The Stealth Amendment: The Impending Ratification and Repeal of a Federal Budget Amendment

Brendon Troy Ishikawa

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol35/iss2/7

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
THE STEALTH AMENDMENT: THE IMPENDING RATIFICATION AND REPEAL OF A FEDERAL BUDGET AMENDMENT

Brendon Troy Ishikawa†

I. INTRODUCTION

We got lucky last time. Nonetheless, the danger remains that the next constitutional amendment will cause the same surprise as did the Twenty-Seventh Amendment. When the Twenty-Seventh Amendment completed its stealth ratification 202 years after proposal, many in Congress quickly checked to see whether any other hidden constitutional time bombs lurked.1 Just as the Twenty-Seventh Amendment’s stealth arose out of its too-slow-to-be-noticed ratification, so too an amendment to balance the federal budget seems to be sneaking into the Constitution because its progress continues to go largely unnoticed amid good economic times.2 The good news about the national debt explains the lack of attention to the Budget Amendment, but cannot prevent its ratification and subsequent repeal once the economic conditions inevitably worsen.

The rules making the ratification and repeal of a Budget Amendment certain arise out of federal officials’ practices, rather than out of the text of the Constitution.3 As things now stand, considerations of personal political cost and timing of elections can have a larger effect on whether an amendment is adopted than considerations of constitutionality because Congress continues its practice of “promulgating amendments.” Moreover, the Supreme Court’s continued abstention on federal amending process issues cedes a plenary power over the process that conflicts with notions of federal-state comity inhering in the Constitution’s design. If the rules do not change, we will have a Budget Amendment as part of the Constitution, but only for a while. If the rules do change, they do so in conflict with James Madison’s expectation that the rules of the amending process should be clear and unchanging even while channeling the process of change. Ultimately,

† Appellate specialist certified by State Bar of California Board of Legal Specialization. This article is dedicated to Stephen and Robyn.
2. See, e.g., Richard W. Stevenson, Clinton and G.O.P. Brace for Budget Battle, N.Y. TIMES (July 21, 1998), at p. A1 (noting “projections showing that the federal budget surpluses will be even bigger than Congress had expected”).
3. James Madison presciently called for consideration of amending process rules on grounds that the requirements were left too vague. See 2 THE RECORDS OF THE DEBATES IN THE CONVENTION OF 1787, at 558 (Max Farrand ed., Rev. Ed. 1966) [hereinafter FARRAND, RECORDS].

353
rules" of the amending process born of political expediency and judicial abstention can powerfully undermine the constitutional precepts upon which this nation should rest securely.

The cumulative effect of Congress and the Court’s answers to questions not addressed in the Constitution itself should serve us with notice of the Budget Amendment’s impending ratification and subsequent repeal. A whole host of rules now attend the laconic guidance of Article V. Some clearly comport with the constitutional text. Some rules resolve an ambiguity in the text. Some rules have been fashioned out of whole cloth. This Article anticipates and assesses the damage of the next surprise amendment with which non-constitutional rules of amendment will surprise us.

II. CONGRESS PROPOSES AN AMENDMENT TO BALANCE THE FEDERAL BUDGET

Throughout this nation’s history, many have criticized the federal deficit spending allowed by Congress’s constitutionally unconstrained power to borrow. In 1798, Thomas Jefferson suggested “taking from the federal government the power of borrowing” by amending the Constitution. In 1824, Andrew Jackson characterized the federal debt as “a national curse” during his campaign for the presidency. Today too, the national debt appears to be a national curse. In exercising unconstrained borrowing power, the United States has amassed an estimated $5,207,000,000,000 in federal debt by the end of 1996. The American electorate now favors “by a large margin” a constitutional amendment to require balancing of the federal budget. Moreover, “[t]here is now a consensus in Washington that the country must do something about the deficit.”

Although the idea of an amendment to balance the federal budget is coeval with the Constitution, no

4. Presidents, for example, have no official role in the amending process because they are not at all mentioned in Article V. See Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798).
5. For example, the “two-thirds of both Houses” of Congress needed to propose and amendment has been interpreted to mean two-thirds of a quorum of each house, rather than two-thirds of members of Congress as a whole. See Rhode Island v. Palmer (National Prohibition Cases), 253 U.S. 350, 386 (1920) (“The two-thirds vote in each house which is required in proposing an amendment is a vote of two thirds of the members present ‘assuming the presence of a quorum’ and not a vote of two thirds of the entire membership, present and absent”).
6. A state may not rescind its earlier ratification of an amendment even though a state may ratify an amendment that it earlier rejected. See Coleman v. Miller, 307 U.S. 433, 448-50 (1939) (affirming Congress’s counting of Ohio and New Jersey’s ratifications of the Fourteenth Amendment, despite the states’ subsequent attempts to rescind their earlier approvals). But see Brendon Troy Ishikawa, Everything You Always Wanted to Know About How Amendments Are Made, But Were Afraid to Ask, 24 HASTINGS CONST. L.Q. 545, 557-70 (1997).
7. The Constitution does not qualify Congress’s power “to borrow money on the credit of the United States”. U.S. Const. art. I, § 8, cl. 2 (capitalization omitted).
9. JOHN STEELE GORDON, HAMILTON’S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT 59 (1997). In 1824, the total national debt totaled $84 million. At the time Jackson made his pledge to eradicate the national debt, it had actually been falling from its high of $127 million a decade earlier. 2 U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1104 (1975).
measure has yet secured the requisite congressional votes or state calls needed for proposal. Recently, the Budget Amendment failed by a single vote in the Senate. As a result, some now consider the issue temporarily "dead." A confluence of congressionally created rules and supreme court doctrine, however, will keep the issue alive.

A. The Rule of Congressional Preemption

During most of the Philadelphia convention, the plan for amending the Constitution allowed only states to initiate the amending process. Not until the end of the convention did Alexander Hamilton rise to suggest that Congress too be given the power to propose amendments. "There could be no danger in giving this power," he asserted "as the people would finally decide in the case." Hamilton thus referred to the requirement that three-quarters of the states ratify an amendment, which would prevent Congress from controlling the outcome of the amending process. And yet, in the power to start the amending process lies Congress’s power to significantly affect, if not determine, the end result.

Despite the availability of two procedures for drafting constitutional amendments, every one of the thirty-three proposed amendments has been drafted by Congress. Congress may propose an amendment "whenever two thirds of both Houses shall deem it necessary". The second procedure, in which two-thirds of the states call for an amendment, has not been ignored even though it has not yet achieved a constitutional convention. On at least two occasions this second procedure has verged upon success. The first occasion concerned the quest to allow popular election of United States Senators.

Before the Seventeenth Amendment’s proposal and ratification, numerous states bound their legislative selection of their United States Senators to the outcome of popular state-wide elections. Americans overwhelmingly supported a federal amendment to allow for popular election of United States Senators. Nevertheless, such an amendment repeatedly failed to pass the Senate despite repeated successful passage in the House of Representatives. Senators who owed their terms in office to personal relationships with their state legislators remained loath to embrace the system of popular election. Self-interest and inertia long thwarted proposals for the amendment in the Senate.


15. 2 FARRAND, RECORDS, at 558.

16. See BERNSTEIN & AGEL, supra note 1, at pp. 301-07.

17. See U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators of each State, chosen by the Legislature thereof."); see also Roger G. Brooks, Garcia, The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism, 10 HARV. J.L. & PUB. POLICY 189, 207-208 (1987) (discussing design of direct primaries and "Oregon system" in attempting to secure popular election of United States Senators prior to Seventeenth Amendment).
Yet, when nearly two-thirds of the states had called for a constitutional convention to bypass Congress in drafting the amendment, the Senate reluctantly proposed what became the Seventeenth Amendment. Senators realized that if they did not write the amendment themselves, it would be drafted for them. Rather than risk the uncertainty of an amending convention -- the outcome of which might to revise more than just the method of election -- Senators sought to constrain the extent of a constitutional reform by writing it themselves. For example, the Senate-approved amendment provided that upon ratification, Senators could complete their terms regardless of whether they had been popularly elected or selected by state legislature. Thus, the prerogative to draft amendments allowed members of Congress to avert a convention that might have changed the nature of their offices. Congressional preemption of a convention allows Congress to lessen the impact of popularly called-for constitutional reforms.

The second instance of a constitutional reform nearly achieving the requisite number of state calls for a convention involves the ongoing movement for an amendment to ensure a balanced federal budget. To date, thirty-two of the requisite thirty-five states have called for a convention to draft the Budget Amendment. Such an amendment would impose borrowing, spending, and taxation constraints on Congress in passing the federal budget. As with the Seventeenth Amendment, numerous congressionally originated proposals have failed to secure the necessary two-thirds majority of Congress required by Article V. Not surprisingly, amendments that would limit congressional powers face seemingly insuperable opposition from Congress itself. But the prospect of an imminent convention can be expected to prompt Congress to preempt the convention by itself proposing the amendment. With the Budget Amendment, Congress seems likely to draft the amendment to allow itself significant flexibility. Versions of the Budget Amendment that have reached floor votes in Congress would allow the amendment's constraints to be waived in any year by a three-fifths vote of Congress. Also, these congressionally drafted versions have lacked any kind of enforcement mechanism. Were Congress to allow a convention to draft the amendment, neither the three-fifths waiver provision nor lax enforceability could be relied upon to find their way into the proposed amendment’s text.

18. See William Van Alstyne, Notes on a Bicentennial Constitution: Part I, Processes of Change, 1984 U. ILL. L. REV. 933, 943; see also Kris W. Kobach, Note, Rethinking Article V: Term Limits and the Seventeenth Amendment, 103 YALE L.J. 1971, 1979 n.36 (1994). One commentator describes the situation in which state calls for a convention nearly achieve the constitutional requisite as the “Politicians Dilemma,” which “may stimulate Congress to act... even though ideally individual members might prefer to keep existing institutional amendments.” Elliot, supra note 13, at 1103-04.

19. U.S. Const. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof”).

20. Thus, it may be said that “there are good reasons to believe that measures that emerge from a Congress prodded into action by the threat of a convention may not be as desirable as the reforms that would be suggested by a convention.” Elliot, supra note 13, at 1103-04.

21. See id. at 1078.

With thirty-two of the thirty-five states necessary for a convention having issued calls, Congress seems to sense the "need" to avoid a convention. Possibly with thirty-three states, and surely with thirty-four, the dwindling opportunity to mitigate the effect of an amendment to constrain Congress members' legislative powers can be expected to result in Congress proposing the amendment to the states.

A casual reading of Article V, with its dual procedures for proposing amendments, does not seem to foster congressional cooption of the power to frame constitutional amendments. Certainly the Framers did not anticipate this development. But out of the existence of two drafting procedures has arisen the Congress' opportunity to blunt reforms of its powers. Congressional preemption of amendment conventions has proven so effective that it seems that state calls essentially prod a reluctant institution rather than securing a desired amendment by an alternative method.

With only three more states calls being necessary to call a constitutional amendment convention, the power to get even two more states to issue calls will likely secure the Budget Amendment's proposal. The next rule of the federal amending process ensures that the thirty-four or thirty-five state mark will be achieved.

B. The Rule of Non-Recognition -- Ignoring State Cancellations of Calls for an Amendment

Although states' calls for a constitutional amendment convention are statutorily required to be officially recorded and printed in the Federal Register, reconsiderations by states are not required to be printed. The practice of ignoring state rescissions of their earlier calls for a constitutional convention on a particular amending topic has received scholarly approval. As a consequence, calls for a particular amendment seem to amass unabatedly, inexorably creeping toward a constitutionally required convention to draft the amendment.

23. To the contrary, Article V's provisions were intended to check self-dealing by federal officials. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 460 (1994).

24. The American Bar Association's survey of the process of state calls for a federal amendment conventions states the typical assumption that Congress will continue to preempt the alternative drafting process. "Since the turn of the twentieth century, the application process has been used primarily to encourage Congress to propose specific amendments." SPECIAL CONSTITUTIONAL CONVENTIONS STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, at 72 (1974) [hereinafter ABA STUDY].

25. But cf. H. L. A. Hart, The Concept of Law 100-110 (2d ed. 1994) (defining a "rule of recognition" as notifying society of which normative prescriptions carry legal significance and which constitute mere exhortations of etiquette). The Rule of Non-Recognition here refers to a rule that even certain actions by state legislatures that should have constitutional effect are nonetheless ignored by federal officials.


27. See, e.g., ABA STUDY, supra note 23, at 32 ("There is no law dealing squarely with the question of whether a state may withdraw an application seeking a constitutional convention, although some commentators have suggested that a withdrawal is of no effect."); F. E. Packard, Rescinding Memorialization Resolutions, 30 CHI.-KENT L. REV. 339 (1952) (arguing that state rescissions of earlier calls for an amendment should be ignored).
This result defies basic democratic principles underlying the Constitution because it furthers fundamental governmental change regardless of whether a once-desired amendment still enjoys popular support. One defender of the rule, however, noted that a state’s attempt to cancel an earlier ratification also goes ignored. Thus, it would be illogical to allow states to rescind calls for amendments but disallow them to rescind earlier ratifications. A similar argument notes that Congress’s lack of power to retract an amendment once proposed should mean that states too lack power to retract called-for amendments.

As a consequence of this rule, the number of states understood to have called for the Budget Amendment will only increase. As a matter of practical reality, Congress will prove unable to ignore the requirement to call a constitutional amendment convention as long as state calls for a Budget Amendment continue to secure broad public support. And the next rule of the amending process, also not reflected in the Constitution itself, demonstrates how a little persuasion on behalf of a popular amendment can go a long way.

C. The “Ant and the Rubber-tree Plant” Rule

Under certain circumstances, a single person can prod enough states legislatures to take action on a federal amendment to satisfy Article V requirements. Gregory Watson provides an example of just such a circumstance with the Twenty-Seventh Amendment’s ratification. In what proved to be largely one-man campaign, Mr. Watson’s efforts culminated with thirty-three state legislatures’ ratification of what became the Twenty-Seventh Amendment.

In Mr. Watson’s case, several factors combined in his favor in addition to his own dedication. First, the amendment had been drafted to curtail the ability of members of Congress to self deal by giving themselves immediate pay raises. Thus, the political cost to state legislators who voted in favor of the amendment was minimal. State legislators themselves did not stand to lose anything by the
Amendment's adoption. Second, Mr. Watson did not need to worry about the number of states counted in favor of the amendment because -- as with calls for an amendment -- the ratification process does not count states that withdraw their support on reconsideration. Thus, Mr. Watson remained free to focus only on states that had not yet acted in favor of the amendment. Third, and most importantly, the anti-salary grab effect of the Amendment proved popular among Americans. The Budget Amendment poses a similar situation. First, the political cost to state legislators who call for the amendment is low because the amendment constrains the powers of federal legislators only. Second, state reconsiderations may not reduce the tally of states that have called for the amendment. Third, Americans overwhelmingly support a constitutional amendment requiring a balanced federal budget. If a single person can secure dozens of state ratifications of the congressional compensation amendment, it is possible that another group can achieve two more state calls for the Budget Amendment. At that point, Congress can be expected to propose the amendment for ratification by three-quarters of the states.

III. The Budget Amendment’s Ratification by Three-Quarters of the States

A. The Rule Disallowing a State to Rescind its Earlier Ratification of an Amendment

The rule against rescissions does not appear in the Constitution, which simply provides that an amendment becomes valid “when ratified by the Legislatures of three-fourths of the several States . . .” Instead, the rule arises out of longstanding congressional precedent combined with Supreme Court precedent that Congress has “plenary” power over the amending process. Numerous commentators support this rule which allows a state to repeatedly reject an amendment before finally ratifying, but disallows a ratification to be reconsidered.

The rule disallowing state rescissions, however, thwarts Article V’s effectiveness in checking federal power. In the amending process, Congress and the states, in their ratifying capacity, exist as co-equals. Both Congress and the states

33. See infra note 32 and accompanying text.
34. Bernstein, supra note 32, at 542.
35. U.S. CONST. art. V.
perform federal functions in determining whether to adopt amendments to the United States Constitution. Hamilton believed that the states, rather than Congress, would "finally decide" the fate of proposed amendments. But during most of this nation's history, Congress has had the last say by ignoring states' attempts to rescind their earlier ratifications. Most commentators expect this congressional precedent to continue. As a consequence, the number of states counted as having ratified the Budget Amendment will invariably increase.

As with the practice of ignoring cancellations of calls for an amendment, this rule imposes a one-way directionality on the amending process that conflicts with democratic principle. Constitutional amendments should owe their ratification to widespread contemporary support rather than a non-constitutional rule arising out of congressional practice. Moreover, the rule allows Congress a say in the ratification stage of the amending process when the Constitution allows states only to decide the fate of an amendment. The rule of ignoring rescissions makes the ratification of the Budget Amendment a sure thing, especially when considered in conjunction with the next rule that also prevents cancellation of ratifications.

B. The Rule Allowing Perpetuities

A state never acts too late in ratifying an amendment. In the federal constitutional amending process, the dead hand of the past seems to continue to produce new amendments. In 1789, James Madison drafted an amendment that was expected to be ratified in the 90's. In fact, the amendment did become part of the Constitution in '92, but not 1792. Instead, the amendment was finally ratified in 1992, more than two centuries after its proposal. The Twenty-Seventh Amendment proves that the rule against perpetuities does not apply to the amending process even it does govern the acquisition of property. Instead, ratifications count regardless of their timeliness.

This rule that ratifications do not expire contradicts a Supreme Court ruling that amendments must be timely ratified to reflect a "contemporary consensus" of the people. In 1921, the Court ruled what is now the Twenty-Seventh Amendment

40. See infra note 34.
41. Until the adoption of the Twenty-Seventh Amendment by Congress in 1992, most twentieth century constitutional scholars assumed that amendments needed to be adopted in a sufficiently short time to reflect ongoing support for the fundamental governmental change. The amount of time that could elapse before an amendment expired, however, remained a point of contention. See Dillon v. Gloss, 256 U.S. 368, 375-76 (1921) (holding that amendments must be ratified quickly enough to reflect a "contemporary consensus," without defining time thereby encompassed).
42. Specifically, the ability of members of Congress to acquire immediately larger salaries. The Rule Against Perpetuities disallows property to come into possession more than 21 years after the life of someone alive when the document was drafted. The amending process rule, however, allows an amendment to become part of the Constitution no matter how long after its creation that it secures the necessary ratifications. The rationale of disallowing people to control their posterity should apply with equal force in the constitutional context as in the property context. Thomas Jefferson, for example, argued that no generation had the right to impose a constitution or debts on future generations. Thus, federal debts and constitutions should expire within 20 years. LEWIS H. KINNELL, FEDERAL BUDGET AND FISCAL POLICY 1789-1958, at 14 (1959).
had expired. This "contemporary consensus" rule in turn has conflicted with practical experience under another rule -- also articulated by the Supreme Court -- that Congress has "plenary" power to determine whether an amendment is timely ratified. With its plenary power over the amending process, Congress has established several "rules," each of which undermines the democratic nature of constitutional change. But Congress's ability to act in its own best interest has not gone without protest.

C. The Rule of Equal and Opposite Reactions

In reaction to congressional self dealing, states have exercised their co-equality with Congress in the amending process by ratifying amendments to curtail congressional prerogatives. Although the usual hierarchy of federalism prevents states from exercising control over Congress, states act as Congress's equal when ratifying or calling for federal amendments. Accordingly, states have used this authority to protest perceived abuses of congressional power.

Perhaps the clearest examples of congressional self-dealing have involved instances in which members of Congress gave themselves large, immediate pay raises. Particularly egregious was the so-called Salary Grab Act in 1873 when Congress raised its salary significantly both prospectively and retroactively. The American public expressed outrage, and Ohio protested by ratifying the compensation amendment that had been proposed a century earlier. Similarly, Wyoming protested Congress's 1977 self-given pay raise by ratifying what was by then an

---

43. Dillon, 256 U.S. at 375-76; see also Coleman v. Miller, 307 U.S. 433, 451-54 (1938) (stating that Congress could determine a pending amendment to lapse within 13 years).

44. Coleman, 307 U.S. at 459. Justice Black concurred with this conclusion: "Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point." Even under the subsequently announced textual-commitment test of Baker v. Carr, this reading of Article V would still require abstention to the extent that the Constitution expressly commits all power to resolve amending process issues. Article V, however, does not so provide. See generally Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 HARV. L. REV. 386 (1983) (arguing for justiciability of amending process issues).

45. In characterizing congressional practices as amending process "rules," I do so in two senses: (1) "the customary or normal condition, occurrence, practice, etc." THERANDOMHOUSECOLLEGEDICIONARY 1153 (Rev. ed. 1988). And, (2) in a normative, legal sense "to exercise authority, dominion, or sovereignty." (Id.) In the first aspect, Congress's practice of ignoring state rescissions since the promulgation of the Fourteenth Amendment deserves to be called a rule. But in the second, legal aspect the description of this practice of disregarding rescissions as a "rule" proves more problematic because of the nature of congressional precedent.

"Congressional precedent" proves an oxymoron upon examination in light of the fact that no session of Congress can find a future session of Congress to adhere to any rule regardless of pedigree or wisdom. Charles Black, Jr., Amending the Constitution: A Letter to a Congressman, 82 YALE L.J. 189, 191 (1972). Nonetheless, some commentators defend congressional precedents as authoritative in rejecting state rescissions. FREEDMAN & NAUGHTON, supra note 33, at 15-18. The Court too has trusted legislative precedent in ceding plenary power over amending process issues to Congress. Coleman v. Miller, 307 U.S. 433, 450, 459 (1939). But in doing so, both the Court and commentators accept that amending process rules founded on congressional practice be subject to continual reevaluation and revision by each new session of Congress.


47. Congress awarded itself two-years' worth of back pay in addition to a significant increase in future salaries. See Bernstein, supra note 32, at 534.

48. Although no other state joined Ohio in ratifying the compensation amendment, Ohio's action contributed to Congress's repeal of the Salary Grab Act. Id.
almost two-century-old amendment. For a third time, during the 1980's and early 90's, other states reacted to seemingly constant congressional pay raises by continuing to ratify the compensation amendment.\textsuperscript{49} Episodes of outrage over congressional self-giving pushed the Twenty-Seventh Amendment toward constitutional enactment.

Similarly, the American public has increasingly grown irate about federal deficit spending as congressional spending habits increasingly appear to constitute self-dealing.\textsuperscript{50} "All this is extremely convenient for politicians, because they can enact programs now, and get the political credit for them, while worrying about actually paying for them later."\textsuperscript{51} If this irritation over perceived congressional self-dealing in the budgeting process secures even a few more sporadic ratifications, then the Budget Amendment will achieve success in much the same way as did the Twenty-Seventh Amendment. Remember that the time elapsed does not cause pending amendments to expire. Unless an express ratification deadline accompanies the Budget Amendment's proposal, ratification will be as certain as its timing will be uncertain.

\textbf{D. The Rule Allowing Congress to Extend an Express Ratification Time Limit (Plus a Possible Bonus Rule!)}

In all likelihood, Congress will subject the ratification of the Budget Amendment to the same seven-year ratification deadline as has been imposed since the proposal of the Eighteenth Amendment.\textsuperscript{52} Given the widespread popularity of an amendment to balance the federal budget, no more than seven years will likely be necessary. Aside from the exceptional Twenty-Seventh Amendment, no extant Amendment has taken even four years to secure ratification.\textsuperscript{53} But even Congress's proposal of the Budget Amendment with a seven-year time limit will not necessarily cause ratification to fail if it requires more than seven years. If Congress does extend the ratification deadline, the Court cannot be expected to disagree, or even to consider the issue. Chief Justice Rehnquist has indicated that the Court may be in no mood to discontinue its half-century of abstention on amending process questions.\textsuperscript{54}

In extending the ratification deadline, Congress may decide again to seek presidential approval. Professor Black has argued that any extension of time to ratify must comply with the constitutional requirement that "Every Bill which

\textsuperscript{49} See id. at 535.
\textsuperscript{51} GORDON, supra note 9, at 188.
\textsuperscript{52} Except for the Nineteenth Amendment, Congress has imposed seven-year ratification deadlines since 1917. U.S. Const. amends. XVIII, XX-XXII. To avoid clutter in the Constitution, the ratification deadline has been transmitted at the same time as proposal, instead of within the amendments' texts. See U.S. Const. amends. XXIII-XXV.
\textsuperscript{53} The Twenty-Second Amendment took the longest, requiring 3 years and 11 months for ratification. U.S. Const. amend. XXII (proposed Mar. 24, 1947, and ratified Feb. 27, 1951).
shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. As a practical matter, the presidential signature seems likely to be obtained regardless of constitutional necessity. Presidents have seemingly always wanted an official role in the amending process and signing a ratification extension may provide a welcome opportunity to continue on an inroad made by President Carter. President Carter signed the resolution passed by Congress to extend the ratification deadline of the proposed equal rights amendment. The presidential signature may also be forthcoming to avoid the appearance of defeating the popular amendment.

But why would Congress vote to extend a ratification deadline for an amendment that its members do not want? The power of the states to force an amendment convention again provides the reason: nothing prevents states from issuing calls while a congressionally drafted version of the amendment pends ratification. Article V, however, was intended to present "every amendment to the Constitution [as] a single proposition [to] be brought forward singly." Nonetheless, Article V does not prevent two amendments -- one drafted by Congress and another by an amendment convention -- from circulating at the same time. Congress, however, may attempt to preclude a more radical version of the amendment from competing with its own version.

Congress, despite its plenary power over the amending process, cannot prevent additional states from issuing calls for the Budget Amendment. Neither can Congress fiddle with the tally of states calling for a Budget Amendment by suddenly counting state cancellations because the record-keeping function has been ceded to an executive branch official.

**E. The Record-Keeping Rule of 1 U.S.C. § 106(b)**

By statute, the Archivist of the United States keeps count of state ratifications of and calls for federal constitutional amendments. Congress long ago surrendered the prerogative to make the initial determination whether sufficient states have complied with Article V. In so doing, Congress has invited the possibility that the final outcome of ratification be determined by the person charged only with keeping the tally.

---

56. Past presidents have signed amendments before being proposed to the states for ratification even while knowing that their signatures had no legal effect. For example, President Buchanan signed the proposed slavery-entrenching Corwin Amendment. Bernstein & Agel, supra note 15, at 91. Then President Lincoln signed the Thirteenth Amendment when it was proposed to the states for ratification. Id. at 100. But see Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798) (holding that Article V process does not require presidential approval).
57. See Ruth Bader Ginsburg, Ratification of the Equal Rights Amendment: A Question of Time, 57 TULSA L. REV. 919, 930 (1979). Hollingsworth does not address this issue, and President Carter might have established a toehold in the amending process.
59. The Framers emphasized that Congress has no power to decline calling a constitutional amendment convention once three-quarters of the state legislatures have called for a particular amendment. See, e.g., THE FEDERALIST No. 85, at 525 (Alexander Hamilton).
Once three-quarters of the states have ratified an amendment, the Archivist of the United States transmits a list of the ratifying states to Congress along with his or her certificate. The Archivist performs this duty within an independent agency of the executive branch, remaining subject to removal by the President. The Archivist’s official function in the federal amending process officially encompasses only the duty to keep and transmit records of state calls and ratifications to Congress. Nonetheless, the timing of the Archivist’s decision to certify that amendment has received the requisite number of ratifications can force Congress to recognize the amendment’s validity.

On at least one occasion the Archivist’s decision to certify an amendment as properly ratified seems to have trumped Congress’s prerogative to determine whether or not to promulgate an amendment. In 1992, the Archivist certified that the compensation amendment had received the requisite number of ratifications to become the Twenty-Seventh Amendment of the Constitution. Congressional leadership expressed consternation with the Archivist’s decision to certify the amendment without first consulting with them. Both houses of Congress undertook to examine the constitutional validity of the geriatric amendment. But under the circumstances, the Archivist’s decision proved fait accompli.

At the time of the Archivist’s certification, congressional elections loomed and the political costs of voting against the popularly supported compensation amendment did not seem worth the price regardless of the constitutionality of its tardy ratification. Indeed, the issue of the ratification’s timeliness seemed irrelevant in light of the 99-0 Senate and 414-3 House vote in favor of approving the amendment. The lopsided vote shows the conclusive effect of certification by Archivist on election-year politics.

To date, no amendment ever certified by the executive branch official charged with keeping track of ratifications has been rejected by Congress or the courts. Were the Archivist to certify the Budget Amendment during an election

---

62. In effect, an unelected federal official can pass judgment on the constitutional validity of actions taken by two-thirds of the members of both houses of Congress and three-quarters of the states. Even the rule of congressional promulgation seems more desirable insofar as it submits the outcome of the amending process to a large, popularly elected legislative body. But cf. Dellinger, supra note 44 (arguing against congressional promulgation of amendment). An ideal solution would dispense with the prerogative of any federal officials to negate or fictitiously supply the ratifications of a sufficient number of states to comply with Article V requirements. Indeed, the Constitution does not provide for any state action beyond the ratification of the last state constituting a three-quarters super-majority. As a practical matter, however, some form of record-keeping and notification of ratification is necessary. See HART, supra note 25, at 100-10.
63. The Archivist’s certification also “persuaded most constitutional scholars to accept the amendment.” Bernstein, supra note 32, at 542.
64. The record-keeping duty has been shouldered by executive branch officials almost from the start. “From 1791 through 1818, the Secretary of State carried out the duty of certifying amendments as a matter of course; in 1818, Congress enacted a statute officially assigning the Secretary that responsibility. In 1951, Congress amended the statute to transfer the responsibility to the Administrator of General Services, who supervised the publication of the Federal Register, and in 1984, yet another statute transferred both tasks to the Archivist of the United States.” BERNSTEIN & ACHEL, supra note 16, at 246 n.*.
year, Congress might acquiesce on a somewhat questionable ratification. Con-
gress cannot always be expected to impartially assess the technical constitutional-
ity of an amendment that originated in reaction to perceptions of congressional
self-dealing. The broader the public support for the amendment, the more likely
that Congress will acquiesce to popular pressure.

Congressional votes on the Anti-salary grab Amendment have already shown
the reluctance of members to vote against the amendment if they face election. In
the 1995 vote on the amendment in the Senate, all five of the senators who
switched from an earlier “no” to “yes” votes faced reelection in the next year. However, “[o]f the six senators who switched from “yes” to “no,” thus sealing the
amendment’s defeat, none face re-election sooner than 1998, by which time [the
1995] vote may well be politically irrelevant.” Similarly, the 1997 vote on the
Budget Amendment failed by a narrow margin, one vote. The deciding senator
who voted against the amendment -- even though he had earlier voted in favor of
the amendment on three separate occasions -- did not face reelection for another
six years. Although the Article V process creates law outside of the ordinary
legislative process, Article I elections may determine whether Congress accepts the
Budget Amendment’s validity. Perhaps equally ironic is that the Budget Amend-
ment’s promulgation may be effectively determined by someone within the execu-
tive branch as disallowed by Hollinsworth v. Virginia.

Practices and precedents not grounded in Article V may largely determine
successful the adoption of the Budget Amendment as part of the Constitution. Congressional precedents and executive branch determinations of amending pro-
cess issues seem to flout Supreme Court rulings. With the addition of a few more
constitutionally problematic practices and precedents, non-constitutional rules
seem to portend the subsequent repeal of the Budget Amendment.

IV. CONGRESS PROPOSES THE REPEAL AMENDMENT TO STATE RATIFYING CON-
VENTIONS

A. The Law of War and Peace

Americans would have lost the War of Independence if they had not incurred
massive debts in the process. Even George Mason, possibly the most ardent oppo-
nent of bills of credit at the Philadelphia convention, recognized the occasional
need to incur large national deficits. “Though he had a mortal hatred to paper
money, yet as he could not foresee all emergences, he was unwilling to tie the

65. Mark Z. Barabak, Balanced-budget About-face Leaves Feinstein Credibility Insecure, SAN DIEGO UNION-
66. Id.
67. Senator Torricelli remained undecided until the last day because “he was in the strongest position to withstand
the pressure because he had won election [50 days earlier] by a convincing margin.” Brett Pulley, Torricelli in
68. 3 U.S. (3 Dall.) 378, 382 (1798).
hands of the Legislature. He observed that the late war could not have been carried on, had such a prohibition existed."⁶⁹  Alexander Hamilton too appreciated the ability of a national debt to consolidate disparate state interests into a unified national interest and to help defend that nation.⁷⁰  Both Mason and Hamilton proved prophetic: the kind of emergencies that this nation has faced were not anticipated and could not have been overcome without incurring debt. One writer has asserted:

"The U.S. has again and again used the national debt to triumph over emergencies. In the 1860s we increased the debt 42-fold to save the Union. In the 1930s we increased it 2.5 times to save the U.S. economy. In the 1940s we more than tripled it to save Western civilization."⁷¹

While congressional borrowing power can be constrained by constitutional amendment, the emergencies requiring deficit spending cannot be eliminated in times of war or peace.

The ability of a nation to borrow on credit can mean the difference between military victory and defeat, between prosperity and prolonged economic hardship. Armed conflicts provide clear examples of recurring crises that require mobilization of national resources through deficit spending. By the time of the Constitution’s founding, Hamilton perceived that "[i]n the modern system of war, nations the most wealthy are obliged to have recourse to large loans."⁷² The American experience has borne out Hamilton’s observation.⁷³ During times of war, Americans have proven willing to pay very high taxes and to have the government incur large amounts to debt to meet the needs of the crisis.⁷⁴ Not surprisingly, the congressionally drafted versions of the Budget Amendment have contained an exception for times of war. But even this may not be enough because not all instances of necessary resort to federal deficit spending occur during times of military conflict.

During times of peace, deficit spending can secure future prosperity. For example, the large federal deficit incurred in the Louisiana Purchase presented an opportunity during times of peace to extend the nation’s security and development. "In 1803, the federal government spent less than $8 million in operations. Thanks to its good credit, however, it was able to borrow $15 million to fund the Louisiana Purchase, adding a million square miles of the earth’s finest agricultural land

⁶⁹. 2 FARRAND, RECORDS, at 309 (statement of George Mason).
⁷¹.  Gordon, supra note 12, at A18; see also GORDON, supra note 9, at 174 ("So surely Hamilton was right, and the American national debt has been an immense, indeed global, blessing.").
⁷³.  See GORDON, supra note 9, at 67 ("While individual battles may be decided by tactics, firepower, courage, and—of course—luck, victory in the long haul of war almost always goes to the side better able to turn the national wealth to military purposes. That usually means the ability to borrow.").
⁷⁴.  See id. at 76. War bond drives, for example, appear as patriotic efforts rather than undesirable deficit spending.
to the country's territory." Just as mortgage loans allow families to acquire their own homes long before they could without resort to debt, so too federal deficit spending has financed important national improvements.

Throughout United States history, federal deficit spending has helped "provide for the common defence, and promote the general Welfare" by facilitating greater use of national resources than could have been employed without the debt. The law of economic necessity in times of war and in times of peace cannot be repealed. Failure to effectively employ debt financing has lost wars and shrunken national territories. Further, the next law of the economic cycle provides that failure to engage in federal deficit spending can trigger economic collapse.

**B. The Law of the Economic Cycle**

Federal deficit spending can mitigate the pernicious effects of economic depression and securities markets emergencies. Conversely, the failure to ensure adequate financial liquidity or the imposition of higher taxes to fund government obligations during times of recession can worsen the plight of Americans. As a matter of well-accepted economic theory, the government's ability engage in deficit spending plays a central role in the maintenance of the economic health of the United States.

The Great Depression, and the events leading up to it, provide illustrate the dangers attending an unshakable adherence to a federal balanced budget. "When the Depression began in 1929, federal budget policy was firmly anchored to the idea that the budget should be balanced annually. A balanced budget was regarded as the principal test of fiscal management." Even two years into the Depression, President Hoover remained doggedly determined to balance the budget and pay the national debt by cutting federal spending and raising taxes. "We cannot squander ourselves into prosperity," he argued. The extreme lack of finan-

---

76. One writer has also likened the national debt to another individual means of employing debt. "[S]ince its creation in the early 1790s, the national debt has been one of this country's biggest boons, just as a credit card can be in a family emergency. Almost overnight, it transformed the U.S. from a financial basket case into the best credit risk in the world." Gordon, *supra* note 12, at A18.
77. During the Civil War, the Union employed debt financing much more efficiently than the Confederate states, which were unable to effectively collect taxes or borrow on credit. The Union encountered great difficulty in financing its war efforts. Even though the Union proved able to efficiently collect taxes, these revenues alone did not suffice. Thus there was a need to borrow on credit. The difficulty with borrowing, however, was that foreign nations were unwilling make loans to the Union because the South was expected to win any armed conflict. MARGARET G. MYERS, *A FINANCIAL HISTORY OF THE UNITED STATES* 149 (1970). Moreover, banks were unable to assume many more governmental obligations. But an ingenious system was devised: efforts to sell Union debts were directed "toward the great mass of small investors who had never before purchased government or any other securities." *Id.* at 161. Jay Cooke, who formulated the plan, "recognized what Alexander Hamilton had earlier pointed out, that owners of government bonds would have a deeper concern for the welfare of their country." *Id.* at 167-69. The inability to borrow effectively or to compel state compliance with taxation mandates similarly undermined both the Confederate government in the 1860's and the government under the Articles of Confederation in the 1780's.
78. KNUEBEL, *supra* note 42, at 143.
79. *Id.* at 148. Even the opposing party in Congress acquiesced to this economic policy.
cial liquidity of this economic policy dried up the purchasing power needed to revive the economy.\textsuperscript{80} Governmental austerity exacerbated and prolonged the Depression.\textsuperscript{81}

Even assuming that the Budget Amendment allows waiver of its provisions by three-fifths vote of Congress, the imposition of a supermajority requirement on both houses promises difficulty in securing deficit spending. In times of economic malaise, the divisive nature of partisan politics greatly increases the difficulty of cooperation needed for supermajority vote requirements. It is perhaps an irony that failure to outspend federal income can exacerbate economic downturns.

This law of the economic cycle requires financial liquidity to periodically exceed income from tax and other federal revenues in order to alleviate economic recession. The economic cycle cannot be repealed. Economists, however, continue to propose solutions involving government spending and monetary policies at odds with the intended constraints of the Budget Amendment.\textsuperscript{82}

\textbf{C. As a Rule, Accounting Gimmicks Are More Easily Resorted to Than Real Spending Reductions}

Experience has shown that constitutional amendments do not always secure the results that their supporters anticipate. As Professor Bernstein has noted, "The amending process sometimes produces results different than the expectations of those who set it in motion."\textsuperscript{83} The Budget Amendment’s supporters anticipate much from its constraints on federal deficit spending. Some writers expect the amendment to be a panacea.\textsuperscript{84} Specifically, most expect that Congress will adopt annual budgets in which taxation and other federal revenues at least equal spending. However attractive this vision may be now, the Budget Amendment’s actual effect may prove far less satisfying.

Respect for the Budget Amendment can be expected to erode to the extent that accounting gimmicks substitute for meaningful budget reform. Although supports hope to curtail federal deficit spending, Congress may discover that other tactics yield a balanced budget more easily. "Consider New York state, which balanced its budget a few years ago by the simple expedient of selling Attica State Prison to itself: The Urban Development Corp., a state agency, borrowed money

\textsuperscript{80} In response, many plans were made to stimulate spending in every area except in federal governmental outlays. \textit{Id.} at 173.

\textsuperscript{81} See \textit{MYERS}, supra note 77, at 309 ("The effect on the economy of increased taxes at this low point of depression was given small consideration. Fiscal policy had not yet appeared on the scene.") Financing governmental spending by taxes instead of borrowing went nearly unquestioned.

\textsuperscript{82} See, e.g., \textit{MALABRE}, supra note 50, at 69-78 (discussing Keynesian, Monetarist, and Supply-Side approaches).

\textsuperscript{83} BERNSWEIN\textsc{&} AGEL, supra note 16, at 136.

\textsuperscript{84} See, e.g., \textit{MICHAEL BABUNAKIS}, \textsc{Budget Reform for Government: A Comprehensive Allocation and Management System (CAMs)} 111-12 (1982): "The passage of such an amendment ... can result in diminished taxes, lower interest and inflationary rates, and the reduced likelihood of induced recessions because of the constraint the amendment will place on federally induced inflation. The private savings rate will increase to permit more investment and productivity gains." But see Martin A. Sullivan, \textit{CBO: A Balanced Budget Would Have 'Slight' Impact on Economic Growth}, \textit{71 Tax Notes} 426-27 (1996) ("How slight is the increase in economic growth? [T]he nominal rate of growth in 2006 would be little over 4.9 percent instead of a little under 4.9 percent.").
in the bond market, turned the money over to the state, and took title to the prison." 85 Similarly, projections of income from federal taxation and revenues needed to determine whether the federal budget remains balance constitute educated guesses at best and, in a more cynical light, politically formulated numbers. 86 And the advent of budget constraints will invite greater manipulations of the assumptions in estimating future income and outlays. "There is an enormous temptation to fudge the numbers. The temptation arises because there is an important asymmetry between the political implications of changing a program in order to achieve an outlay target and changing economic or other assumptions." 87

Even in the best of economic circumstances, Congress might avoid making politically difficult spending reductions and flout the intended effect of the Budget Amendment by engaging in creative accounting practices.

This is to say nothing of the waiver provisions expressly drafted into the Budget Amendment -- in times of military conflict or by vote three-fifths vote of Congress. Thus, members of Congress can comply with the Budget Amendment's provisions and still engage in deficit spending. Current pressures to spend will not abate. Congress will continue to seek benefits for their constituencies, favorite programs, and popular entitlement programs. Compliance with the Budget Amendment's goal of spending reduction may have greater political drawbacks than preservation of entitlements.

Current support for the Budget Amendment comes at a time when neither party in Congress dares to cut entitlements, even though they constitute three-quarters of federal outlays. 88 Once the Budget Amendment requires entitlement cuts to meet its mandate, public support for compliance will almost certainly dwindle. 89 The prospect of cuts to popular entitlement programs will undermine support for the Budget Amendment's constraints. Waivers and accounting tricks will further erode respect for the amendment to the extent that Congress and the public consider the amendment ineffective. Budget Amendment proposals arising in Congress "have not been very strict, have left loopholes for congressional over-ride, and most significantly, have not provided for enforcement in case Congress does not meet the amendment's requirements." 90 The unenforceability of the Budget Amendment's provisions invites Congress to waive its provisions by simply ignoring it.

87. Id. at 98.
88. Even in today's rosy economic climate, there exists a great reluctance to address the effect of entitlements on the federal budget and national economy: "The lesson of the latest budget is that entitlements in general, and Social Security in particular, are still sacred; so sacred that even sensible first steps to put them on sounder financial footing are discarded as too risky. And if politicians are so frightened now, when all the economic indicators are favourable and deficits are at record lows, when will they ever have the nerve to try?" The Lovebirds' Budget: Agreeing to be Nice Does not Solve America's Problems, The Economist, May 10, 1997, at 18.
89. See infra text accompanying note 109.
D. An Unenforceable Rule Is a Rule Meant to Be Broken

The Budget Amendment seems destined to be unenforceable. None of the versions of the Amendment that have reached floor votes in Congress have provided an enforcement mechanism to ensure compliance. Self-policing cannot be expected. To the contrary, public support for the amendment has arisen out of Congress’s failed attempts to force budgetary discipline on itself by statute.91 Although some versions of the Budget Amendment have recognized the role of the President in the federal budget process, the President cannot be expected to enforce the amendment.

Contrary to the expectations of the founding generation, presidents appear more as champions of fiscal austerity than of governmental largess. Presidents have tried to reduce deficit spending by impounding funds, asking for line-item veto power, and an amendment to balance the federal budget.92 None of these tactics have yet reduced government spending. The federal courts have invalidated impoundment and the line-item veto as unconstitutional.93 Even following the passage of the Budget Amendment, “executive refusal to spend unconstitutionally excessive appropriations, raises impoundment difficulties.”94 Insofar as the executive branch is charged with the duty to carry out the laws and to spend statutorily allocated funds, this branch is ill-suited to enforce the Budget Amendment’s provisions. As a participant in the process of budget negotiations, the President cannot also trump the final budget outcome without seriously disturbing the allocation of powers under the Constitution. The next possibility would be equally disruptive of the Constitution’s allocation of duties insofar as the Budget Amendment “would embroil federal courts in the budgetary process, which is supposed to be the province of Congress and the Presidency.”95 Yet, resort to the federal courts would be certain.

The federal courts cannot be expected to enforce the Budget Amendment. As with the executive, the nature of this coordinate branch prevents effective enforcement. Article III imposes constraints on justiciability that bar the federal courts from deciding on advisory opinions, cases in which plaintiffs lack standing, and political questions.96 Each of these constitutionally derived constraints problematizes cases brought in order to enforce the Budget Amendment. The prohibition on advisory opinions precludes the federal courts from following the precedents of the New Jersey courts in deciding challenges under the constitutional requirement of a balanced state budget. “The New Jersey Supreme Court asserts a

91. See id. at 581-83, 588-89.
92. See GORDON, supra note 9, at 179.
94. Crostwait, supra note 22, at 1069.
95. BERNSTEIN & AGEL, supra note 16, at 184.
lack of power to force the state legislature to appropriate or refrain from appropriating funds, but contents itself with disapproval of legislative action. Merely declaring Congress to have violated the Budget Amendment amounts to little more than an idle act. "Aside from deciding that the budget is unbalanced and possibly identifying which appropriations bill caused the imbalance, a court's declaration that Congress acted unconstitutionally is essentially unhelpful." The advisory nature of a case involving alleged noncompliance with the Budget Amendment rests in part on the problem of standing and the injury needed to achieve standing. "[U]nder present federal law, no person would have "standing" to bring suit to compel Congress to obey the amendment." Citizens and private groups will almost certainly not meet the Court's current test for standing to sue. Even members of Congress probably lack standing.

The federal courts cannot enforce the Budget Amendment for reasons of comity and judicially manageable standards reflected in a half-century of abstention from amending process issues. Deciding a challenge under the Budget Amendment would require "an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice [and which] would [amount to] an extravagant extension of judicial authority." That the federal courts will decline to invade the highly charged and highly political budget process by making spending cuts or raising taxes does not reflect undue prudence of the federal judiciary. State courts that have grappled with challenges to enforce balanced budget requirements in their state constitutions have already declined on similar grounds.

In Maryland, for example, the state's highest court found the state constitution's balanced budget requirement justiciable, but avoided the decision by calling the case moot. . . . In New York, the court of appeals in Wein v. Carey denied any power to review directly the state's budget plan for conformity with the constitutional requirement of a balanced budget.

For want of a federal judicial remedy for a political process ailment, the Budget Amendment seems destined to the moribund status of unenforceable constitutional provision. After all, a judicial cure would prove worse than the disease because

97. Croswait, supra note 22, at 1094-95 (footnotes omitted).
98. Id. at 1093 ("A judicial declaration of unconstitutionality may add weight to popular outrage, but this is precisely the kind of advisory function federal courts do not perform.").
100. See Valley Forge Christian College v. Americans United Inc., 454 U.S. 464, 482, 485 (1982); see also Croswait, supra note 22, at 1074-75.
101. See id. at 1075.
103. Croswait, supra note 22, at 1094-95 (footnotes omitted).
104. In this aspect, the Budget Amendment would join the Guarantee Clause. (Interestingly, the Guarantee Clause may be gaining support for its enforceability.) See, e.g., Erwin Chermerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. Colo. L. Rev. 849 (1994).
"repeated and essentially head-on confrontations between the life-tenured bench and the representative branches of government will not, in the long run, be beneficial to either."^105 The prospect of the courts repeatedly appropriating the prerogative of Congress to raise taxes and lower spending would fundamentally reallocate governmental powers under the Constitution.

The Budget Amendment’s ineffectiveness recalls another earlier, constitutional failure to impose restraint. “If the courts could not enforce it, then the amendment would have no teeth, and its failure would breed contempt for the Constitution and the rule of law—again echoing the disaster of constitutional Prohibition.”^106 The Budget Amendment may thus be expected to meet the same fate as the Prohibition Amendment: repeal. Repeal of both Amendments will be due, in no small part, to the fact that they prove unenforceable. Of course, practical problems of enforcement always come as a surprise to amendment supporters. “When the Eighteenth Amendment took effect on January 17, 1920, most observers assumed that liquor would quickly disappear from the American scene. The possibility that a constitutional mandate would be ignored simply did not occur to them.”^107 Unlike prohibition, the Budget Amendment’s constraints will not even be enforceable in court.  

E. Article V Requires Only One-Fifteenth More Congressional Votes to Repeal The Budget Amendment Than to Waive the Amendment’s Constraints

The Budget Amendment proposals that have nearly passed in Congress have incorporated provisions for waivers upon approval of three-fifths of each house. The need for a three-fifths supermajority gives minority parties and interests strong powers to deadlock the budget process. Additionaly, approval of the executive must also be secured. In California, which requires a three-fifths legislative supermajority for passage of the budget, has shown the difficulties of securing supermajority approval for budgetary action. More often than not, the budget pro-

---

^106. BERNSTEIN & AGEL, supra note 16, at 185. Key opponents of prohibition grew increasingly concerned about eroding respect for constitutional law. “When they talked about loss of respect for law, they were genuinely concerned that scoffing at prohibition might lead to disobedience to other laws. Government’s ability to enforce laws was in doubt.” DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 88 (1979). National prohibition’s failure caused not just its own repeal, but also a reconsideration of the nature of legal reform itself. “After prohibition, American lawmakers become cautious about launching another major attempt to reshape individual behavior. The New Deal, for instance, setting a pattern of reform which would persist for decades, confined itself to efforts to remold the institutions or finance, commerce, industry, and government so as to improve people’s economic, social, and political opportunities.” Id. at 200.
^107. Id. at 20.
^108. Members of Congress would not face the criminal prosecution, as was the case for thousands of people who violated national prohibition.
^109. The three-fifths supermajority will likely need to be mustered almost every year: “And now [members of Congress] are going to pass a Balanced Budget Amendment to the Constitution. That is a laugh. It will do about as much good as all the other feeble efforts they have made to avoid biting the bullet. Like establishing statutory debt ceilings. How many times have they raised the ceiling during the last 20 years? Forty-one or is it 42, and still counting.” Harold Pepperell, Why the National Debt Is Not Going To Be Paid Off, 74 TAX NOTES 97, 99 (1997).
cess fails to meet its constitutionally mandated deadline, and causes significant financial turmoil.\textsuperscript{110}

In addition to the recurring practical problem of passing budget provisions by supermajority, the requirement appears problematic as a matter of democratic theory. In short, “the proposed supermajority requirements for tax increases, deficit increases, and deficit spending would give the President and two-fifths plus one of either chamber of Congress a lock on the budgetary process, frustrating democratic decision-making.”\textsuperscript{111} The Senate’s equal representation of states regardless of population dilutes the political power of residents of the most populous states. The budgetary supermajority requirement further undermines the political representation of people in larger states. The congressional supermajority requirement also tips the balance of power in the budget process toward the president, who can defeat a greater number of congressional votes by veto.

A Congress dominated by a different party or agenda than the President can expect annual budget battles whose length and difficulty are exacerbated by the Budget Amendment’s constraints. Members of Congress frustrated by the amendment’s effect on the budget process may seek to reclaim their lost prerogatives. The same number of votes necessary to override a presidential veto of a budget bill also would suffice to propose the Budget Amendment’s repeal. These measures could be passed together in opposition to presidential disapproval of a budget overwhelmingly favored by Congress. Repeal would be facilitated by American’s disenchantment with the increased clout of relatively small interest groups, the need for higher taxes to offset reduced borrowing ability, and aggravation of national economic recession.

The Budget Amendment’s repeal would require only one-fifteenth more congressional votes to get started than to waive the Amendment’s constraints for just one year. Waiver and repeal of the amendment do not require significantly different numbers of congressional votes despite the very disparate effects on Congress’s one-year or permanent escape from Budget Amendment constraints. Repeal does not even require the presidential assent required to pass an annual budget bill. Nothing impedes Congress’s ability to protest and override the exercise of presidential authority by resort to the constitutional amending process. Rather than face recurring budgetary problems made more difficult by supermajority requirements temporary waivers, a congressional consensus can secure a permanent waiver with the same votes needed for one-time veto override.

In contrast to the adoption of the Budget Amendment, members of Congress voting for its repeal stand to increase their legislative powers. Political liability for voting in favor of repeal may be more than offset by the gain in approval from constituents who benefit from a sudden increase in local spending. Constituents

\begin{flushright}
\textsuperscript{110} See CAL. CONST. art. IV, § 12(c) (“The Legislature shall pass the budget bill by midnight on June 15 of each year.”). “Since 1971, with the exception of five budget proposals, the legislature has not submitted an approved budget to the governor by the deadline date.” LEAGUE OF WOMEN VOTERS OF CALIFORNIA, GUIDE TO CALIFORNIA GOVERNMENT 161 (14th ed. 1992).
\textsuperscript{111} BERNSTEIN & ADEL, supra note 16, at 184.
\end{flushright}
may prove to be the driving force for the Budget Amendment’s repeal. Even now, "voter support for a balanced budget -- 80 percent in the abstract -- plummets to the 30 percent range when Social Security is threatened." As in the past, the federal deficit can be anticipated to shed its tarnished image in order to appear as a blessing capable of easing economic difficulties. Congress can take advantage of plummeting public support for the Budget Amendment by presenting the prospect of repeal for the American electorate to decide upon. As shown in the next section, Congress can deflect appearances of self-interest, hasten the ratifying process, and increase the chances of the Budget Amendment’s repeal by proposing the repeal to state ratifying conventions.

V. STATE CONVENTIONS QUICKLY REPEAL THE BUDGET AMENDMENT

A. Rule by the People -- Referenda Determine the Fate of the Budget Amendment

Repeal of the Budget Amendment will likely draw upon the precedent of the Prohibition Amendment. Within ten months of the Twenty-First Amendment’s proposal to state ratifying conventions, national prohibition was repealed. The rapidity of the previously untried ratification by convention method surprised both repeal’s supporters and opponents alike by achieving a faster ratification than any previous Amendment. Although the convention method has not been resorted to since prohibition’s repeal, Congress may well choose to propose the repeal of the Budget Amendment by this method. The advantages of ratification by state conventions include its minimal political costs for federal and state legislators, speed, and public approval of the method.

1. Avoiding Political Suicide

Members of Congress who vote in favor of the Budget Amendment’s repeal likely will want to minimize the appearance of self-aggrandizement by recapturing unrestricted borrowing, taxing, and spending powers. An available tactic can be to portray the proposal of the Budget Amendment’s repeal as a referendum by the people themselves rather than a congressional push. Indeed, this stratagem can win over the American electorate and wavering members of Congress alike.

A familiar statement to students of politics is that “proposal is a neutral act allowing the states to decide.” . . . It is an argument that certainly wins votes. This stance, in a legislative body like Congress, for a member who is neutral

personally or is buffeted by constituents of conflicting persuasions, gets him off the hook.\textsuperscript{113}

The method of ratification by state ratifying conventions polls the sentiment of the American electorate more effectively than ratification by the state legislatures.

In the case of the Twenty-First Amendment, the people elected convention delegates for the sole purpose of acting on national prohibition's repeal. State legislators, by contrast, rarely campaign exclusively on the basis of their position on a potential federal constitutional amendment. Conversely, legislators do not always remain aware of their constituents' sentiments, or vote in accordance with the prevailing public opinion. This last point was demonstrated by Ohio's ratification of the Prohibition Amendment. Several weeks after the Ohio state legislature overwhelmingly voted to ratify the Eighteenth Amendment, Ohio's voters narrowly rejected the Amendment in the only purportedly binding referendum on a federal constitutional amendment.\textsuperscript{114} By submitting the Budget Repeal Amendment to state ratifying conventions, Congress can frame its proposal as one of letting the people themselves decide. The political advantage to members of Congress in using the convention method, however, pale compared to that afforded to state legislators.

Perhaps the main reason for using the convention method for the Twenty-First Amendment was the fear that state legislators would commit "political suicide" by voting for prohibition's repeal. As with national prohibition, voting against an admirable experiment to impose virtuous restraint, such as with the Budget Amendment, may prove too much of an admission of defeat regardless of enforcement difficulties. Further, many state legislators who voted for the ratification of the Budget Amendment may still be in office and continue to support the law. Convention delegates would not face the same concerns incumbency and voting record consistency on the single subject of repeal.

In this sense, ratifying convention delegates have much in common with delegates to the electoral college who vote for the President of the United States. As intended by the Framers, these delegates are not beholden to anyone for reelection, serving instead for a single, unrepeated purpose.\textsuperscript{115} Both types of delegates, however, have become mere figureheads. Unlike the Framers' intention, these delegates' ability to use their own judgment has vanished. Slow evolution of the

\textsuperscript{113} CLEMENT E. VOS, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900, at 110 (1972).

\textsuperscript{114} The United States Supreme Court ultimately struck down the popular referendum as unconstitutionally imposing an extra step in the Article V ratification process. Hawke v. Smith, No. 1, 253 U.S. 221, 227-28, 231 (1920). Ohio's experience contributed to a growing sentiment that national prohibition had been imposed on Americans by Progressive lawmakers who used statutory and constitutional means to impose social experiments. KYVG, supra note 104, at 16 ("The image of a reform achieved by undemocratic means would fester and grow. The validity of legislative ratification in other states would be brought into question by the disparity between the lopsided general assembly action and the close but contrary popular vote in Ohio."). The Twenty-First Amendment's character as a referendum of public sentiment constituted a reaction to perceptions of the undemocratic nature of ratification by the state legislatures. Id. at 174, 181.

electoral college and deliberate engineering of the ratification conventions have caused this result. Over the years, states enacted laws binding their electoral college delegates. Similarly, some states bound their delegates to the convention delegates to reflect the state voter consensus.

Alabama, Arkansas, and Oregon required delegates to vote in accordance with a referendum on the amendment held at the same time as the delegate election. Arizona offered the surest sign the conventions were expected to reflect the voters’ choice. There, if a delegate failed to hold to the position stated on his nominating petition, he would “be guilty of a misdemeanor, his vote not considered, and his office deemed vacant.”

These delegate restrictions constrained ratifying conventions to registering the prevailing public opinion. Prohibition’s opponents effectively turned the federal constitutional amending process into a national referendum of the American people. In doing so, they effectively flouted the Supreme Court’s holding in Hawke v. Smith, No. 1 in which the Court forbade a state’s ratification of a federal constitutional amendment to be determined by referendum of the people of a state.

2. Congressional Influence Over the Convention Process

Although the convention method remained the only method of ratification planned for the Constitution during most of the Philadelphia convention of 1787, the Framers never defined how the convention process would work at either the federal or state level. The Philadelphia convention delegates ignored Madison when he “remarked on the vagueness of the terms, ‘call a Convention for the purpose, as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?”

The Framers also entirely ignored questions concerning state ratifying conventions. Surprisingly, this nation did not face the uncertainties that Madison pointed out for almost 150 years, despite the Framers’ expectations that state conventions would be the favored method of ratification. For the ratification of the Twenty-First Amendment, Congress proved unable to agree upon the details and allowed states to determine how and when to convene the ratifying conventions.


118. 253 U.S. at 228-31; see also National Prohibition Cases, 253 U.S. 350, 386 (1920). For a thoughtful discussion of the strategic planning of prohibition opponents, see generally Vose, supra note 113.

119. 2 Farrand, Records, at 558. Madison did not oppose the convention method, either for drafting or ratifying amendments. Instead, he anticipated “that difficulties might arise as to form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided. 2 id. at 630.
less, as part of Congress’s power to specify the method of ratification it may be able to mandate the dates of delegate elections and the start of the conventions. Opponents of national prohibition urged Congress to issue such instructions in order to prevent state truancy in convening their ratifying conventions.\textsuperscript{120} As an added incentive, Congress could offer to pay for the costs of delegate elections and the conventions.\textsuperscript{121} Congress may also have the power to determine whether state convention delegates be elected at large or by district. If so, Congress may significantly increase an amendment’s chances of ratification by taking advantage of differing rates of support among urban and rural voters.\textsuperscript{122} Together, these congressional prerogatives may give the federal government more control over the ratification process than the Framers intended.\textsuperscript{123} In amending the Constitution, Congress and the states presumably should exist as co-equals. Congress’s ability to control the timing of the convention process also may make the amending process more subject to the “momentary inclinations” and less deliberative than Article V’s design suggests.\textsuperscript{124}

States ratified the Twenty-First Amendment within ten months, within that short time having passed legislation for the election of delegates, organized the conventions, and concluded the business of ratification. These hurdles were quickly surmounted: “Of the forty-three states which established conventions . . . eleven acted within a month, thirty-nine within four months, of Congress’s action submitting the repeal resolution.”\textsuperscript{125} The delegates’ election determined the outcome before the conventions even met. “So perfunctory were the actions of the conventions in carrying out voters’ wishes that the question arose as to whether a simple, direct referendum would not have been more sensible and economical.”\textsuperscript{126} New Hampshire’s convention lasted only seventeen minutes.\textsuperscript{127}

The convention method’s quick ratification of the Twenty-First Amendment could justify congressional specification of equally soon delegate elections and conventions.

3. Seeing Economic Liability As an Asset

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{120}.] Again, this stratagem was urged to negate the power state legislatures to stymie the Repeal Amendment. See VOSE, supra note 113, at 114.
\item[	extsuperscript{121}.] See id.
\item[	extsuperscript{122}.] The Twenty-First Amendment was ratified by delegates chosen from a number of different methods of selection, including these two. See generally VOSE, supra note 113, at 117. With Twenty-First Amendment, rates of support for repeal differed significantly among rural and urban voters. Professor Grimes, in his survey of federal constitutional amendments, notes that several of the extant amendments rested on the support of urban Americans. ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION, at 109, 125-56 (1978) (discussing effects of increasingly urban demographics and the Constitution’s “Urban Amendments”).
\item[	extsuperscript{123}.] Hamilton argued that whenever the requisite number of “States, were united in the desire for a particular amendment, that amendment must infallibly take place.” See THE FEDERALIST No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\item[	extsuperscript{124}.] THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\item[	extsuperscript{125}.] KYVIG, supra note 106, at 174.
\item[	extsuperscript{126}.] Id. at 180.
\item[	extsuperscript{127}.] Id.
\end{enumerate}
\end{footnotesize}
Public opinion of an amendment can reverse itself completely in the space of a few years. An amendment that significantly affects the national coffers ties its public approval to the rising and falling fortunes of the public fisc. Again, the experience of national prohibition illustrates this point well. What began as an ambitious experiment in social policy ended, in large part, as an economic failure. Although economic considerations played an insignificant role in the adoption of the Prohibition Amendment, “it is perfectly obvious the economic conclusions as well as social ones contributed importantly to a public favorable to repeal.” The relatively healthy economy at the time of prohibition’s adoption gave way to the depths of the Great Depression. With the worsening of the economic plight of millions, support for prohibition “sank with breathtaking speed.” Over and over again, opponents argued that prohibition effectively worsened the Depression because the vast profits of the illicit liquor and bootlegging industry escaped taxation. Some asserted that the national debt could have been paid off prior to the Depression if prohibition had not eliminated a major source of national revenues. References to the national debt harkened back to President Hoover’s dogged determination to raise taxes and curb governmental spending even as the economy’s vigor eroded. The Prohibition Amendment’s repeal raised the possibility that the new source of governmental funds could ease the widespread economic hardships. “The return of beer raised the often-expressed hope that repeal would help solve the depression.” When Americans voted for delegates to the ratifying conventions, they voted overwhelmingly for the return of alcohol as well as the return of a large source of federal funds.

Support for the Budget Amendment will likely correspond to its effect on the national economy, individuals’ well-being, and the effect on personal income tax rates. Today’s economic health invariably gives way to tomorrow’s economic recession. A limit on governmental borrowing power requires resort to the other major source of federal funds -- income taxes -- at times when individuals and corporations prove least able to pay. Concomitantly, governmental social programs and projects that could alleviate economic difficulties must be reduced under Budget Amendment constraints.

By contrast, repeal of the Budget Amendment would promise immediately lower taxes and increased federal assistance. Medicare, Medicaid, and Social Security programs directly affect large numbers of voters. The prospect of individual relief and national economic improvement may secure the popular support nec-
necessary for state referenda on convention delegates to ensure the repeal of the Budget Amendment. In contrast to prohibition, which began as a social experiment and ended as an unpopular, economic disaster, the quest to balance the federal budget will begin as an economic measure that ends as an unpopular, social disaster. To the extent that the Budget Amendment constrains federal borrowing power, the government’s ability to affect and safeguard the economy will be curtailed. Borrowing constraints’ effects on the national social order will have profound effects on welfare benefits and entitlement programs. Basic national infrastructure maintenance, natural disaster relief, regulatory protections, and public safety will have to be reduced and shifted, at least in part, to the states. The loss of social benefits will recast, to the degree that the Budget Amendment lives up to its purpose, the federal government’s relation to the American electorate. Supporters of repeal may find that their most persuasive arguments center more on social justice and the functioning of society as a whole than on economic contentions. An emphasis on the beneficial impact of repeal on voters themselves means that the convention method, with its referendum function, is best suited for the ratification of the Budget Repeal Amendment.

B. The Rule of Congressional Promulgation of Amendments

Irregularities in the ratification of a federal constitutional amendment occur regularly. When ratification proceeds by state conventions, questions that Article V fails to address abound. Even with the precedent of the Twenty-First Amendment, the rules of the convention method remain unresolved. Congress’s ability to mandate the delegate election and convention proceeding details, and give incentives for the ratification process remain unclear. Conversely, the conventions’ independence from their state legislatures and courts also continues to pose unsettled issues. Control over the ratification process pits Congress against states in vying to formulate the rules of ratification.

Article V’s design ideally balances congressional and state amending powers -- essentially making them co-equals for the purpose of federal constitutional change. During the framing of the Constitution, the delegates expressed concerns about attempts of Congress or the states to monopolize the amending process. Hamilton argued that “[t]he State Legislatures will not apply for alterations but...
with a view to increase their own powers . . . .” The other delegates agreed and voted to give Congress the same right to propose amendments as the states. Moreover, Congress’s power to determine whether ratification proceed by state legislatures or conventions further bolstered the federal government’s ability to check states’ self-aggrandizement. Congress, however, also received suspect attention. The original Virginia plan stated that “provision ought to be made for the amendment of the Articles of the Union whenever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.” Article V, in its final form, drew criticism for ceding to much power in the amending process to Congress. George Mason characterized Article V as “exceptionable & dangerous” because “the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive . . . .” The response to this criticism was to give states the final say in the ratification or rejection of every proposed amendment.

As a matter of practice, Congress has appropriated the last word. Moreover, the Supreme Court has affirmed Congress’s practice of deciding whether and when to declare an amendment to be ratified. The congressional practice of “promulgating” amendments began with the Fourteenth. For that Amendment, four states presented problematic ratifications: two ratified after initially rejecting the Amendment, and two attempted to rescind their earlier ratifications. Congress counted each of these states toward ratification and declared the Fourteenth Amendment to be part of the Constitution despite the ratifications’ questionability. Although the congressional announcement of constitutionality did not immediately put the issue to rest, the passage of time caused lingering objections to recede into acquiescence. De facto acceptance of the Fourteenth Amendment became de jure legitimacy a half century later in Coleman v. Miller. In that case, the Court summarily decided that long-standing acceptance of the Amendment after congressional promulgation was conclusive upon the courts. The Court also decided that Congress’s declaration of other amendments’ validity would be conclusive in the future. As a consequence, “[t]he Coleman Court transformed the Reconstruction Congress’ unprecedented action into a settled feature of article V, and congressional promulgation has been the focal point of analysis of amendment process issues ever since.”

136. 2 FARRAND, RECORDS, at 558.
137. 1 FARRAND, RECORDS, at 22 (Section 13 of Virginia Plan); see also RAKOVE, supra note 129, at 91.
138. 2 FARRAND, RECORDS, at 629.
139. 2 FARRAND, RECORDS, at 558; see also THE FEDERALIST No.85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
142. Id. The Court has a history of summarily affirming the legitimacy of amendments without much analysis or discussion. See, e.g., Hollingsworth v. Virginia, 3 U.S. (Dall.) 378, 381-82 (1798) (first eleven Amendments).
143. Dellinger, supra note 44, at 397.
Two consequences of *Coleman* have been to shift the balance of powers in the amending process in favor of Congress and to allow for the constant shifting of rules attending the amending process. Instead, the Court should have recognized that “Article V establishes a balance between Congress and the states, and that disputes as to the division of power should not be left to either. Instead, ‘the courts, as a neutral third party, and having the responsibility of ‘guardian of the Constitution” should resolve the disputes.’”144 The Supreme Court’s abdication from deciding amending process questions subjects the future amendments to shifting rules that change with the composition of Congress, upon mere majority vote of that institution. While it takes two thirds of Congress to propose an amendment, a simple majority can vote to promulgate the amendment at the end of the amending process. The outcome of the ratification process should not depend on Congress, but on the verdict of three-quarters of the states.

VI. CONCLUSION

The proposal to amend the Constitution to require an annually balanced federal budget provides an excellent vehicle for examining the set of rules fashioned by Congress and the courts in order to clarify amending process issues left unaddressed by Article V. The cumulative effect of these non-constitutional rules seems to make the ratification of a Budget Amendment inevitable. Ironically, these rules that have been created mainly by “congressional precedent” and Supreme Court abstention also make the Budget Amendment’s subsequent repeal an equally sure thing. Whatever the merits of the Budget Amendment,145 our Constitution deserves better than to be altered due to a mishmash of technical rules that have no textual basis in Article V. Instead, constitutional change represents our most fundamental governmental reorganizations that must rest on the widespread public approval if we continue to claim to be a democracy.

The amending process rules formulated by congressional, executive, and judicial officials now govern more fully than Article V itself. The Budget Amendment’s impending ratification and repeal offers an excellent vehicle for illustrating each of these non-constitutional rules that nonetheless govern constitutional change. As the Framers were well aware that they left Article V in a woefully inadequate state to guide a nation through constitutional change. The Constitution fails to answer fundamental questions about the workings of constitutional conventions, announcing successful ratifications, counting or ignoring state ratifying actions, 144. 13A WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3534.1, at 384 (1984) (quoting Freeman v. Idaho, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot sub. nom., NOW v. Idaho, 459 U.S. 809 (1982).
145. Despite using the Budget as a vehicle for examining the non-constitutional rules governing the amending process, it lies beyond the scope of this Article to pronounce judgment on the amendment’s merits. Excellent analyses of the proposed amendment’s merit from a constitutional point of view have, however, been written. See, e.g., Laurence Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 PAc. L.J. 627 (1979).
timing, and the role (if any) of federal judicial and executive officials in the amending process.