

A KNOWN UNKNOWN:
THE CALL FOR AN ARTICLE V CONVENTION

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INTRODUCTION

Article V of the United States Constitution seems to provide Congress and the states a straightforward way to amend the Constitution. The process of calling a convention of states under Article V, however, is uncharted territory in American history. 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 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.¹

Article V provides two methods to amending the Constitution: the congressional method and the convention method. This article will attempt to answer and provide guidance on key questions regarding whether utilizing the convention method would be a prudent decision.

I. BACKGROUND

In evaluating the true meaning of Article V's Convention Clause, it is important to start with the original intent of the Framers of the Constitution. In drafting Article V, the Framers wanted to provide the People a way to amend the Constitution if the People felt it was necessary. However, the original draft only included the congressional method for proposing amendments. After George Mason expressed concerns about the likelihood that Congress would ever propose an amendment that would rein in its own power, the Framers inserted the Convention Clause, allowing two-thirds of the states to call a

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1. U.S. CONST. ART. V.

convention to propose amendments.² Mason and the Framers agreed that the states could provide the ultimate check on the federal government and keep it from growing too large or powerful.

In looking at the plain meaning of Article V, the convention method holds the same power and effect as the congressional method. Nevertheless, many people, including James Madison,³ were skeptical about what type of form the convention method would take. From the time the Constitution was ratified in 1790 until now, all twenty-seven amendments to the Constitution have been added via the congressional method.⁴ Despite this, there is no evidence that the Framers considered the congressional method to be the preferred method.⁵ Just as George Mason predicted, because Congress has proposed every amendment since ratification, Congress's power has grown immensely.

A. *How the Convention Works*

There are several questions regarding how a constitutional convention of the states would be implemented. There are basic features of the convention process, however, that can be readily established and explained. To begin the process of calling a convention, a supermajority in both State Houses must pass a convention application outlining the state's proposal(s).⁶ Each state's application must contain the same subject matter to be discussed at the convention, although all applications do not have to be identical.⁷ Congress should be generous in its interpretations of each application's subject matter.⁸ Once the required thirty-four state legislatures have submitted similar applications, the states must set an agenda before the convention can be convened.⁹ Once the agenda is set, Congress must call a convention limited in scope to what the states have requested; there is no discretion on the part of Congress in making the decision to call the convention.¹⁰

2. James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1007 (2007); Michael Farris, *The History of Article V: Reclaiming Our Heritage*, ASS'N OF MATURE AM. CITIZENS (Aug. 22, 2014), <http://amac.us/history-article-v-reclaiming-heritage-1>.

3. Rogers, *supra* note 2, at 1007.

4. Larry Greenley, *Save the Constitution by Rescinding Article V Convention Applications*, NEW AM. (Jan. 12, 2016), <http://www.thenewamerican.com/usnews/constitution/item/22314-save-the-constitution-by-rescinding-article-v-convention-applications>.

5. Thomas H. Neale, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, CONG. RESEARCH SERV. 8 (Oct. 22, 2012), <https://www.fas.org/sgp/crs/misc/R42592.pdf> [hereinafter Neale, *Historical Perspectives*].

6. *Id.* at 15.

7. *Id.* at 16–17.

8. *Id.*

9. Rogers, *supra* note 2, at 1007.

10. Neale, *Historical Perspectives*, *supra* note 5, at 7.

After the convention, Congress then sends the convention's proposed amendment(s) to the states—either to the state legislatures or special state conventions—to be ratified by three-fourths (or thirty-eight) of the states. Therefore, Congress controls the mode of how the amendments will be ratified. It is likely that there would be a seven-year time limit for ratification and that the President would have no role in the amendment process.¹¹

In order to host a successful convention, there must be an agreed-upon set of rules and procedures. There are many factors up for debate, including without limitation: how are the delegates chosen; how do the delegates vote; do all states have an equal vote or will larger states be given larger delegations; how long will a state's application remain valid¹²; and must the discussions be limited in scope? Although there is evidence that delegates would likely be chosen by popular vote in their respective states,¹³ the text of Article V provides no guidance on the other issues.

One factor of great importance is whether the convention's subject matter must remain limited. In 1979, the Senate Judiciary Subcommittee on the Constitution, as well as proposed Senate bills, somewhat addressed this issue.¹⁴ They all agreed that states could not call a convention unless the states agreed to the same limited subject matter.¹⁵ The advocacy group "Friends of an Article V Convention" thinks subject matter does not matter, which seems counterintuitive and would have resulted in a convention being called back in 1911.¹⁶ However, these positions do not address whether the subject matter must remain limited once the convention is commenced.

While there is no clear guidance on the procedures of a convention, direction can be gleaned from the Philadelphia Convention of 1787, where state legislatures chose delegates and the convention adopted its own voting and procedural rules.¹⁷ One commentator suggested that a

11. *Id.* at 6.

12. It is believed that a state's application is valid indefinitely, but the House Judiciary Committee has called for shorter time periods. Thomas H. Neale, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, CONG. RESEARCH SERV. (Apr. 11, 2014), <https://www.fas.org/sgp/crs/misc/R42589.pdf> [hereinafter Neale, *Contemporary Issues*].

13. Michael L. Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765, 782 (2011).

14. Neale, *Historical Perspectives*, *supra* note 5, at 16–17.

15. *Id.*

16. *Id.*

17. See generally Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013) (highlighting other state-governed conventions used during the eighteenth century and recognizing how the Founders envisioned states would conduct a convention to amend the Constitution).

group of academics, lawyers, and scholars should develop the convention rules and procedures to safeguard the convention process.¹⁸ Nevertheless, it is likely the states, as opposed to Congress or any other branch of government or group, will have full autonomy to decide the rules and procedures of the convention.¹⁹

B. Past Convention Movements

Just because the states have not successfully used the convention method to date does not mean it cannot have a substantial impact on Congress. The threat of a convention has resulted in congressional action in the past. The first instance of states' action was soon after the Constitution's ratification, which led to Congress's proposal of the Bill of Rights.²⁰ These threats also led to the proposals of the 17th, 21st, 22nd, and 25th Amendments.²¹

Over the course of American history, there have been three major convention movements. The first came before the passage of the 17th Amendment in 1911. Twenty-seven states had joined the movement to call a constitutional convention regarding Senate elections, but Congress, provoked by the movement, decided to introduce and pass the 17th Amendment before two-thirds of the states had joined.²²

The second movement came in response to Supreme Court cases that dealt with the apportionment of voting districts.²³ In 1969, thirty-three states, one shy of the necessary thirty-four, had applied for a convention.²⁴ Nevertheless, support waned soon after this time, and the threat disappeared because of speculation about a "runaway convention" and the minimal impact the Court decisions actually had on rural voting.²⁵

The final major movement came in the late 1970s and early 1980s, when thirty-two states had applied for a convention to propose a balanced budget amendment.²⁶ This movement, like the others, declined over concerns that the convention would not be limited to a single

18. Mary Margaret Penrose, *Conventional Wisdom: Acknowledging Uncertainty in the Unknown*, 78 TENN. L. REV. 789, 796 (2011).

19. See generally David Castro, *A Constitutional Convention: Scouting Article Five's Undiscovered Country*, 134 U. PA. L. REV. 939 (1986).

20. Matthew Spalding & Trent England, *Article V: Congress, Conventions, and Constitutional Amendments*, HERITAGE FOUND. (Feb. 10, 2011), <http://www.heritage.org/research/reports/2011/02/article-v-congress-conventions-and-constitutional-amendments>.

21. *Id.*

22. Greenley, *supra* note 4.

23. Rogers, *supra* note 2, at 1009.

24. *Id.*

25. *Id.*

26. Greenley, *supra* note 4.

subject (or, a runaway convention) and because of a decrease in the number of Republicans in the state legislatures.²⁷

C. *Movements Today*

Today, there are states calling for a convention to attack four different issues. Twenty-seven states have applied for a convention calling for a balanced budget amendment. Four states, supported by the advocacy group “Convention of States,” have applied for a convention calling for a balanced budget amendment and term limits on certain elected officials. Four states have formed “Compact for America,” asking for a balanced budget amendment and proposing a separate interstate compact outlining the process of calling a convention. Finally, four more states have applied for a convention to overturn the Supreme Court’s *Citizens United* decision. There are multiple Republican and Democrat advocacy groups striving for a convention, but many have different visions on how the convention process would work and what subject matter should be covered.

II. THE DEBATE: THE RISKS AND REWARDS OF A CONSTITUTIONAL CONVENTION

Why call a convention? The answer is simple: There are structural and institutional changes needed to be made that must be done through amendments because Congress is corrupt, unaccountable, or would never propose, much less pass, the needed amendments.²⁸ There are many spirited opinions for and against states calling a convention. While an abundant number of opinions highlighting the potential pros and cons provide key insights, many of the analyses are moot until a constitutional convention is actually convened.

A. *The Fear of a Runaway Convention*

The threat of a runaway convention is the primary reason why the People are hesitant to call a convention of states. A runaway convention is a convention that begins proposing other policies that were not supposed to be considered, and authority for such consideration was not granted to the convention at the outset. Hence, the fear is a runaway convention ultimately could throw out the U.S. Constitution and replace it with a new one. However, commentator Michael Stern notes that when one is evaluating the risk of a runaway convention, one must also consider the risks that may be reduced with the use of a convention and

27. Rogers, *supra* note 2, at 1009.

28. Fritz Pettyjohn, *2016 Should be About Article V and Amending the Constitution*, AM. THINKER (Jan. 11, 2016), http://www.americanthinker.com/blog/2016/01/2016_should_be_about_article_v_and_amending_the_constitution.html.

its prevention of a “runaway Congress.”²⁹ Advocates for a convention think that a runaway convention is really not a threat at all for three reasons: (1) the convention can only be called for a limited purpose, (2) the Supreme Court would be able to weigh in on any violations of specific rules and procedures the convention creates for itself, and (3) more states are needed to ratify the proposals than are needed to call the convention.

There are several perspectives on whether the convention can be limited in scope to prevent a runaway convention.³⁰ First, some advocates believe that Congress can limit the scope of the convention and propose rules for it under the political question doctrine.³¹ However, most believe this is untrue and hold that Congress’s calling of the convention is merely ministerial because the entire purpose of the convention is to circumvent a corrupt Congress.³² Since limiting the scope of the convention is not constitutionally committed to Congress, it falls outside the political question doctrine.³³ Furthermore, Alexander Hamilton’s *Federalist No. 85* specifically mentions Congress’s inability to limit the convention.³⁴ Because *Federalist No. 85* never mentions a restriction on the states to place limits on the convention,³⁵ the states are the ones most likely to implement the limits.

Under another perspective, opponents of a convention believe that, based on the original text and meaning of Article V, there are no limits that can be placed on a convention that would hold any legal force.³⁶ They conclude the states have no authority to limit the scope of the convention for two reasons. First, the original text of Article V provides for making “amendments” plural, therefore precluding any attempt by the states to limit the convention to proposing one amendment.³⁷ This argument fails, however, because the use of “amendments” only gives discretion to the convention to propose more than one amendment that will achieve its explicit goal.³⁸ Second, opponents hold that states have no constitutional grant of power beyond initiating the convention.³⁹ This argument at least partially fails because in order to give states the ability to circumvent a corrupt Congress, states must be able to limit the

29. Stern, *supra* note 13, at 781–82.

30. Rogers, *supra* note 2, at 1010–11.

31. *Id.*

32. *Id.* at 1011.

33. *Id.* at 1014.

34. Spalding & England, *supra* note 20.

35. *Id.*

36. Rogers, *supra* note 2, at 1016.

37. *Id.*

38. *Id.* at 1016–17.

39. *Id.* at 1018.

convention to achieve this purpose.⁴⁰ Therefore, the inability of states to limit the scope of the convention would frustrate the purpose of the Convention Clause. Instead, while they may not have direct, explicit authority to limit the procedures of a convention themselves, states can curtail the convention's scope by limiting the purpose for which it is formed.

A third perspective reveals the debate over whether the convention can propose anything it so decides or whether it can only propose amendments covering the subject matter detailed in the states' applications.⁴¹ If, once the convention is convened, it can propose anything outside of the subject matter discussed in the applications, then there is a chance—albeit remote—that the convention could claim ultimate authority and create a separate governing body.⁴² However, this fear can be checked by the requirement that three-fourths of the states must ratify any convention amendments.⁴³ The ratification process can also place a check on the possibility the convention would exceed its scope.⁴⁴

Additionally, the history of the Convention Clause suggests that the convention is only supposed to act as an aid to the states rather than as a separate entity in and of itself.⁴⁵ But again, questions swirl as to whether the delegates can change the ratification process and require ratification by a majority of states in the convention (or something to that effect).⁴⁶ This idea appears unfounded. Any convention-made “rule” like this that would affect the Constitution as it stands today would still require ratification to have any legal effect on the current U.S. government.⁴⁷ Another check on the convention process is that Congress would have the right to not propose to the states for ratification any amendment that surpassed the convention's scope.⁴⁸ This reasoning falls in line with Congress's—and even state legislatures'—responsibility to uphold the Constitution if the convention entered the process having limited itself to a single subject.⁴⁹

40. *Id.*

41. Stern, *supra* note 13, at 772.

42. Rogers, *supra* note 2, at 1019.

43. *Id.*

44. *Id.*

45. Stern, *supra* note 13, at 770.

46. Thomas R. Eddlem, *Is a Runaway Article V Convention a Myth? 1787 Proves Otherwise*, NEW AM. (May 26, 2014), <http://www.thenewamerican.com/usnews/constitution/item/18338-is-a-runaway-article-v-convention-a-myth-1787-proves-otherwise>.

47. Neale, *Contemporary Issues*, *supra* note 12.

48. *See id.* at 28–30.

49. Stern, *supra* note 13, at 780.

B. *The Supreme Court's Potential Role*

Another area of primary concern is whether there is any body of government that can enforce any rules and procedures a convention would make for itself. If the Supreme Court can rule on issues regarding a convention's rules and procedures, would this upset the purpose of the convention because a government branch, which the convention is trying to bypass, is interpreting its rules and procedures?⁵⁰ There is no good answer to this question, but it appears the Supreme Court weighing in on violations of convention rules would not upset the convention's purpose, as the Supreme Court's duty is "to say what the law is."⁵¹

C. *Threats to the Convention Process and the Constitution*

In addition to the concerns already discussed, there are others worth noting. First, the convention could be open to special-interest lobbying from groups that deal with issues over which the convention would be deliberating.⁵² This could threaten the integrity of the negotiations and the proposal of amendments.⁵³ Also, a more apocalyptic concern is that a convention of states could result in a complete overhaul of the Constitution.⁵⁴ This is unlikely for the reasons explained above, but some commentators still hold this belief based on the only other convention in American history, the Philadelphia Convention of 1787.⁵⁵ There is a debate over whether that convention stayed within its scope when revising the Articles of Confederation and producing the current Constitution.⁵⁶ However, in any case it would seem all convention "proposals would be subject to the checks and balances written into the Constitution."⁵⁷

CONCLUSION

Constitutional scholar St. George Tucker, a friend of the Virginia

50. See Walter Olson, *The Wingnut Plot to Rewrite the Constitution*, DAILY BEAST (Jan. 12, 2016), <http://www.thedailybeast.com/articles/2016/01/12/the-wingnut-plot-to-rewrite-the-constitution.html>.

51. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

52. See Robert Greenstein, *A Constitutional Convention Could Be the Single Most Dangerous Way to 'Fix' American Government*, WASH. POST (Oct. 21, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government>.

53. See *id.*

54. See *id.*

55. See *id.*

56. See Rogers, *supra* note 2, at 1019; Eddlem, *supra* note 47. But see Bill Walker, *The Article V Convention: Discussing the Reality Versus the Fantasy*, 28 T.M. COOLEY L. REV. 21, 22–23 (2011).

57. Neale, *Contemporary Issues*, *supra* note 12, at 28.

delegates to the Philadelphia Convention, opined that a convention of states “will probably never be resorted to, unless the federal government should betray symptoms of corruption.”⁵⁸ Therefore, the question is whether the government is so corrupt that the states must take matters into their own hands.

Many leaders in America have weighed in on whether calling a convention of states is sensible. On the right, Texas Governor Greg Abbott,⁵⁹ Rob Natelson for the American Legislative Exchange Council,⁶⁰ talk-show host Mark Levin,⁶¹ former Florida Governor Jeb Bush,⁶² Senator Marco Rubio (FL),⁶³ Senator Ted Cruz (TX),⁶⁴ former Arkansas Governor Mike Huckabee,⁶⁵ Ohio Governor John Kasich,⁶⁶ and Senator Rand Paul (KY)⁶⁷ have all endorsed the idea to accomplish broader conservative goals, such as a balanced budget amendment and placing term limits on Congress members and Supreme Court Justices. Abbott actually has a nine-amendment proposal, known as the “Texas Plan,” aimed at giving more power to the states.⁶⁸ On the left, Wolf PAC, a group founded by liberal TV host Cenk Uygur and supported by four states, has endorsed a convention of states⁶⁹ in order to overturn the

58. Neale, *Historical Perspectives*, *supra* note 5, at 7.

59. Brandi Grissom, *Texas Gov. Greg Abbott Calls for Convention of States to Take Back States’ Rights*, DALL. MORNING NEWS (Jan. 8, 2016), <http://trailblazersblog.dallasnews.com/2016/01/gov-greg-abbott-calls-for-constitutional-convention-to-take-back-states-rights.html/>.

60. Michael Stern, *Rob Natelson on the Article V Convention*, POINT OF ORDER (Aug. 11, 2013), <http://www.pointoforder.com/2013/08/11/rob-natelson-on-the-article-v-convention>.

61. Michael Patrick Leahy, *Mark Levin Wows State Legislators: ‘Take Your Power Back’*, BREITBART (Dec. 5, 2014), <http://www.breitbart.com/big-government/2014/12/05/mark-levin-wows-state-legislators-take-your-power-back>.

62. See Benjy Sarlin, *Jeb Bush Calls for Amendment to Fix Citizens United*, NBC NEWS (Feb. 8, 2016), <http://www.nbcnews.com/politics/2016-election/jeb-bush-calls-amendment-fix-citizens-united-n514251>.

63. S.A. Miller, *Marco Rubio Amplifies Call for Constitutional Convention, Courts Conservative Voters*, WASH. TIMES (Jan. 11, 2016), <http://www.washingtontimes.com/news/2016/jan/11/rubio-amplifies-call-constitutional-convention>. Pulignano worked in the Office of Senator Marco Rubio in the spring of 2016, but his views in this article are his own.

64. See Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT’L REV. (June 26, 2015), <http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment>.

65. See David Sherfinski, *GOP Hopefuls’ Support Boosts Constitutional Convention Idea*, WASH. TIMES (Dec. 24, 2015), <http://www.washingtontimes.com/news/2015/dec/24/marco-rubio-ben-carson-john-kasich-mike-huckabee-s>.

66. *Id.*

67. *Id.*

68. Press Release, Office of the Governor, Governor Abbott Unveils Texas Plan, Offers Constitutional Amendments to Restore the Rule of Law (Jan. 8, 2016), <http://gov.texas.gov/news/press-release/21829>.

69. See *The Plan*, Wolf PAC (last visited Mar. 27, 2016), http://www.wolf-pac.com/the_plan.

Supreme Court's decision in *Citizens United v. Fed. Election Comm'n.*⁷⁰

Among those who have criticized the idea of calling a convention are the late Justice Antonin Scalia and Chief Justice Warren Burger,⁷¹ as well as the John Birch Society.⁷² Also, the Oklahoma legislature voted against its convention applications proposed in 2015.⁷³

President Abraham Lincoln stated that under certain circumstances calling a convention is preferred because it “allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose.”⁷⁴ However, those recommending a convention should remain cautious because of the lack of precedent and the potential unknowns. Since the convention method has never been tested or used, it is impossible to say with certainty whether it would succeed or fail. The real takeaway is that no one knows or can know how a convention would play out until it finally happens—if ever. There are guideposts on what may or should happen, but until a convention is implemented, those guideposts will only serve as futile conjecture.

70. 558 U.S. 310 (2010).

71. See Olson, *supra* note 50.

72. John F. McManus, *Falsehoods Mark the Campaign for a Constitutional Convention*, NEW AM. (Mar. 23, 2015), <http://www.thenewamerican.com/reviews/opinion/item/20499-falsehoods-mark-the-campaign-for-a-constitutional-convention>.

73. Alex Newman, *Oklahoma Defeats Push for Risky Article V Convention*, NEW AM. (Apr. 24, 2015), <http://www.thenewamerican.com/usnews/constitution/item/20734-oklahoma-defeats-push-for-risky-article-v-convention>.

74. Spalding & England, *supra* note 20.