CONGRESS' OBLIGATION TO CALL A CONVENTION OF STATES UNDER ARTICLE V OF THE UNITED STATES' CONSTITUTION

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Abstract

Under Article V of the United States Constitution Congress is required to call a convention to propose amendments to the Constitution whenever two thirds of states legislatures so apply. The exact nature and extent of Congress's authority granted by this provision of the Constitution are, however, unclear. The most contentious questions are whether Article V gives Congress legislative authority to establish rules governing the convention of states process; whether they can scrutinize states' applications and make final decisions regarding their validity, and to what extent the Constitution authorizes federal legislature to control organization of a convention of states and its deliberations. There is no ready answer to neither of these questions, yet they need to be addressed to properly establish what does the obligation to call a convention of states put upon Congress by the Constitution actually entail. The prospect of such a convention may still be dim, still in recent years the alternative route to amend the Constitution has certainly attracted new attention. The extent of Congress's authority under Article V has never been firmly established. In this article we argue that congressional powers regarding convention of states process are strictly limited. To support this conclusion we rely on textual, historical, and structural arguments.

Keywords: *constitutional amendment, convention of states, Article V, United States' Constitution*

I. Preliminary remarks on the Article V convention of states clause

Under Article V of the United States Constitution, the Constitution can be amended in two different ways. First, Congress may propose an amendment "whenever two thirds of both Houses shall deem it necessary". Second, a convention must be called

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for this purpose by the federal legislative body "on the application of the legislatures of two thirds of the several states". Once proposed, amendments need to be ratified by three fourths of the state legislatures or state conventions[1].

American Constitution is one of the most rigid in the world. Over the course of more than two centuries only thirty-three amendments have been sent to the states for ratification and only twenty-seven of those were ultimately ratified and added to the original text. Every one of these amendments was proposed by Congress. Convention for proposing amendments – simply known as convention of states – has never been called. The convention of states clause in Article V gradually became one of the obscure provisions of the Constitution, often characterized as archaic and ill-suited for modern times, if not altogether dangerous. For those who share this sentiment it would be best if it could remain dormant.

However, even if it may seem obsolete to a modern eye a use can always be made of any constitutional provision if it continues to be a part of the constitutional text. In the United States, the best-known case of a successful restoration of a seemingly outdated provision is the impeachment clause, at least as far as it concerns the office of the President. Although it was never questioned that Congress had the power to remove the President from his office, after the acquittal of Andrew Johnson in the impeachment trial in 1868, for over a century there was no attempt to use the impeachment clause again. By the time the Watergate affair broke out in 1972, it seemed unthinkable that federal legislature could ever try to impeach a sitting President, let alone one that was already out of office. Yet, the impeachments trial of Bill Clinton in 1999 and two similar trials of Donald Trump in 2020 and 2021 proved that the impeachment clause has been successfully restored.

Similarly, even if it may seem unthinkable that the convention of states clause could ever be actually triggered, given the state of American politics and current political climate, it wouldn't be much of a surprise if an attempt to bypass Congress in constitutional amendment procedure was in fact successful or come close to it.

On three separate occasions Congress faced the prospect of being required to employ Article V convention of states provision. The first time was in the early 20th century, when after thirteen year-long campaign that started in 1899, thirty-one state legislatures – only one short of constitutional threshold of two-thirds, which at the time was thirty-two – managed to pass applications for a convention to propose an amendment to the Constitution that would mandate popular election of federal senators. Between 1964 and 1969 thirty-three states applied for a convention under Article V to propose an amendment that would overturn the 1964 decision of the Supreme Court in *Reynold v. Sims*[2], which required states to apportion seats in both houses of their legislatures solely on a population basis. Again, the effort came only

[1] U.S. Const. art. V.
[2] Reynolds v. Sims, 377 U.S. 533 (1964).

one state short of the required number of thirty-four states. Finally, between 1975 and 1983 thirty-two states officially applied for a convention of states to propose balanced budget amendment to end federal deficits[3].

The last decade has witnessed a renewed interest in the idea of a convention of states. Balanced Budget Amendment Task Force (BBA Task Force) was established in 2010 to pick up the cause of a balanced budget amendment by turning to the Article V convention. Three years later Convention of States Project (CoS) was launched. The organization advocates for a convention of states for the purpose of proposing one or more amendments to the constitution to impose fiscal restraints on the federal government, to limit the power and jurisdiction of the federal government, and to limit the terms of office of federal officials and members of Congress. These are two most significant initiatives that work towards constitutional change through the alternative route of the convention of states. There are others, of lesser importance[4].

BBA Task Force claims that at present they have secured twenty-eight out of thirty-four necessary state applications. A decent number of them, however, were passed between 1975 and 1983. Their validity is therefore questionable, although it is a matter of dispute whether Congress can reject an application on the contemporaneity grounds (see below). In recent years BBA Task Force managed to push through state legislatures as many as sixteen applications, but it seems that it has somewhat lost its momentum.

The story of CoS Project is very different. Not only the initiative received endorsements from major political figures as well as important conservative commentators and media personalities, but it also has been quite successful and is still actively working to pass convention of states applications by the required number of state legislatures. It took nine years for nineteen states to come around[5]. As of 2022 Convention of States Project resolution was passed by one legislative chamber in six more states. In another fourteen states there was an active legislation for that purpose in state legislature.

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[3] Russell. L. Caplan, Constitutional Brinkmanship. Amending the Constitution by National Convention, Oxford University Press, New York – Oxford 1988, p. 63-65, 73-83.

[4] Wolf PAC, launched in 2011 advocates for a constitutional amendment to overrule Supreme Court's decision in Citizens United v. Federal Electoral Commission, where the Court found regulations that imposed financial restrictions on corporations, aimed to limit their ability to support political broadcast in elections unconstitutional under the First Amendment. As of October 25th, 2022 they claim that four states have applied to Congress to call a convention under Article V (California, Illinois, Rhode Island, Vermont) https://wolf-pac.com (accessed on 25 October, 2022). The most recent initiative of any significance is the U.S. Term Limits (USTL) single-subject initiative to call a convention of states for the sole purpose of proposing an amendment to set term limits for members of Congress. According to data provided by the organization, as of October 25th, 2022 five states have passed U.S. Term Limits single-subject application for congressional term limits (Alabama, Florida, Missouri, West Virginia, Wisconsin), https://www.termlimits.com (accessed on 25 October, 2022).

[5] Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Tennessee, Utah, West Virginia, Wisconsin, https://conventionofstates.com (accessed on 25 October, 2022).

In this article we focus on the role of Congress in the convention amendment process and, more specifically, on the scope of its powers under Article V convention of states clause. In other words, we are interested in a single line in the Constitution that states that "the Congress […] on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments". Thus, our inquiry comes down to dissection of this single short passage of the constitutional text. We argue that the powers of Congress under convention clause of Article V are strictly limited. To support this conclusion we rely on textual, historical, and structural arguments. In the analysis of a constitutional text, the language of a particular provision of the constitution must always be the first place to go. When the language of constitutional text is succinct, as is clearly in this case, one must necessarily turn to additional arguments drawn from history and the structure of the constitution.

II. Congress's authority to establish rules governing the convention process

No action on the part of Congress has been prompted as yet by most recent activity of Article V convention advocates. In the past, however, looming conventions did result in few attempts to address major constitutional questions pertained to the process. None of those attempts was successful, but they did raise one important constitutional question: whether obligation to call a convention under Article V gives Congress the power to legislate on the matter?

In 1967 Senator Sam J. Ervin Jr introduced a bill with intention to establish permanent rules and procedures necessary to implement the convention amendment procedure of the Article V[6]. The bill was reintroduced twice, in 1971 and again in 1973. Both times it passed the Senate only to be left to die in the House Judiciary Committee[7]. According to congressional records fourteen similar bills were introduced in the House of Representatives and thirteen in the Senate since then, last one in 1991 by Senator Orrin G. Hatch. None of them was passed even by one chamber of Congress. These bills differed when it comes to specific provisions, but they all had the same purpose and addressed similar constitutional concerns.

There is no need to discuss all of them in details. It will suffice to present general approach taken by their sponsors. All of them sought to establish rules and regulations for both calling a convention by Congress and for its later operation. Hence, they addressed the following issues: general rules for states application for a convention; procedure

[6] Sam J. Ervin Jr, Proposed Legislation to Implement the Convention Method of Amending the Constitution, "Michigan Law Review", 1968, vol. 66, no. 5, p. 878-879.

[7] Ann. S. Diamond, Convention for Proposing Amendments: The Constitution's Other Method, "Publius: The Journal of Federalism", 1981, vol. 11, no. 3/4, p. 130.

for calling convention by Congress; number of delegates from each state and the method for their selection; procedures for convening convention and its operation, including agreeing amendments, their approval by Congress and ratification by the states.

Not only were these bills "drafted on the assumption that Congress is in fact authorized to control and specify the powers and procedures of Article V conventions"[8]. Their sponsors believed that Congress could legislate on this matter. Senator Ervin had no doubt that Congress could legislate "about the process of amendment by convention", and that its power was "plenary", which means that it could pass legislation on every subject related to convention process and "settle every point" not settled by the Article V itself. He argued that it was residual authority of Congress to pass legislation on "every matter that requires uniform settlement" and since neither the states themselves nor the convention were capable of passing required legislation, it was the Congress that needed to do it[9].

This argument clearly fails to recognize that there may be different way to establish rules and procedures for the convention of states than congressional legislation. It is one thing to argue that Constitution gives Congress certain powers under Article V convention of states clause. It is entirely different to claim that it authorizes federal legislature to establish permanent legal framework for the implementation of these constitutional provisions. One can agree that Congress does have the power to establish rules and procedures for the convention of states, but it does not involve the power to legislate.

The assumption that Congress is authorized to pass legislation to clarify the meaning of Article V and to provide rules and procedures for convention of states was challenged very early on. When the original Senator Ervin's bill was to be reintroduced in Congress in the early 1970s, one commentator argued that "the most obvious thing" that was wrong with it was that the bill attempted to "to bind successor Congresses to vote in a certain way on controverted questions of constitutionality and policy, a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do"[10]. He didn't question the powers of Congress under Article V but claimed that it was the obligation to call a convention when constitutional requirements were met that creates the duty and the power to provide necessary rules and procedures. If this should be the case than obviously only the sitting Congress at the time can exercise this power[11]. This, in turn, excluded congressional legislation, as it would force every future Congress to act in a certain way, and therefore deprive federal legislature of its inherent powers.

[8] C. Herman Pritchett, Congress and Article V Conventions, "Western Political Quarterly", 1982, vol. 35, no. 2, p. 223.

[9] Sam. J. Ervin Jr., op. cit., p. 879-880.

[10] Charles. L. Black Jr., Amending the Constitution: A Letter to a Congressman, "Yale Law Journal", 1972, vol. 82, no. 2, p. 191.

[11] Ibid., p. 193.

The assumption made by Senator Ervin and other proponents of congressional legislation on convention of states is unfounded. Legislative powers of Congress cannot be simply assumed. They must originate from the Constitution. There is no question that Article V does not expressly give Congress the power to make laws. If so, then its law-making authority on the subject-matter must either result from a different part of the Constitution or it must be found in Article V itself, despite the lack of direct provision to that effect.

While general grant of legislative authority to Congress in Article I of the Constitution does not include the power to legislate in matters of constitutional amendment – understandably, since the procedure is addressed in separate Article – it has been argued that necessary and proper clause authorizes Congress to make laws on this subject-matter since it gives the federal legislative body the power "to make all laws which shall be necessary and proper for carrying into execution" not only the powers granted to Congress in Article I, but also "all other powers vested" by the Constitution "in the government of the United States, or in any department or officer thereof". It could be argued, therefore, that congressional legislation is proper, if not necessary, to carry into execution the power to call a convention to propose constitutional amendments, granted to Congress in Article V[12]. Broad understanding of necessary and proper clause developed by the judiciary and constitutional scholarship would make such an argument even more plausible. However, it holds only if one considers "calling" a convention by Congress to be a sweeping power. If it is to be understood as giving Congress full control over the convention itself and the amendment process overall, then it makes sense that certain law-making powers are "necessary and proper" to carry such a vast power into execution. But it would be an example of a circular reasoning: Congress has extensive powers under Article V convention of states process which means that it can make laws to execute them, and it can make laws with respect to this matter because its powers under Article V are extensive[13].

Nothing in the language of the convention of states clause indicates Congress' authority to make laws. Responsibility for calling a convention is not enough to support

[12] This is, generally, a reasoning presented by Charles. L. Black Jr. back in 1963 when he apparently thought that Congress could make laws with regard to convention of states under necessary and proper clause: "Since Congress is to call the convention, and since no specifications are given, and since no convention can be called without specifications of constituency, mode of election, mandate, majority necessary to "propose", and so on, then Congress obviously may and must specify on these and other necessary matters as its wisdom guides it". Charles. L. Black Jr., The Proposed Amendment of Article V: A Threatened Disaster, "Yale Law Journal", 1963, vol. 72, p. 964.

[13] Robert. G. Natelson offers different arguments against the use of necessary and proper clause as the source of congressional law-making power in this context. First, he contends that necessary and proper clause does not apply to Article V because Congress is neither part of the "government of the United States" nor one of its departments. Second, necessary and proper clause will not be enough to bestow upon Congress broad enough powers to control convention of states. Third, "a line of twentieth century cases holds that government legislation cannot control the amendment process". Robert. G. Natelson, The Law of Article V. State Initiation of Constitutional Amendment, Apis Books, Columbia Falls 2020, p. 60-62.

grant of legislative powers. An act of calling an assembly for the purpose of proposing amendments to the Constitution does not necessarily involve making laws. Since, as we noted, congressional power to legislate can never be assumed, those who argue that Congress does have the power to pass legislation with regard to alternative method of constitutional amendment must prove that this authority is legitimate and must show its constitutional grounds. For those who think otherwise it will be enough to claim that no such grant of power was made by the Framers. Which is, we believe, the correct position.

In the very first case concerning Article V, *Hollingsworth v. Virginia* decided in 1798, the Supreme Court rejected the idea that once proposed by Congress, constitutional amendments should be referred to President for his approval and established the principle that amendments to the Constitution are different from ordinary legislation[14]. Since convention of states was never called, no case concerning this method of amending the Constitution has yet reached courts. However, *per analogiam* to reasoning presented in *Hollingsworth* and reiterated by federal court in more recent case[15], an argument can be made that just as proposing amendments, calling a convention of states is also distinct from law-making. This would, of course, mean that any claim on the part of Congress to have the power to pass legislation with regard to this constitutional amendment method is illegitimate. Absent an express constitutional provision that authorizes Congress to legislate on this matter, for the reasons given above such legislation should be considered *ultra vires* and therefore unconstitutional.

III. Congress's authority to control the validity of states' applications

Under Article V Congress must call a convention of states whenever required number of state legislatures apply. The provision creates an obligation, not a right. That much is certain, and crucial for the proper understanding of the clause. "By the fifth article of the [Constitution] – wrote Alexander Hamilton in *Federalist no. 85* – the Congress will be obliged "on the application of the legislatures of two thirds of the States […], to call a convention for proposing amendments […]". The words of this article are "peremptory". The Congress "shall call a convention". Nothing in this particular is left to the discretion of that body"[16]. The last sentence from the well-known essay seems to leave no room for further investigation and speculation. No discretion means no discretion. However, even though the language of Article V is indeed "peremptory", it still does not provide a ready answer to a couple of very important questions: when

[14] Hollingsworth v. Virginia, 3 U.S. 3 Dall. 378 378 (1798). Thomas Millet, The Supreme Court, Political Questions, and Article V – A Case for Judicial Restraint, "Santa Clara Law Review", 1983, vol. 23, no. 3, p. 748-749.

[15] Idaho v. Freeman, 529 F. Sup. 1107 (D. Idaho 1982).

[16] Federalist no. 85 [in:] Clinton Rossiter ed., The Federalist Papers, New American Library, New York 2003, p. 525.

does exactly the obligation to call a convention materialize; and who is authorized to determine whether it did?

Congress is under obligation to call a convention only if constitutional requirements described in Article V have been met, which means when the two-thirds of state legislatures have sent proper applications. Under current rules of the House of Representatives, Chair of the Committee on the Judiciary designates each memorial from the States and determines whether it purports to be an application of the legislature of a state calling for a convention under Article V or rescission of prior application from the state[17]. The Chair does not determine whether an application is valid, but only decides if a memorial sent to the House of Representatives is an application under Article V or a recission of an application and therefore if it should be recorded as such by the Office of the Clerk. The Office of the Clerk is responsible for keeping record of both applications and recissions.

It is not entirely clear whether the role of the Chair of the Committee on the Judiciary is more than only perfunctory. Can he, for example, refuse to designate a memorial as an application if he determines that it does not meet constitutional requirements under Article V? There is one obvious requirement: only state legislatures can apply for a convention. It means, *inter alia,* that no other state official can be involved in the process, that both legislative houses must be in agreement, and that the decision to send an application cannot be determined outside of the state legislature. For example, it cannot result neither from voter initiative nor from referendum[18]. There is no reason why in clear-cut cases the Chair of the Committee on the Judiciary could not refuse to designate a memorial as purporting to be an application under Article V. If not adopted solely by state legislature a memorial is not an application for a convention and should not be recorded as such. The Constitution in Article V puts an obligation upon Congress, but also upon the States. If the former must call a convention once the sufficient number of States apply, the latter must apply in a proper manner. In any case, an application could be rejected by the Chair only on formal grounds, that is only if it didn't come from state legislature. It doesn't mean, however, that a petition certified by responsible state officer as properly adopted by state legislatures can be challenged and rejected in Congress.

Decision made in the House of Representatives does not, of course, bind the Senate. Applications are addressed to Congress and, for obvious reasons, sent to both houses separately. While there is no official record kept in the Senate, every petition received from the state is tabled and recorded. Decision of the presiding officer to table resolution of the state legislature should then be understood as a tacit acknowledgment

[17] H.Res.8 – 117th Congress (2021-2022), sec. 3 (m).

[18] Vide: Jonathan L. Walcoff, The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Convention, "Columbia Law Review", 1985, vol. 85, no. 7.

of the upper chamber that petition meets constitutional requirement of an application under Article V.

Constitution does not grant Congress any power to examine applications and determine their validity on substantive grounds. There is currently no procedure in place to that effect. One can only speculate that should the states claimed that the number of applications had met constitutional threshold, Congress would make an attempt to review recorded applications in order to determine their validity. If Congress decided to do it, it wouldn't enter a completely uncharted territory. In 1887 federal legislature gave itself the power to review electoral votes under the XII amendment's provision that requires electoral votes to be "counted" in the presence of the Senate and House of Representatives[19]. Despite being clearly unconstitutional[20], the Electoral Count Act of 1887[21] has remained in effect for more than a century. If Congress was able to alter the process of presidential election without express constitutional authorization, there is no reason to think that it wouldn't try to do the same with constitutional amendment method[22]. But whatever Congress may or may not try to do when faced with the reality of convention of states, it doesn't change the fact that Article V does not authorize it to review states' applications on substantive grounds.

There has been much debate among scholars and commentators about the limitations of states ability to apply for a convention for proposing constitutional amendments. Two most contentious issues seem to be whether validity of an application depends on its contemporaneity, and what is the permissible scope of the applications.

Some scholars expressed a belief that to remain effective applications should be "reasonably contemporaneous, so that they express the will of the people in thirty-four states at a given time"[23]. The argument here is that time limit on applications is

[19] U.S. Const. amend. XII.

[20] See: Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, "North Carolina Law Review", 2002, vol. 80, no. 5.

[21] Electoral Count Act 3 U.S.C. § 15 (1887).

[22] The exact course of action that Congress would take in such circumstances is of course unpredictable. Much would depend on its composition. This goes beyond the scope of this article. One can, however, notice that an attempt made in early 2021 to nationalize congressional and presidential elections against clear constitutional provisions, and the surrounding debate shows that constitutional concerns regarding the limits of congressional powers are not, to say the least, of the utmost importance for many federal law-makers.

[23] Ann. S. Diamond, op. cit., p. 142. Also: Proposing Amendments to the United States Constitution by Convention, "Harvard Law Review", 1957, vol. 70, no. 6, p. 1072 ("the duty of Congress to call a convention for the proposal of amendments should arise only when contemporaneous debates in two thirds of the states have produced agreement that change is desirable in the whole or some particular aspect of the Constitution"); Arthur E. Bonfield, Proposing Constitutional Amendments by Convention: Some Problems, "Notre Dame Law Review", 1964, vol. 39, no. 6, p. 666 ("There would seem little doubt that Congress would neither be empowered nor under a duty to call an Article V convention unless it receives "relatively contemporaneously", proper applications from the required number of state legislatures)"; Russell S. Caplan, op. cit., p. 112 ("Ancillary to accepting convention applications and determining when a convention

necessary "in order to determine that there is legitimate, simultaneous support for a convention"[24]. In *Dillon v. Gloss* Supreme Court determined that under Article V Congress, in proposing amendments, may fix a reasonable time for ratification and that the period of seven years was reasonable[25]. This ruling is supposed to suggest that a time limit on applications under the same article would also be constitutional.

There are several problems with this reasoning. First, the question in *Dillon* was whether Congress could require that a constitutional amendment proposed by Congress itself needs to be ratified in certain time. There is hardly any parallel here with alternative method to amend the Constitution, which requires initiative by the States. Second, a time limit on applications under Article V could only be imposed either *a priori* by congressional legislation, which as we already established would be unconstitutional, or if and when the number of applications for a convention was sufficient to trigger congressional action. It would basically mean that Congress could be able to arbitrarily decide which applications it would accept as valid under *ad hoc* established time limit. This would be hardly acceptable to the States. Third, in *Dillon* the Court suggested that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal"[26]. This point was, however, rendered moot in 1992 when the second of twelve amendments passed in 1789 was certified by the archivist of the United States as the twenty-seventh amendment to the Constitution, after it had been ratified by the 38th state.

If "a requirement of contemporaneity may not be read into Article V" it is hard to argue that applications for a convention of states cannot cumulate over time[27]. Especially, since state legislatures are free to rescind their applications at any time before the overall number reaches constitutionally required threshold of two-thirds. Until it has been rescinded an application must be therefore considered valid for all intent and purpose, no matter how many years may have passed since it was first sent to Congress[28].

Only in the twentieth century it has become customary for the states to specify subject areas of the amendments they were seeking from the convention of states[29]. Most applications passed by state legislatures in previous centuries, few as they were,

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must be called, Congress (in the absence of a state-imposed deadline) probably has the power to establish a period within which applications remain in effect").

[24] Ann S. Diamond, op. cit., p. 143.

[25] Dillon v. Gloss 256 U.S. 368 (1921) at. 375, 376.

[26] Ibid. at. 375.

[27] Michael Stokes Paulsen, A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, "Yale Law Journal", 1993, vol. 103, no. 3, p. 734.

[28] To avoid any confusion, some states declare in their applications that they constitute a continuing application in accordance with Article V. For instance, in its 2016 application Louisiana legislature resolved that "this Resolution shall constitute a continuing application in accordance with Article V of the United States Constitution until the legislatures of at least two-thirds of the several states have made application for a similar convention pursuant to Article V". S. Conc. Res. no. 52 (La 2016).

[29] Michael Stokes Paulsen, op. cit., p. 736.

simply petitioned for a convention for proposing amendments[30], even if often they did explain the reasons for taking such an action. The overwhelming majority of applications adopted in the last half a century called for a convention for the purpose of proposing amendments on specific subject matters or to pass exact amendments[31]. In application for a convention on a balanced budget amendment submitted to Congress in 1978 Colorado legislature even made a reservation that its application should "be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose"[32].

Given that it has become routine for state legislatures to identify in their applications the amendments they are seeking from the convention of states, one must wonder whether the wording of an application matter? More specifically, does it determine its validity, and if so, can Congress disregard an application on this basis?

It has been argued that "a valid petition should specify subject area for possible amendment. Otherwise, it does not meet requirements of Article V"[33]. This is an odd take, giving Article V text and history. No such requirement can be read into the convention of states clause, which means that such a claim can be safely dismissed as bizarre. It is, however, open to debate whether Article V permits only general or plenary conventions or does it allow states to apply for a limited convention as well. Article V scholars has been divided on that issue.

Some of them insisted that from its very nature a convention as a deliberative assembly could not be limited to particular subject or subjects. This position was most accurately explained by M.S. Paulsen who wrote that "the best arguments concerning the text, structure, history, and political theory of Article V's convention provisions all cohere to suggest that there can be no such thing as a "limited" constitutional convention. Those who dread a "runaway" convention thus misapprehend the very nature of a constitutional convention, which is inherently illimitable in what it may

[30] In early 1789 New York State Legislature adopted an application that called for a "convention of delegates" under Article V "with full powers to take the [...] Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind". H.R. Jour., 1st Cong., 1st Sess. 29-30 (May 6, 1789).

[31] For instance, application adopted by Utah legislature in 2019 calls for "a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress". S. J. Res. no. 9 (Utah 2019).

[32] 124 Cong. Rec. 8778 (1978). Similar reservations were made by Idaho ("this application and request [shall] be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose". 125 Cong. Rec. 3657 (1979); North Carolina ("this application and request [shall] be deemed rescinded in the event that the convention 'is not limited to the subject matter of this application". 125 Cong. Rec. 3310-11 (1979) and Utah ("Be it further resolved, that this application for a Convention Call for proposing amendments be limited to the subject matter of this Resolution and that the State of Utah be counted as a part of the necessary two-thirds states for such a call only if the convention is limited to the subject matter of this Resolution". 125 Cong. Rec. 4372-73 (1979).

[33] Ann S. Diamond., op. cit., p. 143.

propose"[34]. Unlike other opponents of limited conventions M.S. Paulsen did not believe, however, that single-item applications could not be proper applications at all and could not create an obligation upon Congress[35].

Instead, he argued that most applications for a "limited" convention should not be treated as such, because they only express a purpose for which convention should be called. Since "there is no persuasive reason to read words of purpose as if they were words of limitations", an application "phrased without explicit conditions is an application for a general convention"[36].

The alternative reading of Article V points to the similarity of language used in describing both amendment methods. If "Congress shall propose amendments" – so the argument goes – means that it can adopt one or multiple amendments, the same should be true when it comes to convention of states. "Thus, a convention may propose multiple amendments just as Congress can, but it may also propose single amendment. This language should be read as expanding the possible roles of a convention, rather than limiting them. A convention can consider multiple issues and propose multiple amendments or be limited to a single issue"[37]. According to this interpretation applications for a limited convention would be perfectly acceptable, and ultimately the States would be able to determine convention's agenda. However, it does nothing to refute the claim that conventions from their very nature cannot be limited.

Article V neither permits nor prohibits states to apply for a convention limited to certain subject matters or even to consider specific amendment. Whether, once assembled, a convention could be in fact stopped from going beyond its mandate is an altogether different question, and it doesn't need to concern us here. Under Article V states can request a convention with intention to limit its deliberations to particular subjects only, and Congress has a duty to call such a convention if the required number of states apply[38]. The phrasing of applications is important only in as much as it determines the count. Only those applications that express similar purpose can be grouped together and contribute to the two-thirds threshold[39]. In any case, the stated goal of an application does not affect its validity, and Congress cannot disregard a request made under Article V on this ground. With one exception. Those applications

[34] Michael Stokes Paulsen, op. cit., p. 742.

[35] Arthur E. Bonfield, op. cit., p. 662 ("The process of proposing amendments contemplates a conscious weighing and evaluation of various alternative solutions to the problems perceived"); Charles L. Black Jr., Amending the Constitution…, p. 199-200 ("State requests for a limited convention create no obligation under Article V, since they are not applications for the thing which, and only which, the States may oblige Congress to call, by requesting it").

[36] Michael Stokes Paulsen, op. cit., p. 749.

[37] James Kenneth Rogers, The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process, "Harvard Journal of Law and Public Policy", 2007, vol. 30, no. 3, p. 1016-1017.

[38] Vide: Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis, "Constitutional Commentary", 2012, vol. 81, p. 81.

[39] Robert G. Natelson, op. cit., p. 48.

that expressly condition their validity on whether a convention will be limited to particular subject or subjects can be ignored by Congress. Since Congress cannot *a priori* set limits to what convention of states can deliberate and propose, such applications are indeed "self-destruct"[40]. They are *ab initio* null, void and of no effect, and therefore do not bind Congress.

There is nothing in the language of Article V that can support the claim that Congress can enforce a time limit on applications for a convention of states, reject an application for a limited convention or in any other way obstruct the process once the constitutional requirement of sufficient number of applications from the states has been met. Textual arguments seems to be sufficient to refute any claims to the contrary. But it still can be reinforced by historical and structural arguments that concentrate on the purpose of convention of states clause.

The history of Article V in Constitutional Convention leaves no doubt that the intent behind the convention method to amend the Constitution was to deprive the federal government of the full control over the amendment process[41]. The convention of states clause was added only after George Mason raised an objection against the proposition included in the final draft of Article V, arguing that it would make constitutional amendments completely "dependent" on the will of Congress[42]. Convention method provided states with a path to circumvent Congress should it be unwilling to amend the Constitution in a way they desired and refused "needed amendments"[43]. To give Congress any substantial power over the process would not only be unreasonable, but it would defeat the whole purpose of an alternative and additional mode for amending the Constitution[44]. For all we know, Congress was made responsible for calling a convention under Article V for practical reasons only. After all, how else could such an assembly be called, and by whom? no. other national institution was better suited for such a task, and it would be hardly reasonable to

[40] Walter E. Dellinger, The Recurring Question of the "Limited" Constitutional Convention, "Yale Law Journal", 1979, vol. 88, no. 8, p. 1638.

[41] Vide: Tomasz Wieciech, An Article V Convention of States as a Constitutional Initiative at the Federal Level, "Teka of Political Science and International Relations", 2018, vol. 13, no. 1, p. 73-75.

[42] Max Farrand ed., The Records of the Federal Convention of 1787 vol. 2, Yale University Press, New Haven – London 1911, p. 629.

[43] In Virginia ratifying convention Edmund Pendleton exclaimed that, if Congress refused to act "[w]ho shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument". Cited in: Kurt T. Lash, Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V, "American Journal of Legal History", 1994, vol. 38, no. 2, p. 212.

[44] Vide: James Kenneth Rogers, op. cit., p. 1015. As noted by David Castro, "a provision understood by those who ratified the Constitution to be special protection from the evils of centralized government would not be effective if it were controlled by the central government. Article V had to leave one avenue of amendment almost entirely within the realm of state power". David Castro, A Constitutional Convention: Scouting Article V's Undiscovered Country, "University of Pennsylvania Law Review", 1986, vol. 134, no. 4, p. 954.

place this responsibility in the states[45]. At the time of drafting the Constitution, in those states where constitutions could be amended by conventions, state legislatures were responsible for summoning them when necessary[46]. It must have seemed an obvious choice for the drafters of the federal Constitution to just emulate this *modus operandi*. Whenever delegates debated the convention method, they always simply assumed that national legislature would be responsible for calling a convention. But it was never meant to give Congress control over the process beyond making necessary procedural arrangements. If it was to be otherwise the alternative method to amend the Constitution would be redundant. It would also mean that the Framers were either ignorant or extremely devious. Nothing in the drafting history of Article V can support such a claim. In fact, the exact opposite is true. Intentions behind the convention of states method could not be more clear.

IV. Congress's authority over organizational aspects of the convention of states and its deliberations

Article V neither authorizes Congress to scrutinize states' applications nor to decide whether an obligation to call a convention of states materialized. Congress has a duty to call a convention of states once the required number of state legislatures apply. But it is not for Congress to decide if and when it is under constitutional obligation to call a convention under Article V. If Congress did have such a power, it would make him capable of obstructing any effort on the part of the states to make a use of a convention amendment route. Which would be contrary to the purpose of the convention method itself. The only responsibility of Congress it "to call" a convention. What does it mean and what does it involve, however, is not entirely clear.

The strictest interpretation of congressional powers under Article V limits the role of the federal legislature to setting the time, place, and purpose of the convention. It relies entirely on historical arguments and concentrates on the meaning of the "call" in founding-era times. "By the time the Constitution was written – the argument goes – established custom held that a convention call could prescribe to the states and the convention no more than a "time, place, and purpose" trilogy"[47]. Accordingly, making decisions on both composition and rules of the convention would fall outside congressional powers.

[45] Vide: Bill Gaugush, Principles Governing the Interpretation and Exercise of Article V Powers, "Western Political Quarterly", 1982, vol. 35, no. 2, p. 219.

[46] Vide: Constitution of Georgia – 1777 (art. LXIII) [in:] Benjamin Perley Poore ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States, Government Printing Office, Washington 1878, p. 383; Constitution of Massachusetts – 1780 (art. X), ibid., p. 972; Will Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era, Rowman and Little Publishers, Lanham 2001, p. 298.

[47] Ronert G. Natelson, op. cit., p. 56. Vide also: James Kenneth Rogers, op. cit., p. 1015.

Liberal interpretation goes in the opposite direction. Its advocates tend to simply assume that since Article V does not specify the procedures of a convention "Congress must be authorized to decide such questions" and has therefore "implied authority to fix the time and place of meeting, the number of delegates, the manner and date of their election, whether representation shall be by state or population, whether voting shall be by number of delegates or by states, and the vote in convention required to validly propose an amendment to the states"[48]. The disregard presented by those who argue in such a manner, not only for historical precedents and the purpose of the alternative amendment method but also for the basic principle that the powers of Congress are delegated and cannot be assumed, is truly astonishing. Nevertheless, many scholars seem to accept that Congress has imminent powers to determine at least the composition of a convention of states, if only for a lack of viable alternative[49].

The composition and rules of a convention are of course of the utmost importance for its operation and ultimate results. It also goes without saying that uniform rules set by Congress with regard to the number of delegates, their selection or the principle of representation would be much more practicable. But it doesn't mean that such an action is authorized by the Constitution. True, the language of Article V does not provide an easy answer to questions concerning composition and rules of a convention of states. The guiding principle in this case, however, should be the purpose of the provision. As was already mentioned, alternative amendment method was designed to circumvent Congress. This was the whole purpose, to create a route to amend the Constitution not only without congressional involvement but even, and maybe especially, despite the opposition from the federal legislature. To understand it is absolutely crucial to properly assess the role of Congress in the whole process. The correct reading of Article V when it comes to congressional powers must be, therefore, that it requires from Congress only doing everything that is necessary for a convention of states to assemble. Nothing less, and nothing more. It is necessary to set the time and place for delegates to gather. It is not, however, equally essential to determine the number of delegates or the manner in which they should be selected. It is also not necessary to establish the rules under which convention should operate. Delegates can perfectly well do it themselves.

Since the assembly described in Article V is called a "convention of states", the states are, of course, the participants. Normally, sates are represented for the purpose of national political process by their respective governments, specifically by their legislatures as representative branches of states governments. However, Article V does not specify what institution should be responsible for choosing state delegation to the convention. The argument that "Article V indirectly confirms that the method of delegate selection is a prerogative of the state legislature by granting application

[48] Arthur E. Bonfield, op. cit., p. 675.
[49] Vide i.e.: Michael Stokes Paulsen, op. cit., p. 757, ft. 267; C. Hermann Pritchett, op. cit., p. 222.

power to state legislatures in their capacity […] as free-standing assemblies" is not entirely convincing[50]. It may very well be argued that from the very nature of convention as representative assembly, delegates should be chosen directly by the people in every state. Such reasoning would also make representation by population preferable to equal representation of the states[51]. Whatever may or may not be preferable or desirable, the Constitution does not determine neither the number of delegates from each state, nor the method of their selection. However imperfect it may be, decisions in this regard are left to state legislatures as representative bodies in the states. The nature of convention as representative assembly requires election of delegates rather than their nomination, for instance by the executive, but other than that the choice of method of their election is left for state legislatures to decide.

Nothing in Article V indicates that Congress should set the rules for a convention of states. Once the convention is assembled, the initial role of Congress ends. Only after the work of convention is completed and results in one or more propositions of amendments to the Constitution, it is for Congress to decide whether state legislatures or state conventions will be responsible for ratifying these amendments. Convention of states is perfectly capable to establish its own rules. Establishing these rules may prove contentious, but it is for the states assembled in convention to resolve all the problems, whatever their nature may be. Congress is not authorized to supervise convention or to steer its proceedings.

V. Conclusions

Initial interpretations of Article V convention of states clause were in great part determined by the fear of irresponsible or a "runaway" convention that would seek to dismantle the Constitution. In face of such a supposedly grave danger, scholars, and commentators, as well as many politicians, saw in Congress the last bulwark against unwarranted constitutional revolution, and they were more than willing to interpret Article V in the most favorable terms to the federal legislature. From their perspective, Congress was the responsible and reasonable one, and the states were reckless and disruptive. Nowadays, the perception of a convention of states method to amend the Constitution may be slightly different, but especially early legal scholarship on the subject was clearly driven by the overwhelming concern of looming convention of states and its dreadful consequences. For similar reasons there were lawmakers who made repeated attempts to pass legislation that would put supposed congressional powers under Article V on statutory footing.

[50] Robert G. Natelson, op. cit., p. 74. He notices, however, that "in theory, a state legislature could devolve election of commissioners upon the people, voting at large or in districts" which he thinks, however, would be "unprecedented" and "probably unwise". Ibid.

[51] Vide: Ann S. Diamond, op. cit., p. 144.

Renewed interest in convention of states method requires serious reassessment of congressional powers under Article V. It may be true that the convention clause is not sufficiently precise and leaves to many questions without proper answers. Textual, historical, and structural arguments seem to be, however, strong enough to support interpretation that strictly limits congressional powers to control amendment process through convention of states method.

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