

# THE CONSTITUTIONALITY OF A LIMITED CONVENTION: AN ORIGINALIST ANALYSIS

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The United States Constitution employs two basic methods for proposing constitutional amendments.<sup>1</sup> Under the congressional proposal method, two thirds of each house of Congress can propose a constitutional amendment. Under the convention method, the state legislatures can apply for a national convention that would then decide whether to propose a constitutional amendment. The amendments proposed under either of these two methods are then subject to ratification by the state legislatures or state conventions, as Congress determines.

These amendment methods were designed to operate together to ensure that no one entity could prevent the enactment of an amendment. Thus, if Congress seeks an amendment that the state legislatures oppose, Congress can propose the amendment and task state conventions with the ratification decision. Similarly, if the state legislatures seek an amendment that Congress opposes, the state legislatures can apply for a convention that could propose the amendment,

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

which would then be subject to ratification either by the states legislatures or state conventions.

Unfortunately, one of these two amendment methods is broken. The convention method simply does not work. Not only has it never been used to enact an amendment, but no convention has ever been called.<sup>2</sup> This lack of use, moreover, cannot be attributed to a lack of political interest in enacting amendments that Congress opposes. In recent years, there has been strong political support for at least three proposed amendments that would reduce congressional power—a Balanced Budget Amendment, a Line Item Veto Amendment, and a Congressional Term Limits Amendment—but unsurprisingly, Congress has refused to propose any of these. Yet, the convention method has not been employed either to enact these amendments or even to call a convention.<sup>3</sup> That the convention method is broken suggests that the Constitution now operates in a unbalanced way, allowing only amendments that promote congressional power, but not permitting amendments that constrain it.<sup>4</sup>

The most important reason why the convention method does not work is the fear of a runaway convention. To understand this fear, imagine that two thirds of the state legislatures were to apply for a convention on a specific subject, such as restraining the federal government's power to pass unbalanced budgets, and Congress were to call for a convention on that subject. The problem, however, is that the convention might choose to ignore this subject matter limitation and propose a different amendment—perhaps an amendment to authorize a constitutional right to same sex marriage or to prayer in the public schools. And that amendment might then be ratified by the three quarters of the states. A state legislator that sought a balanced budget amendment might, then, end up instead with an

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2. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 734 (1993).

3. An effort has been made in the last several decades to apply for a convention to propose a Balanced Budget Amendment, with 32 of the requisite 34 states legislatures having applied at some time for a convention. But the state legislatures have never been willing to take the next step of satisfying the two thirds constitutional requirement for a convention, even though concerns about federal deficits have been great at various times in the last several decades. The fear of a runaway convention has simply been too great. See RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 161 (1988); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1533 n.47 (2010).

4. See Rappaport, *supra* note 3, at 1526–55.

amendment providing either a constitutional right to same sex marriage or to prayer in the public schools—something that he or she might strongly oppose. The fear of such a runaway convention has led many to oppose use of the convention method.<sup>5</sup>

While the failure of the convention method represents a significant constitutional defect, in this Article I argue that the defect results from the failure to follow the Constitution's original meaning. I contend that the original meaning of the Constitution allows for limited conventions—conventions that are limited only to proposing amendments on specific subjects. Therefore, if the state legislatures apply for a convention limited solely to proposing an amendment that restrains the federal government's power to pass unbalanced budgets, the convention would not be permitted to propose an amendment on other subjects. The Constitution therefore forbids runaway conventions.

To elaborate on my argument, I maintain that, once two thirds of the states apply for the same limited convention, Congress is obligated to call that limited convention. Moreover, the convention is required to conform to the limits in Congress's call. If the convention were to violate the limitations in the call—if it were to propose an amendment that was not within the scope of its authority—then that proposal would be unconstitutional. It would not represent the type of proposal that is allowed by the Constitution and could not be legally ratified by the states. I also argue that the limitations on the convention can be quite strict. The Constitution allows the state legislatures to apply not merely for a convention limited to a specific subject matter. It also allows the state legislatures to draft a specially worded amendment and then to apply for a convention limited to deciding only whether to propose that amendment.

Readers familiar with the literature on the convention method of constitutional amendment may be surprised by my conclusions. In the past, several leading constitutional scholars have argued that the Constitution does not permit the states or Congress to impose limits on a convention.<sup>6</sup> And virtually no constitutional scholar has argued that a convention limited to a specifically worded amendment is constitutional. Yet, I argue that these past scholars have been mistaken. In part, the differences between my view and theirs turn on the fact that I

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5. See CAPLAN, *supra* note 3, at 161; Rappaport, *supra* note 3, at 1533 n.47.

6. See *infra* Part III.

seek to apply a rigorous original meaning analysis, whereas they have either invoked their own normative commitments or applied different or looser versions of originalism. But, in part, the differences are due to what I believe are mistaken inferences and interpretations of evidence. Finally, the differences may also be due to the fact that my analysis provides what is, to my knowledge, the first rigorous textual derivation of the right of the states to apply for a limited convention.

Of course, showing that the Constitution's original meaning authorizes limited conventions will not solve the defect in the convention method. To eliminate the possibility of a runaway convention, it is necessary that other constitutional actors, such as the Congress, the convention, and the courts, also conclude that the Constitution authorizes limited conventions. Without such agreement, these other constitutional actors might engage in or support a runaway convention. While showing that the original meaning authorizes limited conventions is therefore insufficient to eliminating the defect in the convention method, it is a first step in that direction. It is also important for assigning responsibility for this defect. This defect is not, as some would have it, the responsibility of the constitutional enactors who decided to employ an illimitable convention. Rather, the defect is the result of both nonoriginalists and originalists who have misread or ignored the original meaning.

The Article proceeds in five parts. Part I describes the Constitution's two methods of proposing constitutional amendments: the congressional proposal method and the convention method. Part II then explains the two interpretations of the convention method: the limited convention view, which reads the Constitution as authorizing both limited and unlimited conventions, and the unlimited convention view, which interprets it only to allow unlimited conventions.

Part III then undertakes the task of deriving the limited convention view from the constitutional text. It argues, based on evidence from contemporary dictionaries, from other parts of the Constitution, from conventions existing at the time, and from other evidence of word usage, that the original meaning of the Constitution's phrase a "Convention for proposing Amendments" includes both limited and unlimited conventions. It also shows that the Constitution's authorization of state legislatures to apply for a "Convention for proposing Amendments" allows them to apply for limited conventions. Part IV then explores arguments based on structure and purpose, concluding that they

also support the limited convention view. Finally, Part V addresses three arguments against the limited convention view—that a convention was historically understood as illimitable, that the runaway Philadelphia Convention shows that the Framers believed that conventions were not subject to limitations, and that the debates at the Philadelphia Convention indicate that the Framers would have opposed limited conventions. This part rebuts each of these arguments, showing that none of them calls the limited convention view into question.

## I. ARTICLE V

### A. THE CONSTITUTION'S AMENDMENT PROVISIONS

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

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>7</sup>

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

Article V's purpose in providing alternative amendment methods is evident: to prevent a single government entity from

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7. U.S. CONST. art. V.

having a veto over the passage of an amendment. While Congress is given the authority to propose amendments, the convention method allows the nation to bypass Congress and propose amendments that constrain Congress's powers. Similarly, while the state legislatures can ratify amendments, they might choose to reject amendments that constrain their powers. Therefore, the Constitution allows ratification by state conventions, which have different interests than the state legislatures.<sup>8</sup>

This understanding of the congressional amendment process is supported by various statements made at the time of the founding. Thus, George Mason, in the Philadelphia Convention, argued that "It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account."<sup>9</sup> Similarly, James Madison wrote in Federalist No. 43, Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."<sup>10</sup> In the New York legislature, Samuel Jones explained that the Framers "prescribed a mode by which Congress might procure more [power], if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of the [federal] government, if upon trial it should be found they had given too much."<sup>11</sup> Finally, at the North Carolina Ratifying Convention, in response to the claim that the introduction of amendments "depended altogether on Congress," James Iredell replied "that it did not depend on the will of Congress; for the legislatures of two thirds of the states were authorized to make application for calling a convention for proposing amendments, and on such application, it is provided that Congress shall call such convention, so that they will have no option."<sup>12</sup>

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8. Article VII of the Constitution was adopted in part for a similar reason. Article VII, which provided that the Constitution would take effect when nine of the thirteen states, acting through state conventions, ratified it, used state conventions rather than state legislatures in part because it was believed that the state legislatures had interests that would lead them to oppose the new Constitution.

9. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 104-05 (W.H. Norton ed. 1987).

10. THE FEDERALIST NO. 43, AT 315 (James Madison) (Benjamin Fletcher Wright ed., 1961).

11. See 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2522 (John P. Kaminski et al. eds., 2009) [hereinafter DOCUMENTARY HISTORY].

12. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF

Although Article V thus purposefully provides four paths to amending the Constitution,<sup>13</sup> the nation has almost always relied on only one of them: Congress proposes an amendment and the state legislatures ratify it. One time, for the 21st Amendment, Congress proposed the amendment but state conventions were used to ratify it.<sup>14</sup> The one method that has never been employed is having a convention propose a constitutional amendment.<sup>15</sup>

### B. THE CONVENTION METHOD

The convention method works quite differently than the congressional proposal method. Under the convention method, the state legislatures must apply for a convention. When two thirds of the states have applied, Congress must call a convention. The convention, then, must determine whether to propose a constitutional amendment. If it does propose an amendment, Congress must determine whether ratification should occur by state legislatures or state conventions.

In part because the convention method has never been used, there are various questions about the constitutional rules that govern this amendment method, including questions as to who selects the convention delegates and the content and origin of the rules that govern the convention.<sup>16</sup> But the most important question about the convention method for our purposes is whether the Constitution authorizes limited conventions.

An unlimited convention is a convention that has no limits placed on it by the state legislatures.<sup>17</sup> The convention can

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THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 178 (Jonathan Elliot ed. 1891) [hereinafter ELLIOT'S DEBATES].

13. For additional statements expressing similar concerns, see An Old Whig, 13 DOCUMENTARY HIST. 316, 377 (“We shall never find two thirds of a Congress voting or proposing anything which shall derogate from their own authority and importance.”); A Plebeian, An Address to the People of the State of New York, Apr. 17, 1788, reprinted in 20 DOCUMENTARY HIST. 942, 944 (arguing that “those who enjoy these powers” are unlikely “to surrender” them).

14. See CAPLAN, *supra* note 3, at 126.

15. See Paulsen, *supra* note 2, at 734.

16. See Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 696–97 (2011).

17. A convention that was limited by Congress would also be a limited convention. But a convention limited by Congress alone, without a limitation sought in the prior applications of the state legislatures, would be clearly unconstitutional. See *infra* notes 63–66 and accompanying text (discussing limitations on Congress’s powers). Therefore, when I discuss limited conventions, I will mean a convention where the limitations are initially contained in the state applications and only then placed in the call of the convention by Congress.



propose an amendment on any subject it desires, subject to constitutional constraints. In contrast, a limited convention is a convention that is limited as to scope by applications from the state legislatures. One can distinguish between the two types of limited conventions. First, one can imagine a convention limited to a subject, such as to financial matters. While this convention is allowed discretion to decide what amendments to propose in the financial area, it is not allowed to propose amendments that are non-financial. Second, one can imagine a convention that is limited to a specifically worded amendment. In this situation, the state legislatures would have specified a particular amendment in their applications and the convention's duties would be limited to deciding whether or not to propose that amendment. We can call these two types of limited conventions, respectively, "a convention limited as to subject" and "a convention limited to a specifically worded amendment."

## II. THE CONTENDING VIEWS: LIMITED AND UNLIMITED CONVENTIONS

There are two basic views about whether the Constitution allows limited conventions. One position holds that limited conventions are constitutional. Under this limited convention view, if the states apply for a limited convention, then Congress is required to call for such a convention and the convention is permitted to propose only amendments within the scope authorized by the applications of the state legislatures. Any proposals that the convention makes on other matters are illegal. One can further divide this basic limited convention view based on the type of limited convention. Thus, one might hold the limited convention view only for conventions limited to a subject.<sup>18</sup> Or one might go further and also hold the limited convention view as to conventions limited to a specifically worded amendment.<sup>19</sup> Under this latter view, if the states seek a convention limited not merely to a particular subject but to a

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18. See Philip B. Kurland, *A Bill to Provide Procedures for Calling Constitutional Conventions for Proposing Amendments to the Constitution of the United States, on Application of the Legislatures of Two-Thirds of the States, Pursuant to Article V of the Constitution*, 90th Cong. 233–34 (1967) [hereinafter *1967 Hearings*] (memorandum from Philip Kurland to Senator Sam J. Ervin); Arthur Earl Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 953–57 (1968); Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 884 (1968).

19. See William W. Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985, 990–91 (1979).

specifically worded amendment, the convention is limited to deciding whether to propose that specific amendment.

The alternative position holds that the Constitution does not recognize limited conventions. Under this unlimited convention view, a convention can never be limited as to the amendments it can propose.<sup>20</sup> Thus, if the states apply for a limited convention, Congress would not even be authorized to call a convention, because there would be no applications for the only constitutional type of convention—an unlimited convention.<sup>21</sup>

This unlimited convention view has been held by many of the leading scholars of constitutional law over the last 40 years, including Bruce Ackerman, Charles Black, Walter Dellinger, Gerald Gunther, and Michael Paulsen.<sup>22</sup> Despite the illustrious reputations of these scholars, I do not believe their arguments are persuasive from an original meaning perspective. The problem is in part that their methodology does not track that of modern originalism, but it is also the nature of their arguments.

In the next two Parts, I argue in favor of the strongest version of the limited convention view—that states may seek either a convention limited to a subject or a convention limited to a specially worded amendment.<sup>23</sup> In making my argument, I focus on the original public meaning of Article V. I leave aside, for the most part, arguments based on alternative interpretive

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20. See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972) [hereinafter Black 1972]; Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 6–11 (1979); Paulsen, *supra* note 2, at 738 (“[T]here can be no such thing as a ‘limited’ constitutional convention.”); Bruce Ackerman, *Unconstitutional Convention*, *The New Republic*, Mar. 3, 1979, at 8.

21. Some advocates of the unlimited convention view take a flexible view about the meaning of state applications. According to this approach, some state applications that appear to be applying for a limited convention are reasonably interpreted as also applying for an unlimited convention, if Congress concludes that a limited convention is not legal. If two-thirds of the state legislatures made such an application, then this approach would require that Congress call an unlimited convention. See Paulsen, *supra* note 2, at 738.

22. See *supra* notes 2, 20.

23. It is worth noting that the name “limited convention view” is a bit misleading. There is nothing under this view that requires that a limited convention be called. If the state legislatures decide that the circumstances warrant it, they can apply for Congress to call an unlimited convention. In this sense, one might call the limited convention view the state legislative discretion view, since it allows the state legislatures to decide on the type of convention. But I shall stick to the terminology of “the limited convention view” and “the unlimited convention view” because of its greater transparency.

theories, although I do rebut a few influential arguments based on original intent.<sup>24</sup>

While not all constitutional interpreters are originalists, this paper nonetheless is of more general interest than it might at first seem. First, many scholars who do not regard themselves as originalists still believe the Constitution's original meaning is relevant to the Constitution's proper interpretation, even if it is not determinative. Second, original meaning analysis tends to be most influential in areas where long standing precedents do not exist. This is the case regarding the convention method.

### III. THE LIMITED CONVENTION VIEW: TEXT

The limited convention view derives supports from several types of evidence—evidence of text, historical usage, and structure and purpose. It also gains power from weaknesses in the unlimited convention view. This Part focuses on text and historical usage.

The initial challenge is to show that the limited convention view can be derived from the constitutional text. The text of Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.”<sup>25</sup> The limited convention view must derive three conclusions from the text: it must show that two thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call.

The unlimited convention view is obviously skeptical about this possibility. In fact, that view claims to read the text as straightforwardly precluding limited conventions. Under the unlimited convention view, it is thought that the language “a Convention for proposing Amendments” suggests a convention that can propose whatever amendments it likes.<sup>26</sup> Consequently, the view maintains that there is no textual basis for inferring power in the state legislatures or Congress to limit what the convention may consider.

Despite these arguments, I maintain that, once one examines the text, one can see that the elements of the limited

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24. See *infra* Part V.C.

25. U.S. CONST. art. V.

26. See Paulsen, *supra* note 2, at 738.

convention view can be derived from it and, in fact, that the text represents a brief and elegant way of communicating these elements. Advocates of the limited convention view have not previously derived these conclusions from the text, but I undertake that task here.

In particular, I argue that the three elements of the limited convention view—that two thirds of the state legislatures can apply for Congress to call a limited convention, that Congress must then call a limited convention, and that the convention must conform to that call—can be derived from the text in three steps. First, “a Convention for proposing Amendments” is broad enough to cover not merely unlimited conventions but also limited conventions. Put differently, a limited convention is one type of “Convention for proposing Amendments.” Second, if Congress can call a limited convention, then the language certainly suggests that the convention should conform to the limitations of that call. Because the convention derives its authority to meet from the call, it must respect the limitations in that call as well. Third, the language allowing the states to apply for Congress to call a convention also obligates Congress to call a limited convention. When two thirds of the states submit applications for an unlimited convention, that obligates Congress to call that convention. Similarly, when two thirds of the states submit applications for a limited convention, that also obligates Congress to call that limited convention.

I shall discuss each of these three steps in turn. I begin with the meaning of a “Convention for proposing Amendments.”

#### A. A CONVENTION FOR PROPOSING AMENDMENTS.

The Constitution provides that upon the application of two thirds of the state legislature, the Congress shall call a “Convention for proposing Amendments.” The question here is what the Constitution means by the phrase a “Convention for proposing Amendments” and in particular whether such a convention includes a limited convention. Here, I argue that the evidence bearing on the original meaning of the phrase strongly suggests that a limited convention is such a “Convention for proposing Amendments.”

The unlimited convention view argues that the term “propose” suggests that a convention for proposing amendments is unlimited. But I show that the term “propose” did not imply an unlimited power of the convention to endorse any constitu-

tional provision of its choosing. First, I show, based on evidence from contemporary dictionaries and other usages in the Constitution, that the term merely meant the power to authorize an amendment to be sent to the states. Second, I then focus on a convention limited to a specifically worded amendment, showing that nothing about a convention suggests the power to consider alternatives. Finally, I discuss the contrary arguments of Charles Black, perhaps the leading scholar of the unlimited convention view, arguing that they cannot be reconciled with the evidence of the original meaning.

1. The Proposal Power as the Power to Offer for Adoption

The meaning of the phrase a “Convention for proposing Amendments” is best understood as referring to a convention that has the power to formally propose amendments that are then eligible to be ratified by the states. Under the Constitution’s two amendment methods—the congressional proposal method and the convention method—the Constitution provides for two essential steps. One entity formally proposes an amendment. A second entity then formally decides whether to ratify that amendment. The entity with the power to propose is the only entity that can take the first essential step of proposing the amendment. And only an amendment that has been formally proposed can be sent to the states for the second essential step of ratification. Thus, the power possessed by the proposing convention is the power to approve an amendment that can then be sent to the states for ratification.

This understanding of propose is supported by the ordinary meaning of the term when the Constitution was enacted. The first edition of Webster’s Dictionary, for example, has as its first definition, “To offer for consideration, discussion, acceptance or adoption; as, to propose a bill or resolve to a legislative body.”<sup>27</sup> The meaning that I employ accords with this definition: to offer for adoption. The proposing convention has the formal power to offer an amendment for adoption by the ratifiers. The ratifiers, then, have the power to adopt the amendment.

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27. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828). Johnson’s Dictionary of 1755 defines “propose” as “[t]o offer to the consideration” and as a “[s]cheme or design propounded to consideration or acceptance.” 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

This meaning of propose is also followed in other parts of the Constitution. Article V provides that “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .”<sup>28</sup> This meaning of propose is exactly the same as that used for the proposing convention. If two thirds of both houses approve an amendment, it is formally proposed and can then be sent to the states for ratification.

Similarly, the Constitution provides in Article I, section 7, clause 1, that “All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”<sup>29</sup> The term “propose” here once again involves the formal power to offer for adoption. Suppose the Senate receives a revenue bill from the House and then decides to amend it. The Senate then will pass the amended revenue bill and send it back to the house. This revenue bill is then formally proposed by the Senate. If the House passes the exact revenue bill proposed by the Senate, then it is enacted by the Congress and sent to the President. Thus, the Senate’s power to propose revenue bills is similar to the powers of Congress and the convention to propose amendments. In these cases, the power is to offer a specific measure for adoption by another body.

This understanding of the proposing convention also makes perfect sense if we understand the historical context when the Constitution was written. As I show below in my review of the history of conventions,<sup>30</sup> when the Constitution was enacted many different types of conventions existed. Some conventions were enacting conventions—they had the power to draft and enact a constitution or constitutional provision on their own. Other conventions were ratifying conventions, ratifying a constitution or constitutional provision drafted by another entity. Still other conventions were proposing conventions that recommended provisions that another entity had to enact. Given the variety of conventions, it was important for the Constitution to clearly indicate the type of conventions that were being employed. The language of Article V does that well. Thus, the constitutional language clearly speaks of state conventions that only ratify amendments. And, most importantly for our

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28. U.S. CONST. art. V.

29. U.S. CONST. art. I, § 7, cl. 1.

30. See *infra* Part V.A.

purposes, the language, “a convention for proposing amendments,” clearly indicates that the proposing convention only has the power to propose and cannot enact anything on its own.<sup>31</sup> Thus, one need not reach for other possible meanings of a proposing convention (such as the power to exercise discretion over what amendments to propose) to find a purpose for the language. Its primary purpose is to clarify that the convention has only the power to offer an amendment for adoption by the states.

To move now to the key issue, this meaning of “propose” indicates that a convention for proposing amendments can be either a limited or unlimited convention. Certainly, an unlimited convention would be a convention for proposing amendments. Such a convention could decide on what amendment to pass and that amendment would be formally proposed. It could then be sent to the states for ratification.

But both types of limited conventions would also be conventions for proposing amendments. Even in the case of a convention limited to a specifically worded amendment, the convention would make the decision whether to propose that amendment. If it passes that amendment, then the amendment is formally proposed and can be sent to the states for ratification. If the convention does not pass the amendment, then it is not proposed and cannot be sent to the states for ratification. The convention limited to a specifically worded amendment thus has the power to offer an amendment for adoption by the ratifiers and is therefore a proposing convention.

Finally, this definition of a proposing convention is also supported by the fact that limited conventions were well known to the Constitution’s enactors. Perhaps, the most obvious limited proposing convention was the Philadelphia Convention itself. The Congress under the Articles had called for the Philadelphia Convention “for the sole and express purpose of revising the Articles of Confederation” and “when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation

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31. Not only is it forbidden from enacting constitutional amendments, it also cannot enact legislation, as some conventions of various kinds had done or sought to do. See JOHN ALEXANDER JAMESON, *A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION: THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODES OF PROCEEDING* §§ 123–38 (Chicago, E.B. Meyers 2d ed. 1869) (discussing the general legislative powers of individual state conventions at the time of the framing).

of the Union.”<sup>32</sup> This call was limited, because it was intended for the convention to propose revisions that would employ the amendment procedure in the Articles, a procedure which required approval by the Congress and the state legislatures.<sup>33</sup> The Annapolis Convention, which had preceded the Philadelphia Convention, was also a limited convention. The call for the Annapolis Convention, circulated by Virginia, had stated that the convention would propose measures relating to commerce.<sup>34</sup>

State constitutions also appear to have authorized limited conventions. In particular, the Georgia Constitution of 1777 provided:

No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; 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.<sup>35</sup>

Although there are other possible interpretations,<sup>36</sup> the most obvious and, in my view, the best interpretation of this provision is that it limits conventions to deciding whether to adopt the alterations recommended by the petitioning counties.<sup>37</sup> After all, the provision states that the “assembly shall *order* a convention to be called . . . *specifying* the alterations *to be made* according to the petitions.” Other state constitutions also employed conventions limited to ratifying the decisions proposed by

32. 1 ELLIOT’S DEBATES, *supra* note 12, at 480 (letter from the Hon. Robert Yates and the Hon. John Lansing).

33. The Philadelphia Convention, however, became a runaway convention when it proposed a Constitution that adopted a different ratification procedure. For discussion of why this does not count against the limited convention view, see *infra* Part V.B.

34. Journal of the House of Delegates of the Commonwealth of Virginia 153 (Jan. 21, 1786); CAPLAN, *supra* note 3, at 22–23.

35. GA. CONST. of 1777, art. LXIII.

36. It might be argued that the provision merely required the convention to receive the proposed alterations from the majority of the counties, but allowed the convention to ignore them and enact others. But this seems to conflict with the language of the provision, which states that the “assembly shall *order* a convention to be called . . . *specifying* the alterations *to be made* according to the petitions.” The language does not say, “specifying some of the alterations that should be considered by the convention.”

37. Interestingly, this provision of the Georgia Constitution was never used. On its own authority, the Georgia legislature called a convention to draft a new constitution in 1788. CAPLAN, *supra* note 3, at 15. For a discussion of how this authority might be understood, see *infra* notes 87–99 and accompanying text.



others.<sup>38</sup> Finally, there were also numerous limited interstate conventions held in the period between Independence and the Constitution.<sup>39</sup> Although these conventions were directed towards interstate relations such as trade and the war rather than constitutions, they were nonetheless referred to as conventions and had much in common with the Philadelphia Convention.<sup>40</sup>

Finally, if the constitutional enactors allowed limited conventions, one might wonder why they did not indicate more specifically that a convention could be limited. But this question is easily answered. The constitutional language needed to be broad enough to extend to applications not merely for limited conventions but also for unlimited ones. After all, the Framers would certainly have desired that unlimited conventions be permitted, since there is no reason to believe that the states always would have been able to agree on a subject or amendment, especially given the limited deliberation among states in a world with poor communication technology. But the fact that the states might not always be able to agree on a subject or amendment does not mean that they never could have. Thus, to permit state legislative requests both for limited and unlimited conventions, the Constitution speaks in neutral terms of a convention for proposing amendments and of a process whereby the states apply for, and Congress calls, such a convention. Given the Constitution's brevity, the language here of a "Convention for proposing Amendments" makes sense as a simple and straightforward way of expressing a more complicated idea.

If, then, the phrase a "Convention for proposing Amendments" has a general meaning that includes any type of convention that can propose an amendment, one should understand that phrase as the equivalent of what might be communicated in longer and more specific language. The language here should be understood as shorthand for a provision stating that "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention" either for proposing amendments of its own

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38. See, e.g., PA. CONST. of 1776, § 47; VT. CONST. of 1786, § XL.

39. See CAPLAN, *supra* note 3, at 17–19; Natelson, *supra* note 16, at 717–19 (discussing these conventions).

40. These conventions were similar to the Philadelphia Convention most importantly in that they were conventions of multiple states that were tasked with proposing new arrangements that would affect those states and their proposals would only go into effect if approved by those states.

choosing, for proposing amendments regarding a subject, or for proposing a specific amendment.<sup>41</sup>

## 2. A Convention Limited to a Specifically Worded Amendment

Although I have argued in favor of the limited convention view generally, the issue of conventions limited to a specifically worded amendment requires additional attention, since such conventions are more controversial. Several commentators have argued in favor of the constitutionality of conventions limited to a subject, but against the constitutionality of conventions limited to a specifically worded amendment.<sup>42</sup>

The principal argument used against the constitutionality of conventions limited to a specifically worded amendment is that they would deprive the convention of its opportunity to exercise discretion over what specific amendment to pass. This limitation on the convention's discretion is said to be inconsistent with it being a convention for proposing amendments.<sup>43</sup> It is also argued that limiting the convention to a specifically worded amendment would turn it into a ratification convention.<sup>44</sup>

Although these arguments have been persuasive to some advocates of the limited convention view, they have little basis in the Constitution's original meaning. There is nothing in the meaning of the constitutional terms "convention" or "a convention for proposing amendments" that requires a convention to have a choice between different specific amendments. Put differently, a convention can be limited as to whether or not to propose a specific amendment and still be a convention.

It is true that certain conventions at the time of the Constitution were given significant discretion as to what

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41. That Article V speaks of a convention for proposing "Amendments" rather than "an Amendment" surely does not affect the correctness of this interpretation. A limited convention could be restricted to two (or more) subjects or two (or more) specific amendments. Moreover, the enactors needed to use language broad enough to cover conventions that proposed either one or multiple amendments, and the plural was more suited to that task. A convention for proposing amendments would be permitted to propose a single amendment; a convention for proposing an amendment might not be allowed to propose multiple amendments.

42. See, e.g., *1967 Hearings*, *supra* note 18, at 233–34; Bonfield, *supra* note 18, at 953–57; Ervin, *supra* note 18, at 884; Natelson, *supra* note 16, at 732. The main commentator I am aware of who endorses conventions limited to a specific subject is William Van Alstyne. See Van Alstyne, *supra* note 19, at 990–91; Gunther, *supra* note 20, at 6 n.15 (noting Van Alstyne's view).

43. See, e.g., Bonfield, *supra* note 18, at 953–54.

44. Bonfield, *supra* note 18, at 955.

constitutional provisions to propose or enact. But the question is not whether some conventions had discretion. Rather, it is whether all conventions must have discretion and, most importantly, whether a proposing convention must have discretion. The answer to these questions is no.

It is clear from the Constitution itself that conventions need not possess such discretion. The Constitution employs two type of conventions that were given no discretion: state conventions that may be employed to ratify amendments and the original state conventions called to ratify the original Constitution. Clearly, ratification conventions do not have discretion over what measures to enact. They are required to make a single yes-or-no decision. Of course, that does not make them unimportant, since they decide whether a proposed amendment will be enacted.

If conventions generally do not necessarily need to confer discretion, then what about proposing conventions? Is there something about the proposing power that requires such conventions to possess discretion? The commentators discussed above assume that the activity of proposing a constitutional amendment requires that conventions have discretion. After all, they might ask, what is it that a proposing convention does other than deciding what amendment to propose?

But this argument is mistaken. Although the proposing convention contemplated by Article V will sometimes have discretion (such as when the states apply for an unlimited convention or a convention limited to a subject), there is nothing about the concept of a proposing convention in Article V that requires discretion. As we have seen, the Constitution's use of the phrase a "Convention for proposing Amendments" refers merely to a convention that has the authority to offer an amendment for adoption by the states through ratification. There is nothing in the phrase that requires discretion.

The other argument against the constitutionality of a convention limited to a specifically worded amendment—that it is the equivalent of a ratification convention—is also not persuasive. It is true that such a limited proposing convention will be restricted to an up-or-down vote on an amendment, just like a ratification convention is. But that the two conventions share a common attribute does not mean they are identical for constitutional purposes. The question is whether a convention limited to a specifically worded amendment meets the

constitutional definition of a proposing or a ratification convention. As I have been arguing, such a convention meets the definition of a proposing convention, because it has the power to offer an amendment for adoption by the states. By contrast, it does not meet the definition of a ratification convention, which is a convention that has the authority to ratify or enact an amendment proposed by another body.

### 3. Charles Black's Arguments for the Unlimited Convention View

Given these strong arguments for interpreting a proposing convention to allow for limited conventions, what then are the arguments against this conclusion? The principal textual and structural arguments have been made by Charles Black. Black argues that a "Convention for proposing Amendments" means a "a convention for proposing such amendments as to that convention seem suitable for being proposed."<sup>45</sup> I discuss Black's principal textual and structural arguments in turn.

#### a. Text

Black's textual argument derives from the meaning of Congress's power to propose amendments in Article V. Article V authorizes "The Congress, whenever two thirds of both Houses shall deem it necessary, [to] propose Amendments."<sup>46</sup> Black claims that this power is essentially unlimited, entailing "choice among the whole range of alternatives, as to substance and wording."<sup>47</sup> He then claims that "[i]t is very doubtful whether the same word two lines later [referring to "a convention for proposing amendments"] . . . ought to be taken to denote a mechanical take-it-or-leave-it process."<sup>48</sup> Thus, Black's argues that "a convention for proposing amendments" allows the convention essentially unlimited authority to propose amendments because Congress enjoys that same authority under its authority to propose amendments.<sup>49</sup>

Black's argument about the meaning of propose, however, cannot bear the weight that he places on it. It is true that

45. Black 1972, *supra* note 20, at 196.

46. U.S. CONST. art. V.

47. Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962 (1963) [hereinafter Black 1963].

48. *Id.*

49. See Charles L. Black, Jr., *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626, 630 (1979) [hereinafter Black 1979].

Congress has great discretion to decide what amendments to propose, but that does not indicate that this discretion derives from the power to propose. There is an obvious alternative explanation for this result. Article V gives to Congress the power to propose amendments without involving any other entity. Thus, the Constitution does not authorize any significant limits on Congress's proposing power. By contrast, the proposing convention is given the power to propose amendments only if the states apply for a convention and Congress calls it. If one assumes, as I argue in the next section, that the states can apply for a limited convention, then that explains why the Congress has great discretion to propose what amendments it likes and the proposing convention might be limited as to what it can propose: the Constitution gives the state legislatures the power to limit the scope of the convention's proposing power, but it does not give anyone the power to limit Congress's proposing power.

Although Congress's proposing power can easily be explained by the limited convention view, Black's unlimited convention view has great difficulty with the evidence of the original meaning that I have supplied. Black's view cannot account for the ordinary meaning of "propose" at the time of the Constitution, which did not indicate that the power was unlimited. He also has a hard time accounting for the limited proposing conventions that were known to the Framers.

Moreover, Black's interpretation of a "Convention for proposing Amendments" does not even appear consistent with the remainder of Article V. A few lines later in Article V, it provides that after an amendment is proposed, the amendment shall be a valid part of the Constitution when ratified by three quarters of the state legislatures or state conventions, "as the one or the other Mode of Ratification may be *proposed* by the Congress."<sup>50</sup> This use of "propose" is clearly inconsistent with an unlimited discretion to make choices. Rather, Congress is limited to a choice between two alternatives: ratification by state legislatures or state conventions. Clearly, the constitutional authors did not understand the term "propose" to imply unlimited discretion.<sup>51</sup>

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

51. It should be noted that this usage of "propose" may not be the same one that is employed in the earlier part of Article V (where "propose" meant "the power to offer for adoption"). This usage of "propose" allows Congress to make an authoritative choice as to which ratification method to use, whereas the usage of "propose" employed earlier in Article V allows Congress and the convention merely to approve an amendment for

But there is even clearer evidence that Black's understanding of propose is mistaken. In the next section, I discuss a prior version of Article V offered by James Madison. That version provided that "Congress . . . on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution."<sup>52</sup> As I will show, it is plain that, if two thirds of the state legislatures applied for a specifically worded amendment, Congress was required to propose that amendment. Thus, the provision shows clearly that the word "propose" did not mean an unlimited or discretionary power to draft a provision. Instead, its meaning cohered perfectly with the ordinary language meaning I have supplied here: to offer a provision or matter for adoption.<sup>53</sup>

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someone else to ratify. Here, Congress is not offering for adoption, but instead making a decision.

It is not clear why the Philadelphia Convention used this language differently. There are two possibilities. First, the drafters might have been focused on the question whether the amendment would be ratified, which was uncertain, rather than on the ratification method, which Congress could decide. One might think of this as a case of the drafters using language imprecisely. Yet, it is also possible to argue that the drafters were not being sloppy. Instead, one might say that a mode of ratification was successful only if the ratification actually occurred. In that event, the proposed mode of ratification was adopted only if the ratification was successful. Second, it is possible that the Framers were using another sense of "propose," which meant "to lay schemes." See WEBSTER, *supra* note 27 (offering one definition of "propose" as "to lay schemes"). But this usage would be a bit awkward. A scheme or intent is not something that is necessarily realized in the real world; it is not an authorized choice. But even if this usage of "propose" is being employed here, it may still have relevance for understanding the earlier usage in Article V. After all, a scheme or plan might be deemed, based on the analysis employed by Black, to be unlimited. Normally, one has discretion to devise any scheme. That Congress is limited to choosing between two alternatives suggests that "propose" in this related sense can be limited. Thus, neither of the senses of "propose" would necessarily involve unlimited choice, even though often one has discretion as to what matters to propose.

52. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 602 (Max Farrand ed. 1911) [hereinafter RECORDS].

53. Charles Black also offers another textual argument. He imagines that a state legislature submits an application that simply requests "that Congress call a convention for proposing amendments—the exact language of Article V." Black, 1979, *supra* note 49, at 629–31. He then argues that this application is for an unlimited convention and concludes that the constitutional language therefore appears to refer only to such a convention. But Black's argument does not show that the constitutional language is referring only to an unlimited convention. It is true that a state legislature's application for "a convention for proposing amendments" is properly interpreted as applying for an unlimited convention. But that is not because the phrase has only that meaning. Rather, because the state legislature has not specified a subject for the convention, it is reasonably interpreted as seeking an unlimited convention. But if the state legislature had applied for a convention for proposing amendments regarding debt limitation, that would have been a perfectly grammatical and sensible way of seeking a limited convention. Thus, Black's argument, when properly pursued, leads to the conclusion that a convention for proposing amendments can be either a limited or unlimited convention.

Black's mistake here appears to involve confusing an accidental attribute of the power to propose with an essential attribute. It is true that the act of proposing often involves significant discretion, but that is because in most circumstances proposals are not limited by rules. That the power to propose often includes such discretion does not mean that it always does.<sup>54</sup>

#### b. Structure and Relation

In addition to his textual argument, Black also makes an argument based on structure and relation. Black contends that if the proposing convention is unlimited, a national institution will be proposing the constitutional amendment.<sup>55</sup> That national institution can treat a "national problem . . . as a *problem*, with a wide range of possible solutions and an opportunity to raise and discuss them all . . . ."<sup>56</sup> In this respect, an unlimited convention would be similar to the congressional proposal method, which allows another national institution the opportunity to propose a solution to a national problem. By contrast, if the convention were a limited convention—especially if it were a convention limited to a specifically worded amendment—then the proposed solution to the national problem would have originated with the state legislatures. Black contends that the unlimited convention view should be preferred because it allows a nationally formulated solution and because it accords with the congressional proposal method.<sup>57</sup>

It is certainly true that limited conventions allow a national institution—the convention—less power to formulate a solution than do unlimited conventions. But that does not suggest that limited conventions were not intended by the constitutional enactors for two reasons. First, while the constitutional enactors would certainly not have wanted the state legislatures to be able

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54. To take an example from modern language, which appears to follow the 18th century usage, suppose that a House Committee Chair is deciding on what legislation to propose. Under the rules of the Committee, he has the power to propose legislation for the committee that a majority of the committee has affirmed. Suppose further that the committee has affirmed bills A and B. Now, if the Chair were to ask his staff whether he should propose A or B, no one would suggest that he is using language incorrectly, even though his choice was limited. Moreover, if he announced to the House, that under the committee rules, he was proposing for the committee bill A, once again, no one would suggest he was misusing the language. The power to propose often includes significant discretion, but it is not required by the language.

55. See Black 1963, *supra* note 47, at 963; Black 1979, *supra* note 49, at 630.

56. See Black 1963, *supra* note 47, at 963.

57. *Id.*; Black 1979, *supra* note 49, at 630.

to amend the Constitution without being checked by a national entity, neither type of limited convention does that. Even if the state legislatures apply for a convention limited to a specifically worded amendment, the national convention would have the power to reject that amendment. Thus, a national entity could block an excessively parochial amendment.<sup>58</sup>

Second, there is no reason to assume that the constitutional enactors would have always preferred a nationally developed solution. They already had such an arrangement from the congressional proposal method. Moreover, the state legislatures would only apply for a limited convention if there were wide agreement, from two thirds of the state legislatures, that a particular solution was required. If the state legislatures could reach such an agreement, it is not clear why it would be necessary to have a national institution formulate a proposal.

Indeed, if the state legislatures could agree on a solution, then the convention method would be very much like a mirror image of the arrangement under the congressional proposal method. Under the congressional proposal method, the national government formulates an amendment and the states decide whether to adopt it. Here, the state legislatures formulate an amendment and the national convention decides whether to approve that amendment (with the states, of course, ratifying it as well).

Although Black assumes that the Framers would have desired that both amendment methods employ a national institution to formulate the amendment, one can just as strongly argue that they would have preferred a more pluralistic system. Just as the Framers enacted two amendment methods—one relying on Congress, the other not—so they might have wanted the power to formulate an amendment to be placed at the national level under one method and at the state level (to the extent feasible) under the other method. This might be more in accord with the constitutional structure as well as being more desirable.

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58. Moreover, even if the national convention did somehow approve a parochial amendment, the Congress, a national entity, could still act against it. It could require that the amendment be ratified by state conventions rather than state legislatures, and therefore ensure that another body that was independent of the state legislatures would make the ratification decision.



## B. THE APPLICATIONS OF THE STATE LEGISLATURES FOR A CONVENTION

This brings us to the second basic question. If a convention for proposing amendments can include a limited convention, can the states apply for one? There are two issues here. First, does the Constitution allow the state legislatures to apply for a limited convention? Second, if the Constitution does allow the state legislatures to make such an application, does it also require Congress to follow that application and call a limited convention?

### 1. State Legislative Application for a Limited Convention

I have argued that a “Convention for proposing Amendments” is a phrase that covers both limited and unlimited conventions. The question now is whether the states have the power to apply for a limited convention. Since the Constitution authorizes two thirds of the state legislatures to apply for a convention for proposing amendments, and a limited convention is one such convention for proposing amendments, the only way that the states would lack the power to apply for a limited convention is if there is something in Article V that would limit their power. But, to the contrary, the language of Article V strongly suggests that the states have this power.

First, the ordinary meaning of the term “application” supports this understanding. At the time of the Constitution, an application was a request made for something, as a request or solicitation to a court.<sup>59</sup> This term, then, did not contain any limitation in it that would suggest that an application for a convention could only be of a certain kind. Instead, an application involved a request by the applicant and presumably the applicant would decide what he wanted to request in the application. Of course, this is not to say that the applicant could apply for something he was not entitled to apply for. For example, the states could not apply for a convention that would enact constitutional amendments on its own authority. But since a limited convention is one type of a convention for proposing amendments, the state legislatures are entitled to apply for such limited conventions. Thus, the ordinary meaning of application suggests that the state legislatures can apply for limited conventions.

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59. WEBSTER, *supra* note 27 (“The act of making request or soliciting; as, he made *application* to a court of chancery”) (emphasis in original); JOHNSON, *supra* note 27.

Second, this understanding of application also appears to be supported by the only other use of “application” in the Constitution. The Guarantee Clause of the Constitution, which is the constitutional neighbor of Article V, provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”<sup>60</sup>

The Clause thus requires the federal government to guarantee each state a republican form of government and to protect each state against invasion. But the federal government is only allowed to protect the states against domestic violence on the application of the legislature (or the executive when the legislature cannot be convened). The evident purpose of this provision reflects two concerns: It allows the states to receive the support of the federal government to protect against domestic violence, but it prevents the federal government from acting without a prior request of the state. It appears that the constitutional enactors believed that domestic violence might give the federal government an excuse to intervene in a state and to act against a group that the federal government disliked.

Despite the Clause’s clear purpose, a question might arise about how the term “application” should be interpreted. There are two possible meanings, corresponding to the two possible meanings of “application” in Article V. On the one hand, a state legislature might have the power make an application for “limited” protection against domestic violence. Alternatively, a state legislature might possess only the power to make an application for protection generally. Suppose, for example, that there is domestic violence in the eastern part of Virginia concerning a tax revolt by debtors. The Virginia Legislature makes an application to the federal government for protection against the tax revolt in its two most eastern counties. Then, while the federal government is subduing the revolt, there is a violent dispute between farmers and ranchers in the western part of the state. The Virginia legislature, however, believes it can address the matter and does not ask for federal assistance. But the federal government believes that Virginia is in danger and seeks to protect them anyway.

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60. U.S. CONST. art. IV, § 4.

Could Virginia apply for limited protection that is restricted to the tax revolt in the eastern counties? Or is Virginia allowed only to apply for protection generally that would allow the federal government to protect it against the western dispute, despite the wishes of the Virginia state legislature? There is a strong case that Virginia can apply for limited protection. The point of the Clause is to give the state the discretion whether or not to seek protection. If the state seeks protection for the eastern uprising, but not the western one, it furthers the underlying purpose to allow the application to apply only to the eastern one. It allows the state to weigh the dangers of federal intervention versus the state uprising, as to each uprising. Moreover, allowing the federal government to act against another uprising without state approval might give it the ability, once federal troops are in the state, to act against political opponents of the federal government. Finally, if the federal government can act without state approval once an application for protection has been made, then this may discourage a state from seeking protection, even though it needs the protection.<sup>61</sup>

Based on this strong evidence from the ordinary meaning of “application” as well as from its use in the Guaranty Clause, I conclude that the state legislatures have the power to apply for limited conventions.<sup>62</sup>

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61. It might be questioned whether my interpretation of the Guarantee Clause has implications for the meaning of Article V, because my interpretation of the Guarantee Clause relies on the purposes underlying that Clause. Since the purposes underlying the Guarantee Clause might have been different (for reasons unrelated to the meaning of Article V), it might seem that my purpose-based interpretation of the Guarantee Clause does not provide independent support for the limited convention view of Article V.

This argument, however, is mistaken. First, the Guarantee Clause interpretation helps to confirm that my understanding of the ordinary meaning of “apply,” as revealed by the dictionary, is correct. If the Guarantee Clause had the alternative meaning, allowing applications only for protection generally, then one might question whether my reading of the dictionary meaning of “apply” was really correct. It would be odd for the Guarantee Clause to have used the word “apply” if the ordinary meaning of that term suggested a meaning contrary to the purposes of the Clause. Second, the Guarantee Clause supports the limited convention view of “apply” because there is a rule of construction that presumes words used in the same document have the same meaning. If “apply” in the Guarantee Clause had the alternative meaning, then that would have counted against the limited convention view of “apply.”

62. One last piece of evidence in favor of this understanding of application comes from an earlier version of Article V offered by James Madison at the Philadelphia Convention, which I discuss in the next section. The meaning of application in this version supports the view that states can choose for what type of convention they seek to apply.

## 2. Congress's Obligation to Call a Limited Convention

Because the state legislatures may apply for a limited convention, this now leads us to the second issue—whether the Constitution requires Congress to follow the state legislatures' applications and call a limited convention. Once again, the Constitution's original meaning supports the limited convention view.

First, the constitutional language allowing the states to apply for Congress to call a convention obligates Congress to call a convention. Putting the question of a limited convention to the side, assume that two thirds of the state legislatures call for an unlimited convention. It is widely accepted that Congress is obligated to call such a convention. As Gerald Gunther put it, this is one of the few issues upon which there is widespread agreement.<sup>63</sup> The language of Article V strongly supports this result. It provides that “The Congress . . . *on* the Application of the Legislatures of two thirds of the several states . . . *shall* call a convention.”<sup>64</sup> The “shall” indicates that Congress is obligated to call the convention when the requisite number of applications have been submitted. Moreover, this textual analysis is supported by purposive considerations. One of the main purposes of the convention method is to establish an amendment process that does not require Congress's approval. If Congress can refuse to call a convention, that allows Congress to block amendments. Finally, several statements made when the Constitution was enacted confirm that Congress was understood as being obliged to call a convention.<sup>65</sup>

63. See Gunther, *supra* note 20, at 5.

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

65. See *A Friend of Society and Liberty*, PA. GAZETTE, Jul. 23, 1788, *reprinted in* 18 DOCUMENTARY HIST. 277, 283 (statement of Tench Coxe) (“It is provided in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures . . . .”); 4 ELLIOT'S DEBATES, *supra* note 12, at 177 (statement of James Iredell at the North Carolina ratifying convention) (arguing that when two thirds of the legislatures of the different states apply for a convention, “Congress are under the *necessity* of convening” a convention) (emphasis added); *id.* at 178 (statement of James Iredell at the North Carolina Ratifying convention) (arguing that the introduction of amendments “did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention for proposing amendments, and on such application, it is provided that Congress shall call such convention, so that they will have no option”); *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, *reprinted in* 20 DOCUMENTARY HIST. 1139, 1142–43 (statement of Tench Coxe) (“If two thirds of those legislatures require it, Congress *must* call a general convention, even though they dislike the proposed amendments . . . .”).

But if Congress is obligated to call an unlimited convention when the states apply for one, and if the states are authorized to apply for a limited convention, this strongly suggests that Congress is obligated to call a limited convention when the states apply for one. After all, the *same* constitutional language that obligates Congress to call an unlimited convention would apply to the states' applications for a limited convention.<sup>66</sup> Moreover, if the Constitution authorizes both limited and unlimited conventions, there is no reason to allow Congress to block applications for limited conventions, but not unlimited ones.

C. THE OBLIGATION OF THE CONVENTION TO FOLLOW THE LIMITS SET BY THE STATES AND CONGRESS

This brings us to the final basic question. If Congress calls a limited convention, is the convention required to conform to the limitations in that call? Once again, the answer is yes.

First, the convention derives its authority from Congress's call and therefore is subject to the limitations in that call. Without that call, the convention—at least the one authorized by Article V—could not be lawfully brought into existence. If a convention were to try to form without a call, it would clearly be unconstitutional. It is the call that allows the convention to form. Thus, if the authority for the convention to form itself limits the power of the convention, the only convention that can form would be subject to those limits. The convention would have no more authority to go beyond those limits than a convention would have to form on its own without a call.<sup>67</sup>

Second, that the Constitution recognizes limited conventions suggests that a limited convention called by the

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66. Another way to support the point in the text is to note that the Constitution does not allow Congress to call a limited convention when the states call for an unlimited one. But if that is true, then the Constitution should not allow Congress to call an unlimited convention when a limited convention is called.

67. The interpretations put forth in this article also gain support from the two main interpretive methods employed in the early years of the Constitution—the methods of the Democratic Republicans and the Federalists. Despite their significant differences, the interpretive methods of both of these groups support the positions that I defend in this Article. Thomas Jefferson, for the Democratic Republicans, argued that the Constitution was a compact between the states and should be interpreted in favor of the parties to the compact. In this case, this interpretive principle supports allowing the state legislatures to apply for a limited convention. Chief Justice John Marshall, for the Federalists, contended that words in the Constitution should be given their ordinary meaning and that no preference should be given to the states. Once again, this interpretive principle supports allowing the state legislatures to apply for a limited convention, because the ordinary language of the constitutional text favors this result.

Congress should be followed. It would be odd for the Constitution to authorize a limited convention and then allow the convention itself to ignore the limitations. For example, the Constitution says that each legislative house shall determine its rules of proceedings.<sup>68</sup> No one would interpret that clause to mean that, while a house can determine those rules, those rules cannot be made binding on the individual members of the house. Similarly, one would not interpret Article V to authorize limited conventions, but then to allow the convention to ignore the call. Instead, if the Framers intended to allow the convention to ignore the limitations in the call, it is much more likely that they would not have authorized limited conventions, but instead authorized two thirds of the state legislatures merely to recommend measures to the convention.<sup>69</sup>

#### IV. EVIDENCE FROM EARLY INTERPRETATIONS

The textual arguments presented above derive additional support from interpretations made during the framing and ratification period. It is true that there are few situations where people made statements that have clear implications for whether the Constitution allows limited conventions. But these few situations that have been uncovered provide support for the limited convention view, and in one instance, the support is quite powerful.

The most important evidence comes from the Philadelphia Convention's discussion of the version of Article V that preceded the final version. This evidence, which is of word meaning rather than intent, strongly suggests that the words "propose" and "apply" had the meanings employed by the limited convention view. There is other evidence as well. Both a statement made during the ratification period by a prominent Federalist and an application for a convention provide some support for the limited convention view.

While this Part discusses evidence in favor of the limited convention view, Part VI attempts to show that both the discussions and actions of the Philadelphia Convention, that others have argued support an unlimited convention, do not actually do so.

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68. U.S. CONST. art. I, § 5, cl. 2.

69. *Cf.* U.S. CONST. art. II, § 3 (the President "shall . . . recommend to [Congress] such Measures as he shall judge necessary and expedient").

## A. INTERPRETATION OF THE PRIOR VERSION OF ARTICLE V

Initially, the Convention considered the amendment provision contained in the Virginia Plan, which stated “that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”<sup>70</sup> A modified version of this provision was submitted to the Committee on Detail, which reported a clause stating, “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.”<sup>71</sup> This clause, however, was controversial, with objections being raised from a variety of perspectives. Elbridge Gerry criticized it on the ground that it appeared to permit a convention to amend the constitution without any further ratification procedure. Alexander Hamilton opposed it also because it allowed only the state legislatures, not the national legislature, to call for a convention.<sup>72</sup>

At this point, James Madison proposed a replacement for the Committee on Detail’s provision. Initially, the replacement met with favor, being approved by a vote of nine states for, one against, and one divided. After being edited for stylistic purposes, Madison’s provision stated:

The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the 1 & 4 clauses in the 9. Section of article 1.<sup>73</sup>

This provision closely resembles the final Article V language. It was largely the penultimate version of the article, and was changed mainly to employ a convention rather than Congress to draft amendments when the two thirds of the states had applied.

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70. 1 RECORDS, *supra* note 52, at 22.

71. 2 RECORDS, *supra* note 52, at 159.

72. *Id.* at 557–58.

73. *Id.* at 559.

Let us begin by exploring the meaning of this provision. The provision allows amendments to be proposed in two ways. First, it permits two thirds of both houses of Congress to propose amendments. Second, it permits Congress, presumably by majority vote, to propose an amendment upon application of two thirds of the state legislatures.

It seems clear that this provision allows the state legislatures to apply for Congress to propose either an amendment relating to a subject or a specifically worded amendment. In both cases, the provision would require Congress to follow the terms of the applications.

The strength of this interpretation derives from the fact that the provision requires a two thirds vote when Congress acts on its own, but allows Congress to use majority rule when it acts on the applications of the state legislatures. If Congress was not bound by the state legislatures' instructions, it is hard to understand why Congress was required to secure two thirds when acting on its own, but only a majority when acting pursuant to state applications. Thus, when the state legislatures require that Congress propose an amendment concerning a specific subject, Congress would be obligated to pass an amendment and could use majority rule. Similarly, when the state legislatures required that Congress propose a specific amendment, Congress would also be obligated to pass that amendment and could use majority rule. The alternative interpretation of Madison's proposal—that the state legislatures' applications were not binding on the Congress—cannot account for the way that the provision uses majority and supermajority rules and is therefore extremely weak.

This straightforward reading of the provision that I offer also appears to be James Madison's interpretation of it, which can be seen by his response to a proposal to amend the provision. George Mason had argued that Madison's proposal gave Congress too great a role in the amendment process. Mason stated, "As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive . . . ."<sup>74</sup> As a result, Gouverneur Morris and Elbridge Gerry moved to amend the article "so as to require a

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74. *Id.* at 629.



Convention on application of 2/3 of the States,” which eventually became the final version of Article V.<sup>75</sup> Madison objected to the Morris/Gerry proposal on the ground that he “did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.”<sup>76</sup>

Madison’s response reveals his support for the above interpretation in two ways. First, the language of his response suggests that the state legislatures would be applying for *amendments* to be proposed. There is not the slightest suggestion that the state applications would merely allow Congress to decide on its own what amendments to propose. Second, that Madison thought his provision would bind Congress as much as the final Article V also suggests that the states would be proposing amendments in some form. If Congress were given discretion as to what amendments to propose, Madison would not have spoken of it as being bound to the same extent as Congress is to call a convention.

Moreover, that Mason and the other delegates objected to Madison’s proposal does not suggest that they disagreed with Madison’s interpretation of it. Rather, they may have objected to Congress’s additional role under Madison’s version for other reasons. First, if the states sought an amendment on a subject, such as controlling federal debt, Madison’s proposal would give Congress more ability to block the amendment than the final Article V did, even though Congress was obligated under Article V to call the limited convention. While there may be some discretion involved in deciding whether to call a convention, there is considerably more discretion involved in drafting an amendment applied for by the states. Under Madison’s proposal, Congress could use its role to draft a bad provision or to pass nothing at all, claiming it could not agree on a specific proposal. Second, if the states could not agree on either a specifically worded amendment or a general idea for an amendment, the power to propose an amendment then would be possessed entirely by Congress. By contrast, under the final Article V, if the states could not agree on a specifically worded amendment or a general idea for an amendment, they could still apply for an unlimited convention. This would be far preferable from

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75. *Id.*

76. *Id.* at 629–30.

Mason's perspective, because the convention would be independent of Congress.

The meaning of Madison's proposal helps to clarify the meaning of the actual Article V in several important respects. First, the meaning of Madison's proposal confirms the analysis of propose that I offered in Section IIIA above. Under Madison's proposal, when two thirds of the state legislatures applied to Congress for an amendment, Congress was required to propose that amendment, not just any amendment. But if "propose" meant unlimited discretion to recommend a measure, as the unlimited convention view holds, then Madison's provision would not have this meaning. By contrast, if "propose" simply meant "to offer for adoption," then the provision has exactly the meaning that Madison and others believed it had. When the state legislatures apply for an amendment, Congress is required to offer it for adoption by the ratifiers—to propose it.

Second, the meaning of Madison's provision is also revealing as to the language concerning state applications. Both Madison's proposal and Article V contain virtually the same language as to applications—"on the application of two thirds" of the state legislatures. Under Madison's proposal, this language clearly contemplates that the applications can apply for particular amendments (either in general terms or in specific language) and that Congress will be bound to follow these applications. That the actual Article V uses the same language strongly suggests that application has the same meaning and therefore adopts the limited convention view on this issue.

Finally, if one does not merely focus on the individual words "propose" or "apply," but instead looks at the phrases in the clauses, this perspective also supports the limited convention view. Commentators who favor the unlimited convention view interpret the language in the actual Article V, "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments," as not allowing the states to place limits on what the convention can propose. Part of the argument seems to be that there is nothing explicit allowing the states to limit the convention and no implicit authority is implied. But the very similar language in Madison's proposal, "The Congress . . . on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution," clearly allows the states to place limits on what Congress can propose, even though there is nothing explicit allowing the states to do so.

It is hard to see the basis of the distinction between Article V and Madison's proposal.

Thus, the language in Madison's proposal strongly suggests that the final version of Article V adopts the limited convention view as to the meaning of both state legislative applications and the convention's proposing power.

#### B. INTERPRETATIONS FROM THE RATIFICATION PERIOD

It is not merely the actions of the Philadelphia Convention that support a limited convention. At least two pieces of evidence from the period immediately after the Constitution was written also support the limited convention view.

First, Trench Coxe, who was assistant Secretary of State under Alexander Hamilton, wrote a letter to the New York Ratification Convention, urging ratification of the Constitution. In the letter, Coxe wrote<sup>77</sup>:

If two thirds of those legislatures require it, Congress must call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such proposed amendments, they become an actual and binding part of the constitution, without any possible interference of Congress.

This quote suggests that Coxe interpreted the Constitution to allow limited conventions.<sup>78</sup> His claim that Congress must call a

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77. *A Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, reprinted in 20 DOCUMENTARY HIST. 1139, 1142–43 (italics omitted).

78. Coxe here refers to a general convention. While some commentators appear to believe that the term refers to an unlimited convention, Dellinger, *supra* note 20, at 1634 n.47, at the time of the Framing a general convention did not mean an unlimited convention. See CAPLAN, *supra* note 3, at xx–xxi, 23.

A general convention was a convention of all the states, in contrast to a partial convention, which was a convention of a subset of the states. See 6 MADISON'S PAPERS at 425 (noting that Madison and Hamilton, referring to a convention to be held among the New England states, "disapproved of these partial conventions." Rather, Madison "wished instead of them to see a general Convention take place.") When the Framers' generation sought to describe an unlimited convention, they used the terms plenary or plenipotentiary. See James Madison to James Monroe, March 19, 1786, in 8 MADISON'S PAPERS at 505 (contrasting the limited Annapolis Convention with a hypothetical unlimited convention which would have involved "a plenipotentiary commission to their deputies for the convention"); Alexander Hamilton to James Duane, Sept. 3, 1780, in 2 HAMILTON PAPERS at 407–08 (recommending the "calling immediately [of] a convention of all the states . . . vested with plenipotentiary authority" to bring about "a solid coercive union.").

This understanding of general and plenipotentiary is also supported by the meanings of these terms when not used in relation to conventions. For example, Webster's dictionary defines general as "common to many or the greatest number; as a general

convention, even though it dislikes the proposed amendments, suggests that the applications are seeking a convention limited to proposing certain amendments. Of course, the quote is not entirely free of ambiguity. It is possible that Coxe is referring to a situation where the applications were not seeking a convention limited to a specific amendment, but it was known that the state legislators intended the convention to propose those amendments. Still, the wording of the quote suggests that the applications were seeking a convention limited to proposing specific amendments and therefore the quote supports the limited convention view.

Second, one of the first two applications for a convention under the new Constitution also supports the limited convention view. After the Constitution was put into effect, two states made applications for a convention. The movement for a second convention stalled, however, after James Madison led the Congress to propose a bill of rights. While New York's applications sought a plenary or unlimited convention, Virginia's application may have sought a limited convention. The application asked that "a convention be immediately called . . . with full power to take into their consideration the defects of the Constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind."<sup>79</sup> It is possible that this application sought a convention limited to proposing amendments on problems identified by the ratification debates. This would prevent federalists from controlling the convention and proposing provisions that would make the Constitution even more nationalist. Of course, the language here is pretty vague and seems to allow the convention wide discretion. But even if it is not read as establishing a limited convention, the phrasing of the application still supports a limited convention. It asks for a convention "with full power to take into their consideration" the

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opinion; a general custom." Similarly, the Constitution's preamble states as a purpose to "promote the general welfare." Further, in Federalist No. 43, James Madison states the Constitution "equally enables the general and the State governments to originate the amendment of errors." THE FEDERALIST NO. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961). Clearly, the reference to the federal government as the general government suggests that it is the common government of all the people (in contrast to particular state governments). It would not indicate a government of unlimited powers, since the Federalist strongly argued the general government had limited powers.

79. 1 House Journal, 1st Cong., 1st Sess. 28 (1789).

defects in the Constitution suggested by the state conventions. That the application asked for a convention with “full power” suggests that it believed that conventions with less power were possible. Thus, whether or not this is read as seeking a limited convention, it provides some support for the limited convention view.

#### V. THE LIMITED CONVENTION VIEW: PURPOSE AND STRUCTURE

These largely textual arguments in favor of the limited convention view are also supported by two arguments based on purpose and structure. These three arguments suggest that the constitutional enactors would have had strong reasons to allow limited conventions. First, if limited conventions were not recognized by the Constitution, then the constitutional enactors’ decision to have the states determine whether to hold a convention would seem peculiar. Why would the Constitution allow the states to decide on whether to have a convention, but not allow them to specify what subjects the convention should discuss? Put differently, why would the constitutional enactors allow the states to decide not to hold any convention—and thereby to determine that none of the current problems warrant a convention—but not allow them the lesser power of determining that only certain problems warrant a convention?

A second purpose and structure argument for the limited convention view is that allowing the state legislatures to apply for a limited convention permits a more effective amendment procedure. While the state legislatures may desire an unlimited convention to make broad constitutional changes, they might instead seek a limited convention to address smaller problems. The state legislatures might believe that a narrower constitutional change is all that is needed and fear the uncertainty of an unlimited convention.<sup>80</sup> By denying the state legislatures the ability to apply for limited conventions, the unlimited convention view imposes an uncertainty tax on the convention method and makes it less likely that state legislatures will apply for a convention. This is especially problematic since the Constitution views the congressional proposal method and the convention method as alternative procedures useful to

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80. See Van Alstyne, *supra* note 19, at 990 (arguing that a convention is most likely to be called in response to some “*particular* usurpations” by Congress and that a limited convention would be the appropriate way to address a specific concern).

preventing any one entity from blocking amendments. Thus, the limited convention view will further the constitutional purpose of permitting the convention method to be an effective alternative to the congressional proposal method.<sup>81</sup>

Third, the limited convention view employs a more effective mechanism for adopting amendments when there is reason to believe that the Constitution has a defect that requires a specific remedy. When two thirds of the state legislatures have concluded that a specific subject or amendment needs to be considered, there are significant advantages to limiting the convention to addressing that subject rather than allowing it to propose amendments on any subject. To begin with, limiting the convention to a specific area allows for delegates to be selected who have expertise in that area. Limiting the convention to a specific area should also operate to make the convention's review of the issue simpler and smoother. A limited convention is likely to reach a quicker resolution, since it only needs to discuss one issue. Moreover, an unlimited convention could easily take actions that would result in the specific amendment not being enacted, even though it would have enacted under a limited convention. For example, the convention might choose to propose one or more amendments on other subjects and then conclude that it should not propose the specific amendment, because that would amount to too significant a change in the Constitution. Alternatively, the convention might end up deadlocking on other amendments, with the resulting discord leading the delegates to dissolve the convention rather than considering the specific amendment.

These three arguments suggest that the constitutional enactors would have had substantial reasons to adopt the limited convention view. Are there reasons for them to have adopted the unlimited convention view? The strongest argument on the other side is the view that the constitutional enactors would not have wanted the states to have too significant a role in the constitutional amendment process. Therefore, they would have allowed the state legislatures to call an unlimited convention—which the states would be unlikely to do often and would have no formal control over—but not a limited convention, which

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81. Moreover, this constitutional purpose is not merely hypothetical. Because of the fear of a runaway convention, the convention method has proven to be an ineffective, broken amendment method. *See supra* notes 2–4 and accompanying text.

would allow them too much ability to influence the amendment proposing process.

The problem with this view is that it requires a hostility towards the states that was not held generally when the Constitution was enacted. Instead, the Constitution was based on the view that both the national government and the state governments had virtues and vices and the constitutional structure should be designed accordingly. In the Article V area, this view suggests that both Congress and the state legislatures should be able to propose (and ultimately enact) amendments without the other entity being able to veto the amendment.<sup>82</sup> Thus, the desire to prevent the state legislatures from having an effective mechanism to amend the Constitution is inconsistent with the overall design of the Constitution and the purposes underlying it.

#### VI. WEAKNESSES OF THE ARGUMENTS FOR THE UNLIMITED CONVENTION VIEW

These arguments for the limited convention view are powerful. They both show that the limited convention view derives from the ordinary meaning of the constitutional language and give strong reasons why the constitutional enactors would have wanted the constitution to allow limited conventions. But there are three other arguments that have been made against limited conventions that should be addressed. It turns out, however, that these arguments are ineffective. Thus, the case for the limited convention view also draws strength from the weakness of the arguments made against that view.

##### A. A CONVENTION IS NOT AN UNLIMITED ASSEMBLY OF THE PEOPLE

Some commentators have argued that the convention cannot be limited because it is an illimitable assembly of the people.<sup>83</sup> The idea here seems to be that a convention is a special body that represents and exercises the sovereign power of the people. Since the people are the ultimate sovereigns, no limits can be placed on them or the convention. But this argument is mistaken on both textual and historical grounds.

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82. See *supra* text accompanying notes 9–12.

83. See *e.g.*, Paulsen, *supra* note 2, at 738.

### 1. Text

Textually, it seems clear that the national proposing convention (as well as the Constitution's ratification conventions) should not be viewed as exercising the full sovereignty of the people and therefore as illimitable. There are several strong reasons that support this conclusion. First, if the national proposing convention sought to deprive the states, without their consent, of their equal suffrage in the Senate, the convention would be violating a clear textual command and would be acting illegally. Similarly, if the convention's proposed amendment stated that it would be subject to ratification by two thirds of the states (as opposed to the three quarters that the Constitution requires), this action would also be clearly illegal. Thus, it is mistaken to claim that the Constitution cannot limit the convention.

A second reason why the national proposing convention is not illimitable is that it is a mere proposing convention. A convention for proposing amendments does not have the power to enact anything. It merely proposes an amendment that must then be ratified by states. Similarly, the ratification conventions in the Constitution are also limited. They do not have the power to propose amendments. Nor do they have the power to take other actions, such as legislating.

Finally, that the Constitution does not view the conventions as illimitable assertions of the sovereignty of the people is confirmed by the fact that the conventions' roles can also be served by legislatures, which are clearly not exercising sovereign authority. While the national proposing convention has the power to propose an amendment, so does the Congress. Similarly, while state conventions can be used to ratify an amendment, so can state legislatures. Thus, the conventions are unlikely to be exercising sovereign authority if the non-sovereign legislatures can be given the same authority that the conventions exercise. Instead, the conventions are better seen as limited institutions, employed as alternatives to the legislature, to improve the amendment process.

Thus, textually, the Constitution makes it absolutely clear that neither the national proposing convention nor the state ratification conventions are immune from being limited. The Constitution places limits on the provisions that they can propose or ratify; it limits their roles to proposing or ratifying, but not both; and it employs non-sovereign legislatures to perform these same rules. Given that the Constitution does not



treat the conventions as illimitable assertions of sovereign power, there is no reason to infer that the Constitution does not authorize the state legislatures to apply for limited conventions. The Constitution employs conventions as part of a multi-stage process designed to produce desirable amendments. Allowing state legislatures to apply for limits on the national proposing convention is easily seen as a means to that end.

## 2. History

If the fact that a convention can be limited is so textually evident, why does this idea of the convention as an illimitable assembly of the people seem plausible to some commentators? The short answer is that at the time of the Constitution's enactment, conventions had various meanings and had different powers depending on the context. Some conventions exercised quite significant powers, resembling those of a sovereign. But the fact that some conventions had these characteristics does not mean that all or most did. Other conventions exercised much more limited authority. Thus, it is entirely proper to follow the textual and structural cues in the Constitution that suggest the proposing and ratifying conventions were limited, even though some conventions at the time of the Constitution had much broader power.

To understand the meaning of "convention" at the time of the Constitution, it is useful to briefly review the history of conventions. The term "convention" came to prominence in 17th century England. After the revolutions in 1660 and 1689, there was no King in existence to call the Parliament and therefore these Parliaments met on their own authority.<sup>84</sup> These bodies were known as Convention Parliaments. In both cases, the Convention Parliaments legislated fundamental arrangements that were deemed to be part of the English Constitution.<sup>85</sup> Thus, a convention was thought of as a means of enacting a constitution or establishing a government when existing laws did not provide a mechanism for doing so.<sup>86</sup>

It was thus natural that the new states would use conventions when they established their new constitutions and governments after declaring independence from the King. Yet,

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84. CAPLAN, *supra* note 3, at 5; JAMESON, *supra* note 31, at § 8; *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 311 (1969).

85. CAPLAN, *supra* note 3, at 5; JAMESON, *supra* note 31, at § 8.

86. CAPLAN, *supra* note 3, at 7-8; JAMESON, *supra* note 31, at § 8.

the understanding of conventions at the time was still quite undeveloped. Although some states used conventions to write their constitutions, others used legislatures to do so.<sup>87</sup> Moreover, some of these conventions also exercised ordinary legislative powers.<sup>88</sup> Thus, conventions were not yet clearly understood to be entities that had only the power of drafting or enacting a constitution.

The first conventions that only exercised constitutional enactment powers were those of New Hampshire and Massachusetts.<sup>89</sup> In Massachusetts, the legislature had made several unsuccessful attempts to write a constitution that were rejected on the ground that the drafting should occur by an entity limited solely to that task. Finally, in 1779, the legislature accepted the principle and scheduled elections for a constitutional convention that wrote a constitution, which was then approved by the towns.<sup>90</sup> Similarly, the New Hampshire constitution was written by a convention solely limited to that task, and then sent to the people for ratification.<sup>91</sup> Thus, it took several years before two states clearly adopted an approach where constitutions were adopted by conventions that were employed solely for that purpose.

The convention method of enacting constitutional provisions was also developed in other ways. Once a constitution was enacted, the constitution could also authorize its own amendment. This was a very significant development, because it meant that it was no longer necessary to take extra-legal or revolutionary actions when one sought to change the constitution. Given the role of conventions in the writing of constitutions, it was natural for the new constitutions to use conventions as part of their amendment procedures as well.

In an effort to devise desirable amendment procedures, these constitution used conventions in a variety of ways. Some constitutions gave conventions relatively limited powers. As discussed earlier, the 1777 Georgia Constitution, employed a

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87. ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS* 2–4 (1917); *See e.g.*, JAMESON, *supra* note 31, at § 135.

88. *See* HOAR, *supra* note 87, at 4; JAMESON, *supra* note 31, at §§ 136–37 (South Carolina), 139–40 (New Jersey); 193 (Pennsylvania); 145 (Maryland); 146 (North Carolina); 147–49 (Georgia); 150 (New York) (discussing the general legislative powers of individual state conventions).

89. HOAR, *supra* note 87, at 4–5; JAMESON, *supra* note 31, at §§ 118–120.

90. CAPLAN, *supra* note 3, at 13; HOAR, *supra* note 87, at 5–6; JAMESON, *supra* note 31, at §§ 142–143.

91. HOAR, *supra* note 87, at 6; JAMESON, *supra* note 31, at §§ 120–121.

constitutional convention to enact constitutional amendments, but did so only if the convention was called by petitions from the people and only if the convention enacted provisions that had been sought by those petitions.<sup>92</sup> In two other state constitutions, the 1776 Pennsylvania Constitution and the 1784 Vermont Constitution, conventions were employed solely to ratify measures proposed by a council of censors.<sup>93</sup> Further, the 1784 New Hampshire Constitution provided for the legislature, in seven year's time, to have the towns elect delegates to a convention to propose constitutional amendments, which would only take effect if approved by two thirds of the voters collected in the towns.<sup>94</sup>

Other constitutions authorized more powerful conventions. The following three conventions, once called, appeared to have the authority to enact constitutional provisions without further ratification. The 1780 Massachusetts Constitution provided that two thirds of the voters could authorize a constitutional convention in 1795.<sup>95</sup> The 1790 South Carolina Constitution allowed a "convention of the people" to be called upon the vote of two thirds of both branches of the legislature.<sup>96</sup> Finally, the Delaware Constitution of 1792 allowed a majority of the people eligible to vote to authorize the calling of a convention.<sup>97</sup>

Finally, some of these constitutions were amended or replaced through conventions, even though the constitution did not expressly provide for such actions. For example, the Massachusetts Constitution was amended in 1820 by a convention called by the legislature, even though this amendment procedure was not specifically provided for in the constitution.<sup>98</sup> Similarly, the Delaware Constitution of 1776 was replaced in 1792 after the legislature called a convention that the constitution did not specifically authorize.<sup>99</sup> The actions of these types of conventions, which were usually called by the legislature, can be conceptualized in one of three ways. First, they might be categorized as revolutionary actions that violated the previous constitution and therefore were illegal. Second, they

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92. GA. CONST. of 1777, art. LXIII.

93. PA. CONST. of 1776, § 47; VT. CONST. of 1786, § XL.

94. N.H. CONST. of 1784, pt. 2, art. 100.

95. MASS. CONST. of 1780, pt. 2, ch. VI, art. X.

96. S.C. CONST. of 1790, art. XI.

97. DEL. CONST. of 1792 art X..

98. Jameson, *supra* note 31, at § 219.

99. *Id.* at § 223.

might be viewed as actions that were neither authorized nor prohibited by the previous constitution. In this unusual category, the constitution would not authorize the convention, but it would not prohibit it, thereby allowing a convention that represents the people to act on its own authority to frame a new constitution. Finally, the actions of the conventions might be viewed as having been implicitly authorized by the previous constitution. While the constitution did not contain a specific provision that authorized the convention, the constitution's structure and principles were viewed as authorizing the action.

None of these categories, however, provide support for the unlimited convention view. The unlimited convention view argues that the Constitution *authorizes* unlimited conventions. But under the first two categories—revolutionary and unauthorized conventions—the state conventions were *not authorized* by the existing constitution. Thus, these unauthorized state conventions were not precedents for the type of authorized convention that the unlimited convention asserts the Constitution established. If these two type of state conventions were to inform the meaning of the proposing convention, then that convention would not derive its power from the Constitution. It would have extraconstitutional powers. That is simply not the argument made by the unlimited convention view.

Nor does the third category of implicitly authorized conventions provide support for the unlimited convention view. Such implicitly authorized conventions do not comport well with the structure of the Constitution and therefore it is unlikely that the Constitution could be interpreted to implicitly authorize such conventions.<sup>100</sup> Moreover, even if these conventions were

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100. The United States Constitution is not easily interpreted as implicitly authorizing a convention. To be implicitly authorized, such a convention would have to be derived from constitutional structure and general principles rather than from a specific provision. This claim will make most sense in a constitution which has a strong textual commitment to popular sovereignty, vests general legislative powers in the legislature (so that it can call the convention), and does not have ample amendment procedures which appear to "occupy the field" of amendment matters. *See, e.g.,* MASS. CONST. of 1780 pt. 2, ch. VI, art. X. While the U.S. Constitution does endorse popular sovereignty, it confers only enumerated powers on the Congress and also has ample amendment procedures. For an argument in favor of the implicit authorized view (that also allows contrary to text amendments, such as those depriving states of their equal voting rights in the Senate), see generally Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar 1988]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) [hereinafter Amar 1994]; for a critique, see generally Henry Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

implicitly authorized, they would not support the unlimited convention view, since (as discussed in the preceding paragraph) that view makes claims about the explicitly authorized conventions in Article V, not implicitly authorized ones.<sup>101</sup>

We can now turn to the implications of this history for the United States Constitution. First, the history helps to explain why some commentators might regard the proposing convention as an illimitable assertion of the sovereignty of the people, even though the constitutional text so clearly places limits on the convention. At the time of the Constitution, some conventions were seen as specially representing the sovereignty of the people. These conventions had significant power to enact constitutions. But over time, the concept of a convention developed. Conventions also came to be used in more limited ways as part of constitutionally established multi-step processes for constitutional change. These constitutional processes could be used not merely for enacting a new constitution, but also for amending the constitution. Moreover, these constitutional processes placed limits on the powers of conventions. Thus, the commentators who have interpreted the proposing convention as an illimitable convention are making a mistake that is easy to identify. Their mistake is to interpret an ambiguous term to have one meaning when the context makes clear that it has a different meaning.

This analysis also confirms the analysis of the constitutional language that I presented earlier. The Constitution speaks of a “Convention for proposing Amendments.” Why did the enactors

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My own view is that the only area where an implicitly authorized convention might be plausible is a convention that would *replace* the existing constitution with a new constitution. Although there are still strong arguments against it, Article V might be read as “occupying the field” of amendments but not the field of establishing a new constitution. To my mind, an even stronger interpretation is to view such a convention as neither prohibited nor authorized (the second category) rather than as implicitly authorized. Whether or not conventions that seek to establish a new constitution are viewed as in the second or third category, however, they do not support the limited convention view, which views the convention as expressly authorized. *See supra* Part III.

101. The reason these implicitly authorized conventions do not support the unlimited convention view is that these conventions are not Article V conventions. An implicitly authorized convention is one that is implicitly authorized as opposed to the proposing convention in Article V, which is explicitly authorized. The unlimited convention view makes a claim about the power of the Article V convention, not about the power of other conventions. Thus, even if the Constitution does implicitly authorize conventions (and those conventions are unlimited), it does not mean the Article V conventions are unlimited. The Article V convention could be a limited one, while the implicitly authorized one could be unlimited.

use this language? This history makes clear that they needed to indicate that the convention could only propose amendments; it could not enact them on their own authority or exercise other powers, such as passing ordinary laws. The language a “Convention for proposing Amendments” does exactly that. There is no need to search for additional functions of the language to make sense of its inclusion in the Constitution. Moreover, the language becomes even clearer when it is contrasted with the other type of convention in the Constitution—the ratification convention. The proposing convention can only propose amendments; the ratification convention can only ratify them. Neither type of convention has the authority on its own to enact constitutional provisions.

#### B. THE RUNAWAY PHILADELPHIA CONVENTION

Another argument sometimes made against the limited convention view is that the Philadelphia Convention ignored the limits placed on it by both Congress under the Articles of Confederation and the state legislatures and therefore was a runaway convention. Thus, one might conclude that the Philadelphia Convention likewise believed that Congress’s power under the Constitution should not be binding on the national convention. Consequently, it would be constitutional for the convention to ignore the limits on Congress’s call.

The experience of the Philadelphia Convention, however, cannot be applied so quickly to the United States Constitution. Instead, the Convention’s actions are best explained as based either on the view that the Articles were no longer legally binding due to prior infractions or on the belief that revolutionary and therefore illegal action was justified as necessary to save the nation. Neither the Convention delegates nor its defenders argued that limits placed in a call were not legally binding. Instead, they sought to camouflage or minimize the extent of their violation of the limits.<sup>102</sup>

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102. My argument here assumes that the Philadelphia Convention was a runaway convention. Robert Natelson contends, however, that the Philadelphia Convention was not such a convention. Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 719–23 (2011). If he is correct, then, this supports my interpretation even more strongly. Unfortunately, I am not at all certain that Natelson is correct. Natelson states that there were two types of limits placed on the convention: limits imposed by the state legislatures on their delegations to the convention and limits established by the Congress, under the Articles of Confederation, in their call for the convention. Natelson acknowledges that the Convention exceeded the limits imposed by Congress, but argues that Congress’s

One way that the Philadelphia Convention might have understood its actions is as proposing a new constitution, not because conventions had inherent authority to do so, but because the Articles of Confederation had been seriously and repeatedly violated and therefore was no longer deemed binding. James Madison made the argument that state violations had rendered the Articles, as a treaty, voidable, and Akhil Amar has argued that the new Constitution therefore could have legally superseded the Articles.<sup>103</sup> If this was the Convention's view of the matter, its actions would not say anything about the power of a proposing convention under the United States Constitution.

The Philadelphia Convention might also have understood its actions as being illegal under existing law, but as justified on policy grounds by the pressing problems that the states and the nation faced under the Articles. In other words, the Convention was understood as proposing a revolutionary action, but one that was necessary to provide the nation with a desirable political order. Madison argues along these lines in Federalist No. 40 where he appears to acknowledge that the Convention's proposal departed from Articles' unanimity requirement for amendments that was specifically mentioned in the call for the Convention. Madison justified the departure as necessary, because the smallest state, Rhode Island, would have refused to ratify anything the Convention proposed. He claims that it was

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limitations were not contained in a "legal call," since "Congress had no power to issue such a call." *Id.* at 720. By contrast, Natelson interprets the state legislative authorizations broadly and thereby concludes that the Convention conformed to the instructions in 10 of the 12 states. Thus, Natelson concludes that the Convention did not exceed the only limits that were binding.

Even assuming both that Natelson's interpretation of the state directions is correct and that following 10 of the 12 states is sufficient, there is a strong argument that the Congress did have authority over the Philadelphia Convention. Based on the evidence, one can view the Philadelphia Convention as an advisory or drafting committee established by the Congress to recommend amendments to it. The Articles provided that amendments were first to "be agreed to in" Congress "and be afterwards confirmed by the legislatures of every State." The Congress then called for the Philadelphia Convention with the instruction that the Convention "report . . . to Congress" its proposed revisions to the Articles. These actions are entirely consistent with the view that Congress was using the Philadelphia Convention as an advisory committee. If this was the Convention's role, then the Congress would have had authority over the "committee" and therefore the Convention's failure to follow Congress's directions might very well make it a runaway convention.

103. See Amar 1988, *supra* note 100, at 1048; Amar 1994, *supra* note 100, at 465; THE FEDERALIST NO. 43, at 316 (James Madison) (Benjamin Fletcher Wright ed., 1961).

the Convention's duty to make this departure, because the welfare of the nation was in jeopardy.<sup>104</sup>

These two explanations for the Convention's actions, for which there is significant support, do not suggest that the Convention believed it was not legally bound by the limits in the call. Is there any evidence for the opposite conclusion? The best evidence would be statements, made both at the Convention and in defense of its work, that a proposing convention cannot be limited and therefore that its actions were proper. The defenders of the unlimited convention view, however, have not offered such evidence.

Instead, the defenses of the Convention's actions are framed differently. James Madison, for example, attempted to deny or minimize that the convention was departing from the call.<sup>105</sup> It is only when it becomes clear that the Convention has departed, by changing the ratification method from unanimity of state legislatures to nine-thirteenths of conventions, that Madison grudgingly admits it. This is not how someone would argue who believed they were not bound by the call.<sup>106</sup>

#### C. THE SUPPOSED INTENT TO AVOID RELIANCE ON BOTH CONGRESS AND THE STATE LEGISLATURES

Walter Dellinger has also argued against a limited convention based on his interpretation of the intent of the Framers revealed in the Philadelphia Convention debates. Reviewing the statements made at the convention as well as the evolution of the amendment provisions, Dellinger discerns two "themes" of the debates concerning the amendment provisions: that "state legislatures should not be able to propose and ratify amendments that enhance their power"<sup>107</sup> and that "Congress should not have exclusive power to propose amendments."<sup>108</sup>

104. See THE FEDERALIST NO. 40, at 290 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth . . .").

105. *Id.*

106. It might also be argued that the Philadelphia Convention believed that there could not be a limited convention at all (as opposed to the claim discussed in the text that it believed that the limits were not binding). But the same evidence that disproves the claim discussed in the text also refutes this claim.

107. Dellinger, *supra* note 20, at 1630. Dellinger's description of the first theme here—that "state legislatures should not be able to propose and ratify amendments that enhance their power"—is problematic for a variety of reasons. To begin with, even under a convention limited to a specifically worded amendment, state legislatures do not propose amendments. As discussed below, the convention must decide to propose the



From these two themes, Dellinger then concludes that the Framers would not have desired the limited convention view. First, he argues that conventions limited to a specifically worded amendment would allow the states more power than the Framers would have desired. If two thirds of the states applied for a convention limited to a specifically worded amendment (or to a very narrowly defined subject), that would give the states too much authority in the proposal process, since they could both propose and ratify the amendment.

Second, he argues that a convention limited to a specific subject would allow Congress more power over the convention than the Framers would have desired. If two thirds of the states applied for a convention on a subject, the limited convention view would require that Congress “define and enforce” the limits on the convention, which would give Congress too much power over the amendment method.<sup>109</sup> In particular, Dellinger believes that Congress would have to determine whether applications that differed slightly or significantly from one another should be counted as applying for the same convention.

It is important to emphasize that the methodology of Dellinger’s paper—like that of many of the other articles about Article V from the same period—has fallen out of fashion, especially among originalists. Rather than seeking the original meaning of the constitutional language, Dellinger seeks to discern the drafters’ intent from statements made, and the evolution of provisions, at the Philadelphia Convention. This approach has been subject to a variety of criticisms, including that it asks what the drafters who merely proposed the Constitution intended rather than what the Constitution meant to the country and the ratifiers who adopted it. But even assuming that one were to engage in this type of inquiry, Dellinger’s argument suffers from serious infirmities. In particular, the intent that Dellinger claims to divine from the

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amendment. In addition, even if the state legislatures did have power to propose an amendment, they would not necessarily have (or even be likely to have) control over the ratification. After all, if the state legislatures apply for an amendment that enhances their own power, and the convention approves it, Congress would then be likely to allocate the ratification decision to state conventions rather than to state legislatures, in the hope that the conventions might refuse to ratify it. Given the problems with Dellinger’s description of the first theme, I will interpret him as making the more plausible claim that the Framers would not have desired the states to have excessive power over the proposal and ratification process. This will allow his argument to be considered in its strongest light.

108. *Id.*

109. *See id.* at 1631.

Philadelphia Convention is unclear and supports the limited convention view at least as much as the unlimited one.

### 1. The States' Alleged Excessive Power

Let's start with Dellinger's claim that a convention limited to a specifically worded amendment would allow the states more power than the Framers would have desired. There are two basic problems with Dellinger's claim here: his inference that the Framers did not want the states to have significant influence over the proposing power and his argument that the Framers would not have desired conventions limited to a specifically worded amendment.

Starting with the first problem, Dellinger's inference that the convention would not have wanted the states to have a significant role over the proposing power is problematic.<sup>110</sup> The strongest evidence that he has here is from one delegate—Alexander Hamilton. Hamilton objected to a proposal that provided, “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.” Hamilton argued:

The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers— The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention.<sup>111</sup>

Thus, Hamilton opposed the provision because it gave the state legislatures power to apply for alterations with a view to increasing their powers. Dellinger infers from this that Hamilton opposed allowing states too much power in the amendment process and eventually uses this purpose to conclude that the Framers would have opposed a convention limited to a specifically worded amendment.

But Dellinger's argument here is doubtful. The best understanding of Hamilton's view is not that he was opposed to states having a significant role in the amendment process. Instead, it is that he was opposed to an amendment process that did not allow Congress to initiate amendments without the prior

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110. *See id.* at 1633.

111. 2 RECORDS, *supra* note 52, at 558.

consent of the states. He did not oppose the states being able to propose amendments; he merely believed that Congress should also be able to propose amendments. Several pieces of evidence support this interpretation. First, the provision Hamilton was criticizing would have given the state legislatures the exclusive power to initiate amendments—a convention could not be called unless the state legislatures applied for one. Hamilton’s words directly address this point. Because the state legislatures are focused on “increas[ing] their own powers,” they ought not to have the *sole* power to propose amendments. Instead, Congress “ought *also* to be empowered” to call a convention.<sup>112</sup>

Second, this interpretation of Hamilton’s position gains support from the fact that once the amendment provision was altered to permit Congress as well as the state legislatures to propose amendments, neither Hamilton nor other nationalists voiced this objection to the amendment provision. In fact, Hamilton was even willing to support a provision that clearly gave the states the power to propose amendments without the consent of the Congress or a national convention. Madison’s proposal discussed above, which Dellinger admits is most plausibly interpreted to require Congress to submit the amendments applied for by the state legislatures, was seconded by Hamilton.<sup>113</sup> This strongly suggests that Hamilton was not opposed to having state legislatures decide on specific proposals, so long as the Congress also had an independent means of proposing amendments.

How, then, can Dellinger interpret Hamilton’s words to suggest that the states should not have the power to apply for specific amendments? One possibility is that Dellinger has misinterpreted the chronology of the convention. In describing the convention’s consideration of these matters, he writes that the convention had agreed on “a concurrent power to Congress and the state legislatures to initiate the amendment process” and had “easily agreed on the method by which Congress would propose amendments.”<sup>114</sup> He then writes that the debate then focused on the alternative amendment method for the states. While “Mason of Virginia objected to congressional control over the proposal” of amendments, “set against his concerns was the threat, perceived by Hamilton, that the states would seek to

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112. *Id.* (emphasis added).

113. 2 RECORDS, *supra* note 52, at 559.

114. Dellinger, *supra* note 20, at 1625.

enhance their power at the expense of the federal government.” He concludes that “the drafters’ answer to this dilemma was to provide that a national convention to propose amendments be summoned at the request of two-thirds of the state legislatures.”<sup>115</sup>

But this description of the convention proceedings is misleading. As I have shown, Hamilton’s objections were not made to a method under which Congress could propose amendments on its own. Rather, he objected to a method that gave the state legislatures the sole power to initiate the amendment process. Thus, one cannot infer that Hamilton opposed significant state involvement in the proposal process.<sup>116</sup>

We can now turn to the second problem with Dellinger’s claim: Dellinger has weak arguments for why the Philadelphia Convention would have opposed a convention limited to a specifically worded amendment. He maintains that a convention limited to voting on whether or not to propose a specific amendment would have had little purpose, merely serving the function of “delaying the amendment process” and thereby providing additional time for reflection and debate.<sup>117</sup> But it is not clear why Dellinger reads the convention’s function so

115. Dellinger, *supra* note 20, at 1625–26.

116. Dellinger also relies on Roger Sherman’s objection to Madison’s proposal (discussed above) of an amendment provision, which would have allowed the states to apply for Congress to pass an amendment. *See* Dellinger, *supra* note 20, at 1627–28. Sherman objected to the proposal on the ground that “three-quarters of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate.” Dellinger claims that the change to the final Article V “might be seen as responsive to Sherman’s concern, for it provided that a national convention, rather than the states, would formulate proposed amendments.” *Id.*

Dellinger’s argument here, however, is quite a reach. First, if Sherman was concerned about protecting the states, then relying on a national institution (the convention), rather than the states, seems like a counterintuitive strategy. Moreover, employing a national convention that could act based on a majority vote would be less protective of “particular States” than relying on a two thirds vote of the states generally. (Although Dellinger does not make the argument, it might be thought that requiring two thirds of the state legislatures would be redundant, since three quarters of the states are required for ratification. But the Congress can choose ratification by state conventions and therefore having two thirds of the state legislatures approve the amendment would be an additional check.)

Finally, rather than Sherman’s concerns leading to the adoption of a national convention method, it seems that they led to other changes in Madison’s proposal. Once Madison’s proposal was replaced with a national proposing convention, Sherman sought to amend it by adding a provision stating “that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.” 2 RECORDS, *supra* note 52, at 630. The first part of the provision relating to internal police did not pass, but the second part was added to Article V.

117. *See* Dellinger, *supra* note 20, at 1632.

narrowly. The convention does not merely have the power to delay the amendment. The convention has the power to refuse to propose the amendment applied for by the states. This is a veto. Few people regard the President's veto over legislation as inconsequential; it is not clear why this veto is any different.<sup>118</sup> The convention's veto means that a national forum must agree to propose the amendment and it can choose not to do so. This is an important power.

Dellinger also argues that the Framers would not have intended a convention limited to a specifically worded amendment, because calling and holding the convention would have involved a great deal of work just to vote on a predetermined amendment.<sup>119</sup>

This argument, however, suffers from two problems. First, it seems problematic to argue that a convention limited to a specifically worded amendment would not be worth the effort. As discussed, that convention has a crucial role—it is the sole national institution that reviews the proposed amendment and it has the power to veto the proposed amendment. Thus, the convention's role seems important enough to justify its existence. While this convention does not do any drafting, that does not mean its function is unimportant. The Constitution employs state ratifying conventions, which also do no drafting, and no one believes that is odd or inappropriate.

Second, Dellinger focuses only on a convention limited to a specifically worded amendment. But the Framers did not restrict the states to applying only for this type of convention. Rather, they also allowed the states to apply for an unlimited convention or a convention limited to a subject. Thus, the question is not whether it would have made sense for the Framers to have established a procedure only for conventions limited to specifically worded amendments, but instead whether it would have made sense to have allowed the states to call either an unlimited convention, a convention limited to a general subject, or a convention limited to a specifically worded amendment. This convention method makes perfect sense, since it allows the state legislatures to decide what type of convention the particular circumstances required.

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118. In fact, this veto is much stronger than the President's, since it is absolute veto that cannot be overridden.

119. Dellinger, *supra* note 20, at 1632–33.

## 2. Congress's Alleged Excessive Power

Having shown that the debates at the Philadelphia Convention do not suggest that the Framers would have opposed a convention limited to a specifically worded amendment, we can now turn to Dellinger's claims about a convention limited to a subject. Dellinger argues that a convention limited to a sufficiently broad subject might avoid the problems discussed above, but would suffer from another problem. If the different states apply for a single convention limited to a subject, but submit applications with differing language, then this will require the Congress to determine whether the states have applied for the same convention and, if so, to determine what the limits of that convention are.<sup>120</sup> Dellinger argues that the Framers would not have intended for Congress to have this power, because the purpose of the convention method was to provide an amendment method that did not require Congress's consent and Congress might abuse its power in an effort to sabotage an amendment. Once again, there are several serious problems with Dellinger's argument.

First, Dellinger's argument that the Framers would not have desired the Congress to be involved in determining what limits the states had applied for is unsupported. The Framers, of course, do not discuss the specific issue. Although initially it might seem reasonable to infer that the Framers would have always desired Congress to have less power, that is not necessarily the case. The Philadelphia Convention did not entirely strip Congress from participating in the convention process. Congress is clearly given the role of calling the convention, which requires that it decide a host of matters. Even under the unlimited convention view that Dellinger assumes, Congress must make numerous decisions, including how long state applications for a convention last, whether states can withdraw their applications, whether applications sent to the wrong place count, whether state applications that have not received the approval of the governor count, whether applications that seek a limited convention should be counted for an unlimited convention, whether Congress can regulate the voting rule at the convention, whether Congress can regulate the

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120. For example, if some states apply for a convention that will propose an amendment that limits debt, and other states apply for one that will propose a limit on debt and taxes, the Congress will have to determine whether they have applied for the same convention and, if so, to determine whether that convention can make a proposal limiting taxation.

number of delegates from each state, and whether Congress can regulate the method of appointing or electing convention delegates.<sup>121</sup> In addition, Congress is expressly given the power to decide whether the proposed amendment should be ratified by state legislatures or conventions.<sup>122</sup>

Thus, the Framers did not uniformly disfavor a congressional role. Rather, they gave Congress a limited role, appearing to allow Congress to act when the Framers believed the advantages outweighed the costs. Since it is quite possible that the Framers believed that having a limited convention was worth the additional congressional involvement, Dellinger has not pointed to anything in the convention debates to suggest the Framers would not have allowed for limited conventions.

Second, even if one assumes that the Philadelphia Convention did want to minimize Congress's ability to block amendments under the convention method, the delegates still might have adopted the limited convention view. Although the limited convention view might give Congress more of a role, the dangers from that additional role might be outweighed by the problems created by allowing only unlimited conventions. Under the unlimited convention view, state legislatures may fear applying for unlimited conventions out of the concern that such conventions might propose amendments the state legislatures strongly oppose. If that fear leaves the convention method ineffective, then Congress would have more ability to block amendments under the unlimited convention view than under the limited convention view, because the only workable convention method would be the congressional proposal method. Thus, one cannot even infer that the Framers would have adopted the unlimited convention view had they been solely focused on minimizing Congress's ability to obstruct amendments.

Finally, the case for concluding that the Framers would have opposed limited conventions is further weakened when one recognizes that the harm to the convention method from congressional involvement is much smaller than Dellinger suggests. Under the limited convention view, the states have a

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121. See CAPLAN, *supra* note 3, at 105–14, 146–49.

122. U.S. CONST. art. V. Congress's power to decide on the ratification method is a significant power. Not only is the method important for influencing whether a proposed amendment will be ratified; it is also subject to abuse because Congress might fail to choose a ratification method, which might cause an amendment never to be ratified.

choice. If they believe that the risk of Congress acting improperly is too great, they can always choose to apply for an unlimited convention, which would leave them in the same place that Dellinger's interpretation would. But if they believe the risks are small enough—or the benefits outweigh this risk—then they can apply for a convention limited to a subject. Moreover, to reduce the risks of Congress abusing its power, the different states can all agree to use the same language to describe the subject. Given that the states have a choice under the limited convention view as to what type of convention to apply for, one might actually argue that they are unambiguously better off under that view, since they can always choose to apply for an unlimited convention. One might, then, reach the further conclusion that the harm from the unlimited convention view to the Framers' purpose of allowing amendments to be enacted without a congressional obstacle is small indeed.

## VII. CONCLUSION

This Article has re-examined the question of whether the Constitution authorizes limited conventions. I have argued that the Constitution's original public meaning allows the state legislatures to apply for a convention limited either to a subject or to a specifically worded amendment, that Congress must then respond to that application by calling for a limited convention, and that the convention must then follow the limitations of that call. The conclusions I have reached here do depart from those of most of the commentators who discussed the issue in the 1960s and 1970s, as well as some since then. But as I have tried to show, their conclusions were based on a mistaken understanding of the original meaning.

If my argument is correct, it shows that a significant problem with the constitutional amendment process—that the only method for enacting amendments, that does not require Congress's consent, does not work—is not primarily the fault of the Constitution's drafters and ratifiers. Rather, it is the responsibility of interpreters who have failed to follow the original meaning. If the correct understanding of the original meaning were widely accepted in the legal academy, that would bring us one step closer to a workable noncongressional amendment process. Taking the next step, however, would be harder. It would involve generating a sufficiently strong consensus among politicians, judges, and lawyers that limited conventions are constitutional, so that state legislators would



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have the confidence that their application for a limited convention would not result in a runaway convention. Unfortunately, it is at present difficult to imagine getting to that point, but stranger things have happened.