

CONSTITUTIONAL CONVENTIONS: POWER TO THE PEOPLE OR PANDORA’S BOX?

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I. INTRODUCTION

Imagine a world where private organizations controlling state legislatures had the power to change the United States Constitution without any input from Congress whatsoever. There is no need to imagine, as powerful private groups are currently pushing captured state legislatures to the ultimate battleground for constitutional change: an Article V convention. Groups like the American Legislative Exchange Corporation (ALEC) have infiltrated state legislatures, particularly those in conservative states, making it difficult to tell who is actually governing: the democratically elected bodies of the states themselves, or

corporations hawking “pre-packaged bills in state houses across the country.”¹ Organizations such as ALEC have weakened state legislatures to the point that it is unclear where changes in the law are actually coming from. Although people have been aware of ALEC’s existence since the 1970s, the corporation’s practices are certainly not widely known.

So far, the United States has only seen one Constitutional Convention (1787) in which delegates of the United States gathered in Philadelphia and negotiated compromises that would ultimately shape what is arguably the most revered, albeit controversial, document in our governing body of law: the United States Constitution. This could soon change, as groups are campaigning for an Article V convention that would allow state legislatures to propose and subsequently ratify amendments.

In recent years, a group known as the Balanced Budget Amendment Task Force (BBATF) has aggressively encouraged states to pass resolutions that would assemble a convention to propose a balanced budget amendment.² The group’s website contains a running tally of the federal government’s debt, constantly updating dollar by dollar, and includes quotations from the late Supreme Court Justice Antonin Scalia deeming a *limited* convention a “minimal risk.”³ To achieve BBATF’s goal of “implementing fiscal restraint via a balanced budget amendment in order to stop Congress from its egregious violation of Jefferson’s moral admonition, the states must utilize Article V of the [United States] Constitution.”⁴ The “moral admonition” BBATF references is Thomas Jefferson’s concern about the federal government’s ability to borrow money and accrue debt.⁵

Another group, Citizens for Self-Governance, “launched a

1. Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws are All Connected*, THE ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/>.

2. See BALANCED BUDGET AMENDMENT TASK FORCE, <http://bba4usa.org/> (last visited Jan. 15, 2019).

3. *Id.* The late Justice Scalia noted:

The Congress knows that the people want more fiscal responsibility, but it is unwilling to oblige it. . . . If the only way to clarify the law, if the only way to remove us from utter bondage to the Congress, is to take what I think to be a minimal risk on this limited convention, then let’s take it.

AM. ENTER. INST., A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? 13 (1979), <https://www.aei.org/wp-content/uploads/2016/03/AEIForums31.pdf>.

4. BALANCED BUDGET AMENDMENT TASK FORCE, *supra* note 2.

5. *Id.*

project called Convention of States,”⁶ which “advocates [for] a constitutional convention to not only pass a balanced budget amendment, but also to curtail the power and jurisdiction of the federal government.”⁷ Unlike the BBATF movement, the Convention of States movement has more than one item on its agenda (i.e., more than one issue to resolve at a convention). The spokesman for the Convention of States stated, “It is relatively certain that there would be at least a few amendments proposed, perhaps as many as 10 to 12.”⁸ It is clear why organizations like ALEC support the convention; they could potentially influence changes in the law at not just the state, but also the federal level. Arn Pearson, Executive Director of the Center for Media and Democracy, warned that if ALEC “get[s] a convention[,] . . . they get to lock in their conservative supply-side policies for the next generation or more.”⁹

Twenty-eight of the thirty-four state legislatures required to call a convention passed specific resolutions regarding a balanced budget amendment.¹⁰ Some argue, however, that the unprecedented Article V convention has too many unknown variables that could radically alter the Constitution.¹¹ An Article V convention that extends beyond the scope of a balanced budget amendment could result in the proposal of amendments regarding social issues.¹²

6. Simon Davis-Cohen, *Corporate America is Just 6 States Short of a Constitutional Convention*, IN THESE TIMES (Mar. 14, 2016), <http://inthesetimes.com/article/18940/alec-balanced-budget-corporate-constitutional-convention>. ALEC has adopted the proposal set forth by the Convention of States as a model policy. *Id.*

7. *Id.* (internal quotation marks omitted).

8. *Id.*

9. *Id.*

10. See BALANCED BUDGET AMENDMENT TASK FORCE, *supra* note 2. Recently, BBATF has

passed resolutions in Alabama (2011), New Hampshire (2012), Ohio (2013), Georgia, Tennessee, Florida, Michigan, Louisiana (2014), South Dakota, North Dakota, Utah (2015), and West Virginia (2016) . . . BBATF is [now] targeting 13 states: Arizona, Idaho, Kentucky, Maine, Minnesota, Montana, Oklahoma, South Carolina, Virginia, Washington, West Virginia, Wisconsin and Wyoming. In six of these states Republicans control both legislative bodies and the governorship . . .

Davis-Cohen, *supra* note 6.

11. See generally James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POLY 1005 (2007); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011).

12. For example, some states have proposed their own constitutional conventions to ratify amendments protecting abortion rights. See Lauren Evans, *One Bill Would Immediately Protect NY Abortion Rights, but Cuomo Wants a Constitutional*

The process for amending the United States Constitution was purposefully designed to be difficult so that it is insulated from the ever-changing political whims of society. This arduous process ensures that individuals and entities cannot change the Constitution based on their own political goals and popular sentiments of the time. Furthermore, the process works, as evidenced by the twenty-seven amendments¹³ that Congress proposed and ratified. Statutes, which are designed to be easily changed and updated, are a more appropriate remedy for the constantly evolving needs of society. The most recent amendment to the Constitution was ratified in 1992,¹⁴ but there has been a buzz regarding constitutional conventions since then. One might say constitutional conventions are “having a moment,” but even politically informed citizens may be unsure of what this could mean for the country.

This Comment argues that an Article V Constitutional Convention is unnecessary and ultimately dangerous because state legislatures, captured by private entities, would have an open forum to effect changes in the United States Constitution. Part II of this Comment discusses Article V of the United States Constitution and provides background information regarding the powers of state legislatures. Part III argues that ALEC has control over state legislatures, the entities that would call for the Article V convention. Part IV proposes that state legislatures should be more transparent in their legislative processes and thus better insulated from the influence of powerful private groups, or, in the alternative, should offer a method of congressional control over the processes that could calm fears of a “runaway convention.”

II. BACKGROUND

This section considers the origins of Article V, past attempts to use the convention method to propose and ratify amendments, and the fear of the “runaway convention.”

Amendment, VILLAGE VOICE (Feb. 2, 2017), <https://www.villagevoice.com/2017/02/02/one-bill-would-immediately-protect-ny-abortion-rights-but-cuomo-wants-a-constitutional-amendment/>.

13. The Bill of Rights, although promised as part of the ratification process, was not ratified until 1791. *Bill of Rights is Finally Ratified*, HISTORY.COM, <https://www.history.com/this-day-in-history/bill-of-rights-is-finally-ratified> (last visited Jan. 8, 2019).

14. See Stephen G. Calabresi & Zephyr Teachout, *The Twenty-seventh Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxvii> (last visited Feb. 2, 2019).

A. ORIGINS OF ARTICLE V

The United States held its first, and so far only, Constitutional Convention in 1787, during which the original fifty-five delegates negotiated compromises regarding separation of governmental powers, the slave trade, and apportionment of seats in the legislature.¹⁵ Additionally, the Founding Fathers discussed a process for amending the Constitution, which led to the birth of Article V.¹⁶ Prior to its revision during the first Constitutional Convention, Article V laid out two separate ways Congress could propose amendments.¹⁷ Congress could either propose them itself or assemble a convention where representatives from each of the states could ratify proposed amendments.¹⁸ The original Article describing the amendment process, contained in the Virginia Plan, stated that “‘the assent of the National Legislature ought not to be required’ to amend the Constitution.”¹⁹ After several further revisions, the final draft stated: “[T]his Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose.”²⁰ Alexander Hamilton argued that, in addition to the state legislatures, “Congress should also have the power to propose amendments, and the Convention approved the addition of language giving Congress the power to propose amendments.”²¹ The language of Article V, as suggested by James Madison, would remove any reference to a convention and bestow upon the national legislature “sole authority to propose amendments whenever it would deem necessary, or on the application of two thirds of the Legislatures of the several States.”²² George Mason,

15. *America Might See a New Constitutional Convention in a Few Years: If It Did, that Would Be a Dangerous Thing*, THE ECONOMIST (Sept. 30, 2017), <https://www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention> [hereinafter *New Constitutional Convention*].

16. Michael B. Rappaport & David A. Strauss, *Article V*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/articles/article-v/article-v-by-michael-b-rappaport-and-david-a-strauss/interp/22> (last visited Feb. 1, 2019).

17. Rogers, *supra* note 11, at 1006–07; *New Constitutional Convention*, *supra* note 15.

18. Rogers, *supra* note 11, at 1005.

19. *Id.* at 1006 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 159 (Max Farrand ed., 1937)).

20. *Id.*

21. *Id.* at 1006–07.

22. *Id.* at 1007 (internal quotation marks omitted).

a plantation owner from Virginia and a man wary of a powerful federal government, feared that an oppressive Congress would be unlikely to call a convention using either of the abovementioned methods.²³ In order to return some semblance of power to the states, he proposed that states should also retain authority to convene upon two-thirds of their legislatures' (thirty-four states) demands.²⁴ Mason stated that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive."²⁵ Despite this back-and-forth, Mason ultimately prevailed, and the Constitution was signed two days later.²⁶ Article V of the Constitution now reads:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.²⁷

"Mason's mechanism,"²⁸ or the Article V convention, protects the interests of the states by explicitly granting them a mechanism by which they can amend the Constitution independent of Congress. The Framers feared that if Congress had control of the convention, "it could prevent the introduction of amendments it might dislike."²⁹ For this reason, Article V

23. *New Constitutional Convention*, *supra* note 15; *see also* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Method and How to Fix Them*, 96 VA. L. REV. 1511, 1517 (2010).

24. *New Constitutional Convention*, *supra* note 15.

25. Rogers, *supra* note 11, at 1007 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629 (Max Farrand ed., 1937)).

26. *New Constitutional Convention*, *supra* note 15.

27. U.S. CONST. art. V.

28. *New Constitutional Convention*, *supra* note 15.

29. Matt Huffman, *Article V Convention: Can It Be Controlled?*, U. CIN. L. REV. BLOG (Apr. 7, 2015), <https://uclawreview.org/2015/04/07/article-v-convention-can-it->

“protects the states from a recalcitrant Congress” and allows them to amend the Constitution by their own authority.³⁰

In its present form, Article V provides two ways to propose and ratify amendments to the Constitution.³¹ The first and most familiar method allows Congress to propose amendments when approved by a minimum two-thirds vote in both houses.³² Next, “Congress proposes an amendment in the form of a joint resolution.”³³ The joint resolution does not go to the White House for signature or approval because the President does not have a constitutional role in the amendment process.³⁴ After Congress proposes an amendment, the Archivist of the United States, the head of the National Archives and Records Administration, administers the ratification process under the provisions of 1 U.S.C. § 106b.³⁵ The Archivist also submits the proposed amendment to the governors of each state so that it may be formally submitted to each state legislature.³⁶ Even using the congressional method, three-fourths of the state legislatures must ratify the proposed amendment.³⁷ When the Office of the Federal Register (OFR) verifies the receipt of the required number of authenticated ratification documents, a formal proclamation is drafted for the Archivist to certify that the amendment is now a part of the Constitution.³⁸ The Archivist’s certificate of ratification “is published in the Federal Register and U.S. Statutes at Large and [also] serves as official notice to Congress and to the nation that the amendment process has been completed.”³⁹

The second method, which is the subject of this Comment, requires Congress to call a constitutional convention to propose amendments when two-thirds of the states apply for a convention.⁴⁰ Again, three-fourths of the states (thirty-eight

be-controlled/.

30. Huffman, *supra* note 29.

31. U.S. CONST. art. V.

32. *Id.*

33. *Constitutional Amendment Process*, FED. REG., <https://www.archives.gov/federal-register/constitution> (last visited Jan. 15, 2019).

34. *Id.*

35. 1 U.S.C. § 106b (2012); *Constitutional Amendment Process*, *supra* note 33.

36. *Constitutional Amendment Process*, *supra* note 33.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

states) must ratify the proposed changes. It will become abundantly clear that this second method severely lacks the procedural clarity of its congressional counterpart.

B. PAST ATTEMPTS TO USE THE CONVENTION METHOD

Since the ratification of the United States Constitution, roughly 11,000 amendments have been proposed.⁴¹ The twenty-seven subsequently ratified amendments all came through the congressional method of proposing and ratifying amendments.⁴² Mason's mechanism, or the Article V method, has never been used. However, this is not for lack of trying, as some scholars estimate that there have been hundreds of proposed resolutions for Article V conventions.⁴³ It is also estimated that forty-two states currently have Article V applications pending that encompass a variety of subject matters, ranging from campaign finance to right to life/abortion.⁴⁴ In 2017, approximately 175 applications had been submitted in state legislatures across the country during their legislative sessions.⁴⁵

Interestingly, "the threat of a convention has sometimes spurred Congress to action."⁴⁶ For example, "the threat of a second constitutional convention was a key factor in Congress proposing the Bill of Rights."⁴⁷ A constitutional convention also

41. Will Short Gorham, *Of 11,000 Attempts to Amend U.S. Constitution, Only 27 Amendments Have Passed*, POLITIFACT (Aug. 30, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/aug/30/xavier-becerra/11000-attempts-amend-us-constitution-only-27-amend/>. Then-Representative Xavier Becerra stated at a 2011 press conference:

We've had 11,000 attempts to amend the Constitution since 1789. Twenty-seven amendments have been passed, 10 of them in one shot with the Bill of Rights. And so, we're now hearing that Republicans may want two, three days before they plunge us into the economic abyss, propose the eleven-thousand and first constitutional amendment so that in less than three days we pass that when it's taken over 230 to pass 27 out of the 11,000 that were proposed.

Id. Representative Becerra further stated that this amounted to "the height of ridicule." *Id.*

42. *New Constitutional Convention*, *supra* note 15.

43. *Id.*; see also Rogers, *supra* note 11, at 1005 (citing Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764 (1993)) ("[A]s of 1993, almost 400 convention applications had been submitted to Congress by the States since 1789.").

44. *New Constitutional Convention*, *supra* note 15.

45. David Guldenschuh, *Article V Convention Legislative Progress Report* (Aug. 1, 2017), <http://articlevcaucus.com/wp-content/uploads/2017/08/17-0801-AVC-Progress-Report.pdf>.

46. Rogers, *supra* note 11, at 1008.

47. *Id.*

has “tremendous potential as a way of proposing amendments that would enjoy significant popular support but that have not been proposed in Congress.”⁴⁸ A national survey measured support for various hypothetical amendments, and “four of the seven popularly supported amendments arguably share a common characteristic: they would adversely affect the power or interests of members of Congress.”⁴⁹ Those amendments included a balanced budget amendment, an amendment specifying that a judge’s only role is to interpret rather than make law, and an amendment controlling congressional term limits.⁵⁰ Those amendments were specifically proposed because it is highly unlikely that Congress will propose and subsequently approve amendments that “significantly limit the powers of its members, such as a balanced budget or term limit amendment.”⁵¹ Some argue that the convention method is crucial because it provides a means by which the states can “force Congress to adopt amendments that are perceived to be in the national interest by significant percentages of the American population, but that are detrimental to the interests of members of Congress.”⁵²

C. THE “RUNAWAY CONVENTION”

The ambiguous text of Article V creates uncertainty as to what could occur during an Article V convention. Some opposed to the idea of a convention utilize this fear of the unknown to suppress any proposed resolutions. The Virginia House of Delegates offers an illustrative example. In 2016, despite an approved Article V application, Richard Black, a Republican state senator, warned of “devious Democrats hijacking a convention” with their own agenda.⁵³ Senator Black stated that “they could change freedom of religion to say certain teachings of the Bible

48. Rogers, *supra* note 11, at 1020.

49. *Id.* at 1020–21. As one commentator observed:

A balanced budget amendment would make it more difficult for members of Congress to use government spending to benefit their constituents in exchange for political support. Term limits would limit the tenure of members of Congress and force many of them out of office. An amendment prohibiting unfunded mandates that affect the States would limit Congress’s power to control the States. Regulation of personal funds spent during a campaign would interfere with the campaigns of wealthy members of Congress.

Id. at 1020–21 n.83. See generally Arthur H. Taylor, *Fear of an Article V Convention*, 20 BYU J. PUB. L. 407 (2006).

50. Rogers, *supra* note 11, at 1020.

51. *Id.* at 1021.

52. *Id.*

53. *New Constitutional Convention*, *supra* note 15.

are hate speech,” and feared that “they could take away our right to own a gun.”⁵⁴ Although sensationalized, Senator Black validly points out that a convention could certainly take unexpected turns regarding the proposed agenda.⁵⁵ As vociferously as Senator Black is opposed, there are others who strongly advocate for the Article V convention as a means of dismantling the status quo. Lawrence Lessig, a well-respected law professor at Harvard University, argues that an Article V convention is “the only way to achieve campaign finance reform,”⁵⁶ presumably because Congress will never call for these changes itself.

Groups like BBATF propose that a convention could put forth only those amendments specifically stated on states’ applications.⁵⁷ This would potentially prevent the “runaway convention”⁵⁸ feared by those opposed to the Article V state-convened convention. For example, Wisconsin proposed state laws that would ban voting on any unrelated topics.⁵⁹ This proves quite tricky, however, because Article V is silent on many issues that would likely arise if the convention occurred: May the convention’s scope be limited to certain subject matters? If so, who may limit it? How should the states’ applications be tallied? Separately by subject matter or cumulatively, regardless of subject matter? Why should this convention method even be used when states have representatives in Congress?⁶⁰ The questions seem endless. Because the United States has never used an Article V constitutional convention to propose amendments, these questions remain unanswered.

One serious concern, which this Comment addresses in Part III, is what will happen once Congress approves of a convention per the request of those thirty-four states. Can Congress limit the scope of the convention? One commentator argues that the

54. *New Constitutional Convention*, *supra* note 15.

55. See generally Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198–200 (1972); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 4–11 (1979); Rogers, *supra* note 11.

56. *New Constitutional Convention*, *supra* note 15. For an excellent sample of Professor Lessig’s work regarding campaign finance reform, see generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

57. See Davis-Cohen, *supra* note 6.

58. Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2 (1983); Rogers, *supra* note 11, at 1010.

59. *New Constitutional Convention*, *supra* note 15.

60. See generally Rogers, *supra* note 11.

answer is most certainly no, as it seems counterintuitive considering that “[t]he text and history of Article V indicate that Congress’s role in calling a convention is merely ministerial.”⁶¹ The logic is that the original purpose of Article V was to “give states the power to circumvent a recalcitrant or corrupt Congress” and that “it makes little sense for it to give Congress broad power to control a convention.”⁶² These scholars argue that the text of Article V was intended to empower states.⁶³

Assuming Congress cannot limit the scope of an Article V convention, which remains unclear based on the text of Article V, scholars still debate whether the states have the power to limit the scope of the convention.⁶⁴ The text gives no further guidance beyond the states’ ability to “call a Convention for proposing Amendments.”⁶⁵ It has been argued “that the text of Article V bars states from limiting the Convention to a specific issue or amendment.”⁶⁶ The logic behind this argument is that “Article V does not authorize the states to apply for *an amendment*, rather it authorizes the states to apply for a *convention* for proposing *amendments*.”⁶⁷ Thus, according to this argument, “states cannot apply for a Convention for a specific amendment, but rather can only oblige Congress to hold a Convention, where any subsequently proposed amendment could be . . . voted on.”⁶⁸ Essentially, under this theory, states could not call a convention on a single issue. Other commentators argue that this theory fails because “both clauses of Article V use the plural form, ‘Amendments,’” and further that it is “common and constitutionally permissible for Congress to propose single amendments on single issues.”⁶⁹ Based on this line of thinking, it follows that “the Framers likely intended this wording to expand the power of the states and Congress to propose Amendments, rather than limit that power.”⁷⁰ Given that Congress is permitted to propose single or multiple amendments, and that Article V also

61. Rogers, *supra* note 11, at 1011.

62. *Id.*

63. *Id.*

64. Huffman, *supra* note 29.

65. *Id.*

66. *Id.*

67. Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article V and Congress’ Present Duty to Call a Convention for Proposing Amendments*, 14 *HAMLIN L. REV.* 1, 28 (1990).

68. Huffman, *supra* note 29.

69. *Id.*

70. *Id.*

uses the term *amendments* when referring to the process by which the states call a convention, it would follow that states are allowed to propose single or multiple amendments. The Supreme Court has stated that “a term appearing in several places in a statutory text is generally read the same way each time it appears.”⁷¹

There is also the issue of counting the applications. Should applications proposing a specific amendment be counted along with applications requesting a general convention? It could be argued that if it were decided that all types of applications would be considered together, and not separated based on a request for a specific amendment or a general convention, to reach the two-thirds threshold, it is possible that some states would remove their applications to prevent a convention from occurring at all.

As is evident from the abovementioned debate, commentators on both sides present textually based, well-reasoned arguments on the scope of the convention as well as how to tally the proposals for a convention.⁷² Despite this scholarly debate, there is still no clear answer as to the scope of the convention (limited or general) or how the applications would be tallied (specific amendments or a general proposal for a convention).

III. ANALYSIS

This section addresses potential problems that a convention might bring about by analyzing state legislative powers and how they have evolved and changed throughout the history of the United States. This section also explains how private interest groups like ALEC have infiltrated state legislatures, the lack of resources within state legislatures, and whether a constitutional convention could be controlled.

A. WHY WOULD A CONVENTION BE A PROBLEM?

This section argues that state legislatures have not proven to be effective deliberative bodies in the democratic process and analyzes the potential dangers of giving them the power to alter the United States Constitution.

71. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)); *see also* Huffman, *supra* note 29.

72. Huffman, *supra* note 29.

1. STATE POWERS: THEN AND NOW

Based on a clear reading of the United States Constitution, it is quite evident that the Founding Fathers intended to cede a certain amount of sovereignty to the individual states. James Madison stated: “The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.”⁷³ It seems intuitive that smaller governments at the state and local level are more conducive to citizens feeling more involved in the day-to-day decisions of a government that operates on a level closer to them—unlike a far-off entity like the elusive federal government. Furthermore, the power of the states themselves is evidenced by the Tenth Amendment to the United States Constitution, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁷⁴

The rights of individual states versus the scope of the federal government’s control is beyond the scope of this Comment. The issue presented in this Comment is whether the state legislatures themselves are the correct vehicles to change federal law via an Article V convention. This Comment argues that they are not because they have been infiltrated by entities that are not representative of the electoral bodies, but rather private corporations’ interests masquerading as the desires of the people of the individual states. Simply put, what is happening now is not what the Founding Fathers had in mind, as they intended to keep the power at the state level rather than in the hands of a large, centralized government. The Founding Fathers intended for the decision-making power to be left in the hands of the people via their democratically elected representatives, not with private corporations that are buying policy changes for themselves. Based on the recent *Citizens United v. Federal Election Commission* decision from the United States Supreme Court, corporations seem to wield a great deal of power in the political arena.⁷⁵

73. THE FEDERALIST NO. 45 (James Madison).

74. U.S. CONST. amend. X.

75. See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). In *Citizens United*, the Court held:

Political spending is a form of protected speech under the First Amendment, and the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections. While corporations or

The founders' original vision for legislative bodies and their interactions with corporate entities is likely a far cry from the present situation. This Comment's purpose is certainly not to single out conservative-leaning states or voters, but to illuminate the fact that conservative voters do not necessarily know where these laws originate, or whether they are an accurate reflection of the desires of the majority of voters or rather the desires of entities like ALEC.

2. THE UNITED STATES OF ALEC

The American Legislative Exchange Council "is an organization dedicated to the advancement of the free market and limited government principles through a unique 'public-private partnership' between state legislators and the corporate sector."⁷⁶ Formed in 1973 by conservative activist Paul M. Weyrich, ALEC sought "to create a state-level clearinghouse for conservative ideas."⁷⁷ But those critical of ALEC consider it "a shadowy back-room arrangement where corporations pay good money to get friendly legislators to introduce pre-packaged bills."⁷⁸ ALEC, which is known as a "bill mill," essentially allows corporations from the private sector to work with state legislatures to propose new laws,⁷⁹ advancing a "pro-business" and "socially conservative" agenda⁸⁰ in "statehouses from coast to coast."⁸¹

ALEC's membership includes representatives from corporations and nearly 2,000 state legislators.⁸² ALEC's board consists of legislators, but it is financed primarily through its two hundred private-sector members, whose tax-deductible dues range from \$7,000 to \$25,000 annually.⁸³ ALEC's 2010 tax returns indicate that some companies give much more; AT&T,

unions may not give money directly to campaigns, they may seek to persuade the voting public through other means, including ads, especially where these ads were not broadcast.

Citizens United v. Federal Election Commission, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/> (last visited Feb. 10, 2019).

76. Scola, *supra* note 1.

77. Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), <https://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html>.

78. Scola, *supra* note 1.

79. *Id.*

80. McIntire, *supra* note 77.

81. *Id.*

82. *Id.*

83. *Id.*

Pfizer, and Reynolds American contributed anywhere between \$130,000 and \$398,000.⁸⁴ Lawmakers and corporate representatives attend conferences and serve on “task forces,” each pertaining to specific issues, such as telecommunications, products liability, and healthcare.⁸⁵ Each task force is led by a private-sector/legislator duo that works together to develop model bills later introduced by the legislators in their home states.⁸⁶ The origin of certain bills is not always readily apparent to legislators being asked to vote on them.⁸⁷

ALEC opines that its legislator members have “the ultimate say over its policy deliberations, and that no model bills are adopted unless its governing board, made up entirely of legislators, approves it.”⁸⁸ However, ALEC’s organizational rules state that “model legislation must first clear a preliminary vote before going to the board.”⁸⁹ Thus, corporate representatives can prevent the draft bill from even coming up for a vote, and kill the bill in its earliest stages. Furthermore, the corporate members of the task force retain power over new appointments and can be removed “only with cause.”⁹⁰ Legislators on the task force, however, can be removed for any reason.⁹¹

In addition to drafting model bills, ALEC also monitors state legislation in order to “mobilize its lawmaker members to take action” by instructing aides to “keep detailed, color-coded spreadsheets on good bills, and problematic bills” all across the nation.⁹² Moreover, ALEC regularly reminds legislators which bills it supports or opposes.⁹³ This begs the question: Do we really want our legislative representatives “reminded” how they should decide important issues?

Further, ALEC sends legislators useful soundbites to use

84. McIntire, *supra* note 77.

85. *Id.*; see also *Task Forces*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/task-force/> (last visited May 1, 2019).

86. McIntire, *supra* note 77.

87. *Id.*

88. *Id.*; see also *Frequently Asked Questions*, AM. LEGIS. EXCH. COUNCIL, <http://alec.devhm.net/about-alec/frequently-asked-questions/> (last visited May 1, 2019).

89. McIntire, *supra* note 77.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

when discussing favorable legislation.⁹⁴ For example, when the United States Supreme Court considered the constitutionality of the Affordable Care Act, or “Obamacare,” ALEC sent its legislative members a “bullet-point list of criticisms of it, to be used in [their] next radio interview, town hall meeting, op-ed or letter to the editor.”⁹⁵

Critics like Lisa Graves, Executive Director of the Center for Media and Democracy, worked closely with the *Nation* magazine to publish eight hundred ALEC model bills.⁹⁶ Graves’s research discovered that, as of August 2011, “all but one of 104 leadership positions within the organization were filled by Republicans and that the policies ALEC promoted were almost uniformly conservative.”⁹⁷ Graves stated, “They talk a good game about being bipartisan, but the record shows the opposite.”⁹⁸

One researcher used text analysis to determine where bills based on ALEC model legislation were introduced.⁹⁹ She also tracked their progress and found that, during the 2011-2012 legislative session, 132 bills based on ALEC model legislation were introduced in state legislatures.¹⁰⁰ Republicans sponsored more than 90% of those bills.¹⁰¹ She also found that of the legislators who sponsored ALEC model legislation, 57% could be directly linked to the organization,¹⁰² but noted that because ALEC does not disclose its legislative members, this number could be higher.¹⁰³ Bills relating to immigration and the environment were among the most commonly proposed, “followed by those relating to guns and crime.”¹⁰⁴ In fairness, ALEC is

94. McIntire, *supra* note 77.

95. *Id.* (internal quotation marks omitted).

96. *Id.*

97. *Id.*

98. *Id.*

99. See Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS INST. (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>.

100. *Id.* Jackman found that “ALEC model language appeared in bills in 34 states. Those bills were most common in West Virginia, where legislators introduced 10 bills based on ALEC model legislation. Both the Oklahoma and Mississippi legislatures considered nine ALEC bills, Arizona eight, and Kansas and Montana saw seven apiece.” *Id.*

101. *Id.*

102. *Id.*

103. Jackman, *supra* note 99 (“ALEC does not disclose the names of its legislative members, so this figure is based primarily on information from leaked documents.”).

104. *Id.*

relatively progressive in its work with Right on Crime, which promotes a “conservative approach to criminal justice,” focusing on issues such as over-criminalization, civil asset forfeiture, juvenile justice, substance abuse, and parole and re-entry.¹⁰⁵

The group ALEC Exposed features over eight hundred of ALEC’s model bills on its website.¹⁰⁶ In addition to the bills themselves, the group documents “which legislators take part in the group, which corporations support it, and where the bills go once they leave ALEC.”¹⁰⁷ Once all of the model bills were in the same place, they gave a clear picture of what was really happening.¹⁰⁸ Doug Clopp, deputy director of programs at Common Cause,¹⁰⁹ stated that if model bills are presented concerning topics such as voter-identification, anti-immigration, private prisons and the NRA’s “Shoot to Kill” laws, “it’s ALEC” behind them.¹¹⁰

ALEC is instrumental in passing laws regarding voter-identification as well as “stand your ground laws.”¹¹¹ It accomplishes these goals “by having state legislators team up with corporate lobbyists.”¹¹² This information was gathered from “public record requests in state legislatures,” as well as information provided by a whistleblower.¹¹³ Common Cause also received hundreds of documents, including minutes from private meetings and member e-mail correspondence.¹¹⁴ Common Cause

105. RIGHT ON CRIME, <http://rightoncrime.com/> (last visited Jan. 17, 2019).

106. Scola, *supra* note 1.

107. *Id.*

108. *Id.*

109. Common Cause is a “nonpartisan grassroots organization dedicated to upholding the core values of American democracy” whose mission is to “create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.” *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Jan. 17, 2019).

110. Scola, *supra* note 1.

111. According to Molly Jackman’s research:

The ALEC board reviews the status of every piece of model legislation every five years, and adds and removes model bills from the website periodically. . . . [T]he Castle Doctrine, (a.k.a. Stand Your Ground) was removed from the ALEC website following the public scrutiny that arose during the Trayvon Martin trial.

Jackman, *supra* note 99.

112. Peter Overby, *Companies Flee Group Behind ‘Stand Your Ground’*, NPR (Apr. 13, 2012, 3:03 AM), <https://www.npr.org/2012/04/13/150528572/as-pressure-mounts-companies-flee-coalition>.

113. McIntire, *supra* note 77; *see also* Scola, *supra* note 1.

114. McIntire, *supra* note 77.

then shared them with the *New York Times*.¹¹⁵

On the other hand, ALEC representatives argue “that it provides a forum for lawmakers to network and to hear from constituencies that share an interest in promoting free-market, limited-government policies.”¹¹⁶ Bill Seitz, a Republican state senator sitting on ALEC’s governing board, believes “that liberal groups like Common Cause are attacking the organization out of frustration that they don’t have a comparable group that is as effective as ALEC in enacting policies into law.”¹¹⁷ Seitz further stated, “This concept that private companies are writing the bills and handing them to gullible legislators to trundle off and pass is false.”¹¹⁸ The issue with ALEC, as this Comment seeks to demonstrate, is not that it pushes mostly conservative legislation, but rather that it has the authority to push for any legislation *at all*, while the vast majority of politically informed Americans do not even fully understand its methodology. ALEC is not merely contributing money to a political campaign or candidate, which *Citizens United* held is legal,¹¹⁹ but is actively participating in writing laws that will benefit the corporate entities that are its members.

One glaring example of ALEC’s control over state legislatures occurred when a state legislator from Florida submitted a bill seeking to cut corporate tax rates. Unfortunately, the state representative forgot to remove the ALEC boilerplate language from the top of the bill, which read, “[I]t is the mission of the American Legislative Exchange Council”¹²⁰ This mistake became a joke on social media and cable news, but the implications are no laughing matter. The Florida representative’s failure to remove the boilerplate language shows that corporations are working with state legislators to propose legislation that will lower their own taxes. And while this is certainly not shocking, as lobbyists have become part and parcel of our political culture, it is somewhat surprising how blatantly private entities like ALEC are controlling certain state legislatures. It would be even more unsettling to give these corporations access, via the state legislatures, to an Article V

115. McIntire, *supra* note 77.

116. *Id.*

117. *Id.* (internal quotation marks omitted).

118. *Id.*

119. *See supra* note 75 and accompanying text.

120. Scola, *supra* note 1.

convention during which they could potentially alter the United States Constitution. It also reveals to voters at the state level that some of their state and local representatives are bought and paid for by entities like ALEC, rather than beholden to the wants of the electorate. Based on this information, one might ask: Can voters be sure they are being accurately represented? This issue has become increasingly evident in recent years as “watchdog” groups, like the Center for Media and Democracy, have come onto the scene to create awareness of the tactics used by groups like ALEC. After a series of ALEC-drafted documents were leaked, “[p]eople for the first time could really connect the dots between which corporations were involved in ALEC and what the legislative agenda was of ALEC, . . . [a]nd people could look in their statehouses and see that agenda moving.”¹²¹ While some citizens certainly agree with the policy decisions promoted by ALEC, how will they feel if the corporations push the opposite agenda in a few years?

This process, while not illegal, is not the way our system was intended to function. Pro-convention propaganda highlights government shutdowns at the federal level, Gallup polls showing general dissatisfaction with government, and “bureaucratic waste” as reasons why a convention should be called.¹²² A constitutional convention, however, “is not the tonic to satiate this discontent.”¹²³ And although “[d]emocratic control is what the American people yearn for . . . that is not what the convention would offer.”¹²⁴

3. LACK OF RESOURCES LED TO THE CAPTURE OF STATE LEGISLATURES

While pursuing his doctoral degree in government and social policy at Harvard University, Alexander Hertel-Fernandez sought to explore ALEC’s success.¹²⁵ More specifically, he wanted to know what kinds of legislators and states most commonly

121. Overby, *supra* note 112 (internal quotation marks omitted) (quoting Lisa Graves, Executive Director of the Center for Media & Democracy).

122. Davis-Cohen, *supra* note 6.

123. *Id.*

124. *Id.*

125. Alexander Hertel-Fernandez, *ALEC Has Tremendous Influence in State Legislatures. Here’s Why.*, WASH. POST (Dec. 9, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/12/09/alec-has-tremendous-influence-in-state-legislatures-heres-why/?utm_term=.00605b247721.

relied on ALEC-drafted legislation.¹²⁶ The results of his study were somewhat unsurprising. The legislative resources available to a state lawmaker were a major factor in determining whether a state would utilize ALEC model legislation.¹²⁷ States where legislators had smaller budgets, convened for shorter periods of time, and spent less time crafting policy were all more likely to enact ALEC model legislation.¹²⁸ In seventeen states, the average state legislator only does legislative work part-time, receives about \$16,000 in annual compensation, and is assisted by one staffer.¹²⁹ The study also showed that less-experienced legislators were much more likely to rely on model legislation than their more experienced counterparts.¹³⁰ To inexperienced, understaffed, and under-compensated lawmakers, ALEC is a godsend, and this point is reflected in statements from its members. One ALEC member from Oregon explained that “the group is ‘a great resource’ for a part-time legislator whose staff is comprised of his wife, who works half-time, and an aide who works three days a week when lawmakers are not in session.”¹³¹ ALEC’s own directors make this a point of pride, as one director stated: “To a legislator sitting out there in Boise with little more than a desk and a phone, we’re all there is.”¹³² Query whether this sentiment should provide any source of comfort to the individual voter in Boise, but this Comment argues that it should not. State legislators are tasked by the constituent bodies in their states with immersing themselves in the complex process of lawmaking. Despite a lack of time and money, it is still the responsibility of the legislators to write their own bills instead of outsourcing this vital task to private entities.

4. COULD A CONSTITUTIONAL CONVENTION BE CONTROLLED?

The last Constitutional Convention in the United States was the Philadelphia Convention of 1787, the purpose of which was to revise the Articles of Confederation. The delegates that attended this convention clearly “exceed[ed] the express terms of their congressional mandate.”¹³³ Based on this fact alone, some

126. Hertel-Fernandez used leaked records that provided a full listing of model bills that states introduced and enacted in 1995. Hertel-Fernandez, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Hertel-Fernandez, *supra* note 125.

132. *Id.*

133. Shawn Gunnarson, *Using History to Reshape the Discussion of Judicial*

scholars, understandably, fear that a convention could lead to unexpected and unintended results. One scholar posits: “It’s easy to imagine that an Article V convention would find it difficult to limit its agenda to the technicalities of budget finance.”¹³⁴ That scholar argues that divisive social issues, most notably abortion, would likely be interjected into the convention.¹³⁵ One example is illustrative: “Could a gathering intoxicated by the possibility of imposing permanent change resist the urge to achieve by amendment what decades of lobbying, protesting, and the cultivation of sympathetic judicial candidates could not?”¹³⁶

Furthermore, as conflicting opinions around immigration swirl, “conservatives have toyed with the idea of ending birthright citizenship, currently guaranteed by the Fourteenth Amendment.”¹³⁷ The argument is that the temptation to avoid legislative stalemates on divisive social issues such as immigration and abortion might entice convention-goers to “settle” these issues with constitutional amendments. However, this method demonstrates the sort of partisanship the framers sought to avoid.¹³⁸ In order to secure and promote democratic ideals, “an idea should have demonstrated broad and transparent appeal before it is adopted into the framework of the republic.”¹³⁹

It would likely be difficult to control an Article V convention because it would be a “separate constitutionally authorized body.”¹⁴⁰ However, as another scholar argues, despite these well-founded concerns, a convention would not lead to constitutional upheaval:

[E]ven if a convention attempted to exceed its scope, or if it were accepted that its scope could not be limited by the

Review, 1994 BYU L. REV. 151, 162 (1994); *see also* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 480–83 (1995) (stating that while the delegations from several states were specifically limited to revising the Articles of Confederation, others were given broader mandates to make other constitutional proposals, but that even those states’ delegates exceeded their broad mandate by proposing new means of ratifying the Constitution rather than using “existing institutions and procedures”).

134. Jelani Cobb, *Republicans and the Constitution*, NEW YORKER (Mar. 13, 2017), <https://www.newyorker.com/magazine/2017/03/13/republicans-and-the-constitution>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Cobb, *supra* note 134.

140. Rogers, *supra* note 11, at 1019; *see also* Sickles & Boughey, *supra* note 66, at 42.

States or by Congress, the convention is only the first step in the amendment process. The proposed amendments must still be ratified by three-fourths of the States, which is an even greater number than the proportion required to call a convention in the first place.¹⁴¹

That particular scholar argues that there “should be little reason to worry; ratification of thirty-eight states would have proven its popularity.”¹⁴² Some argue that the fears of an Article V convention are “unfounded” and based primarily on fear of a “runaway convention” as well as confusion as to how the convention would be controlled, when in reality “[t]he Convention Clause’s text and history indicate that it grants power to the States to limit the scope of any such convention” and “the States have the ability to reject any amendments proposed by a convention through the ratification process.”¹⁴³ While there is certainly some truth to this reasoning, it is increasingly unclear whether the state legislatures ratifying those amendments are accurate representations of the electoral bodies of the states themselves, or are pushing the agendas of powerful private entities like ALEC. Even if there was no risk of a “runaway convention,” which there very well may be, and states could control the convention process without any clear guidance, precedent, congressional control, or judicial oversight,¹⁴⁴ it is simply too risky to allow this convention to come to fruition. Although the convention could certainly present problems, as discussed in detail above, the real issue is who would control the convention. If it were truly a representation of the desires of the people via the state legislatures that represent them, the convention would be more in line with what the Founding Fathers intended when they drafted Article V, which was written to give power to the state legislatures, not the private entities

141. Rogers, *supra* note 11, at 1019.

142. *Id.* at 1020.

143. *Id.* at 1022.

144. The Supreme Court formulated the political question doctrine, as applied to Article V, in *Coleman v. Miller*, 307 U.S. 433 (1939). *Coleman* involved the validity of the Kansas legislature’s ratification of the Child Labor Amendment, which had originally been rejected in 1924 but was subsequently ratified in 1937. *Id.* at 435–36. The Kansas state senators who voted against ratification in 1937 sued, arguing that the second ratification vote in 1937 was invalid. *Id.* at 436. The Court held that Congress had the final authority to determine the validity of an amendment’s ratification and that the issue “should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.” *Id.* at 450.

controlling them.

IV. PROPOSAL

This section offers some potential solutions moving forward in considering whether an Article V convention would be in the best interests of democracy given the current status of state legislatures. First, more transparency in state legislatures is necessary. Next, candidates who will not be beholden to corporate interests, but rather their constituents, should be valued and placed in elected positions of power. In the alternative, Congress should amend Article V to clarify the confusion discussed in this Comment.

A. TRANSPARENCY IN STATE LEGISLATURES—SUNLIGHT AS A DISINFECTANT¹⁴⁵

In one of his presidential addresses, President Barack Obama quoted the late Justice Louis Brandeis in saying “sunlight is the best disinfectant.”¹⁴⁶ President Obama was speaking about government waste and a bold, new method of keeping taxpayers informed—transparency. President Obama further stated: “I know that restoring transparency is not only the surest way to achieve results, but also to earn back the trust in government without which we cannot deliver the changes the American people sent us here to make.”¹⁴⁷ This sentiment applies with equal vigor to the subject of this Comment. The solution, albeit somewhat naïve, lies in the promotion of true democratic governance over the model bills drafted by corporations. The issue is not a partisan one. No matter their ideology, voters deserve transparency in the workings of their government. ALEC’s harshest critics provide laundry lists of the harmful effects ALEC has on democracy:

The agenda of ALEC also undermines the rights of real people in its legislative goals, in which it:

seeks to make it more difficult for people to hold corporations accountable in court; gut the rights and protections of workers and consumers; encumber health

145. This is a reference to a speech delivered by President Barack Obama during which he quotes the late Justice Louis Brandeis. Barack Obama, President, Presidential Remarks on Economic Stimulus Plan (Jan. 28, 2009) (transcript available at <https://www.c-span.org/video/transcript/?id=985>).

146. *Id.*

147. *Id.*

care reform; privatize and weaken the public education system; provide business tax cuts and corporate welfare; privatize and cut public services; erode regulations and environmental laws; create unnecessary voter ID requirements; endorse Citizens United; diminish campaign finance reform and permit greater corporate influence in elections.¹⁴⁸

ALEC is arguably the antithesis of a democratic form of governance in which corporations exert an extreme form of pressure in vying for their own interests. But, because of the lack of resources in state legislatures,¹⁴⁹ a solution seems elusive. Despite this bleak forecast, there are steps available to citizens who do not have the monstrous pocketbooks of a corporation. For example, constituents can speak directly with their elected representatives and ask if they are ALEC members. If so, they can urge these representatives to consider the needs and wants of their constituencies rather than corporate interests. Certain online entities provide template letters that can be sent to legislators expressing concern regarding ALEC's control over the state legislative process.¹⁵⁰

In addition to corresponding with representatives directly, an individual could contact their local media.¹⁵¹ The media could then help educate the public on who ALEC is as an entity and the effects supporting an ALEC model bill could have on democracy. These methods would ensure that the voting body has the full picture of what is occurring in their legislative houses.¹⁵² Voters can then make informed decisions on whether to continue supporting their elected representatives.

148. Charles Denson, *ALEC: Corporate Interests Undermining Democracy in Our State Legislatures*, CIV. LIBERTIES DEF. CTR. (May 18, 2015), <https://cldc.org/organizing-resources/alec/> (quoting *ALEC: The Voice of Corporate Special Interests in State Legislatures*, RIGHT WING WATCH: IN FOCUS (July 2011), <http://files.rightwingwatch.org/uploads/rww-in-focus-alec.pdf>).

149. *See supra* Section III.A.3.

150. *See* Denson, *supra* note 148.

151. *See id.*

152. It is worth mentioning that ALEC requires all members of the press to register prior to events so that a screening process can occur. *See ALEC Media Policy*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/media-public-affairs/alec-media-policy/> (last visited Apr. 12, 2019). Notably, ALEC held its 38th annual meeting at the Marriott in New Orleans. *See* Denson, *supra* note 148.

B. ELECT INSURGENT CANDIDATES AND EXPAND THE BALLOT INITIATIVE PROCESS

The ballot initiative process would provide another solution to the problem of state legislatures controlled by ALEC. This process “enables citizens to bypass their state legislatures by placing proposed statutes . . . on the ballot” if enough valid signatures are obtained.¹⁵³ Once an initiative is on the ballot, a majority vote is generally required for passage.¹⁵⁴ Essentially, the process provides a method by which electoral bodies vote on matters independently of their state legislatures. Currently, twenty-four states have an initiative process.¹⁵⁵ If the ballot initiative process were expanded, it would ensure a true democratic process that is better insulated from the control of private entities like ALEC.

It is also imperative to ensure voting rights, particularly in light of the United States Supreme Court’s decision in *Shelby County v. Holder*.¹⁵⁶ If certain populations are struggling to cast their votes, it will be difficult to make the necessary changes in the representative state governments. Prior to the Court’s decision in *Shelby County*, the Voting Rights Act of 1965 required that certain jurisdictions—known as “covered jurisdictions”—obtain federal government clearance before enacting laws related to voting.¹⁵⁷ As a result of this decision, there is no longer a requirement of federal government clearance, and many voters are left vulnerable to voter identification requirements and other obstacles at the state level.¹⁵⁸

Another solution to ALEC-controlled legislatures is to elect representatives who refuse to participate in ALEC’s scheme—

153. *Initiative Process 101*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-process-101.aspx> (last visited Jan. 17, 2019).

154. *Id.* No state’s initiative process is the same, and states vary on whether the ballot initiative is direct or indirect. In states with an indirect method, if enough valid signatures are obtained, the proposition is sent to the state legislature. *Id.*

155. *Id.*

156. *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding that the preclearance requirement of Section 5 of the Voting Rights Act was unconstitutional).

157. *Id.*

158. See generally Ari Berman, *There are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, THE NATION (Nov. 4, 2016), <https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/> (explaining that nearly half of the country has made discriminatory voting changes, including voter identification laws, cuts to early voting, and cuts to polling places).

representatives that will work independently of corporate influence to govern on behalf of the citizens who elected them.

C. CONGRESSIONAL CLARIFICATION

Another possible solution is to clarify the Article V Convention Clause power. Using the traditional method of proposing amendments, “the states [could] petition for, or for Congress to propose, an amendment to Article V itself.”¹⁵⁹ Article V “could be amended to clarify the constitutional convention amendment process so that the purposes of the Convention Clause can be given effect.”¹⁶⁰ It is counterintuitive that Article V would protect states from an inert Congress only to give that same Congress control over the convention. This amendment to Article V would clarify any confusion and dispel fears of a runaway convention. The “amendment could explicitly state that Congress cannot limit or control a constitutional convention but that the States may exercise such control, that specific applications can be limited to single issues, and that the resulting convention may only consider those issues.”¹⁶¹ Further, “the amendment could also include basic procedures and details for how a convention would operate to ensure its independence from Congress, and it could explicitly answer questions about the funding of a convention, the selection of delegates and a location, and other procedural and logistical questions.”¹⁶²

One commentator suggests that Article V could be further “amended to decrease Congress’s power over the convention process to further the Convention Clause’s purpose of allowing the States to circumvent a corrupt or unresponsive Congress.”¹⁶³ Independent bodies composed of state leaders, such as the governor of each state, could oversee the convention.¹⁶⁴ This would ensure that the states could independently conduct the convention without any oversight from Congress. Again, this method assumes, idealistically, that the state legislatures are immune from outside influence, and this Comment argues they are not. Nonetheless, it would be somewhat reassuring to have clarification rather than the free-for-all that would result if a

159. Rogers, *supra* note 11, at 1022.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Rogers, *supra* note 11, at 1022.

convention were held without any type of guidelines whatsoever.

V. CONCLUSION

In a time when politics are increasingly polarized, it is of the utmost importance that legislative bodies remain free of powerful private influence. Further, an Article V convention, controlled by captured state legislatures, could have unintended consequences and lead to a chaotic runaway convention. Without any additional clarification, an Article V convention, even of a limited nature to consider the balanced budget amendment, would also likely focus on divisive social issues. These issues are better left to the legislative process, where they can be addressed slowly and deliberately on behalf of all Americans, not just the party in power at the time the convention is held.

At the close of the Constitutional Convention of 1787, a woman reportedly asked Benjamin Franklin a question as he left Independence Hall on the final day of deliberation. The woman asked, “Well, Doctor, what have we got—a Republic or a Monarchy?” To which Benjamin Franklin replied, “A republic, if you can keep it.”¹⁶⁵

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165. Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*, NAT'L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it> (last visited Apr. 24, 2019). This quote was found in the notes of Dr. James McHenry, one of Maryland's delegates to the Convention. McHenry's notes were first published in Luther Martin, *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906), and the anecdote on page 618 reads: “A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it.” When McHenry's notes were included in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 app. A (1911), a footnote stated that the date this anecdote was written is uncertain.