

## CONSTITUTIONAL CONVENTIONS AND THE DEFICIT

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### I.

Law is, by its nature, a conservative force. The role of lawyers, particularly academic lawyers, is to preserve a tradition. Our legal tradition, like the myths and rituals of primitive peoples, stores the accumulated wisdom and experience of our tribe. But the tradition is not the tribe. Like every priesthood, sometimes lawyers must follow, not lead. The tradition of which we lawyers are the guardians is not the only repository of wisdom in society. The ultimate source of law, of the collective will expressed through the state, is "We, the people."

A central question for constitutional law that has been played out over and over again throughout our history is "When shall the legal tradition, which embodies the wisdom of the past, yield to the popular will, representing the wisdom of the present?" On numerous occasions in the past, popular movements of citizens have succeeded in storming the citadel and changing our fundamental law. The Supreme Court's "switch in time" in the 1930's to uphold the New Deal is an obvious example, and

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so, too, in a different way, is the civil rights movement of the 1950's and 1960's.

I want to suggest that we are once again on the verge of such a constitutional moment, a time when legal tradition and the popular will collide; the popular will prevails, and, as a result, the fundamental law changes. In this instance, the drama is being played out in an unfamiliar location: not in the Supreme Court, but in state legislatures. Beginning in 1975, the National Taxpayers Union, a grass-roots movement opposed to federal budget deficits, began to lobby state legislatures to petition Congress to call a constitutional convention to deal with federal budget deficits.<sup>1</sup> So far, this popular movement has persuaded thirty-two state legislatures to adopt resolutions calling upon Congress to convene a constitutional convention,<sup>2</sup> only two shy of the two-thirds required by article V of the Constitution. If two other states join the movement, Congress will either be forced to call a constitutional convention, or to engage in the spectacle of interpreting legalistically petitions from thirty-four states, in defiance of the popular will. On only a few occasions before in our history have we come this close to a constitutional convention.<sup>3</sup>

Constitutional law experts have reacted with almost unanimous hostility to the "threat" of a constitutional convention to consider the federal deficit. For example, Gerald Gunther describes the convention method of amending the Constitution as "a road that promises controversy and confusion and confrontation at every turn."<sup>4</sup> Laurence Tribe is less restrained, calling a convention to consider the deficit "a needless and perilous undertaking—one likely to generate uncertainties where confidence is indispensable, one likely to invite division and confrontation where unity and cooperation are critical, one likely to thwart rather than vindicate the will of the American people and damage rather than mend the Constitution."<sup>5</sup> Perhaps the tenor of academic opinion was summed up best by the title of a recent student law review comment "‘Monster Approaching the Capital’: The Effort to Write Economic Policy into the United States Constitution."<sup>6</sup> Perhaps it should not be sur-

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1. Mohr, *Tax Union Playing Chief Role in Drive*, N.Y. Times, May 15, 1979, at D18, col. 1.

2. See Committee on Federal Legislation, *An Analysis of State Resolutions Calling for a Constitutional Convention to Propose a Balanced Budget Amendment*, 40 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 710, 710 (1985).

3. See *infra* note 35.

4. Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 25 (1979).

5. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 628 (1979).

6. Comment, "‘Monster Approaching the Capital’: The Effort to Write Economic Policy into the United States Constitution", 15 AKRON L. REV. 733, 733 (1982).

prising that the small circle of academic experts on constitutional law would react with hostility at the prospect that an aroused citizenry might take control and attempt to remake the fundamental law which in normal times resides in their care. But the fact that academic experts are playing a predictable, even a useful, role in counseling caution does not make them correct.

I am going to try to defend the iconoclastic view: namely, that the popular movement to call a constitutional convention to consider possible amendments to control federal budget deficits is wiser and more enlightened than the prophecies of doom and disaster made by the legal traditionalists in the academic establishment. My argument comes in three parts. The first is that the function of the article V convention procedure—the reason why the framers put it in the Constitution—is to consider making changes in the structure of our political institutions that we cannot expect the political institutions to initiate themselves. In the words of Walter Dellinger, the article V procedures for amending the Constitution are “a domestication of the right to revolution.”<sup>7</sup> Dellinger’s phrase is particularly apt to describe the article V convention procedure, for it alone recognizes the right of the people to change the government when the government refuses to change itself.

The second part of my argument is that the problem of federal budget deficits is a malady that requires the medicine of a constitutional convention. I will argue that the deficit, properly understood, is a surface symptom of more fundamental problems in our political institutions. Absent a change in human nature to conform to what Cass Sunstein calls “the republican understanding of politics”—namely, that “people . . . in their capacities as citizens, [will] escape private interests and engage in pursuit of the public good”<sup>8</sup>—we cannot expect incumbents in Congress to change the present system.<sup>9</sup> Thus, I believe it is unlikely that the deficit problem can be solved short of a constitutional convention to consider reforms to our political institutions,<sup>10</sup> or, what amounts to the same thing, the palpable threat of a constitutional convention which forces Congress to act. Stated more precisely, the second part of my argument

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7. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983).

8. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

9. For a discussion of the Gramm-Rudman-Hollings legislation, see *infra* text accompanying notes 77-85.

10. My belief that constitutional change is necessary to deal with problems like the deficit distinguishes my views from those of my colleague, Peter Schuck. See Schuck, *Review Essay: The Politics of Economic Growth*, 2 YALE L. & POL’Y REV. 359, 381 (1984). Nonetheless, Professor Schuck and I agree on numerous subsidiary questions, and I have benefited greatly from my discussions with him.

is that *if* one assumes that large structural deficits are a problem,<sup>11</sup> they should be understood as symptoms of fundamental diseases in our political institutions that are unlikely to be cured short of a constitutional convention.

The final part of my argument is to describe the appropriate agenda for a constitutional convention and to explain why fears that the convention will run wild and threaten individual liberty are unfounded.

Overarching these points, however, is a more fundamental message: the time has come for academic lawyers to stop carping and bemoaning the possibility of a constitutional convention to consider the federal deficit. It is time for legal scholars to begin to think seriously about how such a convention should be structured and what its agenda and substance should be. The legal academic establishment has a responsibility to begin to build the intellectual foundations upon which a convention might draw. A brief analogy will make this message clear. Suppose that the Supreme Court were about to rule on a major constitutional issue. It would be regarded as nothing short of scandalous if the academic commentary had ignored the issue on the merits and had focused exclusively on why the Court should have denied certiorari. The fact that the constitutional law relating to the deficit is being made in forums that are less familiar to constitutional law scholars than is the Supreme Court is no excuse for shirking the responsibility of addressing a constitutional issue of first importance to the future of the country.

## II.

I do not mean to imply that legal scholars have ignored the subject of constitutional conventions in recent years. On the contrary, there is a large and growing literature on a number of interesting and important procedural issues—much of it written by Walter Dellinger and William Van Alstyne at Duke, and by my colleagues in New Haven.<sup>12</sup> For exam-

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11. In defending my view that the large "structural" deficits of our day are a symptom of deeper problems in our political institutions, I am not going to waste time trying to prove that large, permanent "structural" deficits are in fact a serious problem; I shall take that as my premise. I offer two justifications for assuming away this policy question. First, most of the country is already convinced that large federal deficits pose a very significant problem; *The New York Times* recently stated that "today's \$200 billion budget deficits [are] widely regarded as the nation's No. 1 problem." Hershey, *Of Budgets Known and Loved*, N.Y. Times, Oct. 30, 1985, at A20, col. 4. Second, I am a lawyer, not a macroeconomist, and I have little to contribute to the discussion of how bad deficits really are.

12. Ackerman, *Unconstitutional Convention*, *New Republic*, Mar. 3, 1979, at 8; Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626 (1979); Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963); Dellinger, *Who Controls a Constitutional Convention?—A Response*, 1979 DUKE L.J. 999; Dellinger, *The Recurring*

ple, scholars have debated whether Congress, or the states, may limit a constitutional convention to a single issue, or even a single proposal.<sup>13</sup> They have argued about how similar the states' petitions must be in order to satisfy the two-thirds requirement.<sup>14</sup> And most recently, Professor Dellinger has suggested that judicial review may be available to force Congress to call a convention if it refuses to act on its own.<sup>15</sup>

These are fascinating procedural questions, but they overlook the central, substantive issue: What is the *proper* role for constitutional conventions in our legal universe? If a convention really is a "monster approaching the capital" that threatens to rend the social fabric, destabilize the republic, and repeal our liberties, then why did the framers include the convention procedure in the Constitution in the first place? When, if ever, is it appropriate to use the convention route for amending the Constitution? It is to these substantive questions that I wish to turn.

An analysis of the role of the convention procedure for amending the Constitution must begin, of course, with the text and structure of article V.<sup>16</sup> The first thing one notices upon reading article V is that "the convention procedure for amending the Constitution" is really no such thing. A constitutional convention has no power to rewrite the Constitution. The convention is merely an alternative to Congress for "*proposing*" amendments to the Constitution. Before an amendment becomes part of the Constitution, it must be ratified by three-fourths of the state legislatures (or, if Congress so provides, by conventions in three-fourths of the states). For this reason, the term "constitutional convention" is

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*Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985; Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 [hereinafter cited as Van Alstyne, *A Letter to a Colleague*].

13. See A.B.A. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974); THE ARTICLE V CONVENTION PROCESS (L. Levy ed. 1971); Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL'Y 79 (1982); Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563 (1982); see also *supra* note 12.

14. Compare, e.g., Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, *supra* note 12, at 1636-38 with Gunther, *supra* note 4, at 5-11.

15. Dellinger, *supra* note 7, at 411-17.

16. Article V reads in pertinent part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

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U.S. CONST. art. V, cl. 1.

misleading; it would be more accurate, albeit less euphonious, to call it an "amendment-*proposing* convention."

Why did the framers create this alternative forum to Congress for proposing amendments to the Constitution? Three differences between Congress and a convention as mechanisms for writing proposed amendments suggest themselves from the text of article V. First, a convention is an ad hoc assembly, not a continuing body like Congress whose members are continuously running for re-election. Second, the members of a convention are not necessarily members of Congress. And third, a convention is an extraordinary body "called" into being in response to a special problem or discrete set of events.<sup>17</sup> The legislative history of article V confirms that these institutional differences between conventions and Congress account for the framers' decision to include the convention alternative in the Constitution.

The view that an alternative method for amending the Constitution was needed surfaced early in the 1787 convention. On June 5, while meeting as the Committee of the Whole, the convention considered a number of preliminary propositions. One of these, (ironically) Proposition 13, was "that provision ought to be made for [hereafter] amending the system now to be established, *without requiring the assent of the Natl. Legislature.*"<sup>18</sup>

Consideration of Proposition 13 was postponed, and when it came up again, "several members did not see the necessity of the [Resolution] at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary."<sup>19</sup> However, George Mason of Virginia strongly "urged the necessity of such a provision."<sup>20</sup>

Mason was a staunch partisan of liberty. He had drafted the Virginia declaration of rights, upon which Jefferson modeled the Declaration of Independence, and he eventually refused to sign the Constitution because of the compromises it struck over slavery and because it lacked a bill of rights. To Mason, it seemed clear that the Constitution would require amendments from time to time, "and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to

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17. Before this last observation gets me embroiled in the raging academic controversy over whether Congress or the states can impose legally binding limits on the scope of a convention, let me emphasize that my third point is descriptive and political, rather than legal. Constitutional conventions are not an everyday thing in American life; they do not have regular office hours like the courts or Congress. As a practical, political matter, they are "called" into being by special circumstances against a backdrop of extraordinary public concern about particular issues.

18. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 121 (M. Farrand rev. ed. 1937) (emphasis supplied) [hereinafter cited as M. FARRAND].

19. *Id.* at 202.

20. *Id.*

chance and violence.”<sup>21</sup> In particular, Mason urged that Congress should not be granted an absolute veto over the amending process, since a defect in Congress might be the problem needing amendment: “It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendt.”<sup>22</sup> Although Edmund Randolph supported Mason’s argument, consideration of the words “without requiring the consent of the Natl. Legislature” was once again tabled.<sup>23</sup>

The subject of an alternative to Congress for proposing amendments to the Constitution came up next in the Committee of Detail, which proposed that Congress call a convention to alter the articles of union upon application of two-thirds of the state legislatures.<sup>24</sup> This approach was formalized as article XIX in an early draft of the Constitution.<sup>25</sup> That August 6, 1787 draft differs in two significant ways from the final text. First, in the draft, the states were required to apply “for an amendment” to the Constitution. This could be read as requiring that two-thirds of the states must agree in advance on the text of a proposed amendment before a convention could be called. Under the text of the Constitution as finally adopted, it is debatable whether the states *may* seek to tie the hands of the convention by agreeing in advance on the text of a proposed amendment;<sup>26</sup> no one would maintain, however, that under the final version of the Constitution, the states *must* agree in advance on the specifics of an amendment. Sometime between the Committee of Detail’s August 6 draft and the final version of the Constitution, the 1787 convention decided to broaden the scope of the convention to allow it to deliberate and consider alternative approaches to problems, rather than simply to have it say “yea” or “nay” to the text of an amendment proposed by the states.

A second change between the draft and the final text of the Constitution is also significant. Although the draft is ambiguous, it is possible to read it as contemplating that an amendment would actually become

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21. *Id.* at 202-03.

22. *Id.*

23. *Id.*

24. 2 M. FARRAND, *supra* note 18, at 148.

25. “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.” *Id.* at 188, art. XIX.

26. Compare Ackerman, *supra* note 12, at 8 (states have no power to “dictate the terms of a constitutional debate”) with Van Alstyne, *A Letter to a Colleague*, *supra* note 12, at 1296-301 (disagreeing with Ackerman and arguing that article V permits states to call convention to deal only with specific issue or agenda).

effective upon adoption by the convention.<sup>27</sup> Under the final version of the Constitution, however, the convention is only authorized to propose amendments, not to adopt them as part of the Constitution. Thus, between the August 6 draft and the final version of the Constitution, the 1787 convention broadened the authority of a convention to deliberate and consider alternative approaches, but it weakened the convention's power to act on its own to amend the Constitution.

The most extensive discussion of the convention alternative for proposing amendments to the Constitution occurred on September 15, 1787, when the convention took up a proposed draft of article V authored by James Madison.<sup>28</sup> In Madison's draft, Congress was to propose amendments to the Constitution when two-thirds of both houses deemed them necessary, or in response to an application by two-thirds of the state legislatures.<sup>29</sup> Again, George Mason objected, attacking the aspect of Madison's proposal that would have given Congress the exclusive authority to propose amendments. According to Mason, it would be "exceptionable & dangerous" to give Congress the sole power to write amendments, "since no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive."<sup>30</sup> Mason elaborated on his concerns in a note that he wrote in the margin of his copy of the draft:

By this article Congress only [will] have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people.<sup>31</sup>

On this occasion, Mason's view finally carried the day. Gouverneur Morris and Eldridge Gerry moved to amend the article drafted by Madison to require Congress to call a convention on application of two-thirds of the states.<sup>32</sup> Madison meekly protested that he did not see why Congress would not be as much bound to propose amendments applied

27. "An alteration may be *effected* in the articles of union, on the application of two thirds . . . of the state legislatures . . ." 2 M. FARRAND, *supra* note 18, at 148 (emphasis supplied).

28. *Id.* at 559.

29. The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .

*Id.* at 629.

30. *Id.*

31. *Id.* at 629 n.8.

32. *Id.* at 629.



for by two-thirds of the states as to call a convention,<sup>33</sup> but stated that he “saw no objection” to providing the convention alternative, except for the procedural “difficulties [that] might arise as to the form, the quorum &c.”<sup>34</sup> Following Madison’s acquiescence, the amendment proposed by Morris and Gerry was adopted unanimously.

What emerges from the legislative history of the convention method of proposing amendments in article V is a persistent and deeply felt concern on behalf of a few delegates, led by George Mason, that Congress should not be given absolute veto power over amendments to the Constitution. Rather, as throughout the Constitution, power should be held in check by creating competing power centers. There is no indication in the legislative history that the constitutional convention route was intended to be used only for fundamental reassessments of the whole constitutional structure; in that sense, references to calling a “Second Constitutional Convention” are misleading. The framers did not intend the article V convention to deal exclusively with circumstances like those that confronted the republic in 1787. On the contrary, the concerns that led to the insertion of the convention alternative were far simpler and narrower. They were, in short, that Congress could not always be trusted to do what was best for the country, and that when it was a practice of Congress itself that gave rise to the need for amendments, some other body should be made available to the people to initiate changes to the Constitution.

Subsequent practice under article V also supports this interpretation of the purposes of the convention alternative. Although it is true that we have never actually held a constitutional convention at the federal level, the article V mechanism of states petitioning the Congress to call such a convention has been used on numerous occasions.<sup>35</sup> Usually, as the number of state petitions neared the two-thirds required by the Constitution, Congress acted on its own. Perhaps the “precedent” most directly relevant for our purposes is the adoption of the seventeenth amendment,

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33. *Id.* at 629-30.

34. *Id.* at 630.

35. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 82, 92d Cong., 2d Sess. 858 (L. Jayson ed. 1973):

[The convention] method has been close to utilization several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators. Two States were lacking in a petition drive for a constitutional limitation on income tax rates. The drive for an amendment to limit the Supreme Court’s legislative apportionment decisions came within one State of the required number. Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

(footnotes omitted).

which provides for the direct election of Senators. For many years, the Senate itself blocked a proposal to amend the Constitution to provide for direct election of Senators. When the petition drive to call a constitutional convention came within one state of the two-thirds needed, the Senate finally relented and passed the amendment itself.<sup>36</sup>

The legislative history thus shows that the case for conventions was largely a negative rather than a positive one—namely, that Congress should not be trusted with exclusive power to block amendments. But it is also noteworthy that the 1787 convention did not turn to other readily available institutions, such as the state legislatures, to propose amendments. Rather, between the August 6 rough draft and the final version of Constitution, the 1787 convention substituted the mechanism of an ad hoc convention, “called” to deal with particular problems, but free to deliberate and propose amendments.

### III.

With this background in mind, I want to turn now to my reasons for believing that the amendment-proposing convention created by the framers is an appropriate legal mechanism for considering what to do about the federal deficit. Obviously, in dealing with a subject as vast as the federal deficit, it is going to be necessary to paint with a broad brush. The most I can hope to accomplish in this article is to paint a picture of our political institutions that may help to explain the deficit; I do not purport to “prove” that the factors I identify are “the cause” of the deficit. Nor do I claim that my explanation is original.<sup>37</sup> On the contrary, numerous people of varied political persuasions report the same thing. In part, I rely on their testimony, which is based both on detached academic analysis and on the personal political experience of being on the frontlines in the war against the deficit.

Let us begin with David Stockman, President Ronald Reagan’s former chief budget-cutter. In December 1981, Stockman gave an interview to the *Atlantic Monthly* that nearly led to his resignation as the director of the Office of Management and Budget.<sup>38</sup> The interview created an immediate public sensation because Stockman made a number of frank,

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36. See HOUSE JUDICIARY COMM., 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 7, 89 (Comm. Print 1957) (C. Brickfield) (listing states that applied for constitutional convention to consider direct election of Senators).

37. For a survey of arguments similar to mine which rely on public choice theory to explain the causes of the deficit, see Foster, *The Balanced Budget Amendment and Economic Thought*, 2 CONST. COMMENTARY 353 (1985). To the extent that my argument has original elements, they are primarily the emphasis on the problems of inter-generational equity, see *supra* notes 32-34 and accompanying text.

38. Greider, *The Education of David Stockman*, ATL. MONTHLY, Dec. 1981, at 27.

politically indiscreet confessions, such as that he had not always believed the budget projections about which he had testified in Congress. Rereading the Stockman interview today, a much more chilling theme emerges. "The Education of David Stockman" is really about power politics and how well-organized interest groups were able to restore proposed budget cuts that would adversely affect them, while those with a more compelling case, but a weaker political organization, got the ax.

As Stockman tells it, he began his job committed to the ideal of cutting the federal budget based on the merits of various programs, not on the strength of the client groups supporting them: "We are interested in curtailing weak claims rather than weak clients. . . . We have to show that we are willing to attack powerful clients with weak claims."<sup>39</sup> What Stockman learned was that it was politically impossible to make budget decisions on this basis. The *Atlantic Monthly* article traces in detail the political power that various interest groups brought to bear on the budget-making process, from Senator Howard Baker's support for the Clinch River breeder reactor,<sup>40</sup> to the "bidding war" that developed between Republicans and Democrats to give "the business community, the influential economic sectors from oil to real estate," tax concessions amounting to \$750 billion over five years.<sup>41</sup> In the end, Stockman said he had learned that the "power of these client groups turned out to be stronger than I realized. The client groups know how to make themselves heard. The problem is, unorganized groups can't play in this game."<sup>42</sup>

David Stockman is not the only government official to claim that the power of well-organized interest groups in Congress is the reason that we have been unable to make a significant dent in the deficit. In a recent article in the *New York Times Magazine*, Richard Snelling, the former governor of Vermont, offered a similar diagnosis, which is worth quoting at length:

Four years ago, as chairman of the National Governors Association, I met with Congressional leaders to discuss the nation's economic problems. At one session, within a few minutes' time, I heard both Pete V. Domenici, Republican of New Mexico, the chairman of the

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39. *Id.* at 30.

40. *Id.* at 36.

41. *Id.* at 47.

42. *Id.* at 52.

To reject weak claims from powerful clients—that was the intellectual credo that allowed [Stockman] to hack away so confidently at wasteful social programs, believing that he was being equally tough-minded on the wasteful business subsidies. Now, as the final balance was being struck, he was forced to concede in private that the claim of equity in shrinking the government was significantly compromised if not obliterated.

*Id.* at 50.

Senate Budget Committee, and James R. Jones, Democrat of Oklahoma, then chairman of the House Budget Committee, declare that the budget and the debt were wheeling out of control. But they said Congress could not act in the face of the combined onslaught of the hundreds of big, powerful special-interest groups based in Washington.

What was true four years ago remains true today. Each of these special-interest groups endorses the notion that the deficit must be shrunk. Some are willing to agree that spending must be cut, others that revenue must be increased. But each group expects the cuts to be made in areas it doesn't care about and the revenues to be raised in ways that do not affect its own tax obligations. Mayors, for example, oppose cuts in urban programs, and the Chamber of Commerce is opposed to any tax increases its members would have to pay.

In 1981, Jones summed up the situation: "There is a constituency for national defense. There is a constituency for every item of the domestic budget. There is a loud constituency for tax cuts. But there really is no constituency for a balanced budget."<sup>43</sup>

If it were only government officials who ascribed the continuing problem of the deficit to the power of interest groups in Congress, perhaps we could dismiss their analysis as a self-serving excuse. The situation described by Stockman and Snelling is, however, precisely what is predicted by the academic theories developed in recent years.

During the last twenty years, economists and political scientists with an economic bent have begun to use microeconomic models to study political behavior. This movement in scholarship, which is usually called "public choice theory," has produced a number of insights relevant to understanding the deficit. This article will not attempt an exhaustive review of the public choice literature<sup>44</sup> and its relevance to understanding why Congress is unlikely to be able to reduce the deficit significantly. It is possible, however, to sketch a few propositions developed by the public choice literature that are relevant to understanding the deficit.

There are two branches to the public choice literature. The first, represented by the work of political scientists such as David Mayhew of Yale and Morris Fiorina of Harvard, studies the behavior of politicians, particularly members of Congress.<sup>45</sup> The essential premise of this work is the simplifying assumption that members of Congress are rational actors who pursue the self-interested goal of re-election.<sup>46</sup> A number of

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43. Snelling, *The Deficit's Clear and Present Danger*, N.Y. Times, Mar. 3, 1985 (Magazine), at 48, 70.

44. For a review of the public choice literature, see D. MUELLER, *PUBLIC CHOICE* (1979).

45. M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 3 (1977) (analysis of incentives that affect behaviors of members of Congress); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5 (1974) (same).

46. D. MAYHEW, *supra* note 45, at 6.

interesting conclusions flow from this postulate. The most important for our purposes is that a rational politician interested in maximizing the chances of re-election will not pay equal attention to the preferences of all the district's voters. Because information is costly to obtain and to transmit, both in terms of time and money, a rational, self-interested politician will pay particular attention to the desires of those citizens who have managed to form themselves into a coherent group organized around particular issues. Thus, the first proposition developed by public choice theory is that organized citizens have a greater influence on the behavior of politicians, who must continually seek re-election, than citizens who are not organized.<sup>47</sup>

The second branch of public choice literature studies the behavior not of politicians, but of interest groups themselves, and in particular, how and why such groups are formed. Again, the analysis adapts microeconomic models to the study of political behavior by making the simplifying assumption that citizens are rational and self-seeking. If this assumption is granted, it can be shown that not all preferences or interests that are shared by large groups of citizens will be expressed through organizations. The seminal work in this area is Mancur Olson's *The Logic of Collective Action*, published in 1965.<sup>48</sup> Olson showed that if a large group of citizens all share a common interest that can be promoted by forming an organization, but the additional benefits to each member of the group from joining the organization will be small, it will be virtually impossible to form such an organization. This is because it will be rational for each member of the group to "let George do it." But if everyone depends on someone else to do the dirty work, it never gets done. Through a series of decisions that are individually rational, a result is reached that is collectively irrational: the group will not be formed, even though all of its potential members would be better off if it were formed than if it were not.<sup>49</sup>

A number of writers have sought to apply the insights developed by Olson and other organizational economists to explain why certain types of laws get passed and others do not. For example, Nobel prize-winning economist George Stigler, in his famous article *The Theory of Economic*

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47. See, e.g., *id.* at 137; Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

48. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

49. *Id.* at 17-18. Olson originally developed this paradox about voluntary organizations by analogy to the economic theory of "public goods." *Id.* at 19-20. Political scientist Russell Hardin of the University of Chicago has recently shown that the essential logic which underlies Olson's paradox is the same as that of the "Prisoners' Dilemma" in game theory. R. HARDIN, *COLLECTIVE ACTION* 25-30 (1982).

*Regulation*,<sup>50</sup> suggests that government regulation beneficial to an industry is more likely if the industry is small and there are barriers to entry. Stigler's argument is that a small group of firms, each one of which is affected in a relatively significant way by what the government does, is more likely to organize and expend time, effort, and money to procure and influence government policy than is a diffuse and disorganized public.<sup>51</sup> Significantly, the conclusion reached by both Stigler and Olson holds true even though the total cost to the public is far greater than the benefit obtained by the industry; the key is that one group is concentrated, and thus is capable of effective political action, while the other is diffuse, a circumstance not conducive to such action.<sup>52</sup>

By emphasizing situations in which benefits are concentrated and costs diffused, public choice theory goes a long way toward explaining the politics of the deficit about which Stockman and Snelling complain. Most government spending programs provide significant benefits to relatively concentrated, and, therefore, relatively well-organized and politically effective constituencies. On the other hand, the costs of government spending are spread over a large and diffuse group—taxpayers. Because the incremental cost of each government spending decision is relatively insignificant to individual taxpayers, and because the benefits from organizing to oppose government spending are speculative and difficult to appropriate, public choice theory predicts that it will be difficult, if not impossible, to organize the broad mass of taxpayers, as such, into an effective counterweight to spending that benefits "special interest groups" with more narrowly focused interests.<sup>53</sup> Thus, public choice

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50. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

51. *See id.* at 10-13.

52. *See also* J. WILSON, *THE POLITICS OF REGULATION* vii-xii (1980). According to Wilson, the "capture theory" holds that groups "capture" governmental agencies because they have the most at stake.

53. This is not to say, however, that it is *never* possible to organize taxpayers as an effective political pressure group. On the contrary, groups of taxpayers frequently do lobby and engage in political activities to obtain changes in the tax code that will benefit them. It is worth noting, however, that most of the tax code issues that generate robust political activity tend to benefit relatively narrow groups, such as the oil industry or real estate investors. It is much rarer that groups are organized successfully to lobby to reduce *general* tax rates, as opposed to supporting particular deductions.

Nor is my argument refuted by the fact that on occasion there have been broadly based, popular movements to hold down general tax rates (for example, the crusade that led to the adoption of Proposition 13 in California in 1978). The argument in the text depends only on the intuition that most of the time there is a *relative* imbalance between the ability of broadly based and narrowly focused groups to organize effectively.

It should also be noted that the term "special interest group" as used in this article is not intended to have any disparaging or pejorative connotations. Rather, it refers simply to the fact that certain governmental actions benefit relatively narrow segments of society while others benefit larger, more diffuse groups. It does not follow, however, that, as a normative matter, programs that benefit

theory implies that there is an inherent bias built into the political system in favor of spending to benefit organized constituencies, even when the total costs of a program exceed its benefits.

But that alone, if true, would not explain the deficit, which is the joint product of government decisions as to revenue as well as spending. James Buchanan and Richard Wagner, leading public choice theorists, have suggested a beguilingly simple explanation for deficits: politicians “enjoy” appropriating money to benefit their constituents, but they do not “enjoy” taxing them.<sup>54</sup> There is plenty of truth to their point, but by framing it in terms of the “likes” and “dislikes” of politicians, Buchanan and Wagner make it sound as if personal preferences are what is behind the seeming inability of the political system to bring spending and revenues into balance. In fact, however, the causes are structural—that is, they inhere in the system of incentives facing politicians, regardless of personal preferences.

To see that this is so, consider a hypothetical rational, re-election-maximizing politician as imagined by conventional public choice theory. For simplicity, assume further that this hypothetical politician weighs equally the effects of government decisions on all the voters in the electoral district. This means factoring out the points made by the public choice literature about the distorting influences of the costs of information, relative concentration of costs and benefits, and the effects of differential degrees of organization. Even in this vastly simplified, imaginary world, rational politicians interested in maximizing their chances of re-election by rational, self-interested voters would not bring government spending and revenues into balance. The reason is simple: by creating a deficit and borrowing to finance it, politicians are able to confer benefits on current voters while imposing a portion of the costs on future generations who will have to pay the bill.<sup>55</sup> To put the point a different way,

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“general” interests shared by the community as a whole are preferable to “special” interest programs that benefit a narrower segment of the community. I do not contend, for example, that reducing taxes of the general population is more desirable as a normative matter than either increasing welfare payments to those in need or, for that matter, increasing the amounts paid to defense contractors. My only points are that spending—whether to aid welfare families or to compensate defense contractors—directly benefits a relatively narrow segment of the community, while the benefits of general reductions in taxes are spread more broadly, and that this fact may have important political and institutional implications.

54. J. BUCHANAN & R. WAGNER, *DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* 93-94 (1977).

55. It is arguable that my claim that large “structural” budget deficits may constitute an inter-generational transfer of wealth that burdens future generations violates my self-imposed ban on the consideration of macroeconomic issues, *supra* note 11. While I do hope to avoid entering the thicket of a full-scale consideration of the long-run dynamic effects of deficits, I note that there is strong support among economists for the proposition that at least *some portions* of a structural deficit do constitute a burden on future generations, which is all that is necessary for my argument. The

the interest group that is the weakest politically is one that is even more difficult to organize than taxpayers—the unborn. Future generations are truly subject to “taxation without representation,” because today’s politicians can vote to implement programs to benefit today’s voters but to be paid for in part by tomorrow’s taxpayers.

When someone who cannot vote can nonetheless be made to pay the costs for something that benefits someone who can vote, a powerful incentive is created for politicians to follow what Bruce Ackerman, John Millian, and I have called the “cost-externalization” strategy, the politician’s “equivalent of a free lunch.”<sup>56</sup> Cost-externalization arises most frequently in a geographic context, when politicians in one state seek to obtain benefits for the voters in their state while imposing disproportionate costs on the citizens of another state. One of the functions of the commerce clause of the Constitution is to restrain politicians from pursuing this tempting type of cost-externalization strategy.<sup>57</sup> Deficit spending provides functionally similar opportunities for politicians to engage in cost-externalization, but across temporal, rather than geographic, boundaries.

Of course, not all deficit spending fits this pattern. For instance, when the government borrows money to build a highway, future generations receive a capital asset that offsets the liability incurred to build the

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essential argument was stated most simply and clearly in an earlier edition of Professor Paul Samuelson’s economics text:

The principal way one generation puts a burden on itself later or on a later generation is by bequeathing it less real capital than would otherwise have been the case. Any growth of public debt that has this effect—as in the case of full-employment borrowing for current public consumption that has to be offset by contractionary monetary policy which will lower investment—most definitely does involve a genuine “burden.”

P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 357 (7th ed. 1967). The most recent edition of Samuelson’s text contains a much more complicated analysis (which I commend to those who are interested); it concludes that “private capital may be displaced by government debt” but “we do not know the extent to which” this effect actually occurs in practice. P. SAMUELSON & W. NORDHAUS, *ECONOMICS* 361, 362 Fig. 17-7 (12th ed. 1985) (emphasis omitted). Both editions also note that the portion of the deficit that is financed by borrowing from foreigners involves a net subtraction from the goods and services available to people in this country. P. SAMUELSON, *supra*, at 357; P. SAMUELSON & W. NORDHAUS, *supra*, at 360.

Thus, to the extent that a portion of the current deficit is (1) attributable to current consumption rather than the creation of offsetting capital assets, and (2) is financed by borrowing from foreigners, it seems clear that the current generation does impose a net burden on future generations through the deficit.

56. Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORGANIZATION 313, 329 (1985).

57. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981) (invalidating Iowa statute banning 65-foot double trucks, a measure which the Court concluded would increase the number of accidents and “shift the incidence of them . . . to other States”) (footnote omitted); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating Arizona statute requiring in-state packaging of produce where compliance would subject producer to substantial additional capital expenditure).



highway. A great impediment to making sense of the deficit is that, unlike most businesses, the government does not use accounting techniques to adjust for the difference between the times when costs are incurred and benefits are received. Because the government lacks such a capital budget, it is difficult for us to judge whether we are treating future generations fairly by bestowing assets that are roughly equal in value to the liabilities we impose.<sup>58</sup> Improved national accounting might be a useful tool, but it alone will not eliminate the problem of inter-generational equity and the deficit. For example, how is one to estimate the benefits to future generations from the "human capital" created by a school lunch program, or for that matter, the alleged increase in national security that comes from building an additional MX missile?

The important point for the moment, however, is not to judge what proportion of the current deficit is actually attributable to politicians succumbing to the temptations of inter-temporal cost-externalization; it is enough for present purposes to recognize that powerful incentives are inherent in the existing political structure for politicians to engage in inter-temporal cost-externalization. Unlike the commerce clause, which protects (albeit imperfectly) citizens in other states from geographic cost-externalization, our Constitution provides no restraints or defenses against inter-temporal cost-externalization.

Not all of the framers overlooked this problem. Thomas Jefferson saw it clearly in his famous letter to Madison in which he criticized the French national debt on the grounds that "the fruits of the earth belong to the living," and argued that one generation does not have the moral right to incur debts binding on another.<sup>59</sup> But on this point, Madison, rather than Jefferson, prevailed.

We may stipulate that James Madison was one of the wisest political theorists who ever lived, but that does not change the fact that he was mortal, and on certain issues at least, even Madison was not omniscient. Examine what Madison had to say in the *Federalist* about the problem of interest groups, which he calls "factions." Madison recognized that "majority factions" may represent a serious threat to the public interest, and most of *Federalist 10* is devoted to explaining the safeguards that the framers built into the Constitution to insure that a majority could not use the democratic process to oppress a minority. What has not attracted sufficient notice about Madison's argument in *Federalist 10*, however, is

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58. Compare Eisner & Pieper, *How to Make Sense of the Deficit*, 78 PUB. INTEREST 101, 103 (Winter 1985) (describing the need for a capital budget) with B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 221-27 (1980) (obligation of one generation to treat future generations fairly).

59. Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, 15 THE PAPERS OF THOMAS JEFFERSON 392 (J. Boyd ed. 1958).

the cavalier way in which he dismisses "minority factions" as a potential threat to the public interest:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It [a minority faction] may clog the administration; it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.<sup>60</sup>

Madison's argument that popular elections are sufficient to insure that minority interest groups do not pose a serious threat to the public interest is simply wrong. Madison's argument depends on the assumption that majorities will take the steps necessary to inform and organize themselves to protect their self-interest, but this assumption is demonstrably wrong, as Mancur Olson has shown in his recent book, *The Rise and Decline of Nations*.<sup>61</sup> The entire public choice tradition, from George Stigler on the right<sup>62</sup> to Lester Thurow on the left,<sup>63</sup> is devoted to showing why Madison's intuitively plausible assumption—that majorities will necessarily be successful in defending their interests through democratic elections alone—is quite wrong.

Democratic elections were not, however, the only defense that the framers of the Constitution erected against undue influence by special interest groups. They carefully crafted a political system in which various elements of the federal government would be elected by different constituencies in the hope that diversity in the distribution of interests among the varying electoral constituencies would prevent any special interest group from exercising undue influence over the government as a whole. A critical element of these defenses against the power of special interests was to distance one house of Congress from the immediate pressures of electoral politics by providing that members of the Senate would not be elected directly, but would be chosen by the state legislatures.<sup>64</sup> The reason for this design choice is explained by Hamilton in *Federalist No. 60*:

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60. THE FEDERALIST No. 10, at 132 (J. Madison) (B. Wright ed. 1961). Madison goes on to say that the real danger is posed by majority factions, which may use popularly elected government "to sacrifice . . . both the public good and the rights of other citizens." *Id.* The "great object to which our inquiries are directed," Madison continues, is how to "secure the public good and private rights against the danger of such a [majority] faction." *Id.*

61. M. OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 17-18 (1982).

62. Stigler, *supra* note 50.

63. L. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* (1980).

64. U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, *chosen by the legislature thereof*, for six Years . . ." (emphasis added)). *But see* U.S. CONST. amend. XVII (direct popular election of Senators).

The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by the electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.<sup>65</sup>

The basic institutional checks designed by the framers of the Constitution to limit the power of interest groups have long since eroded. First, the seventeenth amendment provided direct popular election of Senators.<sup>66</sup> Second, the electoral college has now become largely vestigial, so that as a practical matter, the President is also popularly elected. Third, a vast "administrative state" with broad delegated powers has arisen that lies largely outside the system of checks and balances crafted so carefully by the framers.<sup>67</sup> Finally, as both the country and the nature of government have changed, the principle of geographic diversity of interests, upon which the framers placed primary reliance,<sup>68</sup> is no longer as potent a check on the power of special interest groups as it may once have been. Today there are many interest groups that are more or less evenly distributed throughout the country (social security recipients, for example), and they can bring potent electoral pressures to bear on Representatives, Senators, and Presidents alike.

The cumulative effect of these changes is to render our political institutions systematically vulnerable to the influence of well-organized, narrowly-focused groups seeking subsidies or other forms of preferential treatment from the federal government. The current deficit is merely the outward symptom of these more fundamental problems, resulting from the way in which our political institutions have evolved.

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65. THE FEDERALIST No. 60, at 405 (A. Hamilton) (J. Cooke ed. 1961); see also THE FEDERALIST No. 62, at 418 (J. Madison) (J. Cooke ed. 1961):

[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. . . . [A]s the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies; it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

66. U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years . . . ." (emphasis added)).

67. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 146-47.

68. The framers of the Constitution conceived of the primary powers of government as those of regulating economic activity, and, as a consequence, they were concerned primarily with ensuring that no single economic interest group would secure the power to legislate to the detriment of others. See THE FEDERALIST No. 60, *supra* note 65, at 405-06:

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest?

## IV.

It follows from the foregoing that in order to deal with the problem of the deficit, some form of constitutional change is going to be necessary, because the root causes of the deficit lie deep in the structure of our modern political institutions. This is really the fundamental point of disagreement between opponents and proponents of a convention to consider reforms to deal with the deficit. For example, in a 1979 essay opposing a convention, Bruce Ackerman argued that “[t]he convention mechanism should be reserved for moments of real crisis—when the states are willing to assert the need for an unconditional reappraisal of constitutional foundations.”<sup>69</sup> Ackerman’s conclusion is based in part on his legal position that article V does not permit the scope of conventions to be limited in any way. I do not propose to enter the on-going legal debate over that issue,<sup>70</sup> although I would note that the legislative history of the convention method of proposing amendments to the Constitution, which is reviewed in Section I, suggests that the framers believed that conventions might be appropriate in circumstances less dramatic than what Professor Ackerman might characterize as moments of “real crisis.” I do agree with Professor Ackerman’s central point, however, that conventions for proposing amendments—like constitutional amendments proposed by Congress—should be used only if the problem to be addressed calls for a “reappraisal of constitutional foundations.”<sup>71</sup>

Professor Ackerman goes on to assert that the deficit is not a problem that merits such a “reappraisal”: “Of course, if the state legislatures were convinced that they must apply for a full-fledged constitutional convention or none at all, the present bubble [of support for a convention] would burst immediately. Nobody thinks we are now in the midst of constitutional crisis.”<sup>72</sup>

Ackerman’s analysis may be accurate as a psychological assessment of the motives of certain state legislatures; many states have attempted to narrow their “calls” for a convention to the balanced budget amendment because they share Professor Ackerman’s view that budget deficits are not a problem that merits a full-scale convention for the “reappraisal of constitutional foundations.”

Perhaps it is time to question the premise that underlies both Ackerman’s analysis and that of the state legislatures that have limited their “calls” for a convention to the consideration of the so-called balanced

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69. Ackerman, *supra* note 12, at 8.

70. See *supra* text accompanying note 13.

71. Ackerman, *supra* note 12, at 8.

72. *Id.* at 8-9.

budget amendment.<sup>73</sup> A key question that needs to be taken more seriously is whether the causes of the deficit really lie only in the surface politics of the moment, or whether the roots run deeper into the structure of our institutions. Perhaps even Ackerman could not assert as blithely today as he did in 1979 that “nobody” thinks we are in the midst of a situation that merits a fundamental reappraisal of institutions. Since Ackerman wrote, we have witnessed a continuing series of ineffectual attempts by our national political institutions to come to grips with the deficit.<sup>74</sup> Perhaps this will not continue, and sometime during the next decade we will suddenly experience a great breakthrough that finally puts us on the path of eliminating the deficit through ordinary political means. If that happens, undoubtedly the steam will go out of the movement to call a convention to deal with the deficit.

But suppose for a moment that the political history of the next decade is not so happy; suppose instead that the process continues for the next decade as it has for the last, with politicians posturing and attempting to shift responsibility to one another, but without any real reform. At that point, I suspect that many more of us will be prepared to consider the possibility that the deficit is merely the surface symptom of a more fundamental imbalance in our political institutions which cannot be remedied short of some form of constitutional change.

Let me emphasize, however, that I do not necessarily equate “constitutional change” with the text of *the* Constitution itself. I agree with Gerhard Casper’s point that much of the law that performs the function of constituting our government and defining power relationships among institutions is performed not by the Constitution as such, but by a framework of statutes and other laws.<sup>75</sup> My point is only that the basic ground rules under which politicians function are going to have to change before anything substantial can be done about the deficit. Conceivably, struc-

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73. For the text of the so-called “Balanced Budget Amendment,” see *infra* note 102.

74. The first, and perhaps the most ambitious, attempt to gain control of the deficit through statutory reform was the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C.A. §§ 621-688 (1985)). Although moderately successful in achieving certain more limited objectives (such as improving the budgetary information available to Congress), the new congressional budget process has been a dismal failure as a mechanism for controlling deficits. See A. SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 568-73 (1980) (summarizing critics’ complaints that budget process failed because it did not curb growth in federal spending or produce balanced budget); Schick, *The First Five Years of Congressional Budgeting*, in THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS 3, 27 (R. Penner ed. 1981) (“Those who wanted the congressional budget to be a contest over national priorities have been greatly disappointed.”).

75. See Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187, 197-98 (1985); see also Elliott, *supra* note 67, at 169 (citing Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976)).

tural changes could be accomplished by statute or even by a rule of Congress. The important point, nevertheless, is that the impetus for a change in the ground rules cannot be expected to come from Congress itself.

The essential reason why we cannot expect Congress to initiate the kinds of changes that will be necessary to deal with the deficit is that incumbents are among the prime beneficiaries of the present system.<sup>76</sup> The present system allows incumbents to enhance their prospects for re-election by catering to well-organized interest groups and imposing costs on future generations. There is no reason to assume that Congress will volunteer to be part of the solution, because Congress is part of the problem.

The enactment of the Gramm-Rudman-Hollings legislation<sup>77</sup> does not in any way conflict with this analysis. On the contrary, Gramm-Rudman-Hollings confirms many aspects of my argument. In the first place, the "impetus" for the legislation did not come from Congress. Rather, it was a response by Congress to a perception that the public was demanding action to deal with the deficit.<sup>78</sup> Like the seventeenth amendment,<sup>79</sup> Gramm-Rudman-Hollings was passed in part to stave off the drive to call a constitutional convention. Thus, if Gramm-Rudman-Hollings ultimately proves to be a success as a legal mechanism for addressing the deficit, the wisdom of the framers in including in the Constitution the right to petition for a constitutional convention will once again be confirmed. On the other hand, if Gramm-Rudman-Hollings does not succeed, the public will become increasingly aware that constitutional change is needed to address the political causes of the deficit.

It is thus immaterial to the purposes of this article to speculate about whether Gramm-Rudman-Hollings will "work." But it should be noted that whether Gramm-Rudman-Hollings really represents decisive action by Congress to deal with the deficit is at least debatable. Instead, Gramm-Rudman-Hollings may turn out to be merely the latest in a long series of cosmetic gestures by which Congress declares that decisive action to deal with the deficit will be taken at some time in the future (pref-

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76. See M. FIORINA, *supra* note 45, at 41-42 (major activity of members of Congress is constituent service because it enhances re-election prospects).

77. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037 [hereinafter referred to by its popular name, "Gramm-Rudman-Hollings"].

78. See 131 CONG. REC. S17390 (daily ed. Dec. 11, 1985) (statement of Sen. Gramm) ("This bill is going to become law because the people who do the work, pay the taxes, pull the wagon, and make America work are for it . . ."); *id.* at S17391 (statement of Sen. Hollings) ("What the people said was that something had to be done about these continuing deficits which are bankrupting the future of America. 'And we want something done now,' is what they said.").

79. See *supra* text accompanying notes 35-36.

erably by someone else and after the next election).<sup>80</sup> The actual cuts in government spending required by Gramm-Rudman-Hollings for fiscal 1986 are relatively small (“only” \$11.7 billion); in fact, the cuts required under the legislation for fiscal 1986 are actually *smaller* than the spending-cut goals agreed upon by the President and Congress prior to the enactment of Gramm-Rudman-Hollings.<sup>81</sup> Thus, in the short run, the effect of Gramm-Rudman-Hollings is actually to give Congress an excuse to make *fewer* cuts than previously agreed, in exchange for a promise to make even bigger cuts in fiscal 1987, after the next election. And, of course, when 1987 arrives, Congress will not be legally bound to adhere to the commitments made in Gramm-Rudman-Hollings, just as it was not legally bound to adhere to the deficit ceilings it declared in the Deficit Reduction Act of 1984.<sup>82</sup> Congress can always change Gramm-Rudman-Hollings, just as it changed every other previous statute in which it declared that it would deal with the deficit (not now, of course, but *mañana*).

Gramm-Rudman-Hollings may be different, however, because it does not require Congress to *do* anything to cut the deficit; if Congress fails to act, cuts go into effect “automatically.”<sup>83</sup> This feature is its central genius because the provisions for “automatic” cuts alter the political equation facing members of Congress. Before Gramm-Rudman-Hollings, if spending was cut or taxes increased, individual members of Congress could be held responsible; under Gramm-Rudman-Hollings, cuts are made, but no one can be blamed.

In concept, this change in the “rules of the political game” is tantamount to the kind of “constitutional” change by statute that was called for earlier in this article.<sup>84</sup> It is worth noting, however, that this feature of Gramm-Rudman-Hollings has recently been declared unconstitutional by a three-judge district court.<sup>85</sup> Although couched in the language of separation of powers, the court’s decision can be understood as saying that a change in the power relationship between Congress and the other branches as fundamental as that made by Gramm-Rudman-Hollings cannot be made by statute, but would require a constitutional amend-

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80. See Schiller, *Gramm-Rudman: Toothless Dragon*, N.Y. Times, Feb. 6, 1986, at A29, col. 3; see also Roberts, *Politics of Deficit: Economic Move Tied to Election*, N.Y. Times, Oct. 28, 1985, at A15, col. 1.

81. See Deficit Reduction Act of 1984, Pub. L. 98-369, § 2101, 98 Stat. 494, 1057 (1984).

82. See Schiller, *supra* note 80.

83. See Gramm-Rudman-Hollings, *supra* note 77, §§ 251-252 (“sequestration” procedures).

84. See *supra* text accompanying note 75.

85. *Synar v. United States*, C.A. No. 85-3945, slip op. at 48-49 (D.D.C. Feb. 7, 1986), *prob. juris. noted*, 54 U.S.L.W. 3548 (U.S. Feb. 24, 1986) (No. 85-1377); see also Pear, *U.S. Judges Hold New Budget Law Unconstitutional*, N.Y. Times, Feb. 8, 1986, at 1, col. 3.

ment. This is not the place to explore whether the lower court's ruling will, or should, stand up on appeal. The distinct possibility that a central feature of Gramm-Rudman-Hollings may ultimately be voided by the Supreme Court as unconstitutional does demonstrate, however, that the prospect of a constitutional convention to deal with the deficit is far from moot.

The efficacy of the political innovation brought about by Gramm-Rudman-Hollings depends significantly on automatic budget cuts mandated by an institution outside of Congress; no congressional action is required. If Gramm-Rudman-Hollings is stripped of this feature by the Supreme Court, the inevitability of constitutional change to deal with the deficit will become clear. If we are to deal decisively with the deficit, the political incentives that cause Congress to function as it does must be changed—if not through Gramm-Rudman-Hollings, then in some other way.

Many opponents of a convention to consider ways to deal with the deficit deny that the responsibility for the deficit lies with Congress. Instead, they attribute the deficit to an absence of responsible leadership in the current administration. For example, in a recent article<sup>86</sup> Senator Daniel Patrick Moynihan argues that the current deficit was created deliberately by the Reagan administration to serve its own "strategic, political purposes" of forcing Congress to make deep cuts in domestic social spending: "The deficit was policy, a curious legacy of the young radicals who came to power in 1981, but not a symptom of a failed system of Government."<sup>87</sup>

Perhaps Senator Moynihan is correct in maintaining in 1985 that the cause of the deficit is not structural defects in the legislative process, but merely the lack of wisdom of certain politicians in the other political party. In evaluating Senator Moynihan's argument, however, it may be worth bearing in mind that four years ago the same Senator Moynihan was opposed to a convention to deal with the deficit precisely because he expected the new administration and Congress to act decisively in 1981 to eliminate the deficit: "Surely advocates of a balanced budget should feel they won the last election, and that their wishes have been heard. Congress is now trying. As we tried last year. Cannot they now declare victory? Can we not hear clearly from the President on this matter?"<sup>88</sup> Perhaps Senator Moynihan will prove right this time, and "with luck"

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86. Moynihan, *Reagan's Inflate-the-Deficit Game*, N.Y. Times, July 21, 1985, § IV, at 21, col. 1.

87. *Id.*

88. Moynihan, *The Imprudence of Forcing a Balanced Budget*, Wall St. J., Mar. 18, 1981, at 28, col. 4.



we will indeed eliminate the growth of the deficit by the year 2000. But if we do not, perhaps we should stop trying to explain away each failure in terms of the superficial politics of the moment. Instead, we may begin to discern a pattern which suggests that the problems lie deeper in the structure and relationships among our modern political institutions.

From a broad, historical perspective it should be relatively clear that in the long run we cannot depend on the presidency to balance the budget, no matter who the incumbent may be. By the nature of the office, the modern presidency is the source of broad governmental initiatives.<sup>89</sup> In one administration, the initiative of the moment may be a trillion dollar program to modernize the nation's defenses; in the next, a war on poverty, or a move to clean up toxic wastes. The fact that one considers this or that particular presidential initiative unwise is beside the point. What is important is that because of the nature of the presidency, there is likely to be a broad executive program that is usually going to involve significant governmental expenditures. It follows, therefore, that we cannot expect the executive to act year in and year out as the principal restraint on governmental expenditures.<sup>90</sup>

Fiscal discipline is going to have to come from Congress. This point ought to be evident from the text of the Constitution, which commits the power over the purse not to the President but to Congress.<sup>91</sup> Moreover, it is also evident from our history that the primary locus for fiscal restraint must be in Congress. In a highly significant article, political scientist Norman J. Ornstein reviewed the governmental responses to deficits throughout our history.<sup>92</sup> Ornstein concluded that when deficits became a significant problem in the past, concentration of power in the hands of a few "barons" in Congress enabled them to restrain spending by their colleagues:

[T]he problems of the 1960s and 1970s were not just the result of poor economic performance, presidential programs and misfeasance, and such noble but misguided actions as indexing entitlements. Congress

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89. There is, of course, a vast literature on the presidency. For one work illustrating the conventional view that the President is inherently an initiator of governmental action, see R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960).

90. From this perspective, the attempt by the executive branch during the Nixon-Ford years to restrain spending by "impounding" appropriated funds emerges as an aberration. Moreover, the legal status of the power of the executive branch to control spending by impounding funds is doubtful. See *Train v. City of New York*, 420 U.S. 35, 45-46 (1975); *Local 2677, American Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60, 76 (D.D.C. 1973).

91. See U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

92. Ornstein, *The Politics of the Deficit*, in *ESSAYS IN CONTEMPORARY ECONOMIC PROBLEMS*, 1985: THE ECONOMY IN DEFICIT 311 (P. Cagan ed. 1985).

itself has contributed to the deficit problem, through institutional reforms that removed many of its traditional restraints on federal spending. Since the 1920s . . . Congress had relied on tough-minded, institution-oriented, and strong-willed Appropriations committees to put brakes on the natural political impulses to spend more money for individual political advantage. During the 1940s and 1950s . . . important Appropriations Committee chairmen . . . erected internal incentives and restraints on their committee members to keep the committees acting as guardians of the federal treasury. But reforms in the late 1960s and early 1970s diluted the role of the Appropriations committees and, by democratizing and decentralizing power to a large number of subcommittees, to rank-and-file members, and to the staff, removed many of the existing restraints on the growth of federal spending. Individual members and subcommittees, led by entrepreneurs seeking political advantage, reputation, and power, came up with new ideas for more spending and accelerated the problems of the 1970s.<sup>93</sup>

Ironically, then, the congressional "reforms" of the 1970's are one of the principal institutional "causes" of the deficit. With the demise of the seniority system in Congress and the diffusion of power among individual members, it is doubtful that sufficient concentrations of power are left in Congress to enable it to resist the pressures to spend that emanate from electoral politics in a welfare state.

No one advocates that we bring back the seniority system. It is possible to imagine, however, that Congress might again create within itself new concentrations of power that could discipline spending, as powerful Appropriations Committee chairmen did in the past. Indeed, at least some supporters of the 1974 Congressional Budget and Impoundment Control Act hoped that eventually the Budget Committee of each house might perform that function.<sup>94</sup> To date, the budget committees have not been able to achieve the power to discipline spending, primarily because other committees of Congress have been unwilling to be restricted by "ceilings" laid down by the budget committees; as a practical matter, the process has frequently worked in the opposite direction, with the budget committees merely endorsing a "ceiling" arrived at by adding up the spending plans of other committees.<sup>95</sup>

Although, of course, no one can predict the future with certainty, it seems fair to surmise that other attempts to create central, disciplining institutions within Congress are likely to suffer a similar fate. Greater power has devolved to rank-and-file members of Congress in recent

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93. *Id.* at 319-20.

94. See B. ASBELL, *THE SENATE NOBODY KNOWS* 143-58 (1978); *id.* at 151 (statement by Senator Edmund Muskie: "If the Budget Act is to mean anything, . . . it means that at some point we must say, 'This much and no more' . . .").

95. See Schick, *supra* note 74, at 27.

years; it is difficult to conceive of the circumstances that would lead these members of Congress to renounce their new powers voluntarily. It follows that the impetus for real institutional reform will have to come from outside of Congress.

Thus, it is not likely that Congress will grant the President's request that he be given a "line item veto,"<sup>96</sup> because the line item veto would reduce the power of individual members of Congress over spending decisions.

It is important to be clear, however, that the thesis that the stimulus for real institutional reform must originate outside of Congress does not imply that Congress will never take any action, nor does it imply that a convention will actually have to be convened in order to produce some effect. On the contrary, it is a fundamental premise of institutional analysis that "the most effective kind of power" is power "that does not have to be used to be effective."<sup>97</sup> Thus, on several prior occasions in our history, Congress was prodded to act by the developing *threat* of a convention to propose amendments to the Constitution.<sup>98</sup>

Bruce Ackerman, Jolin Millian, and I recently coined the term "Politicians' Dilemma" (by analogy to the well-known "Prisoners' Dilemma" in game theory) to describe a phenomenon by which the threat of action by others provokes individuals to take actions that would otherwise not be in their interest.<sup>99</sup> Our thesis was that certain industries were persuaded to support federal environmental legislation in the late 1960's and early 1970's, even though ideally they would have preferred to remain unregulated; they were persuaded because a combination of institutional structures and the developing political organization of environmentalists confronted them with the credible threat that something even worse, from their perspective, than federal legislation would come about if they did nothing.<sup>100</sup> In that instance, the "impetus" for federal environmental legislation came from successful political organizing by environmentalists at the state and local level.

The growing threat of a convention to propose constitutional amendments to deal with the deficit creates a similar "Politicians' Dilemma" for members of Congress. This may stimulate Congress to act (through measures such as Gramm-Rudman-Hollings), even though ide-

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96. See President Ronald Reagan's 1985 State of the Union Address, 131 CONG. REC. H322, H324 (daily ed. Feb. 6, 1985).

97. Elliott, *supra* note 67, at 152; see also C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS: NATURE AND DEVELOPMENT 16-18 (1937) ("rule of anticipated reactions").

98. See *supra* note 35.

99. Elliott, Ackerman & Millian, *supra* note 56, at 324-26.

100. *Id.* at 326.

ally individual members might prefer to keep existing institutional arrangements. However, there are good reasons to believe that the measures that emerge from a Congress prodded to action by the threat of a convention may not be as desirable as the reforms that would be suggested by a convention. For example, Gramm-Rudman-Hollings exempts from cuts certain programs that together comprise about half of the budget, including Social Security and some farm subsidies.<sup>101</sup>

## V.

For a number of reasons, I believe that the amendment-proposing convention created by the framers in article V is a particularly appropriate body to undertake the fundamental reassessment of the design of our political institutions to deal with the deficit. As the legislative history reviewed in Section I shows, the framers of the Constitution intended the amendment-proposing convention to be a device for proposing constitutional reforms when Congress could not be expected to act. Moreover, a convention has the freedom to debate a variety of proposals in an attempt to come up with satisfactory institutional reforms. It would be premature to anticipate in detail the possible solutions that might be proposed by a convention; the purpose of the convention is to debate and develop possible solutions. But one can at least suggest some tentative areas that a convention might consider.

The starting point for a convention to deal with the deficit must be a recognition that the causes of the deficit lie in the structure of our modern political institutions. Until we resolve the underlying institutional issues, no stop-gap measure can truly resolve the problem of the deficit. Thus, the same reasons why I favor a convention to consider how to deal with the deficit are precisely the reasons why I am opposed to the balanced budget amendment.<sup>102</sup> The balanced budget amendment would

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101. See Gramm-Rudman-Hollings, *supra* note 77, §§ 255-256; see also *Deficit Magic: Worse Than Nothing*, N.Y. Times, Nov. 1, 1985, at A34, col. 1.

102. Several different versions of the so-called Balanced Budget Amendment have been introduced, but most incorporate the essential features of the following resolution which was introduced in the current Congress:

SECTION 1 Prior to each fiscal year, the Congress shall adopt a statement of receipts and outlays for that year in which total outlays are not greater than total receipts. The Congress may amend such statement provided revised outlays are no greater than revised receipts. Whenever three-fifths of the whole number of both Houses shall deem it necessary, Congress in such statement may provide for a specific excess of outlays over receipts by a vote directed solely to that subject. The Congress and the President shall ensure, pursuant to legislation or through exercise of their powers under the first and second articles, that actual outlays do not exceed the outlays set forth in such statement.

SECTION 2 Total receipts for any fiscal year set forth in the statement adopted pursuant to this article shall not increase by a rate greater than the rate of increase in national income in the year or years ending not less than six months nor more than twelve months before such fiscal year, unless a majority of the whole number of both Houses of Congress shall

treat a symptom, without addressing its underlying causes. Therefore, it would be doomed to failure, if not worse.<sup>103</sup>

If I am correct that the causes of the deficit lie in the structure of political institutions, the ultimate solution must also lie in reforming institutions. A good place to start would be by reconsidering the seventeenth amendment, which mandated direct election of Senators, thereby nullifying one of the principal restraints on the power of special interests which the framers had carefully designed into the original Constitution.<sup>104</sup> No one would suggest that we should go back to the original method of selecting Senators by state legislatures; indeed, the primary reason for the seventeenth amendment was that selection of Senators by state legislatures proved impractical and frequently resulted in vacancies, corruption, and paralyzing deadlocks in the state legislatures.<sup>105</sup> But perhaps in moving away from state legislatures, we did not give sufficient consideration to the long-run effects of tying both houses of Congress directly to the electorate. Particularly in a modern welfare state, in which many of us receive benefits directly from the government, it might be better if there were at least one institution in the government that was free to consider allocative decisions from the standpoint of the long-run

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have passed a bill directed solely to approving specific additional receipts and such bill has become law.

SECTION 3 Prior to each fiscal year, the President shall transmit to Congress a proposed statement of receipts and outlays for that year consistent with the provisions of this article.

SECTION 4 The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect.

SECTION 5 Total receipts shall include all receipts of the United States except those derived from borrowing and total outlays shall include all outlays of the United States except those for repayment of debt principal.

SECTION 6 The Congress shall enforce and implement this article by appropriate legislation.

SECTION 7 This article shall take effect for the second fiscal year beginning after its ratification.

S.J. Res. 13, 99th Cong., 1st Sess., 131 CONG. REC. S335 (daily ed. Jan. 3, 1985); *see also* H.R.J. Res. 27, 99th Cong., 1st Sess. (1985).

103. The serious flaws in the proposed balanced budget amendment are almost too numerous to mention. It would be very difficult to enforce in practice, and its terms invite evasion and litigation. Moreover, distinguished economists have expressed concern that the balanced budget amendment would hamstring national economic policy. Paradoxically, both problems can be traced to a common conceptual source. The proposed balanced budget amendment grows out of dissatisfaction with the way in which the national political process has exercised its discretion over taxing and spending decisions. Rather than attempt to remedy the defects in the political process that have caused discretion to be exercised as it has been, however, the authors of the proposed balanced budget amendment attempt to limit the power of national political institutions to make discretionary decisions on fiscal matters.

Because it does not deal with root causes, this effort is doomed to fail. Because it attempts to restrain decisions which must by their nature remain flexible, the cure might well be worse than the disease.

104. *See supra* text accompanying note 87.

105. For an analysis of the factors that led to the adoption of the seventeenth amendment, see 1 G. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 85-117 (1938).

best interests of the United States as a whole, without regard to the political consequences in the next election. This would be a major change in political direction, and it should not be undertaken without thorough political debate and reflection. Perhaps a convention might conclude that the best way to deal with the deficit, and indeed with the problems of special interest legislation generally, would be to rewrite the seventeenth amendment so that Senators would serve one twelve-year term, without possibility of re-election.

Whether there is merit in this particular illustration of the kinds of matters that a convention might consider is beside the point. It is offered only as an example to illustrate the kind of fundamental reassessment of institutional relationships that will eventually have to be made if we are truly going to deal with the deficit.

One need not believe that our generation is particularly blessed with an abundance of "Madisons" and "Jeffersons" in order to believe that we should welcome a convention to consider ways to deal with the deficit. The point is not that the people who would represent us at a convention are "wiser" or "better" than the people who represent us in Congress; on the contrary, some of them might be the same people. Rather, the key to understanding why a convention might be able to solve a problem that Congress cannot solve is recognizing that a convention would address the issues surrounding the deficit in a setting vastly different from that in which Congress functions.

The first major difference between Congress and a convention as institutions for considering how to deal with the deficit is that a convention is an *ad hoc* assembly, called into existence only in extraordinary circumstances to deal with a momentous national problem. The fact that the nation has never before felt the need to call a convention into being would inevitably imbue the occasion with a sense of historical significance and purpose that would transcend the "politics as usual" atmosphere that prevails in Congress. Moreover, the historical parallel between this convention and the first constitutional convention two hundred years earlier could not help affecting the way that the delegates would conceive of the task before them. One should not minimize the significance of a setting rich with history and tradition in motivating men and women to transcend the narrow politics of the moment; the performance of Congress during the Watergate era is an example within recent memory of ordinary men and women performing in an extraordinary fashion when they find themselves in a setting of obvious historical significance.

Moreover, history and tradition would also influence the decisions by the states concerning whom to send to the convention. What few

historical precedents exist suggest that delegates to a convention would be selected in a manner that would minimize the potential influence of special interest groups in the selection process.<sup>106</sup> But even if that were not the case, and delegates to a convention were selected in exactly the same way as members of Congress, there is no reason to assume that voters would value the same things in a potential delegate to a constitutional convention that they value in a candidate for Congress. Like the delegates themselves, the electorate would also be influenced by the historical moment of the occasion and by the nature of the issues that the convention was called to consider.

Although history and tradition are undoubtedly of the utmost importance, there are also structural reasons why delegates to a convention could approach the problem of the deficit from a perspective different from that of Congress. Members of Congress are imbedded in a complex web of ongoing relationships and incentives; for example they have positions of power on particular committees, and they must face re-election at frequent intervals by residents of geographic areas in which particular interests are concentrated. When they analyze a proposed measure relating to the deficit, they cannot avoid being influenced by predictions of its effect on their own personal prospects in the next Congress and in the next election.

The influence of narrow, self-interested considerations would be far less pronounced in a convention to propose amendments to the Constitution. First, not all the delegates would be members of Congress, with a personal, political stake in the outcome. Even more importantly, a convention to propose a constitutional amendment to deal with the deficit would frame issues at a higher level of generality and abstraction. The issue would no longer be how much to cut farm subsidies or social security next year, but rather how to restructure the political institutions

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106. Most of the delegates to the 1787 convention were selected by state legislatures, while a few were appointed by state governors. C. WARREN, *THE MAKING OF THE CONSTITUTION* 808-09 (1929); see also 1 *DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1786-1870*, at 9-46 (1894) (collecting state acts and resolutions appointing delegates). Although each state delegation contained multiple members, each state cast only a single vote at the convention. See F. McDONALD, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 26 (1982). Both indirect elections and block voting by states would tend to attenuate the influence of interest groups.

In recent years, several bills have been introduced in Congress to provide that delegates to a convention would be popularly elected in the same number and manner as Senators and members of the House of Representatives: two delegates elected at large from each state, and one elected from each congressional district. See S. 2812, 98th Cong., 2d Sess. § 7(a) (1984); H.R. 3373, 98th Cong., 1st Sess. § 7(a) (1983); see also AMERICAN ENTERPRISE INSTITUTE, *PROPOSED PROCEDURES FOR A LIMITED CONSTITUTIONAL CONVENTION* 26-27 (1984). From the standpoint of reducing interest group influence on the delegates, the procedures suggested recently are less desirable than the historical precedents.

which would make such decisions in the future. Focusing on the "rules of the game," rather than on particular outcomes, would make it much more difficult to discern whether any particular congressional district would "win" or "lose" from the changes. As philosopher John Rawls has argued persuasively, just outcomes are more likely when participants consider issues behind a "veil of ignorance" that prevents them from knowing whether they personally would gain or lose from the rules which are adopted.<sup>107</sup> A constitutional convention concerned with institutional issues comes as close as a real-world institution can to duplicating the conditions of Rawls's "veil of ignorance."

Moreover, the fact that a convention is an ad hoc assembly, called into being to deal with a particular national problem, rather than a continuing body like Congress that deals with a variety of issues over time, would also tend to reduce the influence of narrow interests and partisan political considerations. At least since Kenneth Arrow proposed his famous Impossibility Theorem,<sup>108</sup> students of politics have recognized the importance of side deals and vote trading (i.e., "logrolling") in the functioning of democratic bodies.<sup>109</sup> Representatives of narrow interests not shared by the majority are able to dominate democratic voting if, *but only if*, they are able to make deals with one another to trade support on one issue for support on another.<sup>110</sup> But unlike members of Congress, who deal with one another on a variety of issues over time, the delegates to a convention called to deal with the single issue of the deficit would have very little to trade with one another in order to marshal a majority in favor of measures that would only benefit narrow interests. A convention would have to find a solution which appeared to be in the interest of a substantial majority of Americans, or it would not be able to agree on any solution at all.

Finally, an amendment-proposing convention is an appropriate legal mechanism to deal with the deficit because of its open-ended character. The deficit is a symptom of the need for a critical reassessment of certain aspects of our politics. It is impossible to predict in advance exactly where such a re-evaluation might lead. A convention provides a forum in which delegates representing the people come together to debate and deliberate in the hope of finding solutions that will be acceptable to three-fourths of the states.

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107. J. RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

108. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59-60 (1963).

109. *See, e.g.*, A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 26 (1979).

110. Riker & Brams, *The Paradox of Vote Trading*, 67 *AM. POL. SCI. REV.* 1235, 1236 (1973); *see also* Ackerman, *Beyond Carolene Products*, 98 *HARV L. REV.* 713 (1985) ("discrete and insular minorities" possess disproportionately large political power because of ability to make deals with other groups).



I realize that this open-ended quality is exactly what many people fear about a convention. They imagine that a convention might become a runaway that would, for example, repeal the first amendment, or that a convention might become a forum in which various groups, from those opposed to abortion to those who wish to abolish the Electoral College, might seek to write their pet projects into the Constitution.

Undoubtedly, there are real risks to holding a convention. But there are also real risks to continuing "business as usual," without taking extraordinary action to deal with the deficit. Moreover, I believe that the fears of the opponents of a convention are largely overstated. First of all, it is not self-evident to me that the first amendment, as interpreted by the Supreme Court in recent years, should be above scrutiny. In *Buckley v. Valeo*,<sup>111</sup> *First National Bank of Boston v. Bellotti*,<sup>112</sup> and *Federal Election Commission v. National Conservative Political Action Committee*,<sup>113</sup> the Burger Court has written into the first amendment the proposition that special interests have an inviolable constitutional right to raise and spend unlimited amounts of money to influence public policy. The only plausible effect of these decisions, in my view, is to exacerbate the problems of minority factions already identified in the public choice literature. If I were to start looking for ways to change the Constitution in order to deal with the deficit, the first amendment is not where I would begin, but neither do I believe that it should be immune from consideration by a convention called to consider the underlying causes of the deficit.

There are even more fundamental reasons why I do not share the fears of a runaway constitutional convention. As a legal matter, an article V convention simply does not have the power to "rewrite" the Constitution; it may only "propose" amendments, which do not become effective unless they are approved by three-quarters of the states. But at bottom, the restraints on a convention would be political, not legalistic. I have no doubt that a few groups would try to bring their pet projects for amending the Constitution before the convention. Yet I also have no doubt that after a few days or weeks of heated and inconclusive debate, a majority of the convention would decide to limit its focus to the problems that led two-thirds of the states to "call" a convention. Many constitutional lawyers are exceedingly uncomfortable with relying on political restraints of this sort, perhaps because they have gotten used to thinking of the Constitution as a compendium of rules enforced by the judiciary. But if that were all there were to it, the Constitution would be only a

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111. 424 U.S. 1 (1976).

112. 435 U.S. 765 (1978).

113. 105 S. Ct. 1459 (1985).

lifeless piece of parchment backed by an army.<sup>114</sup> The Constitution is all that it is because of the reverence in which it is held by the people of the United States. There is no reason to assume that this reverence for the Constitution will suddenly evaporate the moment the thirty-fourth state joins in the call for a convention to do something about the federal deficit.

On the contrary, the real danger facing us is that we will make the framers into secular deities and treat their handiwork as sacrosanct. Ironically, to do that would pervert the constitution that they gave us. There was not a constitution that ordained interpretation by an elite priesthood and amendment by a corps of incumbent officeholders as the only legitimate methods of change. Rather, the framers believed in the people. In the amendment-proposing convention of article V, they codified the right of the people to change the government when the government was unable or unwilling to change itself.

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114. Cf. Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 92 (1985) (discussing sources of obligation to obey law).