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Paul G. Rando

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RECONSTITUTING THE UNITED STATES: COULD AN ARTICLE V CONVENTION PREVENT THE NEXT JANUARY 6?

*Paul G. Rando**

“[T]here is no place for violence in a democratic society dedicated to liberty under law”¹

“What will finally unite Americans?
A great crisis that leaves us no choice but to come together.”²

I. INTRODUCTION: PLASTIC HOURS

During the year leading up to the 2020 presidential election, the United States was nearing a so-called “plastic hour,” a time when institutional inertia breaks down enough that it becomes possible to effect profound change.³ This period was marked by an absence of solidarity and a growing divide between the disparate factions of politics in the United States, and by problems brought on by the coronavirus pandemic, including the associated economic downturn.⁴ Scholars suggest that for such a period to transform into a plastic hour that triggers lasting social change powerful enough to ensure a peaceful end to violent times, requires a catalyst, or a crisis.⁵

After a contentious election cycle, an election day followed by months of litigation,⁶ and concerns of a hostile takeover by the losing party,⁷

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1. *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

2. Historian Joseph J. Ellis, in response to a question posed, by TIME Magazine journalist Lucas Wittmann, about a natural catastrophe. See Lucas Wittmann, *Best-Selling Historian Joseph J. Ellis Explains What the Founding Fathers Got Wrong*, TIME MAG. (Oct. 18, 2018), <https://time.com/5428184/joseph-ellis-founding-fathers-trump/> [<https://perma.cc/Q7FQ-Y4CE>].

3. George Packer, *Make America Again*, ATLANTIC 48 (Oct. 2020), theatlantic.com/magazine/archive/2020/10/make-america-again/615478/; see also ILAN STAVANS, ART AND ANGER 79 (2001) (defining a plastic hour as “an instant in life in which a single insight might provoke a whole re-evaluation of our worldview.”).

4. Packer, *supra* note 3.

5. *Id.*

6. See, e.g., Russell Wheeler, *Trump’s Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Total Wipeout*, BROOKINGS INST. (Nov. 30, 2021) (finding a win rate of only 1.5% among the sixty-odd lawsuits filed that challenged the results of the 2020 election), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> [<https://perma.cc/P8N6-R5DF>].

7. See, e.g., *Fact Check: Trump Did Not Tweet Declaring Martial Law*, REUTERS (Dec. 23, 2020), <https://www.reuters.com/article/uk-factcheck-fake-trump-tweet-martial/fact-check-trump-did->

America's plastic hour *seemed* to materialize on January 6, 2021 ("Jan. 6"). That afternoon, political junkies turned on their news outlet of choice expecting nothing more thrilling than the certification of electoral votes to confirm Joe Biden as the next President of the United States (albeit, perhaps, with a bit of political showboating). Instead, some twenty-nine million Americans watched supporters of former President Trump storm the U.S. Capitol building, threatening both the certification process and the lawmakers involved in carrying it out.⁸ For the first time in living memory, violence nearly managed to overthrow the seat of U.S. government established by the Constitution almost 250 years ago.⁹ When the attackers breached the Capitol, Congress was counting votes — but the rioters did not ultimately stop the certification. Even so, a continuing threat of more politically motivated, constitutional violence now lingers.

In the wake of the Jan. 6 attack, there has been little in the way of profound social change, despite the new administration's ambitious agenda.¹⁰ Section II of this Comment attributes the lack of profound social change to the notion that Jan. 6 was not a plastic hour at all, but merely the most sensational symptom of a larger constitutional crisis which is currently underway in the United States. This crisis is defined in part by the looming threat of further large-scale violence that could still threaten or disrupt the nation's governmental system as outlined in the Constitution. Section II crafts an overview of the crisis, describing constitutional violence, gripping political gridlock, and polarization.

If Jan. 6 was not the plastic hour, then the opportunity remains for social change on a level necessary to quell the crisis. On the basis of the constitutional crisis and all its facets, and the potential that more violence will erupt unless a peaceful solution is implemented, this Comment seeks a peaceful solution. In this same vein, it asks: is an Article V constitutional convention the ideal method to resolve the crisis? In theory, a convention could be the peaceful, consensus-building solution to the needs of a nation nearing disaster. If the larger constitutional crisis is the real "plastic hour," then perhaps the solution ought to be equally monumental. But drastic

not-tweet-declaring-martial-law-idUSKBN28X2HE [https://perma.cc/234W-3KUP]. Though Reuters determined that the martial law tweet was fake, the President's tweet certainly caused a fair amount of worry. See Jazmin Goodwin, *Trump's Talk of Martial Law Sends White House Staffers Rushing to the Press*, CNN BUS. (Dec. 21, 2020), <https://www.cnn.com/2020/12/20/media/stelter-trump-martial-law/index.html> [https://perma.cc/7VFH-QAW7].

8. Mark Joyella, *Attack on Capitol Pushes CNN to its Most-Watched Day in History*, FORBES (Jan. 7, 2021), <https://www.forbes.com/sites/markjoyella/2021/01/07/attack-on-capitol-pushes-cnn-to-its-most-watched-day-in-history/?sh=1eaac9c73121>.

9. Ronald G. Shafer, *Congress Investigated an Attack on the Capitol 200 Years Ago. It Didn't Go Well*, WASH. POST (Oct. 20, 2021) (detailing the British attack on Washington, D.C. during the War of 1812), <https://www.washingtonpost.com/history/2021/10/20/war-1812-capitol-attack-congress/> [https://perma.cc/AP9L-VFLC].

10. See, e.g., Packer, *supra* note 3.

times may not call for such drastic measures.

To answer this Comment's central question, Section III imagines a hypothetical convention, highlights many of the unknown factors involved in running one, and considers how the risks introduced in Section II might play out. Ultimately, Section IV concludes that, based on the foregoing discussion, an Article V convention would be insufficient to prevent another instance of constitutional violence — let alone to address the larger constitutional crisis — and proposes a middle road between the extreme measure of a constitutional convention and taking no action at all.

II. BACKGROUND: CONSTITUTION IN CRISIS

The term “constitutional crisis” evades clear definition.¹¹ Generally, it is a moment in which the very fabric of a constitutional system frays, either because political disputes cannot be peaceably resolved within the system's framework, or because significant political figures are unwilling to uphold their constitutional obligations.¹² This Section argues that the United States is in the midst of such a crisis.

In Part A, this Section situates Jan. 6 firmly in the context of constitutional violence, a particular form of politically-motivated violence. Next, Part B discusses the state of the Constitution today—how it is viewed, who it represents, and how things have changed since Jan. 6. Then, Part C discusses the futility of constitutional amendment via Congress, the risks of a constitutional convention, and a potential third avenue.

A. *Constitutional Violence: January 6, 2021*

In the Declaration of Independence, Thomas Jefferson wrote that life, liberty, and the pursuit of happiness are inalienable rights, and that “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government”¹³ Throughout American history, many have attempted

11. Sean Illing, *How Do We Know if We're in a Constitutional Crisis? 11 Experts Explain*, VOX (May 16, 2019) (“There's no set of agreed-upon conditions, no ultimate standard that indicates when a country has officially entered into a constitutional crisis.”) <https://www.vox.com/2019/5/16/18617661/do-nald-trump-congress-constitutional-crisis>.

12. *Id.*; see also *Constitutional Crisis*, GOOGLE DICTIONARY, <https://www.google.com/search?q=constitutional+crisis+definition&oq=constitutional+crisis&aqs=chrome.1.69i59j35i39j0i512l3j69i60l2j69i61.3941j0j7&sourceid=chrome&ie=UTF-8> [<https://perma.cc/6H2H-YB77>] (last visited Apr. 23, 2022) (“a situation in which a major political dispute cannot be clearly resolved on the basis of the particular government's constitution or established practice”).

13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

to alter the government the Constitution created, some by amendment and others by violence.¹⁴

The latter phenomenon is referred to as constitutional violence:¹⁵ disorder that threatens to alter or disrupt the form and operation of the United States government. Contrast constitutional violence with “merely” political violence, which may be about any matter of politics or any issue of the day.¹⁶ There is a significant amount of overlap between the two ideas.¹⁷ Direct attacks on federal government officials and buildings, for example, could fall into either category.¹⁸ Because constitutional violence is a subset of political violence, every instance of constitutional violence *is* political violence, just as every square is a rectangle. But the inverse does not always hold true.

Violence has played a “pivotal role” in shaping the United States into the country it is today.¹⁹ As an attempt to prevent the peaceful transition of power to the newly-elected President of the United States by halting the certification of votes, Jan. 6 was an act of constitutional violence. Inside the Capitol Building, at 1:00 in the afternoon, the people of Congress tallied votes from the 2020 presidential election, overseen by then-Vice President Mike Pence, acting pursuant to Article II of the U.S. Constitution.²⁰ Earlier that day, the Vice President’s office had issued a statement declaring Pence’s intention to honor the tradition of certifying

14. See, e.g., F.E. Guerra-Pujol, *Domestic Constitutional Violence*, 41 U. ARK. LITTLE ROCK L. REV. 211 (2019).

15. Some scholars use this or similar phrases (“violence of constitution”) to describe a distinct but related type of violence: conflicts that result in the formation of *new* governments, such as the American and French revolutions in the eighteenth century. Such violence is more in the vein of “to abolish” than “to alter” and is not the type contemplated in this Comment. See generally David Bates, *Constitutional Violence*, 34 J.L. & SOC’Y 14 (2007).

16. See, e.g., Darel E. Paul, *America’s History of Political Violence*, FIRST THINGS (Jan. 7, 2021) (In the United States, “[r]iots against abolitionists, blacks, immigrants, Catholics, the military draft, war, capitalists, capitalism, [and] police . . . are too numerous to list.”), <https://www.firstthings.com/web-exclusives/2021/01/americas-history-of-political-violence> [<https://perma.cc/UEG7-WBUR>]. For a more specific example, consider *Cooper v. Aaron*, the Supreme Court case concerning an uprising in Little Rock, Arkansas, in protest against *Brown v. Board of Education*’s mandate to desegregate schools. The uprising was so violent that it caused President Eisenhower to call in the National Guard. The Court in *Cooper* upheld its decision in *Brown*. See Guerra-Pujol, *supra* note 14; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

17. See, e.g., Paul, *supra* note 16 (“In 1954 a group of Puerto Rican nationalists used semi-automatic pistols to shoot five U.S. Representatives on the floor of the House. Bombs were planted and exploded inside the Capitol building in 1971 and again in 1983.”).

18. *Id.*

19. Guerra-Pujol, *supra* note 14.

20. U.S. CONST. art. II (“The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.”); see also Jacqueline Alemany et al., *Key Findings of the Post’s Jan. 6 Investigation*, WASH. POST (2021), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/> [<https://perma.cc/WC94-ERTK>] (last visited Nov. 20, 2022).

votes,²¹ instead of bowing to pressure from the Trump Administration and others to disqualify votes against President Trump, thereby making President Trump the winner.²²

While Congress counted votes, President Trump was finishing a speech on the Ellipse near the White House, to a crowd of approximately 120,000 supporters.²³ During the speech, President Trump told his listeners, “[W]e are determined to defend and preserve government of the people, by the people and for the people. . . . [I]f you don’t *fight like Hell*, you’re not going to have a country any more [sic].”²⁴ He concluded by sending the crowd “to the Capitol and we’re going to try and give . . . our Republicans . . . the kind of pride and boldness that they need to *take back our country*.”²⁵

Many of the events that followed have been seared into the American collective memory. Rioters overwhelmed police officers struggling to barricade the Capitol steps, and smashed windows to gain entry.²⁶ A self-proclaimed “patriot warrior” in the crowd stole the baton of an officer who was then beaten and maced.²⁷ Capitol Police Officer Eugene Goodman escorted Senator Mitt Romney to safety and led the attackers away from the Congressional chambers, and the House adjourned to seek safety.²⁸ Then Goodman, pursued by an armed mob who was taunting him, proceeded to lead the attackers away from the Senate chambers and the small ceremonial office where Mike Pence hid.²⁹

21. Letter from Michael Pence, Vice President of the United States, to Congress (Jan. 6, 2021) (“I do not believe that the Founders of our country intended to invest the Vice President with unilateral authority to decide which electoral votes should be counted. . . .”) (available at *Pence’s Letter to Congress on Jan. 6, 2021*, WASH. POST (Oct. 29, 2021), <https://www.washingtonpost.com/context/pence-s-letter-to-congress/a73a4363-4bae-42ff-9177-7816806c0227/> [<https://perma.cc/8R7W-34PP>]).

22. Alemany et al., *supra* note 20 (showing that in the lead-up to Jan. 6, President Trump increased pressure on Vice President Pence and “embraced a cast of renegade lawyers who argued that Pence could reject electors from a handful of states and, ultimately, nullify Biden’s victory.”).

23. Alemany et al., *supra* note 20; *see also* William M. Arkin, *Exclusive: Classified Documents Reveal the Number of January 6 Protestors*, NEWSWEEK (Dec. 23, 2021), <https://www.newsweek.com/exclusive-classified-documents-reveal-number-january-6-protestors-1661296> [<https://perma.cc/YM9T-F554>] (claiming the crowd was six times larger than law enforcement anticipated).

24. Elizabeth M. Iglesias, *Trump’s Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 7, 11 (2021) (citing *Trump’s Speech That ‘Incited’ Capitol Violence: Full Transcript*, AL JAZEERA (Jan. 11, 2021), <https://www.aljazeera.com/news/2021/1/11/full-transcript-donald-trump-january-6-incendiary-speech>) (emphasis added).

25. *Id.* (emphasis added).

26. Alemany et al., *supra* note 20.

27. *Id.*

28. *Id.*

29. *Id.* Vice President Pence was later taken to an underground loading dock to hide. *See* C. Ryan Barber, *Mike Pence Stayed For Hours in a Capitol Loading Dock on January 6, Secret Service Confirms at an Accused Rioter’s Trial*, BUS. INSIDER (Mar. 21, 2022), <https://www.businessinsider.com/secret->

Later, rioters entered the Senate chamber, now empty of legislators.³⁰ Some, including the infamous QAnon Shaman (Jacob Anthony Chansley), approached the well, carrying a Trump flag, and joined in prayer thanking God “for filling this chamber with patriots.”³¹ Meanwhile, inside the House chamber, lawmakers hid behind their bulletproof seats and wore gas masks against the threat of tear gas.³² At this point, President Trump had yet to remark on the crowd of his supporters who had invaded a government building during government proceedings.³³ It took the National Guard arriving—some five hours after the attackers first breached the Capitol barricades—to quash the mob.³⁴ Five people were killed.³⁵

Those who hoped the Commander-in-Chief would condemn the chaos were disappointed. Former President Trump, who commands a broad support base to this day, has a proven habit of actively encouraging or tacitly approving of violence. For instance, half a year before Jan. 6, the President had ordered the use of tear gas, rubber bullets, and threats of military action to disperse peaceful Black Lives Matter protests.³⁶ Two years prior to that, President Trump refused to outrightly condemn the perpetrators of the violence in Charlottesville.³⁷ The pattern continued on Jan. 6. In transit from the Ellipse to the White House, President Trump attempted to divert the vehicle to go to the Capitol, and had to be physically restrained by a Secret Service agent.³⁸ Several hours after the rioters breached the Capitol, President Trump tweeted his praise for the

service-confirms-mike-pence-january-6-capitol-loading-dock-2022-3?op=1 [https://perma.cc/QQ5Y-B5ZJ].

30. Alemany et al., *supra* note 20.

31. *Id.* He did not mean the democratically-elected lawmakers who ordinarily legislate there.

32. *Id.*

33. *Id.*

34. Jill L. Goldenziel, “*Revolution*” at the Capitol: How Law Hindered the Response to the Events of January 6, 2021, 81 MD. L. REV. 336, 345 (2021).

35. Iglesias, *supra* note 24 (citing Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>).

36. Iglesias, *supra* note 24.

37. See, e.g., Nancy Cook, *Trump Fails to Condemn White Supremacists in Statement on Charlottesville Violence*, POLITICO, (Aug. 12, 2017) (“[H]e never . . . called the behavior of the white supremacists unacceptable.”) <https://www.politico.com/story/2017/08/12/trump-white-supremacists-charlottesville-violence-241575> [https://perma.cc/EJ9J-X7RJ]; David Smith et al., *Donald Trump Refuses to Condemn White Supremacists at Presidential Debate*, GUARDIAN (Sept. 29, 2020) (“Trump said there ‘were very fine people, on both sides.’”), <https://www.theguardian.com/us-news/2020/sep/29/trump-proud-boys-debate-president-refuses-condemn-white-supremacists>.

38. Doina Chiacu & Rose Horowitz, *Trump Tried to Grab Steering Wheel to Go to U.S. Capitol Jan 6 – Witness*, Reuters (Jun. 28, 2022) (citing witness testimony at a Congressional hearing on President Trump’s involvement with the Jan. 6 attack; reporting that President Trump said “I’m the effing president, take me up to the Capitol now.”), <https://www.reuters.com/world/us/trump-tried-grab-steering-wheel-go-us-capitol-jan-6-witness-2022-06-28/>.

attackers, calling them “great patriots.”³⁹ He told them to “go home with love & in peace.”⁴⁰ That same night, Congress resumed its business, and at 3:24 in the morning, Vice President Pence formally declared Joseph Biden the winner of the electoral vote count.⁴¹

In terms of constitutional violence, two features make Jan. 6 unique. First, that it seriously disrupted a democratic process described in Article II of the Constitution. The certification of votes is more than mere formality — it is constitutional requirement.⁴² The Constitution does not state that having one’s supporters violently interrupt the certification process is an appropriate method for objecting to election results. The method for peaceful, Congressional objection to election results is outlined in the Electoral Count Act of 1887.⁴³

The second, and potentially more significant unique factor about Jan. 6 is that it was endorsed by the acting President of the United States. Jan. 6 illustrates that the American constitutional system is in crisis. Political disputes are being addressed with violent action instead of peaceful resolution.⁴⁴ In addition, the country’s democratically elected leader, who four years earlier swore an oath to uphold and defend the Constitution of the United States,⁴⁵ violated that oath, and instead tacitly endorsed and

39. Alemany et al., *supra* note 20.

40. *Id.*

41. *Id.*

42. U.S. CONST. art. II, cl. 3.

And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify . . . The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.

Id.

43. 3 U.S.C. § 15 (“Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives . . .”).

44. For another example, take the 2017 “Unite the Right” rally in Charlottesville, Virginia, in which right-wing extremists who carried tiki torches and the flags of hate groups such as the American Nazi Party marched on Emancipation Park, ostensibly to protect a local statue of General Robert E. Lee from being removed. Counter-protestors chanting “Black Lives Matter” were attacked, and one was killed when one of the protestors drove his car into the crowd. See Dara Lind, *Nazi Slogans and Violence at a Right-Wing March in Charlottesville on Friday Night*, VOX (Aug. 12, 2017), <https://www.vox.com/2017/8/12/16138132/charlottesville-rally-brawl-nazi>; *Deconstructing the Symbols and Slogans Spotted in Charlottesville*, WASH. POST (Aug. 18, 2017) (explaining the flags of the American Nazi Party, Vanguard America, Identity Evropa, Southern Nationalists, and the Traditionalist Worker Party, along with other symbology affiliated with white supremacy, including the Iron Cross, valknut, sonnenrad, the Confederate flag, and the flag of fictional country Kekistan), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-videos/> [https://perma.cc/QL6-T8SP]; Paul Duggan, *Charge Upgraded to First-Degree Murder for Driver Accused of Ramming Charlottesville Crowd*, WASH. POST (Dec. 14, 2017), https://www.washingtonpost.com/local/crime/driver-accused-of-plowing-into-charlottesville-crowd-killing-heather-heyer-due-in-court/2017/12/13/6cbb4ce8-e029-11e7-89e8-edec16379010_story.html [https://perma.cc/LGH6-8AAV].

45. Lindsey Bever, ‘I, Donald John Trump...’: *The 38 Most Momentous Words President Trump*

actively sought to aid in violence against constitutionally enumerated procedures.⁴⁶

B. The State of the Constitution

The Constitution has served as a guidepost and organizational document for the American polity for nearly 250 years, but the needs of today's America are quite different from those of a fledgling nation during the late eighteenth century.⁴⁷ Thus, another element of the ongoing constitutional crisis is the breakdown of the Constitution's relevance to modern American society, and of the inability for a government structured by the Constitution to "insure domestic Tranquility."⁴⁸ Perhaps it is this element which most inspires legal scholars to call for an Article V convention.⁴⁹ It may also be the element that makes a convention the most risky.

Scholars claim the U.S. Constitution is all but unworkable in modern times.⁵⁰ Recent constitutional violence suggests they are right. It is a key effect of today's constitutional crisis that more violence is an ever-looming possibility, and that the institutions meant to prevent and overcome such crises are mired in gridlock while lawmakers edge further apart, toward the poles of the political spectrum. This Part discusses the Constitution's current ability (or lack thereof) to maintain a peaceful society and an operational government. The first sub-part discusses the future likelihood of violence in the United States. The following sub-part handles polarization and gridlock.

Said at His Inauguration, WASH. POST (Jan. 20, 2017) (quoting the former President's oath of office: "I, Donald John Trump, do solemnly swear that I will . . . to the best of my ability, preserve, protect and defend the Constitution of the United States."), <https://www.washingtonpost.com/news/morning-mix/wp/2017/01/20/i-do-solemnly-swear-the-35-most-momentous-words-donald-trump-will-say-at-his-inauguration/> [<https://perma.cc/N5UP-A8HK>].

46. See Iling, *supra* note 11; see also discussion on criminal affirmance, *infra* Section II(B)(1).

47. For one thing, the population has blossomed from less than ten million, to more than 330 million. See Aaron O'Neill, *Population of the United States 1610-2020*, STATISTA (Mar. 19, 2020), <https://www.statista.com/statistics/1067138/population-united-states-historical/> [<https://perma.cc/T972-Q38M>]. Furthermore, what was once a collection of relatively independent agrarian states has molded into an industrial national with a much more robust federal government. See generally ZINN, *infra* note 152.

48. U.S. CONST., pmb.

49. See generally Sanford Levinson, *So Much to Rewrite, So Little Time . . .*, 27 CONST. COMMENT. 515 (2011).

50. Alex Seitz-Wald & National Journal, *The U.S. Needs a New Constitution—Here's How to Write It*, ATLANTIC (Nov. 2, 2013), <https://www.theatlantic.com/politics/archive/2013/11/the-us-needs-a-new-constitution-heres-how-to-write-it/281090/> [<https://perma.cc/9Q6X-67SF>] (quoting University of Texas Professor Sanford Levinson: "[The Constitution] gets close to a failing grade in terms of 21st-century notions on democratic theory.").

1. After January 6, More Violence is on the Horizon

There is no provision in the Constitution that lists incitement of violence as an appropriate method to solve internal political disputes, and the Supreme Court has repeatedly held that there is no place for violence in a democracy such as this one.⁵¹ Yet in the wake of Jan. 6, roughly one-third of all Americans believe that violence is already an appropriate remedy when “elected leaders will not protect America.”⁵² The Republican National Committee defended the Jan. 6 perpetrators as being engaged in “legitimate political discourse.”⁵³ Moreover, many Americans believe that the country is heading toward a period of “mass violence, a breakdown of federal authority, and the division of the country into warring red and blue enclaves.”⁵⁴

More specifically, the memory of the Jan. 6 attack may contribute to further incitement of violence. To start, it is not out of the realm of possibility that former President Trump will be prosecuted for his role on Jan. 6 (despite surviving a post-presidency conviction trial in the Senate after being impeached by the House).⁵⁵ Congressional hearings throughout summer 2022 revealed, to a greater extent at each session, the degree of President Trump’s complicity in the attack.⁵⁶ His conviction would likely lead some of his opponents to call for more aggressive action by the Department of Justice, while other commentators call for a more

51. *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

52. Daniel A. Cox, *After the Ballots Are Counted: Conspiracies, Political Violence, and American Exceptionalism*, SURVEY CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/> [<https://perma.cc/XL93-N9SX>].

53. Matthew Dallek, *Prosecuting Trump Would Set a Risky Precedent. Not Prosecuting Would Be Worse*, WASH. POST (Feb. 18, 2022), <https://www.washingtonpost.com/outlook/2022/02/18/trump-prosecute-risk-law/> [<https://perma.cc/2TH9-D5B6>].

54. Robert Kagan, Opinion, *Our Constitutional Crisis is Already Here*, WASH. POST (Sept. 23, 2021), <https://www.washingtonpost.com/opinions/2021/09/23/robert-kagan-constitutional-crisis/> [<https://perma.cc/58N8-G67M>]; see also Bruce Ackerman & Gerard Magliocca, *Biden vs. Trump: The Makings of a Shattering Constitutional Crisis*, POLITICO (Feb. 01, 2022), <https://www.politico.com/news/magazine/2022/02/01/biden-trump-constitutional-crisis-00003959> [<https://perma.cc/AXG7-6SXC>] (foretelling widespread hysteria during, and as a result of, the 2024 presidential election).

55. David Rhode, *The January 6th Criminal Case Against Donald Trump*, NEW YORKER (Jan. 5, 2022), <https://www.newyorker.com/news/daily-comment/the-january-6th-criminal-case-against-donald-trump> [<https://perma.cc/MS6H-HL75>] (“Despite [Attorney General] Garland’s attempts to divorce the Justice Department from politically charged prosecutions, it is increasingly clear that investigating Trump is becoming the defining issue of his tenure.”); see also Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021), <https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial>.

56. See, e.g., Josh Dawsey, *Analysis: Committee Shows How Trump Barreled Through Warnings*, WASH. POST (July 12, 2022), <https://www.washingtonpost.com/national-security/2022/07/12/jan-6-committee-hearings-live-updates-day-7/>; see also Paul Kane, *Analysis: Republicans Pleased With Trump to Call of the Attack*, WASH. POST (July 21, 2022), <https://www.washingtonpost.com/national-security/2022/07/21/jan-6-committee-hearings-live-updates-day-8/>.

reserved approach.⁵⁷ There is reason to believe that prosecuting President Trump, or his top aides, for the events of Jan. 6 will cause his supporters to commit further acts of violence.⁵⁸ President Trump has already actively praised events similar to Jan. 6, including the trucker convoy that shut down traffic in Ottawa in protest of Canadian COVID-19 public health measures.⁵⁹ It is also worth considering that Jan. 6 did not take place in a historical vacuum; President Trump had a long-standing pattern of encouraging violence amongst his supporters prior to Jan. 6, which culminated in the Capitol attack.⁶⁰ The pattern does not seem to have ended on Jan 6., nor when Joe Biden took the presidential oath of office. For example, in early 2022, Republican Representative Mo Brooks revealed that President Trump had asked him to remove President Biden from office and immediately “hold a new special election for the presidency.”⁶¹ Such an idea could inspire violent support from President Trump’s base as easily as the image of him in handcuffs could inspire their violent outrage; it could equally be used by President Trump’s detractors to justify violent opposition. There is no reason to suspect that Jan. 6 marked an end to plotting by those responsible for planning it.

The options for legal consequences for Jan. 6 presents a Hobson’s choice.⁶² A decision by the Justice Department to avoid prosecuting

57. Rhode, *supra* note 55. One representative called A.G. Garland’s response “weak” and “feckless,” while a former D.O.J. official urged Garland not to prosecute unless the facts and the law supported such action, while adding that Garland shouldn’t “go easy on Trump.” *Id.*

58. Dallek, *supra* note 53 (“Indicting could trigger violence, spark a cycle of retribution once Republicans take back power . . .”). Signs that prosecution is imminent could also bolster President Trump’s desire to seek reelection in 2024, in order to avoid criminal consequences for four more years. *See, e.g.,* Josh Marcus, *Does New York Investigation Make it More Likely Trump Will Run Again in 2024 to Avoid Prosecution?*, INDEPENDENT (Jan. 19, 2022), <https://www.independent.co.uk/news/world/americas/us-politics/trump-2024-new-york-investigation-b1996682.html> (discussing the criminal charges of fraudulent business practices brought against President Trump by New York Attorney General Letitia James, unrelated to the Jan. 6 attack).

59. Dallek, *supra* note 53. (“He praised the anti-public-health trucker convoy that shut down a key bridge linking Detroit to Ontario and has wreaked havoc in Ottawa . . . before suggesting that the truckers do the same in the United States, an even greater “tinderbox.””).

60. *See, e.g.,* Dallek, *supra* note 53. President Trump’s long history of sanctioning violence includes “calling white supremacists in Charlottesville ‘fine people’; ordering the Proud Boys to ‘stand back and stand by’ [when asked to condemn white supremacy during a presidential debate] . . . tweeting ‘liberate Michigan’ to followers a few months before a plot to kidnap and murder the state’s Democratic governor.” *Id.*; Iglesias, *supra* note 24, at 9 (detailing President Trump’s dispersal of Black Lives Matter protestors with tear gas and rubber bullets).

61. Brent D. Griffiths, *Mo Brooks Says Trump Asked Him to ‘Immediately’ Remove Biden From Office and Illegally Hold a New Presidential Election*, BUS. INSIDER (Mar. 23, 2022), https://www.businessinsider.com/mo-brooks-says-trump-asked-him-to-immediately-remove-biden-from-office-and-illegally-hold-a-new-presidential-election-2022-3?utm_source=reddit.com [<https://perma.cc/ET6J-M7WY>].

62. “An apparently free choice when there is no real alternative.” *See Hobson’s Choice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Hobson%27s%20choice#:~:text=Definition%20of%20Hobson's%20choice,or%>

President Trump may be just as dangerous as the alternative.⁶³ Shortly after Jan. 6, *The Atlantic* reported research from Penn State showing that criminal affirmance (when the government tacitly condones dangerous behavior by neglecting to prosecute its perpetrators) is especially strong when the would-be defendant is amongst society's elite.⁶⁴ Thus, failing to prosecute President Trump may be seen as implicit approval for the attack,⁶⁵ and may empower the groups responsible for the violence to engage in more of it.⁶⁶ As Representative Diana DeGette pointed out during President Trump's post-Jan. 6 Senate trial, "[I]n 2017, it was unfathomable to many of us to think that Charlottesville could happen."⁶⁷ Yet, it did happen.⁶⁸ And then the violent dispersal of Black Lives Matter protests happened in Washington, D.C.⁶⁹ Then Jan. 6. The idea that more violence, or violence of a more extreme nature, seems "unfathomable" is no reason to discount the possibility that it may nevertheless occur. The nation's stage is being set, claims the *Washington Post*, for chaos.⁷⁰ "Imagine weeks of competing mass protests across multiple states as lawmakers from both parties claim victory and charge the other with unconstitutional efforts to take power."⁷¹ Imagine civil war unfolding in your hometown.

In fairness, the likelihood that constitutional violence will amount to *civil war* seems small at this point, almost two years after Jan. 6. Polling

20more%20equally%20objectionable%20alternatives [https://perma.cc/ECD4-ZQKC] (last visited Apr. 23, 2022).

63. Grant Tudor & Ian Bassin, *Don't Be Scared of Prosecuting Trump*, ATLANTIC (Jan. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/prosecution-executive-branch/617647/> [https://perma.cc/AH2G-QAJ2]; see also Dallek, *supra* note 53 (noting that during Reconstruction, governmental failure to prosecute the violent acts of white supremacists tacitly condoned such violence).

64. Tudor & Bassin, *supra* note 63 (citing Francesca Jensius & Abby Wood, *Caught in the Act But Not Punished: On Elite Rule of Law and Deterrence*, 4 PENN ST. J.L. & INT'L AFFS. 686 (2016)).

65. Similarly, President Trump's refusal to condemn the violence in Charlottesville constituted approval of such drastic measures, and in part led to Jan. 6 itself.

66. Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160 (2021) ("[D]omestic terrorists are emboldened by the belief that politicians encourage violence or that authorities will tolerate it.") (citing Arie Perliger, *Terror Isn't Always a Weapon of the Weak—It Can Also Support the Powerful*, CONVERSATION (Oct. 28, 2018), <https://theconversation.com/terror-isnt-always-a-weapon-of-the-weak-it-can-also-support-the-powerful-82626>), <https://www.journalofdemocracy.org/articles/the-rise-of-political-violence-in-the-united-states/> [https://perma.cc/5HP6-YJEV].

67. Lisa Lerer, *Donald Trump's Impeachment Legacy: Violent Extremism*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2021/02/13/us/politics/donald-trump-impeachment.html> [https://perma.cc/K3MA-CYZH].

68. Andrew Katz, *Unrest in Virginia: Clashes Over a Show of White Nationalism in Charlottesville Turn Deadly*, TIME, <https://time.com/charlottesville-white-nationalist-rally-clashes/> [https://perma.cc/3SY2-3Z9Q].

69. Iglesias, *supra* note 24, at 9.

70. Kagan, *supra* note 54.

71. *Id.*

shows that an enormous majority of Americans (83%) disapprove of the attack and think it posed a threat to democracy.⁷² The pragmatic reader will acknowledge, however, that merely disapproving of the “unfathomable” does nothing to prevent its recurrence. After all, the implication of the above poll is that some fifty-six million Americans (17% of an approximate nationwide population of 329.5 million) did approve of Jan. 6. Furthermore, even if what results is “only” more politically-motivated constitutional violence that doesn’t amount to all-out war,⁷³ it’s still an ugly scene, and one well worth preventing if prevention is possible.

2. Bipartisanship: A Relic of Congresses Past

These divisive issues are certain to contribute to the already-exasperating problem of Congressional gridlock — the inability to pass legislation. For many years, factors including, but not limited to, the rise of social media have pushed Americans into insular bubbles that function as echo chambers, reinforcing their own views and demonizing people who view things differently.⁷⁴ Polarization in the populace reflects in the halls of Congress,⁷⁵ where it manifests as increased partisanship and legislative stalemate.⁷⁶ The composition of the 117th Senate confirms that Congress is in a state of gridlock: Republicans hold fifty seats, Democrats hold forty-eight, and two Independents caucus with the Democrats, making the division exactly even for the second time in only twenty

72. Brittany Shepher, *Majority of Americans Think Jan. 6 Attack Threatened Democracy: POLL*, ABC NEWS (Jan. 2, 2022), <https://abcnews.go.com/Politics/majority-americans-jan-attack-threatened-democracy-poll/story?id=81990555> [<https://perma.cc/7KTM-LY4S>]. An overwhelming majority (72%) of Americans believe the people involved in the attack on the Capitol were “threatening democracy.” *Id.*; see also Anthony Salvanto et al., *CBS News Poll: A Year After Jan. 6, Violence Still Seen Threatening U.S. Democracy, and Some Say Force Can Be Justified*, CBS NEWS (Jan. 2, 2022), <https://www.cbsnews.com/news/january-6-opinion-poll-2022/> [<https://perma.cc/ZG4B-PG45>].

73. In the twenty-first century, it may be difficult to know when constitutional violence turns into all-out war. Civil wars of this century (or, wars in general) tend not to involve Side A and Side B lining up in nice lines to shoot each other with muskets, as in eighteenth century wars. See generally Yishai Beer, *Military Strategy: The Blind Spot of International Humanitarian Law*, 8 HARV. NAT’L SEC. J. 333 (2017).

74. Andrew E. Lelling, *Prosecutorial Discretion in a Time of Political Polarization*, 54 SUFFOLK U. L. REV. 479, 484 (2021) (citing Rani Molla, *Social Media Is Making a Bad Political Situation Worse*, VOX (Nov. 10, 2020), <https://www.vox.com/recode/21534345/polarization-election-social-media-filter-bubble>).

75. Whether polarization trickles up (from the populace to Congress), or trickles down (from Congress to the people), is hard to say.

76. Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1099 (2013).

years.⁷⁷ The upcoming 118th Senate is only slightly less logjammed.⁷⁸ Former President Barack Obama once remarked “[t]his country was founded on compromise.”⁷⁹ But compromise is proving ever more difficult in the chambers of Congress. “[N]ame-calling, conspiracy theories, and strategic obstructionism” have dominated federal legislative politics for decades.⁸⁰

In the Senate, parties rely more heavily than ever on cloture — the rule that requires a vote by at least sixty members to bring a matter to a vote for approval, sometimes referred to as the filibuster.⁸¹ Cloture freezes the ability for measures to get approved when neither party has sufficient votes to even bring a matter to the floor.⁸²

It may come as no shock that there are many exceptions to cloture filibuster (if there were not, Congress would never vote on anything at all).⁸³ Yet, these exceptions provide little relief. When a matter is not stalled by the filibuster rule, it gets conscripted as a pawn in contentiously partisan Senate battles. For example, consider presidential appointments, one of the higher-profile votes not subject to filibuster.⁸⁴ In the twenty-first century, confirmation votes on the President’s nominees to the Supreme Court have developed into hyper-partisan scenes of political

77. *Party Division*, U.S. SENATE (showing that the last time either party had a majority large enough to guarantee passage of any measure presuming Senators all voted along party lines, even measures requiring a supermajority, was the 89th Congress’s 68-seat Democratic majority in 1965-67), <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/BEU3-K7ZP>] (last visited Apr. 23, 2022).

78. See e.g., Sam Gringlass, *Here Are The Results in Georgia’s Senate Runoff Election*, NPR (Dec. 06, 2022), <https://www.npr.org/2022/12/06/1139566883/georgia-runoff-results-raphael-warnock-herschel-walker> (confirming Rev. Raphael Warnock’s victory over Herschel Walker, securing a 51-49 Democratic Senate majority); Richard Luscombe, *Herschel Walker’s Son Revels in Father’s Georgia Senate Runoff Defeat*, Guardian (Dec. 07, 2022), <https://www.theguardian.com/us-news/2022/dec/07/herschel-walker-son-christian-celebrates-defeat-georgia>.

79. Barack Obama, President, White House Press Conference (Dec. 07, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/07/press-conference-president> [<https://perma.cc/LU3M-2E7T>].

80. McKay Coppins, *The Man Who Broke Politics*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/> [<https://perma.cc/U8KR-ZGJ6>] (claiming that these strategies have “poisoned America’s political culture and plunged Washington into permanent dysfunction”).

81. Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POLI. SCI. 261, 269 (2015) (citing BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS, 153-54 (CQ Press, 2012), who states that cloture has only been used as a frequent practice since the 1990’s).

82. *Id.*

83. One report estimates that as many as 80% of the Senate votes cast in 2021 fell under some exception to the filibuster rule. See Robert Mangas, *Exceptions to the Senate Filibuster Rule: A Look at Senate Votes in 2021*, NAT’L L. REV. (Jan. 5, 2022), <https://www.natlawreview.com/article/exceptions-to-senate-filibuster-rule-look-senate-votes-2021> [<https://perma.cc/TA9J-8Z3E>].

84. *Id.*

theater. Nominations alternatively get stalled⁸⁵ or rushed⁸⁶ as befits the party in control of the Senate at the time.

Party polarization, it seems, has “tied [Congress] in knots, reducing . . . legislative productivity”⁸⁷ Political parties are growing “more ideologically coherent and distinctive, headed by institutionally stronger leaders inside government, and bolstered by committed activists and large networks of party-allied organizations outside government.”⁸⁸ These machines of political power aim their focus more on electioneering, less on deliberation and compromise toward a productive goal.⁸⁹ The governing body’s inability to overcome political differences and make policy decisions can be reflected (if clumsily) by reviewing legislative output: from 2011-13, the 112th Congress enacted only 283 laws, compared to the 93rd Congress nearly four decades earlier, which enacted 649 laws.⁹⁰ The Senate is also acting on a smaller portion of executive nominations than they have in the past.⁹¹ While it’s true the Constitution does not dictate a minimum number of laws or nominations upon which the Congress must act, and further, some individuals may feel that the decline in legislation merely reflects an appropriate scale of output for the national legislature, polarization and gridlock have impacted Congress’ rate of execution of the legislative powers granted to it by to the Constitution.⁹²

C. Methods & Madness of Constitutional Amendment

The Comparative Constitutions Project’s study comparing the duration

85. In spring 2016, Chief Judge of the U.S. Court of Appeals for the District of Columbia Merrick Garland was nominated by President Barack Obama (a Democrat) to replace the late Justice Antonin Scalia on the Supreme Court. For over half a year, Senate Majority Leader Mitch McConnell (a Republican), along with the Senate Judiciary Committee, refused to hold a vote to confirm Judge Garland, claiming that it was inappropriate to hold a SCOTUS nomination vote in a presidential election year. See Ron Elving, *What Happened With Merrick Garland in 2016 and Why it Matters Now*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/7CQM-EKWY].

86. In late October 2020, mere weeks before that year’s presidential election, a Republican-controlled Senate led by Mitch McConnell confirmed Amy Coney Barrett, formerly a judge on the Seventh Circuit Court of Appeals, to replace the late Justice Ruth Bader Ginsburg on the Supreme Court. See Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html [https://perma.cc/8EXP-RESD].

87. Lee, *supra* note 79, at 270.

88. *Id.* at 275-76.

89. *Id.* at 276.

90. Teter, *supra* note 76, at 1104.

91. *Id.* at 1105 (citing Theodoric Meyer, *Under Obama, More Appointments Go Unfilled*, PROPUBLICA (Feb. 27, 2013), <http://www.propublica.org/article/under-obama-more-appointments-go-unfilled>).

92. U.S. CONST. art. I, § 1.

and endurance of every nation's constitution shows that while the U.S. Constitution is the oldest constitution still in effect,⁹³ it is also one of the least amended.⁹⁴ That is the case, in part, because it is one of the most difficult to amend.⁹⁵ The U.S. Constitution formally provides for its own amendment via two methods: by a two-thirds vote to amend in both chambers of Congress, or by a constitutional convention called by application of two-thirds of the state legislatures.⁹⁶ A convention may be proposed "on one or many topics (or just a general call for convention without proposing a specific topic)."⁹⁷ The Supreme Court, however, has a long history of amending the Constitution informally through judicial review, creating sometimes "[m]ajor doctrinal shifts . . . without any change in constitutional text."⁹⁸

The Constitution has been formally amended twenty-seven times since 1787, but there has never been a successful attempt to call a constitutional convention in that time, and nearly three decades have passed since the most recent amendment.⁹⁹ This Part deals primarily with the formal avenues for amendment laid out in Article V. The first sub-part deals with Congress' amendment record, and the second sub-part discusses the pitfalls that have faced calls for convention. Finally, the last sub-part introduces the National Popular Vote Interstate Compact, an agreement which is not an Article V amendment, but will (if triggered) work profound change on the American constitutional system.

1. Amendment by Congress: Once Difficult, Now Futile

The difficulty of actually enacting constitutional change through the legislative process is almost impossible to overcome in the twenty-first century.¹⁰⁰ Not only must an amendment pass by a two-thirds vote in both

93. Zachary Elkins et al., *Timeline of Constitutions*, COMPAR. CONSTS. PROJECT (2022), <https://comparativeconstitutionsproject.org/chronology/> [<https://perma.cc/54DB-2X3M>].

94. *Id.*

95. *See, e.g.*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. 153 (Dec. 2021).

96. U.S. CONST. art. V. The term "formally" here distinguishes Article V procedures from informal constitutional amendments via judicial review, as established by the Supreme Court in *Marbury v. Madison*. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803).

97. Abbey Pizel, *A Constitutional Convention is Closer Than You Think*, COLO. FISCAL INST. (Feb. 28, 2019) (citing U.S. CONST. art. V), <https://www.coloradofiscal.org/a-constitutional-convention-is-closer-than-you-think/blog>.

98. Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443, 443 (2013) (citing *inter alia* the many major shifts in doctrine on Congress' authority over interstate commerce and over regulation of the termination of a pregnancy as examples of Court-driven constitutional change).

99. Pizel, *supra* note 97.

100. *See, e.g.*, Jesse Wegman, Opinion, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now.*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html> [<https://perma.cc/SC8N-HS5M>]; Janelle Bouie, Opinion, *The Constitution Was Made*

chambers of Congress, but the legislatures of three-quarters of the states must then ratify the amendment.¹⁰¹ Out of more than 12,000 proposed amendments, only twenty-seven have ever been adopted.¹⁰² The most recent amendment was ratified in 1992, meaning there has not been any amendment in this millennium.¹⁰³ In addition, much of the ratification process for the Twenty-Seventh Amendment occurred when it was first introduced by James Madison in 1789.¹⁰⁴ The most recent *newly-proposed* amendment, the Twenty-Sixth, took effect over half a century ago in 1971 as a response to the Vietnam War.¹⁰⁵

There have, of course, been attempts to enact more new amendments. One proposal to note is the Equal Rights Amendment (“ERA”). The amendment, first proposed in 1923, would have read: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”¹⁰⁶ The ERA, which sought to achieve the same equal protection under the law for women as the Fourteenth Amendment afforded to freed slaves, first experienced pushback because of the worry that treating men and women equally in the law would detrimentally ignore clear differences in biology.¹⁰⁷ A “STOP ERA” campaign launched in the 1970s on similar bases slowed what *had been* growing support for the amendment; by the end of the 1970s, the ERA had been approved by only thirty-five of the thirty-eight states required add a proposed amendment to the text of the U.S. Constitution.¹⁰⁸ Recently, the ERA has been approved by three more states (Nevada, Illinois, and Virginia).¹⁰⁹ If this were purely a numbers game, the ERA would now be ratified. However, the deadline also needs to be

for Us, Not the Other Way Around, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/opinion/democracy-madison-robert-dahl.html> [<https://perma.cc/8KK2-3H4M>] (“[T]he barrier to constitutional amendment is impossibly high.”).

101. U.S. CONST. art. V.

102. *Id.*

103. *Id.*

104. *Id.*

105. *The 26th Amendment*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (June 17, 2021), <https://www.nixonlibrary.gov/news/26th-amendment> [<https://perma.cc/W2Z4-3XR6>] (explaining that the Twenty-Sixth Amendment, which lowered the voting age from twenty-one to eighteen, was a response to the incongruity in allowing eighteen-year-olds to fight and die in war but not to vote for their nation’s leadership).

106. S.J. Res. 21, 68th Cong., 1st Sess. (1923); *see also* 65 CONG. REC. 150 (1923).

107. Melissa Murray, *The Equal Rights Amendment: A Century in the Making*, 43 HARBINGER 91, 94 (2019) (showing that, especially with regard to workplace conditions and working hours, some women opposed the ERA on the basis that they would lose important legal protections).

108. *Id.* at 95-96.

109. *Id.* at 97; *see also* Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html> [<https://perma.cc/M75E-QZUE>].

considered.¹¹⁰ Some argue that the fifty-year deadline written into the ERA means that all approvals after 1983 are invalid; others contest that since Article V makes no mention of amendment deadlines, Nevada's, Virginia's, and Illinois' approvals are valid.¹¹¹ Thus, if the numbers didn't already make it clear, the ERA shows that politics impact amendment ratification. If another state elects to approve the ERA, there is sure to be a heated contest over its fate.

Before the current, decades-long amendment drought, there have previously been multiple periods of profound constitutional amendment. The most apparent example is the Bill of Rights. Ten of the twenty-seven amendments were passed in 1791, as a response to criticism against the Constitution.¹¹² Another period of great change was the Reconstruction after the Civil War, which saw passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, all methods by which Congress tried to overcome the evils of slavery and societal racism.¹¹³ These periods brought drastic change to the government and the American way of life.¹¹⁴ Together, these two moments—post-Civil War and post-adoption of the Constitution—account for nearly half the total amendments. Both demonstrate how past “plastic hours” have been leveraged to work immense change to this nation.

Today, the worsening polarization in Congress and among the states¹¹⁵ does not bode well for the possibility of congressional amendment. While amending the Constitution was rare prior to Jan. 6, doing so in the current political climate is likely impossible. Amendment by Congress requires a two-thirds supermajority of both chambers to approve the proposed amendment before sending it to the states for ratification.¹¹⁶ The idea that any constitutional amendment designed to address the crisis underlying the Jan. 6 attack and to dispel the fear of continuing violence could pass

110. See Williams, *supra* note 109 (“Virginia’s decision does not seal the amendment’s addition to the United States Constitution. A deadline . . . expired in 1982, so the future of the measure is uncertain, and experts said the issue would likely be tied up in the courts and in the political sphere for years.”).

111. *Id.*

112. ZINN, *infra* note 152, at 99.

113. *Id.* at 198 (“The Thirteenth Amendment outlawed slavery[.] . . . The Fourteenth Amendment repudiated the prewar Dred Scott decision [and] seemed to make a powerful statement for racial equality[.] . . . The Fifteenth Amendment said: ‘The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.’”).

114. Such as by enforcing new obligations upon the States or the federal government, or by guaranteeing new rights to citizens and ensuring citizenship to new populations.

115. Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER (Dec. 27, 2021), <https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized> (“Such is the state of the union these days that no forum seems too small or too sleepy to be polarized . . . [Y]ou would think a civil war had already begun.”).

116. U.S. CONST. art. V.

through the 117th Congress is implausible, bordering on absurd. The Senate once failed to so much as vote to approve the creation of a commission to investigate the events of Jan. 6.¹¹⁷ So long as the filibuster system remains in effect, accomplishing anything that requires a Senate supermajority—let alone a supermajority of both chambers—will prove unfeasible at best, and the “world’s greatest deliberative body” will do little more than argue, accuse, and allow legislation to deflate.¹¹⁸

2. Amendment by Convention: Risks & Results

If the fact that only twenty-seven of 12,000 proposed amendments have been adopted proves that constitutional amendment is difficult *via Congress*, the fact that none has been adopted by constitutional convention might suggest that amendment by convention is impossible. The language providing for constitutional convention is sparse. Article V provides that an amendment can join the Constitution after being proposed by “the legislatures of two thirds of the several states . . . [who] shall call a convention”¹¹⁹ Alexander Hamilton envisioned empowering the states to call a convention as being a safeguard against federal overreach.¹²⁰ James Madison believed this option was equally valid as the Congressional amendment option.¹²¹ Why, then, have each of the twenty-seven amendments ratified so far gone through the Congressional approach—a two-thirds vote of approval by both Houses of Congress?¹²²

Currently, forty-two states have one or more resolutions to call an Article V convention pending.¹²³ More than a dozen of the resolutions concern a proposed federal budget balancing amendment, several others support a more open-ended “convention of states,” and some support an effort to make a constitutional amendment overturning *Citizens United v. FEC*, the 2010 case that significantly changed campaign finance law.¹²⁴

117. Ryan Nobles et al, *Senate Republicans Block January 6 Commission*, CNN (May 28, 2021), <https://www.cnn.com/2021/05/28/politics/january-6-commission-vote-senate/index.html> [<https://perma.cc/DH49-H2AV>].

118. Susan Mulligan, *The Filibuster: The Senate’s Glorified Tradition of Obstruction*, U.S. NEWS (Jan. 14, 2022), <https://www.usnews.com/news/the-report/articles/2022-01-14/the-filibuster-the-senates-glorified-tradition-of-obstruction>.

119. U.S. CONST. art. V.

120. THE FEDERALIST NO. 85 (Alexander Hamilton) (“We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.”).

121. THE FEDERALIST NO. 43 (James Madison) (“[The Constitution] equally enables the general and the State governments to originate the amendment of errors”).

122. David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2370 (2021).

123. Pizel, *supra* note 97.

124. Jay Riestenberg, *U.S. Constitution Threatened as Article V Convention Movement Nears*

In 2016, Texas Governor Greg Abbot initiated the Texas Plan, a campaign to call a convention to propose amendments designed to check the power of the federal government, which quickly garnered support from states such as Tennessee, Indiana, and Oklahoma.¹²⁵

The sparse constitutional language on Article V conventions is deceptively simple. At closer glance, what the constitutional Framers left unwritten hides chasms of dangers and uncertainty. A bipartisan, nationwide collection of legislators, judges, and legal scholars oppose the possibility of a convention due to these dangers.¹²⁶ Difficulty of success is far from alone in the gallery of risks associated with a convention. There is also the possibility of a runaway convention. Vagueness in the “convention of states” general proposals, and lack of guidance from Article V, has made some people worry that a convention will overstep its bounds.¹²⁷ The original Constitution exceeded the bounds of the convention’s call to amend the Articles of Confederation, after all.¹²⁸ There is nothing in the Constitution to prevent a constitutional convention from being expanded in scope to issues not raised in the convention calls passed by the state legislatures.¹²⁹ Nor has Congress ever succeeded in crafting a set of rules to govern a convention, despite multiple attempts.¹³⁰ That any group of Americans organizing and running a constitutional convention would be sailing into uncharted waters is a defining feature of many critics’ concerns about Article V conventions.

Success, COMMON CAUSE (Mar. 21, 2018), <https://www.commoncause.org/resource/u-s-constitution-threatened-as-article-v-convention-movement-nears-success/> [<https://perma.cc/8MJH-BNJU>]; see generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that governmental limitations on campaign finance contributions by corporations violate the Free Speech Clause of the First Amendment).

125. Tom Lindsay, *The U.S. Constitution: An Illegal Document?*, FORBES (May 25, 2016), <https://www.forbes.com/sites/tomlindsay/2016/05/25/was-americas-1787-constitutional-convention-illegal/?sh=1d20b0c74d9c> [<https://perma.cc/QWK8-2TLF>].

126. Riestenberg, *supra* note 124 (quoting Supreme Court Justices Warren Berger, Antonin Scalia, and Arthur Goldberg, Solicitors General Archibald Cox and Walter E. Dellinger, and more than two dozen law professors, all citing concerns about the lack of precedent and appropriate guidelines for such a venture).

127. *Id.* (“There is nothing in the Constitution to prevent a constitutional convention from being expanded in scope to issues not raised in convention calls . . .”).

128. Lindsay, *supra* note 123.

129. *Id.*; see also Michael Leachman & David A. Super, *States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (Jan. 18, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf> [<https://perma.cc/22GZM389>] (“There is no guarantee that a convention could be limited to a particular set of issues . . .”).

130. Noah Rothman, *A Pander For the Ages*, COMMENTARY (Dec. 31, 2015), <https://www.commentary.org/noah-rothman/a-pander-for-the-ages/> [<https://perma.cc/G642-QSP2>].

3. The Potential for Amendment by Compact: A Note on the NPVIC

In addition to the constitutionally-enumerated methods of amendment described above, there has in this millennium developed a potential creative solution for amendment — something of a middle path between the strict requirements for congressional amendment and the risky road of constitutional convention. This creative alternative concerns the Electoral College. Under the Constitution, every state may select its own method for appointing delegates to the Electoral College, the body that selects the next President of the United States.¹³¹ Many states operate under a state-wide popular vote system — that state’s delegates will vote for the candidate who won the popular vote in that state.¹³² The result of the varied appointment system is that, from time to time, the candidate who wins the national popular vote loses the presidential election, having failed to secure enough electors.¹³³

As an attempt to remedy the situation, the National Popular Vote Interstate Compact (“NPVIC”) requires each member state to appoint its delegates to the candidate who wins the national popular vote.¹³⁴ In theory, once a number of states representing 270 or more Electoral College delegates have signed on to the NPVIC, then all future presidential elections will go to the national popular vote winner.¹³⁵ Whether the NPVIC is ultimately allowed to hold sway over election outcomes, however, may ultimately depend on Congress or the Supreme Court due to the Constitution’s Compact Clause, which forbids states from entering certain interstate agreements without Congressional approval.¹³⁶ If Congress does not approve the NPVIC, it is possible that a state party to the compact will seek a contrary decision from the highest Court.

The NPVIC, if enabled, would clearly alter the constitutional system of Article II by replacing states’ freedom to choose their own methods of appointing electors with a process that automatically selects the national popular vote winner, relegating the Electoral College to historical

131. U.S. CONST. art. II, § I.

132. Ronak Patel, *Chapter 188: Forget College, You’re Popular! A Review of the National Popular Vote Interstate Compact*, 43 MCGEORGE L. REV. 645 (2012).

133. *Id.*; see also *5 of 46 Presidents Came into Office Without Winning the Popular Vote*, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/5-46-presidents-came-office-without-winning-national-popular-vote> [<https://perma.cc/9KWH-NFET>] (listing John Quincy Adams, Rutherford B. Hayes, Benjamin Harrison, George W. Bush, and Donald Trump as the five individuals who won presidential elections despite losing the national popular vote).

134. Patel, *supra* note 132, at 646.

135. *Id.*

136. *Id.* at 647.

obsolescence. Crucially, the NPVIC would achieve this result outside of the formal amendment processes outlined in Article V, relying only on widespread consensus and the Compact Clause. Furthermore, assuming (perhaps naively) that the citizens of states *not* party to the compact do not violently protest, the compact will have achieved its goal peacefully. When considering potential peaceful solutions to the current crisis and the possibility it will erupt in debilitating violence, lawmakers should take the NPVIC into consideration.

III. DISCUSSION: CONVENTION, 2026

Jan. 6 was a symptom of the nation's constitutionally violent disease; it was not the disease itself. This is why the nation has yet to experience the profound social change to be expected from "plastic hours" such as the American Revolution, or the Civil and Vietnam Wars. Thus, the potential to enact sweeping, nation-saving change remains.

This Section imagines a hypothetical near-future in which the nation has capitalized upon the urgent need to peacefully resolve its many differences by calling a constitutional convention. This fiction takes place in 2026, to coincide with the 250th anniversary of independence from Great Britain. The delegates gather with a singular mandate:

To re-evaluate the original Constitution, every clause and amendment, and forge a new series of amendments that reflect the needs of modern America in such a way as to prevent nation-destroying violence.

Before the convention can take place, preliminary questions must be answered. Note that each of these questions could conceivably inflame passions and lead to, if not violent insurrection, then vicious argument. Who, for example, will be on the roster of delegates? Perhaps it will comprise the members of Congress. But if so, why hold a convention at all? That is to say, what would differentiate the convention from an ordinary session of Congress? Should the states instead appoint separate delegates, subject to the states' own appointment methods as is currently the practice concerning the Electoral College? Should it be left to a popular vote? Further, should each state have a number of delegates proportionate to its population (as in the House of Representatives), or should each state have an equal number of delegates (as in the Senate)? Perhaps the more significant problem is that the question of who gets to decide the answers to these other questions is equally unclear. There is no rubric for this in the Constitution.¹³⁷

Assume for the moment that these initial questions have been reasonably answered without sparking panic, outrage, and violence. The

137. See, e.g., Riestenberg, *supra* note 113.

delegates arrive safely at the convention,¹³⁸ ready to partake in peaceful (if heated) discussion about the nation's issues and its governing document.

Unlike the United States in 1787, the nation today is not in the nascent stages of self-government in the aftermath of a revolutionary war. The United States has endured nearly 250 years under the current Constitution, longer than that of any other nation, and there have been amendments when enough of the government has agreed that the Constitution should change. But the previous Section established that the United States is experiencing a constitutional crisis, one illustrated by Jan. 6's events at the Capitol and which may yet incite further violence. Whether insurrections, revolutions, and civil war result or peace prevails, the nation exists in a unique moment of peril, a result of polarization and norm breaking.¹³⁹ This Section engages in a thought experiment: can the 2026 convention offer a way out of the crisis?

Thomas Jefferson once wrote to James Madison, “[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”¹⁴⁰ Over two centuries later, a 1993 study of all applications for constitutional convention showed that there were forty-five states “with their lights ‘on’ for a general convention,” though by 2011, that number had reduced to thirty-three on account of several recissions.¹⁴¹ Using the 2026 Article V convention as a fictional framework, this Section demonstrates why calling a constitutional convention may not be an ideal reaction to the current crisis. But first, Part A will show that a convention has the potential for some positive impacts.

138. But where will it take place – in Philadelphia, where Independence was declared? In Washington, D.C., the nation's capitol? In some place more geographically central? It's yet another topic that sparks more questions than answers; another area where history and the Constitution leave no guidance and no precedent.

139. See, e.g., Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [https://perma.cc/27W3-WXJP]; see also David Montgomery, *The Abnormal Presidency*, WASH. POST MAG. (Nov. 10, 2020) (detailing twenty presidential norms broken by Donald Trump, including the tax release tradition, the norm against personally profiting from official business, and abuse of the powers of appointment and pardon), <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/> [https://perma.cc/8SSM-ZGU4].

140. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison> [https://perma.cc/J6QQ-WDGZ].

141. Pozen & Schmidt, *supra* note 122, at 2371 (citing Michael Stokes Paulsen, *How to County to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837, 839-55 (2011)).

*A. A More Perfect Union:
The Benefits of an Article V Convention*

The Constitution, and by extension the United States of America, has never been a perfect document (or nation). As the remarks of President Jefferson show, it was not intended to be. “The framers were not philosophers searching for a description of an ideal system . . . They were practical men, eager to achieve a stronger national government.”¹⁴² The Constitution was only meant to establish a government that was *more* perfect than that which came before it.¹⁴³ Whether by replacement or amendment, creating a more perfect union should be the ultimate goal of any attempt to change the Constitution — to root out the flaws in our system and attempt to alleviate them. This Part will illuminate key ways that the 2026 constitutional convention could achieve that goal. Sub-part (i) discusses pacifism and consensus-building in the face of crisis, before sub-part (ii) discusses representation.

1. Building Consensus

In future constitutional violence, “[p]artisans on both sides are likely to be better armed and more willing to inflict harm than they were in 2020.”¹⁴⁴ And it is likely that there are actors on both sides of the political aisle who fervently agree that “a little rebellion now and then is a good thing.”¹⁴⁵ People on both extreme ends of the political spectrum are, so to speak, raring to go.¹⁴⁶ As Jan. 6 clearly demonstrated, there remain those who, discontented with the outcome or structure of American life, are willing to take up arms and inflict harm in the course of conducting a “little rebellion.”

But when parties are extremely divided, reaching peaceful consensus as to the disputed topic is a necessary alternative to violence. Consensus can represent a societal convergence of public opinion, or the process (and

142. Bouie, *supra* note 100 (quoting ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?*, 38 (Yale University Press, 2001)).

143. U.S. CONST. pmb1.

144. Kagan, *supra* note 53.

145. Zinn, *infra* note 152, at 95 (quoting Letter from Thomas Jefferson to James Madison (Jan. 30, 1787)).

146. On the extreme left, the Socialist Rifle Association, at least in part a natural disaster recovery nonprofit, also engages in education and advocacy for gun rights with a slant on supporting workers’ rights. See SOCIALIST RIFLE ASS’N, <https://socialistra.org/> [https://perma.cc/7KXV-9HLR]. On the extreme right, groups such as the Proud Boys (who were involved in both the Unite the Right Rally and the Jan. 6 attack) encourage “political” violence in support of their view of Western values. See Matthew Kriner & Jon Lewis, *Pride & Prejudice: The Violent Evolution of the Proud Boys*, 14 CTC SENTINEL 26 (2021), <https://ctc.usma.edu/wp-content/uploads/2021/07/CTC-SENTINEL-062021.pdf> [https://perma.cc/F2JT-ZH32].

result) of coming to agreement amongst a group.¹⁴⁷ “The most important thing a convention would do is to simply jump-start and conduct a national conversation that we’re not having,” says University of Texas Constitutional Law Professor Sanford Levinson.¹⁴⁸

Building conflict-avoiding consensus between the poles of American political ideology is reason enough to call delegates from the fifty states to participate in a constitutional convention designed to rededicate the nation to some of its purported ideals, such as opportunity, liberty, peace, and justice. After all, “arguments over the filibuster will seem quaint in three years if the American political system enters a crisis for which the Constitution offers no remedy.”¹⁴⁹

To achieve consensus, a deliberative body “attempts to integrate the insights of all members in order to find a solution that incorporates all points of view and that all members can support.”¹⁵⁰ Some readers might call this a naïve fantasy; others might point out that a convention would be redundant since this type of deliberation is Congress’ *raison d’être*. To those with a pacifist mindset, and indeed to the 83% of Americans who thought that Jan. 6 threatened democracy, this fantasy, naïve or not, should seem preferable to insurrection and violent overthrow. Clearly, no convention in the United States of the twenty-first century would be devoid of *argument* — things would almost certainly get a little more heated than your average faculty lounge debate. Even so, the hope is that the act of calling delegates together with the purpose of engaging in these necessary debates would prevent actual, harmful violence. The peacefully achieved result of a convention that represents the careful and considered deliberation of its framers is preferable to gunfire and marauders in the hallways of government institutions.

In any case, Sections II(B) and II(C) showed that the world’s greatest deliberative body is failing to deliberate. Congress cannot achieve the consensus necessary to reach a peaceful end to this crisis if it fails to do the work of consensus-building. Thus, it is possible that putting the Constitution into the hands of a body whose members do not serve, nor have ever served, in Congress, has the potential to achieve what Congress cannot.

147. Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions*, 19 OHIO STATE J. DISP. RESOL. 937, 940 (2004) (citing KATHRYN A. WELCH ET AL., BUILDING CONSENSUS: IMPROVING QUALITY IN DECISION MAKING 6-7 (1994)).

148. Seitz-Wald, *supra* note 50.

149. Kagan, *supra* note 54.

150. Della Noce, *supra* note 147, at 940.

2. Giving *Everybody* a Voice

The document that gave birth to a government supposedly created “of the people, by the people, and for the people”¹⁵¹ was written with input from a scant minority of its population—both at the time, and in relation to the nation’s current demographic makeup. In 1787, a handful of wealthy, white, male landowners met in Philadelphia at the Constitutional Convention.¹⁵² There were no slaves, no free non-white men, no women, and no un-propertied men amongst the delegates.¹⁵³ On the contrary, the Constitution was a “slaveholder’s document,” written in part by slave-owning delegates and designed in part to protect slavery as an institution.¹⁵⁴ It did not mention the nation’s very small population of free African-Americans, either.¹⁵⁵ Nor were there any delegates of Native American descent, although the topic of conversation had direct impacts on Native American interests and, some believe, may have been partially inspired by Native American ideology.¹⁵⁶ The Constitution treats native populations, similar to slaves, as distinctly other—they were not counted for representation in Congress, not taxed, and had no standing to sue in federal courts.¹⁵⁷ As the icing on the cake to prove that the Constitution of 1787 did not represent the full nation it purported to govern, it was approved by ratification of only nine of the thirteen states that existed at the time.¹⁵⁸ More than showing that unanimity did not take place, this

151. Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863); see also James A. Langley, Opinion, *Who Coined ‘Government of the People, By the People, For the People’?*, WASH. POST (Mar. 31, 2017) (noting that Lincoln evidently borrowed the phrase from John Wycliffe’s introduction to his 1384 Bible translation), https://www.washingtonpost.com/opinions/who-coined-government-of-the-people-by-the-people-for-the-people/2017/03/31/12fc465a-0fd5-11e7-aa57-2ca1b05c41b8_story.html [<https://perma.cc/2DG3-BHGJ>].

152. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 91 (HarperCollins 2003).

153. *Id.*

154. Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 969-71 (1993) (explaining how the Three-Fifths compromise, the Fugitive Slave Clause, the amendment provisions of Article V, and other parts of the Constitution all supported the slaveholding delegates and those like them whom they represented).

155. *Id.* at 963.

156. *Meet the Framers of the Constitution*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> [<https://perma.cc/NL8R-EFHH>] (last visited March 16, 2020); see also Mike Lee, *How an Iroquois Chief Helped Write the U.S. Constitution*, DAILY BEAST (Aug. 13, 2017), <https://www.thedailybeast.com/how-an-iroquois-chief-helped-write-the-us-constitution> (“In his speech, Canasatego introduced the colonists to the federalist ideas that bound the disparate tribes into unity: it was a bond that encouraged unity, especially in matters of defense, even as it supported the independence of each tribe when it came to self-government.”).

157. Finkelman, *supra* note 154, at 948.

158. This is somewhat misleading: As the ninth state to ratify, New Hampshire made the Constitution legally effective on June 21, 1788. But the document was ratified by Virginia four days later, New York the following month, North Carolina in November, and Rhode Island in May 1790. See *U.S. Constitution Ratified*, HISTORY.COM (June 18, 2020), <https://www.history.com/this-day-in-history/u-s-constitution->

including *inter alia*, “life, liberty, and the pursuit of happiness,”¹⁶⁷ or “life, liberty, [and] property”¹⁶⁸ — to ensure the U.S. government is able to effectuate those principles on behalf of *everybody* under its care.

As suggested above, the demographic makeup of the 2026 convention’s delegates would not need to be based in any way on the current or past makeup of Congress. If it were organized as an entity separate from the existing political structure, the convention would be an ideal place for the populations who have been given the right to vote since the time of initial ratification of the Constitution to have even more direct impact than the right to vote allows (especially in a gerrymandered and hyper-partisan government). Instead of merely voting for leaders and representatives, populations who were not represented in 1787 could have a seat at the table when it comes to deciding how the nation is to be governed moving forward.

Thus, there are some benefits to the possibility of replacing the U.S. Constitution in an Article V convention. In some ways, it could be exactly what the nation needs to move beyond the current climate and to forge a better future. Consequently, the next Part demonstrates how the idea plays out when an Article V convention is followed to its logical conclusion.

B. Welcome to the Jungle: Conventional Dangers

The benefits invoked in the previous Part are desirable. However, the justification for the 2026 convention is to unite the splitting factions of American politics in order to avoid violence. One major element the mandate lacked, however, was specificity. Which exact constitutional clause(s) should the delegates seek to amend? The problem of Jan. 6, and the larger crisis of which the attack was a major symptom, cannot be easily pinned down to one or two clauses. The reader should keep that fault in mind throughout this Part.

The proceedings themselves suggest countless areas of danger which, taken together, may suggest that an Article V convention is too risky an endeavor to be worth attempting, even in the face of today’s extraordinary circumstances. There is a lot that could go wrong, and the following sub-parts each address corresponding dangers (though they are all inter-related).¹⁶⁹ Sub-part 1 tackles the threat of a runaway convention, while sub-part 2 discusses the risk a convention would pose to existing institutions and doctrines of constitutional law. Sub-part 3 briefly discusses the unspoken threat underlying both of the previous sub-parts:

167. THE DECLARATION OF INDEPENDENCE, para 2 (U.S. 1776).

168. U.S. CONST. amends. V, XIV.

169. The list is not comprehensive, but it attempts to address several of the most common critiques of any proposal to hold an Article V convention.

would a constitutional convention have the power to “cancel” the Constitution altogether? Finally, sub-part 4 briefly illustrates various other risks.

1. Run Away! The Convention is Here (and It’s Really, Really Big!)

The 1787 convention that drafted and debated the U.S. Constitution was a runaway convention—though only in the strict sense that its mandate was to amend, not replace, the Articles of Confederation.¹⁷⁰ Few since have argued that the nation would have been better had the convention stayed within the bounds of its mandate.

But the proposed mandate for the hypothetical 2026 convention is sparse in its language—to *forge new amendments that reflect the needs of modern America in a way that avoids nation-destroying violence*. Like Article V itself, this offers little in the way of limitation or guidance, and offers the delegates extraordinary leeway in interpretation. That is to say, instead of crafting a few amendments designed to build consensus among a polarized nation so as to avoid violence, the convention’s delegates could decide to scrap the whole Constitution and draft a new one. Even if the mandate were less open-ended, it is unlikely that any clause could keep the delegates beholden to its limitations. Once the convention begins, the American people could hang their hopes for a desirable outcome on three things only: the bounds of the convention’s mandate, faith that the delegates will execute their positions in good faith within those bounds, and the historical weight of a Constitution that was framed for a predominately agrarian society but now governs an industrialized superpower.¹⁷¹

Some Americans may feel that violent overthrow of the constitutional system poses a bigger risk than a peacefully deliberated rewrite. There is, after all, no place for violence in our democratic system.¹⁷² The crisis that is currently underway has shown that constitutional violence is not out of the question; indeed, although many might consider violence against the government to be “unfathomable,” such violence has already taken place and is likely to happen again.

To these Americans, it may seem more productive at this stage, and more conducive to a peaceful future for this country, to call a convention

170. See Lindsay, *supra* note 128.

171. Perhaps there is another hope for peace in this convention: that one side of the political spectrum might enforce the boundaries of the convention’s mandate through force of arms, in which case Americans would know that the text of their original Constitution was relatively safe while its spirit was arguably shattered, along with the ultimate goal of the convention itself.

172. Cox v. Louisiana, 379 U.S. 559, 574 (1965).

and allow a coalition of citizens representing modern America to take measures they deem necessary to guard against the threat of a runaway convention, than to allow that fear to forestall any efforts to engage in a convention at all. The possibility of a runaway convention may in fact be an opportunity for a convention to do exactly what a convention is *meant* to do: allow the parties to decide the scope and powers of their own government.

Ultimately, without enforceable limitations, the Constitution would be at the whims of the delegates. Any faction of them with enough influence could hijack the convention and, if not rewrite the whole Constitution, pick and choose their favorite clauses and eviscerate the remainder. The hypothetical 2026 convention then dissolves into something no better than the Congress of today: divided, partisan, cutthroat, and toxic.

2. Done with Doctrine: The Convention's Threat to Government & Law

The difficulty of constitutional amendment in the United States lends itself to a degree of comfortable stability in government. Concurrent to the other fears associated with a runaway convention, there is the worry that a convention resulting in a new Constitution will also cause damage to the existing institutions of American government—both those mentioned in the Constitution (such as the Presidency, Congress, the Supreme Court, the Post Office) and those not mentioned (such as FEMA, OSHA, and other federal agencies). Without restrictions, those delegates who wish to adhere closely to the convention's mandate may not be competent to protect the bicameral legislature, or the office of President.

It is equally uncertain to what degree the clauses of a newly written Constitution would affect long-standing and well-respected doctrines in constitutional law, such as the First Amendment freedoms of speech and of the press, or the Fifth Amendment right against compulsory self-incrimination as protected by *Miranda* warnings.¹⁷³ If the 2026 convention is heavily influenced by a liberal majority, it stands to reason they might eliminate Second Amendment rights that conservatives tend to protect. Vice versa, a conservative majority could gut *Obergefell v. Hodges*' protection of the equal right to marriage for same-sex couples.¹⁷⁴ Would it be appropriate for a majority of the delegates to decide these important constitutional questions, questions they were not called upon to answer?

Likely not. As such, Americans may distrust the resulting document

173. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

174. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

due to lack of precedent since 1787,¹⁷⁵ and may lose confidence in the stability and security of their government in years to come.¹⁷⁶ There is no safeguard stopping disgruntled citizens from asking their states to call a convention once a decade, once a year, once a month.¹⁷⁷

3. Constitutional Cancel Culture

Due to these concerns, it is likely that many Americans would criticize this hypothetical 2026 convention as being the product of “cancel culture,” or the modern trend of boycotting celebrities or corporations that exhibit qualities found to be morally problematic.¹⁷⁸ Political actors have, in recent years, weaponized the fear of being attacked by trigger-happy cancel mobs to gain political advantage, suggesting that the cancel mob wants others to live in fear.¹⁷⁹ With such rhetoric, politicians can convince their base to vote against what they say the cancel mob supports.¹⁸⁰ It’s easy enough to see how a convention could be accused of “cancelling” the current Constitution, or at least delegitimizing the institutions it creates.

This presents an immense hurdle for the 2026 convention to overcome. The convention’s organizers would need to be careful about their messaging. It would not bode well for a convention call to be shut down on the fear that the end goal is to “cancel” the Constitution. If a convention were to occur, it would be imperative to find a way for most of the current Constitution, the institutions it creates (such as Congress, the Presidency, and the Supreme Court), and our constitutional rights to emerge more or less intact. Because this is an outrageously difficult goal, cancel concerns will be especially prevalent during the ratification and transition period between the current Constitution and whatever the convention produces, and would likely continue for a long time beyond ratification.

On the other hand, because of the current constitutional crisis,

175. Pozen & Schmidt, *supra* note 122, at 2370.

176. Of course, faith in the stability of American institutions has already eroded considerably in the past five years. *See* Goldsmith, *supra* note 139 (“That’s one reason Donald Trump was elected. His assault on those institutions, and the defiant reactions to his assault, will further diminish that trust and make it yet harder to resolve social and political disputes.”); *see also* David Brooks, *America is Having a Moral Convulsion*, ATLANTIC (Oct. 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/collapsing-levels-trust-are-devastating-america/616581/> [<https://perma.cc/GGM4-TTSV>] (“Americans haven’t just lost faith in institutions; they’ve come to loathe them, even to think that they are evil.”).

177. Granted, there is also nothing to say doing so would necessarily be harmful.

178. Aja Romano, *The Second Wave of “Cancel Culture”*, VOX (May 5, 2021), <https://www.vox.com/22384308/cancel-culture-free-speech-accountability-debate> (showing that cancel culture is used by both sides of the political spectrum merely to silence or ignore others, rather than to truly hold them accountable).

179. *Id.*

180. *Id.*

replacing the Constitution could be good public relations, so to speak. Branding constitutional reform via convention as a more democratic process than the Congressional amendment procedure could garner a lot of favor among the American populace. Satisfaction with democratic society is at a low point in the United States.¹⁸¹ American citizens could become more content with the operation of their government if they were given a more direct part to play in its crafting (via convention).¹⁸²

4. The Final Frontier: More Challenges & Unknowns

The Twenty-Seventh Amendment and the ERA both prove that it can take quite some time to get an amendment ratified. In the event that the hypothetical 2026 convention does *not* runaway with its mandate and, as instructed, delivers a handful of new amendments, the nation may have to wait months, years, decades, or even *centuries* before the proposed amendments are finally ratified. This may beg the question: why do it at all? In fact, this reality could almost support an argument that the convention should, in the spirit of 1787, overstep its bounds and write itself a clause ratifying its own output by some lesser criteria than the three-fourths vote of states required by Article V.

The biggest foreseeable obstacle and reason to avoid an Article V convention is this: if Jan. 6 was bad, what happens when a convention gets underway could be much worse. All the foregoing risks are things a critic, a crowd, or an angry mob could latch onto as incentives to engage in even more drastic forms of violence. A convention could end up exposing the nation to a prevalent risk of more violence, under the auspices of a peaceful solution to the problems violence posed in the first place.

And how peaceful would the convention itself really be? Perhaps the delegates would like to think of themselves (or their constituents would like to envision them) as Hamiltonian, Jeffersonian, or Madisonian—that is, as people with closely held, passionate convictions who yet retain the ability to put aside self-interest and debate with calm decorum when the

181. See, e.g., Roberto Foa & Andrew James Klassen, *Where People Are Satisfied With Democracy and Why*, CONVERSATION (Feb. 11, 2020), <https://theconversation.com/where-people-are-satisfied-with-democracy-and-why-130979> [<https://perma.cc/2FCH-3YWC>].

182. *Id.* (engagement and agency in the civic process is one of four absolutely essential pillars to citizen satisfaction in a democratic society, along with limiting polarization); *but see also* Richard Wike & Alexandra Castillo, *Many Around the World Are Disengaged From Politics*, PEW RSCH. CTR. (Oct. 17, 2018) (civic engagement – participating in the process of government – normally does not extend beyond occasionally exercising the right to vote), <https://www.pewresearch.org/global/2018/10/17/international-political-engagement/> [<https://perma.cc/F49S-HZK6>].

need arises.¹⁸³ But Congress has not always been a model of calm decorum,¹⁸⁴ and among the many other elements for which the 2026 convention lacks sufficient controls, it would be difficult to ensure that the delegates maintained their own peace.

IV. CONCLUSION: AN UNCONVENTIONAL SOLUTION

It is perhaps both a blessing and a curse that, no matter what happens at the hypothetical 2026 convention, it could not hope to stifle Americans' political passion. No constitution has the power to put an end to fervent debate about the elements of our constitutional system and their proper role. Nor *should* any constitutional amendment (or replacement) seek to do so. Debate has been prevalent throughout American history.¹⁸⁵ But an Article V constitutional convention, with the lofty goal to encourage more profound and engaged debate than at any point since the 1787 convention, may not be the appropriate measure to build consensus and enforce the strength of long-standing principles of American constitutional democracy that are in danger from the rising tide of constitutional violence.

It may still be too soon after Jan. 6 to accurately predict what the post-attack landscape of American government will look like. But the tea leaves are there for the reading. That which once seemed “unfathomable” has taken place, time and time again. That civil war now seems less than entirely “unfathomable” should set off alarms of nuclear proportions. The disparate sides of the political spectrum *must* come together to peacefully reach consensus about the future of the United States or risk a violent unraveling of the Union in the face of seemingly insurmountable political and social forces. However, it appears that an Article V convention may not be the appropriate venue in which to achieve consensus, despite the potential for a convention to increase civic engagement and interest in the Constitution.

183. Which is not to say that Hamilton, Jefferson, or Madison necessarily possessed those qualities. Whether they did or not, a certain amount of American mythmaking has imbued such attributes upon the founding generation. See, e.g., HEIKE PAUL, THE MYTHS THAT MADE AMERICA: AN INTRODUCTION TO AMERICAN STUDIES, 197 (2014) (“The myth of the Founding Fathers constitutes an American master narrative which has enshrined a group of statesmen and politicians of the revolutionary and post-revolutionary period as personifications of the origin of American nationhood, republicanism, and democratic culture.”).

184. See, e.g., Faye Fiore, *Lack of Decorum a Long Capitol Tradition*, L.A. TIMES (May 19, 1993), <https://www.latimes.com/archives/la-xpm-1995-05-19-mn-3468-story.html> [<https://perma.cc/5TQ9-TJPG>] (describing gun duels and wrestling matches among members of Congress, and claiming that “the only thing out of whack about today’s Congress is the public’s expectation that it ought to behave better”).

185. See, e.g., PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., 7 (Dec. 2021) (“[L]awmakers and the public, throughout the Nation’s history, have been attentive to and engaged in debate about . . . the constitutional system.”).

All the same, the crisis is still underway, and some solution must be reached. It would be unwise to let the urgency in the wake of Jan. 6 pass without taking some action. Fortunately, this discussion has identified a path toward a potential solution in the NPVIC. Though the compact is narrowly tailored to the issue of national popular voting in the presidential election (and, if it works, will only work because it leverages the existing Electoral College system to achieve its goal), the method it uses to amend the constitutional system may signify that the nation is not limited to a choice between Congress, convention, or judicial review to achieve change.

When it comes to hyper-partisanship in our legislatures, on our televisions, and amongst our fellow citizens, a multi-state compact like the NPVIC may present a holy grail solution. Multiple benefits would attach to such a solution: (1) it would allow lawmakers to focus on a carefully contained issue, with little chance to bleed into other issues — for example, election security or fraud, which has been the source of so much tension and violence, including Jan. 6; and (2) it could draw on existing institutions, thereby limiting the need for quarrels regarding who, when, where, etc. This suggests the possibility of an alternative strategy to the too-difficult and too-risky methods the Constitution’s Framers dictated in Article V. If the NPVIC comes into effect, it should inspire lawmakers to look for similar “one-off” consensus-building solutions to national problems, starting with those likely to be the seeds of future violent activity.

The hypothetical 2026 convention was based on the theory that an enterprising group of delegates and deliberators representing the vast spectrum of American identity could identify specific clauses within the Constitution that could, with amendment, shore up the political chasms that divide the nation and thereby prevent constitutional violence from evolving into civil war. Though the risks of a runaway convention and damage to American institutions are too great to endorse in good conscience, the NPVIC may suggest that, with creativity, a sufficiently large group of states can develop a peace compact that could yet bring the nation back from the brink of violence.