

Amending the U.S. Constitution by Convention

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Introduction

The U.S. Constitution allows amendment through two legal pathways, each with certain steps. In one pathway the U.S. Congress proposes amendments, and in the other a specially organized convention proposes them. Thereafter, the two paths merge where proposed amendments are presented to states for final ratification.

Though two paths are available, only the Congressional path has ever seen use. This means that Congress, never a convention, has originated all 27 of the existing, ratified Constitutional Amendments. Furthermore, while Congress claims a 27-0 exclusive record on *ratified* amendments, it also claims exclusive control on ever *proposing* amendments. Congress has generated and presented to the states every single amendment ever proposed.

The convention pathway is still in storage, packed away by founding fathers. The nation has never considered an amendment proposed by the convention method, and such a proposing convention has never even occurred. Without a completed process to view in the recent past, the convention method presents some questions.

While the convention practice is dormant, its purpose is very much alive, and it can still provide an important means for the People of the U.S. to govern themselves. Toward that end, this article seeks to clarify each step on the amendment-by-convention path. While many have written, argued, commented and worried about certain elements of a proposing convention, few sources treat the procedure comprehensively. This article seeks to color a complete yet concise picture by synthesizing history and law. In the end this synthesis will show the convention-process to be rather straightforward.

Clear procedures proposed in this article will hopefully serve our Constitutional purpose. At moments of increased interest in a convention, professors, journalists, and politicians have lurched into debates and published piecemeal information. These sources have

generally viewed the questions with national, contemporary perspectives and assumptions.¹ In so doing they have slighted the state-centric, historical, Constitutional plan. We would do well to consider it all anew because national, legalistic players have little to say on the matter. By design, the primary actors in the convention path are state legislators and state delegates. These state officials carry different perspectives than members of Congress and other national parties, and will generate their own procedural specifics.

While these state officials would have a wide variety of reading on the topic, I write toward a comprehensive treatment that might serve as a reference on procedure. In this article I hope to synthesize various other commentaries, consider critiques, fill in some gaps, and provide a legal method for states to move an idea for a constitutional amendment from conception to ratification. The article discusses: first, an overview of the Constitution's amendment provision; second, the application of states for a convention; third, the amendment-proposing convention itself; and fourth, state ratification of a proposed amendment.

Overview of Constitutional Article V

The United States Constitution allows amendment by Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V thus allows either Congress *or* a convention to propose amendments for states to ratify. If by convention, the process would move through three basic phases: applications of individual states, the proposing convention, and ratification by individual states.

The basic reason for having the two alternative paths, either convention or Congress, seems self-evident: if one path is corrupted and requires reform, the other path allows successful reform around recalcitrant parties.

¹ See, for example, Thomas H. Neale, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress," Congressional Research Service (April 11, 2014), <http://www.fas.org/sgp/crs/misc/R42589.pdf>.

In order to illustrate and provide context to the discussion, this article and associated materials carries the example of Congressional term limits. In various states where the public has voted on it, and in various public opinion polls, a large majority of the U.S. populace supports term limits for elected government officials. Individual members of Congress at times have discussed and proposed an amendment to the U.S. Constitution to limit Congressional terms, but Congress has never issued such a proposed amendment for states to consider. Congress as a body would have incentives to oppose limits on terms in office, and it would be hard to imagine a circumstance otherwise.

In such a situation, the convention method of amendment offers a stark alternative to Congressional inaction. Where incentives of Congress are opposed to those of the People, the Constitution allows the people to still have their way, outside of Congress' control. Many have argued the pros and cons of term limits, and this article will not retrace the several points. However, this article and appendices carry term limits as an example because of the contrast it demonstrates.

The Founders envisioned just such conflicts when including Article V in the Constitution. One author summarized their deliberations this way:

The problem of Congressional resistance to ... amendments is not a new or unforeseen one. The Framers considered this very issue in their deliberations over the amendment process. On the third day of the Convention, Edmund Randolph broached the issue when he presented the Virginia Plan, a collection of resolutions that became the foundation of the Convention's work. The thirteenth resolution of the Plan stated simply that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." Virginia's George Mason was a strident advocate of this approach; he stressed that "[i]t would be improper to require the consent of the Nat[ional] Legislature, because they may abuse their power, and refuse their consent on that very account." This concept of an amendment process without decisive congressional involvement survived basically intact in the second proposal on the subject-[in] the Report of the Committee of Detail, which stated that: "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."²

Because the Founders expected a future need to circumvent Congress, in fact, the original, draft Article V provision did not include any power at all for Congress to propose amendments. This followed the patterns of most states at the time, which provided for amendment outside of their legislatures. Some of the founders expected the convention method to suffice on its own. Consider:

² Krish Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 Yale L.J. 1971 at 1999 (1993) (citations omitted). See also William W. Van Alstyne, "The Limited Constitutional Convention—the Recurring Answer," 1979 Duke L.J. 985, 987+ (1979) and Walter E. Dellinger, "The Recurring Question of a Limited Constitutional Convention," 1979 Yale L. J. 1623, 1626 (1979).

The first suggestion for an amendment provision at the Constitutional Convention of 1787 did not include any role for Congress. The Virginia Plan, one of the major proposals that led to our Constitution, simply stated that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required... This approach was hardly surprising because it merely paralleled the current state practices. In 1787, of the eight states with an amendment process, only three provided a role for their legislatures.³

The Framers may have considered, however, whether exclusive state power over amendment would diminish the new national government. As a compromise, Article V provided that either a state-sponsored convention or the national Congress could propose amendments. In both pathways, a national body would serve to coordinate national perspectives.⁴

Thus the convention method does not entirely ignore national politics. Article V evidently intends to act by a national convention while including Congress in the process, in an administrative role. Over the years, at various junctures when applications for proposing conventions loomed, certain members of Congress have proposed bills or otherwise debated how to govern the process. In the end, Congress may not have much authority to rule over the process, in light of the manifest purpose to empower states, but the record of Congressional bills can help inform how a convention might unfold.⁵ Some of the ideas from proposed bill(s) and other records are incorporated into this article.

The Founders finally settled on certain checks and balances--the People, states, a national convention, and Congress--in the Article V amendment processes. Even though Article V has never yielded a convention-sponsored amendment, a part of the convention path has actually contributed to results desired by the People. At certain points, state legislative activity, public interest, and state initiatives for amendment conventions coalesced to push Congress into action. In these circumstances the mere possibility of a convention resulted in Congress stepping up to propose the desired amendment instead.

In fact, current state efforts to enact Congressional terms limits compare interestingly with the previous state efforts to enfranchise women and to create direct elections for U.S. Senators. Those past efforts led to the 17th and 19th amendments, respectively. In both instances, the entrenched U.S. Congress had resisted reform over extended periods because it threatened

³ Ronald D. Rotunda and Stephen J. Saphranek, "An Essay on Term Limits and a Call for a Constitutional Convention," 80 Marq. L. Rev. 227, 232 (1996-1997) (citations omitted).

⁴ See Walter E. Dellinger, "The Recurring Question of a Limited Constitutional Convention," 1979 Yale L. J. 1623, 1629 (1979) (citations omitted).

⁵ See, for example, Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 898 (1967-1968) and Note, "Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 Harv. L. Rev. 1612, 1627 (1971-1972).

the position and political strength of its members. In response, various states had applied for an amendment-proposing convention.

When submitting these state applications, many states also created primary elections or referenda in concert with their legislatures to effectively establish a direct election for Senators. Likewise, many states granted women franchise long before the U.S. Congress did. In the end, in both cases, after a commanding number of states had acted within their realm of sovereignty, including applications for amending conventions, the U.S. Congress capitulated by passing a proposed Constitutional Amendment and submitting it to the states for ratification.⁶

In this way, the Article V convention path has served some purpose. The People have achieved desired reform while the government has endured. Article V has absorbed social and political shocks, making the Constitution remarkably resilient. Even though the convention pathway remains incompletely used, its existence has contributed to our Constitutional foundation. It is important, even if partially to this point, and confirms the basic democratic tenants of our government:

[T]he 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.... [T]he article V procedures for amending the Constitution are "a domestication of the right to revolution." [This] 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.⁷

Notwithstanding the Founders logic and the successful reforms of the past, some still question the wisdom or possibility of a convention. Some worry about a "runaway convention", where the delegates would overwrite significant parts of the existing Constitution with radical reforms. Others believe it impossible to amend the constitution via convention because, they argue, the Constitution itself leaves the process vague and unwieldy, or because attempts at convention have always failed.⁸ In page after page and speech after speech, ultimately these criticisms boil down to one of two themes: it's impossible, or it's dangerous.

The "impossibility" criticism simply recounts the fact that it has been tried hundreds of times without any success. Various state legislatures have indeed initiated numerous

⁶ See Krish Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 Yale L.J. 1971 at 2000 (1993); see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

⁷ E. Donald Elliott, "Constitutional Conventions and the Deficit," 1985 Duke L.J. 1077, 1079 (1985) (citing Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process," 97 Harv. L. Rev. 386, 431 (1983)).

⁸ See, for example, Walter E. Dellinger, "The Recurring Question of a Limited Constitutional Convention," 1979 Yale L. J. 1623, (1979); Dwight W. Connely, "Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?" 22 Ariz. L. Rev 1011, (1980); and Brenden Troy Ishikawa, "Everything You Wanted to Know About How Amendments Are Made, But Were Afraid to Ask," Hastings Const. L.Q. 545 (1996-1997).

applications, for numerous reasons, all aimed at establishing an amending convention, but none has ever reached critical mass or met legal standards to have any effect.

As for the “dangerous” criticism, the argument basically holds that a convention might “runaway” with the Constitution by proposing eccentric amendments. One author elaborated on the critique in this way:

Article V [of the U. S. Constitution] attempted to correct Congressional entrenchment ... by providing a second road of amendment free from congressional obstruction. Unfortunately, this endeavor failed; the convention road has proven impassable. There have been [hundreds of] attempts to set the convention mechanism of Article V in motion. Yet, none has succeeded. Pervasive fears of a "runaway" convention meddling with hallowed parts of the Constitution have made it politically impossible to persuade two-thirds of the states to demand a convention on a particular issue. On numerous occasions, the number of applications has come within three or four states of reaching the two-thirds mark. Yet each time the process has ground to a halt. Opposition to the substance of a sought-after amendment solidifies and combines with ubiquitous dread of a runaway convention.

Such fears are not the only barrier to a convention. Congress has employed its own tactics to place the mechanism further out of reach, thus ensuring its monopoly over the power to propose amendments. Chief among these is its consistent refusal to pass an implementation bill defining valid petitions from the states, setting time limits on when the two-thirds mark must be reached, and detailing the procedures of a convention. Beginning in 1971 with a bill proposed by Senator Sam Ervin, every attempt to define rules for a potential convention has been defeated by members of Congress unwilling to encourage convention applications by removing the veil of uncertainty. These obstacles make it unlikely that a national convention will *ever* occur.⁹

While important, these criticisms do not put amendment-by-convention out of reach. As this article will show, Congress has, at most, limited authority over the process, meaning the states can specify procedure in concert, removing ambiguity about the process. And as for the danger of a “runaway” convention, this article will detail the several steps of amendment-by-convention path that require significant majorities in order to proceed. The checks are as stringent as any democratic process should be. The final phase in particular—state ratification—is the same as was seen with all 27 of the existing amendments. Looking at the quality of the amendments as a whole, who would argue that the ratification phase of Article V, demanding state-by-state majorities, has not worked democratic magic? With the same ratification check in place, it is hard to fear some eccentric, undesirable change to our government at the hands of a proposing convention, unless, of course, we fear our own selves. Put in a different way:

... 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

⁹ Krish Kobach, “Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments,” 103 Yale L.J. 1971 at 2001-2002 (1993) (citations omitted).

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 misleading; it would be more accurate, albeit less euphonious, to call it an "*amendment-proposing* convention."¹⁰

Given the numerous safeguards built into the convention method of amending the Constitution under Article V, fears regarding the use of this method are unfounded. In fact, the convention method provides greater protection than the Congressional method because of a wider breadth of people and perspectives involved. For these reasons--wide participation and increased constraints--even President Abraham Lincoln expressly favored the convention method of amendment.¹¹ We need not fear each other as the sovereign People of the United States, nor need we fear a convention pathway checked at several points by democratic processes. With clarified procedure, an amendment-proposing convention can serve us well.

Application of the Legislatures of Two Thirds of the Several States

The first step in the proposing-convention pathway involves applications from 34 of 50 state legislatures. An "application of a legislature" simply contemplates a joint resolution from a state's legislature (or a resolution from a unicameral assembly) requesting that Congress call a convention. The legislature would pass the resolution by ordinary procedure, as it would pass any other bill or resolution. It would need to pass each house of a bicameral legislature in exactly the same form. It would also require certification from the appropriate state officers, according to state law. Finally, these same officers would have to transmit to Congress a single resolution certified by the state.¹²

A question naturally arises about whether an application has to follow the full process of legislation in the several state legislatures or, in other words, whether a governor could veto an application issuing from a legislature. In the opinions *Hawke v. Smith* and *Leser v. Garnett*, the Supreme Court consistently found that state legislatures act as independent federal instruments under the language of Article V.¹³ This means that a state legislature's function in calling for a convention would not be subject to further strictures from any other officers of government, including the state's governor, who has no necessary role to play.

¹⁰ E. Donald Elliott, "Constitutional Conventions and the Deficit," 1985 Duke L.J. 1077, 1081-1082 (1985).

¹¹ Ronald D. Rotunda and Stephen J. Saphranek, "An Essay on Term Limits and a Call for a Constitutional Convention," 80 Marq. L. Rev. 227, 232 (1996-1997) (citing Abraham Lincoln, First Inaugural Address, reprinted in 4 *The Collected Works of Abraham Lincoln* 270 (Roy P. Basler, ed. 1953)).

¹² Dwight W. Connely, "Amending the Consitution: Is This Any Way to Call for a Constitutional Convention?" 22 Ariz. L. Rev 1011, 1025 (1980).

¹³ See generally *Hawke v. Smith*, 253 U.S. 221 (1921) and *Leser v. Garnett*, 258 U.S. 130 (1922).

This idea carries over to questions about alternative forms of state lawmaking, such as public initiative. The public cannot generate an application by initiative or similar ballot measure because only the legislature holds a right to do so under the Federal Constitution. In reviewing this question specifically, courts have repeatedly reaffirmed that a state legislature essentially functions as an exclusive organ of the federal government. The case-law was recapitulated well in this way:

[A]n application made directly by the people through their reserved initiative power is invalid in light of the requirements of article V. Case law is clear that the term “legislatures” in [Article V] denotes representative bodies, rather than the entire law making power reserved to the states. Thus, the people are to be excluded from any direct participation in [Article V] process. If the conclusion that the term “legislatures” has the same meaning throughout article V is correct, then the people ... must be precluded from directly applying for a constitutional convention.¹⁴

In this way the term “legislature” in the Constitution means exclusively that, a political body that functions independently of all other parties such as the public or other state officials.

This reading also follows historical patterns of Constitutional amendment. Legislatures have always functioned independently when ratifying amendments proposed by Congress. It is only consistent to apply the same independent definition of “legislature” for the application phase of amendment under Article V. In other words:

Logically, if the word “legislatures” means legislative body in the ratification section of article V, the same meaning should be given to legislatures in the convention application section of the same article. By analogy, the power to propose the initiation of an amendment must also rest solely with the state legislature. The inevitable conclusion is that [another state officer] has no role to play in the amendment process.¹⁵

While parties besides state legislatures may not have authority to enact an application for a convention, they can still participate indirectly in the process. While various courts and authors concur that neither the public (by initiative, referendum, etc.) or other branches of state governments may issue applications or otherwise force state legislatures to act or refrain from acting under Article V of the Constitution, there is nothing to say that government officials or the public cannot or should not lobby or otherwise communicate with state legislatures about the prospect. Indeed, all legal opinions leave open the possibility that the public and other branches

¹⁴ Anthony James Guida, Jr., “States Role in Article V Conventions,” 54 U. Cin. L. Rev. 217, 328 (1985-1986) (citing *Hawke v. Smith*, 253 U.S. 221 (1921)). See also various court opinions: *AFL-CIO v. Eu*, 36 Cal. 3d 687 (1984); *Uhler v. AFL-CIO*, 105 S. Ct. 5 (1984); *Leser v. Garnett*, 258 U.S. 130 (1922); *Barlotti v. Lyons*, 182 Cal. 575 (1920); *Petusky v. Rampton*, 307 F. supp. 235 (D. Utah 1969)).

¹⁵ Dwight W. Connely, “Amending the Consitution: Is This Any Way to Call for a Constitutional Convention?” 22 Ariz. L. Rev 1011, 1029 (1980).

of state governments may influence state legislatures actions by informal measures.¹⁶ In a vibrant democracy, vibrant discussion should be expected.

Once an application passes a state legislature, the appropriate state official or officials that normally certify legislative acts should send it to Congress. A state legislature would wisely include in an application 1) a title of its application; 2) the full text of the application; 3) the signatures of the presiding officer(s) of the legislature (if unicameral) or its houses (if bicameral); and 4) the signature(s) and certification of any other appropriate officer(s) that the application is accurate and duly reflects a resolution passed according to the legislature's rules.¹⁷

One might imagine several competing possibilities for a state to correctly deliver its application to Congress. Because of the confusion, in fact, the Congressional Research Service recently conceded that Congress cannot accurately identify the number or type of applications it has received.¹⁸ Facing a confused Congress, states would wisely choose all of the main possibilities at once as a fail-safe procedure. And if states act in a coordinated fashion with the same possibilities, the coordination will afford greater legitimacy to the chosen method of delivery. To be thorough, a state should direct the application to the President of the United States Senate, the Secretary of the Senate, the Speaker of the House, and the Clerk of the House, all in order to avoid any question about whether the application was correctly delivered to Congress.¹⁹

Alongside the mechanics of an application lies the question of its timing relative to other states. Author Michael Stokes Paulsen critically reviewed the timing of constitutional amendments employed by Congress, the states, and courts. He concluded that the various acts of political bodies as "concurrent legislation" that accumulate to a critical point of validation. That is, Article V can treat applications for conventions, proposed amendments issuing from Congress or a convention, and state acts of ratification as essentially the same as other enactments coming from the respective political bodies. Like a resolution or bill when these bodies propose statutes, their amendment-related enactments remain indefinitely valid unless they include a sunset provision or unless they are repealed, revoked, or rescinded.²⁰ This approach provides a consistent way to solve many intermittent questions that arise between the lines of a broad Article V.

¹⁶ See Anthony James Guida, Jr., "States Role in Article V Conventions," 54 U. Cin. L. Rev. 217, 330-332 (1985-1986).

¹⁷ See Dwight W. Connely, "Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?" 22 Ariz. L. Rev 1011, 1033 (1980) (citations omitted).

¹⁸ Thomas H. Neale, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress," Congressional Research Service, 39 (April 11, 2014), <http://www.fas.org/sgp/crs/misc/R42589.pdf>. See also Scott Bomboy, "Unraveling Part of A New Constitution Convention Riddle," Yahoo News (April 7, 2014), <http://news.yahoo.com/unraveling-part-constitution-convention-riddle-100206215.html>.

¹⁹ See generally Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, and at 896-898 (1967-1968).

²⁰ See generally Michael Stokes Paulsen, "A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment," 103 Yale L. J. 677 (1994).

Having treated application procedure and timing, the next consideration is content. What must an application say in order to count toward the total number needed for a convention? On content, the more specific questions usually become: 1) whether applications can carry valid restrictions, such as a deadline or limitation on the agenda/scope of the convention, and, if so, 2) whether the applications from the several states have to be identical.²¹ The general answer to both questions is “yes”, meaning that the applications can have restricting language and that they do need to be similar to other applications in order to count with those applications. These issues—restrictive language, and similar language—relate to one another and have some overlap; they together outline the requisite substance of applications necessary to muster a convention.

From the outset, even before the Constitution was ratified by all thirteen colonies, states applications for proposing conventions often carried specific content and specific intent.²² Virginia ratified the Constitution in June of 1788 and, in the same document, issued a draft bill of rights. Shortly thereafter, in November, Virginia’s legislature issued the first call for convention in order to “secure ... the inalienable rights of mankind.”²³

Commonly, applications have prescribed the topic of Constitutional amendment intended for debate at the proposing convention. Such prescriptions, limiting debate at the proposing convention, appear routinely in state applications both old and new. Restrictive provisions specifically seeking an amendment for the direct election of senators appeared in many applications during the buildup to Congress’ proposal of Constitutional Amendment 17.²⁴ Restrictions similarly appeared plainly in 1979, for example, when 30 states applied to Congress for a convention with consistent limiting language, seeking to bind the agenda of a convention to that of a balanced budget amendment.²⁵ Evidently, states issued restrictive language in their applications as Legislatures sought to address some specific political item of importance to their states.

In other cases, applications have carried restrictive time-limits. In carrying a time-limit, the applications essentially had a sunset provision that would render it invalid if not creating a convention by a certain deadline.

Academics in recent decades have argued about whether restrictive provisions are valid in an application. Some consider restrictions as binding, just as in any other legislative

²¹See Gerald Gunther, “The Convention Method of Amending the United States Constitution,” 14 Ga. L. Rev. 1, 7 (1979).

²² Robert G. Natelson, “Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3),” pp 15-17, Goldwater Institute Policy Report No. 241, September 16, 2010.

²³ Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, pp56-58, Greenwood Press (1989).

²⁴ See generally Robert G. Natelson, “Learning From Experience: How the States Used Article V Applications in America’s First Century (Part 2 of 3),” Goldwater Institute Policy Brief No. 10-06, November 4, 2010.

²⁵ Gerald Gunther, “The Convention Method of Amending the United States Constitution,” 14 Ga. L. Rev. 1, 3 (1979); see also 2011 Montana Senate Bills, SJ0004 and SJ0005, sponsored by Senator Art Wittich.

pronouncement. Others, discounting centuries of practice that started with Virginia's first call, dismiss restrictions as either invalid appendage to an application or as a destructive element of an entire application.²⁶ The restriction-invalid and restriction-destructive perspectives mark the two extreme edges of ideas around a state's application. At one edge all specific language beyond a call for a convention is meaningless; at the other edge, all specific language invalidates the application. While neither point finds specific contrary language in Article V itself, Article V quiet gives just as much credence to a moderate perspective. It is simple and consistent to acknowledge the duly expressed intent of a legislature, just as in any other context.

Both of the extreme perspectives point to the Philadelphia Convention to shore up their positions. There the group functioned as a separately empowered, national deliberative body.²⁷ The delegates arrived with a nominal purpose to revise the Articles of Confederation, yet they proposed an entirely new constitution. The argument continues by asserting that, therefore, neither state legislatures, nor Congress, nor any other party can legally control a proposing convention, making invalid either a restrictive provision itself or the whole application that carries it.

These points of view, however, uniformly ignore the tight tether between state legislature and convention delegation that operated at Philadelphia and throughout the founding era. Author Robert Natelson has exposed this historical verity to explain that the Philadelphia convention was a state-sponsored event. At that time the state legislatures did tie delegates' authority to specified instructions on the scope of their work, and the delegates felt bound by their instructions while carrying out their duties.²⁸

True, the Philadelphia Convention functioned independently from other political bodies and reached beyond some public expectations. Yet the authorization and credentials—*coming from the state constituents*--of most of the delegates remained valid and consistent with the ultimate product. That is, the convention gathered and carried out business even though some delegations carried with them restrictive instructions. Even before debate got underway, the delegates of Delaware presented their credentials which prominently noted that they were prohibited from accepting anything but equal voting among the states.²⁹ Their restrictive credentials were valid, and all five Delaware delegates later sustained the Constitution in good conscience because of the great compromise.

²⁶ See, for example, Walter E. Dellinger, "The Recurring Question of a Limited Constitutional Convention," 1979 Yale L. J. 1623, 1636 (1979); and Michael Stokes Paulsen, "How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention," 34 Harv. J. L. & Pub. Pol'y 837, 840 and 854 (2011).

²⁷ See, e.g., discussion by Walter E. Dellinger, "The Recurring Question of a Limited Constitutional Convention," 1979 Yale L. J. 1623, 1636 (1979).

²⁸ See Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 715-732 (2010-2011).

²⁹ See James Madison, *The Debates in the Federal Convention of 1787*, 18 (Hunt and Scott, editors), Prometheus Books (2007).

Contrast Delaware's delegation to New York's delegation. Two of the delegates from New York left the convention in protest because they believed the proceedings exceeding their authority. This left Alexander Hamilton the lone, dissenting delegate from New York, who was able to sign the Constitution but unable to vote New York in favor of it. In the end, restrictive credentials evidently bound delegates but did not destroy their authority to act within them.

In this way, the restriction-invalid and restriction-destructive points of view defy our broad legal traditions. Generally throughout American law, any party or agent may define or limit its acts within a larger realm of authority.³⁰ Parties can limit their rights or acts by contract. Parties can grant limited powers to other agents. Parties can specify various contingencies before other rights or obligations come into being. Legislative bodies always treat limited topics in various bills within the totality of legislative authority. In none of these cases comes into question the power of the parties to circumscribe their own or their agents' acts. In all of these cases, moreover, the defining, circumscribing acts of a party preserves authority to act. Thus, a moderate view, simply recognizing restrictions, would allow legislatures to follow basic legal principles in applying for a convention.

Specific political history likewise supports the validity of restrictions in applications. This history displays a common practice of both voters and legislative bodies expressly instructing their delegates to various political bodies. More than one author has elucidated well the long history of this practice. Through many centuries, in Britain and in American representative politics, Parliament, Congress, and delegates to conventions including the Philadelphia Convention itself, have received expressed written instructions by vote of the empowering constituency. These instructions came either from the electorate or from state or local elected bodies to their delegates/representatives serving in other, often superior bodies.

These constituent instructions have, at many important political junctures, guided and encouraged delegates in forming our fundamental laws. Restrictive instructions appear, for example, with the delegates who convened to issue the Declaration of Independence, the Articles of Confederation, the Constitution, and Constitutional Amendments.³¹ The general idea that a state legislature, when applying for a convention, would instruct Congress or later delegates relative to a desired amendment, matches exactly with actual practice in place at the time Article V of the Constitution was written. Such instruction, by way of contingencies and restrictions in a convention application, would have been expected by the framers.

³⁰ See Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 704-705 (2010-2011).

³¹ Survey by Kris W. Kobach, "May 'We the People' Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution," 33 U.C. Davis L. Rev. 1 (1999); and Robert G. Natelson, "Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3)," Goldwater Institute Policy Report No. 241, September 16, 2010. Compare Neal S. Manne, "Good Intentions, New Inventions, and Article V Constitutional Conventions," 58 Tex. L. Rev 131 (1979).

In *Federalist No. 85*, Hamilton expressed that a purpose of Article V was to allow states to initiate a convention with a specific amendment in mind:

[E]very amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place.³²

At that time the numbers nine and ten related, respectively, to the two-thirds necessary to call a proposing convention and the three-fourths necessary to ratify proposed amendments. Together, Hamilton's language and significant corroborating history demonstrates that the substance of amendments can originate with the states, before a proposing convention meets. This would mean that specific restrictive language in an application must be valid. The legislatures, when calling for a convention, can be taken at their word.

With specific language intact, the answer naturally flows as to whether applications must be the same. Hundreds of applications for a constitutional convention have issued from the various states; by some the count reaches some 400, by others more than 700. Different parties have counted in different ways, but by the numbers alone, some believe that a constitutional convention should have occurred long ago.³³ Perhaps in response to these sheer numbers, some states have, in recent years, unequivocally revoked all previous applications of any sort in order to clarify their current posture. Even after the revocations, by some counts there are, currently, nearly enough outstanding state applications to require a general constitutional convention.³⁴ While such counts of convention applications are fascinating, the counts and the history together make sense of why we have not had a proposing convention, and what will be required to call one.

Apparently, there have not been enough *similar* applications at the *same* time. The hundreds of applications have carried restrictive language that differed enough from one another to fail the requisite number.³⁵ No act of Congress, no legal ruling, no consensus of authorities has concluded that the applications were invalid because of specific, limiting provisions. Rather, precisely *because* of the differences between the restrictive provisions in each application,

³² See discussion of Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 882+ (1967-1968).

³³ Compare Friends of Article Five Convention website, www.foavc.com, with Michael Stokes Paulsen, "How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention," 34 Harv. J. L. & Pub. Pol'y 837 (2011) and with Congressional count "Federal Constitutional Convention," U.S. Senate Document No. 78, 71st Congress, 2d Session (Jan. 6, 1930).

³⁴ See Michael Stokes Paulsen, "How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention," 34 Harv. J. L. & Pub. Pol'y 837, 858 (2011).

³⁵ See Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, Chapter 4 and Appendix IV, Greenwood Press (1989).

various parties—most importantly Congress--assumed the applications were different enough that they did not accumulate to the requisite two-thirds number.³⁶

Even when sharing subject, the applications probably must also share time-frame. This is probably so not because of a legal bar, but because Congress has apparently ignored applications which shared subject but which arose at disjointed periods.³⁷ The space in time dimmed the value of pending applications. Thus, without common subject and timing, state applications have never generated a sustained demand for a convention. With no convention in sight, the only logic of history, sustained by current practice, is that applications have had enough differences in intent or timing as to fail the two-thirds, magic number.

In any case, questions of time will arise if no time limit appears in the application or subsequent enactment. These questions concern, for example, how long an application is valid, how long Congress has to act on the applications, how long states have to designate delegates to a convention, or how long states have to vote on a proposed amendment. The Supreme Court has dealt with the question only slightly, leaving the overarching uncertainty. The best approach in answer, it seems, is to make each state application effective for an expressed period of time before it lapses.³⁸ This “sunset” approach, consistent with the discussion of contingencies above, entirely removes the question of time limits as a means for opponents to hamper the amendment process. Likewise, the application can carry deadlines for Congress to call a convention and default provisions in the alternative. This approach further solidifies the expectations of the legislatures and constituent public involved, motivating Congress, delegates and others to action. All of these ideas appear in the draft application following this article.

These several points about restrictive language, similarity among states, and deadlines, outline the path toward accumulating applications from two-thirds of the states. By the open language of Article V, by history, and by practice, state legislatures hold authority to bind applications for a proposing convention with express restrictions. At the same time, however, historical precedent suggests that the applications must be essentially the same in order to combine for the requisite number. States will thus have to coordinate restrictions in their applications.³⁹ Equally important, the states should act within a compressed, common time period. Together, a shared timing and substance of the applications would convincingly

³⁶ See Thomas H. Neale, “The Article V Convention to Propose Constitutional Amendments: Historical Perspectives for Congress,” Congressional Research Service, 16-18 (October 22, 2012), <http://www.fas.org/sgp/crs/misc/R42592.pdf>; and see Report 98-254 at 3, U.S. Senate, on the “Constitutional Convention Implementation Act,” August 10, 1984.

³⁷ See Sara R. Ellis, Yusuf Z. Malik, Heather Graves Parker, Benjamin C. Signer, & Al'Reco L. Yancy, “Article V Constitutional Conventions: A Primer,” 78 Tenn. L. Rev. 663, 668-669 and 671 (2010-2011); and see Robert G. Natelson, “Proposing Constitutional Amendments by Convention: Rules Governing the Process,” 78 Tenn. L. Rev. 693, 713-714 (2010-2011).

³⁸ See, for example, Sam J. Ervin, Jr., “Proposed Legislation to Implement the Convention Method of Amending the Constitution,” 66 Mich. L. Rev. 875, 890-891 (1967-1968) (discussing proposed time limits on applications’ validity).

³⁹ See Larry J. Sabato, *A More Perfect Constitution*, 205-211, Walker & Company (2007).

demonstrate, both legally and publicly, a commanding demand for convention. An example application follows this article in order to show how these ideas would function together.

Because of the high convention threshold, a severability clause in the applications might be considered. This would help, the argument might say, applications that varied slightly or that miss some legal requirement to effectively accumulate. Yet, in a broader sense, any severability would probably prove counterproductive as it would threaten important specific terms of the application. A convention with expressed subject and form would help win confidence of the public and legislatures, meaning that any severability would undermine support at the start. Severability, after all, carries uncertainty. This means that exact coordination at the outset, rather than severability as a backstop, has the best chance of producing the desired result. The example application purposely avoids any severability provision.

As a final point, once a state legislature submits an application, a question arises about whether it could rescind the application before the requisite number of applications accumulates at Congress. Analogous Supreme Court precedent implies that states may not be able to rescind applications, since the Court in 1938 deferred to Congress when it ignored the rescission of a state's *ratification* vote.⁴⁰ Because this precedent is convoluted and directed at ratification, it is subject to criticism and question, particularly related to applications. In turn, some have argued that states do retain the right to rescind an application before the requisite two-thirds are submitted to Congress.⁴¹ Allowing rescission seems to be the correct legal standard, but the previous Supreme Court case calls that into question. This means that states have a possible right to rescind applications, but they should not count on it when deciding to apply for a convention. In order to bolster a right to rescind, a legislature would likely specify the same in its application.

Given the proposition that Congress can fill in the details necessary to exercise its powers, Congress might establish some convention application procedures. Since Congress is required to call a convention upon application of two-thirds of the states, Congress has some power to count and differentiate applications. By regulating convention applications, Congress is merely providing a method for determining when it is necessary to exercise its duty to call a convention. Such regulation amounts to the filing in of subsidiary matters of detail approved by the Supreme Court.⁴² So far, Congress has not specified application procedures, leaving it to the states to coordinate.

Convention for Proposing Amendments

⁴⁰ See *Coleman v. Miller*, 307 U.S. 433 (1938).

⁴¹ See Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 898 (1967-1968).

⁴² Dwight W. Connely, "Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?" 22 Ariz. L. Rev. 1011, 1020 (1980).

If Congress receives at least thirty-four applications, several questions arise: What is a convention? What is a call? What if Congress does not issue a call? Who determines the procedures for the convention, such as the selection of delegates, the location, the time, the presiding officer, and the voting rules? While the Constitution itself does not provide specific answers, adequate explanation surfaces from the country's previous convention history, including the Philadelphia Convention of 1787.

In America and elsewhere in the British realm, colonial/state governments and members of Parliament sporadically authorized agents, called synonymously "delegates," "deputies," or "commissioners," to attend various conventions, specifically and purposely so named. These conventions have been distinct from meetings of the Continental Congress, the U.S. Congress, state legislatures, or Parliament, which gathered to legislate or otherwise carry out regular government business. The conventions have met outside of normal legal procedures, not attending to legislation, but attending to fundamental government structure.⁴³ Over the course of U.S. history, national or inter-state conventions have met many times, and state conventions have met hundreds of times.⁴⁴

On a national scale, around a dozen conventions have occurred in the past, all during the Revolutionary War and subsequent period governed by the Articles of Confederation. These conventions were distinct from the Continental Congress. At that time conventions gathered in various cities with delegations from independent American states.⁴⁵ The delegates routinely carried credentials as agents of separate sovereigns—the colonial or state legislatures—which credentials provided the scope of work the delegates were to perform.

Leading up to Philadelphia, George Washington himself had hosted commissioners from Maryland and Virginia, at Mount Vernon, in order to solve problems over navigation on the Potomac. Following on their success, they extended invitations to other states to convene delegates in Annapolis in September, 1786. There, as only five state delegations attended, the convention adjourned and Alexander Hamilton addressed a report to the five states, sending also to the other states and to Congress. Among other things, the report called for another meeting in Philadelphia scheduled for the second Monday of May, 1787. The report asked that the

⁴³ Robert G. Natelson, "Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3)," pp 8-10, Goldwater Institute Policy Report No. 241, September 16, 2010.

⁴⁴ Michael Stern, "A Brief Reply to Professor Penrose," 78 Tenn. L. Rev. 807, 808 (2010-2011) (quoting John J. Dinan, *The American State Constitutional Tradition* (2009)).

⁴⁵ Robert G. Natelson, "Amending the Constitution by Convention: Practical Guide for Citizens and Policymakers (Part 3 of 3)," pp 4-5, Goldwater Institute Policy Brief No. 11-02, February 22, 2011; and Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 708-709 (2010-2011).

convention would “devise ... provisions ... adequate to the exigencies of the Union; report such ... to the Congress; [and offer the same to be] confirmed by the legislatures of every state....”⁴⁶

In response, Governor Edmond Randolph of Virginia supported a resolution in the state’s legislature, which appointed delegates for the May meeting. He sent copies of the act to all other state governors, which immediately prompted six to respond and appoint delegates. In this way, correspondence among states originally formed the calls for the Philadelphia Convention.⁴⁷

Shortly thereafter, Shay’s rebellion exposed the precariously weak state of security within the individual states. With some states calling for convention, and with pressing fundamental questions of stability in mind, Congress contributed its recommendatory act:

Whereas ... [a] Convention appearing to be the most probable mean of establishing in these states, a firm national government;

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.⁴⁸

Importantly, the Congress did not hold authority to summon or to control state delegations. Congress was, apparently, unnecessary to establish the convention. Yet it did contribute to attendance by requesting, “in its opinion,” that states send delegations, and by corroborating the time, place and purpose of the meeting. Furthermore, Congress did not hold authority to define the scope of the convention, so the states did so by the instructions or credentials issued to their delegates. Their evident purpose was to render the federal Constitution adequate to preserve the Union. The term “Constitution”, however, did not refer to a written document, as none existed, but referred generally to the foundational system of government, as such term is still used in the United Kingdom.

Rhode Island infamously ignored the calls, and the twelve other states went on without it. Following established patterns, these state legislatures chose delegates with specific instructions and credentials; Pennsylvania hosted the convention; the Pennsylvania delegation appointed Robert Morris to bring the convention to order; the convention elected a president; and, finally, it

⁴⁶ Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, p19, Greenwood Press (1989) (citing report of Sept. 14, 1786, in C. C. Tansill, ed., *Documents Illustrative of the Formation of the Union of American States*, House Doc. 398, 69th Congress, 1st Sess., 1927).

⁴⁷ Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, pp 20-21, Greenwood Press (1989).

⁴⁸ James Madison, *The Federalist* No. 40, January 18, 1788; and 23 Journals of Continental Congress 73 (Feb. 21, 1787), as cited in Robert G. Natelson, “Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3),” p 11, Goldwater Institute Policy Report No. 241, September 16, 2010.

adopted its own voting and procedural rules. Thus, the national “convention” meant a state-sponsored show, where state agents could coordinate, and the “call” amounted to any communication which requested attendance for a set time, place, and agenda.

The delegates at Philadelphia furthered these ideas when debating Article V itself, as they sought to ensure that states could advance desired amendments. The development of the debate reinforces the idea of the convention as coordinating body for the states. The sequential drafts of Article V, in fact, graduated from that where the states proposed amendments directly to that where the states initiated a common proposing convention. Apparently, the framers considered how difficult it would be for several colonies to communicate simultaneously in order to agree on a written, proposed amendment. Because of limited, delayed communications among the several states, that is, the convention was a practical method to bring state officials together for efficient coordination. Author Michael Stern described Article V’s development at Philadelphia this way:

It seems evident from this history that the primary, if not sole, purpose of the convention method was to enable the states to initiate the amendment process without the need of congressional assistance and to solve the logistical problem of reaching agreement on a single text.... The history also suggests an intent that the Article V Convention serves as an aid to the states and not to function as an independent entity exercising significant discretion in its own right.⁴⁹

Understanding the historic expectation, purpose and call of a convention leads to questions of procedure. The first matter is what to do if Congress does not issue a call. By some, Congress has already failed its duty to call a convention, making it possible that Congress would do so again.⁵⁰ A state may have standing to sue Congress and seek an order for the Convention, but whether the U. S. Supreme Court would accept jurisdiction and rule on such a suit remains unclear. Various Supreme Court opinions cloud these questions, and a full discussion is beyond the scope of this article.⁵¹

To promote clarity and to anticipate Congressional recalcitrance, the state applications could carry a default call. That is, the applications could identify a time and place for meeting if Congress does not, just as Virginia’s call did ahead of the Philadelphia Convention of 1787. If Congress thereafter fails to act, a state could sue for a court order blessing their action based on the default call, or the states may choose to proceed in defiance of Congress according to the concurring calls in the applications.⁵² Such defaults may simplify court proceedings and/or may

⁴⁹Michael Stern, “Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention,” 78 Tenn. L. Rev. 765, 770 (2010-2011) (citations omitted).

⁵⁰ See Larry J. Sabato, *A More Perfect Constitution*, 205-211, Walker & Company (2007).

⁵¹ See Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, pp 84-86, Greenwood Press (1989).

⁵² See, Michael Stokes Paulsen, “How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention,” 34 Harv. J. L. & Pub. Pol’y 837, 858 (2011).

allow the convention to proceed around a legitimate state consensus. A default call might also stimulate Congress to act. With these several benefits, default provisions appear in the example application with this article.

Beyond a default call, the applications can specify initial rules to govern the convention. Considering the history of the Philadelphia Convention, it becomes clear that the states and their agents at the convention, not Congress, hold authority over procedure. The states have independent authority to select and instruct their delegation, and the delegates thereafter retain authority to establish the procedural rules of the proposing convention once it is underway.⁵³ For simplification, the form application appearing with this article exercises the states' authority by default rules that would initially order the convention, according to Philadelphia pattern. Once convened, the delegates themselves can make alterations if needed during the meeting.⁵⁴

The history amply shows both what it means to "call a convention" and how state delegates control convention procedure. Yet politicians and academics manage to make these confusing subjects. In the sixties and seventies, some in Congress proposed expansive, specific resolutions, like the Ervin-Helms bills of the Senate.⁵⁵ In 1984, the Senate considered the "Constitutional Convention Implementation Act".⁵⁶ These bills, never passed, provided that Congress would call a convention by specifying the time and place, creating an agenda for the convention that reflected any limitations in the states' applications, and appropriating funds to pay for facilities and to pay the expected delegates. They went on to specify when applications would expire, where applications should be sent, how delegates should be chosen, and how many delegates should represent each state.⁵⁷ Following these bills, some have simply assumed that Congress holds authority to control all these factors and more.

These Senate bills assumed that Congress holds broad, controlling powers not written in the Constitution and never practiced in our history. The bills proposed that delegates be chosen in the same number and over the same districts as each state's Congressional delegation. That is, each state would elect two delegates at large, corresponding with the Senate, and each House district would elect an additional delegate to serve with the state's delegation. At the convention,

⁵³ Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 738 (2010-2011); and Robert G. Natelson, "Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3)," pp15-22, Goldwater Institute Policy Report No. 241, September 16, 2010.

⁵⁴ James Kenneth Rogers, "The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process," 30 Harv. J. L. & Pub. Pol'y 1005, 1015 (2006-2007) (citing John Ulster, "Arguing and Bargaining in Two Constituent Assemblies," 2 U. Pa. J. Const. L. 345, 358-369 (1999)).

⁵⁵ See Gerald Gunther, "The Convention Method of Amending the United States Constitution," 14 Ga. L. Rev. 1, 21 (1979), and see Michael Stokes Paulsen, "How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention," 34 Harv. J. L. & Pub. Pol'y 837, 860 (2011).

⁵⁶ See Report 98-254 at 3, U.S. Senate, "Constitutional Convention Implementation Act," August 10, 1984.

⁵⁷ See, for example, Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 898 (1967-1968).

according the bills, a majority vote of all convention delegates would control, irrespective of state, with each delegate's vote counted independently.⁵⁸ The U.S. Vice President would serve as the initial presiding officer of the convention with authority to administer an oath to the delegates and to preside until another president was nominated and elected. The subsequently elected officer(s) would have a duty to maintain and publish a record of the proceedings, votes, and, of course, the text of any proposed amendment(s). Such published record could also conceivably carry a time limit for Congress to act in submitting the same to the states for ratification.⁵⁹

All of this has led to unnecessary confusion. Because no *national proposing* convention has occurred since Philadelphia, because that convention's history has been somewhat obscure, and because Congress has debated procedure without any conclusive action, some have erroneously concluded: "No one can make confident assertions about how the convention method was intended to operate."⁶⁰

In reality, taking the records and context of earlier conventions together clarifies the main points of procedure with confidence. Some provisions in the Senate bills corroborated with precedent, but some were overreaching. Considering Article V's limited language and the practice at the time of the Philadelphia Convention, Congress should only call for a time, a place, and the subject matter for a convention. Congress could also, presumably, provide funds. If Congress does not act to fund the meeting, the states would have to foot the bill for their delegations, as at the time of the earlier conventions. These duties of Congress amount to administrative functions since, by Article V, Congress was not intended to substantively control.

With this precedent, the simplicity of Article V can suffice. Upon receiving requisite applications, Congress can call a convention by identifying the time and place of the convention, and by generally stating the agenda in its call. Congress might also appropriate funds for facilities and delegates' pay or reimbursement. An example call, similar to the Philadelphia call, appears with this article. After Congress "calls" the convention in this way, the authority of Congress ends.

According to Philadelphia precedent, the State legislatures would pick up from there. The state legislatures would provide for delegates as they see fit, without the need of any direction from Congress. At the convention itself, the delegates could adopt procedural rules. The clearest mode of voting is by state-unit, since that was the method in use at the Philadelphia

⁵⁸ Alternatively, See Note, "Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 Harv. L. Rev. 1612, 1627 (1971-1972); and Larry J. Sabato, *A More Perfect Constitution*, 212, Walker & Company (2007).

⁵⁹ See, for example, Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 898 (1967-1968); and see See Report 98-254 at 3, U.S. Senate, "Constitutional Convention Implementation Act," August 10, 1984.

⁶⁰ Gerald Gunther, "The Convention Method of Amending the United States Constitution," 14 Ga. L. Rev. 1, 11 (1979).

convention, and may form the unwritten assumption in Article V. After all, all other functions of amendment refer particularly to the states and function by one vote per state.

In selecting delegates, the respective state legislatures retain authority to select delegates directly or, possibly, to enable another method for selection.⁶¹ Historically, state legislatures did so directly without any input from Congress. As an alternative, the state legislatures probably hold authority to enable public elections for delegates, by state-wide voting or by district voting of various sorts (such as in each House district). Some of the previous proposed bills in Congress prohibited a sitting member of Congress as a convention delegate, but such a prohibition contravenes precedent and is not within Congress' authority to determine. Each state legislature can itself decide on the delegation or can enable some other method of selection, just as they did in 1787.

Given the possibilities, a state legislature, as opposed to state elections, would best serve as the means of selecting delegates. First, the state legislature could convene promptly and recall a delegate that is out of line with instruction from his or her state, out of line with the stated purpose of the convention. Recall would be cumbersome, if not impossible, to accomplish promptly if a state had to organize a public election to consider unseating a delegate. Second, legislative appointment of delegates aligns with the history and function of Article V. Because state legislatures then chose delegates, and because the legislatures continue to be the political bodies responsible to apply for a convention, the founders probably assumed the legislatures would be choosing delegates again in the future.

As a default, the convention should follow unit voting—one vote per state, as determined by its delegation—in line with the Philadelphia Convention where the delegations met as agents of equal, distinct sovereigns. At that time, and as a first order of business in establishing convention procedures, whether unit voting would continue arose as a point of dispute between larger and smaller states. The Virginia delegation, including the presiding officer Washington and the Constitution's principal author Madison, had the most to lose by unit voting, but they orchestrated unit voting for the sake of agreement.⁶² Unit voting affords simple consistency because it lines up with convention precedent, with state sovereignty, with state convention applications under Article V, and with state amendment ratifications under Article V. Though disproportionate, unit voting would serve well again as a modern convention default, unless the convention agrees otherwise.

Although some commentators choke on ancient procedure compared with contemporary perspective, no ambiguity about convention procedure is large enough for alarm. Alternatives in procedures create opportunity, not obstacles. And despite the greatly varied opinions about

⁶¹ See Gerald Gunther, "The Convention Method of Amending the United States Constitution," 14 Ga. L. Rev. 1, 8 (1979).

⁶² See James Madison, *The Debates in the Federal Convention of 1787*, 19 (Hunt and Scott, editors), Prometheus Books (2007).

modern convention procedure, still stands the same precedent of the Philadelphia convention, validated after centuries of durability. Since the writers of the Constitution were likely referring to their own, contemporaneous process when availing future Americans of a convention, it seems logical that their method would form the default procedure, absent any specific direction otherwise.

While all these steps might appear dim in the distant past, the process need not surrender to confusion for lack of recent practice. And, for clarification, the states' applications can provide for these procedural basics as a default in case Congress fails to act. The example application appended to this article includes default procedural rules.

During the convention, an important question concerns whether the delegates might act within the bounds of the set agenda, or whether they might debate and vote on other topics. As with the discussion about restrictions written in applications, various authors believe one extreme or the other about restricting the subject of debate at the convention itself.

Precedent shows that the state legislatures can be expressly involved in instructing and controlling the delegates to a proposing convention. Through many centuries, in British and in American representative politics, the constituents of representatives to Parliament, to Congress, and to various Conventions representing the people at large, have voted specific written instructions into their delegation of authority to their representatives.⁶³ While a spat of state-court legal decisions have criticized constituent instructions,⁶⁴ the bulk of U.S. history and law leaves us to expect that constituent instructions will continue to play a role in shaping and guiding any proposing convention. Like the discussion of agency law and state applications appearing above, agency law circumscribes the delegates at a convention.

The state rule, broadly speaking, is that ... a state may limit a convention's agenda. The argument in support of the rule is that the ... sovereign has the power to amend the basic principles by which it has chosen to be governed. Since by definition the sovereign's amending power cannot be limited, the sovereign may delegate its entire amending power to a suitable agent, such as a convention. It follows that the sovereign may validly delegate only a portion of its amending power.⁶⁵

Limiting delegates' authority does in fact corroborate with the Philadelphia Convention. On the first day of the convention, for example, James Madison carefully noted on "reading the credentials of the deputies ... [that] those from Delaware were prohibited from changing the article in the Confederation establishing an equality of votes among the States."⁶⁶

⁶³ See a complete survey by Kris W. Kobach, "May 'We the People' Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution," 33 U.C. Davis L. Rev. 1 (1999).

⁶⁴ Id.

⁶⁵ Francis J. Heller, "Limiting a Constitutional Convention: The State Precedents," 3 Cardozo L. Rev. 575 (1981 – 1982) (citing cases in Virginia, Massachusetts, Pennsylvania, Tennessee and Kentucky upholding state legislative limitations on conventions).

⁶⁶ James Madison, *The Debates in the Federal Convention of 1787*, 18 (Hunt and Scott, editors), Prometheus Books (2007).

Yet the Delaware delegates compromised on state voting, making today's critics worry about a "runaway convention" where delegates would disregard their restrictive instructions. At Philadelphia delegates convened ostensibly to amend the Articles of Confederation, but they scrapped the confederation altogether and instead proposed the Constitution.⁶⁷ During the period of ratification, in fact, some anti-federalist vehemently argued that, in the first place, the Philadelphia Convention did not have authority to even discuss terminating the Articles of Confederation, making the product of the convention invalid.⁶⁸

Between those expecting strict limitations and those warning of ineffective limitations, are moderate views that "the truth lay somewhere in between."⁶⁹ This view accords with the final product at Philadelphia. At a minimum, limitations specified by states in their applications or in their delegates' commissions would certainly establish moral bounds. They likely would not, however, create rigid, immediate gag orders on delegates.⁷⁰ Outside of the delegates and their own adopted rules, there does not appear an immediate outside authority to silence debate on certain topics. Once the convention got underway, it would be hard to imagine debate limited, by force, in some proximate way.

That said, the states can still enforce limits during the convention. One author has suggested that states attach sanctions to the authorizing credentials of a delegate.⁷¹ Even without express sanctions, if a delegate's actions differ from the state's instructions or credentials, the actions, in effect, would form a non-binding recommendation back to his or her state.⁷² The state could accept the recommendation, by the legislature's resolution or by ratification, or it could reject the recommendation by overriding the delegate's votes, or by failing to ratify. Moreover, if the actions during the convention itself show a delegate wildly off course, a state's legislature could recall or reprimand the delegate, or could publicly invalidate, by official enactment, all votes and authority of the delegate. In this way the delegates remain leashed to the stated scope of the convention, as authorized and monitored by each state legislature.

This shows that the Philadelphia Convention of 1787 was not a radical, runaway departure from the delegates understood purpose. A few delegates left in protest, and some constituents at home were dissatisfied with the product. But the delegations of 11 states (out of 12 attending) endorsed the proposed constitution at the Convention. The state legislatures thereafter approved by organizing ratifying conventions and, finally, the state conventions approved by unanimously ratifying it! By acknowledging their agents' actions, the states and the

⁶⁷ See, for example, Mary Margaret Penrose, "Conventional Wisdom: Acknowledging Uncertainty in the Unknown," 78 Tenn. L. Rev. 789 (2010-2011).

⁶⁸ See Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, p26, Greenwood Press (1989).

⁶⁹ Gerald Gunther, "The Convention Method of Amending the United States Constitution," 14 Ga. L. Rev. 1, 12 (1979).

⁷⁰ See Robert G. Natelson, "Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 Tenn. L. Rev. 693, 747 (2010-2011).

⁷¹ Michael Stern, "Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention," 78 Tenn. L. Rev. 765, 786 (2010-2011).

⁷² Robert G. Natelson, "Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3)," p10, Goldwater Institute Policy Report No. 241, September 16, 2010.

People uniformly approved and accepted the Constitutional product. This precedent provides a comfortable method of control around the delegates of future conventions.

Ultimately then, the alarmist cries of a runaway convention fall quiet. The *limited power to propose* gave legitimacy to the Philadelphia Convention, and the *limited power to propose* will give legitimacy to the next convention. The federalist minds, which carried the Constitution to ratification, explained their actions at the Philadelphia Convention this way:

James Wilson: “[I have] authority to conclude nothing, but ... [I am] at liberty to propose anything.”

Alexander Hamilton: “We can only propose and recommend—the power of ratifying or rejecting is still in the States.”

James Madison: “[The convention was] merely advisory and recommendatory.”⁷³

This makes plain that Article V reiterates the path to legitimacy that the founders themselves followed. At that time, states expected that their delegates would meet in conventions and conclude business. Since a question about the legitimacy of Philadelphia’s product lingered, the delegates did not announce or attempt to enforce a final product. They instead returned the product as a suggestion to the states for consideration.

A modern convention would thus remain intentionally controlled in several ways. These ways include: the expectation and supervisory authority of the states that applied for the convention and that sponsored the delegates, the high public attention on such a convention, and the ultimate ratification which requires a super-majority of states to become effective.

Still, some have suggested that Congress should check whether a convention’s proposal conforms with the stated agenda. If it does not, the argument goes, then Congress should refrain from sending it to the states for ratification.⁷⁴ This seems inconsistent with the rest of Article V discussed here, however, as Congress’ role is administrative only—to send a proposal to the states with a chosen method of ratification. Congress did not have authority to check the product in 1787, and it does not hold authority to do so today. Without Congress, the state-sponsored delegates can perform their work with adequate supervision from their own states.

Congress notwithstanding, the many controls available, both legal and political, mean that a convention drifting from its purpose will come to naught. The ratification vote, above all, forms the ultimate check on the convention’s work, as summarized by other authors:

[S]tates and the Congress possess the power-both political and constitutional-to limit the agenda of a convention. Moreover,... there are judicially nonenforceable yet compelling provisions of the Constitution.... [T]he convention always has the potential to exceed the institutional limits placed on it. Nevertheless, the ... article V requirement of

⁷³ Paul J. Weber and Barbara A. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention*, p26, Greenwood Press (1989) (citations omitted).

⁷⁴ See Robert G. Natelson, “Amending the Constitution by Convention: A Complete View of the Founders Plan (Part 1 of 3),” Goldwater Institute Policy Report No. 241, September 16, 2010.

ratification of amendments by the states substantially diminishes the risks of a "runaway" constitutional convention.⁷⁵

It would be difficult for any governmental body to enforce a limitation on the convention, especially given that a constitutional convention once created, could conceivably claim independent authority as a separate constitutionally authorized body. There is little reason to worry, however, or if it were accepted that its scope could not be limited by the States or by Congress, the convention is only the first step in the amendment process. The proposed amendments must still be ratified by three-fourths of the States, which is an even greater number than the proportion required to call a convention in the first place.... The ratification process itself is the means of enforcing a subject-matter limit on a convention.⁷⁶

All of the procedural points in the process will demand coordination in order to achieve success. Since the particulars of applications, precedent, and rules will affect a convention and its proposal, the states must cooperate from the outset. Various authors' analyses of Article V identifies obstacles that have blocked amendment by convention over history, and each point suggests that a successful approach to a convention would coordinate as many particulars as possible in every state enactment along the way.⁷⁷ The forms appearing with this article attempt just such coordination.

At the conclusion of the convention, the presiding officer would transmit the text of any proposed amendment to the same officers of Congress that received the applications, along with a certification. Because court opinions and legislative practices have regarded time limits randomly and inconsistently, a proposed amendment would wisely carry a deadline for ratification in order to avoid confusion. An example form of proposed amendment, with deadline and certification, appears with this article.

Ratified by Three Fourths of the Several States

After an amendment is proposed, the last step—ratification--presents a clear procedure because it has been successfully completed many times. Ratification by the states can occur by either state legislatures or state convention, at Congress' discretion. Used only once for the 21st Amendment, the state conventions offer less, but still valuable, historical precedent. State

⁷⁵ New York State Bar Association Committee on Federal Constitution, Article V and the Proposed Constitutional Convention Procedure Bills, 3 Cardozo L. Rev. 529, 548 (1981-1982).

⁷⁶ James Kenneth Rogers, "The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process," 30 Harv. J. L. & Pub. Pol'y 1005, 1019 (2006-2007) (citation omitted).

⁷⁷ See, for example, Michael B. Rappaport, "Reforming Article V: The Problems Created by the National Convention Method and How to Fix Them," 96 Va. L. Rev. 1509, 1567-1578 (2010).

legislatures, on the other hand, have ratified all of the rest of the 27 Amendments, offering a large body of historical precedent on how to ratify a proposed amendment. Because so much of ratification has already passed, this article treats it only briefly here.

Over the Constitution's tenure, some interesting questions about ratification have challenged state legislatures, Congress, and courts. Some of the questions, only summarized and noted here, include: whether a proposed amendment has an implied time limit for ratification, whether a state can rescind ratification, what makes state legislative procedure valid when ratifying, and whether the Supreme Court or the Congress should ultimately confirm ratification.⁷⁸ The answer to these questions, as the law now generally stands, is as follows: there is no time limit for ratification unless specified in the proposed amendment; states may not be able to rescind ratification if the Congress refuses to acknowledge the rescission, irregular state-legislative procedure may invalidate a state's apparent ratification, and Congress holds some initial power to affirm ratification.⁷⁹ Taken together, the precedent suggests that states should enact uniform ratifications by regular legislative or convention processes in order to ensure success of a proposed amendment. An example state enactment of ratification appears with this article.

As for ratification by legislatures, the procedure would follow the exact same guidelines discussed previously in this article concerning the application. Since the process appears repeatedly in the past, no more than brief mention is warranted here. Essentially, the state legislatures again act as independent federal instruments under the language of Article V.⁸⁰ Each legislature would ratify by a resolution (if unicameral) or joint resolution (if bicameral). There are no other strictures from any other officers of government, such as a state's governor, who has no necessary role to play. This idea extends to the electorate, who likewise carries no direct authority in the process.⁸¹ A legislature would use the same certification and notification methods as with the application for the convention in the first place.

⁷⁸ See generally Brenden Troy Ishikawa, "Everything You Wanted to Know About How Amendments Are Made, But Were Afraid to Ask," *Hastings Const. L.Q.* 545 (1996-1997) (reviewing, among other cases, *Coleman v. Miller*, 307 U.S. 433 (1938), *Dillon v. Gloss*, 256 U.S. 368 (1921), and *Carter v. Goldwater*, 444 U.S. 996 (1979)).

⁷⁹ See generally Brenden Troy Ishikawa, "Everything You Wanted to Know About How Amendments Are Made, But Were Afraid to Ask," *Hastings Const. L.Q.* 545 (1996-1997) (reviewing, among other cases, *Coleman v. Miller*, 307 U.S. 433 (1938), *Dillon v. Gloss*, 256 U.S. 368 (1921), and *Carter v. Goldwater*, 444 U.S. 996 (1979)); and see Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 *Mich. L. Rev.* 875, 902 (1967-1968).

⁸⁰ See generally *Hawke v. Smith*, 253 U.S. 221 (1921) and *Leser v. Garnett*, 258 U.S. 130 (1922). See also Anthony James Guida, Jr., "States Role in Article V Conventions," 54 *U. Cin. L. Rev.* 217, 328 (1985-1986) (citing *Hawke v. Smith*, 253 U.S. 221 (1921)). See also various court opinions: *AFL-CIO v. Eu*, 36 Cal. 3d 687 (1984); *Uhler v. AFL-CIO*, 105 S. Ct. 5 (1984); *Leser v. Garnett*, 258 U.S. 130 (1922); *Barlotti v. Lyons*, 182 Cal. 575 (1920); *Petusky v. Rampton*, 307 F. supp. 235 (D. Utah 1969)).

⁸¹ See Anthony James Guida, Jr., "States Role in Article V Conventions," 54 *U. Cin. L. Rev.* 217, 328 (1985-1986) (citing *Hawke v. Smith*, 253 U.S. 221 (1921); *AFL-CIO v. Eu*, 36 Cal. 3d 687 (1984); *Uhler v. AFL-CIO*, 105 S. Ct. 5 (1984); *Leser v. Garnett*, 258 U.S. 130 (1922); *Barlotti v. Lyons*, 182 Cal. 575 (1920); *Petusky v. Rampton*, 307 F. supp. 235 (D. Utah 1969)).

While legislatures have done most of the ratifying, as mentioned, state conventions could instead take the role. Evident in the background of the 21st Amendment, Congress chose state conventions for ratification as a means of direct referendum. It worked successfully despite wide variations in the several states. Numerous authors have described well the process and politics involved; consider these commentaries:

One of the most important issues through the ratification process was the method by which the people would elect convention delegates to the state conventions that would vote on the Twenty-First amendment. This question centered on whether delegates would be chosen by state-wide or local elections. At the time, Congress made no decision on this issue. Consequently, the states stepped into the vacuum.... The absence of a clear rule in Article V did not lead to chaos. On the contrary, states simply proceeded according to the provisions and procedures in the state constitutions. Despite the novelty of the state convention methods, a clear demonstration has been given of what can be accomplished, even in legislation of a novel character, when the objective is definite and the public insistent.⁸²

If Congress requires the states to use ratifying conventions, the people will have to elect delegates to represent them in the conventions. These elections will provide the people with a greater power to control the results of the amending process. The state conventions are called for specific purpose of deciding whether to ratify particular proposed amendments. As a result, the people will know where the delegates stand on the issue of ratification at the time they select the convention delegates. If Congress provides for ratification by three-quarters of the state legislatures, the state representatives and senators will decide whether to ratify the proposed amendments. However, these representatives and senators have already been elected and were not chosen to decide whether to accept a proposed amendment. The people will not know where the representatives stand on the issue of ratification and, thus, they cannot control the results of the amending process.⁸³

A state convention to ratify or reject a particular proposed amendment to the Constitution can be structured in a way so as to make it, in effect, a referendum by the people on that particular issue. The possibilities are well exemplified by the process followed in the ratification of the twenty-first amendment repealing the eighteenth amendment. In most of the states, delegates to the ratification convention ran on a pro or con platform.... On that occasion Congress left to the states the procedures for establishing the state constitutional conventions and a considerable diversity from state to state resulted. In some states delegates to the constitutional convention were elected at

⁸² Ronald D. Rotunda and Stephen J. Saphranek, "An Essay on Term Limits and a Call for a Constitutional Convention," 80 Marq. L. Rev. 227, 242-243 (1996-1997).

⁸³ Ronald D. Rotunda and Stephen J. Saphranek, "An Essay on Term Limits and a Call for a Constitutional Convention," 80 Marq. L. Rev. 227, 240 (1996-1997).

large and, in other states, from districts and in still others a combination of the two systems....⁸⁴

As a final note, when a state ratifies a proposed amendment, the appropriate state official should deliver an appropriate certificate to the National Archivist.⁸⁵ It would also seem prudent to deliver copies of the certificate to Congressional officers as when submitting the original application for a convention.

Given consistent theory and some precedent, the Constitution and attendant history leave a clear path for the process of ratification. Considering the precedent, an amendment will clearly succeed where the states, either by convention or by their legislatures, act promptly to ratify and do so according to regular past procedure. When a proposed amendment issues to states, a simple, prompt response from three-fourths of states will establish a clear popular desire for the amendment and will meet the legal standard imposed by Article V of the Constitution.

⁸⁴ Willard H. Pedrick and Richard C. Dahl, "Let the People Vote! Ratification of Constitutional Amendments by Convention," 30 Ariz. L. Rev. 243, 248, 254 and n. 24 (1988) (citations omitted).

⁸⁵ 1 U.S.C. §106(b).