REOPENING THE CONSTITUTIONAL ROAD TO REFORM: TOWARD A SAFEGUARDED ARTICLE V CONVENTION

MICHAEL STERN*

"[A] constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."
–James Madison, *The Federalist No. 49*[1]

Every one of the twenty-seven amendments to the United States Constitution has been proposed by the Congress.[2] Even though the First Congress proposed a number of amendments that limited congressional powers or privileges (namely the Bill of Rights[3] and the amendment to limit congressional pay raises[4]), subsequent Congresses have shown little interest in following this example. They have proposed amendments that significantly expand congressional power (such as the Sixteenth Amendment that authorized a federal income tax[5]) but have proposed none that significantly limit congressional power or prerogatives. Recent Congresses, for example, have declined to propose amendments to require a balanced budget or impose term limits.[6] This would have come as no surprise to the Framers, who understood that Congress could not be expected to provide a check on itself.[7] The system they designed not only divided powers within the federal government, but also between the federal and state governments to provide a "double security" for the rights of the people.[8] As James Madison explained in *The Federalist No. 51*, under this

* The author formerly served as Senior Counsel in the Office of General Counsel, U.S. House of Representatives, as Deputy Staff Director for Investigations for the Senate Committee on Homeland Security and Governmental Affairs, and as Special Counsel to the House Permanent Select Committee on Intelligence. He writes about constitutional issues relating to the legislative process and other congressional legal issues at www.pointoforder.com.

1. THE FEDERALIST NO. 49, at 108 (James Madison) (J. & A. McLean ed., 1788).

2. *See* Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 904 (1968).

3. U.S. CONST. amends. I–X.

4. U.S. CONST. amend. XXVII.

5. U.S. CONST. amend. XVI.

6. *See* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1513 (2010).

7. *See id.* at 1525.

8. *See* THE FEDERALIST NO. 51, at 119–20 (James Madison) (J. & A. McLean ed., 1788).

system "[t]he different governments will control each other."[9] For this reason they included in Article V of the Constitution an alternative method for proposing constitutional amendments, one that did not require congressional acquiescence.[10] The convention method of amendment gave the states a constitutional road to bypass Congress when it was necessary to "erect barriers against the encroachments of the national authority," as Alexander Hamilton wrote in *The Federalist No. 85*.[11]

However, uncertainties and fears regarding the convention method have prevented its successful use to propose constitutional amendments.[12] In particular, many have feared that an Article V Convention might stray far from the concerns that caused the states to call for it.[13] The states might desire to set forth on the road to a specific constitutional reform, but a so-called "runaway convention," it is suggested, could take an unforeseen and dangerous detour from the intended path, proposing radical or ill-considered amendments to the Constitution.[14]

In this Article, I will evaluate the risks of a runaway convention in light of the constitutional text, structure, and purpose of Article V and will suggest why these risks are much smaller than often suggested. I will also suggest additional safeguards to minimize any concerns regarding a runaway convention. In combination with the inherent protections of Article V, such safeguards can ensure that the constitutional road to reform will be clearly defined and well marked, and may be traveled safely by the states when they must act to impose limitations on a "runaway Congress."

I. CONSTITUTIONAL CONSIDERATIONS

Article V provides that:

> [T]he 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

9. *Id.* at 120.

10. *See* Rappaport, *supra* note 6, at 1516–17.

11. THE FEDERALIST NO. 85, at 363–64 (Alexander Hamilton) (J. & A. McLean ed., 1788).

12. *See, e.g.*, Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 763 (1993).

13. *See generally, e.g.*, Arthur H. Taylor, *Fear of an Article V Convention*, 20 BYU J. PUB. L. 407 (2006) (analyzing the rationality of common fears related to the process).

14. *See, e.g.*, Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 4–5 (1979).

> 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.[15]

The debate involving the risk of a runaway convention has generally focused on the question of whether a "Convention for proposing Amendments" is, by its constitutional nature, an unlimited convention or whether such a convention may be limited, as a matter of constitutional theory, to considering only such amendments within the scope of the "Application" of the states. Some commentators suggest that unless one can provide a definitive answer to this legal question, it is simply too risky to hold an Article V Convention.[16] I maintain that this is not the case. Nonetheless, the constitutional foundations of the Article V Convention are significant insofar as they shed light on how the constitutional actors in the convention amendment process should, and likely will, fulfill their roles.

A. *The Origins of the Article V Convention*

Article V originated as part of the Virginia Plan presented to the Philadelphia Convention on May 29, 1787.[17] The Virginia Plan stated that the "Articles of Union" should be amendable "whensoever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto."[18]

This provision was referred to the Committee of Detail, which produced a draft stating that "[t]his Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose."[19] Implicit in this statement is that state legislatures would determine, at least in the first instance, when it would become necessary to amend the Constitution and that a convention would be called for the purpose of considering any amendment that the states deemed necessary.[20]

---

15. U.S. CONST. art. V.

16. *See, e.g.*, Gunther, *supra* note 14, at 25 (warning that the road "promises controversy and confusion and confrontation at every turn"); Richard W. Hemstad, *Constitutional Amendment by Convention – a Risky Business*, 36 WASH. ST. B. NEWS 16, 21 (1982) (predicting the possibility of "[A] period of significant instability in the American political system . . . .").

17. *See* Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 360–61 (1979).

18. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., 1911).

19. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 159 (Max Farrand ed., 1911).

20. The language chosen by the Committee of Detail may have been derived from the

Subsequently, on September 10, 1787, objections targeted this provision on the grounds that it gave only the state legislatures the power to initiate amendments.[21] Hamilton argued that the states would "not apply for alterations but with a view to increase their own powers."[22] Congress, he contended, "will be the first to perceive and will be most sensible to the necessity of amendments, and ought also be empowered" to call a convention on its own initiative.[23]

Madison then proposed a substitute that addressed Hamilton's concerns.[24] His proposal provided:

> The Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[25]

The convention adopted the proposal by a vote of nine in favor, one opposed, and one divided.[26]

The Madison Substitute served two functions. First, it eliminated the convention altogether, reflecting Madison's reservations regarding the effectiveness of the convention method.[27] Second, it put the state legislatures and Congress on equal footing. Congress shall propose amendments whenever amendments are deemed necessary by two-thirds of both Houses or applied for by two-thirds of the states.

The Madison Substitute does not explicitly state *what* amendments Congress shall propose. The only reasonable interpretation, however, is that

---

Georgia Constitution of 1777, which stated that "the assembly shall order a convention to be called for that purpose." GA. CONST. of 1777, art. LXIII. The Georgia assembly was to call a convention for amendments "specifying the alterations to be made, according to the petitions preferred to the assembly." *Id.*; *see* RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 95 (1988).

21. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 557–58.

22. *Id.* at 558.

23. *Id.*

24. *See id.* at 559.

25. *Id.*

26. *See id.*

27. Responding to the draft produced by the Committee of Detail, "Mr. Madison remarked on the vagueness of the terms, 'call a Convention for that purpose,'" posing the following questions: "How was a Convention to be formed? [B]y what rule decide[d]? [W]hat the force of its acts?" *Id.* at 558. After the convention method was reintroduced, Madison again noted "difficulties might arise as to the form, the quorum [etc.]" *Id.* at 630.

Congress is to propose those amendments deemed necessary by two-thirds of both Houses or applied for by two-thirds of the states. It would be far-fetched to contend, as literally permitted by the language, that Congress could propose an amendment that was different from one deemed necessary by two-thirds of both Houses. It would be equally unreasonable to conclude that Congress could propose an amendment that was different from one applied for by the state legislatures.[28]

There is, or at least there was at the time, a significant logistical difference between the two types of amendments. While it would have been straightforward to determine which amendments might be deemed necessary by two-thirds of Congress, coordination among the state legislatures was much more difficult considering the limitations of communications in the eighteenth century. It does not appear from the records of the Philadelphia Convention that anyone considered the possibility that the state legislatures could agree, in advance, on the text of a particular desired amendment to the Constitution. One can only assume that the Framers believed that agreement on a single text without a meeting among the states was impractical or created too great a potential for miscommunication and misunderstanding.

This view likely underlay the objection raised by George Mason, on September 15, 1787, to the Madison Substitute.[29] Mason described the provision as "exceptionable [and] dangerous" because "the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress."[30] Therefore, Mason believed that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[31]

---

28. Such a reading would mean that if the states applied for an amendment to establish freedom of speech, for example, the Congress could propose, by a majority vote, an amendment on an entirely different subject, something that it would lack the power to do in the absence of the state applications. Clearly this was not the intent of the Madison Substitute. As James Kenneth Rogers has noted, the Madison Substitute makes little sense except in the context of a specific type of amendment desired by the states. Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1017 (2007).

29. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 629.

30. *Id.*

31. *Id.* Mason's view would be echoed in the remarks of a delegate to the state constitutional convention of Maryland two centuries later; Royce Hanson, during the debates of Maryland Constitutional Convention of 1967–68, noted that:

> [T]here is probably no group of people in creation less likely to reform themselves than the members of the legislature when the time for that reform has arrived, and it is for this reason that it seems to me that we should provide in the constitution a means external to the legislature for the revision of that part of the constitution which pertains to the legislature.

To remedy this problem, "[Gouverneur] Morris [and Eldridge] Gerry moved to amend [Madison's language] so as to require a Convention on [the] application of [two thirds] of the [states.]"[32] Madison responded that he "did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call . . . a Convention on the like application."[33]

Although not reflected in the records of the Philadelphia Convention, the answer to Madison's point must have been that the calling of a convention was merely a ministerial act, with no degree of discretion, while proposing amendments would necessarily have involved some degree of discretion. For example, even if two-thirds of the states applied for a convention and clearly specified the type of amendment they wanted, Congress would still have to agree on the precise wording of the amendment. If Congress was unable to do so, the amendment would never be proposed.

Despite believing the Morris/Gerry proposal to be unnecessary, Madison stated that he had no objection to "a Convention for the purpose of amendments," although he reiterated his concerns about the effectiveness of the convention method, given that there was no definition of how the convention would actually operate.[34] Lacking time or inclination to address these concerns, the Philadelphia Convention agreed to the Morris/Gerry proposal.[35] The amendment assumed its final form when it was agreed to include substantive limitations on the amendment power, including "that no State, without its Consent, [could] be deprived of . . . equal Suffrage in the Senate."[36]

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.[37] 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.

This view of Article V, moreover, was the one presented to the states during the ratification process. Madison continued to adhere to the view that the proposing power given to the convention was merely a quasi-

---

JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 61 (2009).

32. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 629.

33. *Id.* at 629–30.

34. *Id.*

35. *See id.*

36. *Id.* at 662–63.

37. *See* CAPLAN, *supra* note 20, at 29 ("The division of the amendment power was the essential compromise of [A]rticle V, for determining who could propose amendments went far to determining what kind of amendments would be adopted.").

ministerial extension of the state's power to initiate amendments.[38] In *The Federalist No. 43*, he explained that Article V "equally enables the general and the State governments to originate the amendment of errors."[39] In other words, there was no substantive difference between the power of the states to apply for a convention and the power of Congress to propose amendments.

During the debates over ratification of the Constitution, Federalists pointed to the convention method as a key safeguard to protect the states and the rights of the people against potential overreach by the new national government. For example, in *The Federalist No. 85*, Hamilton emphasized the convention method as a means of correcting any perceived errors in the Constitution, explaining that "alterations [in the Constitution] may at any time be effected by" the requisite number of states.[40] He explained that "whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place."[41] Rejecting the notion that Congress could block the convention method, Hamilton wrote:

> [T]he national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan, [C]ongress will be *obliged*, "on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the [C]onstitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are preemptory. The [C]ongress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. . . . We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.[42]

These assurances regarding the convention method would, at best, be misleading if the states lacked any ability to define or control the Article V Convention. If the proposing power of the convention were entirely separate from and independent of the application power of the states, one could not "safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority,"[43] nor could one say that the state and federal governments had equal ability to "originate the amendment of errors."[44]

---

38. THE FEDERALIST NO. 43, at 65 (James Madison) (J. & A. McLean ed., 1788).
39. *Id.*
40. THE FEDERALIST NO. 85, *supra* note 11, at 361.
41. *Id.* at 362.
42. *Id.* at 363–64.
43. *Id.*
44. THE FEDERALIST NO. 43, *supra* note 38, at 65.

B. Textual Analysis of Article V

The key language of Article V is that "[t]he 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 . . . ."[45]

Professor Michael Stokes Paulsen, echoing Professor Charles Black, argues that "[t]he most straightforward reading of the constitutional text concerning what the convention *is*—'a Convention for proposing Amendments'—strongly suggests that it must be, in the words of Professor Black, 'a convention for proposing such amendments as that convention decides to propose.'"[46] Professor Paulsen further contends that "[t]he text supplies no basis for inferring a power, on the part of either Congress or applying state legislatures, alone or in concert, to limit what the convention may consider."[47]

It is true that the text is silent as to what amendments the convention may propose. It is not at all obvious, however, that this silence means that the convention is unlimited in what it may propose. To the contrary, it seems perfectly logical to infer a relationship between the "Application" of the state legislatures and the "Convention for proposing Amendments" to which the application gives rise.[48] Rather than reading the "Convention for proposing Amendments" as a "[c]onvention for proposing such amendments as that convention decides to propose,"[49] it would be at least equally natural to read it as a "convention for proposing such amendments as the state legislatures have applied for."[50]

Professor Paulsen also suggests that the structure of Article V supports the inference that a convention must be unlimited. In his words, "[t]he convention-proposal method is worded in parallel with the congressional-proposal method, implying an equivalence of their proposing powers . . . ."[51] Because Congress is not subject to any limitation on the amendments it may propose, in Professor Paulsen's view, the convention must be similarly unlimited.[52]

This analysis overlooks the presence of the two triggering clauses in Article V.[53] In the case of the congressional-proposal method, the triggering

---

45. U.S. CONST. art. V.

46. Paulsen, *supra* note 12, at 738 (quoting Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 199 (1972)).

47. *Id.*

48. U.S. CONST. art V.

49. Black, Jr., *supra* note 46, at 199.

50. *Id.*

51. Paulsen, *supra* note 12, at 739.

52. *See id.*

53. U.S. CONST. art. V.

clause is "whenever two thirds of both Houses shall deem it necessary."[54] In the case of the convention-proposal method, the triggering clause is "on the Application of the Legislatures of two thirds of the several States."[55] The structure of Article V implies an equivalence between these two triggering clauses, which becomes clearer when one considers the original language of the Madison Substitute.[56] In that provision, the two triggering clauses were alternative means of triggering the congressional-proposal method.[57] As finally adopted in Article V, one clause triggers the congressional-proposal method, while the other triggers the convention-proposal method.[58]

When one recognizes the equivalence of the two triggering clauses, the structure of Article V strongly supports the conclusion that a convention may be limited.[59] Just as Congress's power to propose amendments is limited to those amendments that two-thirds of both Houses deem necessary, the convention's power to propose amendments must be limited to those amendments that two-thirds of the state legislatures have applied for.

Finally, Professor Paulsen argues that the Framers must have understood the term "convention" to refer to a body with unlimited or "plenary" powers.[60] This contention is unpersuasive for several reasons. First, the historical evidence of practice at the time of the founding generation suggests that conventions served a variety of purposes and the term did not have a single fixed meaning.[61] Specifically, not all conventions were understood to be plenary, and limited conventions were known—such as the convention provided for in the Georgia Constitution of 1777.[62]

---

54. *Id.*

55. *Id.*

56. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 559.

57. *See id.*

58. *See* U.S. CONST. art. V.

59. *See id.*

60. Paulsen, *supra* note 12, at 740 ("[T]he best early evidence of 'contemporaneous understanding,' as revealed by early practice, suggests that the founding generation understood conventions to be plenary.").

61. *See* CAPLAN, *supra* note 20, at 3–26. Indeed, Madison's objection to "the vagueness of the terms, 'call a Convention for the purpose'" strongly suggests that the meaning of the term in the context of Article V was not so clear or self-evident. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 558.

62. *See* CAPLAN, *supra* note 20, at 95–98. Recent scholarship by Professor Robert Natelson further supports this point. *See* Robert. G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan (Part 1 in a 3 Part Series)*, POLICY REPORT NO. 241 (GOLDWATER INSTITUTE), Sept. 2010, at 8–12, *available at* http://www.goldwaterinstitute.org/article/5005. Surveying the historical evidence, Professor Natelson concludes that "[a] reference to a 'convention' in an 18th-century document did not necessarily mean a convention with plenary powers, even if the reference was in a constitution. Although it *might* refer to an assembly with plenary powers, it was *more likely* to denote one for a limited purpose." *Id*. at 10.

Second, even if conventions generally had been understood to be plenary, it does not follow that the specific "Convention for proposing Amendments" established in Article V was intended to be of this nature.[63] This convention, after all, was intended for a specific, and limited purpose—to propose amendments to "this Constitution."[64] It was not given the power to enact anything, merely to propose, and the power to propose was limited to "amendments" to "this Constitution."[65] Even the power to propose was subject to substantive limits.[66] For example, it could not extend to denying the states equal suffrage in the Senate.[67] The evidence, therefore, does not support the conclusion that an Article V Convention must be understood as plenary.

C. The Purpose of the Article V Convention

Scholars who believe that an Article V Convention must be unlimited have struggled to explain the constitutional purpose that would be advanced by this interpretation. Although it is possible to argue that the unlimited convention is simply an unintended consequence of the compromise language that the Framers ultimately settled upon, this argument is weakened by the absence of a plausible rationale for the unlimited convention.[68]

This issue must be distinguished from questions regarding the practical difficulties of defining and enforcing limits on an Article V Convention. It is one thing to argue that these difficulties mean that an Article V

---

63. *See generally* Gunther, *supra* note 14.

64. U.S. CONST. art. V.

65. I will not rehearse here the long-standing debate as to whether the Philadelphia Convention itself was a "runaway convention" that ignored the limits on its authority under the Articles of Confederation. Fears that an Article V Convention might exercise power beyond that granted by Article V itself are, by definition, extra-constitutional in nature. No one can prove definitively that a group of individuals will not claim to exercise some authority that they do not have. It should be observed, however, that the chances of an Article V Convention having the prestige or ability to assert an extra-constitutional legitimacy, in effect to proclaim a new constitutional order for the United States, is exceedingly remote.

66. U.S. CONST. art. V

67. *Id.*

68. As Professor Rappaport notes:

> If limited conventions are not recognized by the Constitution, then the constitutional provision allowing the states to decide whether to hold a convention seems peculiar. Why would the Constitution allow the states to decide to call a convention, but not allow them to specify what subjects the convention should discuss?

Rappaport, *supra* note 6, at 1521.

Convention will be unlimited as a practical matter. It is another to contend that Article V affirmatively grants a convention the power to address any subject, however unrelated to the application that gave rise to that convention. Other than to discourage state legislatures from applying for a convention in the first place, it is difficult to see what purpose is served by granting the convention such wide powers of proposal.

It might be argued that the Framers chose an unlimited convention because, on the one hand, they saw little risk in allowing the convention to propose whatever amendments it pleased, while, on the other, attempting to define the limits of an Article V Convention in any kind of useful way would simply be too difficult. This argument has some attraction, particularly if one believes, as I do, that the ratification requirements of Article V constitute substantial protection against radical or ill-conceived amendments.

There are, however, two strong objections to this argument. First, the Framers were not as blithe toward proposed constitutional amendments as it would suggest. Article V requires a two-thirds majority of both Houses to propose a constitutional amendment, even though the amendment must still be ratified by three-fourths of the states.[69] It is difficult to see why the Framers would not have insisted that an amendment proposed by a convention be similarly grounded in a broad consensus—as would be the case if the amendment were responsive to the application of two-thirds of the state legislatures.

Second, the difficulty of definition may explain why Article V does not attempt to define the relationship between the state application and amendments proposed by convention for purposes of *all* conventions that might be applied for by the states. It does not, however, provide a reason why constitutional actors[70] in the amendment process could not define and enforce such a relationship in the context of a *particular* convention call.

Other attempts to identify a constitutional purpose of the unlimited convention are similarly unavailing. Professor Walter Dellinger argues that "the [F]ramers did not want to permit enactment of amendments by a process of state proposal followed by state ratifications without the substantive involvement of a national forum."[71] By transferring the proposing power from Congress to the convention, the Framers chose a body that would be "like Congress, a deliberative body with a national perspective, capable of assessing the need for constitutional change as well as developing proposals to be submitted for ratification."[72]

It is possible that the Framers valued the deliberative capabilities of the convention, although there is no evidence of this in the debates during the

---

69. *Id.*

70. State legislatures, the courts, Congress, and the convention itself.

71. Walter Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1630 (1979).

72. *Id.* at 1626.

Philadelphia Convention or the ratification process. To the contrary, the evidence discussed above suggests that the purpose of the deliberation process was to serve primarily as an aid to the states in solving the logistical difficulties of reaching an agreement on the text of a proposed amendment.[73]

In the event that the convention was to exercise a significant deliberative function, it does not follow that its deliberations should be unlimited. It is possible that the Framers intended the convention to deliberate on alternative solutions to pertinent issues; however, it is difficult to imagine what purpose would be served by having the convention deliberate on unrelated issues. Not only would such a broad deliberative scope serve no discernible purpose, it would make it less likely that the convention would fulfill what Professor Dellinger acknowledges as its core mission of responding to the states' grievances.[74]

Like Professor Dellinger, Professor Gerald Gunther emphasizes the deliberative function of the Article V Convention, but he also suggests that the convention serves the purpose of providing a check on the less deliberative proceedings of the state legislatures.[75] He notes that "[t]hirty-four state legislatures acting separately simply are not as likely to act as seriously as a single national forum in the proposing of constitutional amendments."[76] Professor Gunther contends that this consideration supports the interpretation of the convention as unlimited.

There is little evidence to suggest that the Article V Convention was intended to provide a check on the state legislatures. Professor Gunther cites Roger Sherman's objection, raised after the Philadelphia Convention had adopted the Madison Substitute, "that three fourths of the States might be brought to do things fatal to particular States."[77] Contrary to Gunther's assertion, Sherman's objection was not to the Madison Substitute in particular, as shown by the fact that he continued to raise objections after

---

73. Indeed, Professor Dellinger acknowledges that the amendment-proposing function does not necessarily involve any significant degree of deliberation. He notes that the "most plausible reading" of the Madison Substitute "is that it would have permitted two-thirds of the state legislatures to propose amendments to the Constitution; Congress would merely transmit those amendments to be ratified." *Id.* at 1628. Moreover, he acknowledges that the transfer of the amendment-proposing function from Congress to the convention "may have been based on Mason's belief in the practical necessity of having a single deliberative body undertake the consultation, debate, drafting, compromise, and revision necessary to produce an amendment." *Id.* at 1629–30.

74. *See id.* at 1639 ("It is reasonable to expect that a convention would choose to confine itself to considering amendments addressing the problem that led states to apply for the convention.").

75. *See* Gunther, *supra* note 14, at 12–13.

76. *Id.* at 19.

77. *Id.* at 15 (internal quotation marks omitted).

the convention method was adopted.[78] What Sherman wanted was substantive limits on the amendment power to protect states' rights.[79]

Granting Professor Gunther's premise that the Framers intended the convention as a check on the states, the rationale for an unlimited convention is still lacking. Even a convention that is limited to consideration of a single amendment must deliberate regarding the meaning and effect of that amendment and reach a decision as to whether to propose it.[80] Thus, assuming for argument's sake that the Framers intended that the Article V Convention serve as a check on the allegedly impulsive state legislatures, it fulfills that purpose just as well within the framework of a limited convention as that of an unlimited convention.

Finally, it has been argued that the unlimited convention is a necessary result of the Framers' desire to limit Congress's role in the convention method process.[81] Professor Paulsen, for example, argues that "[i]f states could call for a limited convention, Congress would be placed in the position of prescribing and enforcing . . . limitations on the work of the convention, giving Congress a major role inconsistent with the convention method's intended purpose."[82]

The convention method was designed to limit Congress's role in the state-initiated amendment process.[83] Allowing Congress to define the limits of an Article V Convention would indeed raise serious concerns. However, no such concerns are raised if the states prescribe the limits in their application and Congress simply calls the convention, without adding to or subtracting from what the states have declared. In fact, were Congress to reject the application for a limited convention, or call for an unlimited convention in contravention of the application, this would, itself, arguably expand Congress's role beyond what the Framers intended.[84]

With regard to determining whether a proposed amendment must be submitted to the states for ratification, Congress will have to exercise some degree of judgment, regardless of whether a convention is limited or unlimited. There could, for example, be disputes about whether a particular amendment was proposed in accordance with the convention's voting or other rules. Similarly, Congress may have to resolve disputes about whether a particular amendment falls within the scope of a limited convention. Such a determination, however, need not involve an undue amount of

---

78. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 630–31.

79. *See id.*

80. *See* Dellinger, *supra* note 71, at 1631–32.

81. *See* Paulsen, *supra* note 12, at 739.

82. *Id.* at 739.

83. *See* Paulsen, *supra* note 12, at 739.

84. To be clear, if one assumes that an application for a limited convention is invalid, Congress presumably would have the power to reject such application. But the fact that Congress is required to determine whether an application is valid is not an argument for or against a limited convention. *See* Dellinger, *supra* note 71, at 1624.

congressional discretion. If the states set forth clear rules defining the scope of the convention, Congress may enforce these rules without raising any concerns about exceeding its proper role.[85]

D. The Role of Constitutional Doubt

The above discussion identifies some weaknesses of the theory that an Article V Convention must be unlimited and explains why the limited convention theory is more consistent with the constitutional text, structure, and purpose. It must be acknowledged, however, that the *purely legal* issue of whether an Article V Convention may be limited cannot be definitively resolved. Constitutional scholars have long debated the question, and it is widely recognized to be a quintessentially open one.

Our concern here, however, is not with identifying the "right answer" to a constitutional question in the abstract, but with determining the real-world risks of a runaway convention. Those who are worried about a runaway convention will probably not be mollified by the assurance that such a convention would be unconstitutional, even if there were greater scholarly consensus on the point. Moreover, asking the question of how the United States Supreme Court might resolve the issue produces no more of a definitive answer, and indeed, it is unclear when or whether the courts might intervene in the convention amendment process.[86]

It has often been assumed that these uncertainties enhance the risks of an Article V Convention, but this assumption is flawed. What it overlooks is the role of constitutional doubt in guiding the actions of constitutional actors, other than the courts, within the framework of the convention amendment process. These actors must exercise both political and legal judgment in performing their functions. So long as there is a serious doubt regarding the constitutionality of an out-of-scope amendment, the

---

85. *Cf.* United States v. Rostenkowski, 59 F.3d 1291, 1306 (D.C. Cir. 1995) (holding that a court may interpret and apply a rule of the U.S. House of Representatives without infringing on the House's exclusive rulemaking power, so long as the rule is sufficiently clear that the court may be confident in its interpretation).

86. As Professor Randy Barnett has observed, claiming that something is "unconstitutional" usually means one of the following: (1) it may refer to the actual meaning of the Constitution, independent of any authority's interpretation of that meaning; (2) it may refer to what the Supreme Court has said about a particular constitutional issue in the past; or (3) it may refer to a prediction that a majority of the Supreme Court would vote that the particular action is unconstitutional. *See* Randy Barnett, *In What Sense is the Personal Health Care Mandate "Unconstitutional"?*, THE VOLOKH CONSPIRACY (Apr. 16, 2010, 11:27 AM), http://volokh.com/2010/04/16/in-what-sense-is-the-personal-health-insurance-mandate-unconstitutional. In this case, however, there is virtually no relevant judicial authority and little basis for predicting how, or whether, the Supreme Court would rule. We are therefore primarily interested in the best arguments as to the meaning of the Constitution and how constitutional actors, other than the courts, will likely respond to them.

constitutional actors should refrain from proposing, submitting, or ratifying such an amendment.

1. The Article V Convention. If the state application limits the convention's deliberations either to a particular subject or a particular amendment, the convention will have to determine how to respond to that limitation. The issue is likely to arise at the outset of the convention, when the delegates vote to adopt rules to govern the proceedings. As discussed later, the states applying for a limited convention should instruct their delegates to vote for rules that limit the convention's deliberations in accordance with the application.

As a practical matter, the question of the constitutionality of an out-of-scope amendment will probably be of limited significance to the Article V Convention as a whole. Lacking any extended institutional existence, it is doubtful that the convention would give a great deal of attention to the constitutional issue, unless there was a serious attempt to push an out-of-scope amendment. In that case, it seems likely that the political difficulties of proposing the amendment would have greater salience than the legal issues.

Those delegates who have been instructed to comply with the limitations set forth in the application of their state, however, will have a strong legal incentive to abide by those instructions. Failure to do so would mean violating a personal obligation under state law. Unless the delegate believes that the United States Constitution clearly overrides this obligation, the delegate would likely comply with it. Furthermore, it should be noted that even if the Article V Convention had the power, under the federal Constitution, to propose out-of-scope amendments, it does not follow that states are powerless to instruct their delegates with regard to such amendments.[87] Thus, the legal uncertainties weigh heavily against any delegates violating their state law obligations to oppose an out-of-scope amendment.

2. Congress. If an Article V Convention were to propose an out-of-scope amendment, Congress would have to decide whether to submit the amendment to the states for ratification. Such submission cannot occur automatically because, under Article V, Congress must determine whether ratification will take place by state conventions or legislatures—as has been the case for all congressionally proposed amendments except for the Twenty-first Amendment.

Members of Congress take an oath to support the Constitution and are generally thought to have a duty not to vote for unconstitutional measures.[88]

---

87. Professor Paulsen, for example, notes that the applying states, in his view without power to limit the convention directly, "might well exercise considerable control by selecting delegates committed to enforcing a limitation on the agenda." Paulsen, *supra* note 12, at 760.

88. *See Oath of Office*, UNITED STATES SENATE, http://senate.gov/artandhistory/history/common/briefing/Oath_Office.htm#1 (last visited Apr. 5, 2011).

Although the nature of this obligation and the quality of Congress's compliance with it have been the subject of considerable debate, it is likely that most members of Congress would feel themselves obligated to ensure that only valid amendments are submitted to the states for ratification. Furthermore, Congress has an institutional incentive to limit the authority of an Article V Convention with respect to proposing amendments. Finding that an Article V Convention could not be limited would give that convention a greater authority to propose amendments than Congress itself, since the latter can only propose amendments when two-thirds of both Houses deem it necessary.

Congress also has an incentive to act in advance of actually receiving an out-of-scope amendment. By declaring that it will not submit out-of-scope amendments for ratification, Congress would both deter any such amendments and avoid subsequent charges that its refusal to submit a particular amendment was based on policy preference, rather than constitutional principle.

It seems unlikely that many members of Congress would favor, as a matter of policy, an unlimited Article V Convention. Nevertheless, some members may believe that the Constitution requires that an Article V Convention be so unlimited. Alternatively, those members could support a constitutional amendment recently introduced in Congress that would remove any doubt that an Article V Convention may be limited to consideration of a single constitutional amendment.[89]

3. The States. If Congress were to submit an out-of-scope amendment for ratification by state legislatures, state legislators would face the same constitutional issue as members of Congress.[90] State legislators also take an oath to uphold the Constitution of the United States. State legislators who voted to apply for an Article V Convention limited to a single subject or amendment would arguably violate this oath if they subsequently voted to ratify an out-of-scope amendment.[91]

State legislatures have a substantial interest in avoiding this situation because ratifying an out-of-scope amendment might undermine future attempts to call a limited Article V Convention. Accordingly, as discussed later, state legislatures may adopt procedures that would make it virtually impossible to ratify out-of-scope amendments. This pre-commitment can ensure that subsequent political pressure to ratify a popular out-of-scope

89. *See* H.R.J. Res. 95, 111th Cong. (2010) (known as the "Madison Amendment").

90. It is theoretically possible, but highly unlikely, that Congress could submit an out-of-scope amendment for ratification by state conventions. As discussed later, the state legislatures can erect legal barriers to protect against this remote possibility.

91. The state legislator's duty to reject an out-of-scope amendment does not necessarily turn on whether the legislator voted for a limited Article V Convention in the first place. However, it would be difficult for a legislator to reconcile a vote for a limited convention with a subsequent vote to ratify an amendment that exceeded the scope of that limited convention.

amendment will not undermine the constitutional position of state legislatures.

State legislatures are in a different position than Congress in one respect. While Congress has a constitutional duty to submit a valid proposed amendment for ratification, the state legislatures are under no such duty to ratify such an amendment. Thus, constitutional doubt as to the validity of an out-of-scope amendment cuts only one way—against ratification.

II. EVALUATING THE RISK OF A "RUNAWAY CONVENTION"

At this point, we should define more precisely what is meant by a "runaway convention." At the extreme, the phrase implies a convention that adopts radical or far-reaching proposals, such as repealing the Bill of Rights or similar outlandish measures. Those who suggest such a possibility warn that the absence of legal certainty regarding the outer scope of a convention's power means that there is no such thing as a "safe" Article V Convention.

The question must be asked: "safe compared to what?" After all, somewhere in our constitutional system must lie the ultimate authority to make law and declare what the law is. This power, wherever it resides, necessarily implies the possibility of results that we would regard as unacceptable.

Judicial review, for example, creates the risk that the Constitution will effectively be changed or "amended" whenever a majority of the Supreme Court decides that it should be.[92] Whether one views any particular decision of the Court as unjustified or unacceptable, it is impossible to deny that judicial review creates the risk of extreme or unacceptable outcomes.

On the other hand, limiting or eliminating judicial review, while reducing the risk of "judicial amendments" to the Constitution, would increase the risk that the political branches would violate or ignore constitutional limits on their authority. Professor John Hart Ely paraphrases the critics of his theory of judicial review thus: "[Y]ou'd limit courts to the correction of failures of representation and wouldn't let them second-guess the substantive merits? Why, that means you'd have to uphold a law that provided for _____!"[93] In other words, minimizing the risk of a runaway court means, to some extent, increasing the risk of a runaway legislature.

Assessing the risk of a runaway convention must therefore include consideration of not only the risks that may exist in using the convention method of amendment, but also the risks that might be reduced by the

92. *See* Taylor, *supra* note 13, at 415 ("[O]ur system already includes a wide-open amendment proposing process through the judiciary.").

93. JOHN HART ELY, DEMOCRACY AND DISTRUST A THEORY OF JUDICIAL REVIEW 181 (1980).

method's use or by the mere recognition of the method as usable. These offsetting risks are, of course, precisely those for which the Framers designed the Article V Convention in the first place. It can scarcely be denied that the limited powers granted to the Congress in Article I of the Constitution have not proved to be a meaningful check on the expansion of federal power. The Article V Convention, if available as intended to check the "encroachments of the national authority," would mitigate this risk.

Of course, if one does not believe that the growth of federal power is a matter of concern, then one may not wish to take any risks, however minimal, to counteract it.[94] In that case, however, the real objection is to the existence of the convention method of amendment. Fear of a runaway convention, while reducing the risk that an Article V Convention will be called or even creditably threatened, in the short term, does not change the fact that the convention method of amendment is unquestionably a part of the Constitution. Insisting on the unlimited nature of the Article V Convention also increases the risk, whatever it may be, that someday such an unlimited convention will occur.

A. The Inherent Safeguards of Article V

Because no convention has ever been called under Article V and the process for selecting delegates is as yet undefined, it is relatively easy to stoke fears that the convention might fall under the control of radical or irresponsible elements prone to the temptation of a runaway convention. Yet sober reflection reveals that this danger is more imagined than real.

Although some state legislatures might choose a different method, it is likely that most delegates to an Article V Convention will be elected by popular vote.[95] Political scientists Paul J. Weber and Barbara A. Perry argue that the process of selecting delegates to an Article V Convention can be predicted with a reasonable degree of confidence.[96] Candidates for election "will include those who have an active interest in the purpose of the convention and who are willing to take a position for or against

---

94. *See* Jack M. Balkin, *The Consequences of a Second Constitutional Convention*, BALKINIZATION (Sept. 17, 2010, 4:49 PM), http://balkin.blogspot.com/2010/09/consequences-of-second-constitutional.html (noting that whether one thinks an Article V Convention "is a good thing or a bad thing has much to do with whether you think that the convention will address and help resolve serious issues that the country needs to face down").

95. The great weight of opinion in modern times has favored election of convention delegates. *See, e.g.*, Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 892 (1968) (noting that legislation introduced by Senator Ervin to govern Article V Convention proceedings initially allowed either election or appointment of delegates but was changed to require election). Delegates to the majority of state constitutional conventions have also been popularly elected. *See* DINAN, *supra* note 31, at 12.

96. *See* PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: THE MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION 113–15 (1989).

amendments."[97] They are likely to have substantial name recognition, organizational and financial support, and prior campaign experience.[98] In the course of campaigning, they will be asked to take positions on proposed amendments and whether they would take part in a runaway convention.[99] Those elected will generally reflect mainstream political views, be representative of existing political interests, and will be "highly unlikely to approve radical changes."[100]

Therefore, even apart from outside constraints on an Article V Convention, the chances of delegates approving outlandish types of amendments are highly remote. But it must be remembered that an Article V Convention has only the power to *propose* amendments. It cannot actually affect any change to the Constitution without the subsequent ratification of three-fourths of the states. Thus, the inherent safeguards in the Article V process include:

> [T]he number of delegates and divisions within the convention itself, which would make it extraordinarily difficult for one faction or a radical position to prevail; the delegates' awareness that the convention results must be presented to Congress, which might not forward any amendment that went beyond the convention mandate; the Supreme Court, which might well declare certain actions beyond the constitutional powers of the convention; and *most important of all, the need to get the proposed amendment ratified not only by the thirty-four states that called for the convention, but by thirty-eight states.*[101]

Noting that "[m]ore effective constraints on a constitutional convention can hardly be imagined,"[102] Weber and Perry conclude that, "[n]otwithstanding the arguments of legal scholars with limited methodological tools (or partisan objectives) and political columnists with active imaginations, calling a constitutional convention would be a safe political process."[103] Before his appointment to the bench, Justice Antonin Scalia similarly observed that the risk of an "open convention" is "not much of a risk" since "[t]hree-quarters of the states would have to ratify whatever came out of the convention."[104]

The safeguards inherent in the Article V Convention process apply to all potential amendments, but they particularly ensure that a convention will

---

97. *Id.* at 113.
98. *See id.*
99. *See id.* at 114.
100. *Id.* at 115.
101. *Id.* at 117 (emphasis added).
102. *Id.*
103. *Id.* at 119–20.
104. Antonin Scalia, *Supplement at the American Enterprise Institute Forum*, *in* A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? 22–23 (Am. Enter. Inst. for Pub. Policy Research, 1979), *quoted in* CAPLAN, *supra* note 20, at 138.

not adopt radical, divisive, or controversial proposals.[105] It might be argued, however, that an Article V Convention could still propose out-of-scope amendments of a different type. For example, a convention might make hasty or ill-considered changes to the text of an amendment contained in the state applications, with unintended consequences. Or, a convention might be faced with a temporary groundswell of support for a particular amendment, say, for instance, in reaction to an unpopular Supreme Court decision, causing it to exceed the mandate set forth by the applying states. These more realistic possibilities may necessitate that additional safeguards be built into the process.

B. Additional Safeguards

To build additional safeguards into the Article V Convention process, the states applying for the convention must agree on and set forth in their applications the text of the single amendment they wish the convention to consider. Without such a text, a convention nominally limited to a particular topic is unlikely to be, in practice, significantly more limited than an unlimited convention. Judging whether a proposed amendment falls within a particular topic is ultimately a subjective exercise that is vulnerable to manipulation or obfuscation. Just as the enumerated powers of the Congress under Article I have proved to be a weak barrier against expansion of the federal government, so might a convention limited to a single subject, such as a "balanced budget," expand into unforeseen areas.[106]

It should be noted here that some commentators believe that, although the Article V Convention may be limited to a particular subject or topic, it cannot be limited solely to considering a specific amendment.[107] The distinction appears to be based on the idea that limiting the convention to a single amendment unduly restricts its deliberative freedom and effectively transfers the proposing power from the convention to the states.[108]

My own view is that this distinction, while attractive on the surface, is neither ultimately persuasive nor particularly workable. First of all, limiting

---

105. Even Professor Gunther, who warns against the risks of an Article V Convention, acknowledges that it is unlikely to adopt "wild-eyed proposals." Gunther, *supra* note 14, at 10.

106. *See id.* at 18 ("If a convention cannot be limited to simply voting 'yes' or 'no' on a particular balanced budget scheme, what is to prevent it from considering such questions as permissible or impermissible expenditures for, say, abortions or health insurance or nuclear power?"). This is not to say that a limited convention would necessarily expand in such a way, but the primary constraints would be the inherent safeguards of Article V rather than any additional legal or procedural safeguards created by specifying a particular subject matter.

107. *See, e.g.*, Ervin, *supra* note 95, at 884.

108. *See id.*

the convention to a single text does not prevent it from fully deliberating about the particular amendment. It is not clear why deliberating about a single text is any less deliberative than deliberating about a more broadly defined subject. Since the convention retains the ultimate decision as to whether to propose the amendment, a single amendment rule also does not transfer the proposing power to the states.

Second, limiting the convention to a single amendment is simply a way of narrowly defining the subject that the convention shall consider. If the state application for a convention defines the "subject" by reference to the text of a specific amendment, it is difficult to see how this categorically changes the nature of the convention. A rule giving the convention the deliberative freedom to consider alternative solutions to a particular problem would lead to endless debate whether the "problem" was defined so narrowly as to deprive the convention of the appropriate amount of deliberative freedom.

No constitutional principle appears to support distinguishing a convention limited to a single subject from one limited to a single amendment. The only justification for rejecting the narrower limitation would seem to be one of efficiency—if the convention rejects the particular amendment on the grounds that there is a superior solution, the states would have to submit a new application to permit consideration of the alternative. Efficiency, however, clearly was not the objective of Article V. Moreover, nothing in Article V requires the states to limit the convention to a particular amendment—it simply permits them to do so.

Accordingly, I concur with the view of Professor William Van Alstyne that an Article V Convention limited to the text of a single amendment is perfectly permissible.[109] Moreover, having the states submit such an amendment in their application would seem to address the criticism of the convention-method process that the states are too cavalier in applying for conventions.[110] If the states do the hard work of hammering out and agreeing on the text of a single amendment, they are far more likely to take the process seriously and use it only advisedly.

Nevertheless, the fact that the states propose a single amendment does not necessarily mean that the convention must be without any power to change it. The state legislatures could provide a channel by which minor and non-controversial changes could be adopted—for example, by unanimous consent of the convention—and thereby minimize constitutional objections without significantly increasing the risk of a runaway convention.

In order to ensure that an Article V Convention is limited to consideration of a single amendment identified by the states in their applications to Congress, the states may employ the following safeguards.

---

109. *See* William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1305 (1978).

110. *See* Gunther, *supra* note 14, at 3.

These safeguards could be embodied in a uniform act similar to other uniform acts created to enable the states to exercise their federal functions.[111]

The Application Safeguard. In applying for an Article V Convention, each state legislature applying may pass a resolution containing the identically worded text of the amendment sought. The applications should specify (1) that they are to be considered only in conjunction with other applications seeking the identical amendment and (2) that the convention shall be for the sole purpose of considering the specified amendment.

The applications may also provide Congress with a period of time—for example, six months from the date on which the required thirty-four applications have been received—in which to propose an identical constitutional amendment pursuant to Article V's congressional method. If Congress acts, the applications will be voided and no convention will be required.

The Convention Safeguard. Each applying state will require its delegates to vote for convention rules that limit its deliberations to consideration of the single amendment at issue. As noted previously, such rules may permit looking beyond the stipulated amendment only if the convention complies with rigorous procedural requirements, such as for a unanimous vote of the convention.[112] These rules, adopted at the convention's outset, may also provide that the convention proceedings will terminate after an up-or-down vote on the amendment.

The Delegate Safeguard. Each state may require its delegates to support the specified rules and limit their participation in the convention to consideration of the specified amendment. Violation of this pledge might be made punishable by sanctions, disqualification, or both.

The Congressional Safeguard. Although Congress's role in the convention process is largely ministerial, Congress remains responsible for submitting any proposed constitutional amendments to the states for ratification and for determining the method of ratification. The applying states may request that Congress refuse to submit any out-of-scope amendment for ratification.

This safeguard would be further enhanced if Congress pre-committed not to submit an out-of-scope amendment for ratification. Congress could take this action either by joint resolution or by a resolution adopted by the House, the Senate, or both. Even a commitment by a single House would offer substantial assurance that an out-of-scope amendment would not be submitted for ratification. The resolution could be adopted with respect to a

---

111. *See, e.g.*, UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT (Interim Draft Mar. 2, 2010), *available at* http://www.jamesmadisoncenter.org/PresidentialElectors/NCCUSLProposedFaithlPresElectors.pdf.

112. Where an amendment is changed in accordance with such a procedural requirement, the modified amendment would continue to be considered an "in scope" amendment for purposes of subsequent ratification.

specific convention call. Alternatively, the states could adopt a uniform act establishing the procedures for the Article V Convention application, thereby enabling Congress to adopt a resolution regarding any "out-of-scope" amendment as defined by that uniform act.

The Ratification Safeguard. The most important safeguard, of course, is the one specifically provided by the Framers, namely that no amendment proposed by the convention is valid until ratified by three-fourths (thirty-eight) of the states. Needless to say, it is exceedingly unlikely that any applying state would ratify an out-of-scope amendment.

To further assure applying states that their sister states will not ratify an out-of-scope amendment, each applying state might adopt measures to prevent such an eventuality. State legislatures could adopt rules requiring a supermajority to ratify an out-of-scope amendment or stipulating that consideration of such an amendment is entirely out of order.[113] More controversially, a legislature might prohibit any state convention for the purpose of ratifying an out-of-scope amendment.[114]

The Judicial Safeguard. As a last resort, an out-of-scope amendment could be challenged in federal court. Such a challenge would, of course, raise significant justiciability issues, but enabling legislation could remove all non-constitutional barriers to such a suit. Thus, while there is no guarantee that the courts would reach the merits, proponents of an out-of-scope amendment would face a substantial risk that their efforts would be struck down by the courts.

III. CONCLUSION

The full power of the above safeguards is evident in their cumulative impact, as illustrated by the difficult road faced by a proponent of an out-of-scope amendment. In order to obtain the convention's endorsement of such an amendment, its proponent must first persuade a majority of the convention to defeat the convention rules and vote in favor of the out-of-scope amendment. This would mean persuading delegations from at least ten applying states to violate their oaths and risk legal sanctions, not to mention bad publicity. In addition, costly and protracted litigation would likely ensue in the respective state courts of the ten "faithless" delegations.

Second, the proponent of an out-of scope amendment must persuade Congress to submit the amendment for ratification, in clear violation of the

---

113. One federal court has held that states have significant latitude in determining the procedures for ratifying a federal constitutional amendment. *See* Dyer v. Blair, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Future Supreme Court Justice John Paul Stevens authored the opinion).

114. Such a provision, which would become relevant only in the unlikely event that Congress chose the convention method of ratification, would present perhaps the most likely scenario under which federal courts might reach the merits of whether an out-of-scope amendment is constitutionally valid.

applying states' intentions and possibly in violation of Congress's own commitment not to do so.

Third, the proponent must to convince thirty-eight states to ratify the out-of-scope amendment. This would require ratification by at least twenty-two of the applying states. In order to have any prospect of accomplishing such a feat, the proponent would have to overcome state rules prohibiting ratification or establishing supermajority requirements of both houses in those twenty-two states to ratify the amendment. Alternatively, the proponent would have to believe that Congress would choose the convention method of ratification—which it has done only for ratification of the Twenty-first Amendment—and would have to have a legal strategy to require states to call such conventions.

Finally, the prospect of a federal court challenge would remain. Whatever its ultimate outcome, such a challenge would be time-consuming and expensive for the proponents of the out-of-scope amendment.

Given this outlook, it is impossible to imagine that anyone would seek to hijack a convention for purposes of promoting an out-of-scope amendment. If one hypothesizes an out-of-scope amendment so broadly popular as to have even a remote chance of surmounting the obstacles we would erect, there would be far easier ways to achieve the desired goal.

In short, these safeguards will keep the constitutional road to reform marked and open and will secure it against any chance of unwanted detours by a so-called "runaway convention."