evan Caminker, with whom I was originally planning to co-write this Essay. Many of the best ideas in this piece are Evan's as much as mine.

1. See *Bramberg v. Jones*, 978 P.2d 1240 app. at 1252-57 (Cal. 1999) (providing the text of the proposed law).

2. See *id.* at 1241, 1251-52.

of other states had already enacted measures virtually identical to Proposition 225,³ and at least six other state and federal courts had struck these measures down as violating Article V.⁴ And so, this Essay really concerns the constitutionality of a nationwide movement of which California's experience is but one small part. Second, unlike many other popular referendums, this time it has been the reviewing courts, and not the voting public, who have ignored constitutional first principles. The short of it is that judges all across the country have gotten things fundamentally wrong here, and that ballot measures like Proposition 225 that have been passed nationwide are not unconstitutional, or at least not unconstitutional for the reasons that have been given.

To see this, let us start with what Proposition 225 and its counterparts in other states do. This requires that we go back to the Supreme Court's 1995 decision in *U.S. Term Limits, Inc. v. Thornton*,⁵ in which the Court held that neither state governments nor Congress can impose congressional term limits under our existing Constitution.⁶ If such term limits are to come about, the *Thornton* Court made clear that they require an amendment of the Constitution through Article V.⁷ Backers of Proposition

3. For a discussion of the measures enacted in Nebraska, Arkansas, Colorado, Maine, and Oklahoma, see *Miller v. Moore*, 169 F.3d 1119, 1121-22 (8th Cir. 1999); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 53-55 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119, 119-24 (Ark. 1996); *Morrissey v. Colorado*, 951 P.2d 911, 913-14 & app. B at 919 (Colo. 1998); *Opinion of the Justices*, 673 A.2d 693, 694-98 (Me. 1996); *In re Initiative Petition No. 364*, 930 P.2d 186, 186-91 (Okla. 1996).

4. Measures similar to Proposition 225 have been struck down in the states of Nebraska, Colorado, Oklahoma, Arkansas, and Maine. See, e.g., *Miller*, 169 F.3d at 1121-22; *Gwadosky*, 966 F. Supp. at 53-55; *Donovan*, 931 S.W.2d at 119-24; *Morrissey*, 951 P.2d at 913-14; *Opinion of the Justices*, 673 A.2d at 694-98; *Initiative Petition*, 930 P.2d at 188-91; see also *AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984) (invalidating earlier measure on the same grounds used to invalidate Proposition 225); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (invalidating measure similar to Proposition 225 on other grounds); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (invalidating state initiative for balanced budget amendment on the same grounds as Proposition 225).

5. 514 U.S. 779 (1995).

6. See *id.* at 827.

7. See *id.* at 837 ("Any [congressional term limit] must come not by legislation adopted either by Congress or by an individual State, but rather—as have other

225, working with similar groups in other states, have tried to move things along in that direction by enacting in each state a plebiscitary initiative. Each initiative, among other things, "instructs" state and federal legislators in that state to pursue the Article V amendment process by proposing, supporting, and ratifying a federal term limits amendment, a template version of which is included in the initiative measure.⁸ If a legislator fails to take any of a number of defined steps along the Article V proposal and ratification path, the initiative provides that a "scarlet letter"⁹ designation be placed on the next election ballot—indicating that the individual legislator has "*DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS*."¹⁰

As indicated above, lower courts—most recently the California Supreme Court—uniformly have invalidated these measures.¹¹ The gist of these decisions is that scarlet letters and related devices are coercive and that such coercion violates Article V of the United States Constitution.¹² According to these decisions, Article V requires that state legislatures be free and independent to make their own decisions through their own deliberative processes when deciding whether to seek and/or ratify federal constitutional amendments.

This logic has a certain appeal these days. A recent and very prominent line of federalism decisions—the so-called state-commandeering or state-conscription cases like *New York v. United*

important changes in the electoral process—through the amendment procedures set forth in Article V." (footnote omitted)).

8. The template amendment provides that "[n]o person may serve in the office of U.S. Representative for more than three terms [and no] person may serve in the office of U.S. Senator for more than two terms." *Bramberg v. Jones*, 978 P.2d 1240, 1254 (Cal. 1999) (quoting Proposition 225).

9. This is my term, not one used in any initiative.

10. *Bramberg*, 978 P.2d at 1254 (quoting Proposition 225).

11. See *supra* note 4.

12. See, e.g., *Miller v. Moore*, 169 F.3d 1119, 1122-24 (8th Cir. 1999); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 54-62 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119, 122-28 (Ark. 1996); *Bramberg*, 978 P.2d at 1246-52; *Morrissey v. Colorado*, 951 P.2d 911, 913-17 (Colo. 1998); *Opinion of the Justices*, 673 A.2d 693, 696 (Me. 1996); *In re Initiative Petition No. 364*, 930 P.2d 186, 191-93 (Okla. 1996).

*States*¹³ and *United States v. Printz*¹⁴—might be read as creating a deliberative autonomy enjoyed by state institutions, especially state legislatures, when they carry out their duties. It would be tempting to connect the dots from all these cases and derive a general principle of legislative autonomy and immunity from coercion and conscription. In the end, however, I think the state-conscription cases involve a very different situation—that of the federal government coercing state legislatures—from the scarlet-letter-device cases. When the people of a state, the masters of their legislature, if you will, engage in such coercion, no federal constitutional value is offended.¹⁵ Of course, *Thornton* and other constitutional developments tell us that the people of each state are not the masters of the national legislature, Congress.¹⁶ For that reason, although the reviewing courts have not drawn a distinction between the two sets of government agents, scarlet letters imposed on federal legislators may be impermissible¹⁷ even though they are quite allowable for their state counterparts.¹⁸ I will return to the question of coercing federal legislators a bit later.

But let us begin by focusing on scarlet letters that are imposed upon state legislators. My discussion assumes that scarlet letter devices really are, as lower courts have held them to be, “coercive,” rather than “informational.”¹⁹ Indeed, my argument is that nothing in Article V prohibits coercive action by the people

13. 505 U.S. 144 (1992).

14. 521 U.S. 898 (1997).

15. Indeed, as I suggest below, when the federal Constitution is used to interfere with the power the people of each state enjoy to structure their state government in ways they see fit, constitutional values of federalism are compromised. See *infra* notes 102-13 and accompanying text.

16. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806-27 (1995); *infra* notes 45-66 and accompanying text.

17. See, e.g., *Gralike v. Cook*, 996 F. Supp. 901 (W.D. Mo. 1998).

18. To say that scarlet letters are allowable under Article V is not, of course, to say they are wise. I express no view in this Essay on the wisdom of using scarlet letters and other coercive measures to push along the Article V amendment process. Nor do I express any view on the wisdom of congressional term limits.

19. Because of the crucial time at which voters would see the ballot designations—the moment at which they cast their ballots—scarlet letters are obviously more influential than, say, political advertising. Whether they are “coercive” depends on what we mean by that term and is a difficult, but ultimately irrelevant, question.

of a state against its legislature. Thus, my Article V analysis would be no different if the people of the several states, instead of adopting a scarlet letter approach, had gone even "further" by backing up their instructions to their state legislative contingents by imposing on those legislators who disregarded the popular directives a flat ineligibility to seek reelection.

My inquiry into these matters proceeds as follows. In Part I of this Essay, I open the analysis of coercive measures against state legislators by focusing on the text of Article V, particularly its reference to "Legislatures of . . . the . . . States."²⁰ I conclude that the term, used against the historical backdrop of state constitutions in 1787, was not designed to interfere with the preexisting control that people enjoyed over their state legislatures. I then reinforce this textual/historical reading with compelling structural and practical arguments. Most importantly, I argue that the structural concern over governmental self-dealing counsels against reading Article V as giving a veto over constitutional change to government actors.²¹ I conclude Part I by analyzing other places in which the Constitution has empowered "Legislatures of . . . the . . . States" and concluding that these other provisions of the Constitution further undermine the reading of Article V that courts across the nation have embraced.

In Part II, I explain why Article V uses the term "Legislatures of . . . the . . . States" rather than "states," the more generic term used elsewhere in the Constitution. In Part III, I consider possible counterarguments to my reading of Article V, including some based on old Supreme Court cases and others based on structural constitutional themes. In Part IV, I quickly dispose of the issue bracketed above—the application of coercive measures to *federal* legislators. I then conclude by suggesting that there may be some additional constitutional questions that need to be asked about scarlet letter and other coercive measures—questions that have nothing to do with any Article V reasoning embraced to date.²²

20. U.S. CONST. art. V.

21. My treatment of structural considerations in this Part also includes an analysis of the "Republican Guarantee Clause." See *infra* notes 102-08 and accompanying text.

22. See *supra* note 246 and accompanying text. These last comments are tentative

I. WHY ARTICLE V CAN'T MEAN WHAT THEY SAY IT MEANS

A. *Text and History*

Article V of the Constitution has received more scholarly attention in the past few decades than ever before.²³ Much of this recent and needed²⁴ attention has focused on whether Article V is the exclusive lawful means of federal constitutional amendment. Those who say that Article V is not the exclusive means of amending the Constitution argue that the national polity is sovereign under American constitutional theory, and that a majority of this national polity enjoys the constitutional right to amend the document through deliberative means, whether or not these means meet the requirements of Article V.²⁵ Those who support the conventional view that Article V is completely exclusive reject the idea that ultimate sovereignty resides completely in a majority of the national people. Instead, these scholars argue that Article V reflects a federalism compromise in which people of each state surrendered some of their sovereignty in 1787 as the price to pay for ratifying the Constitution. How-

and will be elaborated in a future essay. See Vikram David Amar & Alan Brownstein, *Scarlet Letters and Constitutional Limits on Ways to Structure Ballots* (forthcoming).

23. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990); Henry Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

24. I say academic attention is needed because there are so many unresolved questions concerning Article V, see Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627 (1979), and because Article V was invoked often—a dozen times—during the last 90 years. Compare that to the complete absence of Article V amendments, not counting the Reconstruction amendments (which were legally and historically anomalous) for the 109 years between 1804 and 1913. Moreover, people today seem to be making more and more calls to amend the Constitution. See, e.g., Senator Dianne Feinstein, *For the Victims*, WASH. POST, Oct. 5, 1999, at A16 (arguing in favor of proposed Victims' Rights Amendment); David E. Rosenbaum, *Stars, Stripes, Flames and Free Speech Redux*, N.Y. TIMES, May 31, 1999, at A11 (discussing the perennial debate over the proposed flag-burning amendment).

25. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 15-17 (1998); Amar, *supra* note 23, at 488-94.

ever, because of mistrust of other state peoples, they did so only on the condition that future changes to the Constitution would comply with Article V's particular and cumbersome processes.²⁶ Thus, the scholarly debate on Article V exclusivity thus far has focused on the relationship between the national polity and state polities, as well as the relationship between the peoples of the various states. But the important and separate matter of the relationship under Article V between the people of each state and their elected legislators has received no academic attention until this Essay. Even as I examine this last question, though, I should note that my resolution of it is not unrelated to the way the exclusivity question has been decided. Indeed, as I demonstrate below, the conventional reading of Article V exclusivity—embraced by most commentators as well as all courts—counsels strongly in favor of my resolution of the question of popular coercion.²⁷ With that background, let us turn in earnest to the popular coercion question.

Any assessment of the constitutionality under Article V of coercion of state legislatures must, of course, consider the text of Article V itself, which provides:

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

26. See, e.g., Monaghan, *supra* note 23; Tribe, *supra* note 24, at 632-37 (discussing the compromise present in the Article V Convention); see also Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 720 (1981) (describing some of the Framers' intentional efforts to make the amendment process difficult in anticipation of state subversion).

27. See *infra* notes 71-101 and accompanying text.

its Consent, shall be deprived of its equal Suffrage in the Senate.²⁸

Article V sets out two paths to proposing amendments, congressional proposal or a proposing convention, and two paths to ratifying them, through state legislatures or, at Congress's election, through state conventions. Article V thus refers to "Legislatures . . . of the . . . States," and "Conventions in . . . the States," but not—at least not explicitly—to the people of the states.²⁹ "Legislature," the argument against coercive measures like Proposition 225 runs, is a term of art. Use of the term "legislature" creates a nondelegable power on the part of *elected representative* legislatures. "Legislatures" means legislatures, not conventions, and *certainly* not the people of each state themselves.

This textual argument is expressed quite directly in the eighty-year-old United States Supreme Court opinion in *Hawke v. Smith*,³⁰ a decision heavily relied upon in recent lower court rulings³¹ and one that I will take up in more detail in Part III.A.³² In *Hawke*, the Court invoked Article V in refusing to enforce an Ohio constitutional provision that recognized the power of the people of Ohio to reverse, by referendum, decisions to ratify proposed federal amendments made by the state legislature.³³ In broad language, the *Hawke* Court observed:

What did the framers of the Constitution mean in requiring [in Article V] ratification by "*legislatures*?" That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. . . . There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the

28. U.S. CONST. art. V.

29. *Id.*

30. 253 U.S. 221 (1920).

31. See, e.g., *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Gralike v. Cook*, 996 F. Supp. 901 (W.D. Mo. 1998); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999).

32. See *infra* notes 153-86 and accompanying text.

33. See *Hawke*, 253 U.S. at 227.

States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.³⁴

At first glance, this textual argument has some surface plausibility. We all instinctively think, and throughout American history have thought, that there is a difference between the people and a legislature. We also presume that the Framers of the Constitution chose their words carefully. On more thorough reflection, however, analysis of the textual term "Legislatures of . . . the . . . States" *supports* rather than undermines measures like Proposition 225. To begin with, in all the lower court cases construing scarlet letter devices, it is *the legislatures* that are coerced into doing the applying.³⁵ The legislatures may not like what they are being forced to do, to be sure, but *they* are still the ones acting. There is an obvious sense, therefore, in which the scarlet letter devices comply with the text of Article V completely.³⁶

This may seem too formalist for some readers, however.³⁷ If the people are forcing the issue, then, in reality, it is the people *rather than* the legislature making the key decisions and exercising the power. This recognition brings us to the heart of the textual argument—the idea that as a matter of text, real power must reside in an “independent legislature,” and cannot be transferred to someone or something else. It is at this point, however, that the textual argument seems to go beyond the text itself. Of course, the text does refer to state legislatures, but it nowhere explicitly says that state legislatures means legislatures free to act according to their discretion—“independent legislatures”—as opposed to legislatures typically guided and even bound by their creators and masters—the state peoples.

34. *Id.* at 227-28.

35. See, e.g., *Miller*, 169 F.3d at 1119; *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 52 (D. Me. 1997); *Donovan*, 931 S.W.2d at 119; *Bramberg*, 978 P.2d at 1240; *Morrissey v. Colorado*, 951 P.2d 911, 911 (Colo. 1998); Opinion of the Justices, 673 A.2d 693, 693 (Me. 1996); *In re Initiative Petition No. 364*, 930 P.2d 186, 186 (Okla. 1996).

36. This is a quick and easy way to distinguish *Hawke*, which involved not coercing, but supplanting, the standing legislature's power. For an even better way to distinguish *Hawke*, see *infra* notes 153-86 and accompanying text.

37. It may be worth pointing out that textualism itself, taken seriously, is too formalistic for many.

Perhaps an analogy here will drive home the point I am making. There are a lot of interesting connections between various structural themes of the Constitution, so let us look outside of Article V to another structural idea: separation of powers, particularly Article II's Appointments Clause. The Appointments Clause says: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."³⁸ Imagine that Congress passed a law vesting appointment power for an assistant Attorney General in the Attorney General, the head of the Justice Department. Would anyone argue that the President does not have the right to coerce the Attorney General, through threats and imposition of the ultimate sanction—firing—into appointing the kind of person the President wants as assistant Attorney General? I think not, even though the Constitution clearly distinguishes here between the "President" and "Heads of Departments."³⁹ Most everyone would concede presidential power to coerce here and would not read the reference to "Heads of Departments" to mean "independent Heads of Departments." Indeed, at least as it relates to the head of the Justice Department, the idea of an "independent" department head would strike most people as unthinkable. Instead, under Article II, the President effectively gets to control the power that the Constitution allows Congress to vest in underlings. Why? Because as a backdrop matter of executive power, he is the underlings' master—their superior. So too, as a backdrop principle, state people are masters of their legislatures. We therefore should not read the words of Article V as excluding popular control, just as we do not read the words of Article II as excluding presidential control.⁴⁰

I just described popular control of state legislatures as a backdrop principle. Where does this principle come from? After all, in

38. U.S. CONST. art. II, § 2, cl. 2.

39. *Id.*

40. One of the important reasons we do not read Article II to forbid presidential control is the idea of separation of powers. The other great structural theme of the constitutional design, federalism, similarly counsels against reading Article V to forbid popular control. See *infra* notes 102-19 and accompanying text.

the context of the unitary executive, the master/servant relationship between the President and the "Heads of Departments" comes from our understanding of Article II and the theoretical background against which it was enacted. My suggestion that the people are masters of their state legislative servants also derives from the setting against which the Founders used the phrase "Legislatures of . . . the . . . States."

As the eminent historian Gordon S. Wood has explained, during the period between the Revolution and the framing of the Constitution, "many Americans believed their representatives to be . . . mere agents or tools of the people who could give [them] binding directions . . ."⁴¹ Drawing on ideas from both the great Whig tradition and people like Locke and Trenchard, American leaders who shaped political rhetoric and discourse during this period characterized the relationship between people and their government in master/servant terms.⁴² Moreover, when it came time to draft new state constitutions to govern the former colonies, Americans built these ideas explicitly into the text of their new charters. The Virginia Constitution of 1776 was fairly representative of others in this regard: it opened by declaring that "all power is vested in, and consequently derived from, the people; *that magistrates are their trustees and servants, and at all*

41. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 371 (1969).

42. *See id.* at 363-89. Samuel Chase, for example, observed:

From the nature of government by representation, the deputies must be subject to the will of their principals or this manifest absurdity and plain consequence must follow, that a few men would be greater than the whole community, and might act in opposition to the declared sense of all their constituents.

Id. at 371 (emphasis omitted). Similarly, John Adams noted:

[Representation] is in reality nothing more than this, the people choose attorneys to vote for them in the great council of the nation, reserving always the fundamentals of the government, reserving also a right to give their attorneys instructions how to vote, and a right at certain, stated intervals, of choosing a-new; discarding an old attorney, and choosing a wiser and better.

John Adams, *The Earl of Clarendon to William Pym*, in *THE WORKS OF JOHN ADAMS* 477, 481 (Charles Francis Adams ed., 1969) (1851); *see also* DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 110-11 (1990) (quoting John Adams and discussing the idea, shared by the Framers, that the government is the servant of the people who are the true arm of government).

*times amenable to them.*⁴³ As Professors Farber and Sherry have summarized:

When the American states gained the opportunity [after the Revolution] to create legislatures more to their liking [than was Parliament], they implemented many of these ideas. In 1776, [John] Adams again expressed the views of many of his compatriots when he described the ideal legislature: "It should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them." In order to create such a legislature, and to check the power of legislators, the new states uniformly established very short terms of office. Elections for the lower house were held every year in every state except South Carolina, where they were held every other year. . . .

Voters in most states also had the right to instruct their representatives and to direct votes on individual issues. [Four] state constitutions [explicitly] guaranteed such a right. In the others, the right was assumed.⁴⁴

43. VA. CONST. of 1776, Bill of Rights § 2 (emphasis added), *reprinted in* 7 THORPE, AMERICAN CONSTITUTIONS, CHARTERS AND ORGANIC LAWS, 1492-1908, at 3813 (1909); MD. CONST. of 1776, art. V, *reprinted in* 3 THORPE, *supra*, at 1687 ("[T]he right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government . . ."); MASS. CONST. of 1780, art. V, *reprinted in* 3 THORPE, *supra*, at 1890 ("All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."). For examples of other states, see N.H. CONST. of 1784, art. VIII, *reprinted in* 4 THORPE, *supra*, at 2454 ("All power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and at all times accountable to them."); PA. CONST. of 1776, art. IV, *reprinted in* 5 THORPE, *supra*, at 3082 ("That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."). For a good general discussion of these provisions, see John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

44. FARBER & SHERRY, *supra* note 42, at 111. The four states whose constitutions contained explicit instruction language were North Carolina, see N.C. CONST. of 1776, Declaration of Rights, art. II, *reprinted in* 5 THORPE, *supra* note 43, at 2787; Pennsylvania, see PA. CONST. of 1776, Declaration of Rights, art. XVI, *reprinted in* 5 THORPE, *supra* note 43, at 3084; Massachusetts, see MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* 3 THORPE, *supra* note 43, at 1890; New Hampshire, see N.H. CONST. of 1784, pt. 1, art. X, *reprinted in* 4 THORPE, *supra* note 43, at 2455. In addition, the 1777 Constitution of Vermont, which became a state in 1791, contained

We can see this state constitutional backdrop right to instruct and control state legislators even more clearly when we examine how the issues of instruction and control over the newly created *federal* legislature were resolved. Shortly after the ratification of the Constitution, Congress discussed a bill of rights package.⁴⁵ During that discussion in 1789, a motion was made to include in what would become the First Amendment a right of the people "to instruct their representatives."⁴⁶ This proposal was made in part because Virginia,⁴⁷ New York,⁴⁸ and North Carolina,⁴⁹ in ratifying the Constitution, had appended declarations of rights—constitutional wish lists—that included a right to instruct.⁵⁰ Ultimately, a congressional committee voted down the language recognizing a right to instruct,⁵¹ and the bill of rights package that was sent by Congress to the states for ratification made no mention of instruction.⁵²

explicit instruction language. See VT. CONST. of 1777, ch. I, art. VI, reprinted in 6 THORPE, *supra* note 43, at 3740.

A number of commentators, even some who may be disinclined to my bottom line in this Essay, have commented on the populist nature of state governments in 1787. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-26 (1990) (arguing that the Framers designed the federal Constitution to "filter" out the "excess of populism in the state governments"); Monaghan, *supra* note 23, at 140, 173 (citing THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 159 (1993) and quoting J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 61-62 (Macmillan 1912) (1907) for the proposition that "the doctrine [was] expressly recognized in some of the states and virtually in all, that a majority of the qualified voters could amend the fundamental law"); Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1061-66 (1996) (arguing that the Constitution was a reaction to populism in state government).

45. See 1 ANNALS OF CONG. 703 (Joseph Gales ed., 1789).

46. 1 *id.* at 733. The context of the proposal made clear it was directed specifically at Congress. Cf. *Barron v. Baltimore*, 32 U.S. 243, 249 (1833) (finding that constitutional amendments afford protection from the federal government, not the states).

47. See 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (Ayer 1987) (1888) [hereinafter DEBATES].

48. See 1 *id.* at 328.

49. See 4 *id.* at 243.

50. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1059 (1988).

51. See 1 ANNALS OF CONG., *supra* note 45, at 747.

52. Cf. U.S. CONST. amend. I (illustrating that the Constitution protects the rights

Particularly illuminating for present purposes, however, are four important features of the debate in Congress over the proposed instruction language. First, although participants in the congressional discussion debated whether the votes of faithless federal legislators, that is, legislators who disobeyed their instructions, would count if the instruction language were enacted, there was general agreement that a right to instruct connotes a right to bind and to sanction disobedience.⁵³ Second, in response to suggestions made by opponents of instruction that such a right had no historical basis, supporters of the right pointed repeatedly and explicitly to the state constitutional provisions in three important states—Massachusetts, Pennsylvania, and North Carolina—which recognized a right to instruct in a legally binding way.⁵⁴ Third, and related, no instruction opponent, when confronted with the state constitutional precedents, ever once remotely suggested that these state constitutional provisions would be limited in any way by these states having recently ratified the Constitution.⁵⁵ Instead, instruction opponents simply argued against the wisdom and propriety of binding *federal* legislators.⁵⁶ When they did—and this is the fourth point—they often invoked arguments that can be used to *distinguish* between state and federal legislators for purposes of popular control.⁵⁷

Consider, in this regard, the powerful statement made by Roger Sherman:

It appears to me, that the words [of the proposed instruction clause] are calculated to mislead the people, by conveying an

of assembly and of petition, but does *not* protect the right of federal instruction).

53. See 1 ANNALS OF CONG., *supra* note 45, at 735-46.

54. See, e.g., 1 *id.* at 744-45 (statements of Page and Burke).

55. Such a suggestion, if valid, would have been very relevant to the question at hand. If state legislatures were free from instruction when performing duties created by the federal Constitution, then no instruction of federal representatives would have made sense, inasmuch as every one of their duties, indeed their very existence, is owing to the federal Constitution.

One would think that if anyone believed that anything in the new Constitution—be it Article V or the Republican Guarantee Clause, *see infra* note 102—altered the existing powers enjoyed by state peoples over their legislatures, someone would have mentioned such an important and likely controversial idea.

56. See, e.g., 1 ANNALS OF CONG., *supra* note 45, at 739 (statement of Stone).

57. See, e.g., 1 *id.* at 735 (statement of Clymer).

idea that they have a right to control the debates of the [national] Legislature. This cannot be admitted to be just, because it would *destroy the object of their meeting*. I think, when the people have chosen a representative, it is his duty to *meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community*.⁵⁸

Thus, to Sherman, a key reason for rejecting a right to instruct federal representatives was geographical. The Republic was founded on the idea that different states and regions would have different information, desires, values and interests, and that Congress was designed to be a *national* body to which people *from all reaches of the country* would come to exchange, debate, and resolve ideas. Each congressional district or state was a mere part of the national whole, and allowing each part of the whole to instruct particular representatives destroyed the very reason for having Congress "assemble" and hold "Meetings]" as Article I of the Constitution requires.⁵⁹

This idea that states or districts were only "parts" of the "whole" and could not have all the relevant information that comes from a "meeting" with other parts of the "Union" recurs throughout the discussion of the failed instruction language.⁶⁰ For our purposes, it also helps explain why instruction is permitted at the state but not at the federal level as a general matter of federal constitutional law. As Madison argued in *Federalist* 10 and 63, a truly deliberative government like the federal

58. 1 *id.* at 735 (emphases added).

59. U.S. CONST. art. I, § 4, cl. 2 ("The Congress *shall assemble* at least once in every Year, and *such Meeting* shall be" (emphases added)).

60. See, e.g., 1 ANNALS OF CONG., *supra* note 45, at 738-39 (statement of Madison); 1 *id.* at 742 (statement of Livermore); 1 *id.* at 746 (statement of Lawrence). One scholar reflected on this idea, contrasting colonial instruction with the way things worked in Parliament:

Instruction was but one form by which representation in the colonies was kept "actual," a form of *attorneyship*, as distinct from the virtual representation celebrated in Burke's description of Parliament as "a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole."

BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 84-85 (1968) (quoting Edmund Burke's speech to the electors of Bristol in 1774).

Congress required the "extensive territory" that made up the new Union.⁶¹ Madison observed that geographical units with more "narrow limits," like those "occupied by the democracies of Greece," could not be expected to have the model of "representative government" exemplified by Congress.⁶²

This distinction between the geographically expansive federal Union and the more "narrowly limited" states was woven into the Constitution itself. Unlike Congress, state legislatures are not *required* by the federal Constitution to "assemble" or hold "meetings." Congresspersons necessarily come from different geographic regions; Article I requires as a qualification for Congress that candidates "be [i]nhabitant[s] of . . . [the] State[s]" in which they are elected.⁶³ By contrast, there is no federal constitutional requirement that state legislatures be selected from separate geographical districts within the state; certainly, a state could choose to elect all its legislators through an at-large system.⁶⁴ Moreover, the division of geopolitical authority among political subdivisions within a state is purely a matter of state law.⁶⁵ As far as the federal Constitution is concerned, the state is the smallest part of the national whole—it is the constitutional quark. It is for these reasons that John Adams understood intuitively that federal instruction posed different issues than state legislative instruction:

Upon principle, I see no right in our Senate and House to dictate, nor to advise, nor to request our representatives in Congress. The right of the people to instruct their representatives, is very dear to them, and will never be disputed by me. But this [federal instruction] is a very different thing from an interference of a State legislature.⁶⁶

61. See THE FEDERALIST NOS. 10, 63 (James Madison).

62. THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961).

63. U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

64. I argue below that the Constitution does not even mandate that state legislative representative bodies exist in any form. Even if I am wrong about this, however, there is no plausible argument that state legislatures must mirror Congress.

65. See, e.g., *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907) (observing that states may delegate or withdraw power to local government in their "absolute discretion. . . . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States").

66. John Adams, *Letter to J.B. Varnum*, in 9 THE WORKS OF JOHN ADAMS, *supra*

Given this historical backdrop of state legislative instruction, the textual argument from Article V against coercion of state legislatures looks more questionable. If the *Hawke* Court was correct that the term "Legislature" was "not a term of uncertain meaning"⁶⁷ at the founding, that meaning cuts in favor of, and not against, popular coercion of state legislatures. To put my point another way, as a matter of text, Article V should take "legislatures of the states" as it finds them—subject to control by the people of the states.⁶⁸ Indeed, it is not uncommon to find discussions throughout the framing period in which the term "legislature" is used interchangeably with "people." For example, in describing the essence of republican government, Charles Pinckney in the South Carolina ratifying convention explained that a "republic [is a form of government] where the *people at large, either collectively or by representation, form the legislature*."⁶⁹ I do not mean to argue, of course, that the Framers did not understand that there was an observable difference between the people acting directly and through a legislative body.⁷⁰ Instead, as Pinckney's words illustrate, what I am suggesting is that a dominant mode of thought regarding the state governments in effect before ratification viewed legislatures as merely alter egos of the people.

B. Structural Considerations

If the textual/historical argument against reading the phrase "legislature" to mean "independent legislature" were not persua-

note 42, at 604, 605.

67. *Hawke v. Smith*, 253 U.S. 221, 227 (1920).

68. The Constitution incorporates other terms whose meaning is defined under state law. For example, the term "property" in the Fifth Amendment is defined by reference to expectations arising from state law. For a discussion of the Constitution's incorporation of terms defined under state law, see Board of Regents v. Roth, 408 U.S. 564, 575-78 (1972); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1366-71 (1996).

69. 4 DEBATES, *supra* note 47, at 328.

70. Indeed, as we will see, there is a big difference in that legislatures may act selfishly, and, for that reason, need to be monitored by the people. See *infra* notes 72-101 and accompanying text.

sive enough, there are compelling structural and pragmatic reasons as well.⁷¹ Most importantly, denying the right of the people to coerce state legislatures would require us to *read Article V to give ordinary government complete control over changing ordinary government*. Such a reading is impossible to square with the pervasive fear the Framers expressed about government self-dealing and the right of the *people* to respond to such self-dealing by altering their form of government.

1. Popular Sovereignty and the Agency Problem

The Constitution was founded on the legitimate power, or sovereignty, of the people. This sovereignty meant first and foremost that the people created government, not vice versa, and that the people could therefore change government when appropriate. Throughout the debate over whether to alter America's basic government by ratifying the Constitution, both proratification federalists and antiratification antifederalists built their arguments on this "transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness . . .'"⁷² As James Madison put the point to the delegates at Philadelphia, "[t]he *people* were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. *They could alter constitutions as they pleased.*"⁷³

Indeed, the *whole idea* of building an amendment process into the Constitution derived from a concern that the people would need to reclaim some of the power they had delegated to their everyday government agents in an orderly way. As James Iredell, who would later serve with distinction on the Supreme Court, explained at the North Carolina ratifying convention:

71. Of course, the structural arguments I present below are independent of each other, and of the textual/historical arguments I presented above. One could embrace any or all of them to agree with my conclusion.

72. THE FEDERALIST NO. 40, at 253 (James Madison) (Clinton Rossiter ed., 1961) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

73. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max Farrand ed., 1937) [hereinafter RECORDS] (statement of Madison) (emphasis added); see also 4 DEBATES, *supra* note 47, at 230 ("The same authority that created can destroy; and the *people* may undoubtedly change the government" (statement of James Iredell) (emphasis added)).

[In America] tumultuous proceedings are as unnecessary as they would be improper and ineffectual. Other means are in our hands, as much preferable as good order is to confusion . . . [Whenever the people want to change their constitution], it is entirely within their power to effect it without the slightest disturbance.⁷⁴

What is more, among leading federalists and antifederalists alike, it was well understood that such constitutional change often would be necessitated by government officials who abused their power. Indeed, concern about what economists today call "agency costs" was one of the most dominant themes running through political discussion in the 1780s.⁷⁵ In *Federalist* 63, Madison succinctly distilled the concern in very simple but powerful terms: "The people can never willfully betray their own interests; but they may possibly be betrayed by the representatives of the people"⁷⁶ Linking together all these ideas of popular sovereignty, betrayal by government agents, and the need for an amendment process, Edmund Pendleton told the Virginia Ratifying Convention over which he presided:

We, the people, possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? . . .

74. 4 DEBATES, *supra* note 47, at 232.

75. As many other constitutional scholars have demonstrated, this concern about abusive and disloyal government agents animated much of structure of the original Constitution, and a great deal of the Bill of Rights as well. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

76. *THE FEDERALIST* NO. 63, at 386 (James Madison) (Clinton Rossiter ed., 1961); see also *THE FEDERALIST* NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) ("Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people."). This is why, for example, state legislatures—which were not to be trusted—could not ratify the original Constitution. Instead, the people themselves had to ratify the original Constitution in special conventions. See *infra* notes 149-51 and accompanying text.

Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.⁷⁷

When the time came to spell out a particular amendment procedure in Article V, no concern weighed more heavily on the minds of the drafters than government selfishness. An early version of what became Article V was roundly rejected because it vested amendment authority in Congress alone, giving the national legislature in essence a veto over constitutional change: "It would be improper to require the consent of the [National] Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendm[en]t."⁷⁸

As Walter Dellinger wrote twenty years ago, this theme—Congress ought not to have control over amendment process lest the process be used to retain and aggrandize Congress's own powers—is one of the few that emerges quite clearly from the proceedings.⁷⁹

But concerns about self-dealing were not limited to Congress. Just as those who crafted Article V explicitly rejected a congressional block on changing the Constitution, so too they explicitly rejected giving state governments a veto.⁸⁰ Responding to another early version of Article V that gave proposal power directly to the legislatures of the states and not to Congress, Alexander Hamilton objected: "The State legislatures will not apply for alterations but with a view to increase their own powers."⁸¹ This concern was a serious one—so serious that the final version of

77. 3 DEBATES, *supra* note 47, at 37.

78. 1 RECORDS, *supra* note 73, at 203 (statement of Mason); see also THE FEDERALIST NO. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]t has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed."); Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1626, 1630 (1979).

79. See Dellinger, *supra* note 78, at 1630.

80. See *id.* at 1626-28.

81. 2 RECORDS, *supra* note 73, at 558.

Article V not only denied state legislatures exclusive authority to propose amendments, but also allowed Congress to cut state legislatures out of the ratification process.⁸² Moreover, the final version denied state legislatures any power to propose amendments *at all*, instead giving states only the power to call for a national convention.⁸³ Professor Dellinger has observed that this proposing convention was attractive to the Framers because it was a "national body."⁸⁴ It seems quite natural that it was attractive also because it was a *nongovernmental* body, and thus was not prone to the selfishness of ordinary government.

So those crafting and discussing Article V in 1787 were worried Congress would act selfishly, and that state legislatures would act selfishly. Were they also worried about Congress and the state legislatures acting selfishly at once? The antifederalists certainly were. Consider, for example, the analysis of Article V by the *Federal Farmer* in October, 1787:

While power is in the hands of the people, or democratic part of the community, more especially as at present, it is easy, according to the general course of human affairs, for the few influential men in the community, to obtain conventions, alterations in government, and to persuade the common people they may change for the better But when power is once transferred from the many to the few, all changes become extremely difficult; the government, in this case, being beneficial to the few, they will be exceedingly artful and adroit in preventing any measures which may lead to a change; and nothing will produce it, but great exertions and severe struggles on the part of the common people.⁸⁵

The Federalists responded to charges like these by denying the characterization of Article V as entrenching government and aristocratic interests. Quite telling are the remarks Rufus King made at the Massachusetts ratifying convention, three months after the *Farmer's* remarks:

82. See U.S. CONST. art. V.

83. See Dellinger, *supra* note 78, at 1632.

84. *Id.*

85. *Letters from the Federal Farmer (IV)* (Oct. 12, 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION 579 (Philip B. Kurland & Ralph Lerner eds., 1987).

[M]any of the arguments of [constitutional opponents are] founded on the idea of future amendments being impracticable. [I] call[] upon [these] gentlemen to produce an instance, in any other national constitution, where the *people* had so fair an opportunity to correct any abuse which might take place in the future administration of the government under it.⁸⁶

James Iredell was perhaps most thorough in responding to criticisms of Article V, in his statements to the North Carolina ratifying convention:

The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of [any] Assembly [A]lterations can without difficulty be made, *agreeable to the general sense of the people*. Let us attend to the manner in which amendments may be made. The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, *and yet amendments be generally wished for by the people*, two thirds of the legislatures of the different states may require a general convention for the purpose, in which case Congress [sic] are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper. . . . *By referring this business to the legislatures, expense would be saved; and in general, it may be presumed, [that] they would speak the genuine sense of the people. It may, however, on some occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary.*⁸⁷

Iredell's passage is telling. The goal of the Article V amendment process is to obtain amendments "agreeable to the general sense

86. 2 DEBATES, *supra* note 47, at 116 (statement of King) (emphasis added); see also 2 *id.* (stating that there is no other government "in which such a wise precaution has been taken to secure to the *people* the right of making such alterations and amendments, in a peaceable way, as experience shall have proved to be necessary" (statement of Jarvis) (emphasis added)).

87. 4 DEBATES, *supra* note 47, at 177 (statement of Iredell) (emphases added).

of the people," those that are "generally wished for by the people," and those that reflect a "genuine sense of the people."⁸⁸ Indeed, Iredell is explicit that if Congress fails to propose an amendment that is wished for "by *the people*," the state legislative call for a proposing convention is the cure.⁸⁹ And while Iredell's reference to congressional "flexibility" to circumvent self-interest on the part of state legislatures specifically relates to ratification, the concern underlying the "flexibility" applies to calls for a proposing convention as well.⁹⁰

It is true, of course, that the Framers probably anticipated that a healthy competition between state and federal governments would ensue, with each helping to keep selfishness on the part of the other in check.⁹¹ This competition may have grown less intense over the decades, partly because through federal funding the federal government may have "tamed" state governments. Rotation of individuals from state to federal office also may have broken down the competition.

But surely the Framers appreciated in 1787 that even with fierce competition, certain kinds of potential federal amendments could tempt *all* levels of government to betray the wishes and interests of the people. Liability of government officials for constitutional torts is one example. Pay raises for government

88. 4 *id.*

89. 4 *id.*

90. Nor would it be a good argument to suggest that the inclusion of the ratifying convention route means the Framers assumed that the "legislature" route would involve legislative independence. Not all states had an explicit right to instruct, and although the people of each state retained the right to amend their state constitution to include such a device for control, the Framers quite sensibly did not want to rely on the people of each state doing so at the ratification stage. I suppose the Framers could have invoked the idea of *state proposing conventions*, but such proposing conventions probably were not mentioned for two reasons. First, time may not be of the essence at the proposing stage as it is at the ratification stage, and thus the control the people of each state enjoyed over their legislatures would suffice. Second, the Framers had no direct experience with state proposing conventions when it came to the federal Constitution. Instead, they had experience with a national proposing convention, which of course took place in Philadelphia, and *ratifying* conventions in each state. I should note also that there may be additional reasons for having conventions that go beyond the need to circumvent state legislative self-interest.

91. For a discussion of the "competition" view of federalism, see *infra* notes 208-22 and accompanying text.

officials is another because pay scales for one level of government often are used as reference points for determining fair pay for other levels. Term limits is yet a third example, for similar reasons: The success of term limits at one level of government may embolden and empower proponents of term limits at other levels. It would be bizarre to think the Framers would not be concerned with these kinds of possibilities and would want to give ordinary government officials a monopoly on constitutional change in these areas. Although federal antitrust laws were not yet enacted, certainly the founding generation appreciated that competitive organizations often conspire and collude with each other for the greater goal of rent seeking.⁹²

It is important to note that elections for government officials do not solve the problem. Such elections, unlike debate over a potential constitutional amendment, are not focused on a single issue. Therefore, for example, even if an overwhelming majority of voters in a state embraced federal term limits and did not like the fact that their state legislature refused to apply for a constitutional convention, voters in each state legislative district would have to weigh that discontent along with a number of other policy preferences in deciding whether to punish their state representative. Worse still, because punishing an incumbent could cause voters in a state district to perhaps lose legislative seniority unless voters in other districts all across the state were engaged in similar punishment, a "prisoners' dilemma" makes regular elections even less useful.⁹³

Let me be clear: Those who framed and ratified Article V no doubt *expected* that state legislatures would exist and that most of the time the people of each state would give their representative body some slack to consider federal constitutional amend-

92. Cf. A.C. Pritchard & Todd J. Zywicki, *Constitutions and Spontaneous Orders: A Response to Professor McGinnis*, 77 N.C. L. REV. 537, 539 (1999) (indicating that "state and federal government actors [often times] seek to collude over the allocation of authority and revenues, maximizing each level's ability to distribute rent seeking opportunities").

93. This is where devices like scarlet letters come into play, because they make it more likely that voters in other districts will punish unresponsive incumbents there. For a lengthier discussion of prisoners' dilemmas in the term limits context, see Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 928-29 (1992).

ments. *Expecting* some slack and *mandating* that such slack exist as a federal constitutional matter, however, are very different things. And whether we judge the matter from the perspective of the founding or now, the essential concern about governmental self-dealing argues overwhelmingly against an interpretation that gives government an absolute block on changing government—particularly when it comes to something like term limits.

All of this is *especially* true because the Supreme Court,⁹⁴ as well as the lower courts that have struck down scarlet letters,⁹⁵ view Article V as the *exclusive* means to amending the Constitution. All the rhetoric quoted above about the right of the *people*, as distinguished from government agents, to change their form of government must mean *something*, and if it does not mean amendment *outside* of Article V,⁹⁶ then it must mean the right of popular decision making *within* the confines of Article V.⁹⁷ Be-

94. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837-38 (1995) (holding that Article V is the exclusive means of imposing congressional term limits).

95. See, e.g., *Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999) ("The U.S. Constitution provides . . . exclusive means for its own amendment."); *Donovan v. Priest*, 931 S.W.2d 119, 128 (Ark. 1996) ("Article V of the United States Constitution [requires] that all proposals of amendments to that Constitution" come exclusively through the Article V processes); *Bramberg v. Jones*, 978 P.2d 1240, 1247 (Cal. 1999) ("The United States Supreme Court has held that the means for amending the federal Constitution set forth in Article V are exclusive and may not be modified by state law.").

96. Of course, there are strong arguments that support the legality of a non-Article V amendment process. For the foreseeable future, however, courts are unlikely to embrace these arguments. A good survey and discussion of these arguments is found in Amar, *supra* note 23.

97. Some, including Henry Monaghan, have read the rhetoric about the "people's" right to alter and abolish as a "source of political authority" rather than a "mode of exercise." Monaghan, *supra* note 23, at 129, 164-72. If I understand him correctly, what he suggests is that the people need not have any actual power, so long as those representatives who exercise power can trace their election to the people. Whether or not this is a plausible reading of the rights of the *people of the United States* to alter and abolish, it is completely unpersuasive as applied to the *state* peoples. This is so because, as Monaghan himself points out, state constitutions in 1787 implemented popular sovereignty operationally, giving voters the rights of instruction and state constitutional amendment. See *id.* at 172. Thus, at least at the state level, the popular sovereignty rhetoric was understood as more than a theory about political authority. For this reason, Monaghan and others who defend Article V exclusivity would do better to argue that Article V exclusivity is consistent with the right of the people to alter and abolish precisely because the people of each

cause we have explicitly rejected a Constitution that allows for popular control of Congress,⁹⁸ Article V's reference to state legislatures is the only place for that popular control to be incorporated into the system to initiate constitutional change. The mere likelihood that regular elections for government officials will, in most cases, enable the people to effect constitutional change is simply not enough. The theoretical (or not so theoretical) possibility that newly elected legislature after newly elected legislature might decide, upon taking office, that the proposed constitutional amendment platform on which they ran and got elected is no longer such a good idea⁹⁹ is impossible to square with the *absolute right* the people have to alter their form of government under our Constitution.¹⁰⁰

In pondering these points, we would do well to keep in mind Justice Story's description of Article V as a "safety valve" in his famous *Commentaries*:

In regard to the constitution of the United States, it is confessedly a new experiment . . . Its framers were not bold or rash enough to believe, or to pronounce it to be perfect. . . .

state can control their state legislatures. In other words, exclusivity proponents should embrace—and not resist—my thesis here because it helps them resolve an otherwise thorny problem.

98. See *supra* notes 46-66 and accompanying text.

99. George Nethercutt, a Republican representative from Washington, famously defeated then-Speaker of the House Tom Foley after pledging to serve only three terms. The popular media recently has berated Nethercutt for breaking his promise and deciding to run for a fourth term. See, e.g., Robert T. Nelson, *Nethercutt Haunted by Term Vow*, SEATTLE TIMES, Apr. 12, 1999, at B1, available in LEXIS, News Library, MAJPAP File; Sam Howe Verhovek, *Some Backtracking on Term Limits*, N.Y. TIMES, Apr. 12, 1999, at A20; Edward Walsh, *Term-Limit Pledges Are Coming Due: Some Advocates May Run Again*, WASH. POST, Mar. 15, 1999, at A1; George F. Will, *Terms Unlimited*, WASH. POST, June 24, 1999, at A27.

100. Perhaps my point here can be seen more easily by considering the four analytic options from which we have to choose when it comes to Article V: (1) the people control neither Congress nor the state legislatures; (2) the people control both Congress and the state legislatures; (3) the people control Congress and not the state legislatures; or (4) the people control the state legislatures and not Congress. The first is inconsistent with the idea of popular sovereignty to alter the Constitution—a right the Framers repeatedly asserted as foundational. See *supra* notes 72-77 and accompanying text. The third is implausible in light of the historical record. Our choice is then between the second and the fourth. Given the history and structure of the document, the fourth seems best. Even if one were to embrace the second, however, the recent scarlet letter cases would still be decided wrongly.

[T]hey knew, that time might develop many defects in its arrangements, and many deficiencies in its powers. . . . They knew the pride and jealousy of state power in confederacies; and they wished to disarm them of their potency. . . . They believed that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.¹⁰¹

2. *Federalism and the "What If No State Legislature Exists?" Problem*

The argument against popular control of legislatures in Article V becomes even less plausible when we move from the theoretical level to the practical. What if a state did not have a legislature? To be sure, the Framers expected state legislatures to exist in roughly the same form we know them today, just as they expected Article II executive department heads to exist. The Constitution, however, does not *require* either.

The only contrary argument imaginable would be based on the so-called Republican Guarantee Clause of Article IV.¹⁰² Like other scholars who recently have written on that Clause, I do not read it as requiring representation. The term "republic" was used throughout the founding era most often as a synonym for majoritarian democracy, and not for representative government.¹⁰³ The clause certainly was designed to preserve forms of state government that existed at the framing, which necessarily included the right of the people to instruct.¹⁰⁴ Moreover, the

101. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1822 (New York, Da Capo Press 1833).

102. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

103. See generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); William T. Mayton, *Direct Democracy, Federalism and the Guarantee Clause*, 2 GREEN BAG 2D 269 (1999). These two pieces collect historical evidence to refute the argument some have made, based on language in *Federalist Number 10*, that a "republican guarantee" necessarily means representative filters.

104. See Mayton, *supra* note 103, at 270-72. If the Republican Guarantee Clause called into question any aspect of existing state constitutions in 1787, certainly this

clause was intended to allow states to "*experiment* by altering these forms, . . . [s]ubject only to the condition that these choices and experiments remain within the zone of popular sovereignty."¹⁰⁵ Hamilton put the point this way in *Federalist* 21: "[The Clause] could be no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence."¹⁰⁶ Indeed, the power the people of a state have to structure their own government organizations and agendas in different ways, and to experiment to find the structure that best accomplishes liberty and happiness, is a central tenet of federalism that explains a great number of important federalism decisions over the decades.¹⁰⁷ As Laurence Tribe has suggested, "the real business of preserving federalism [is] protecting the structure of state government from federal intrusion."¹⁰⁸

would have been a major point of discussion and controversy.

105. *Id.* at 271.

106. THE FEDERALIST NO. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

107. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Coyle v. Smith*, 221 U.S. 559 (1911) (upholding a 1910 Oklahoma law moving the state capital to Oklahoma City despite a federal law purporting to condition Oklahoma's admission to the Union on a proviso that the state capital remain at Guthrie until 1913). *New York* is discussed *infra* notes 208-14 and accompanying text.

108. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 918 (3d ed. 2000). For those persons who might be inclined to think the Republican Guarantee Clause in any way prohibits popular coercion of state legislatures, two additional points warrant mention. First, virtually no one argues that all direct democracy is unconstitutional, so that a distinction between exercise of the initiative power generally and popular coercion must be found. If one is found, perhaps because exercise of the initiative power, like permissible federal preemption, does not offend state legislatures in the way coercion does, there is a second problem: Popular coercion of state legislatures does not, most people would think, raise a federal constitutional problem when state legislatures are coerced in matters of state law alone. For example, the people of a state can, by initiative, constitutionally force their state legislature to produce a state budget on time by depriving legislators of pay after a certain date if they have not enacted a state spending plan. For purposes of the Republican Guarantee Clause, however, why would this coercion be any different than coercion in the context of Article V? If the answer is that Article V uses the phrase "legislature," then the Republican Guarantee Clause has added nothing to the discussion, and we are left with the historical understanding of the word "legislature" I described a bit earlier.

But if we interpreted the word "legislature" in Article V to exclude people, then a state that chose to experiment by not having a legislature for some period of time would be denied its say on federal constitutional amendments. The Ohio Supreme Court pointed out over eighty years ago that this would be an odd dilemma indeed:

[T]hat each state has the sole and paramount right to determine what its Legislature shall be cannot now be disputed. It is [a] matter of common knowledge that there is too much petty continuous disturbance of state laws by the various General Assemblies of the several states. Too many laws are enacted, amended, and repealed without rhyme or reason Suppose some one were to propose and the people were to pass an amendment to the state Constitution providing for the abolition of the General Assembly for a period of ten years, during which time all laws should be proposed and enacted by the people of the state through the initiative and referendum. . . . [D]uring such period [would] the state [] be powerless to either favor or reject a proposed amendment to the national Constitution, because it had no General Assembly[?] Such an absurd situation disqualifying a state from passing upon proposed amendments to the national constitution surely was never contemplated.¹⁰⁹

A possible rejoinder might be: "Well, there is no requirement of a legislature, but if the people of a state choose to have one, federal amendment is one thing they have got to give to it—a nondiscrimination requirement of sorts." There is some language in the most-cited United States Supreme Court case in the area, *Hawke v. Smith*, that supports this view.¹¹⁰ In refusing to give effect to the Ohio constitutional provision that authorized the people of Ohio to annul by referendum a ratification of a federal amendment effected by the legislature, the Court did observe that Ohio, while retaining a referendum, had chosen to give most legislative powers to a state legislature.¹¹¹ However, it is hard to understand a nondiscrimination principle in terms of

109. *Hawke v. Smith*, 126 N.E. 400, 403-04 (Ohio 1919) (Wanamaker, J., concurring), *overruled by* 253 U.S. 221 (1920).

110. *See Hawke*, 253 U.S. at 230-31.

111. *See id.* at 228-29.

any underlying constitutional values that might be at work.¹¹² Moreover, such a principle would require the difficult if not impossible task of determining whether a state really *had* a legislature. In other words, how "general" does a body's legislative powers have to be in order that it qualify as a legislature? What if a state creates a number of lawmaking bodies, and reserves to its people the most important lawmaking function? Does it have to assign Article V duties to one of its representative bodies? If so, which one?¹¹³

3. The "What About Recall Efforts?" Problem

Yet another line-drawing problem arises when we consider how far courts are willing to push their rule against coercion of state legislatures. In particular, consider that many state constitutions explicitly provide the people of each of those states with the power to recall their elected representatives before the next regularly scheduled election.¹¹⁴ Imagine that the people of a state exercised the power to remove some or all of a state legislature *because* the legislature failed to take some action—either calling for a convention or ratifying a pending proposal—concerning a federal constitutional amendment. Could a court, in the name of Article V legislative independence, enjoin such a recall effort?¹¹⁵ If not, imagine further that the people of the state then replaced the vanquished legislature with one that promptly followed the people's will by calling for the convention

112. If either of the two values analyzed in Part III, *see infra* notes 208-34 and accompanying text—filtration or preservation of states' rights—were at work, a non-discrimination norm would seem underprotective as to its goal.

113. The language of the Ohio Supreme Court opinion in *Hawke v. Smith* is provocative here: "The Constitution of Ohio nowhere uses the word 'legislature,' and if the strict letter of the law be applied, Ohio has no Legislature in the strict and technical sense. Its Legislature is a 'General Assembly' plus the referendum in the hands of the people." *Hawke*, 126 N.E. at 404 (Wanamaker, J., concurring).

114. *See, e.g.*, CAL. CONST. art. II, § 13; COLO. CONST. art. XXI, § 1; GA. CONST. art. 2, § 2, para. 4; MICH. CONST. art. II, § 8; *see also supra* note 43 (expanding on the theme of legislative accountability to the electorate as enunciated in various state constitutions).

115. The Court has held that at least some cases raising questions under the Article V ratification process are justiciable. *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 390-403 (1983).

or ratifying the proposed amendment. Do the actions of the second legislature count, or are they nullified by improper control over Article V processes by the people?¹¹⁶ If the second legislature's actions count, how do we distinguish actual recall removal from instruction with the threat of removal?

To consider these questions, perhaps it would help to take a broader view. We would all concede that state voters are free to take the state legislature's stance on federal amendment(s) into account when making decisions at regular elections, just as people could for federal congresspersons at federal elections. Yet, if election awareness is permissible, why are instruction and recall not? A quick answer might lie in the distinction we draw between election awareness on the one hand, and instruction and recall on the other, in the congressional context; why not draw the same distinction as to state legislatures? My response is one I have already given above: Federal agents are intended to deliberate nationally, whereas state entities are not.¹¹⁷ That is why the people of a state can instruct state legislatures, but not their federal representatives, on ordinary legislative matters.

To see the point from another angle, consider that the time frame for congressional elections is spelled out expressly in the Constitution¹¹⁸ and cannot be shortened by the people of any state. By contrast, the time frame for state legislative elections is not prescribed by the federal Constitution, and therefore state elections can be very frequent. Indeed, at the founding, they were often yearly.¹¹⁹ Suppose technology improves such that a state chooses to hold its "regular" elections four times a year, and the people of the state use these regular elections to impose their will across the board, including in the federal amendment context. Would anyone say that Article V is violated?

116. I am assuming, of course, that a court could discern the actual intent of the electorate here. *Cf.* *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating an initiative measure because of the intent of the voters).

117. *See supra* notes 56-66 and accompanying text.

118. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year . . ."); *id.* § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen . . . for six Years.").

119. *See, e.g.,* FARBER & SHERRY, *supra* note 42, at 111-12; WOOD, *supra* note 41, at 166-67.

C. Other Settings in Which the Phrase "Legislature" Has Been Used

1. Senate Elections

Sometimes interpretation of a phrase in the Constitution benefits from a comparison of how similar language elsewhere in the document has been understood. "Legislatures . . . of the . . . States" are authorized by the Constitution to do a variety of things, and although I do not pretend to touch on every place in the Constitution that might be compared to Article V, a few specific provisions deserve some attention. Most important are the provisions in Article I regarding the election of United States Senators.

The original Constitution, before passage of the Seventeenth Amendment in 1913, provided in Article I, Section 3 that the "Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ." ¹²⁰ Like Article V, Article I, Section 3 textually makes the state legislatures the actors; it is the "Legislature[s] thereof," and not the "states" more generally, that shall do the "cho[osing]." ¹²¹

For the purposes of this discussion, I need not fully engage the question whether, as an originalist matter, "legislature" in Article I, Section 3 was intended to mean "independent legislature." ¹²² Whether they were guaranteed it by the Constitution or

120. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

121. *Id.* Compare this language with Article II, Section 2, Clause 2, providing that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, [the state's electoral college] Electors." *Id.* art. II, § 2, cl. 2 (emphases added). Although Article II uses the term "legislature," it is not terribly relevant to my inquiry because the subject of the sentence is *the State* itself. In any event, there is no instance in which the people of a state have tried to coerce its state legislature to pick the presidential electors who are most popular with the electorate; such a move has been unnecessary, because by 1820 most states, and by 1865 all states, provided by statute for popular election of presidential electors. For further discussion, see Amar & Amar, *supra* note 93.

122. There may be some originalist support for this. See, e.g., THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("The Senate will be elected absolutely and exclusively by the State legislatures."). There is evidence cutting the other way, however, so it is not clear that Article I, as originally written, did more than *authorize*, as opposed to mandate, states to delegate United States Senator selection to standing legislatures.

not, state legislatures did enjoy independence in selecting their preferred persons for the Senate for the first one hundred years of the Republic.¹²³ But by the late nineteenth century, some years before the formal enactment of the Seventeenth Amendment providing for direct election,¹²⁴ state legislative independence had broken down.¹²⁵

Throughout the 1890s and early 1900s, the people of various states were devising more or less effective means of limiting state legislators' discretion in their choice of federal senators.¹²⁶ What evolved into the most sophisticated approach, the so-called Oregon Plan (or Scheme), began simply enough: State legislative candidates in Oregon were given the opportunity to formally pledge to follow the will of the voters, as expressed through an advisory election, when it came time to pick the next federal senator.¹²⁷ Initially, the pledges were moral only.¹²⁸ As other states began to follow Oregon's lead, however, more creative and coercive devices were employed. Nebraska, in fact, pioneered precisely the kind of scarlet letter system under attack today.¹²⁹ Other states followed suit, crafting variations on the Oregon and Nebraska devices to suit their local needs.¹³⁰ Ultimately, Oregon

123. See FARBER & SHERRY, *supra* note 42, at 340; C.H. HOEBKE, *THE ROAD TO MASS DEMOCRACY* 16-17, 84-85 (1995).

124. See 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, for six years . . .").

125. Several Commentators, have written about these events at some length. See Amar, *supra* note 68; Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENTARY 201 (1996); Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971 (1994). Rather than trudge through the details in this Essay, I will summarize quickly the historical developments and trust that interested readers will explore other more historical accounts. For the most thorough of these accounts, see GEORGE H. HAYNES, *THE ELECTION OF SENATORS* (1906).

126. See Rotunda, *supra* note 125, at 206-09.

127. See HAYNES, *supra* note 125, at 101; Rotunda, *supra* note 128, at 208-09.

128. See Rotunda, *supra* note 125, at 208-09.

129. See HAYNES, *supra* note 125, at 103 (quoting Nebraska Laws § 253); Rotunda, *supra* note 125, at 209.

130. See Rotunda, *supra* note 125, at 209; Kobach, *supra* note 125, at 1978-79 & n.33.

voters enacted a state constitutional amendment that, as a matter of state law, *bound* state legislators to select the United States Senate candidates who were most popular among state voters.¹³¹ By 1912, when the Senate approved the Seventeenth Amendment, nearly sixty percent of the senators were already selected by virtual direct election.¹³²

Of course, the Nebraska scarlet letters and the Oregon constitutional provision binding state legislators, as well as all the copycat measures from other states, were never litigated in the United States Supreme Court,¹³³ or lower courts for that matter. That fact in itself may be telling. Moreover, any challenge to the Oregon and Nebraska devices would have been difficult. If the Oregon and Nebraska models were unconstitutional, that would mean that all the senators elected from all the states that employed such devices for over a decade were illegitimate. The Supreme Court Justices and lower federal court judges who were confirmed by these tainted senators were therefore also illegitimate in some sense. Putting to one side the obvious point that

131. See Brooks, *supra* note 125, at 208.

132. See Rotunda, *supra* note 125, at 208-09.

133. The Supreme Court in *Hawke*, seven years after the enactment of the Seventeenth Amendment, observed that:

It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the [Seventeenth] amendment to accomplish the purpose of popular election is shown in the adoption of the amendment.

Hawke v. Smith, 253 U.S. 221, 228 (1920). A determination in 1920 that the Oregon Plan was unconstitutional would have sent shock waves through the country. Moreover, here (as elsewhere), the *Hawke* Court's reasoning is flawed. The Seventeenth Amendment could have been enacted to *clarify* the people's (preexisting) power to elect Senators. Clauses in the Constitution often are inserted for this clarifying effect. See Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 2-7 (1998) [hereinafter Amar, *Constitutional Redundancies*] (discussing the idea of redundancy as a tool for clarification). Moreover, the Seventeenth Amendment could merely have changed the "default rule" from legislative to popular election, even though the people of the state had always enjoyed the right to change the earlier default rule on their own.

I myself have at times made the same error of logic committed by the *Hawke* Court here. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 223 (1995) [hereinafter Amar, *Jury Service*] (agreeing mistakenly with Justice Harlan's reasoning that enactment of the Fifteenth Amendment by itself shows that voting was not covered by the Fourteenth Amendment).

there would be no judicial remedy for such illegality, I have a tough time envisioning anyone in any of the three branches of the federal government concluding that the entire federal regime was *ultra vires* in this way for over a decade. Thus, this history may be strong historical support for modern scarlet letter proponents.¹³⁴

2. Other Uses of Similar Language

Two other places in the Constitution where "state legislatures" are empowered warrant discussion. Article I, Section 4 allows the "Legislature" of each state to "prescribe" the "Times, Places and Manner of holding Elections for Senators and Representatives"¹³⁵ As I explain more fully below,¹³⁶ the Supreme Court has held—and I completely agree—that this clause does not prohibit a state constitution from vesting reapportionment power in the people of a state acting through their referendum and initiative powers.¹³⁷ Thus, in this clause of the Constitution, the term "legislature" of a state has not meant "independent legislature." Finally, Article IV of the Constitution provides that no new state shall be carved out of territory from existing states "without the Consent of the Legislatures of the States concerned"¹³⁸ I see absolutely no constitutional reason why direct popular consent, or consent through a special convention, would not suffice to cede state property validly.

Of course, even a devout "intratextualist"¹³⁹ would acknowledge that a single term like "state legislature" can mean different things in the same document.¹⁴⁰ For me, however, these analogies, particularly the Oregon Plan story, are helpful ones

134. See Rotunda, *supra* note 125, at 210.

135. U.S. CONST. art. I, § 4, cl. 1.

136. See *infra* notes 194-207 and accompanying text.

137. See *Ohio ex rel. Davis v. Hildebrand*, 241 U.S. 565 (1916).

138. U.S. CONST. art. IV, § 3, cl. 1.

139. "Intratextualism" is a term used to describe the interpretive method by which similar words or terms in the Constitution are analyzed by reference to each other. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748-49, 788-95 (1999). For an extensive example of intratextualism, see Amar, *Jury Service*, *supra* note 133.

140. For example, the term "person" may mean different things in different constitutional contexts; corporations are persons for purposes of the Due Process Clause of the Fourteenth Amendment, even though they are not persons for purposes of the Census Clause.

for a couple of reasons. To begin with, they refute the simplistic textual argument that "legislature" *has to* mean "independent legislature." Relatedly, and more importantly, because of the structural concerns over self-dealing government agents I discussed at length above, Article V is the *least* likely candidate in the Constitution for interpreting "legislature" to mean "independent Legislature."¹⁴¹ Giving state legislatures absolute and non-delegable control over the selection of United States senators and the drawing of congressional district lines—matters of "ordinary" government—would have been much more conceivable than giving them control over federal amendments. Yet, in Article I, we have read "legislature" in its limited sense—that is, subject to whatever popular control state law sets up.¹⁴² A fortiori, the same should be true for Article V.

II. A BETTER APPROACH TO UNDERSTANDING "LEGISLATURE" IN ARTICLE V

If the term "legislature" cannot, for the textual and structural reasons identified above, mean "independent legislature," why is it there? After all, the term "Legislatures . . . of the . . . States" has to mean something, and are we not entitled to infer that those who wrote and ratified the Constitution deliberately chose that term over the more generic "state(s)," which is used extensively elsewhere in the document? I think we are, and in the end I do not think it is hard to see why Article V speaks in terms of "legislatures." Begin by recalling James Iredell's ringing statement in the North Carolina ratifying convention.¹⁴³ He spoke of referring Article V matters to state legislatures to save "expense."¹⁴⁴ As I acknowledged earlier, the Framers *expected* states to have ordinary standing legislatures. It makes perfect sense for the Framers to have wanted to take advantage of what were likely to be existing institutions in each state to make the amendment process as efficient as possible. Mason made this suggestion when the topic of amendment first emerged at the

141. See *supra* notes 72-101 and accompanying text.

142. See *supra* notes 117-34 and accompanying text.

143. See *supra* note 87 and accompanying text.

144. 4 DEBATES, *supra* note 47, at 177.

Philadelphia Convention: "[I]t will be better to provide for [amendments] in an easy . . . way" ¹⁴⁵

A second, and more important, explanation for use of the term "legislature" is also suggested by Iredell, as well as a number of other prominent Framers, including Mason and Randolph. Iredell expressed his happy belief that the Constitution could be "altered with as much *regularity*, and as *little confusion*, as any act of Assembly." ¹⁴⁶ Earlier, Mason had spoken in similar terms of the need to "provide for [amendments] in [a] *regular* and Constitutional way [in order to avoid] chance and violence." ¹⁴⁷ The point here is that those who crafted Article V quite naturally wanted to ensure that there was some smooth, orderly, and uncontroversial way to handle proposal and ratification so that disputes about the validity and legitimacy of newly enacted amendments would be kept to a minimum. ¹⁴⁸

This concern over uncertainty suggests that the term "Legislatures . . . of the . . . States" may well have been designed to avoid confusion generated by a deadlock between a state's executive authority and its legislative authority. Article V is best read, then, as preferring the state's supreme legislative authority whenever there is a dispute as to federal amendment. Under this reading, a state can involve the people in the decisions made by the legislature as long as doing so does not create confusion as a matter of state law about who speaks in the name of the state's supreme legislative authority in this realm. Another entailment of this approach would be to view state legislatures *as the constitutional default*: Unless and until state law speaks definitively as to another superseding state authority, Article V authorizes state legislatures, where they exist, to play an important role in the amendment process. However, when a state has *clearly* replaced that default with another republican, that is, democratic, alternative, Article V is not offended.

145. 1 RECORDS, *supra* note 73, at 203 (statement of Mason); *see also* 3 DEBATES, *supra* note 47, at 37 (statement of Pendleton) (referring to the amendment method as "easy").

146. 4 DEBATES, *supra* note 47, at 177 (emphases added).

147. 1 RECORDS, *supra* note 73, at 203 (emphasis added).

148. *See, e.g.*, 3 DEBATES, *supra* note 47, at 37 (statement of Pendleton) (referring to the amendment process as "quiet").

Finally, Article V mentions "legislatures" simply to make clear that states can, if they choose, delegate Article V power to ordinary government representative bodies. In the absence of Article V, state legislatures would have no constitutional amendment role at all, and it would be questionable whether the people of a state could participate in the constitutional amendment process through a vehicle other than special conventions.¹⁴⁹ Remember, the original Constitution was not, and consistent with federalist political thought, could not have been ratified simply by the ordinary legislatures of the thirteen states.¹⁵⁰ As George Mason put the point: "[T]he authority of the people [is] . . . essential The Legislatures have no power to ratify [the proposed federal constitution]. They are the mere creatures of the state Constitutions, and cannot be greater than their creators."¹⁵¹

This "authorization" reading of Article V is perfectly consistent with the "default" approach described above. Taken together, they mean that the people of each state are free to influence, indeed even coerce, Article V decisions so long as state law speaks clearly. In the absence of a state deviation, however, Article V presumes the legislature, should one exist, speaks for the state. The "authorization" reading merely adds to the "default" reading the observation that, in the absence of a state legislature default in Article V, the people of each state may not have been able to delegate the power.

III. POTENTIAL COUNTERARGUMENTS

Let us now take up arguments that persons opposing my thesis may assert. Because the lower court opinions that I criti-

149. See Amar, *supra* note 23, at 459.

150. See WOOD, *supra* note 41, at 532-35.

151. 2 RECORDS, *supra* note 73, at 88; see also THE FEDERALIST NO. 40, at 252-53 (James Madison) (Clinton Rossiter ed., 1961) ("The proposed Constitution was to be submitted to the people themselves" (emphasis added)); THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961) ("The Constitution is to be founded on the assent and ratification of the people of America [and] derived from the supreme authority in each State—the authority of the people themselves."); THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961) ("This article [VII] speaks for itself. The express authority of the people alone could give due validity to the Constitution." (emphasis added)).

cize here make no historical or structural arguments and instead rely exclusively on some old Supreme Court cases, I take up these old cases first.¹⁵² I then posit some structural arguments against my position that no one has advanced yet, but that might be asserted as more attention is focused on this important issue.

A. Supreme Court Case Law

Far and away the most important case is *Hawke v. Smith*,¹⁵³ decided in 1920. The *Hawke* decision is featured centrally in each and every one of the recent rulings invalidating Article V scarlet letters.¹⁵⁴ I squarely acknowledge that the broad language from *Hawke* quoted in Part I¹⁵⁵ suggests that, at least at the ratification stage, the word "legislature" in Article V does not include the people. On the other hand, *Hawke* involved a *supplantation* of the legislature by the people and not mere *coercion* by the people to force the legislature to act.¹⁵⁶ Much more importantly, the broad language in *Hawke* was not necessary to the result in that case. And there is other language in the opinion that helps explain, in ways consistent with the reading of Article V that I embrace here, why the case was decided correctly and was, in fact, an easy call.¹⁵⁷

The facts of *Hawke* are rarely presented in modern cases citing it,¹⁵⁸ and indeed are not all apparent from the Supreme

152. See *infra* notes 153-207 and accompanying text.

153. 253 U.S. 221 (1920).

154. See, e.g., *Miller v. Moore*, 169 F.3d 1119, 1123-24 (8th Cir. 1999); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 56-57 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119, 125-27 (Ark. 1996); *Bramberg v. Jones*, 978 P.2d 1240, 1247-49 (Cal. 1999).

155. See *supra* note 34 and accompanying text.

156. This is the same textual point I made earlier, when I suggested that scarlet letters comply with the technical terms of Article V because, whether coerced or not, the legislature is doing the acting. See *supra* notes 35-36 and accompanying text.

157. *Hawke* may also be limited to the context of amendments proposed by Congress, as distinguished from those generated by a proposing convention. The idea would be that where Congress has proposed an amendment, it could attach certain conditions on its ratification, such as ratification by "independent legislatures."

158. See, e.g., *Miller*, 169 F.3d at 1123-24; *League of Women Voters*, 966 F. Supp. at 56-57; *Donovan*, 931 S.W.2d at 125-27.

Court opinion itself.¹⁵⁹ But we cannot easily understand what is at stake without appreciating the sequence of events.

On December 1, 1917, two-thirds of each house of Congress adopted a resolution proposing and submitting for ratification what ultimately became the Eighteenth Amendment to the Constitution—the alcohol prohibition amendment.¹⁶⁰ An important feature of the resolution was its provision “that the Amendment should be inoperative unless ratified” by the requisite number of legislatures of the states “within seven years from the date of . . . submission.”¹⁶¹ On January 7, 1919, the Senate and House of Representatives of Ohio, acting as the General Assembly of the state of Ohio, adopted a resolution ratifying the proposed prohibition amendment and mandated that certified copies of the joint resolution of ratification be forwarded by the governor of Ohio to the United States secretary of state and to the presiding officer of each house of Congress.¹⁶² On January 27, 1919, the governor of Ohio complied with the legislature’s resolution.¹⁶³ Two days later, the secretary of state of the United States proclaimed that the Eighteenth Amendment had been ratified, listing Ohio as one of the thirty-six states having ratified the same.¹⁶⁴

On March 11, 1919,¹⁶⁵ six weeks after the United States secretary of state proclaimed ratification, a voter in Ohio filed with defendant Harvey Smith, the secretary of state of Ohio, a referendum petition pursuant to provisions in the Ohio Constitution.¹⁶⁶ The petition, which had been signed by the requisite number of voters, six percent, requested that Mr. Smith prepare

159. See *Hawke v. Smith*, 253 U.S. 221, 224-25 (1920).

160. The Eighteenth Amendment, which was repealed by the Twenty-first Amendment, see U.S. CONST. amend. XXI, § 1, had “prohibit[ed] the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.” *Hawke*, 253 U.S. at 224-25.

161. *Hawke*, 253 U.S. at 225.

162. See *id.*

163. See *id.*

164. See *id.*

165. See Petition in Common Pleas Court, Record at 16, *Hawke v. Smith*, 253 U.S. 221 (1920) (No. 582).

166. See *id.* Record at 16-17.

ballot materials for an election to be held by the people of Ohio to approve or reject the alcohol prohibition amendment to the United States Constitution.¹⁶⁷ The 1918 Ohio Constitution “reserve[d] to [the people] themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.”¹⁶⁸ By its terms, the Ohio Constitution required that any legislative ratification not go into effect “until ninety days after it shall have been adopted by the General Assembly,” during which time signatures could be gathered and a referendum petition could be filed.¹⁶⁹

In April of 1919, plaintiff George Hawke brought suit in Ohio county court to enjoin Smith from expending any state monies in preparing and printing forms for the referendum ballot, on the ground that such a referendum under these circumstances would violate federal law.¹⁷⁰ The trial court, the state appellate court, and the Ohio Supreme Court all rejected this claim, holding that the referendum ballot could proceed.¹⁷¹

The United States Supreme Court reversed, in effect refusing to permit the Ohio Constitution’s referendum provisions to be implemented on these facts.¹⁷² In doing so, the Court spoke in the broad terms quoted earlier,¹⁷³ essentially saying that a legislature is a legislature, and not the people. In assessing this language, we must bear in mind that courts—even the Supreme Court—are part of the “ordinary government” about whom the framers displayed distrust. There is an element of elitist anti-populism¹⁷⁴ in the *Hawke* Court’s tone that is difficult to square

167. *See id.* Record at 19.

168. *Id.*

169. *Id.*

170. *See id.* Record at 16-21.

171. *See Hawke v. Smith*, 253 U.S. 221, 224 (1920).

172. *See id.* at 231.

173. *See supra* note 34 and accompanying text.

174. I see this elitism in the lower court opinions as well. As evidence of this elitist bias, which plagues me and other law professors too, I should quickly add, consider the California Supreme Court’s treatment of the severability clause in the invalidated Proposition 225. After concluding that the people of California had no direct role to play in the Article V process, the California Supreme Court turned to whether any portion of the initiative could be saved. *See Bramberg v. Jones*, 978 P.2d 1240, 1252 n.19 (Cal. 1999). I submit that it could be saved merely by excising

with the historical and structural arguments I have advanced. For these reasons, the passage is very unpersuasive.

Moreover, the Court's broad language was unnecessary to resolve the case before it because there was a much firmer ground on which to do so, and one that the Court itself suggested. After explaining that the Ohio referendum could not proceed, the Court observed: "Any other view might lead to *endless confusion* in the manner of ratification of [the] federal amendments."¹⁷⁵ Now here is a concern that is rooted in the structure and history of the Constitution itself. And the facts of the case implicate this concern as powerfully as one could imagine. Let us not forget that by the time the referendum petition was filed, the governor of Ohio had already told the federal authorities that the legislature of Ohio had ratified the Eighteenth Amendment.¹⁷⁶

Indeed, things were worse than that for the Ohio referendum proponents. The United States secretary of state had already

references to "Article V" from Proposition 225. So construed, Proposition 225 merely would have instructed the California legislature to make a non-Article V application to Congress, communicating the will of the people of California concerning a federal term limits amendment. True, under the court's reasoning, Congress would not have had to "count" this application towards Article V's two-thirds threshold, but so what? Such an application still might have had an effect on Congress—certainly more effect than disparate communications from individual constituents.

The California court's response to this option is brief but revealing. Citing to an earlier case, which, of course, it has the power to overrule, the court observed: "[I]nsofar as a provision of an initiative measure simply adopts a resolution calling upon Congress to propose an amendment . . . , the measure 'does not create law and thus . . . does not "adopt" a "statute" within the meaning of' [the voters' initiative powers in the California Constitution]." *Id.* (quoting *AFL-CIO v. Eu*, 686 P.2d 609, 628 (Cal. 1984)).

The problem I have with this reasoning is simple: Proposition 225, construed to excise the "unconstitutional" references to Article V, does more than "adopt[] a resolution calling upon Congress," it imposes a statutory duty on the California legislature to take an act—to expend funds to make a non-Article V application on behalf of the people of California for whatever it may be worth. A "resolution" by the people is not quite the same thing as an "Application," even one that will not count for Article V purposes, by the legislature on behalf of the people. For a variety of reasons, the latter may have more impact. Surely if the people of California through the initiative instructed the state legislature to expend funds on some other communicative activity, say antismoking ads, we would say that initiative "creates law." It is far from clear to me why Proposition 225's obligations, though only directed to the legislature, are not obligations arising from a "law."

175. *Hawke*, 253 U.S. at 230 (emphasis added).

176. See *supra* note 163 and accompanying text.

proclaimed the validity of the new amendment.¹⁷⁷ Did anyone really think the people of Ohio could reopen the validity of an amendment already proclaimed by the federal government to be the Supreme Law of the land? To put the point another way, by ordering the governor to communicate ratification—apparently in violation of the ninety-day waiting period¹⁷⁸—the Ohio legislature effectively blocked the state referendum procedure from being used. A very different case would have been presented, however, had referendum proponents been able to get into court to enforce the Ohio Constitution *before* legislative ratification was communicated to Washington. Given the way things did in fact happen, had the United States Supreme Court given effect to the referendum provision, an immensely uncertain situation would have resulted. In some ways, then, *Hawke* can be understood to be more about the lack of remedies for state law breaches than it was about state law conflict with Article V.¹⁷⁹

The Supreme Court even acknowledged much of this two years later, in *Leser v. Garnett*,¹⁸⁰ when it affirmed the validity of the Nineteenth Amendment over objections that various states had improperly ratified the Amendment in violation of state legislative procedures.¹⁸¹ In dispensing with the challenge, the Court explicitly relied on the ground that the governors of the states in question had—whether or not they complied with state law in doing so¹⁸²—already certified to the federal govern-

177. See *supra* note 164 and accompanying text.

178. The governor communicated ratification to the United States secretary of state 20 days after the state legislature ratified the amendment. See *supra* notes 162-63 and accompanying text. This apparently violated Ohio's law because the Constitution of Ohio mandated that no ratification "shall go into effect until ninety days after it shall have been adopted by the General Assembly." Petition in Common Pleas Court, Record at 19, *Hawke v. Smith*, 253 U.S. 221 (1920) (No. 582).

179. Cf. 1 ANNALS OF CONG., *supra* note 45, at 741 (observing that "binding" instructions need not void the vote of faithless agents).

180. 258 U.S. 130 (1922).

181. See *id.* at 137. Plaintiffs in *Leser* also challenged ratification in some states on the same ground unsuccessfully urged in *Hawke*—that violation of state referendum laws made ratification ineffective. See *id.* On this point, the *Leser* Court merely cited *Hawke*. See *id.*

182. The *Leser* Court explained that as long as the "legislatures . . . had power to adopt the resolutions of ratification," their having done so was conclusive upon the United States secretary of state. *Id.* Of course, this reasoning really did not take head on the plaintiff's argument that because the legislatures in question had vio-

ment, and that certainty required respect for these certifications.¹⁸³ This makes perfect sense. How could we expect federal *executive* and *legislative* officials, to whom notice of certification by states is sent, to arbitrate disputes about what state law means? One way to understand the reference to "legislatures" in Article V, then, is to say that their communication to Congress counts as "official"; but this does not mean that Article V prevents state law from coercing state legislatures into communicating to the federal government the message that pleases the people. Courts, like the California Supreme Court in the Proposition 225 case,¹⁸⁴ are fully capable of enforcing this coercion before the fact *in ways that avoid confusion and uncertainty*. Given all this, to the extent that *Leser* adds anything,¹⁸⁵ the light it casts backward on *Hawke* might be a narrowing one.¹⁸⁶

lated "rules of legislative procedure," they lacked "power." *Id.* In any event, for our purposes, if violation of procedural rules in *Leser* does not deprive a state legislature of power, then neither should violation of the referendum provisions at issue in *Hawke* and at issue in another part of *Leser* have deprived the Ohio legislature of its power. Ohio's certification to the federal government in *Hawke*, then, is "conclusive" by the reasoning of *Leser* without regard to whether Ohio law violated Article V.

183. See *id.* (relying on *Field v. Clark*, 143 U.S. 649, 669-73 (1892)).

184. See *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999).

185. The precedential value of *Leser* is weakened by the fact that, as the Court itself noted, the states whose ratification was in question were unnecessary to the ultimate ratification of the Nineteenth Amendment inasmuch as enough other states had already ratified it. See *Leser*, 258 U.S. at 137. One could argue, I suppose, that because some of the unchallenged state ratifications took place after some of the challenged state ratifications, those unchallenged subsequent ratifications may have been improperly influenced by the earlier "illegal" ratifications being contested in *Leser*. Perhaps it is for that reason the Court went on to discuss the merits of the plaintiffs' claims that various ratifying states had violated state referendum and state procedural rules.

186. Mike Paulsen has noted this aspect of *Leser*:

Of course, the state's transmission of its ratification should be one that federal authorities may take at face value. . . . (The Court so held just two years after *Hawke*, in *Leser v. Garnett*). It is thus the responsibility of state authorities to enforce any state law *procedural* condition subsequent prior to transmittal. . . .

Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 732 (1993). Because of the opacity of the *Hawke* opinion, however, Professor Paulsen did not realize that *Leser* narrowed *Hawke* and at the same time made its outcome correct. Accordingly, Professor Paulsen suggests that *Hawke* was "wrongly decided." See *id.* at 731 ("On balance, . . . the [best thing to do] is simply to recognize that *Hawke* was wrongly decided."). In a discussion with him, I think I have convinced Professor Paulsen that

The other opinion involving the Supreme Court that often is mentioned in the scarlet letter debates—though this time by scarlet letter proponents—is *Kimble v. Swackhamer*,¹⁸⁷ written in 1978. *Kimble* was not a decision by the full Court. Rather, it was an in-chambers opinion by then-Justice Rehnquist.¹⁸⁸ Acting in his capacity as Circuit Justice for the Ninth Circuit, he refused to enjoin a Nevada law that called for a state popular election to provide advice to the Nevada legislature on the question of ratifying the Equal Rights Amendment.¹⁸⁹ Obviously, *Swackhamer* is a limited decision. First, it involved only one Justice.¹⁹⁰ Second, it involved a purely advisory referendum that had no legal or ballot designation ramifications.¹⁹¹ Third, and no one until the California Supreme Court in the Proposition 225 opinion had mentioned this,¹⁹² it involved input of the people sought by the legislature rather than imposed by the people themselves.¹⁹³

There is one other Supreme Court case, decided a few terms before *Hawke*, that I think is very important, *Davis v. Hildebrant*,¹⁹⁴ although no one else seems to talk about it. *Davis* involved a challenge to popular involvement not in Article V, but rather in Article I, Section 4, which, as I noted above, like Article V uses the term state “legislature.”¹⁹⁵ Article I, Section 4, Clause 1 provides in full: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chosing Senators.”¹⁹⁶

Hawke has unnecessary and unpersuasive language, but is correct on its facts and susceptible of a narrower reading consistent with its reference to “confusion.”

187. 439 U.S. 1385 (Rehnquist, Circuit Justice 1978).

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.* at 1386.

192. *See Bramberg v. Jones*, 978 P.2d 1240, 1248 (Cal. 1999).

193. In other words, the advisory referendum was itself the product of a Nevada legislative statute. *See Kimble*, 439 U.S. at 1386.

194. 241 U.S. 565 (1916).

195. *See supra* note 135 and accompanying text.

196. U.S. CONST. art. I, § 4, cl. 1.

The plaintiffs in *Davis* challenged another progressive feature of the Ohio Constitution—the provision that empowered the people of Ohio directly to engage in congressional redistricting by the initiative and referendum process.¹⁹⁷ They argued, as do challengers to today's scarlet letters, that "legislature" in Article I, Section 4 means a representative body rather than the people acting directly.¹⁹⁸ Accordingly, the plaintiffs argued, Ohio's redistricting done by the people in 1916 did not have the force of law.¹⁹⁹

The Supreme Court rejected this challenge to redistricting by referendum, relying on Congress's apparent tolerance of popular participation.²⁰⁰ The Court noted that Congress, in an earlier federal statute enacted in 1911, had inserted a clause that was "plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."²⁰¹ This congressional statement, reasoned the Court, effectively cured any problem that otherwise would exist.²⁰²

At first blush, the *Davis* Court's approach seems reasonable and not necessarily inconsistent with *Hawke*. After all, the textual grant of power to Congress in Article I, Section 4 does seem to distinguish this clause from Article V, where Congress enjoys no such broad discretion.²⁰³ But a closer look at *Davis* reveals that the reliance placed on the congressional Act becomes more complicated and *Davis* becomes much more difficult to reconcile with the broad statements in *Hawke*. Why? Because as a textual matter—and *Davis* purports to be a textual decision relying on the textual power Congress enjoys under Article I, Section

197. See *Davis*, 241 U.S. at 566-67.

198. See *id.* at 567.

199. See *id.*

200. See *id.* at 568-69.

201. *Id.* at 568.

202. See *id.* at 568-69.

203. Compare U.S. CONST. art. I, § 4, cl. 1 (allowing Congress to make or alter regulations governing elections for senators and representatives), with *id.* art. V (proscribing the specific proposal and ratification process for amendments).

4²⁰⁴—Congress itself in 1911 did not “make or alter” any “regulation.” Instead, it merely created authority in states, subject only to state law constraints, *for them* to make such regulations in any way they wanted and to define “legislative power” for these purposes to include the people.²⁰⁵ That is precisely the way the Court characterized the federal statute, both in *Davis*²⁰⁶ itself and in the discussion of *Davis* in *Hawke*.²⁰⁷ But if Congress is not making any laws itself and is merely saying it thinks a definition of “legislature” for Article I, Section 4 that includes popular power is reasonable enough to permit state law flexibility, why not the same for Article V? In the end, then, I think *Davis* is in tension with a broad reading of *Hawke*, such that *Hawke* is bracketed by two decisions, *Davis* before it and *Leser* after it, both of which may counsel in favor of a narrower understanding of the *Hawke* result.

B. Possible Structural Arguments Against Popular Input

There are two other kinds of arguments that, though not articulated by any of the courts in this area, may lurk beneath the results. I think neither of these arguments works on its own terms, and certainly neither can overcome the structural and historical arguments I have advanced above.

1. Competitive Federalism

The first set of structural arguments to consider are those that have been invoked recently by the Court, in cases such as *New York v. United States*,²⁰⁸ to protect state legislative preroga-

204. See *Davis*, 241 U.S. at 569.

205. See *id.*

206. See *id.* (“[T]he referendum . . . should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.” (emphases added)).

207. See *Hawke v. Smith*, 253 U.S. 221, 230 (1920) (noting that in *Davis*, “Congress had itself recognized the referendum as part of the legislative authority” (emphases added)).

208. 505 U.S. 144 (1992); see also *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206 (1998) (reviewing the applicability of the Federal Americans with Disabilities Act of 1990 to a state prison system); *Printz v. United States*, 521 U.S. 898 (1997) (applying the prohibition on commandeering to the Brady Act, a federal statute requiring state officials to make a reasonable effort to determine if certain pro-

tive against coercion from without—from the federal government—rather than from within.²⁰⁹ On the view adopted in these cases, one of the primary virtues of federalism is the creation of two levels of government, each of which will keep the other in check.²¹⁰ The federal government watches over state governments and state governments blow the whistle on federal overreaching, with individual liberty and happiness being the beneficiaries. In cases like *New York*,²¹¹ the Court worries about accountability and monopolization-of-time problems that arise when the federal government “commandeers” state legislatures to do federal bidding.²¹² In such a situation, state legislators may get derailed improperly from their own business and may also be improperly blamed for bad federal policies by the people, and thus weakened in their eyes. Perhaps the crispest articulation of this idea by the Court comes from *Gregory v. Ashcroft*,²¹³ and was repeated in the following form in *New York*:

[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.²¹⁴

The idea as applied to Article V would be that we should interpret the amendment process to make it difficult to enact

spective firearm sales would be illegal).

209. See *New York*, 505 U.S. at 161.

210. See *Printz*, 521 U.S. at 921.

211. See Mathew P. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: *New York*, *Printz*, and *Yeskey*, 1998 SUP. CT. 'REV. 71, 79 (observing that “tyranny prevention” value “has figured most prominently in the recent case law” like *New York*).

212. See *New York*, 505 U.S. at 169 (“Accountability is thus diminished when, due to Federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by Federal regulations.”).

213. 501 U.S. 452 (1991).

214. *New York*, 505 U.S. at 181 (internal quotations and citations omitted).

amendments that have the effect of weakening state government, *and* that state legislatures are best situated to appreciate and safeguard the institutional interests of state government against federal intrusion. Therefore, the amendment process should involve, as much as possible, state legislatures rather than the people, who may not have the experience (or selfish incentives) to understand the importance of state government.

It is true, as observed above, that Article V was animated by a concern about selfish aggrandizement of federal powers, all of which explains why Congress was not given a veto.²¹⁵ However, it is hard to leap from this observation to an affirmative grant of any protection of state legislatures. Indeed, the text and structure of Article V seem to foreclose such a move. In particular, under the straightforward terms of Article V, Congress can, without input from state legislatures, propose a self-enhancing amendment that, at Congress's direction, can be ratified not by state legislatures but by state conventions.²¹⁶ Because state legislatures are not in control of conventions, which instead are drawn from and answer directly to the people,²¹⁷ the federal government—the chief rival of state government on this view of federalism—can remain completely within Article V bounds and yet promote amendments reducing state legislative power *without state legislatures having any formal input*.²¹⁸ Article V simply does not guarantee that state legislatures are included in the amendment process to protect themselves.

Now someone might respond by saying: "Precisely because Congress has the power to propose whatever constitutional amendments it wants in order to further its self-aggrandizing agenda, we should read Article V to permit state legislatures that same unfettered discretion in determining which amendments *they* would like to have enacted. After all, if we are guided by a theory of federalism that emphasizes healthy competition, should not state legislatures have available to them what

215. See *supra* notes 78-79 and accompanying text.

216. This is true even if the amendment calls for a state to relinquish its proportional representation in the House. See U.S. CONST. art. V (providing "that no state, without its Consent, shall be deprived of its equal suffrage in the Senate").

217. That is the whole point of a ratifying convention.

218. See U.S. CONST. art. V.

their competitor does?" The simple response to this is that the words, structure, and history of Article V reject parity between Congress and state legislatures. I just noted that Congress has the unfettered power to propose. In contrast, state legislatures, *even if we read the term "legislatures" to mean "independent legislatures,"* simply lack that power under Article V. Instead, Article V provides only that state legislatures, or more specifically two-thirds of them, can force Congress to "call a Convention for proposing Amendments" ²¹⁹ This convention, in turn, will have discretion ²²⁰ whether to propose any amendments for ratification at all. Indeed, the penultimate draft of Article V, as Professor Dellinger has pointed out, would have given state legislatures precisely the same power to propose amendments and have them voted on as enjoyed by Congress. ²²¹ But the Framers rejected that version in favor of the final version that deprives states of the power to propose. ²²²

219. *Id.*

220. This is clear historically and textually. Because Congress is acknowledged to have discretion in proposing, so too would a convention. Indeed, there has never been a question about whether a convention would have discretion to propose or not propose. There has been a debate on whether the convention can propose amendments outside the scope of the applications of the states. See Dellinger, *supra* note 78, at 1636-38. I take no view on this, except to say that if there is such unfettered discretion, it comes, as Charles Black suggested, from the nature of the term "Convention to propose" itself, and the fact that the Convention in Philadelphia enjoyed full discretion. See *id.* at 1624 n.5 (citing Charles Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 189 (1972)). The argument for unbridled convention power made by Walter Dellinger, see *id.* at 1630-31, resting on the historical desire that state legislatures not be able to propose on their own, would be completely addressed by a veto power on the part of the national convention and does not require broad-ranging power to propose amendments unrelated to the issues giving rise to the convention. Of course, under any reading, the convention would have to enjoy the power to decide what "unrelated" means in this context.

221. See Dellinger, *supra* note 78, at 1625.

222. It is for these reasons that the Court has never included Article V in the "political safeguards of federalism" theory that animates, for example, the *Garcia* decision. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 & n.1 (1985).

I should add that a competition can be healthy, even if both sides are not armed identically. The simple fact is that no matter how we read Article V, Congress and the states do not have identical sets of weapons in the federalism battle for the hearts and minds of the people. There are a number of important respects *outside* the federal amendment process in which Congress has more power to compete. For example, it can preempt state lawmaking power by virtue of supremacy. It

2. Filtration

The other structural argument that may be invoked to support reading the term "legislature" to mean "independent legislature" is grounded in filtration and deliberation. The notion here is pretty simple: The Constitution in large measure reflects distrust of passionate popular majorities, and the requirement of independence on the part of state legislatures ensures that decisions concerning federal amendment will be more thoughtful and judicious.²²³

There are a number of powerful responses. To begin with, there is no historical evidence reflecting this deliberative view of state legislatures in the Article V setting.²²⁴ Instead, the Framers' analyses of Article V at the Philadelphia Convention, in *The Federalist Papers*, and the state ratifying conventions use

is not hamstrung, because of the rejection of the "instruction" language proposed in the First Amendment, by popular meddling in fashioning ordinary law. Everyone concedes the permissibility of instruction of state legislatures in most everyday legislative activities, but this means state legislatures may be less free to prove their stuff, for example, by passing currently unpopular laws that look wise in a few years, than is Congress. Yet this fact has not lead us to construe the Tenth Amendment or anything else in the Constitution as interfering with the right of the people to instruct their state legislatures as a general matter.

I do not mean to suggest that state government is less well armed than Congress in all respects. Their proximity to the people might give them access and credibility those inside the beltway lack. In any event, my point here is that the competitive balance of federalism does not, and could not, require Congress and state legislatures to be accorded identical treatment.

223. Cf. THE FEDERALIST NO. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961) (warning against the danger of public passions in putting constitutional questions to a decision of the whole society).

224. Compare this with the "indirect" election of senators under Article I before the Seventeenth Amendment and the selection of presidential electors under Article II. For example, James Madison described the Senate election process under Article I as having the advantage of "favoring a select appointment." THE FEDERALIST NO. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961).

In a similar vein, Alexander Hamilton in *Federalist* 68 defended the presidential election scheme in the following terms:

It was . . . desirable that the immediate election [of the President] should be made by men *most capable* of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.

THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

the terms "legislatures of the states" and "states" interchangeably and suggest, if anything, that state legislatures were to mirror the people in the states.²²⁵ Nor is it surprising that there is no discussion of state legislatures as "filters" here. Most importantly, for the structural reasons I discussed above, state legislatures were the *last* bodies appropriate to serve as filters.²²⁶ Recall yet again that when the original Constitution was ratified, the Framers explicitly rejected state legislatures as legitimate ratifiers because, as organs of ordinary government, they were presumptively *improper* filters.²²⁷

Moreover, it is not clear that the people acting directly *need* any filters in the amendment context.²²⁸ The state *ratifying* "*conventions*" that Article V authorizes Congress to choose may be defined broadly enough to include popular democracy. In other words, it might be that Congress can choose direct democracy as a route to *ratify* proposed amendments. If this is so, then it is not obvious why the people would be thought competent to ratify but not competent to be involved in the *proposal* process.

Related to this notion, consider that at the time of the framing the state of Rhode Island thought that a successful popular referendum would have sufficed to ratify the original Constitution, even though Article VII of the Constitution refers only to the "Ratification of the Conventions of . . . States."²²⁹ Responding to the objection that popular referendum would not have been enough, Rhode Island's Governor Collins explained:

Although this state has been singular from her sister states in the mode of collecting sentiments of the people upon the Constitution, it was not done with the least design to give any offence to the respectable body of those who composed

225. See, e.g., 4 DEBATES, *supra* note 47, at 177 (statement of Iredell) ("[State legislatures], it may be presumed, . . . will speak the genuine sense of the people."); see also THE FEDERALIST NO. 49, at 313-17 (James Madison) (Clinton Rossiter ed., 1961) (discussing conventions for proposing amendments to the Constitution and arguing that the legislatures reflected the will of the people).

226. See *supra* notes 72-101 and accompanying text.

227. See *supra* notes 149-51 and accompanying text.

228. Of course, a filter is not the same thing as deliberation. The latter may exist through requirements of "cooling off" periods and multiple elections, without the downside of the former.

229. U.S. CONST. art. VII.

the [Philadelphia] convention, or a disregard to the recommendation of Congress, but upon pure republican principles, founded upon that basis of all governments originally deriving from the body of the people at large.²³⁰

Finally, and in any event, the “filtration” argument collapses, as did the federalism argument, under the weight of the structure of Article V itself. Put simply, concerns about filtration are already addressed by the rest of Article V, no matter how we read the word “legislature.” Remember, when two-thirds of the states apply, all that happens is Congress assembles a national convention.²³¹ This national convention is a big, deliberative filter that completely satisfies concerns about hasty or passionate changes in the Constitution.²³² Indeed, it is a much more deliberative filter than are the state legislatures. Like Congress, it is a *national* body that allows delegates from each state to meet and compare concerns. Additionally, because the proposing convention is a *national entity that did not predate* the Constitution, it—just like Congress or the Philadelphia Convention that created it—would not be amenable to instruction.²³³ For this reason, it would have complete discretion to screen out passionate and hasty amendments. If even further filtration were needed, it can be found in the high supermajority requirements in Article V

230. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 528 (1995); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 112 (1996) (indicating that Rhode Island’s actions were legitimate under legal principles of the founding).

231. See U.S. CONST. art. V.

232. If the deliberation concern is styled not in terms of unwise amendments, but rather unwise *failures* to amend, there would be no justification for refusing popular calls for a convention. At most, this argument would justify an independent power on the part of state legislatures to make applications—not to block any.

233. In the same way, the electors of the so-called electoral college *may* be free agents. I say “may” here because, on the one hand, the electoral college, like Congress and an Article V proposing convention, is truly a national group whose existence owes entirely to the Constitution. On the other hand, the electoral college does not “meet” and deliberate like Congress or an Article V proposing convention. The question of whether electors can be “bound” and be punished for breaking pledges is therefore an open one. Cf. *Ray v. Blair*, 343 U.S. 214 (1952) (finding that the Twelfth Amendment does not demand absolute freedom for the presidential elector to vote his own choice and that an Alabama Democratic Party pledge requirement was not unconstitutional).

and the time required to surmount such supermajority requirements.²³⁴

IV. THE QUESTION OF COERCING FEDERAL LEGISLATORS

Thus far, I have concentrated on coercive measures as applied to state legislators. As has been implicit through much of my discussion, the analysis is quite different with regard to federal legislators. As I have explained at length,²³⁵ shortly after ratification, language that would have included a right to instruct Congress was proposed as part of the Bill of Rights and was consciously rejected for sound reasons recounted above.²³⁶ This episode, together with cases like *Thornton*²³⁷ and *McCulloch v. Maryland*²³⁸ stand for the proposition that, unlike state legislatures, Congress is not an agent of people of the states for any purpose.²³⁹ The people of a state cannot displace Congress or preempt it by making law directly in the way they can displace their state legislature.²⁴⁰ The people of the states do not pay Congress's salaries the way they pay their state legislators' salaries; the federal treasury does.²⁴¹ Additionally, the people of the states cannot recall Congresspersons. In all respects, Congress is a federal institution and Congresspersons wear only one hat—a federal hat.

Moreover, as to the House of Representatives, there may be another problem with scarlet letters and other coercive devices. Federal statutes require that House members be elected by district and not by all the voters in a state.²⁴² These federal

234. See, e.g., 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 371-72 (1803), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 85, at 583; see also 3 STORY, *supra* note 101, § 1824 (discussing the Article V amendment process and concluding that the "guards . . . against the too hasty exercise of the power . . . are apparently sufficient").

235. See *supra* notes 45-66 and accompanying text.

236. See *supra* notes 58-66 and accompanying text.

237. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); see *supra* notes 5-16 and accompanying text.

238. 17 U.S. (4 Wheat.) 316 (1819).

239. See *Thornton*, 514 U.S. at 803; *McCulloch*, 17 U.S. (4 Wheat.) at 328.

240. See *Thornton*, 514 U.S. at 798; *McCulloch*, 17 U.S. (4 Wheat.) at 328.

241. See U.S. CONST. art. I, § 6, cl. 1.

242. See, e.g., 2 U.S.C. § 2c (1994).

statutes trump inconsistent state law by virtue of the Supremacy Clause.²⁴³ Thus, any instruction by the people of a state as a whole to individual House members, even if unproblematic on other grounds, might violate federal statutes.

Also, any attempt to enforce scarlet letters and other coercive devices might, if taken too far, run afoul of *Thornton* itself to the extent that such efforts may be seen as adding qualifications for federal office beyond those in the Constitution.²⁴⁴ Finally, any scarlet letter devices as to federal incumbents certainly could be undone by Congress through its Article I, Section 4 power to "make or alter" laws governing congressional elections.²⁴⁵ Of course, such congressional action may be difficult politically.

CONCLUSION

Having disposed of the problem raised by federal instructions, let us now turn back one last time to popular control of state legislators, and to the scarlet letter device itself. To say that the Article V reasoning of the recent decisions has been shoddy is not to approve of each and every scarlet letter device that has been challenged. I recognize that scarlet letters and other coercive devices may raise important constitutional questions that have nothing to do with the use of the word "legislature" in Article V.²⁴⁶ These interesting questions must await further consid-

243. U.S. CONST. art. VI, § 2.

244. See *Thornton*, 514 U.S. at 800-01.

245. See U.S. CONST. art. I, § 4, cl. 1.

246. A meaningful analysis of these other concerns requires consideration of many factors which I shall be examining in another article. For now, by way of an appetizer, let me quickly and tentatively flag just three of the many possible residual concerns some people may have about scarlet letters.

First, and somewhat ironically in light of the discussion so far, I would be worried if a scarlet letter device originated from the legislature itself, rather than from the people through the voter initiative. For example, if a majority of legislators want to stigmatize those individuals who will not go along with some popular program by a notation at the next election, I begin to worry about improper entrenchment. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Second, I wonder how easy it is to decide whether a legislator has disregarded voter instructions such that the ballot notation is triggered. The more discretionary the task of identifying faithless legislators, the more I worry about who is doing the identifying and how the person or entity is doing it. Third, I worry about what the ballot designation itself says, and whether the designation could be misleading or inflammatory. For example, would it

eration. But that is all right—it is always nice to have something exciting to look forward to.

be constitutional to require a ballot notation of "PROMOTES RACIST POLICIES" for any legislator who voted in the previous session for any race conscious remedial program? There may be special concerns about voter deception that counsel in favor of judicial scrutiny of proposed ballot designations. To be sure, notations of political party identity can be misleading, but they seem different in kind. *Cf.* Rotunda, *supra* note 125, at 210. Moreover, is it so clear that government could impose a party identification next to the name of a candidate on the ballot who would rather not have one?