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A Dangerous Adventure: No Safeguards Would Protect Basic Liberties from an Article V Convention

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Numerous thoughtful people who favor one or another of the causes espoused by groups seeking an Article V convention nonetheless oppose efforts to call a convention.[1] The reason is simple: as soon as an Article V convention convened, it could pursue any agenda it chose. It might or might not propose amendments along the lines its proponents urge, but it could also advance amendments on any other topic. Fears of such a "runaway convention" have united people across the political spectrum to work against this dangerous adventure.

Proponents of an Article V convention can neither point to any legal authority for limiting the agenda of a convention nor any body with the authority to rein in such a convention. They insist that such a convention somehow could be counted upon to restrain itself in deference to some vague principles they infer from meetings that were not Article V conventions. This insistence that an Article V convention would follow rules that do not exist stands in marked contrast to their complaints that Congress and some state legislatures routinely disregard explicit rules that uncontestably *do* exist. It also stands in striking contrast to their own willingness to urge state legislatures to disregard state constitutions to advance their proposals for an Article V convention.

Concerns about a runaway convention have caused many state legislatures to rebuff demands that they apply to have Congress call an Article V convention and other states to rescind prior applications. Rather than accept these judgments, however, convention advocates have radically shifted their strategy in the hopes of having Congress call a convention without persuading the requisite number of states. To do this, they are abandoning years of insisting

[1] Article V of the U.S. Constitution provides, "on the Application of two thirds of the Legislatures of the several States, [Congress] shall call a Convention for proposing amendments." U.S. Const. art. V.

that all convention applications must match and are seeking to resurrect applications passed more than a century ago to address wholly unrelated questions.

This Issue Brief analyzes the various claims made by proponents of an Article V convention that the states or other actors somehow could control or limit the damage that an Article V convention might do. It explores the increasingly disingenuous strategies convention proponents are pursuing to have Congress convene an Article V convention without convincing thirty-four states to apply for one. It shows how a decades-old memo from an office in the Department of Justice, which argues that a limited Article V convention is possible, provides no protection against the determined special interest groups that will seek to turn an Article V convention to their agendas. Finally, it points out that even if some law did limit the scope of a convention's agenda, no entity has the authority to enforce such limits.

I. A Rose By Any Other Name: Proponents' Semantics Should Not Obscure their Call for an Unprecedented Constitutional Convention

A. An Article V Convention is a Constitutional Convention

Recognizing the weakness of their case on the merits, advocates of an Article V convention have sought to distract their audiences with obscure semantic games. In particular, convention advocates insist that an Article V convention is a "convention of the states" and that that is something distinct from a "constitutional convention." According to their contrived nomenclature, a "constitutional convention" is a convention called to write an entirely new convention.[2] They characterize an Article V convention as a "convention of the states," which they assert is limited to proposing amendments to the existing Constitution.[3] This line of argument is absurd on many levels.

Semantically, an Article V convention obviously is a constitutional convention. "Constitutional" is an adjective meaning "relating to a constitution."[4] An Article V convention is a convention relating to the U.S. Constitution and hence is a "constitutional convention." Convention proponents embrace their own idiosyncratic definition of "constitutional convention" as a convention empowered to write an entirely new constitution. As noted below, an Article V convention actually is empowered to do just that: nothing constrains the scope of the amendments it may entertain. Proponents of an Article V convention are free to call it anything they like, of course, but nothing in law or ordinary usage makes their definition authoritative or gives them any basis for correcting others.

To avoid proponents' tiresome and disingenuous efforts to distract their audience with this feigned semantic dispute, it may be most convenient simply to refer to the convention in

[2] ROBERT G. NATELSON, ARTICLE V: A HANDBOOK FOR STATE LEGISLATORS 7 (2012).
[3] *Id.*
[4] *Constitutional*, MERRIAM-WEBSTER (last visited Sept. 13, 2021).

question as an "Article V convention," which it indisputably is. But calling it a "constitutional convention" is also entirely accurate. And, as the next section explains, the claim that an Article V convention would be a "convention of the states" has no support in the Constitution.

B. An Article V Convention Would Not Be a "Convention of the States"

Much more significant than its semantic shortcomings is the total lack of legal support for the claim that an Article V convention would be a convention of the states. Article V makes no mention of the term "convention of the states" or anything like it. Article V describes the convention it envisions as "a convention for proposing amendments."[5] Calling that a "constitutional convention" is an accurate description of what would occur.

The "convention of the states" characterization, moreover, seems deliberately misleading. Nothing in Article V requires that the convention would be one of, or controlled by, the states. Under the language of Article V, Congress is the one that would "call" the convention. To be sure, a prerequisite for the exercise of that power is the applications of two-thirds of the states. But the states' ability to trigger a congressional power is not at all the same thing as having that power themselves. In much the same way, the Senate's advice and consent triggers the president's power to appoint judges and high executive branch officials, but the power of appointment remains with the president.[6]

The United Nations General Assembly is a convention of the nations in that each country chooses and controls its delegation. Article V confers no similar authority on the states. In this country's only prior convention for proposing amendments to a constitution – the Philadelphia Convention of 1787 – the delegates were not under the control of the states' governments; some worked hard to advance the federalist cause despite representing strongly anti-federalist states.[7]

The Constitution's failure to provide for a "convention of the states" was no accident. The delegates to the Philadelphia Convention were deliberately moving the country away from a confederation controlled by states to one with a federal government drawing its authority directly from the People. The Articles of Confederation, agreed to a decade earlier, had claimed its authority was derived from the states. It opens with a declaration that "the Delegates of the United States of America in Congress assembled" have agreed on "Confederation and perpetual Union between the States" they represented. The Constitution, by contrast, proclaims that its authority comes directly from the People: "WE THE PEOPLE of the United States … do ordain and establish this Constitution for the United States of America."[8] Nothing in the

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[5] U.S. Const. art. V.

[6] Id. Art. II, § 2, cl. 2.

[7] Indeed, the convention provided for ratification by state conventions precisely because it understood that its departure from states' legislatures' wishes meant it had no chance of ratification through either Congress or the legislatures. David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995 at 42–55 (1996).

[8] U.S. Const. pmbl.

Constitution's preamble makes any reference to the states as a source of power or authority in creating the federal government. It follows that the People, not the states, are expected to control an Article V convention. As the U.S. Supreme Court has noted, "The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States."[9] Convention proponents' claim that they seek a "convention of the states" with the powers of Article V is a deceptive and dangerous fantasy.

C. An Article V Convention Would Be Unprecedented

Another reason proponents prefer that everyone call an Article V convention a "convention of the states" is to further their argument that many conventions of states have occurred previously without incident. It is, of course, true that representatives of states meet on numerous occasions throughout the year and have done so since the early days of the nation. Indeed, in our own day, numerous private groups, such as the National Governors' Association and the National Conference of State Legislatures, routinely bring together representatives of the fifty states. None of these entities, however, has the power to launch the legal process of amending the U.S. Constitution.

If all the proponents wanted was for representatives of states to meet with one another, they could have that in an instant, without the need for state legislatures' resolutions or the involvement of Congress. Indeed, one of the best-funded groups advocating an Article V convention organized their own convention of representatives of states to supposedly demonstrate that nothing untoward would occur.[10] In point of fact, the United States Congress itself is an annual convention of representatives of all the states – and one that has, by a two-thirds vote in both chambers, the power to propose constitutional amendments. State governments do not choose their representatives to Congress, and as noted below, they are by no means assured of selecting the delegates to an Article V convention.

Of course, the proponents of a convention are not satisfied with a "convention of the states" of the kind that has occurred countless times over the years: they want a convention with the special powers provided only to a convention called under Article V. The only precedent for that sort of gathering on the national level is the Philadelphia Convention of 1787. And the Philadelphia Convention did indeed disregard its charge to consider amendments to the Articles of Confederation and produced a largely new Constitution instead. Thus, proponents of an Article V convention would not be satisfied with a mere convention of the states: they are holding out specifically for a constitutional convention.

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[9] Hawke v. Smith, 253 U.S. 221, 226 (1920). As Chief Justice Marshall wrote, although the people of the United States act to direct the federal government through their respective states, "the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments." McCulloch v. Maryland, 17 U.S. 316, 403 (1819).

[10] Sanya Mansoor, *How a Mock Convention is Helping Fuel a Movement to Change the Constitution*, CTR. FOR PUBLIC INTEGRITY (July 30, 2018).

II. The Possibility of a Runaway Convention

Previous attempts to convene an Article V convention have faltered when voters and state legislators focused on the danger of a runaway convention: a convention that heeded special interests' urgings to disregard the purposes for which the convention ostensibly was called and threatened basic liberties. This danger has not abated with time and remains the single most important reason that people across the political spectrum have united to oppose calling an Article V convention. None of the supposed "safeguards" touted by convention proponents withstand serious examination.

A. Legislatures Are Not Assured of Selecting Delegates from their States to an Article V Convention

Article V does not empower state governments to select delegates to an Article V convention. As the Congressional Research Service noted in 2014, "Congress has traditionally laid claim to broad responsibilities in connection with a convention, including … determining the number and selection process for its delegates."[11] If the majority in the Congress that calls an Article V convention believes that the delegates state governments would select will support the changes it desires, it will have state governments make the selections. If, on the other hand, the congressional majority is of a different party than that which controls most state legislatures – as is the case today – it could provide for a different method of selection. It could, for example, direct that the states' governors, or their attorneys general, or their secretaries of state, should serve as delegates. It could call special elections in each congressional district for delegates. It could appoint federal judges serving in each state as delegates.[12] It could even designate its own Members as delegates to the Article V convention.[13] In today's take-no-prisoners political environment, it is naive to imagine that Congress would passively allow the formation of a convention whose delegates were unlikely to reflect its wishes.

B. States Cannot Control Delegates to an Article V Convention

Proponents of an Article V convention sometimes suggest that states can enact "delegate control laws" that supposedly would ensure that the state's delegates would adhere to the desires of the state's legislature and remove any delegates that strayed. These farcical laws are outside

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[11] Thomas H. Neale, Cong. Res. Serv., R42589, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress 4 (2014).

[12] *Id.* at 40 n.170.

[13] *Id.* at 40 n.169. (citing Amer. bar assoc., amendment of the constitution by the convention method under Article V 37 (1974)). Article I § 6 of the Constitution prohibits Members of Congress from holding positions in the executive or judicial branches of the federal government, but arguably an Article V convention is none of these things. Even if Congress did not designate Members themselves as delegates, it could allow each of its Members to designate someone to serve as the delegate from their state or district. U.S. Const. art. I, § 6, cl. 2.

states' authority and would have no effect in the real world.[14] They are, instead, another means of distracting legislators from the very real dangers that an Article V convention would bring.

As noted above, nothing in Article V assures that states will get to select the delegates to an Article V convention. The actual delegates may owe their positions to Congress or to the voters in a special election, not to the state legislatures. Such delegates would have little reason to bow to the wishes of the state legislature. Indeed, some delegates may not come from states at all: as the Congressional Research Service notes, Congress could select delegates from the District of Columbia or the U.S. territories.[15]

Even if state legislatures do initially select their states' delegates, that does not give them control over what the delegates ultimately do. Nothing in Article V provides such authority, and nothing in Article V makes any provision for terminating the mandate of delegates who disregard the wishes of their appointing authority. The office of delegate to an Article V convention is a federal office, not a state one, and therefore it is not subject to the control of the state legislature.[16] State governments may no more recall delegates to an Article V convention than they can recall their Members of Congress. State laws purporting to control how delegates vote or to impose penalties on delegates for their actions in connection with the convention would likely be found just as unenforceable as state laws seeking to control any other federal official.

And even if state legislatures had the power to remove delegates to an Article V convention, that power would be ineffectual. An Article V convention is not an on-going institution with continuing members. Particularly if some states are asserting the power to recall delegates, the convention may decide to postpone all votes until just before it adjourns. Thus, a delegate may cast only a single vote, on a resolution containing all the final actions of the convention. Once that vote is taken, the convention will dissolve and any action a state might wish to take to recall that delegate will be moot.

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[14] *See* Michael Leachman & David A. Super, STATES LIKELY COULD NOT CONTROL CONSTITUTIONAL CONVENTION ON BALANCED BUDGET AMENDMENT OR OTHER ISSUES 6 (2017).

[15] NEALE, *supra* note 11, at 42–43.

[16] The U.S. Supreme Court has held that "the function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution, and it transcends any limitations sought to be imposed by the people of a state." Leser v. Garnett, 258 U.S. 130, 137 (1922). Even more than the state legislators' power to ratify proposed amendments to the U.S. Constitution, the function of delegates to an Article V convention is established only by the U.S. Constitution. Delegates, as delegates, have no role in state government at all.

C. Article V's Language Provides No Basis for Limiting what a Convention Might Do

Nothing about the idea of a "Convention for proposing Amendments," as provided for in Article V, limits the scope of the convention in any way. It is common in Congress and many state legislatures for the second chamber to consider a piece of legislation to "amend" the first chamber's bill by striking everything after the enacting clause and inserting an entirely new bill. A similar approach in an Article V convention – an amendment that rewrites everything after the preamble – would do nothing to preserve the rights and liberties that the current U.S. Constitution protects. For convention proponents to establish that the act of "merely" proposing amendments is somehow safer than rewriting the Constitution, they must show some legally binding limitation on the scope of an "amendment."[17] That they cannot do.

Moreover, even if an Article V convention somehow was limited to proposing amendments, that hardly limits its ability to transform our government or to strip away crucial individual liberties. The Fourteenth Amendment was "merely" an amendment but dramatically increased the federal government's powers. The Seventeenth Amendment was "merely" an amendment, yet it transformed how we constitute one of the two chambers of Congress. The Twenty-First Amendment repealed the Eighteenth Amendment and ended Prohibition. An Article V convention "proposing amendments" could similarly conclude that the First Amendment, the Second Amendment, the Fourteenth Amendment, Article I's limits on congressional powers, or other central provisions of the Constitution have outlived their usefulness or require radical reformulation.

No soothing, and deceptive, turn of phrase by convention proponents can hide the fact that convening an Article V convention would be a radical and dangerous step. The Declaration of Independence, which founded this nation, stated that "That whenever any Form of Government becomes destructive of [life, liberty and the pursuit of happiness], it is the Right of the People to alter or to abolish it, and to institute new Government[.]" James Madison cited this principle in Federalist No. 40 to justify the Philadelphia Convention's having disregarded the limits on the formation and ratification of amendments imposed by the Articles of Confederation. Whichever interest groups prevail in an Article V convention will invoke the same principles to justify whatever choices they make, including the method they choose for selecting delegates and departures they make from Article V's ratification procedures (just as the Philadelphia Convention of 1787 cast aside the ratification requirements of the Articles of Confederation).

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[17] *Cf.* Convention of States Action, ARTICLE V CONVENTION OF STATES: THE FOUNDERS' CONSTITUTIONAL PLAN FOR WE THE PEOPLE TO SECURE AMERICA'S FUTURE 20 (2020) [hereinafter Convention of States Action, Pocket Guide] (arguing that amendments at the any hypothetical convention are "merely suggestions" until ratification).

D. States' Applications for an Article V Convention Would Not Limit its Agenda or Powers

Article V empowers states to apply to Congress for it to call a convention, but nothing in Article V or any other law empowers states to condition their applications on a convention adhering to any particular agenda. This is consistent with other parts of the Constitution, which allow an official or body to act or to decline to act but not to act conditionally. Thus, for example, Congress may delegate authority to the President or refuse to delegate authority to the President, but it may not delegate authority on the condition that the President may not act if Congress votes a resolution of disapproval.[18] Similarly, the President may sign a spending bill or veto a spending bill, but the President may not sign the bill on the condition that specific spending items be removed at the President's discretion.[19]

III. We Cannot Rely on States' Having a Restraining Role in the Ratification Process

Article V provides that constitutional amendments, whether proposed by Congress or by a convention, should only take effect if ratified by three-quarters of the states, either through their legislatures or in ratifying conventions. Many convention proponents argue that this provides protection against dangerous amendments that might emerge from an Article V convention. Unfortunately, this is tenuous at best.

First, we have little assurance that a convention would adhere to Article V's ratification procedures. The most directly applicable precedent – the Philadelphia Convention of 1787 – completely ignored the ratification procedures in the Articles of Confederation, the constitution in force at that time. Article XIII stated that:

the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

Rejecting this requirement of unanimity because anti-federalist sentiment in several states assured that it could not be met, the 1787 Convention declared that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[20] Nine of the thirteen states then in the union was a mere two-thirds, not even the three-quarters that Article V requires for approval of subsequent amendments. The 1787 Convention also bypassed states' elected legislatures and authorized state conventions to make the final decision on ratification.

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[18] Immigration & Naturalization Serv, v. Chadha, 462 U.S. 919 (1983) (striking down the "legislative veto").

[19] Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the "line-item veto").

[20] U.S. Const. art. VII.

The most charitable possible interpretation of the 1787 Convention's ratification rules is that it was inviting states to withdraw from the Articles of Confederation and enter into a new union, founded on the new Constitution. But that is something all states expressly gave up the power to do in the Articles of Confederation. Article VI, paragraph 2, of the Articles of Confederation stated that:

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

Thus, without Congress's consent, the states ratifying the Constitution had no authority to make it effective among themselves. States also had surrendered their right to question Congress's authority to determine whether to authorize a new constitution. Article XIII stated that: "Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them." Nor were the states free to secede from the Articles of Confederation: as noted, Article XIII stated that "the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual."

Thus, if an Article V convention writes a new constitution and declares that it will become binding on states that ratify it upon the approval of two-thirds of the states – defying Article V's ground rules – it can cite the 1787 Convention as precedent. With the country closely divided, three-quarters of the states are unlikely to support any of the constitutional changes sought by either liberal or conservative groups. Not wanting its work to go to waste, whichever faction controls the Article V convention could lower the threshold for ratification just as the Philadelphia Convention did (perhaps also imposing a higher threshold for future changes as was done in 1787).

An Article V convention also could put its product on a nationwide referendum. With the country so evenly divided, relatively modest manipulations of who gets to vote could be enough to tip the balance and permanently change our form of government. If challenged for disregarding Article V, the new scheme's proponents would argue that their ratification method is more democratic and is commonly employed in other countries and many U.S. states. Our Constitution always has valued preservation of individual liberty and prevention of tyranny more than bowing to the wishes of a transient majority, but those determined to impose their will in permanent law are unlikely to worry about such niceties.

Even if the convention chose to follow Article V's ratification procedures, that would not eliminate the threat. First, the convention could package constitutional changes into single amendments to increase their chances of ratification. Nothing in Article V requires amendments to embrace only a single subject, and several existing amendments – including the

First, Fifth, Sixth, Eighth and Fourteenth – combine several distinct subjects.[21] Some provisions might prove so attractive to some liberal or conservative groups that they would accept other, potentially troubling, constitutional changes to get them. Would an amendment combining a balanced budget requirement with an equal rights amendment for women win ratification? How about an amendment overturning *Citizens United v. FEC*[22] and making a national security exception to the First Amendment? Or an amendment establishing equality for same-sex couples and limiting the federal government's power to override states' regulation of election practices?

Second, even if three-quarters of the states did not ratify an amendment immediately, that amendment could linger, waiting for demographic changes in a few holdout states or a wave election to push it over the top. Article V contains no expiration date for amendments. The Twenty-Seventh Amendment (limiting congressional pay raises) was ratified in 1992, more than two centuries after it was first proposed.[23] Congress has included ratification deadlines for some proposed amendments, but nothing would require an Article V convention to do so.[24] Also, because the Supreme Court has treated the process of amending the Constitution as a "political question" beyond the competency of the federal courts, we have no authoritative word about whether states may rescind resolutions of ratification.[25] If not, then an amendment could pick up the states currently disposed to favor it in the first years after the convention and then linger until politics changed in enough other states to put it over the top. It might never have the support of three-quarters of the states – or even a majority – at any one time yet still eventually become part of the Constitution when enough states had cycled through support for it at one time or another. Once a convention proposed a dangerous amendment, it could indefinitely hang like a sword over our democracy, awaiting its moment.

IV. An Old Office of Legal Policy Memo Provides No Security Against a Runaway Convention

More than three decades ago, during the previous effort to call an Article V convention supposedly to enact a balanced budget amendment, the policy development staff in the

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[21] U.S. Const., amend. I (freedom of speech, government treatment of religion); Id. amend. V (due process, grand jury, double jeopardy, self-incrimination, and government takings of private property); Id. amend. VI (right to a speedy trial, right to counsel, right to an impartial jury, right to confront one's accusers, venue); Id. amend. VIII (banning excessive bail and fines and prohibiting cruel and unusual punishment); *Id.* amend. XIV (due process of law, equal protection of the law, guaranteeing the validity of U.S. debt, defining U.S. citizenship, and many other provisions).

[22] Citizens United v. Fed. Election Comm'n. 558 U.S. 310 (2010) (striking down campaign finance regulation).

[23] Burns Lib., The George Washington Univ. L. Sch., *27th Amendment Ratified May 7, 1992*, BURNS BRIEF LIB. BLOG (May 3, 2020).

[24] *See, e.g.*, U.S. CONST. amend. XVIII § 3; *Id.* amend. XX § 6; *Id.* amend. XXI § 3; *Id.* amend. XXII § 2 (all providing for a ratification deadline of seven years after submission to the states).

[25] Coleman v. Miller, 307 U.S. 433, 450 (1939).

Department of Justice released a memo to the attorney general asserting that a limited Article V convention was possible.[26]

The memo itself does not purport to be an authoritative interpretation of the Department of Justice. Instead, it seeks to "generate considerable thought on a topic … about which there are several reasonable points of view" and to be "provocative and informative."[27] The Office of Legal Policy is not empowered to reach authoritative interpretations for the Justice Department: it develops policy arguments for the attorney general, and in 1987 the attorney general evidently favored an Article V convention. Authoritative Justice Department analyses issue from the Office of Legal Counsel or the Solicitor General's office. Indeed, the memo contains some striking factual mistakes.[28]

Most fundamentally, nothing in the Constitution or other federal law gives the Justice Department any authority over an Article V convention or the process of amending the Constitution generally. We have no reason to expect that an Article V convention would take it seriously. Even if one is persuaded that it would be *desirable* for Congress to call limited purpose Article V conventions, or that doing so is consistent with Article V's purpose, function, or history, that belief provides no protection against the interest groups that dominate an Article V convention and choose to turn it to their own ends. In this era of political ruthlessness, an interest group with the opportunity to lock its priorities into permanent law is not going to be deterred because someone thinks that theorists of a "limited convention" have the better of a hard-fought intellectual dispute.[29] In addition, even those that agree with the memo that a limited convention is *possible* at some point in the future need not agree that the Article V convention that proponents are trying to call now will be so limited. As proponents increasingly talk about aggregating quite different state applications, they eliminate any coherent set of principles that could limit the scope of the Article V convention they seek.

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[26] Off. of Legal Policy, U.S. Dep't of Justice, REPORT TO THE ATTORNEY GENERAL, LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION (Sept. 10, 1987).

[27] *Id.*

[28] For example, the memo states that "[n]ot only did the Articles of Confederation not provide a convention method of initiating amendments, they provided no amendment power at all." *Id.* at 34. The Articles did not provide for conventions, but Article XIII clearly lays out the amendment power, requiring a majority vote in Congress and ratification by every state's legislature.

[29] Liberals see evidence of conservatives' lack of seriousness about the Constitution in the events of January 6, 2021, and many Republicans' unwillingness to criticize strongly those and related efforts. Conservatives, in turn, see evidence of liberals' lack of seriousness about the Constitution in efforts to resuscitate the Equal Rights Amendment decades after friend and foe alike understood that the time for its ratification had passed. Fossil fuel interests will not pass up the opportunity to forbid important environmental protections in a new Constitution just because someone thinks that the arguments for a limited Article V convention are a bit more persuasive than those against such limits.

A. The Memo's Arguments that a Limited Convention is Possible Have No Foundation

1. Congress and the States are Not Equals Under Article V

Not only does the memo have no legal force or even a basis for receiving deference, its arguments are not especially persuasive on the merits – certainly not enough to reliably deter a headstrong majority in an Article V convention. The memo begins with an elaborate argument that because Congress can propose a limited set of amendments, so can states.[30] It implies this result from the principle that Article V's two methods of proposing amendments (a 2/3 vote of Congress or through constitutional convention called by Congress in response to applications from 2/3 of the states) should be treated equally. Leaving aside the fact that Article V nowhere decrees this equality, this argument confounds the states with the Article V convention. Article V does not empower states to propose amendments to the Constitution: it empowers states to apply to Congress for a convention. The convention that Congress calls, then, is the body that could claim parity with Congress. Either Congress or an Article V convention may propose anything from narrow, surgical amendments to a sweeping rewrite of the entire document.

No one doubts that an Article V convention *can* limit itself; the danger of a runaway springs from the absence of any legal authority requiring that a convention *must* limit itself. Indeed, the memo's principle of equality would vest the convention with the same breadth of authority that Congress enjoys. States may not limit the scope of amendments that Congress may propose even though Congress is composed entirely of Members chosen within each state. Similarly, states may not limit the scope of amendments that an Article V convention may propose even if Congress chooses to have that convention consist entirely of delegates who live in each of the states. The memo acknowledges that this point has been made by towering constitutional scholars Alexander Bickel, Charles Black, Walter Dellinger, and Gerald Gunther but dismisses them as "confus[ed]."[31] The interest groups dominating an Article V convention would surely feel that Professors Bickel, Black, Dellinger and Gunther provide them more than enough cover to justify expanding the convention's work beyond its nominal purposes.

The memo also acknowledges that these scholars make the "constitutional[ly] plausib[le]" argument that allowing states to limit an Article V convention's scope would prevent the convention from acting as a check on abuses the states themselves might come to commit.[32] The memo rejects this view based on its inference from 1787 debates on Article V that it believes fail to show that the Framers intended a convention to serve that purpose.[33] In none of this does the memo even attempt to ground its position in the language of Article V. Its attempt to derive a definitive answer from the deliberations of the Philadelphia Convention are undermined by

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[30] OFF. OF LEGAL POLICY, *supra* note 26, at 5–14.
[31] *Id.* at 14–16.
[32] *Id.* at 16.
[33] *Id.* at 16–18.

Article V's lack of a clear, linear path to its final form and the absence of any meaningful discussion of this issue. The Framers provided a means of initiating constitutional change that did not require overwhelming agreement within both chambers of Congress; the idea that the several states, rather than the convention, must somehow be able to able to exercise their power to apply for a convention in a way parallel to the way Congress proposes particular amendments is not fairly derivable from the constitutional text or the historical record.

2. Article V Contains No Supermajority Requirement

The memo next argues that Article V should be understood as limiting constitutional amendments to situations in which a broad, supermajority consensus exists for a particular change. From that premise, the memo argues that a convention limited to an issue that excited two-thirds of the states' legislatures is the best way to ensure that.[34] Here again, the best thing that can be said for the argument is that it makes a plausible case for why a limited convention would be *desirable*; this provides no security against a runaway convention absent clear law making one *mandatory*. The faction dominating a convention will not turn back from enshrining its preferences in the Constitution because some Justice Department lawyers decades ago found a limited convention appealing. And here again the memo acknowledges that Constitutional Law giants Charles Black, Walter Dellinger, and Gerald Gunther make a strong textual argument to the contrary[35] – positions sure to be cited by dominant interest groups as they expand an Article V convention's scope to meet their desires.

Also, taking this argument seriously would invalidate many of the state applications for an Article V convention to promulgate a balanced budget amendment. Article V convention proponents claim to have active applications from twenty-seven states, but seven of these applications date from the 1970s.[36] What legislators in these states thought almost half a century ago has no bearing on whether a supermajority exists today. Some of today's most conservative states were among the most liberal half a century ago, and vice versa. Proponents of an Article V convention can hardly invoke the principle of supermajority consensus to argue that a limited convention will occur and then ignore the supermajority principle by cobbling together state applications enacted generations apart.

3. There is No Precedent for a Limited Article V Convention

Finally, and most implausibly, the memo insists that Congress and various other officials long have interpreted Article V as providing for limited conventions.[37] The obvious problem with

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[34] *Id.* at 20–23.

[35] *Id.* at 24, 26–27.

[36] These states are Arkansas, Iowa, Kansas, Mississippi, Nebraska, North Carolina, and Pennsylvania. Two more states, New Hampshire and Ohio, voted their most recent Article V applications more than seven years ago. *Seven States to a Balanced Budget Amendment*, BBA TASK FORCE (last visited Sept. 30, 2021). The Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments, arguably reflecting the principle of simultaneous consensus, set seven-year deadlines for their ratifications to be effective.

[37] OFF. OF LEGAL POLICY, *supra* note 26, at 28–31.

this claim is that no Article V conventions, limited or otherwise, have been held. Particular politicians here and there no doubt have expressed opinions about limited conventions, but Congress has never acted to call one – much less seen whether the resulting convention would obey the purported limitations. Discussion of a legal issue that does not drive an actual decision with real-world consequences is referred to in law as obiter dicta. The colloquial translation would be "talk is cheap." Federal courts treat only actions taken that had real-world consequences as precedent because expressions of abstract legal opinion are too often rendered carelessly, even disingenuously, and without the benefit of focused legal arguments by representatives of interested parties. Similarly, what politicians say about the abstract idea of an Article V convention means little, and as Congress has never called such a convention, we have no interpretations of the scope of such a convention that had real consequences.

B. The Memo's Arguments that Someone Might Enforce Asserted Limits on a Convention's Agenda are Wishful Thinking

Even if the agenda of some Article V convention might be limited in theory, this fact would provide no practical protection to our basic liberties unless someone had the power to enforce those limits. Recognizing this, the memo includes a final section asserting that, if it was determined that a limited Article V convention was in order, someone could actually enforce those limitations. Alas, it has little more to offer than wishful thinking.

1. Congress is Unlikely to Impose Limits

The memo starts by speculating that state legislatures would refuse to ratify amendments proposed by a convention that disregarded its limits. However plausible that might have been in the 1980s, today it is difficult to imagine a legislature refusing to ratify an amendment it favors on the merits based on a procedural objection – and one that surely would be heavily contested at that. Plenty of liberals and plenty of conservatives in today's politics have proven willing to overlook procedural niceties to achieve their agendas.

The memo then suggests that Congress could invoke the Necessary and Proper Clause to legislate restrictions on an Article V convention that it called.[38] The notion that Congress could control a convention is notably at odds with the principle (which the memo elsewhere endorses) that the convention method was intended specifically to disempower a Congress in which the People may have lost confidence. Moreover, as the memo notes, even during less polarized times, Congress repeatedly rejected proposed legislation to set rules for an Article V convention.[39] And whatever might have happened in the 1980s – a time when the U.S. Senate was able to confirm Justice Antonin Scalia to the Supreme Court by a 98-0 vote – today it is inconceivable that a congressional majority, having called an Article V convention that it expects to advance its agenda, would then act to constrain delegates' ability to do so. Finally, and most crucially, even assuming that Congress wanted to impose rules and that it accepted

[38] *Id.* at 35.

[39] *Id.* at 36–38, 40.

the memo's aggressive reading, the convention would have little reason to defer to Congress on the scope of its agenda.

2. Supreme Court Precedent Suggests the Courts Will Not Enforce Limits

Next, the memo asserts that the federal courts could somehow police an Article V convention. It admits that this is precluded by the Supreme Court's decision in *Coleman v. Miller*,[40] but insists that "[t]he rationale of *Coleman*, while widely cited, is not accepted by anyone as an adequate resolution of the question of judicial review."[41] Needless to say, the mere hope that the Supreme Court will overrule a longstanding precedent that it has not even criticized is a very thin reed on which to rest the preservation of our basic constitutional rights against a runaway convention. Given the lack of textual support in Article V for any limitations on a convention's scope and the subjectivity of any judgment about whether a particular amendment is or is not within any limitations if there were any, it is farfetched to think the current Supreme Court giving serious thought to intervening.

3. Delegate Self-Restraint is a Doubtful Limit

Finally, the memo makes a half-hearted argument that the delegates to an Article V convention would restrain themselves from going beyond limits on its agenda.[42] It is difficult to imagine a principle more completely at odds with the Framers' thinking than the claim that powerful officials may be counted upon to restrain themselves. And because convention delegate is a one-time, non-recurring position, no delegate need worry about re-election or reappointment. Even if they did, today's political environment is overrun with examples of officials whose political support grows after they trample over procedural norms to pursue agendas espoused by their bases.

C. The Memo Misunderstands the Nature of our Constitution

For all the memo's citations to particular events around this nation's founding, the memo misses the broad principles that animated the Framers' drafting of the Constitution. As James Madison famously acknowledged in Federalist No. 10, no system can ensure that a narrow, self-interested faction does not attain dominance at some time. The Constitution's intricate system of checks and balances seeks to limit how much lasting damage such a faction can do while it holds power. When the Framers sought to impose checks and balances, however, they wrote those constraints into the text of the Constitution. The memo's implausible premise is that the Framers intended subject-matter limitations to check the powers of an Article V convention – a body with far more potential for lasting mischief than any of the three on-going branches of government – but left not even a hint of this in the Constitution's text.

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[40] Coleman v. Miller 307 U.S. 433, 450 (1939) (holding that Congress has absolute control over the process of amending the Constitution).

[41] OFF. OF LEGAL POLICY, *supra* note 26, at 44.

[42] *Id.* at 48–49.

V. Desperate Times Call for Desperate Measures: The Aggregation Strategy

For many years, groups affiliated with the American Legislative Exchange Council (ALEC) claimed that the scope of the convention they have sought would be limited by the language of states' resolutions asking Congress to call such a convention.[43] They claimed that this followed from the principle that all applications must address the same subject if they are to be aggregated together.[44] The assertion that the subject of states' applications would limit the scope of an Article V convention was wholly without support: nothing in Article V or any other law gives any effect to limits in states' applications.[45] Now, however, convention proponents have abandoned any serious pretense that they believe that claim because they are seeking to aggregate their applications with ones passed over a century ago to address entirely unrelated problems.[46] They have had to adopt this position because their efforts to add new states have largely stalled, and five states that passed Article V applications decades ago – Colorado, Delaware, Maryland, Nevada, and New Mexico – have rescinded those old resolutions.[47]

A. Convention Advocates' Efforts to Count States that Reject their Proposals

With little prospect of actually persuading 34 states to roll the dice on an Article V convention, proponents have shifted toward counting states that have rejected their proposals. Most

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[43] For example, ALEC's primary publication promoting an Article V convention insists that "applications may limit a convention to one or more subjects." Natelson, supra note 2, at 12; Convention of States Action, Pocket Guide, supra note 17, at 23 (insisting that "there is absolutely no precedent for a 'runaway convention'" while failing to note that there is no precedent for any Article V convention, runaway or otherwise).

[44] For example, Mark Meckler, President of the Convention of the States Project, told the Nebraska Legislature in 2019 that, to reach the constitutional threshold of 34 states, all applications must address the same subject:

"HUNT: For the record, do you agree that resolutions that are different, that address different specific issues or whatever, that we could combine them to reach a convention of states?

MARK MECKLER: No, ma'am. Different resolutions are not aggregable."

Neb. Comm. on Military & Veterans' Affairs, Hearing on LR7 & LB151, 106th Legislature (2019) (oral testimony of Mark Meckler, President, Convention of the States Project). Similarly, "[i]n order for the applications to be aggregated (counted together towards the 34-state threshold), they must all cover the same topic or set of topics for a Convention." Convention of States Action, Pocket Guide, supra note 17, at 19.

[45] ALEC's handbook purports to rely upon "existing case law" without citing any. natelson, supra note 2 at 12. As no Article V convention has ever been called, the courts obviously have had no occasion to consider or rule on any of these questions.

[46] Even before their recent turnaround, convention proponents often caveated their claims about a limited Article V convention to provide cover for expanding its agenda. See id. at 12 (warning against "attempting to restrict unduly the convention's deliberative freedom."). ALEC does not identify any limits on this "deliberative freedom" that would stop an Article V convention from making whatever changes its dominant factor desires.

[47] H.J.Res. 21-1006, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021); H.J.Res. 2/S.J.Res. 2, (Md. 2017); S.J.Res. 10, 79th Sess. (Nev. 2017); H.J.Res. 10, 2017 Reg. Sess. (N.M. 2017); H.Con.Res. 60, 148th Gen. Assemb. (Del. 2016).

dramatically, in 2018, former professor Rob Natelson, whose legal analysis several groups frequently cite, published a paper arguing that convention proponents could get to thirty-four states by counting recent applications together with those that six other states voted more than a century ago on specific topics unrelated to the current proposals, and in all cases, now moot.[48] Proponents are increasingly embracing this strategy. For New York, they count a resolution passed in 1789 asking Congress to call an Article V convention to promulgate a Bill of Rights.[49] Once a Bill of Rights was adopted a few years later, the desires stated in this application were satisfied; no one has regarded it as a live application in more than two centuries. For Illinois,[50] Kentucky,[51] and New Jersey,[52] convention proponents count applications indicating a willingness to hold an Article V convention if doing so would avoid the Civil War over slavery. Contrary to the proponents, none of these applications expresses a general interest in an Article V convention at any time and for any purpose: by their very terms, these applications may be aggregated only with other contemporaneous applications seeking to prevent the Civil War. Once the southern states' secession was complete and the Civil War was underway, these

[48] Robert Natelson, Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?, Federalist Soc. (May 9, 2018).

[49] New York's resolution declares that the state only ratified the new Constitution on the promise that a Bill of Rights would soon be added and asks that the federal government not exercise its new powers until that is done. Resolution of February 7, 1789, 1 Am. state papers 7 (1789) (Joseph Gales ed., 1834).

[50] Illinois's application makes clear that it is agreeing to an Article V convention only if that would avert the Civil War. It declares that "the people of the State of Illinois do not desire any change in our Federal constitution" but says that if any of the states threatening secession wishes to have an Article V convention to find a way of avoiding the Civil War, Illinois will concur. 1861 Ill. Laws 281-82 (Mar. 14, 1861).

[51] Kentucky's application clearly was limited to disputes over slavery: "Whereas the people of some States feel themselves deeply aggrieved by the policy and measures which have been adopted by the people of some other States; and whereas an amendment of the Constitution of the United States is deemed indispensably necessary to secure them against similar grievances in the future…." It goes on to recommend a package of constitutional amendments proposed by Kentucky Senator John Crittenden that would have prohibited any future attempt to abolish slavery. William Russell Pullen, The Application Clause of the Amending Provision of the Constitution 79–80 (1951) (unpublished Ph.D. dissertation, University of North Carolina Chapel Hill) (on file with the University of North Carolina Chapel Hill).

[52] New Jersey's application also states that its sole purpose is to avert the Civil War by adopting the Crittenden Compromise. It states that "as the Union of these States is in imminent danger unless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments to said Constitution." Joint Resolution on the State of the Union passed by the Legislature of New Jersey, Cong. Globe, 36th Cong., 2d Sess. 680 (Feb. 1, 1861).

applications, too, ceased to be active. Finally, for Oregon[53] and Washington,[54] convention proponents count applications passed in 1901 to seek the popular election of U.S. senators, a goal achieved twelve years later with the ratification of the Seventeenth Amendment. Not one of these applications has anything to do with the espoused goals of today's convention proponents: a balanced budget amendment, congressional term limits, or limiting federal powers. Five of the six states have consistently rejected proposals to apply for an Article V convention to propose a balanced budget amendment,[55] and the sixth – Oregon – rescinded its Article V application for a convention to propose such an amendment in 1999.[56]

Nonetheless, aggregating unrelated state applications increasingly appears to be the convention advocates' strategy. In 2020, a former Convention of the States Project (CoSP) operative wrote that the Article V convention "movement overall has slowed to such an extent that realistically, the current disjointed strategy to convene [an Article V convention] may be 'a bridge too far.'"[57] He concluded that "not much will improve during year 2020 and beyond" and that rescissions could put an Article V convention even farther out of reach.[58] His response was to argue that pro-convention groups should unite to ask Congress to call a plenary Article V convention that would not purport to have any limits on the subject-matter of amendments it might propose. This would disregard the ardent promises convention proponents have been making for years to supporters that any convention would be limited to one narrow topic and that no runaway convention would be possible.

Former Wisconsin Governor Scott Walker in 2020 proposed that states file federal court actions for a writ of mandamus to force Congress to call an Article V convention.[59] To justify his assertion that thirty-four states had applied for an Article V convention, Gov. Walker invoked

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[53] Oregon's application recites that "Oregon in common with many of the other states has asked congress to adopt an amendment to the Constitution of the United States providing for the election of United States Senators by direct vote of the people" but complains that the U.S. Senate has repeatedly refused to support such an amendment. It seeks such a convention "urgently," which surely cannot mean a convention more than 120 years later. H.J. Res. 4, 1901 Or. Laws 477–78 (Jan. 25, 1901).

[54] Alone among the six applications that convention proponents characterize as "generic," Washington's application does not make explicit reference to any substantive agenda for the Article V convention it proposes. H.B. 90, 1901 Wash. Laws 333 (Mar. 12, 1901).

[55] See, e.g., S.J. Res. 56 (Ky. 2021) (failed resolution following Convention of States Project model); H.J. Mem. 4001/S.J. Mem. 8000 (Wash. 2021) (same).

[56] S.J. Mem. 9, 70th Or. Leg. Assemb., Reg. Sess. (Or. 1999).

57 Paul Gardiner, A New Strategy for the Article V Convention of States Movement, Hunt for Liberty (Feb. 13, 2020).

[58] Id.

[59] Am. Leg. Exch. Council, Four Paths to A State-Drafted Voter-Ratified U.S. Balanced Budget Amendment youtube (July 23, 2020); see David A. Super, Gov. Scott Walker's Proposed Mandamus to Compel Congress to Call an Article V Convention, Balkanization (July 31, 2020) (exploring implications of Gov. Walker's plan).

Natelson's idea of counting six states' applications submitted over a century ago for wholly different purposes and now entirely moot.

Other pro-convention groups are embracing similar theories in light of their failure to convince states on the merits. U.S. Term Limits has persuaded only four states to pass its Article V application yet lists twelve other states as counting toward the goal of thirty-four.[60] These states have passed the much more sweeping CoSP application, which would broaden an Article V convention's agenda far beyond term limits into some areas that term limits supporters might oppose. Because the CoSP application's stated goals include "limiting the power and jurisdiction of the federal government,"[61] it could justify amendments to curtail federal enforcement of any of the individual liberties in the Bill of Rights.

Beyond that, U.S. Term Limits' website until recently described twelve other states as having "passed a plenary (inclusive) application that can be combined (aggregated) with those of other states towards a Term Limits Convention under Article V of the U.S. Constitution."[62] None of these states have ever passed an application indicating a desire to impose federal term limits. Instead, this is a more aggressive version of Natelson's idea of counting Article V applications passed in response to political crises occurring over a century ago. U.S. Term Limits does not explain why four states' preference for an Article V convention confined to term limits should prevail over the preferences of the far greater number of other states it claims seek a convention with a broader agenda.

One of the groups seeking an Article V convention to promulgate a balanced budget amendment has gone so far as to publish a list claiming already to have thirty-four states – counting six based on applications from more than a century ago that have nothing to do with the federal budget (as well as Colorado, which has rescinded all its convention applications).[63]

To bring about their desired result, proponents of an Article V convention are working to elect Members of Congress who will implement their aggregation strategies and disregard states'

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[60] U.S. Term Limits, *Term Limits Convention Progress Map*, U.S. TERM LIMITS (last visited Sept. 13, 2021).
[61] CONVENTION OF STATES ACTION, POCKET GUIDE, *supra* note 17, at 19.
[62] Its progress map has recently been changed to delete these claims for the twelve states in question but not to put anything in their place (leaving its description of these states' status blank). By contrast, states such as California it designates as "not passed." U.S. Term Limits still has a statement asserting that New York's 1789 application seeking a bill of rights counts toward their goal of an Article V convention on term limits. U.S. Term Limits, *NY Article 5 Application Status: Inclusive*, U.S. TERM LIMITS (last visited Sept. 3, 2021). The twelve states U.S. Term Limits apparently seeks to add to those actually endorsing its proposal include four states that applied for an Article V convention to avert the Civil War (Illinois, Kentucky, New Jersey, and Ohio), seven states that applied for an Article V convention to bring about direct election of U.S. senators (Iowa, Kansas, Nebraska, North Carolina, Oregon, Washington, and Wisconsin), and New York's 1789 application seeking an Article V convention to write a Bill of Rights.
[63] Colorado rescinded its application in April 2021. H.J. Res. 21-1006, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021).

considered choices not to support the current campaigns to hold a convention. Because no court or other body has the authority to override Congress's determination of the number of applications it has received, if enough Members are willing to act dishonestly, they can call an Article V convention without ever obtaining 34 legitimate, current applications.

Finally, Natelson also published an argument in 2018 challenging states' authority to rescind Article V convention applications they previously had submitted.[64] He argued that Congress should reject states' rescissions by finding that the states were wrong to worry about a runaway convention. He characterized these views of the state legislatures as "material mistakes" that entitles Congress to disregard their decisions. Precisely the same logic could empower Congress to override any state decisions to try to limit the scope of an Article V convention or to refuse to ratify amendments that such a convention might produce. If Congress can void any state decisions it regards as "mistaken," federalism is well and truly dead. Yet none of the convention proponents appear to have repudiated Natelson's argument or even stopped relying on his writings to make their case.

B. Aggressive Aggregation Theories' Implications for a Convention's Agenda

If an Article V convention may be called by disregarding the manifest will of various states that the convention for which they applied be limited to meeting the emergencies they intended – establishing a Bill of Rights, preventing the Civil War, or having popular election of senators – then the convention certainly may disregard the will of other states that desire to limit such a convention to proposing a balanced budget amendment, enacting term limits, or restricting federal power. And once Congress starts aggregating disparate Article V convention applications, it could easily bring in applications on other subjects, such as abortion regulation.[65] After many years of arguing that the terms of states' applications would limit the scope of an

[64] Robert Natelson, Are Recent "Rescissions" of Article V Applications Valid? Independence Inst. (Aug. 13, 2018).

[65] Eleven states – Alabama, Arizona, Indiana, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, Pennsylvania, and Rhode Island – appear to have unrescinded applications seeking an Article V convention to restrict abortion. Another nine states have old Article V convention applications passed in response to prior controversies, such as the need for a Bill of Rights, the Civil War, or the desire for popular election of senators, the kinds of applications convention proponents now describe as "generic" or "plenary." See generally Friends of the Article V Convention, Article V Amendment Applications Tables, friends of the article v convention (last visited Sept. 14, 2021) (documenting Article V applications from 1789 onwards). A willful Congress could decide to add these to the CoSP applications; whether the resulting convention addressed abortion or term limits, fiscal policy, and restricting federal power, the agenda inevitably would depart from the expectations of at least one set of states. This demonstrates that convention proponents' new approach to aggregation cannot be reconciled with their claim that the content of states' applications somehow limits a convention's agenda.

Article V convention, proponents' shift to the "aggregation" strategy and open embrace of a "general" convention concedes that those arguments never had any law behind them.[66]

Even if the scope of an Article V convention were somehow limited by the language of state applications, and even if proponents could secure 34 applications on the same subject-matter, no entity has the power to hold a convention to such an agenda. Article V empowers Congress to call such a convention, and in so doing Congress might specify the rules it would like the convention to follow, but the Constitution gives Congress no on-going supervisory authority over a convention. The Supreme Court has held that the process of amending the Constitution is a "political question" into which the courts may not intervene.[67] Article V gives no role whatsoever to the President in the process of amending the Constitution. And, as discussed above, the states' only role in the convention process is submitting applications to Congress for the convention to be called.

VI. Conclusion

Once Congress calls it into being, an Article V convention will be by far the most powerful public body in the land. And in today's polarized and ruthless political environment, we have every reason to expect that the interest groups that take control of this convention will press their advantage to the maximum extent possible. The result could be a country dramatically transformed from the one we know today. Those pushing us toward such a convention on the strength of vague hopes that the states – or anyone else – will somehow prevent anything bad from happening are gambling with our nation's most precious civic treasures. This is a gamble none of us can afford.

[66] Gardiner, supra note 57. Indeed, Gardiner mentions the first impeachment and trial of President Trump – an event having nothing to do with a balanced budget, term limits, or the scope of federal power – as an issue that an Article V convention might address.

[67] Coleman v. Miller, 307 U.S. 433, 450 (1939).

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