

NOTE

THE OTHER WAY TO AMEND THE CONSTITUTION: THE ARTICLE V CONSTITUTIONAL CONVENTION AMENDMENT PROCESS

I. INTRODUCTION

The Constitution specifies two different ways for amendments to the Constitution to be proposed. The first method allows Congress to propose amendments when such amendments are approved by at least a two-thirds vote in both houses.¹ The States can then ratify the proposed amendments. The second method is less familiar to most people, as it has never been used. This method requires Congress to call a constitutional convention to propose amendments when two-thirds of the States apply for such a convention.² Many questions exist about the use of this amendment process. May the convention's scope be limited to certain subject matters? If so, who may limit it? How are state applications to be tallied—separately by subject matter or cumulatively, regardless of their subject matter? What is the relevance of the convention method of proposing amendments? Why should it ever be used? Some of these uncertainties about the convention have most likely contributed to states' reluctance to use the method. Yet, as of 1993, almost 400 convention applications had been submitted to Congress by the States since 1789.³ This Note will attempt to explore the history of the Convention Clause in Article V and answer some of the questions about its use.

1. U.S. CONST. art. V.

2. *Id.*

3. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764 (1993).

II. HISTORY

A. *The Constitutional Convention*

Much of the confusion about Article V comes from its ambiguous language. This ambiguity is the result of compromises at the Philadelphia Convention of 1787 between groups that wanted to exclude the national legislature from participating in the amendment process and groups that wanted to grant the national legislature the sole authority to amend.⁴ The earliest proposal for an amendment provision, contained in the Virginia Plan, stated that “the assent of the National Legislature ought not to be required” to amend the Constitution.⁵ Convention delegates privately circulated a proposed constitution authored by Alexander Hamilton⁶ that gave the power to amend the Constitution to the national legislature and the power of ratification to legislatures or conventions in the States.⁷ The Convention’s first official action regarding the method for amending the Constitution was to adopt Resolution 17, which stated that the Constitution should contain some means for amendment, but did not specify the particular process to be used.⁸

The first reference to the use of a convention requested by the States is found in drafts of the Constitution kept by the Committee of Detail.⁹ After several revisions, the Committee’s final statement stated 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.”¹⁰ Hamilton and others argued that in addition to State legislatures, Congress should also have the power to propose amendments, and the Convention approved the addition of language giving Congress the power

4. See Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article V and Congress’ Present Duty to Call a Convention for Proposing Amendments*, 14 *HAMLIN L. REV.* 1, 10 (1990).

5. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 22 (Max Farrand ed., 1937) (hereinafter *RECORDS OF THE FEDERAL CONVENTION*).

6. 3 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 5, at 617.

7. *Id.* at 630.

8. 2 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 5, at 84.

9. Van Sickle & Boughey, *supra* note 4, at 16-17.

10. 2 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 5, at 159.

to propose amendments.¹¹ James Madison proposed new language that removed reference to a convention and gave the national legislature sole authority to propose amendments whenever it would “deem necessary, or on the application of two thirds of the Legislatures of the several States.”¹² This language was adopted by the Convention, with no discussion about the elimination of the references to the use of conventions.¹³

On September 15, as the Convention was reviewing the revisions made by the Committee of Style, George Mason expressed opposition to the provisions limiting the power to propose amendments to Congress. According to the Convention records, Mason thought 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.”¹⁴ In response, Gouverneur Morris and Elbridge Gerry made a motion to amend the article to reintroduce language requiring that a convention be called when two-thirds of the States applied for an amendment.¹⁵ Madison stated that he did not object to the convention method, but in expressing what proved to be prophetic concerns, he pointed out that “difficulties might arise as to the form” the convention would take.¹⁶ Morris and Gerry’s motion was unanimously adopted.¹⁷ After Roger Sherman expressed concern that the Constitution could be amended to take power away from smaller states,¹⁸ the clause stating “that no State, without its consent” could be deprived of “equal suffrage in the Senate” was added.¹⁹ No further changes were made to the text of Article V, and the final version of the Constitution was adopted.²⁰ The final text of Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two

11. *Id.* at 555, 557–59.

12. *Id.* at 555, 559.

13. Van Sickle & Boughey, *supra* note 4, at 20.

14. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 629.

15. *Id.*

16. *See id.* at 629–30.

17. *Id.* at 630.

18. *See id.*

19. *Id.* at 631; *see also* U.S. CONST. art. V.

20. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 633–34, 662–63. For a more detailed account of the drafting of Article V at the Constitutional Convention, see Van Sickle & Boughey, *supra* note 4, at 7–24.

thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.²¹

B. *Attempts to Use the Convention Method*

Although the convention method for proposing amendments has never been used, the threat of a convention has sometimes spurred Congress to action. During debates over the Constitution's ratification, the threat of a second constitutional convention was a key factor in Congress proposing the Bill of Rights.²² There have been several occasions where the number of state applications for a convention was close to reaching the required two-thirds; at least once during the course of events leading to the adoption of the Seventeenth Amendment, the threat of a constitutional convention may have spurred Congress to act preemptively to propose the desired amendment itself.²³ The prospect of a convention may also have played a role in leading Congress to propose the Twenty-first, Twenty-second, and Twenty-fifth Amendments.²⁴

21. U.S. CONST. art. V.

22. See RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 32–40, 165–68 (1988) (observing that Virginia and New York submitted petitions requesting such a convention in 1788 and 1789, respectively).

23. See Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 ARIZ. L. REV. 1011, 1015, 1016 n. 49 (1980); Van Sickle & Boughey, *supra* note 4, at 37. *But see* CAPLAN, *supra* note 22, at 65 (“[T]here remains no evidence that the convention threat by itself forced the Senate to approve the [Seventeenth A]mendment. At least as influential was the growing quota of senators chosen by popular vote.”); Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1976–80 (1994) (arguing that the growing proportion of senators elected by popular vote was the “most influential [factor] in finally winning a formal amendment to the U.S. Constitution”).

24. Connely, *supra* note 23, at 1016 n.49.

In the last four decades, there have been two nearly-successful attempts by the States to call a convention, each attempt needing applications from only one or two additional states to reach the two-thirds requirement. The first attempt was a reaction to two Supreme Court decisions, *Wesberry v. Sanders*²⁵ and *Reynolds v. Sims*,²⁶ which dealt with the apportionment of votes and voting districts. State legislatures began to file applications with Congress requesting a convention to address the issue of these reapportionment decisions, and the Council of State Governments officially endorsed such an amendment.²⁷ By 1969, thirty-three states had submitted applications calling for a convention to address the apportionment issue, one short of the thirty-four needed.²⁸ Shortly afterwards, however, several states rescinded their applications, and the momentum for a constitutional amendment to overturn these Supreme Court decisions declined.²⁹ There were two likely reasons for the failure of this attempt to call a convention. First, as the number of states that had applied approached thirty-four, well-publicized speculation that the convention, once called by Congress, could not be limited to a single issue spread fear of an uncontrollable convention. Second, as states reapportioned their districts to comply with the Supreme Court decisions, opponents of reapportionment realized that it did not threaten rural interests, as they had previously feared.³⁰

The second nearly-successful attempt to call a convention arose out of the state legislatures' desire for a balanced-budget amendment in the late 1970s and early 1980s. As was the case with the Seventeenth Amendment, pressure from applications requesting a convention led the Republican-controlled Senate to approve a balanced budget amendment in 1982 by a margin of 69 to 31.³¹ The amendment, however, did not have enough support to pass in the Democrat-controlled House of Represen-

25. 376 U.S. 1 (1964) (upholding the principle of one person, one vote and stating that the "Constitution's main objective [is] making equal representation for equal numbers of people the fundamental goal of the House of Representatives").

26. 377 U.S. 533 (1964) (requiring equal apportionment of seats in state legislatures so that different districts have roughly equal populations).

27. CAPLAN, *supra* note 22, at 74-75.

28. *See id.* at 76.

29. *See id.*

30. *See id.* at 75-76.

31. *See* S.J. Res. 58, 97th Cong., 128 CONG. REC. 19,169, 19,229-30 (1982).

tatives.³² The States were unable to provoke a response from Congress as they had been able to with the Seventeenth Amendment.

The first state application for a balanced budget amendment was made by North Dakota in 1975, and the thirty-second was made by Missouri in 1983.³³ The drive to request a convention then lost momentum.³⁴ Among the reasons for this slowdown were, once again, fears that a convention could not be limited to a single subject, a decrease in the number of Republicans (who tended to support the amendment more than Democrats) in state legislatures, and concern in the Northeast about the loss of federal grants if the budget were balanced.³⁵ Another significant reason for the loss of momentum was the passage in Congress of the Balanced Budget and Emergency Deficit Control Act, known as the Gramm-Rudman-Hollings Act, which required that the budget be balanced by 1991.³⁶

III. UNANSWERED QUESTIONS ABOUT AMENDING THE CONSTITUTION THROUGH A CONVENTION

As previously discussed, much of the opposition to recent attempts to propose amendments through a convention comes from concerns that it could become a "runaway convention."³⁷ The fear is that a convention would exceed its mandate and radically alter the Constitution, or at least propose amendments beyond the scope of the originally intended subject matter.³⁸ There are two perspectives on this issue: some believe Congress has broad power to limit the scope of a convention and to impose rules and procedures for its operation through

32. See H.R.J. Res. 350, 97th Cong., 128 CONG. REC. 27,172, 27,255 (1982). The final vote was 236 to 187, 54 votes short of the required two-thirds majority.

33. CAPLAN, *supra* note 22, at 79, 83.

34. *Id.* at 83.

35. *Id.* at 84.

36. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, *invalidated by* *Bowsher v. Synar*, 478 U.S. 714 (1986); *see also* CAPLAN, *supra* note 22, at 84-85; Van Sickle & Boughey, *supra* note 4, at 37-38.

37. Arthur J. Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2 (1983).

38. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198-200 (1972); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 4-11 (1979).

the “political question” doctrine;³⁹ others believe that, based on the original text, meaning, and purpose of Article V, the scope of a convention cannot be limited.⁴⁰ A related question is whether applications for a convention limited to a particular subject matter should be considered separately, thereby ensuring that a convention is held only when two-thirds of the States have requested a convention for the same subject matter, or if all applications should be considered jointly, so that a convention is required when two-thirds of the States have applied for a convention for any purpose.

Because the United States has never used an Article V constitutional convention to propose amendments, these questions have never received definitive answers. This Article’s position is that Congress does not have the power to limit a convention. The text and history of Article V indicate that Congress’s role in calling a convention is merely ministerial. The original purpose of Article V was to give States the power to circumvent a recalcitrant or corrupt Congress. It thus makes little sense for it to give Congress broad power to control a convention. In light of the text of Article V and its purpose to empower States, States should have the power to limit the scope of a convention and to limit their applications’ validity to only a certain topic. The original purpose of Article V also indicates that States’ applications should be grouped and counted by subject-matter.

A. *The Political Question Doctrine and Congress’s Power Over a Convention*

Proponents of the view that Congress has broad discretion to control the subjects discussed at, and the procedures used in, a constitutional convention primarily base their arguments on the political question doctrine.⁴¹ The Supreme Court first formulated the political question doctrine, as applied to Article V,

39. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 879–80 (1968); Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 907–08 (1968); cf. ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 31–32 (1974) (stating that under the political question doctrine, Congress has the authority to determine the timeliness of state applications for a convention).

40. Black, *supra* note 38; Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1633–36 (1979).

41. See *supra* note 39 and accompanying text.

in *Coleman v. Miller*.⁴² *Coleman* involved a question about the validity of the Kansas legislature's ratification of the Child Labor Amendment. The Kansas legislature originally rejected the proposed amendment in 1924, but reversed itself in 1937 and ratified the amendment.⁴³ The Kansas state senators who voted against ratification in 1937 sued, arguing that "by reason of [Kansas's previous] rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality" and that the second ratification vote in 1937 was invalid.⁴⁴ The Court held that Congress, not the Court, had the final authority to determine the validity of an amendment's ratification.⁴⁵ In reaching this conclusion, the Court stated that the issue "should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."⁴⁶

The Court based its conclusion on the "historic precedent" of the authority Congress exercised in determining the validity of the States' ratifications of the Fourteenth Amendment.⁴⁷ There was uncertainty regarding the ratification of the Fourteenth Amendment because Ohio and New Jersey first ratified the amendment and then later rescinded their ratification. Congress requested that the Secretary of State provide a list of states that had ratified the amendment. Secretary Seward issued a report noting Ohio and New Jersey's attempted rescission and concluded that if their original ratifications were still in force, the amendment had already been ratified and had become part of the Constitution.⁴⁸ Congress responded the next day by passing a resolution declaring the Fourteenth Amendment to be part of the Constitution, thereby refusing to recognize the rescissions.⁴⁹ The Court also noted that Georgia, North Carolina, and South Carolina rejected the amendment, and it was ratified in those states only after Congress directed that

42. 307 U.S. 433 (1939). For a criticism of *Coleman*, see Paulsen, *supra* note 3, at 707–21.

43. *Coleman*, 307 U.S. at 435–36.

44. *Id.* at 436.

45. *Id.* at 458.

46. *Id.* at 450.

47. *Id.* at 448–50.

48. *Coleman*, 307 U.S. at 449.

49. *Id.* at 448–49.

new state governments be established in those states.⁵⁰ The Court declared that in spite of these irregularities in the ratification process, “[t]his decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.”⁵¹

In a concurring opinion joined by three justices, Justice Black stated that “control of [the amending] process has been given by [Article V] exclusively and completely to Congress. The process itself is ‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”⁵² Thus, whenever an issue falls under the political question doctrine, it is non-justiciable in the eyes of the courts. The issues before the Court in *Coleman*, however, dealt only with the validity of the ratifications, and the Court based its holding on Congress’s Article V power over ratification.⁵³

As the political question doctrine developed, the Court seems to have established a three-part test to determine when it should apply.⁵⁴ First, the Court asks if there has been a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁵⁵ Second, the Court asks if there are a “lack of judicially discoverable and manageable standards for resolving” the question.⁵⁶ Third, the Court considers factors dealing with “deference to the political branches and avoidance of judicial policymaking.”⁵⁷

A discussion of the criticisms of *Coleman* and the political question doctrine is beyond the scope of this Article. Even assuming the validity of the political question doctrine, however, Congress still lacks authority over the convention process. As is

50. *Id.* at 448.

51. *Id.* at 449–50. *But see* Dyett v. Turner, 439 P.2d 266, 273–74 (Utah 1968); Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555 (2002); *cf.* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 364–65 (2005).

52. *Coleman*, 307 U.S. at 459 (Black, J., concurring). The three justices who joined Justice Black’s opinion were Justices Roberts, Frankfurter, and Douglas.

53. Article V states that ratification can be accomplished either through the state legislatures or by ratification conventions in each state and that “the one or the other Mode of Ratification may be proposed by the Congress.” U.S. CONST. art. V.

54. *See* Paulsen, *supra* note 3, at 713.

55. *Id.* (internal quotation omitted).

56. *Id.* (internal quotation omitted).

57. *Id.* (internal quotation omitted).

explained below, the text and history of the Convention Clause demonstrate that Congress is obligated to call a convention when two-thirds of the States have applied for one, and has no discretion in the matter. Thus, the political question doctrine does not apply to congressional control of a convention because it fails the first part of the test: the issue has not been constitutionally committed to Congress (except for a ministerial duty), but to the States.

1. *The States' Power over the Convention Process*

Exclusive and complete control of the convention process by Congress would be contrary to the language and purpose of the Convention Clause of Article V. The clear meaning of Article V requires State control of the convention process.

Article V states that Congress, “on the Application of the Legislatures of two thirds of the several States, *shall* call a Convention for proposing Amendments.”⁵⁸ The use of the word “shall” indicates that Congress has no discretion in the matter and is obligated to call a convention.⁵⁹ Several comments made by those involved in the drafting and ratification of the Constitution confirm this view. In *The Federalist*, Alexander Hamilton stated that, upon the application of two-thirds of the States for a convention, Congress was “obliged” to call a convention and that “[t]he words of this article are preemptory. . . . Nothing in this particular is left to discretion.”⁶⁰ Similarly, during the ratification debates in North Carolina, James Iredell, who later became one of the original justices of the United States Supreme Court, stated that whenever two-thirds of the States apply for a convention, Congress is “under the necessity of convening one” and that they have “no option.”⁶¹

58. U.S. CONST. art. V (emphasis added).

59. See Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 367–69 (1979) (arguing that “Article V places a mandatory duty upon Congress to call a convention, when properly petitioned”); Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced-Budget Amendment*, 10 PAC. L.J. 627, 634 (1979) (“Neither the text nor the history of Article V leaves any reasonable doubt In this context ‘shall’ clearly means ‘must.’” (internal citations omitted)); Van Sickle & Boughey, *supra* note 4, at 41–42 (stating that Congress’s role in calling a convention should be “merely mechanical or ministerial, rather than discretionary.”).

60. THE FEDERALIST NO. 85, at 456–57 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

61. 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177–78 (Jonathan Elliot ed., 1937).

The purpose of the Convention Clause strengthens the argument that Article V gives control of the convention process to the States. The records of the Constitutional Convention clearly show that the purpose of the Convention Clause was to protect the States against a recalcitrant or corrupt Congress. In the face of congressional inaction, the States could circumvent the national legislature to propose needed amendments.⁶² If Congress had broad discretionary power over the conventions, it could potentially prevent or obstruct a convention that was desired by two-thirds of the States, thereby defeating the purpose of the convention method of amending the Constitution.

If Congress does not have power over a constitutional convention, there still remains a vexing question: who determines the procedures for the convention, such as voting rules and selection of delegates? There are no clear answers, but some guidance may be gleaned from the country's only experience with a constitutional convention: the Philadelphia Convention of 1787. In that convention, state legislatures chose delegates, and the convention adopted its own voting and procedural rules.⁶³ A convention to amend the Constitution could follow a similar path, with the process for selection of delegates from each state determined by the state legislatures. The convention would then determine its own voting rules and procedures when the delegates from the States convene. Admittedly, this is not an ideal solution because such a system could lead to much confusion and possibly inequitable voting rules at the convention. The only definitive way to eliminate this possible confusion and inequity would be to amend the Constitution with more specific procedures and details for the operation of the convention.

*B. Does the Original Meaning of Article V
Prevent a Limited Convention?*

Congress's inability to limit the scope of a convention suggests that a limited convention, even if requested by the States is not permissible. If the States, however, were prevented from limiting a convention, the purpose of empowering them to bring about desired constitutional change in the face of a recal-

62.1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 202–03; 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 629; 4 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 61.

63. Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 358–69 (1999).

citant Congress would be significantly curtailed. It is necessary, therefore, to take a middle road when interpreting the Convention Clause. While the States may not have direct authority to limit a constitutional convention, they do have the ability to indirectly do so by applying for a convention limited to a specific subject matter. Congress's ministerial duty to call a convention would require that it call the limited convention the States requested.

Two arguments are typically presented to support the view that the States are unable to limit the scope of a constitutional convention. First, commentators suggest that the text of Article V precludes the States from limiting a convention.⁶⁴ Second, some have argued that the States have no constitutional grant of power beyond initiating a convention; thus, once a convention has been called, it is a federal proceeding beyond their control.⁶⁵ The textual argument against the power of the States to limit a convention is based on revisions of the word "amendment," changing it from singular to plural, in early drafts of the Constitution at the Philadelphia Convention, with the final text allowing states to apply for "a Convention for proposing Amendments."⁶⁶ It is inferred that this change was intended to preclude the States from limiting a convention to the discussion of a single issue or amendment, meaning that the States could call only a general convention.⁶⁷ This argument fails, however, because the same plural is used to specify the method for Congress to propose amendments: Congress "shall propose Amendments."⁶⁸ The change from "amendment" to "amendments" in the Convention Clause was made after the plural usage for congressionally proposed amendments was added.⁶⁹ The two clauses have similar language, stating that Congress "shall propose amendments" and that the States may apply for a "Convention for proposing amendments."⁷⁰ The common practice for Congress to limit itself to proposing single amendments on single issues at a time has never before raised any constitutional issues. It therefore makes more sense to in-

64. See Van Sickle & Boughey, *supra* note 4, at 27–28, 45–46.

65. See Connely, *supra* note 23, at 1021.

66. U.S. CONST. art. V.

67. Van Sickle & Boughey, *supra* note 4, at 27–28, 45–46.

68. U.S. CONST. art. V.

69. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 555, 602, 629–30.

70. U.S. CONST. art. V.

interpret the change of the word “amendment” to a plural form to mean that a convention has the same power as Congress to propose amendments, rather than being limited to proposing single amendments. Thus, a convention *may* propose multiple amendments just as Congress can, but it may *also* propose single amendments. 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.

The history of the drafting of the Convention Clause at the Philadelphia Convention shows that the Clause’s accepted meaning at the time was that the applications by the States to Congress could be limited and could thus limit the subject matter of a convention. At one point in the drafting process, the Convention removed the language granting States the power to apply for a convention and instead gave Congress the power to propose amendments whenever it would “deem necessary, or on the application of two thirds of the Legislatures of the several states”⁷¹ This language is nearly identical to the Convention Clause language in Article V that requires Congress to call a convention “on the Application of the Legislatures of two thirds of the several states.”⁷² The draft language surely meant that the States could make applications to Congress to propose amendments on specific issues. If the draft language meant that the States could make only a general application to Congress for amendments, presumably the applications would not be permitted to give notice to Congress of the specific subject matters that the States desired be addressed in the amendments. The clause would serve little purpose beyond notifying Congress that two-thirds of the States thought that some unknown changes to the Constitution were desirable. Moreover, there would be no point in allowing the states to make a general application in this context, because Congress would have the general authority to propose amendments regardless of whether two-thirds of the States had made applications. The similar language in the final version of Article V to the earlier draft language should thus be interpreted to have the same meaning: the States may make limited applications.

71. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 5, at 555, 559; *see supra* Part II.A.

72. U.S. CONST. art. V.

The second argument—that the States have no power beyond initiating a convention—is partially correct. They do, however, have indirect authority to limit the convention. Congress’s obligation to call a convention upon the application of two-thirds of the States is mandatory, so it must call the convention that the States have requested. Thus, Congress may not impose its own will on the convention. As argued above, the purpose of the Convention Clause is to allow the States to circumvent a recalcitrant Congress. The Convention Clause, therefore, must allow the States to limit a convention in order to accomplish this purpose. The prospect of a general convention would raise the specter of drastic change and upheaval in our constitutional system. State legislatures would likely never apply for a convention in the face of such uncertainties about its results, especially in the face of a hostile national legislature.⁷³ States are far more likely to be motivated to call a convention to address particular issues. If the States were unable to limit the scope of a convention, and therefore never applied for one, the purpose of the Convention Clause would be frustrated.

A related concern is whether States’ applications that are limited to a particular subject should be considered jointly regardless of subject or tallied separately by subject matter to reach the two-thirds threshold necessary for the calling of a convention.⁷⁴ This is an important question because if all applications are considered jointly regardless of subject matter, Congress may have the duty to call a convention immediately based on the number of presently outstanding applications from states on single issues.⁷⁵ If the above arguments about the States’ power to limit a convention are valid, however, then applications for a convention for different subjects should be counted separately. This would ensure that the intent of the States’ applications is given proper effect. An application for an amendment addressing a particular issue, therefore, could not be used to call a convention that ends up proposing an amendment about a subject matter the state did not request be addressed.⁷⁶

73. These fears, however, are mitigated by the States’ own powers over ratification. See *infra* Part III.C.

74. Paulsen, *supra* note 3, at 737–43.

75. *Id.* at 764. Paulsen counts forty-five valid applications as of 1993.

76. If it were established that applications on different topics are considered jointly when determining if the two-thirds threshold has been reached, states would almost certainly rescind their outstanding applications to prevent a general

It follows from this argument that Congress's ministerial duty to call a convention also includes the duty to group applications according to subject matter. Once a sufficient number of applications have been reached, Congress must call a convention limited in scope to what the States have requested.

C. *Can a Constitutional Convention Exceed its Scope?*

The United States' last experience with a constitutional convention was the Philadelphia Convention of 1787, which plainly exceeded its mandate of revising the Articles of Confederation.⁷⁷ Thus, there are well-founded concerns about whether a modern convention with a limited mandate would exceed its original scope and radically alter the Constitution, adopt undesirable amendments, or lead to constitutional upheaval.⁷⁸ It would be difficult for any governmental body to enforce a limitation on the convention, especially given that a constitutional convention, once created, could conceivably claim independent authority as a separate constitutionally authorized body.⁷⁹ There is little reason to worry, however, because even if a convention attempted to exceed its scope, or if it were accepted that its scope could not be limited by the States or by Congress, the convention is only the first step in the amendment process. The proposed amendments must still be ratified by three-fourths of the States, which is an even greater number than the proportion required to call a convention in the first place.

The ratification process itself is the means of enforcing a subject-matter limit on a convention. If the convention proposes

constitutional convention. Some states have already acted based on fears of a general convention. For example, in 1999 the Idaho legislature adopted a resolution rescinding all of its outstanding applications for a constitutional convention. S.C.R. 129, 1999 Leg. (Idaho 1999). Georgia passed a similar resolution in 2004. H.R. 1343, Gen. Assemb. 2004 (Ga. 2004). Both resolutions were motivated by a fear that a convention could exceed its scope and propose sweeping changes to the Constitution.

77. See Shawn Gunnarson, Comment, *Using History to Reshape the Discussion of Judicial Review*, 1994 BYU L. REV. 151, 162 (1994); see also Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 480–83 (1995) (stating that, although the delegations from several states were specifically limited to only revising the Articles of Confederation, others were given broader mandates to make other constitutional proposals, but that even these states' delegates exceeded their broad mandate by proposing new means of ratifying the Constitution rather than using "existing institutions and procedures").

78. See *supra* note 38 and accompanying text.

79. Van Sickle & Boughey, *supra* note 4, at 42.

extra amendments, they would only be adopted if the legislatures or ratifying conventions in thirty-eight states agree. If an amendment receives such widespread support, there should be little reason to worry; ratification in thirty-eight states would have proven its popularity. Most of the States that originally requested the convention would have to ratify an extra amendment for it to become part of the Constitution, thereby legitimizing the convention's actions. The ratification process itself is thus the States' means of enforcing a subject-matter limit on a convention. If the States determine that the convention exceeded its scope, they can refuse to ratify the proposed amendments.

IV. THE MODERN SIGNIFICANCE OF THE CONVENTION CLAUSE

One may question the Convention Clause's significance, since it has never been used to amend the Constitution. The Convention Clause has played an important role, however, in spurring Congress to amend the Constitution.⁸⁰ Over the last forty years, state efforts to call a constitutional convention have come within one or two additional states of success.⁸¹ Moreover, a constitutional convention has tremendous potential as a way of proposing amendments that would enjoy significant popular support but that have not been proposed in Congress.

A national survey conducted by Harris Interactive in 2005 measured support for different hypothetical amendments. The survey showed that seven potential amendments received the support of sixty-four percent or greater of the population.⁸² The three most popular proposed amendments were a balanced budget amendment, an amendment requiring that judges only interpret and not make the law, and a congressional term limits amendment. The results are summarized below in Table 1.

Four of the seven popularly supported amendments arguably share a common characteristic: they would adversely affect the power or interests of members of Congress.⁸³ The high percent-

80. See *supra* Part II.B.

81. *Id.*

82. Arthur H. Taylor, *Fear of an Article V Convention*, 20 *BYU J. PUB. L.* 101, 124–31 (2006).

83. A balanced budget amendment would make it more difficult for members of Congress to use government spending to benefit their constituents in exchange

age of support that these amendments enjoy shows that the convention method for amending the Constitution is still relevant. There are issues that enjoy widespread popular support in the country, but on which Congress has failed to act. Two-thirds of Congress is unlikely to approve amendments that significantly limit the power of its members, such as a balanced budget or term limit amendment. The Convention Clause provides an important means to adopt—or force Congress to adopt—amendments that are perceived to be in the national interest by significant percentages of the American population, but that are detrimental to the interests of members of Congress.

Table 1: Percentage Support for Different Proposed Amendments to the Constitution

Subject Matter	Percent Supporting	Percent Opposing
Balanced budget amendment	76%	18%
Require that judges interpret the laws and not write them	74%	20%
Term limits on Senators or Representatives	71%	23%
Prohibit Congress from passing laws affecting state governments unless Congress gives the funding needed to pay for those laws	69%	22%
Permit prayer at school meetings or ceremonies	67%	29%
Allow Congress to regulate the amount of personal funds a candidate may spend in a campaign	65%	29%
Define marriage in all states as the union of a man and a woman	64%	32%

V. CONCLUSION

The history of the convention method of amending the Constitution is filled with much confusion and debate about its meaning, proper application, and scope. One of the major reasons it has never been used is the prevalence of doubts and concerns about the limitations that could be placed on a convention. The convention method of proposing amendments may never realize

for political support. Term limits would limit the tenure of members of Congress and force many of them out of office. An amendment prohibiting unfunded mandates that affect the States would limit Congress's power to control the States. Regulation of personal funds spent during a campaign would interfere with the campaigns of wealthy members of Congress.

its potential so long as such confusion exists. Much of the fear surrounding a convention is unfounded. The Convention Clause's text and history indicate that it grants power to the States to limit the scope of any such convention. In addition, the States have the ability to reject any amendments proposed by a convention through the ratification process.

A possible solution to clarify the Convention Clause power would be for the States to petition for, or for Congress to propose, an amendment to Article V itself. It could be amended to clarify the constitutional convention amendment process so that the purposes of the Convention Clause can be given effect. Such an amendment could explicitly state that Congress cannot limit or control a constitutional convention but that the States may exercise such control, that specific applications can be limited to single issues, and that the resulting convention may only consider those issues. The amendment could also include basic procedures and details for how a convention would operate to ensure its independence from Congress, and it could explicitly answer questions about the funding of a convention, the selection of delegates and a location, and other procedural and logistical questions. Article V could also be amended to decrease Congress's power over the convention process to further the Convention Clause's purpose of allowing the States to circumvent a corrupt or unresponsive Congress. An amendment could empower a new independent body, perhaps made up of the governor of each state, or the chief justice of each state's supreme court, to call a convention when a sufficient number of states have applied, to oversee the convention, to ensure it does not exceed its scope, and to make it clear that Congress does not have convention oversight powers.

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