

The state legislatures might be able to overcome those uncertainties if the great majority of the states agreed on a single proposal when applying for a convention, strongly asserted that a national convention that considered other proposals would be acting improperly or illegally, and attempted to promote the selection of convention delegates who were unlikely to vote for a different proposal. The states could pursue this strategy by sending representatives to an advisory convention where they negotiated a specific proposed amendment and a common strategy for pursuing it. The state legislatures could then attempt to pursue this strategy by applying for a convention to draft that specific amendment and announcing that they regarded the convention as limited to deciding only whether to propose that specific amendment.

The Article proceeds in five parts. Part I describes the existing procedures for using a national convention to propose a constitutional amendment. It notes several of the most important questions that remain open under this method. It also argues that the existing Constitution allows for limited conventions, even though most commentators have argued that the Constitution only permits conventions that are unrestricted as to their subjects. Part II argues that this amendment method is defective, because the uncertainties about the process and the possibility of a runaway convention mean that state legislatures are unlikely to apply for a convention. Part III explores the normative and interpretive implications of this failure of the national convention amendment method. Part IV proposes a reform of the national convention process by substituting a state drafting process. Finally, Part V describes how the state drafting method might actually be adopted under the existing national convention method.

I. A BRIEF OVERVIEW OF THE NATIONAL CONVENTION PROCEDURE

This Part discusses the procedure for enacting a constitutional amendment through a national convention. It first describes the text and structure of Article V. It then discusses some of the issues that Article V does not clearly resolve, including whether Article V allows limited conventions and whether Congress can regulate the national convention. While I will discuss various legal positions on

the issues, I do not generally attempt to resolve the issues. The point is to explore the legal terrain, not to conquer it.

A. The Structure of Article V

Article V of the Constitution describes in a single paragraph the various methods for amending the Constitution. It provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.⁶

Article V thus establishes a two-step process for enacting an amendment: first an amendment is proposed and then it is ratified. There are also two ways of completing each step. An amendment can be proposed either by two-thirds of each house of Congress or by two-thirds of the state legislatures applying for Congress to call a convention that would an amendment. Similarly, an amendment can be ratified by three-quarters of the states, either through their legislatures or through state conventions. Finally, Article V is modular: either of the proposal methods can be paired with either of the ratification methods.

Although Article V thus provides four paths to amending the Constitution, the nation has almost always relied on only one of them: Congress proposes an amendment and the state legislatures ratify it.⁷ Yet, Article V's purpose in providing alternative methods

⁶ U.S. Const. art. V.

⁷ No amendment has ever been passed under the national convention method, nor has a national convention ever been called. See Michael Stokes Paulsen, A General

is evident: to prevent a single government entity from having a veto over the passage of an amendment. While Congress is given the authority to propose amendments, the convention method allows the nation to bypass Congress and enact amendments that would constrain Congress's powers.⁸ Similarly, while the state legislatures can ratify amendments, they might choose to reject amendments that constrain their powers. Therefore, the Constitution allows ratification by state conventions, which would have different interests than the state legislatures.⁹

This understanding of the congressional amendment process is supported by statements made at the time of the Founding. Thus, George Mason, argued at the Philadelphia Convention that "[i]t would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account."¹⁰ Similarly, James Madison wrote in *The Federalist No. 43* that Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."¹¹

B. Limited or Unlimited Conventions

Although the Constitution specifies that an amendment may be drafted by a national convention, it unfortunately does not clearly answer various questions about this amendment method. An important question about this method is whether the Constitution allows limited conventions—that is, conventions limited to a specific

Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, 103 Yale L.J. 677, 734 (1993). Only once, for the Twenty-First Amendment, has Congress employed state conventions, rather than state legislatures, to ratify an amendment. See Russell L. Caplan, *Constitutional Brinkmanship: Amending the Constitution by National Convention* 126 (1988).

⁸ Of course, the fact that one purpose of the provisions was to avoid providing any entity with a veto does not mean that it was the only purpose. The enactors might have had other purposes, such as ensuring deliberation or an efficient amendment process.

⁹ Article VII of the Constitution, which provided that the Constitution took effect when nine of the thirteen states ratified it, used state conventions rather than the state legislatures in part because it was believed that the state legislatures had interests that would lead them to oppose the new Constitution.

¹⁰ Madison, *supra* note 1, at 89–90.

¹¹ *The Federalist No. 43*, at 246–47 (James Madison) (Clinton Rossiter ed., 1961).

matter. One position holds that limited conventions are constitutional. Under this limited convention view, if the states apply for a convention limited to a specific subject, then Congress is required to call for such a convention and the convention is obligated to consider only that subject.¹² Any proposals that it makes on other subjects are illegal. An even stricter version of this position holds that if the states seek a convention limited not merely to a specific subject but to specific language for an amendment, the convention is limited to deciding whether to propose that language.

The alternative position holds that the Constitution does not recognize limited conventions. Under this unlimited convention view, a convention can never be limited as to the subjects it will consider, because the Constitution does not recognize limited conventions.¹³ If the states apply for a limited convention, the result will depend on the nature of the applications.¹⁴ If it is clear that the state applications request only a limited convention, then Congress would not even be authorized to call a convention, because there would be no applications for the only constitutional type of convention—an unlimited convention. By contrast, if the states preferred a limited convention but were understood to be applying for an unlimited convention if a limited convention were not deemed legal, then Congress would be required to call an unlimited convention and any proposals it would make would be legal.

This issue has been vigorously debated, and I will not attempt to resolve it here. My concern is only to show that both positions are plausible. While the greater part of the commentary appears to argue for the unlimited convention view, I judge the case for the limited convention view to be at least as strong as the opposing view.¹⁵

¹² See Caplan, *supra* note 7, at x; 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).

¹³ See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 *Yale L.J.* 189, 198 (1972) [hereinafter Black, *Letter to a Congressman*] (stating that “[t]hirty-four times zero is zero” in reference to the view that if two-thirds of the states apply for a limited convention, these applications should not be considered valid); Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 *Yale L.J.* 1623, 1624 (1979); Paulsen, *supra* note 7, at 738.

¹⁴ See Paulsen, *supra* note 7, at 738.

¹⁵ My argument does not require resolution of this issue—it is enough for there to be reasonable arguments on each side—because my primary claims are that nonconforming amendments are undesirable and that there is a method for eliminating them.

Therefore, I will spend more time defending the position that limited conventions are allowed.

Let us begin with the arguments for the unlimited convention view. First, the constitutional text might be thought to cut against a limited convention. The text provides that "The Congress, . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . ." ¹⁶ One might argue that "a Convention for proposing Amendments" suggests a convention that can propose whatever amendments it likes. ¹⁷ Thus, the states apply for a convention and the convention decides which amendments to propose. Further, the Philadelphia Convention, which wrote Article V, had been limited in its mandate but chose to exceed that limitation, and its decision was accepted and approved by the nation. ¹⁸ Finally, a limited convention, ¹⁹ especially one limited to considering a specific amendment, might seem to relocate the proposal power to the states and render the work of the convention "a cipher or sham." ²⁰

The arguments for the limited convention view are also strong. To begin with, the language of the clause can be interpreted to allow limited conventions. That is, the language "Congress, . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" can be

The only area where I come close to relying on the limited convention view is my suggestion that state legislatures should announce that they believe this interpretation and regard it as unconstitutional for Congress or the national convention to depart from their limitations. See *infra* Section V.B. But this does not assume the constitutionality of a limited convention. It merely asserts that it is reasonable for state legislatures, who believe it, to announce that they do. State legislatures that do not believe it can always announce that they believe that the conventions should follow the restrictions as a matter of political morality, even though they are not legally required to follow them. Similarly, if the courts were to conclusively rule that the convention need not follow state directions, the legislatures can continue to advocate those directions on the basis of political morality.

¹⁶ U.S. Const. art. V.

¹⁷ See Black, Letter to a Congressman, *supra* note 13, at 198; Paulsen, *supra* note 7, at 738.

¹⁸ Paulsen, *supra* note 7, at 740.

¹⁹ It might also be argued, in favor of an unlimited convention, that the role of the convention in proposing amendments appears to be similar to the role of Congress in proposing amendments, and there are no restrictions on Congress's authority to propose amendments. See Black, Letter to a Congressman, *supra* note 13, at 198-99. But see *infra* note 25 (responding to this argument).

²⁰ Paulsen, *supra* note 7, at 739; see also Dellinger, *supra* note 13, at 1624.

fairly read to suggest that two-thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call. This reading of the language involves three steps. First, "a Convention for proposing Amendments" is broad enough to cover not merely unlimited conventions but also limited conventions. Put differently, a limited convention would be one type of "Convention for proposing Amendments."²¹ Second, if Congress can call a limited convention, then the language certainly suggests that the convention should conform to the limitations in that call. As the language appears to obligate the convention to meet, it would also appear to obligate the convention to follow the basic terms set forth in the call. Third, the language allowing the states to apply for Congress to call a convention also appears to obligate Congress to call a limited convention. When two-thirds of the states submit applications, that obligates Congress to call a convention. Similarly, when two-thirds of the states submit applications for a limited convention, then that would also seem to obligate Congress to call that limited convention.

One might wonder why the language here does not more clearly indicate that the state legislatures can make binding applications for limited conventions. But the language needed to be broad enough to extend to applications not merely for limited conventions but also for unlimited ones. Thus, the Constitution speaks in neutral terms of a convention for proposing amendments and of a process whereby the states apply for, and Congress calls, such a convention. After all, the Framers would certainly have desired that unlimited conventions be permitted, since there is no reason to believe that the various states would have been able to agree on a specific subject or amendment, especially given the lack of deliberation between states in a world with limited communication technology. But the fact that the states might not always be able to agree on a subject does not suggest that they never could or that their desire to restrict the convention to such a subject should have been ignored.

²¹ That the language speaks of a convention for proposing "Amendments" rather than "an Amendment" surely does not change this result. A limited convention might be restricted to two subjects. Moreover, the language needed to be broad enough to cover both unlimited and limited conventions.

There are also structure and purpose arguments that support the limited convention view. 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? Put differently, why would the constitutional enactors allow the states to decide not to hold any convention—and thereby to determine that none of the current problems warrant a convention—but not allow them the lesser power of determining that only certain problems warrant a convention?

Another structure and purpose argument for the limited convention view is that allowing the state legislatures to request either a limited or unlimited convention, depending on the circumstances, appears to be a superior amendment procedure. Put differently, it is hard to understand why the Philadelphia Convention would have desired to deprive the state legislatures of the ability to request a limited convention. While the option to have an unlimited convention that could make large changes to the Constitution is certainly an important feature, the availability of such unlimited conventions does not require that the state legislatures should be prevented from requesting limited conventions in other circumstances. In some circumstances, state legislatures might believe that smaller constitutional changes are needed and that an unlimited convention is not the appropriate way to effect these changes.²² By denying the state legislatures the ability to apply for limited conventions, the unlimited convention view would make it more difficult, if not impossible, to use the noncongressional amendment method.²³

²² See Van Alstyne, *supra* note 12, at 1305 (arguing that a national convention is most likely to be called in response to some “*particular event*” and that a limited convention would be the appropriate way to address a specific concern).

²³ There are at least two other structural arguments that support recognizing limited conventions. First, the possibility of a runaway convention means that the national convention process might subject amendments to less strict requirements than the congressional amendment process. Second, the possibility of a runaway convention means that the states may refuse to call a convention on a subject for fear that the convention will act on other subjects. This has the effect of significantly weakening the national convention process. While these structural arguments are relevant, I make similar arguments in the normative section of the paper and therefore will not develop them further here.

Proponents of the limited convention view also have responses to the other arguments for the unlimited convention view. The argument that the Philadelphia Convention was a runaway convention, suggesting that such conventions were allowed, is also problematic. To begin with, the Federalists certainly attempted to deny or minimize that the Philadelphia Convention had exceeded its powers, not something that the Federalists would have done if a runaway convention were considered acceptable.²⁴ Furthermore, the Philadelphia Convention might have thought that its actions were justified, even if they conflicted with the prior law, because the Articles of Confederation had been seriously violated and thus were voidable.²⁵ Moreover, even if the delegates believed they were violating the Articles, that does not mean they thought it legal to do so. Rather, they might have simply believed that a revolution was justified because the Articles were functioning poorly.²⁶ Finally, while a limited convention devoted to a single pre-specified amendment would certainly have less responsibility than an unlimited convention, that does not mean that its proposing power would have been transferred to the states. The convention would still be a proposing convention, because it would decide whether the specific amendment should be proposed. By themselves, the states could propose nothing.

If there are limited conventions, then difficult questions are raised for Congress when deciding whether the states have called for a convention on a specific subject. Most importantly, what happens if the states seek conventions on similar but not identical subjects? For example, one state might seek a convention on a balanced budget amendment, whereas another might seek one on a balanced budget and tax limitation amendment. In this case, Con-

²⁴ The Federalist No. 40 (James Madison), *supra* note 11, at 222-23.

²⁵ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1048 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 465 (1994).

²⁶ The argument that the role of the national convention is similar to that of Congress, which enjoys unrestricted authority to propose amendments, can also be rebutted. See *supra* note 19. One might argue that the role of Congress is actually shared by the states and the convention, because the states decide whether the convention should meet. Thus, one cannot infer that the convention, rather than the states, enjoyed the power to decide what subjects to discuss.

gress would first have to interpret each state's application. Did the second state, in the above example, authorize a convention on solely a balanced budget amendment if that is what all the other states authorized? If the states do not expressly instruct Congress on how to interpret their applications in those circumstances, then Congress faces a difficult, if not impossible, task in doing so. Should Congress assume that a state is willing to authorize a convention on a subset of the subjects it authorized? Or should it assume that a state is willing to authorize a convention on another subject in addition to the one it specified if that other subject is reasonably related to the subject it authorized? These and a host of other difficult questions confront the Congress that must address similar but distinct applications.

C. Can Congress Regulate the Convention?

Once Congress determines the kind of convention that can be called and whether the states have applied for one, the next question is what powers Congress has over the formation and operation of the convention.²⁷ Here, I focus on three specific questions concerning whether Congress might or might not have power over the convention. First, who determines how delegates are selected for the convention? Second, who determines the voting rule at the convention, such as majority or supermajority rule? Third, who determines voting rights at the convention, such as voting based on equal states or on population? Although these issues are distinct, they turn on a common analysis.

Let us start with the first question: who determines how members are selected at the convention? One possibility is that the selection method is based on state law.²⁸ When the convention is called, state law may already provide a method for selecting the delegates or the state legislature may enact a method. State law might provide that the delegates are selected by popular election or are chosen by the legislature.

²⁷ For a variety of views on Congress's power over formation and operation of the convention, see *A Constitutional Convention: How Well Would It Work?* 8 (Am. Enterprise Inst. 1979) (presenting views of Walter Berns, Gerald Gunther, Antonin Scalia, and Paul Bator).

²⁸ See Caplan, *supra* note 7, at 119 (arguing that the selection method of delegates "is up to each state").