POLICY brief

Goldwater Institute

No. 11-02 | February 22, 2011

Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers (Part 3 in a 3 part series)

by Robert G. Natelson, Senior Fellow, Goldwater Institute and Professor of Law at the University of Montana (Ret.)

EXECUTIVE SUMMARY

by Nick Dranias, the Goldwater Institute Clarence J. and Katherine P. Duncan chair for constitutional government and the director of the Institute's Dorothy D. and Joseph A. Moller Center for Constitutional Government

This is the third in a series of reports by Goldwater Institute senior fellow Robert G. Natelson on the power of state legislatures to initiate the process for amending the U.S. Constitution under Article V. The previous two reports explain that the purpose of the Article V amendments convention is to provide a parallel process whereby the states effect constitutional amendments.

This report provides crucial practical drafting guidance for exercising the states' constitutional authority. In essence, it recommends that state legislators draft their Article V applications and delegate commissions with an eye to targeting specific subject matters, while still giving state delegates a meaningful level of deliberative independence to ensure that the amendments convention can serve its consensus-building and problem-solving purpose. The key is to regard an amendments convention as a modern-day "task force"—a representative body that is limited to a specific agenda but expected to exercise judgment on accomplishing that agenda.

GOLDWATER INSTITUTE

Introduction[1]

Article V of the United States Constitution allows either Congress or what the Constitution labels a "Convention for proposing Amendments" to formally propose constitutional amendments for ratification. A convention for proposing amendments also has been called an *Article V convention*,[2] an *amendments convention,* or a *convention of the states*. The common practice of referring to it as a "constitutional convention" or "con-con" is inaccurate and improper.[3]

When two-thirds of the state legislatures apply to Congress for a convention for proposing amendments, the Constitution requires Congress to call one. This report refers to the procedure as the *state-application-and-convention process*. The Framers inserted it, and the Ratifiers approved it, primarily to enable the people, through their state legislatures, to amend the Constitution without the consent of Congress. They contemplated that it would be used if the people concluded the federal government had too much power or if it should exceed or abuse its powers.[4]

Article V of the United States Constitution allows either Congress or what the Constitution labels a "Convention for proposing Amendments" to formally propose constitutional amendments for ratification.

In some ways, the state-application-and-convention process is a federal analogue of state constitutional procedures allowing voter initiatives. Both serve as ways of bypassing the legislature if lawmakers fail to adopt needed reforms.

Although the state-application-and-convention process has not been carried to completion, throughout American history there have been many efforts to obtain an amendments convention.[5] Some efforts failed only because Congress responded by proposing the sought-for amendments. Other efforts enjoyed insufficient popular support. In recent years, a principal deterrent has been uncertainty about the governing law and how the process is supposed to work. The uncertainty arises partly from a lack of reliable scholarship on the subject, and partly from misinformation campaigns waged by opponents of change.

This is the third in a series of three reports providing objective, accurate information about the state-application-and-convention process. The first report, titled *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, undertook the most thorough examination to date of relevant Founding-era sources and explained how the Founders intended the process to work. Among its many conclusions was that a convention for proposing amendments was to be a limited-purpose assembly composed of delegates acting as agents of the state legislatures. The Constitution, as understood by the Founders, permits state legislatures to apply for a convention unlimited as to subject matter, but it also permits the state legislatures to define the topic the convention is to address. The Founders believed that the latter would be the more common practice.

The first report further concluded that under the Founders' design, state applications cannot limit the convention to specific amendment language. Rather,

the convention is a deliberative body that drafts and proposes (or opts not to propose) amendments. However, as explained in this third report, delegates are subject to instructions from their home states while the convention is in session.

Finally, the first report concluded that under the Founders' plan, convention proposals within the scope of the prescribed subject are eligible for state ratification or rejection; those outside that scope are recommendations for future action only, not subject to ratification.

The second report in the series was *Learning from Experience: How the States Used Article V Applications in the Constitution's First Century.* It surveyed actual practice from the time of the Founding through adoption of the Seventeenth Amendment in 1913. During this time, there were dozens of state applications, accompanied by revealing public discussion and relevant Supreme Court cases. The second report showed that from 1789 through 1913, prevailing practice and understanding remained consistent with the Founders' views. Most policymakers continued to think of a convention for proposing amendments as a "convention of the states." Most applications contemplated a convention limited to one or more issues, but none tried to restrict the convention to particular amendment language. Most applications identified subjects that Congress had failed to address effectively. Some applications sought conventions that would propose amendments to clarify constitutional meaning, resolve constitutional crises, or both.

The guidance and recommendations are based on the findings of the two earlier reports, additional Founding-era evidence unearthed since the first report was published, and authoritative court cases issued at all stages of our history.

This third report offers guidance and recommendations for those seeking to implement the state-application-and-convention process. The guidance and recommendations are based on the findings of the two earlier reports, additional Founding-era evidence unearthed since the first report was published, and authoritative court cases issued at all stages of our history.

There are two caveats for the reader:

1. Recent history shows that as promoters of the process approach success, supporters of the status quo campaign furiously to abort it. In the past, powerful opposition has come from key figures in Congress, in the judiciary, in the media, and in academia. Opponents have advanced legal objections designed to induce Congress to disregard applications and to persuade the courts to invalidate them. The claim that a convention would be inherently uncontrollable usually has been the most prominent weapon in their arsenal. More recently, however, as the claim of uncontrollability has become increasingly untenable, some opponents have returned to other assertions of uncertainty. This report recommends ways to anticipate, and avoid, some of those objections; it also recommends ways to respond to those who raise them.

2. This report provides general background to the state-application-and-convention process. It is not a substitute for legal advice. *Those seeking legislative applications for a convention for proposing amendments should consult competent legal counsel qualified to practice within their own state, and ask counsel to respond only after reading all three reports.*

The Article V Convention in Context

Some people believe that the only precedent for a convention for proposing amendments is the 1787 gathering in Philadelphia that wrote the Constitution. From that, they characterize an Article V convention as a "constitutional convention." The truth is quite different.

At the time of the Founding, a "convention" was any assembly, other than the legislature, designed to serve a governmental function.[6] Although convention practice began in Great Britain during the 17th century, Americans put it to very wide use, particularly during the Founding era. Between 1774 and 1787, there were dozens of conventions.

At the time of the Founding, a "convention" was any assembly, other than the legislature, designed to serve a governmental function. Americans put it to very wide use, particularly during the Founding era.

Some conventions were held purely within a single polity. They represented the people of a particular colony or state.[7] Others were interstate or "foederal" (federal) in nature. Interstate conventions consisted of delegates sent by the respective state legislatures to consult on problems prescribed by the commissions that empowered them. Each state delegation formed a unit, often called a "committee," and the gathering as a whole sometimes was referred to a convention of "the states"[8] or a convention of "committees."[9] Each delegation represented its state and was subject to instructions from the state legislature or the legislature's designate. The powers and duties of the delegates toward the state legislatures were regulated by well-accepted principles laid down by the law of agency.[10]

Within the limits of preset subject matter and subsequent instruction, conventions enjoyed considerable deliberative freedom—they were, after all, convened to act as problem-solvers. They elected their own officers and adopted their own rules. In general, interstate conventions were modeled on those attended by international diplomats.[11]

The initial interstate convention of the Founding era was the First Continental Congress (1774), which, despite being denoted a "Congress,"[12] both qualified as a convention and was understood to be one.[13] There were at least ten other interstate conventions held between the Declaration of Independence and 1787: two in Providence, Rhode Island (1776-77 and 1781); one in Springfield, Massachusetts (1777); one in New Haven, Connecticut (1778); two in Hartford, Connecticut (1779 and 1780); one in York, Pennsylvania (1777); one in Philadelphia (1780), one in Boston (1780),[14] and one in Annapolis (1786).[15]

Some single-state conventions served only a narrow purpose. For example, the Georgia Constitution of 1777 authorized an intrastate convention solely to draft constitutional amendments suggested by a majority of counties.[16] This provision may have been the direct inspiration for the U.S. Constitution's "Convention for proposing Amendments."[17] Other conventions served broad, constitutive purposes and were called "plenipotentiary" conventions. Among these were the bodies that erected independent state governments after eviction of the colonial governors.

Among interstate conventions, the First Continental Congress was the most nearly plenipotentiary: It was empowered to "to consult and advise [i.e., deliberate] with the Commissioners or Committees of the several English Colonies in America, on proper measures for advancing the best good of the Colonies."[18] The 1787 Philadelphia gathering (contrary to common belief) was nearly plenipotentiary: It enjoyed very broad power to suggest a new form of government, and was not, as so often claimed, a "runaway" convention.[19]

Most interstate conventions were far more limited—that is, they were targeted at particular problems. The delegates deliberated on the subject or subjects they were empowered to consider, perhaps issued recommendations, and then went home.[20] The famous Annapolis Convention of 1786 was to focus on "the trade and Commerce of the United States"[21]—whose important but limited scope induced James Madison explicitly to distinguish it from a plenipotentiary convention.[22] The first assembly at Providence (1776-77) was restricted to currency and defense measures,[23] and the second (1781) was entrusted only with ascertaining how to provide army supplies in a single year.[24] The gatherings at New Haven and Philadelphia (1780) dealt with price regulation only.[25] The first Hartford Convention was empowered to address currency and trade,[26] and the second met "for the purpose of advising and consulting upon measures for furnishing the necessary supplies of men and provision for the army."[27] In 1777, Congress recommended to the states that they sponsor conventions in York, Pennsylvania, and Charlestown, South Carolina, to consider price-stabilization measures.[28]

Significantly, the convention journals reveal that all of these assemblies remained essentially within the scope of their calls. There were no "runaways."

The records left from the Founders' frequent conventions, both within states and colonies and among polities, are sources of convention customs, protocols, and usage. As explained below, these customs, protocols, and usages are of distinct value in clarifying and explaining the legal rules laid down by Article V.

Significantly, the convention journals reveal that all of these assemblies remained essentially within the scope of their calls.[29] There were no "runaways."

The Constitution authorizes three kinds of conventions, all serving limited purposes. Two kinds are intrastate: (1) conventions to ratify the Constitution and (2) conventions to ratify particular amendments.[30] The third is interstate or federal: the convention for proposing amendments.[31] Its purpose is to draft and

propose for ratification constitutional amendments addressing subjects designated by applying states.[32] It pinch-hits for Congress when Congress refuses to act. Like all federal conventions, its members are delegates sent by the state legislatures, and they serve as agents for those legislatures.[33]

The Constitution's Express Grants of Amending Power

Article V of the Constitution reads in relevant part:

> 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....[34]

The purpose of an interstate convention is to draft and propose for ratification constitutional amendments addressing subjects designated by applying states. It pinch-hits for Congress when Congress refuses to act.

Article V envisions roles in the amendment process for four distinct sorts of assemblies:

- Congress;
- state legislatures;
- state ratifying conventions; and
- conventions for proposing amendments.

Article V grants eight distinct enumerated powers to these assemblies. Four powers are granted at the *proposal* stage and four at the *ratification* stage. At the proposal stage, the Constitution grants

1. to two-thirds of each house of Congress authority to propose amendments;
2. to two-thirds of the state legislatures power to require Congress to call a convention for proposing amendments;
3. to Congress power to call that convention (and requires it to do so); and
4. to the convention authority to propose amendments.

At the ratification stage, the Constitution

1. authorizes Congress to select whether ratification shall be by state legislatures or state conventions;
2. (if Congress selects the former method) authorizes three-fourths of state legislatures to ratify;

3. (if Congress selects the latter method) empowers (and requires) each state to call a ratifying convention; and
4. further empowers three-fourths of those conventions to ratify.

Note that in each of these grants, the people bestow on one of these assemblies authority to perform a specific function. When a state legislature or state convention performs an Article V function, it does not act as an organ of the state, nor does it exercise powers reserved to the states under the Ninth and Tenth amendments.[35] Each power is bestowed by Article V alone, in what the Supreme Court calls a "federal function."[36] Similarly, under Article V, Congress does not act as the federal legislature but as an assenting body. In the amendment context, therefore, this report designates all four bodies by the label *Article V assemblies*.

Article V's Grants of "Incidental" Powers

Unlike the Articles of Confederation,[37] the Constitution recognized and incorporated the agency law rule of *incidental powers*.[38] Under the doctrine of incidental powers, unless there are words to the contrary, a grant of an express or "principal" power carries with it a grant of implied or "incidental" powers. The doctrine of incidental powers ensures that an agent receives sufficient authority to carry out the intent or purpose behind the grant.[39] For example, an agency document entrusting a person with "management of my store, including the power to hire personnel and purchase inventory" generally includes incidental authority to fire personnel and sell inventory.

The doctrine of incidental authority was a well-developed component of Founding-era jurisprudence and defined the outer limits of the Constitution's granted powers.

The doctrine of incidental authority was a well-developed component of Founding-era jurisprudence and defined the outer limits of the Constitution's granted powers. Under the law of the time, for Power B to be incidental to a principal power (Power A), Power B had meet certain requirements. To begin with, it had to be less "worthy" than Power A[40]—less valuable, less important, subsidiary. Thus, authority to manage a store would include authority to sell inventory in the ordinary course of business, but not to sell the entire enterprise.

In addition, one of two other requirements had to be met: Power B had to either (1) allow only actions customary for exercising Power A or (2) be so necessary to the exercise of Power A that the agent's work would be crippled (subject to "great prejudice"[41]) unless Power B were included.[42] For example, under the Founders' law, the sale of inventory would be incidental to the management of a store, because it is customarily part of store management. For the power to advertise to be incidental to management it had to be customary for store managers to advertise—or that circumstances be such that otherwise the store could not prosper. Custom or "great prejudice" was not enough. To be incidental, Power B had to be subsidiary as well.[43]

Outside of the anomalous world of the Supreme Court's commerce power and taxing power jurisprudence, pretty much the same standards of incidence apply today.[44]

The Constitution expressly acknowledges the grant of incidental powers to Congress by the Necessary and Proper Clause.[45] (The word "necessary" in the clause is a legal term of art meaning "incidental.")[46] The Founders explained that the Necessary and Proper Clause bestowed no authority. It was merely an acknowledgment—in the language of the law, a "recital"[47]—that, unlike the Articles of Confederation, the Constitution included incidental powers. Those powers would have been included even if there were no Necessary and Proper Clause.[48]

Accordingly, incidental powers also accompany grants not within the literal scope of the Necessary and Proper Clause. For example, that provision does not apply to the President's powers, but it always has been understood that the President enjoys incidental authority.[49] The Necessary and Proper Clause does not pertain to the grants to conventions and state legislatures in Article V, because the clause applies only to the "Government of the United States" and "Department[s] or Officer[s] thereof."[50] Those grants carry incidental powers with them nevertheless.[51]

How can we define the incidental powers of each Article V assembly? The many conventions and convention calls during the Founding era left us a record of practices and customs.

How can we define the incidental powers of each Article V assembly? The many conventions and convention calls during the Founding era left us a record of practices and customs. By virtue of the incidental powers doctrine, those practices and customs are plainly part of Article V.[52] When we cannot find a relevant custom, we must ask what the underlying purposes of a provision are, and how requisite a proposed power is to those purposes.

Judicial Review

History is not the only guide in helping us understand the state-application-and-convention process. Court decisions assist us as well. At one time, some argued that the courts should take no jurisdiction over Article V matters—that Congress, not the judiciary, should referee the process. Article V matters, it was said, were "political questions" of the kind inappropriate for the judiciary. Support for this view came from a four-justice concurring opinion and a brief *dictum* (uncontrolling side opinion) in a 1939 Supreme Court case, *Coleman v. Miller.*[53]

In *Coleman*, a six-judge majority of an eight-justice bench refused to review whether Kansas had ratified a proposed "anti-child labor" amendment. Doing so would have required the Supreme Court to disregard the official state certification of ratification and delve into potentially unsolvable issues of Kansas legislative procedure. The Court's *dictum* added that Congress, not the courts, should

determine whether a state could ratify an amendment after earlier rejecting it. Four of the six justices separately concurred. They contended that *all* questions of proper ratification should be left to Congress.

The *Coleman* dictum and the four-justice concurrence violated a famous aphorism of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."[54] This "province and duty" necessarily includes an obligation to say what the Constitution is, including any amendments. That, in turn, requires the Supreme Court to determine whether a putative amendment is really part of the Constitution.[55]

Fortunately for our inquiry, *Coleman* has not been followed. As Professor Walter Dellinger once wrote, the case is an "aberration."[56] Today, the courts consciously reject the "hands-off" rule of the dictum and concurrence.[57] Although the judiciary has applied the "political question" doctrine to some Article V cases, in each of those cases, special facts called for abstention.[58] There is no general principle that Article V issues are not justiciable.

The proof has been a respectably long series of court rulings on Article V extending from 1798 to modern times. For the most part, the results are consistent with the intended force of Article V, even if the reasoning sometimes is different.

The proof has been a respectably long series of court rulings on Article V extending from 1798 to modern times. For the most part, the results are consistent with the intended force of Article V, even if the reasoning sometimes is different.

Frequently Asked Questions

Following are some of the most important questions asked about the Article V process and their corresponding answers.

Applications for a Convention for Proposing Amendments

What Is an Application, and How Is It Adopted?

Article V gives the name "Application" to the resolution by which a state legislature demands that Congress call a convention for proposing amendments. As an Article V assembly, a state legislature is generally free to adopt its own procedures for issuing an application.[59] There are some basic rules, however. Both Founding-era precedent[60] and modern case law[61] tell us that the governor has no role in the process. He need not sign the application, and may not veto it—no matter what the local state law is on the subject. This is consistent with a very early Supreme Court case dealing with another Article V assembly—Congress.[62] That case held that the President is not part of the procedure by which Congress proposes amendments.

The reason state and federal executives are excluded from the amendment process is that Article V confers powers on the *named assemblies*, not on the

lawmaking apparatus per se.[63] Resolutions pursuant to Article V, including votes approving applications, are not legislative in nature.[64]

For the same reason, state constitutional provisions governing the legislative process do not apply to an Article V application. The courts have invalidated state requirements of legislative supermajorities[65] and referenda.[66] Restrictions on how an Article V assembly approves resolutions are valid only if freely adopted by the assembly itself.[67]

May an Application Be Limited to Particular Subject Matter?

The history of the state-application-and-convention process firmly supports the conclusion that an application may request a convention unlimited as to subject.[68] That conclusion is uncontroversial, but many have claimed that the applying states do not have the complementary power of limiting a convention to one or more subjects. However, the same history that confirms the states' power to apply for an open convention even more clearly confirms their power to apply for a convention limited in subject matter. As noted earlier, during the Founding era, rather than being plenipotentiary in nature, the overwhelming majority of interstate conventions were limited to one or more prescribed subjects.[69] During the debates over ratification of the Constitution, participants frequently referred to the prospect of states applying for an Article V convention focusing on prescribed reforms.[70] The conclusion is clear: The Constitution's grant of power to apply for a convention carries with it the incidental power to limit the subject matter of the convention.[71]

The conclusion is clear: The Constitution's grant of power to apply for a convention carries with it the incidental power to limit the subject matter of the convention.

Early post-ratification practice was consistent with the view at the Founding. Applications limited as to subject matter included the 1832 application from South Carolina, the petition from Alabama the following year, the 1864 application from Oregon, and arguably the 1789 application from Virginia. The ensuing decades witnessed a veritable flood of single-subject applications on such topics as direct election of U.S. senators and control of polygamy.[72]

Case law in the subject is scanty, but what is available also is consistent with the power of legislatures to limit convention subject matter.[73]

May an Application Limit the Convention to Particular Language?

Some comparatively recent applications have tried to impose restrictions beyond subject-matter limits. For example, some have sought to require the convention to take an up-or-down vote on an amendment whose precise wording is set forth in the application.[74] Applications also have imposed conditions on the effectiveness of the application. These have included conditions precedent (providing that the application becomes effective only when a certain event or

events occur)[75] and conditions subsequent (providing that the application becomes ineffective if a particular event or events intervene).[76] Some have imposed both kinds of conditions.[77] There also have been suggestions that applications might impose operating rules for the convention.

Such limitations are constrained by both practical and legal restrictions. As a practical matter, the more terms and conditions placed in applications, the less likely they will match each other sufficiently to be aggregated together to reach the two-thirds threshold. If Congress or the courts dislike the contemplated amendments, they may well seize upon wording differences to justify refusal to aggregate.[78]The courts also are likely to reject any effort by state legislatures to impose rules on the convention. During the Founding era, conventions enjoyed the power to enact their own rules,[79] suggesting that such is an incident of an Article V convention's authority to convene, deliberate, and propose. The same practice has prevailed in later years with intrastate conventions.[80] The issue has not been presented squarely to the courts because an Article V convention has not been held. However, the courts have protected the right of state legislatures, when acting under Article V, to make their own rules,[81] and they have defended the deliberative independence of state ratifying conventions in other ways.[82] Opponents may well argue that if an application purports to prescribe rules to the convention, it is void for attempting to obtain an illegal result.[83]

The text of the Constitution grants the convention, not the state legislatures, the power "for proposing Amendments." The Framers could have drafted the language otherwise, but they did not.

Another issue is how far applying legislatures can go in restricting the convention's deliberations and discretion in advance[84]—by, for example, requiring an up-or-down vote on particular wording or imposing conditions on applications. History provides a short answer: Although up-or-down votes occasionally were required of intrastate gatherings, interstate conventions invariably were deliberative entities, if not always among delegates, then at least among state delegations. Each was an assembly to which were presented one or more problems (i.e., subjects), with a request that the assembly propose solutions. The power to deliberate was, and is, an incident of the power to propose. And the text of the Constitution grants the *convention*, not the state legislatures, the power "for proposing Amendments." The Framers could have drafted the language otherwise, but they did not. The state legislatures were to enjoy their amendment power not directly, but through a gathering in which the delegates represented them and while in session were subject to their instructions.[85]

Why did the Framers insert a convention in the process? Presumably because it was a proven device for collective deliberation, compromise, and conciliation—meaning by deliberation, common consideration and weighing of possible alternatives, and by compromise and conciliation, hearing and responding to the viewpoints of all states, including those that had not applied for the convention. It is true that a large group of applications with similar restrictions also is likely to be the product of deliberation, compromise, and conciliation. But the convention

setting encourages more, and includes the non-applying states. An independent level between state applications and state ratification subjects the process of decision to additional "refinement," to use James Madison's term.[86]

This is another topic on which most subsequent history is consistent with the Founders' vision. Throughout the 19th and early 20th centuries, there were many applications for conventions limited as to subject matter, but none sought to dictate precise wording or terms to the convention. At least one application was subject to a condition: An 1861 New Jersey resolution was to be effective only if Congress did not act.[87] But that condition did not infringe the assembly's deliberative freedom once the convention had been called.

In the 1930s, state legislatures did try to restrict the deliberative freedom of Article V assemblies to ensure adherence to the popular will. In 1933, this effort won judicial approval in the Alabama Supreme Court advisory opinion *In re Opinion of the Justices.*[88] A state law governing the convention called for ratifying or rejecting the Twenty-first Amendment, which repealed Prohibition. The statute provided that an elector's vote for convention delegates would not be counted unless the elector first voted "yes" or "no" on the question of whether Prohibition should be repealed. The law required delegates to take an oath promising to support the result of the referendum. The court sustained this procedure as promoting the popular will but gave little or no weight to the goal of ensuring a deliberative process.

Throughout the 19th and early 20th centuries, there were many applications for conventions limited as to subject matter, but none sought to dictate precise wording or terms to the convention.

If Assembly X effectively restricts the deliberation of Assembly Y, some of Assembly Y's decision making authority is transferred to Assembly X. By absolutely binding the convention to the popular will, the Alabama statute effectively transferred ratification from the convention to the voters. They became the true ratifiers. For this reason, other courts have not followed the rule of *In re Opinion of the Justices*.

Even before that case, the Supreme Court had decided that *legislative* ratification could not be displaced by a referendum[89]—that the state legislature's discretion could not be compromised by extraneous rules.[90] Further, in the same year as *In re Opinion of the Justices*, the Supreme Court of Maine ruled that a referendum cannot bind a ratifying *convention* because the "convention must be free to exercise the essential and characteristic function of rational deliberation."[91] (Obviously, however, the scope of convention deliberation cannot exceed the subject matter for which it is empowered.) Since that time, a string of cases have recognized explicitly the connection between control and deliberation, and have done so in the context of state applications as well as in the context of ratification. In 1978, Justice William Rehnquist upheld a referendum to influence the application process while emphasizing that the referendum was purely advisory.[92] Six years later, the Montana Supreme Court voided an initiative that would have

required state lawmakers to apply for a convention for proposing a balanced-budget amendment. Relying on the U.S. Supreme Court cases disallowing transfer of ratification power to the voters, the Montana tribunal held that, "[a] legislature making an application to Congress for a constitutional [*sic*] convention under Article V must be a freely deliberating representative body. The deliberative process must be unfettered by any limitations imposed by the people of the state."[93]

The same year, the California Supreme Court invalidated a voter initiative imposing financial penalties on lawmakers who failed to support an application for a balanced-budget amendment.[94] The court observed that this was inconsistent with a goal of Article V, which "envisions legislators free to vote their best judgment."[95]

During the 1990s battle for federal term limits, activists used the state initiative process to induce lawmakers to support term limits. Members of Congress were instructed to support congressional proposal of a term limits amendment. State lawmakers were instructed to support applications for a convention that would propose term limits. Voter-adopted initiatives inflicted negative ballot language on politicians who refused. Again and again, courts invalidated these measures, because by impeding the deliberative function, they transferred discretion from Article V assemblies to other actors.[96] Although one could interpret those measures as a form of aggressive advice rather than actual coercion, the courts consistently voided them.

As an application campaign nears apparent success, it will be opposed by hostile opinion-makers, judges, and members of Congress. They will contend that applications restricting convention discretion are inherently void.

As an application campaign nears apparent success, it will be opposed by hostile opinion-makers, judges, and members of Congress. They will contend that applications restricting convention discretion are inherently void.[97] If the restriction relates merely to subject matter, there is no legal problem.[98] Nor is there a legal problem if a state legislature's application goes beyond specifying subject matter by offering mere *recommendations* to the convention.[99] However, legislatures that seek to dictate specific language, conditions, or procedures to the convention place their applications at risk.

As explained below, during the sitting of the convention, the individual delegates can be governed by instructions from the state legislatures they represent. (If instructions clash, the process becomes one of deliberation among states.) Instead of imposing detailed restrictions in the applications, therefore, legislatures should wait until the convention opens.[100]

One final point on the issue of convention discretion: There is no inconsistency, nor need there be tension, between state applications specifying subject matter and the assembly's need for deliberative freedom. A convention for proposing amendments, like most of the interstate gatherings held in the Founding era, is a problem-solver. In modern jargon, it is a "task force." For a task force to operate

effectively, those creating it must both (1) define the issue to be addressed and (2) allow the task force the deliberative freedom needed to arrive at a useful proposal. It would be futile to fail to identify the issue or to impose a solution in advance. Similarly, in the state-application-and-convention process, the state legislatures specify the problems to be addressed and commission the delegates. The convention is then permitted the deliberative freedom necessary to make a considered proposal.

May States Rescind Applications?

Some have argued that states cannot rescind applications, and that once adopted an application continues in effect forever, unless a convention is called. This position is contrary to the principles of agency the Founders incorporated into the process. An application is a deputation from the state legislature to Congress to call a convention. Just as one may withdraw authority from an agent before the interest of other parties "vests," so the state legislature may withdraw authority from Congress before the two-thirds threshold is reached.

The power of a state to rescind its resolutions, offers, and ratifications was well established when Article V was adopted. This power ends only when the culmination of a joint process was reached.

As author Russell Caplan has shown, the power of a state to rescind its resolutions, offers, and ratifications was well established when Article V was adopted.[101] This power ends only when the culmination of a joint process was reached. Thus, a state may rescind ratification of a constitutional amendment any time before three-fourths of the states have ratified, but not after. Similarly, as at least one modern court has held,[102] a state can withdraw its application any time before two-thirds of states have applied.

Can an Application Grow "Stale" with the Passage of Time?

Some have argued that applications automatically become "stale" after an unspecified period of time and no longer count toward a two-thirds majority. There are several reasons for concluding that applications do not become stale. First, there appears to be no evidence from the Founding era or from early American practice indicating that applications become stale. Second, although a 1921 Supreme Court case, *Dillon v. Gloss*, suggested that *ratifications*, to be valid, must be issued within reasonable time of each other,[103] the Court essentially disavowed much of the *Dillon* "staleness" language 18 years later.[104] Third, the staleness issue pertaining to ratification seems to have been resolved by the universally recognized adoption of the Twenty-seventh Amendment, based on ratifications stretching over two centuries.[105]

Fourth, even if *ratifications* can become stale, it does not follow that *applications* should follow the same rule. One reason for the "staleness" discussion in *Dillon*

was the Court's interpretation of congressional power to choose a mode of ratification.[106] However, congressional authority over the calling of a convention is narrower than the power over ratification: Congress's mode-of-ratification decision is partly discretionary; its duty to call a convention is only ministerial.[107]

Finally, there is the problem of who is to judge staleness. Because the Constitution prescribes no time period, whether an application is "stale" is a matter of judgment. As the Supreme Court has noted, the courts are not in a position to make this judgment, because they have no legal criteria by which to judge.[108] Leaving the decision to Congress would be the worst possible solution,[109] because doing so could defeat the central purpose of the state-application-and-convention process—that is, to allow the states to bypass Congress. Comparatively recent history strongly suggests that Congress would manipulate the period to interfere with the process. For example, during the 1960s, U.S. senators opposed to state-suggested amendments argued that all applications should be deemed stale (and therefore invalid) after a period of no more than two or three years.[110] Because of the biennial schedule of many state legislatures, this would have effectively excised the state-application-and-convention process from the Constitution. On the other hand, a decade later, when many states balked at approving a *congressionally proposed* amendment, Congress purported to intervene by extending the ratification period from seven to ten years.[111]

In the final analysis, the only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or a ratification) outdated, the legislature may rescind it, as many have done.

The only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or a ratification) outdated, the legislature may rescind it, as many have done.

The Convention Call

What Power Does Congress Have When Calling the Convention?

The central purpose of the state-application-and-convention process—to enable the states to promote amendments without congressional obstruction—is reflected in Article V's requirement that after two-thirds of states have applied, Congress "shall" call a convention.

The Constitution occasionally bestows authority of a kind normally exercised by one branch on another branch. The President is the chief executive, but he may veto bills, which is essentially a legislative power.[112] The Senate is usually a legislative body, but it tries impeachments, a judicial power,[113] and approves nominations, an executive power.[114] Congress usually exercises legislative authority, but the Constitution grants Congress authority to declare war, which previous to Independence had been considered an executive power.[115]

The Founding-era record establishes that the role of Congress in calling an amendments convention is to serve as a ministerial agent for the state legislatures.[116] In this role, Congress acts in an executive rather than a legislative capacity. Because calling a convention is a mandatory executive duty, it should be enforceable judicially. One potential remedy against a recalcitrant Congress is a declaratory judgment.[117] Furthermore, because the duty is "plain, imperative, and entirely ministerial," a writ of mandamus is appropriate.[118] Courts also may grant equitable relief, such as an injunction, even against a legislature, if it is violating the Constitution.[119]

To ensure that Congress does not "gerrymander" the process to defeat its central purpose, powers incidental to its call must be minimal. They certainly do not include broad authority, as some have suggested,[120] to determine how many delegates there will be, how they will be apportioned, and what the rules of the convention will be. During the Founding era, an entity asking for an interstate (federal) convention requested states to send delegates of their own choosing. The states themselves, not the "caller," determined how the delegates were chosen. Conventions elected their own officers, decided after they convened where they would meet, and adopted their own rules, including voting rules.[121] In interstate conventions, the default rule of suffrage was "one state, one vote," although the convention theoretically had power to alter this. In modern times, the general rule that a convention, or a legislature, operating under Article V controls its own voting rules and procedures was applied by the future Justice John Paul Stevens in his much-quoted opinion in *Dyer v. Blair*.[122]

The Founding-era record establishes that the role of Congress in calling an amendments convention is to serve as a ministerial agent for the state legislatures. In this role, Congress acts in an executive rather than a legislative capacity.

Based on Founding-era custom, the powers of Congress incidental to the call are to determine whether the two-thirds threshold has been met, and to specify the time and initial place of meeting and any subject-matter restrictions imposed by the applications. Decisions on other matters are within the authority of other Article V assemblies.

What Other Formalities Are Required for the Call?

The Supreme Court has held that Congress may propose amendments by a two-thirds vote of members present (assuming a quorum), not of the entire membership.[123] By parity of reasoning, Congress should be able to call the convention by majority of members present (assuming a quorum).

As noted above, the evidence strongly supports the conclusion that the President has no role in the amendment process. This is because Article V bestows power on particular assemblies, not on the entire legislative apparatus.[124]

The Convention

Who Establishes the Rules for Selecting Delegates?

Some have suggested that, under the Necessary and Proper Clause, Congress might specify how delegates to an Article V convention are chosen.[125] However, Founding-era practice informs us that delegate selection is incidental to the powers of the state legislature, not to the powers of Congress. Subsequent history is fully consistent: Applications and other documents from the Founding through the 19th century generally referred to Article V conventions as "federal conventions" and "conventions of the states," rather than as conventions of the people.[126] The Supreme Court also has used the term "convention of the states."[127] On the one occasion when Congress opted for a proposed constitutional amendment to be ratified by state conventions rather than state legislatures, the states were left in full command of delegate selection.[128]

Of course, state legislative decisions are subject to general rules imposed on the states by the Constitution, particularly the guarantees of due process, equal protection, and voting rights defined by the Fourteenth,[129] Fifteenth,[130] Nineteenth,[131] and Twenty-sixth amendments.[132] The Twenty-fourth Amendment, prohibiting requirements that electors be taxpayers, does not apply to voting for conventions under Article V.[133]

Founding-era practice informs us that delegate selection is incidental to the powers of the state legislature, not to the powers of Congress.

Who Sets the Rules of the Convention?

As noted above, both Founding-era custom and modern case law hold that control over the convention's proceedings is its own prerogative.[134] As incidents to its power to propose amendments, the convention may establish its own rules, elect its own officers, determine where it continues to sit, fix the hours of sitting, judge the credentials of members, and otherwise oversee housekeeping.[135] If the convention wishes to alter the "one state, one vote" rule, it may do so. During the Founding era, conventions could punish members of the general public for such "breaches of privilege" as slander of the convention or of members, but this power was removed by the Due Process Clause of the Fifth Amendment.

How Are Delegates to Deliberate? and What Is the Role of State Instructions?

The Constitution grants the convention, not the states, the power to propose amendments. This suggests that, within its prescribed subject(s), the convention has full authority to draft and propose, or refuse to propose, one or more amendments. It need not adopt specific language set forth in state applications.[136]

This conclusion is strengthened by important comments in the Founding-era record—such as Madison's observation that the convention could refuse to

propose anything,[137] by then-prevailing practice,[138] by how the states drafted their applications in the subsequent 125 years,[139] and by a string of court decisions designed to protect the deliberative freedom of Article V assemblies.[140]

Yet the deliberative quality of the convention does not mean that the delegates are completely free actors. American convention delegates have long been subject to instructions from those they represent.[141] As in prior federal conventions, they are representatives of the state legislatures, and therefore subject to instructions. This is not inconsistent with the deliberative quality of the convention: Delegates will discuss issues among themselves and with officials back home, and officials back home will discuss issues with their counterparts in other states. The result will be a textured, multilayered deliberation likely superior to anything that either the state legislators or the delegates could have produced alone.

Delegates will discuss issues among themselves and with officials back home, and officials back home will discuss issues with their counterparts in other states. The result will be a textured, multilayered deliberation likely superior to anything that either the state legislators or the delegates could have produced alone.

What Happens If the Convention "Proposes" an Amendment Outside the Subject Matter Assigned by the Applications?

Because the convention ultimately serves the state legislatures, proposals outside the call are *ultra vires*: Only those within the scope of authority, as fixed by the applications, have legal force.[142] Under agency law (both at the Founding and today), an agent may suggest to his principal a course of action outside the agent's sphere of authority—but it has no *legal* effect. For example, if a convention called to consider a balanced-budget amendment recommends both a balanced-budget amendment and a term-limits amendment, only the former is a "proposal" within the meaning of Article V. The latter is merely a recommendation for future consideration. Congress may specify a "Mode of Ratification" only for the balanced-budget amendment, and states may ratify only that proposal.[143] If Congress, the legislatures, or the public agrees with the convention's term-limits recommendation, the states may apply anew for a convention with authority to propose it, or Congress itself may propose it.

Transmittal of Proposals to the States

Although a convention's proposal does not technically pass through Congress to the states, the Constitution does require and empower Congress to select one of two "Modes of Ratification." Congress's power in this regard is the same as if it had proposed the amendment.

Congress has no choice as to whether to choose a mode. The Constitution requires it to do so. Because selecting, like calling an Article V convention, is a mandatory rather than discretionary duty, it should be enforceable judicially.[144] On the other hand, the congressional decision to select one mode rather than the other is unreviewable.[145]

Congress may enjoy some powers incidental to selecting the mode of ratification. But a power incidental to selecting the mode of ratification must be both subsidiary to it and coupled with it by custom or strong necessity.[146] The power to select the mode is obviously a limited and discrete choice, and certainly does not justify sprawling congressional authority over the state ratification process. The Supreme Court's holding in *Dillon v. Gloss*[147]—that Congress may specify a time period for ratification as an incident of selecting the mode—may or may not be correct, but it should apply only when the proposal comes from Congress. Congress may specify a time period for *its own* proposed amendments, since proposers generally may impose time limits on their proposals. But when a convention proposes amendments, the convention, not Congress, is the correct agency for setting the time limit. Vesting the power in Congress would be inconsistent with the purpose of the state-application-and-amendment process, since it would enable Congress to throttle proposals it disliked by imposing very short time limits.[148]

Recommendations for Advocates

Anticipate Objections

In recent years, most of the visible opposition to the state-application-and-convention process has come from small political groups claiming that the convention would be uncontrollable. My previous two reports have demonstrated that such claims are insubstantial and can be disregarded.

In recent years, most of the visible opposition to the state-application-and-convention process has come from small political groups claiming that the convention would be uncontrollable and might even stage a *coup d'etat*. My previous two reports have demonstrated that such claims are insubstantial and can be disregarded. Much more threatening will be the potent and sophisticated opposition that will mobilize as the state-application-and-convention process gains ground. Opponents will include members of Congress and the executive branch, media proponents for the federal government, and representatives of the far-flung web of interests now enjoying access to federal power or receiving federal largess: tax-supported foundations and policy centers, lobbyists, academics, and others. They will be well funded and aggressive.

We can predict some of their tactics from how they resisted state application campaigns in the latter half of the 20th century, as well as from ways in which entrenched special interests battle citizen initiatives at the state level. For example, we can expect them to subject leaders of the application process to harassment and personal abuse and to tell the public that a successful convention will rob them of jobs and government benefits.

In addition to summoning the ghoul of the "runaway convention," opponents may claim that the process is "minority rule" because if all the least-populous states—and only the least populous states—applied for a convention, then one

could be called at the behest of states with less than a third of the population. (The implausibility of that scenario has not deterred some from raising it in the past.)[149]

Opponents also will raise legal objections. Politicians, lawyers, and academics who would never apply the same standard to amendments increasing federal power will assert that the state-application-and-convention process must be legally picture-perfect to be valid.[150] They will sue to invalidate state applications, and perhaps sue to prevent Congress from aggregating applications or issuing a call. They also will rely on legal grounds to induce Congress to disregard applications.

It follows that advocates must proceed in a manner that is as legally bulletproof as is consistent with success. That requires advocates to anticipate legal obstacles, avoid those that can be avoided, and prepare defenses against those that are unavoidable. Some impediments are unforeseeable and will have to be met as they arise.[151]

Advocates must proceed in a manner that is as legally bulletproof as is consistent with success. That requires advocates to anticipate legal obstacles, avoid those that can be avoided, and prepare defenses against those that are unavoidable.

Legal arguments, of course, vary in their degree of credibility. Among the more specious objections raised against the application campaigns of the 1960s and 1970s were the following: (1) despite the Constitution's use of the word "shall," Congress has no obligation to call a convention when it receives proper applications from two-thirds of the states;[152] (2) the state-application-and-convention process is no longer part of the Constitution and may be ignored;[153] (3) applications from "mal-apportioned" legislatures do not count;[154] (4) applications dating from before a legislature is reapportioned do not count;[155] (5) applications more than a few years old are "stale";[156] (6) single-subject applications are invalid,[157] and (7) Congress may use its power under the Necessary and Proper Clause to control delegate-selection and convention rules.[158] Reliance by Congress or the courts on such arguments to abort or hobble a convention could ignite a constitutional crisis of the first magnitude.

Potential legal objections with more merit include (1) a rescinded application is no longer valid;[159] (2) varying and inartfully drawn applications, even if targeted at the same subject, are too imprecise to be aggregated;[160] and (3) applications are void if they try to control the convention unduly—if, for example, they mandate precise language or convention rules.[161]

Promote the Right Amendments

Most people have one or more causes dear to their hearts that they would love to see written into the Constitution. But the state-application-and-convention process is no place for unpopular, ineffective, or idiosyncratic causes. Each potential amendment should comply with at least four criteria:

1. Like most amendments already adopted, it should move America back toward Founding principles.

2. It should promise substantial, rather than merely symbolic or marginal, effect on public policy.

3. It should be widely popular.

4. It should be a subject that most state lawmakers, of any political party, can understand and appreciate.

History's most successful application campaign—for direct election of U.S. senators—met all of these criteria. The proposal was widely popular and well understood by state lawmakers because, year after year, legislative election of senators had fostered legislative deadlocks, corruption, and submersion of state elections by federal issues. Direct-election advocates represented the campaign as necessary to restore Founding principles, and predicted substantial improvement in the quality of government.[162]

As of this writing, an amendment addressing federal deficit spending or imposing a single-subject rule on Congress probably meets all four criteria; an amendment to abolish the income tax or ban abortion probably does not.

Coordinate

Some of America's most successful reform campaigns took advantage of close cooperation among states. The American Revolution was coordinated first through "committees of correspondence" and later by the Continental Congress. Other interstate campaigns failed for lack of coordination, notably the effort to call an Article V convention to stave off the Civil War.[163]

During the battle for direct election of senators, the legislatures of several states erected standing committees with funded command centers to prepare common forms and assist the common effort. In future application campaigns, state legislatures may do the same, or an independent organization may take the lead. There should be a common presence on the World Wide Web. Each applying legislature should designate a contact person for official communications from other states. Each applying legislature should notify all other state legislatures of its actions. All applications should be sent to as many recipients as possible, especially (of course) Congress.

As the campaign builds steam, states should communicate on such subjects as how they will choose their delegates, what the convention rules will be, and the size of state delegations. The exchange of information, including information about America's long history of conventions, will enable states to address differences in advance of the meeting, maintain momentum and control over the process, and protect it from congressional interference.

The exchange of information, including information about America's long history of conventions, will enable states to address differences in advance of the meeting, maintain momentum and control over the process, and protect it from congressional interference.

Adopt Simple Common Forms

History shows that legislative resolutions applying for a convention must be carefully and simply worded and follow a common formula.[164] This reduces the risk of the kind of misunderstandings that plagued the application process during the nullification controversy.[165] It also reduces the risk that different applications will be deemed to cover different subjects. The resolutions (in most states, probably concurrent rather than joint, since the governor's signature is unnecessary) should be relatively short. Each resolution should say that it is an application pursuant to Article V and clearly call for (not just recommend) a "convention for proposing amendments" rather than a "constitutional" or some other kind of convention. Lengthy or argumentative "whereas" clauses are inadvisable. If political conditions call for explanations, they can be inserted into an accompanying document, such as an explanatory resolution.

The organizers of the campaign for direct election of Senators understood these rules. Their "Minnesota form," used widely in that campaign, remains an excellent starting point for drafters,[166] both because it meets the most important criteria and because it enjoys the *imprimatur* of historical usage.

History shows that legislative resolutions applying for a convention must be carefully and simply worded and follow a common formula. The resolutions also should be relatively short.

This author suggests that drafters avoid precatory and recommendatory language. If, however, the legislature wishes to recommend particular terms or wording in the application, the application should be clear that (1) the amendment is being recommended, but (2) the convention is being demanded. Ideally, though, a legislative recommendation should be in a separate resolution, adopted either at the time of application or, preferably, after the convention has been called.

Ensure That the Application Specifies the Subject of the Amendment without Dictating the Wording

For reasons already explained, an application should not require or be conditional on the convention proposing precise wording. This may be construed as an impermissible infringement of the convention's legal prerogatives or as a narrowing of a subject otherwise common with other applications.

This author recommends that each application state a single subject, with wording identical to, or as close as possible to, the applications on that subject issued by other states. Legislatures adopting resolutions after a number of other states already have applied may wish to designate previous applications it considers as addressing the same subject.[167] If the state legislature wishes to apply for a convention to consider several issues, it should approve one application for each. Otherwise, Congress may refuse to aggregate applications because of disparate terms.

The 1901 Minnesota form of application for direct election of senators is probably a good model. It applied "for the calling of a convention to propose an amendment to the Constitution of the United States making United States Senators elective in the several States by direct vote of the people."[168] That application clearly delineated the subject, but left to the convention such details as "grandfathering" of sitting senators, qualifications of electors, election at large or by districts, filling of vacancies, and whether to specify requirements for plurality or majority voting.[169]

Operate Contemporaneously and Quickly

By a proper interpretation of the law, state applications do not grow "stale." They remain effective until either rescinded or two-thirds of states have applied for a convention on the same subject.[170] Because the Supreme Court never has ruled authoritatively on the point, advocates must take care to give opponents no grounds for plausible objection on the basis of time. If possible, the entire campaign must be planned for completion in three to four years.

Make Clear That the Process Is a State, Not Federal, Procedure

Advocates must be very clear that congressional intervention into this state-based procedure is unwelcome, and will be resisted.

Advocates must be very clear that congressional intervention into this state-based procedure is unwelcome, and will be resisted. From the very beginning, advocates must announce clearly that state legislatures will govern the application process, that Congress has no discretion over whether to call the convention, that the states will determine how their delegates are chosen, and that the convention itself will determine its own rules, including its voting rules.

Respond to the "Minority Rule" Argument

As in the past, opponents will claim the state-application-and-convention process is a license for "minority rule" because, in theory, states with a minority of the American population could trigger a convention. Advocates should respond by pointing out that this is improbable as a practical matter because political realities will put larger states on the same side as smaller states: Texas, for example, is much more politically akin to a low-population state like South Dakota than to a large-population state like Massachusetts. Further, the application stage is only an initial step in a three-step process. A majority of states at the convention will have to propose any suggested amendments; in the glare of public view, they are unlikely to advance proposals most Americans find distasteful. Finally, any proposal will have to be ratified by 38 states—including, in all probability, some that failed to apply. They will almost certainly represent a supermajority of the American people.

Consider Carefully How, and How Many, Delegates Are to Be Chosen

Under a proper interpretation of Article V, each state legislature determines how delegates are to be chosen and how many will be chosen. These should be matters of interstate discussion once it appears an application campaign will be successful.

The three most obvious methods of selection are designation by the state executive, selection by the legislature, and election by the people. The weight of historical precedent favors selection by the legislature, and under Article V it is the state legislatures rather than the governor or the people that are immediate participants in the amendment process. Furthermore, legislative selection is more democratic than gubernatorial choice and may be a better way than popular election to select participants for what is essentially a large legal and political drafting committee. In addition, delegates will be subject to legislative instruction, and are more likely to respond to that instruction if the legislature selected them and can replace them.

Under a proper interpretation of Article V, each state legislature determines how delegates are to be chosen and how many will be chosen. These should be matters of interstate discussion once it appears an application campaign will be successful.

The principal objection to legislative selection will be that it is not as democratic as direct election. In one sense, this is true, but in another, it is not: Delegates amendable to legislative instruction can be guided according to their state legislature's sense of evolving public opinion. Delegates elected directly, and presumably not subject to replacement, may pursue their own agenda irrespective of how public opinion evolves.

Of course, however the delegates are chosen, their work will be subject to popular review through the difficult ratification process.

Where political conditions require that delegates be elected directly, each state legislature will have to determine whether election at-large or in districts is most appropriate.

As to the size of delegations: The delegations at the 1787 convention ranged from two (New Hampshire) to eight (Pennsylvania). Several factors argue for limiting the size of modern delegations to three or at most five per state. (An odd number will tend to avoid deadlock within a state delegation and resultant loss of that state's vote.) One factor is that while the delegates in Philadelphia needed to assess fundamental principles of American government, those in a convention for proposing amendments will face a much more limited task. Another is that there are now far more states to be represented. Delegates today are less likely to be absent due to transportation difficulties and bad health, and if a delegate can no longer serve, he or she can be replaced almost instantly.

Consultation among the states well in advance of the convention probably will result in general agreement on the proper size of delegations. If some states,

either through an abundance of enthusiasm or a desire to cripple the process, send delegations of excessive size, the convention may adopt a rule limiting the number on the floor from each state at any time.

Conclusion

The Founders intended the state-application-and-convention process to be used, especially when the federal government has abused or exceeded its authority. Not employing it in such circumstances dishonors and threatens the Founders' design.

Because a convention for proposing amendments has never been called, the process might seem mysterious. Some have taken advantage of the appearance of mystery by calling up specters of their own devising.

There need be no mystery. The nature of the process is recoverable from American history and American law. We know how other federal conventions worked during the Founding, and we have nearly two centuries of experience after the Founding with state applications and with other kinds of conventions. These three reports have largely recovered that history, and while they do not answer all questions involved, they do answer the fundamental ones.

The Founders intended the state-application-and-convention process to be used, especially when the federal government has abused or exceeded its authority. Not employing it in such circumstances dishonors and threatens the Founders' design.

Remaining issues will be resolved as state lawmakers and other citizens invoke the process—by mutual consultation and, perhaps in a few instances, by judicial decision. There is nothing unusual in this: As the Founders recognized, some constitutional questions can be elucidated only through practice. The venture is worth the price, for as events over the past few decades have shown, without a vigorous state-application-and-convention process, our Constitution is not fully effective after all.

About The Author

Robert G. Natelson, the author of "The Original Constitution: What It Actually Said and Meant," is a constitutional historian. He is a senior fellow at the Goldwater Institute in Phoenix, Ariz., and a senior fellow in constitutional jurisprudence at the Independence Institute in Golden, Colo. He served as professor of law at the University of Montana for 25 years. He is best known for his studies of the Constitution's original understanding, and for bringing formerly neglected sources of evidence to the attention of constitutional scholars. His works are listed at http://constitution.i2i.org/about (last accessed February 22, 2011).

NOTES

1 *Bibliographical Note*: This endnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster,* 72 Yale. L.J. 957 (1963) [hereinafter Black]

Arthur E. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949 (1967-1968) [hereinafter Bonfield]

Russell L. Caplan, Constitutional Brinkmanship: Amending the Constitution by National Convention (Oxford Univ. Press, 1988) [hereinafter Caplan]

The Public Records of the State of Connecticut—From October, 1776, to February, 1778, Inclusive (Charles J. Hoadley ed., 1894) [hereinafter 1 Hoadley]; The Public Records of the State of Connecticut—From May, 1778, to April, 1780, Inclusive (Charles J. Hoadley ed., 1895) [hereinafter 2 Hoadley]; and The Public Records of the State of Connecticut—From May, 1780, to October, 1781, Inclusive (Charles J. Hoadley ed., 1922) [hereinafter 3 Hoadley]

Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (5 vols.; 1941 ed. inserted in 2 vols.) (2d ed. 1836) [hereinafter Elliot's Debates]

Roger Sherman Hoar, Constitutional Conventions: The Nature, Powers, and Limitations (1917) [hereinafter Hoar]

Journals of the Continental Congress (34 vols., various dates) [hereinafter JCC]

Paul G. Kauper, *The Alternative Amendment Process*, 66 Mich. L. Rev. 903 (1967-68) [hereinafter Kauper]

Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2010) [hereinafter Origins of the Necessary and Proper Clause]

Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan* (2010) [hereinafter Natelson, *Amending*]

Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in the Constitution's First Century* (2010) [hereinafter Natelson, *First Century*]

Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95 (2007) [hereinafter Natelson, *Tempering*].

Robert G. Natelson, The Original Constitution: What it Really Said and Meant (2010) [hereinafter Natelson, Original Constitution]

Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677 (1993-94) [hereinafter Paulsen]

Grover Joseph Rees, *The Amendment Process and Limited Constitutional Conventions,* 2 Benchmark 66 (1986) [hereinafter Rees].

2 Technically, however, state ratifying conventions also are "Article V conventions."

3 *See generally* Natelson, *Amending*, *supra* note 1.

4 It may also serve to give "political cover" to those in Congress who believe that change is necessary, but who dare not act to promote it. For example, a member of Congress may believe that "earmarks" are wrong—but without a constitutional ban on earmarks, he cannot abstain from seeking them without endangering reelection.

5 *See generally* Natelson, *First Century, supra* note 1.

6 Natelson, *Amending*, *supra* note 1. *See also In re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933) ("The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes"). *Id.*, 167 A. at 179.

7 *Id.*, *supra* note 1. *See also* Hoar, *supra* note 1, at 2-10 (describing state constitutional conventions at the Founding); *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176, 179 (1933) (noting that conventions within states directly represented the people).

8 *E.g.*, 2 Hoadley, *supra* note 1, at 578 (reproducing a resolution of the 1780 Philadelphia Convention, referring to it as a "meeting of the several states"). After the Constitution was ratified, early state applications applied similar nomenclature to a convention for proposing amendments. Natelson, *First Century*, *supra* note 1.

9 *E.g.*, 17 JCC, *supra* note 1, at 790 (Aug. 29, 1780).

10 Natelson, *Amending*, *supra* note 1.

11 Caplan, *supra* note 1, at 95-96.

12 The term was commonly used to denote a meeting of sovereignties. *See, e.g.*, Thomas Sheridan, A Complete Dictionary of the English Language (1789) (unpaginated) (defining "congress" in part as "an appointed meeting for settlement of affairs between different nations").

13 *E.g.*, 1 JCC, *supra* note 1, at 17 (quoting the credentials of the Connecticut delegates, empowering them to attend the "congress, or convention of commissioners, or committees of the several Colonies in British America").

The Second Continental Congress (1775-81) arguably also was a convention, but because it acted as a regular government for more than six years, this author has not treated it as such. The Confederation Congress (1781-89) was a regularly established government.

14 *See* 17 JCC, *supra* note 1, at 790 (Aug. 29, 1780) & 18 *id.*, at 932 (Oct. 16, 1780) (referring to the three-state convention, which met in August of that year).

15 For a summary of special purpose conventions, see Caplan, *supra* note 1, at 17-21, 96. The journals of the conventions at Providence, Springfield, New Haven, Hartford, Boston, and Philadelphia (1780) are reproduced in 1 Hoadley, *supra* note 1, at 585-620, 2 Hoadley, *supra* note 1, at 562-79, and 3 Hoadley, *supra* note 1, at 559-76. 7 JCC, *supra* note 1, at 124 (Feb. 15, 1777) contains the congressional recommendation for the York convention; *id.* at 125 contains one for Charlestown, which apparently was never held. The roster and recommendations of the Annapolis Convention are at http://avalon.law.yale.edu/18th_century/annapoli.asp (last visited Dec. 19, 2010). For a summary of the York Convention, see Byron W. Holt, *Continental Currency*, in 5 Sound Currency, Apr. 1, 1898, at 81, 106-07.

16 Ga. Const. (1777), art. LXIII:

> No alteration shall be made in this constitution without petitions from a majority of the counties ... at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

17 The Committee of Detail's draft at the 1787 convention looked rather like the Georgia provision. 2 The Records of the Federal Convention of 1787, at 188 (Max Farrand ed., 1937).

18 1 JCC, *supra* note 1, at 18 (commission of Connecticut delegates).

19 The charge that the 1787 Philadelphia Convention was a "runaway" is based on misunderstandings of Founding-era law and vocabulary (Natelson, *Amending*, *supra* note 1, at 10-12), and of the sequence of events: Congress did not initiate the process, and its resolution for a narrow call was only a non-binding "opinion." Seven states gave their delegates very broad authority before Congress acted, and ultimately only two of the twelve participating states followed the narrower congressional formula.

20 *See* sources cited *supra* note 15.

21 *Proceedings of Commissioners to Remedy Defects of the Federal Government* (Annapolis, Sep. 11, 1786), *available at* http://avalon.law.yale.edu/18th_century/annapoli.asp (last visited Dec. 19, 2010). Because only five states were present, the delegates voted not to proceed with their charge and suggested to Congress that it call a convention with a broader charge.

22 Caplan, *supra* note 1, at 23. On this usage, see also *id.*, *at* xx-xxi (explaining usage) & 20 (quoting Hamilton).

23 1 Hoadley, *supra* note 1, at 585-86.

24 3 Hoadley, *supra* note 1, at 575-76.
25 *Id.* at 607 (New Haven) & 2 Hoadley, *supra* note 1, at 572 (Philadelphia).
26 2 Hoadley, *supra* note 1, at 562.
27 3 Hoadley, *supra* note 1, at 565 (commission of New Hampshire delegate).
28 Caplan, *supra* note 1, at 17. 7 JCC, *supra* note 1, at 124-25 (Feb. 15, 1777).
29 To anticipate objections: The Founding generation would have seen the first Providence Convention's decision to recommend a day of prayer (1 Hoadley, *supra* note 1, at 598-99) as well within its charge to consult for the common defense. The Boston Convention's liberality in construing its commission to advise on all affairs "related to the war" was understandable given the broad scope. 3 Hoadley, *supra* note 1, at 561-64. As noted above, the 1787 convention was not a runaway, as often charged, except perhaps as to a small minority of delegates.

The strongest case for a runaway involves the Annapolis Convention, convened to consider issues of commerce but which soon adjourned because of poor attendance. It recommended that a plenipotentiary convention be held the following year. However, agents may make recommendations outside their commissions, although those recommendations have no legal force. Natelson, *Amending*, *supra* note 1, at 4-5 & 9.
30 U.S. Const. art. V.
31 *Id.*
32 Natelson, *Amending*, *supra* note 1, at 10-12.
33 *Id.*
34 U.S. Const. art. V.
35 *United States v. Sprague*, 282 U.S. 716, 733 (1931); *Hawke v. Smith* ("*Hawke I*"), 253 U.S. 221 (1920); *Dyer v. Blair*, 390 F.Supp. 1291, 1308 (N.D. Ill. 1975) (Justice Stevens) ("[T]he delegation [from Article V] is not to the states but rather to the designated ratifying bodies"). *Cf. United States v. Sprague*, 282 U.S. 716 (1931) (Article V a grant to Congress *qua* Congress, not to the U.S. government).
36 *Leser v. Garnett*, 258 U.S. 130, 137 (1922). *See also Opinion of the Justices to the Senate*, 373 Mass. 877, 366 N.E.2d 1226 (1977); State *ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933); *In re Opinion of the Justices*, 204 N.C. 306, 172 S.E. 474 (1933); *Prior v. Norland*, 68 Colo. 263, 188 P. 727 (1920).
37 Article II of the Articles of Confederation excluded the doctrine of incidental (implied) powers by this language:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

38 This subject is fully developed in a new Cambridge University Press book on the Constitution's Necessary and Proper Clause (Origins of the Necessary and Proper Clause, *supra* note 1), and the discussion here follows that treatment.
39 *Id.* at 82-83.
40 *Id.* at 61-62.
41 *Id.* at 65.
42 *Id.* at 64-66.
43 As Chief Justice Marshall pointed out, the goal for exercising the incidental power had to really be to further the principal. An incidental power could not be exercised for its own sake on the "pretext" of seeking an authorized goal. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Nevertheless, Congress now frequently regulates activities, allegedly as incidents of the power to regulate "Commerce ... among the several States," merely for the sake of governing those activities rather than to effectuate regulation of commerce. Natelson, *Tempering*, *supra*, note 1.
44 *Id.* at 113-15.
45 U.S. Const. art. I, § 8, cl. 18.

46 Origins of the Necessary and Proper Clause, *supra* note 1, at 64.
47 *Id.* at 97-108.
48 Chief Justice John Marshall, who wrote *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the greatest of cases on the clause, fully agreed with this. Natelson, *Tempering*, *supra* note 1, at 101-02.
49 The famous debate in the First Congress over whether the President could remove federal officers without senatorial consent was won by those who claimed that the power to remove was either incidental to the power to appoint or incidental to the executive power generally. The debate is found at 1 Annals of Cong. 473-608 (June 16-23, 1789), *available at* http://international.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=51 (last visited Dec. 19, 2010).
50 *United States v. Sprague*, 282 U.S. 716 (1931) ("[T]he fifth article does not purport to delegate any governmental power to the United States.... On the contrary ... that article is a grant of authority by the people to Congress, and not to the United States").
51 At a conference at Cooley Law School on September 16, 2010, a participant cited *United States v. Sprague*, 282 U.S. 716 (1931), for the proposition that Article V was not open to construction, and so granted no incidental powers. However, *Sprague* involved not the entirety of Article V, but only unambiguous language where no construction or supplementation was necessary. *Id.* at 732.
52 *Cf. In re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933) (relying on custom to determine permissible apportionment of delegates for state ratifying convention).
53 307 U.S. 438 (1939).
54 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
55 As the court did in *United States v. Chambers*, 291 U.S. 217 (1934) (taking judicial notice of the ratification of the Twenty-first Amendment).
56 Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harvard L. Rev. 386, 389 (1983).
57 *E.g.*, *AFL-CIO v. Eu*, 36 Cal. 3d 687, 206 Cal. Rept. 89 (1984) (declining to follow the "political question" doctrine from *Coleman*); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (upholding, in a three-judge decision written by the future Justice Stevens, an Illinois legislative decision that a three-fifths vote would be necessary to ratify a federal constitutional amendment). Justice Stevens explicitly rejected the "political question" portion of *Coleman*. *See also Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., sitting as a circuit judge, upholding Nevada's use of non-binding referenda on pending constitutional amendments); *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981), *judgment vacated as moot*, *Carmen v. Idaho*, 459 U.S. 809 (1982).

Cf. Powell v. McCormick, 395 U.S. 486 (1969), where the Court eschewed the political question doctrine and issued a decision directly against Congress.
58 *Coleman* itself was in this category, for investigation would have required that the Court look behind a state's certification of ratification. *See also Leser v. Garnett*, 258 U.S. 130 (1922) (suggesting that validity of the Fifteenth Amendment was no longer open to question, but resolving the validity of the Nineteenth Amendment); *White v. Hart*, 80 U.S. 646 (1871) (refusing to hear the argument that a provision of the Reconstruction-era Georgia Constitution had not been freely adopted, when the state professed to adopt that provision voluntarily, and opening the issue would unsettle several ratified constitutional amendments).
59 *E.g.*, *Dyer v. Blair*, 390 F.Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.).
60 Natelson, *Amending*, *supra* note 1, at 14.
61 Opinion of the Justices to the Senate, 373 Mass. 877, 366 N.E.2d 1226 (1977) (application not subject to gubernatorial veto).
62 *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

63 *United States v. Sprague*, 282 U.S. 716 (1931) (bestowal of power on Congress); *Hawke v. Smith* ("*Hawke I*"), 253 U.S. 221 (1920) (bestowal of power on state legislature). *See also Hawke v. Smith* ("*Hawke II*"), 253 U.S. 231 (1920).

64 *Hawke v. Smith* ("*Hawke I*"), 253 U.S. 221 (1920), *citing Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). Thus, the term "legislature" in Article V represents a usage similar to that by which the Constitution provided for the election of U.S. senators by the state legislatures, (U.S. CONST. art. I, § 3, cl. 1), but different from the reference to the lawmaking process of the "Legislature" in the Times, Places, and Manner Clause, U.S. CONST. art. I, § 4, cl. 1. *Smiley v. Holm*, 285 U.S. 355 (1932); *Davis v. Hildebrant*, 241 U.S. 565 (1916).

65 *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (refusing to apply state constitutional requirement of a supermajority vote).

66 *Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith* ("*Hawke I*"), 253 U.S. 221 (1920). *See also State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933); *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933); *In re Opinion of the Justices*, 204 N.C. 306, 172 S.E. 474 (1933); *State ex rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895 (1933), *cert. denied*, 290 U.S. 679 (1933); *Prior v. Norland*, 68 Colo. 263, 188 P. 727 (1920).

But see Kimble v. Swackhamer, 439 U.S. 1385, appeal dismissed, 439 U.S. 1041 (1978) (Rehnquist, J.) (permitting non-binding referendum).

67 Dyer, *supra*.

68 Such applications were submitted by New York in 1789, by Georgia in 1832, and by several other states in the run-up to the Civil War. Natelson, *First Century*, *supra* note 1, at 6 & 8-13.

69 *Id*.

70 Natelson, *Amending*, *supra* note 1, at 15-18.

71 On custom as defining incidental powers, see the section on the subject above.

72 Natelson, *First Century*, *supra* note 1, at 19-21.

73 *E.g.*, *In re Opinion of the Justices*, 204 N.C. 306, 172 S.E. 474, 477 (1933) (state may limit authority of a ratifying convention). *See also Opinion of the Justices to the Senate*, 373 Mass. 877, 366 N.E.2d 1226 (1977) (holding that a single-subject application is a valid application, and although refusing to hold that it would restrict the convention, noting that the Founders expected the states to specify subject matter in their applications).

74 *E.g.*, 133 CONG. REC. 7299 (Mar. 30, 1987) (reproducing Utah application specifying precise text of amendment).

75 CONG. GLOBE, 36th Cong., 680 (Feb. 1, 1861) ("[U]nless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments").

76 *Supra* note 74 (Utah application stating that it becomes void if Congress proposes an identical amendment).

77 139 CONG. REC.-SENATE 14565 (Jun. 29, 1993) (Missouri application containing condition precedent of congressional nonaction, followed by condition subsequent of congressional action).

78 Caplan, *supra* note 1, at 107-08, suggests that refusal to aggregate would be improper, and that applications could be amended to comply with each other.

79 *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937), at 7-9 & 14-16 (discussion and agreement to rules of Constitutional Convention); 2 Hoadley, *supra* note 1, at 577 (recording the 1780 Philadelphia convention as adopting its own rule for succession of officers); 2 ELLIOT'S DEBATES, *supra* note 1, at 1 (appointment of rules committee at Massachusetts ratifying convention); 3 *id.* at 3 (recording Virginia ratifying convention as adopting rules of state house of delegates); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND 3 (James Lucas & E.K. Deaver, 1836) (reporting that 1774 provincial convention adopted its own voting rule).

80 Hoar, *supra* note 1, at 170-84 (discussing the rule-making power of conventions).
81 *E.g.*, *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975).
82 *E.g.*, *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176, 180 (1933).
83 *Cf.* Bonfield, *supra* note 1, at 959 (arguing that applications seeking ratification by state legislatures rather than state convention seek an illegitimate end and should be disregarded).
84 As explained below, state legislatures may send instructions to delegates while the convention is in process.
85 *Infra*.
86 *See, e.g.*, The Federalist No. 10 (Madison).
87 Cong. Globe, 36th Cong., 680 (Feb. 1, 1861) ("[U]nless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments").
88 148 So. 107 (Ala. 1933).
89 *Hawke I*, *supra*.
90 *Leser*, *supra*.
91 *In re Opinion of the Justices*, 132 Me. 491, 167 A. 176, 180 (1933). *See also Dyer, supra*, 390 F.Supp. 1291, 1307 (N.D. Ill. 1975) ("Article V identifies the body—either a legislature *or a convention*—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself."). (Emphasis added.)
92 *Kimble v. Swackhamer*, 439 U.S. 1385, appeal dismissed, 439 U.S. 1041 (1978) (Rehnquist, J.). *See also AFL-CIO v. Eu*, 36 Cal.3d 687, 206 Cal. Rptr. 89 (1984), *stay denied sub nom. Uhler v. AFL-CIO*, 468 U.S. 1310 (1984) (advisory resolution).
93 *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826, 830 (1984).
94 *AFL-CIO v. Eu*, 36 Cal.3d 687, 206 Cal. Rptr. 89 (1984), *stay denied sub nom. Uhler v. AFL-CIO*, 468 U.S. 1310 (1984).
95 686 P.2d at 613.
96 *E.g.*, *Donovan v. Priest*, 931 S.W. 2d 119 (Ark. 1996), *cert. denied*, 117 S.Ct. 181 (1997) (no official report) (requiring an assembly that can engage in "intellectual debate, deliberation, or consideration"); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D. Me. 1997); *Barker v. Hazetine*, 3 F. Supp. 2d 1088, 1094 (D.S.D. 1998) ("Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota's congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost"); *Gralike v. Cooke*, 191 F.3d 911, 924-25 (8th Cir. 1999), *aff'd on other grounds sub nom. Cook v. Gralike*, 531 U.S. 510 (2001) ("Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions"); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999).
97 *See, e.g.*, Black, *supra* note 1, at 962-64 (arguing that an application referencing specific language should be disregarded).
98 *See* Natelson, *Amending*, *supra* note 1; Natelson, *First Century*, *supra* note 1; and discussion above.
99 The state ratifying conventions made extensive recommendations for amendments to be acted on either by Congress or by an Article V convention. *See also Kimble v. Swackhamer*, 439 U.S. 1385, appeal dismissed, 439 U.S. 1041 (1978) (Rehnquist, J.) (advisory referendum); *AFL-CIO v. Eu*, 36 Cal.3d 687, 206 Cal. Rptr. 89 (1984), stay denied sub nom. *Uhler v. AFL-CIO*, 468 U.S. 1310 (1984) (advisory resolution).
100 *Infra*, section entitled, "How Are Delegates to Deliberate, and What Is the Role of State Instructions?"
101 Caplan, *supra* note 1, at 108-110.

102 *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981), *judgment vacated as moot, Carmen v. Idaho*, 459 U.S. 809 (1982).
103 *Dillon v. Gloss*, 256 U.S. 368 (1921).
104 *Coleman v. Miller*, 307 U.S. 438, 452-53 (1939):

> But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications.

105 *See* Paulsen, *supra* note 1.
106 *Dillon*, 256 U.S. at 376.
107 *See United States v. Sprague*, 282 U.S. 716 (1931) (discussing congressional discretion at to mode); Natelson, *Amending*, *supra* note 1 (discussing ministerial nature of call after applications).
108 *Coleman v. Miller*, 307 U.S. 438, 453-54 (1939).
109 *Cf.* Paulsen, *supra* note 1, at 717 ("[T]he least defensible position would seem to be one of plenary congressional power").
110 Caplan, *supra* note 1, at 75-76 (quoting Senator Robert Kennedy).
111 *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho 1981), *judgment vacated as moot, Carmen v. Idaho*, 459 U.S. 809 (1982) (ruling on the action of Congress purporting to extent the ratification period for the "Equal Rights Amendment").
112 U.S. Const. art. I, § 7, cls. 2 & 3.
113 *Id.*, art. I, § 3, cl. 6.
114 *Id.*, art. II, § 2, cl. 2.
115 *Id.*, art. I, § 8, cl. 11. On the king's power to declare war, see Natelson, Original Constitution, *supra* note 1, at 124.
116 Natelson, *Amending*, *supra* note 1, at 19-22.
117 *Powell v. McCormick*, 395 U.S. 486 (1969) (issuing a declaratory judgment retroactively reinstating an improperly evicted member of Congress).
118 *Roberts v. U.S. ex rel. Valentine*, 176 U.S. 221, 232 (1900). *Cf. Powell v. McCormick*, 395 U.S. 486, 502 n.16, 517, 550 (1969) (not ruling out such relief against the relevant congressional officer). Representative Theodore Sedgwick, an attorney speaking to the First Congress, noted the possibility of mandamus against Congress or the Senate. 1 Annals of Cong. 544 (June 18, 1789), *available at* http://international.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=51 (last accessed Dec. 19, 2010).
119 *E.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting a state's contention that its legislature and governor were not bound by federal court injunction).
120 *E.g.*, Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale. L.J. 957, 964 (1963). The contrary position on this point was adopted in Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 Ga. L. Rev. 1, 23-24 (1979), although Professor Gunther, like most academics who addressed the issue in the 1960s and 1970s, opposed a convention.
121 *E.g.*, 1 Hoadley, *supra* note 1, at 589 (recording the first Providence Convention as electing its own officers); *id*. at 611 (recording the New Haven Convention as setting its voting rule as "one state, one vote"). 2 Elliot's Debates, *supra* note 1, at 3 (recording the Massachusetts ratifying convention as judging credentials and deciding where to meet). *See also supra* note 79 (providing other examples of conventions setting their own rules).
122 390 F.Supp. 1291, 1307 (N.D. Ill. 1975) ("Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself"). Although Justice Stevens was referring to a ratifying body, there is no reason this rule should not apply to an amendments convention.

123 *Rhode Island v. Palmer* (National Prohibition Cases), 253 U.S. 350 (1920). This case was foreshadowed by a similar holding in *State ex rel. Erkenbrecher v. Cox*, 257 F. 334 (D.C. Ohio 1919).
124 *Supra* section entitled, "The Constitution's Express Grants of Amending Power."
125 This has been the apparent justification of proposed congressional legislation. *See, e.g.*, Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1967-68). *See also* Kauper, *supra* note 1, at 906-07.
126 Natelson, *First Century*, *supra* note 1.
127 *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).
128 *See generally* Everett Somerville Brown, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1938).
129 Prohibiting states from violating the "privileges or immunities" of U.S. citizens or depriving persons of due process of law or equal protection of the law.
130 Banning denial of the vote based on race.
131 Prohibiting denial of the vote based on sex.
132 Prohibiting denial of the vote based on age, if over the age of 18.
133 U.S. CONST. amend. XXIV reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> The Congress shall have power to enforce this article by appropriate legislation.

134 *Supra* section entitled, "May an Application Limit the Convention to Particular Language?"
135 *See also In re Opinion of the Justices*, 132 Me. 491, 167 A. 176 (1933) (holding that the state ratifying convention governs questions of qualifications and filling of vacancies).
136 *Supra* section entitled, "May an Application Limit the Convention to a Particular Language?"
137 James Madison to Philip Mazzei, Dec. 10, 1988, in 11 *The Papers of James Madison* 388, 389 (Robert A. Rutland & Charles F. Hobson eds., 1977).
138 For example, the Annapolis Convention adjourned without making a recommendation related to its charge. *See* http://avalon.law.yale.edu/18th_century/annapoli.asp (last visited Dec. 19, 2010).
139 *See generally* Natelson, *First Century* (reproducing various applications, all of which left the convention with considerable drafting discretion).
140 *Supra* notes 88-96 and accompanying text.
141 Hoar, *supra* note 1, at 127-29.
142 Natelson, *Amending*, *supra* note 1, at 5 & 9.
143 *Id.*, at 24 (quoting the conclusion of a study by President Carter's Assistant Attorney General, John Harmon).
144 *Supra* section entitled, "What Power Does Congress Have When Calling the Convention?"
145 *United States v. Sprague*, 282 U.S. 716 (1931).
146 *Supra* section entitled, "Article V's Grants of 'Incidental' Powers."
147 256 U.S. 368 (1921).
148 Rees, *supra* note 1, at 93-94.
149 *See, e.g.*, Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE. L.J. 957, 960 (1963); Kauper, *supra* note 1, at 914 (referencing argument of Theodore Sorenson). *See* Natelson, *Amending*, *supra* note 1 at 23-24, and *infra* for responses to this argument.

150 *E.g.*, Black, *supra* note 1, at 963 ("Generally, a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all"). *See also* Bonfield, *supra* note 1, at 952 (following Black).

There is a delicious irony behind Professor Black's position: He achieved national notice with constitutional arguments that relied on the Fourteenth Amendment, whose ratification was a particularly messy affair.

151 A number of unforeseeable legal obstacles have been imposed on the initiative process at the state level. *See, e.g.*, *Marshall v. State ex rel. Cooney*, 293 Mont. 274, 975 P.2d 325 (1999) (overruling preexisting election laws after the election and imposing the change retroactively to invalidate adoption of a tax-limitation initiative).

152 To his irritation, the late Senator Sam Ervin encountered this attitude among some of his colleagues. Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 878 (1967-1968).

153 William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L. J. 1 (1963-1964).

154 Caplan, *supra* note 1, at 75 (paraphrasing Senator Joseph Tydings).

155 Bonfield, *supra* note 1, at 961-92.

156 Caplan, *supra* note 1, at 75-76 (paraphrasing Senator Robert Kennedy). *See also id.* at 110-14 (discussing this issue). Caplan paraphrases Professor Paul Freund of Harvard Law School as arguing that shorter time limits should be imposed on states applying for a convention than for ratifying an amendment approved by Congress. The opinion illustrates an elite view, but seems indefensible. *Id.* at 112-13. *See also* Bonfield, *supra* note 1, at 963-65 (arguing that applications more than about two-and-a-half years old should be disregarded); Lester Bernhard Orfield, THE AMENDING OF THE AMERICAN CONSTITUTION 41-42 (1942) (suggesting possible time limits).

157 *E.g.*, Charles L. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972). *Compare* William Russell Pullen, THE APPLICATION CLAUSE OF THE AMENDING PROVISION OF THE CONSTITUTION 55-57 (Chapel Hill, 1951) (quoting the governor of New Jersey, arguing that a 1832 South Carolina application was *too broad*).

158 *See, e.g.*, Kauper, *supra* note 1, at 907:

> Similarly, the power to issue a call for a convention implies the power to fix its time, place, and duration, and the compensation of delegates. Moreover, some questions, such as the composition of the convention, the method of selecting the delegates, and whether each state shall vote as a unit as opposed to voting by individual delegates, are fundamental questions which cannot be resolved by the delegates themselves. A broad supervisory role of Congress inheres in the situation.

159 *Supra* note 125 and accompanying text.

160 This problem is discussed in Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1636-38 (1979). *See also* Natelson, *First Century*, *supra* note 1, at 9 (describing confusion over the 1832 South Carolina application).

161 *Supra* section entitled, "May an Application Limit the Convention to a Particular Language?"

162 *See* Natelson, *First Century, supra* note 1, at 16-22. The author is not commenting on the advisability of direct election, but is discussing public perceptions during the direct-election campaign.

163 Natelson, *First Century, supra* note 1, at 10-13.

164 Thus, confusion among applicants and potential applicants during the Nullification Crisis was succeeded by more clarity and standardization during the direct-election campaign. *Id.*

165 Natelson, *First Century, supra* note 1, at 9.

166 34 CONG. REC. 2560 (Feb. 18, 1901):

> *Be it enacted by the legislature of the State of Minnesota:*
>
> SECTION 1. The legislature of the State of Minnesota hereby makes application to the Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention to propose an amendment to the Constitution of the United States making United States Senators elective in the several States by direct vote of the people.
>
> SEC. 2. The secretary of state is hereby directed to transmit copies of this application to the Senate, House of Representatives of the Congress and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislatures now in session in the several States, requesting their cooperation.

167 Rees, *supra* note 1, at 90 (discussing proposal by Senator Orrin Hatch).

168 *Id.*

169 The Seventeenth Amendment ultimately dealt with several, but not all, of those issues. U.S. CONST. amend. XVII reads as follows:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.
>
> This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

170 *See supra* section on "staleness."

The Goldwater Institute

The Goldwater Institute was established in 1988 as an independent, non-partisan public policy research organization. Through policy studies and community outreach, the Goldwater Institute broadens public policy discussions to allow consideration of policies consistent with the founding principles Senator Barry Goldwater championed—limited government, economic freedom, and individual responsibility. Consistent with a belief in limited government, the Goldwater Institute is supported entirely by the generosity of its members.

Guaranteed Research

The Goldwater Institute is committed to accurate research. The Institute guarantees that all original factual data are true and correct to the best of our knowledge and that information attributed to other sources is accurately represented. If the accuracy of any material fact or reference to an independent source is questioned and brought to the Institute's attention with supporting evidence, the Institute will respond in writing. If an error exists, it will be noted on the Goldwater Institute website and in all subsequent distribution of the publication, which constitutes the complete and final remedy under this guarantee.

GOLDWATER
INSTITUTE
in defense of liberty

500 East Coronado Rd., Phoenix, AZ 85004 | Phone (602) 462-5000 | Fax (602) 256-7045 | www.goldwaterinstitute.org