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INTRODUCTION

> "Mr. IREDELL replied, that it was very evident that it 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 to propose amendments, and, on such application, it is provided that Congress shall call such convention, so that they will have no option."[1]

Since the ratification of our Constitution over 200 years ago, legal scholars and others have often wondered and debated, albeit with little fanfare, the implications and practicality of convening a "constitutional convention" for the purpose of proposing amendments to the U.S. Constitution according to the

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1. 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 178 (Jonathan Elliott ed., Philadelphia, J.B. Lippincott, 2d ed. 1876).

form set out in Article V of the Constitution. The subject has also been discussed recently by bloggers,[2] attorneys,[3] and at least one United States Senator.[4] These questions concerning Article V have ranged from the authority that a convention would have;[5] to the practicality of a calling a convention; to how a convention would be run;[6] and to the limitations of such a convention.[7] However, the majority of these musings have been theoretical—mere speculative questions. There has been no urgency as such questions do not necessarily need to be answered until the constitutionally required two-thirds of the states apply to Congress for the calling of a convention.[8] But what if the required number of states have in fact applied? And what if Congress is thereby acting unconstitutionally by failing to call for such a convention? I would posit that this is in fact the case, and Congress is shirking its constitutional duty by failing to call a national constitutional convention as required by Article V of the United States Constitution.

Article V states:

> "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 . . . ."[9]

Thus, according to Article V, there are four distinct ways in which the Constitution may be amended: amendments may be proposed at a national constitutional convention and ratified by conventions in three-fourths of the states; amendments may be proposed by Congress and ratified by conventions in three fourths of the states; amendments may be proposed by Congress and ratified by the legislatures of three fourths of the states; or amendments may be

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2. *See* The Lonely Conservative, *Time for an Article V Convention?—Updated*, LONELY CONSERVATIVE, Mar. 23, 2010, http://lonelyconservative.com/2010/03/time-for-an-article-v-convention.

3. *See* Marianne Moran, *Give States a Tool to Check Federal Power*, RICH. TIMES-DISPATCH, Sept. 19, 2010, http://www2.timesdispatch.com/news/2010/sep/19/ed-mora19-ar-511703/?referer=None&shorturl=http://timesdispatch.com/ar/511703.

4. *See* Sen. John Cornyn, *Power to the People—How to Balance the Budget*, FOX NEWS, Sept. 13, 2010, http://www.foxnews.com/opinion/2010/09/13/sen-john-cornyn-constitutional-convention-balanced-budget-obama-founders.

5. *See generally* LESTER ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION (1942).

6. *See generally* AMERICAN BAR ASSN., SPECIAL CONST. CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974).

7. *See generally* JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS (1993).

8. U.S. CONST. art. V ("Congress . . . on the application of the Legislatures of two thirds of the several States, shall call a Convention . . . ").

9. U.S. CONST. art. V.

proposed at a national constitutional convention and ratified by the legislatures of three fourths of the states. To date, the Constitution has been amended a total of twenty-seven times. Twenty-six of these times have been by the third option above—Congress proposed the amendments, and they were ratified by state legislatures.[10] The Twenty-First Amendment, repealing the Eighteenth Amendment, was the only amendment to have been ratified by state conventions rather than by the legislatures.[11] However, the remaining two options for amending the Constitution have never been utilized—the two options whereby the amendments are proposed by a national constitutional convention. Although all fifty states have at one time or another petitioned Congress concerning constitutional amendments,[12] Congress has never called an Article V convention, despite the explicit language in Article V that states that Congress "shall" call a convention upon the applications of the required number of states for such a convention.[13] This Note will analyze the various factors surrounding the calling of a convention and whether Congress is acting unconstitutionally by refusing to acknowledge its constitutional duty to call such a convention, by examining the reasons the Framers included a convention method for amending the Constitution, the justiciability of Article V and arguments for why questions regarding Article V applications should be answered with deference to the states, and whether the requisite number of states have indeed called for such a convention under Article V.

I. WHY THE FRAMERS INCLUDED TWO METHODS OF AMENDING THE FEDERAL CONSTITUTION IN ARTICLE V

It will be helpful to begin by examining the reasons behind the structure of Article V of the Constitution. First, the Framers were concerned with the language of the then-current Articles of Confederation,[14] which required ratification by every state legislature for proposed amendments.[15] This was determined to be excessive and a near insurmountable barrier to proposed amendments. Thus, the Framers attempted to craft an amendment process that would allow

10. *See* The Constitution of the United States of America as Amended: Unratified Amendments & Analytical Index, H.R. DOC. 110-50, at 13–27 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd050.pdf.

11. *See* U.S. CONST. amend. XXI, § 3 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States . . . "); The Constitution of the United States of America as Amended: Unratified Amendments & Analytical Index, H.R. DOC. 110-50.

12. *See* Friends of the Article V Convention, TABLE 05: 744 Applications by ALL 50 States, http://foa5c.org/file.php/1/Articles/AmendmentsTables.htm#Table05 (last visited Oct. 5, 2010).

13. U.S. CONST. art. V.

14. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 558 (Max Farrand ed., 1937).

15. ARTICLES OF CONFEDERATION art. XIII (U.S. 1781) ("And 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.").

the people to more easily implement constitutional change.[16] By examining the evolution of the phrasing of Article V, the reasoning behind the final language becomes clear. One of the first submitted proposals stated, "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."[17] This proposal was later dropped, and the subsequent replacement proposal resembled the final language of Article V much more closely.[18] Yet the new proposal was still missing a vital provision—there was no system for calling a convention to propose amendments. Instead, 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 . . . ."[19] This new proposal immediately caused many strong reactions by various delegates, because "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive . . . ."[20] When the final language was proposed, James Madison was noted as saying 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."[21] Madison's main objection, among others, to requiring Congress to call a national convention stemmed from the lack of clarity of how a convention was to be formed, yet did not relate to the basic objection that the states should have the authority to bypass Congress in the amendment process.[22] Regardless, the final language was passed in spite of his objections.

Alexander Hamilton later expounded on his own views of Article V in *The Federalist No. 85*.[23] Hamilton was writing to convince the states to vote to adopt the proposed Constitution, even though it may not be "perfect," because the enacted Constitution could later be amended.[24] Specifically, Hamilton responded to the fears that a national government would not willingly give up its powers by allowing the Constitution to be amended, stating:

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16. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 558.
17. *Id.* at 188.
18. *Id.* at 559.
19. *Id.*
20. *Id.* at 629 n.8.
21. *Id.* at 629–30.
22. *Id.*
23. THE FEDERALIST NO. 85 (Alexander Hamilton).
24. *Id.* ("No advocate of the measure can be found, who will not declare as his sentiment, that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such an one as promises every species of security which a reasonable people can desire . . . . If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system.")

> But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged 'on the application of the legislatures of two thirds of the States (which at present amount to nine), to call a convention . . . .' The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body . . . . We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.[25]

The ability for the states to require the calling of a convention and the means for calling a convention were insisted upon by the various delegates. The fears of an over-oppressive federal government prompted them to include a device within the Constitution for *the people* (vis-à-vis the state legislatures) to amend the Constitution, without the consent of Congress.[26]

This determination is vital to understanding the present legal circumstances and why I argue that Congress is presently *required* to call a convention; that is, deference should be given to the people/states when determining whether an application for an Article V convention by a state is valid and whether the two-thirds threshold has been met, rather than Congress.

II. THE JUDICIAL BRANCH AND ARTICLE V

There have been relatively few Supreme Court cases addressing Article V. The few cases which do exist, however, have all dealt with the second part of the amendment process—ratification. The Supreme Court has held that Congress has been given authority over the amendment process, and thus many legal challenges to the disputed ratification process of various amendments have failed.[27]

A. Previous Rejection and/or Withdrawal of Ratification of Proposed Amendments by the States

In *Coleman v. Miller*,[28] the Court settled a dispute concerning whether a state legislature, having previously rejected a proposed amendment, may then revote in favor of the amendment. Another legal challenge in *Coleman* was whether a state may rescind its ratification of an amendment. The Court held that in both cases, the issue was a political question, and thus injusticiable.[29] The court relied on the history of the Fourteenth Amendment when reaching its conclu-

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25. *Id.*
26. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14 and accompanying text.
27. *See generally* Coleman v. Miller, 307 U.S. 433 (1939); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920).
28. *Coleman*, 307 U.S. at 433.
29. *Id.* at 450.

sion.[30] The states of Georgia, North Carolina, and South Carolina had originally rejected the Fourteenth Amendment.[31] After new governments were created in these states during Reconstruction, these states then ratified the amendment.[32] On the other hand, Ohio and New Jersey originally ratified the amendment, and then later attempted to rescind their ratifications.[33] In July of 1868, when Congress asked the Secretary of State to report on the number of states that had at that time ratified the Fourteenth Amendment, the Secretary included the States of Ohio, New Jersey, North Carolina and South Carolina in his tally, bringing the number of ratifications to the very number (twenty-eight) needed for the amendment to pass.[34] The Secretary of State included in his report the attempted rescissions by Ohio and New Jersey, expressing his doubt about whether the attempted rescissions were valid.[35] Congress apparently agreed, and declared the Fourteenth Amendment a part of the Constitution the next day.[36] Justice Hughes, in his opinion for the Court in *Coleman*, recounted this history and stated, "[I]n accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."[37] Thus, the Court refused to consider the question, merely because of the "historic precedent" of Congress's passage of the Fourteenth Amendment.[38] While no one today will argue that the Fourteenth Amendment was a mistake, classifying the case as a political question merely because Congress has expressed its view on an issue in the past is flawed jurisprudence.

It is also vital to recall that the language of Article V that outlines the process for proposing amendments differs from the language that outlines the ratification of amendments. An amendment may be *ratified* by three-quarters of state legislatures or state conventions, "as the one or the other Mode of Ratification may be proposed by the Congress."[39] An amendment is *proposed*, however, by Congress, or upon the application of two-thirds of the States, at which point Congress "*shall* call a Convention for proposing Amendments."[40]

As argued above, this is because the entire point of adding the option for the states to call for a convention was to circumvent a corrupt Congress.[41] There is

30. *Id.* at 448.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 448–49.
36. *Id.* at 449.
37. *Id.* at 450.
38. *Id.*
39. U.S. CONST. art. V.
40. *Id.* (emphasis added).
41. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14 and accompanying text.

no "political question" as to whether Congress should or should not call a convention—if the required number of states apply, Congress *must* call for one. There is no legal authority for Congress to exercise its control on the process.

B. Timeliness

The Court in *Coleman* also addressed the issue of "timeliness"—whether ratification of an amendment must come within a reasonable time of the proposal, and whether Congress has the authority to designate a specific time-frame for ratification for an amendment.[42] The Court began by looking to past precedent, where the Court had held in *Dillon v. Gloss*[43] that Congress did in fact have the authority to prescribe a specific time limit on ratification. *Dillon* concerned the passage of the Eighteenth Amendment, which had a time limit of seven years for ratification. The Court in *Dillon* stated, "We conclude that the fair inference or implication from article 5 is that the ratification must be within a reasonable time after the proposal."[44] At the time there were still four amendments pending before the state legislatures, including two from 1789,[45] and the Court felt that "few would be able to subscribe"[46] to the view that some states would be able to vote to ratify these amendments that long after proposal, and that such a view was "quite untenable."[47] However, one of those pending amendments is in fact now a part of our Constitution—the Twenty-Seventh Amendment, ratified in 1992.[48] Distinguishing the holding in *Coleman*, the Court did not deny that a reasonable period of time between proposal and ratification is preferable, but ruled instead that such a question was also in the power of Congress.[49] The Court explained its holding by referring to the various "relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice."[50] Thus, Congress had the power, regardless of whether a time limit had accompanied the proposed amendment, to decide whether state ratifications of amendments had been within a reasonable time after proposal and whether such ratifications would be valid.

Once again, however, we must return to the difference between the proposal of amendments and their subsequent ratification. As Justice Hughes stated,

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42. *Coleman*, 307 U.S. at 452.
43. Dillon v. Gloss, 256 U.S. 368 (1921).
44. *Id.* at 375.
45. *Id.*
46. *Id.*
47. *Id.*
48. The proposed amendment, which eventually became the Twenty-Seventh Amendment to the United States Constitution, was originally proposed along with the original Bill of Rights. *See* National Archives, The Constitution of the United States: Amendments 11–27, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html#27 (last visited Nov. 18, 2010) ("Originally proposed Sept. 25, 1789. Ratified May 7, 1992.").
49. Coleman v. Miller, 307 U.S. 433, 454 (1939).
50. *Id.* at 453.

determining whether a state ratification occurred within a "reasonable" amount of time is certainly not a justiciable issue, and should therefore be left to Congress.[51] However, the purpose behind the option for states to call for a constitutional convention was mainly a check against the possibility of a corrupt Congress.[52] Therefore, Congress should *not* have the authority to decide whether state applications for an amendment occurred within a "reasonable" time period. It would certainly be preferable for all states to apply within the same general time period. But if the judicial branch of the federal government does not have the ability to determine what a "reasonable" time period would be, and Congress does not (or should not) have the authority to define a "reasonable" time period in the cases of state applications for a convention, then the next best alternative would be to defer to the states. Such a deferral would mean that all state applications, regardless of when they were submitted, should be considered together when determining whether the required two-thirds have called for a convention. As such indeterminacy raises numerous legal questions and concerns, the obvious solution would be to introduce an amendment defining what a "reasonable time" for applications would be. Until such an amendment becomes a part of the Constitution, however, Congress is bound to follow the letter and the spirit of Article V, and not consider the issue of timeliness when tallying current state applications.

C. Specificity

Another argument raised to defend Congress's present actions concerns the fact that many state applications for an Article V convention specify the type of amendment to be proposed. Some scholars argue that a convention application that attempts to limit the convention is an invalid application.[53] "Limited" application proposals have ranged from balanced budget amendments,[54] to the repeal of the income tax,[55] to apportionment issues,[56] and even to proposed amendments to Article V itself.[57] There is also disagreement among scholars as to whether all state applications, whether referring to a specific proposed amendment or to just a general call for a convention, should be tallied together,

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51. *Id.* at 454 ("The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.").

52. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14 and accompanying text.

53. *See* Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L. J. 1623, 1640 (1979).

54. *See generally* 122 CONG. REC. S4329 (1976) (application from South Carolina); 123 CONG. REC. S18,419 (1977) (application from Tennessee); 125 CONG. REC. S134 (1979) (application from Texas).

55. *See generally* 106 CONG. REC. S10,749 (1960) (application from Nevada); 103 CONG. REC. S6474 (1957) (application from Indiana); 98 CONG. REC. S1496 (1952) (application from Virginia).

56. *See generally* 109 CONG. REC. H2278 (1963) (application from Idaho); 111 CONG. REC. S7259 (1965) (application from Arkansas); 111 CONG. REC. S14,308 (1965) (application from Florida).

57. *See generally* 109 CONG. REC. S4779 (1963) (application from Wyoming); 109 CONG. REC. S5868 (1963) (application from Missouri); 109 CONG. REC. S10,441 (1963) (application from South Carolina).

or whether the proposals should be considered only with similar applications from other states.[58] The argument for tallying only the similar applications together is, generally, whether a state which petitions for a constitutional convention for a specific purpose must be subjected to a general convention, where any and all amendments may be considered.[59] This style of framing the argument seems to be arguing in favor of states' rights, in that no state will be subjected against its will to the possibility of proposed amendments which were not the reason behind the state's application for a convention. However, the logic behind this framing of the argument is flawed.

First, according to the language of Article V itself, Congress, "on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments."[60] The word "Amendments" is plural. Including the option of a constitutional convention would seem to indicate implicit approval of the people of the various states coming together to decide whether to propose amendments, and if so, which amendments. It would also seem preferable for the states to have more power than the federal government to amend the document that actually serves to limit the power of the federal government. Yet Congress has the authority to propose virtually any amendment it wishes.[61] Congress can also propose to the states multiple simultaneous amendments, such as when it proposed the Bill of Rights. An Article V convention should have the same authority. In fact, it would almost seem preferable to propose more than one amendment at a constitutional convention, especially after going to the trouble of calling one. The proposals would be just that—proposals. They would then be voted on by the legislatures of the various states (or by state conventions if Congress so desires), and each proposal would pass or fail depending on whether the requisite three-fourths of the states choose to ratify the proposals. Thus, the requirements for passage would essentially be the same as if Congress had originally proposed the amendment.

Furthermore, allowing multiple amendments to be proposed, along with the possibility of an increased number of amendments to the federal Constitution, could make it easier for the people to address and adapt to the issues currently facing our society. Thomas Jefferson believed that the people should form a new constitution every generation.[62] While that view may be a bit extreme and

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58. *Compare* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 747–48 (1993), *with* Dellinger, *supra* note 53, at 1636–38.

59. *See* Dellinger, *supra* note 53, at 1637.

60. U.S. CONST. art. V.

61. The only prohibition on Congress' power to propose amendments is that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." *Id.*

62. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 5 THE WRITINGS OF THOMAS JEFFERSON 115, 121 (Paul Leicester Ford ed., New York, G. P. Putnam's Sons 1895) ("On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and

undesirable in today's society, there are other examples of how multiple amendments proposed at the same time could in fact be desirable. One such example is Georgetown Law professor Randy Barnett's proposed "Bill of Federalism."[63] Barnett's Bill of Federalism is presented as analogous to the Bill of Rights—ten separate amendments bound by a common theme. Barnett's proposal includes amendments for repealing the income tax, restricting the amount of power Congress has under the Commerce Clause, granting states the power in specific circumstances to repeal laws passed by Congress, and others.[64] Although Barnett does not argue that Congress is required to call a convention at this time, his strategy in proposing ten amendments rather than one is relevant. Barnett hopes that if the supporters of all the separate proposed amendments unite behind the Bill of Federalism, it will have a much better chance of being proposed by Congress or by a constitutional convention if necessary.[65] Even if supporters of one amendment disagreed with another of the proposed amendments, those supporters could still unite behind all ten amendments being *proposed*, and each will pass or fail the *ratification* stage on its own merits. Thus, if the required two-thirds of the state legislatures are persuaded that *some* type of constitutional change should be affected, they would have the ability to require that Congress call a convention.

Finally, the practicality of restricting a convention to a specific amendment is questionable. Who would determine whether applications are sufficiently similar to be tallied together? If the point of proposing a convention is to circumvent a (hypothetically) corrupt Congress, then Congress should not have the authority to decide whether individual applications are sufficiently alike to be considered together. Furthermore, if a constitutional convention was in fact restricted to a specific amendment, who would determine what that amendment would be? For example, suppose that the states call for a convention restricted to a balanced budget amendment. How would one define the limits of such an amendment? If a representative at a convention limited to a balanced budget amendment suggested that Congress should be allowed to pass an unbalanced budget on a two-thirds majority, would that exceed the limits meant to be placed on the convention by one of the states? There are many similar hypothetical scenarios, many of which are not far outside the realm of probability. In the absence of any limiting statute or constitutional provision, deference should be

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consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.").

63. Randy Barnett, *A Bill of Federalism*, FORBES, May 20, 2009, *available at* http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett_2.html.

64. *Id.*

65. *Id.* ("By identifying 10 separate amendments, a coalition can be formed from people who support different constitutional reform measures that could not be combined into a single amendment. At the same time, opposition to any one provision cannot be used to sink the whole proposal.").

to the people, rather than to the government. Although having such broad and nearly unlimited power vested in a convention may be contrary to how many would wish the process for altering our system of government to be, any such precautions and limitations should have been expressly codified by Congress if it wished to have any standing to discount otherwise valid applications by the states. I do not argue here that Congress may not prescribe the process by which a state must apply for a convention, only that it has not done so. Without any other limitation, there is no legal authority for Congress to unilaterally determine whether certain applications for a convention should be tallied together in order to reach the required two-thirds.

III. WHETHER THE REQUISITE TWO-THIRDS OF THE STATES HAVE CALLED FOR A CONSTITUTIONAL CONVENTION UNDER ARTICLE V[66]

According to some accounts, there have been over 700 applications by the legislatures of all fifty states calling for an Article V convention.[67] This number includes *all* Article V applications, including calls for a general convention and calls for a convention concerning a specific issue. In fact, excluding rescissions, there have been at least 115 applications for a convention to propose a balanced budget amendment (as of 1992), 45 applications for a convention to propose a right-to-life amendment (as of 1981), 35 applications for a convention to propose the repeal of the Sixteenth Amendment (as of 1962), and 56 applications for a general convention (as of 1961).[68] However, these figures are not as straightforward as they may seem. Because there have been various attempted rescissions of applications by a number of the states, it is difficult at first glance to determine whether the required number of applications has been before Congress at the same time, and thus it has been easy for the calls for a convention to be overlooked by the public and brushed aside by the Congress. Yet this is merely an attempt to mask Congress's constitutional responsibility to convene an Article V convention. As each application has come before Congress, Congress has responded by acknowledging the application in the Congressional Record, referring the application to a committee (typically the Committee on the Judiciary of whichever house acknowledges the application), and then promptly ignoring the application from that point onward.[69] The questions

66. Much of the information utilized in this section is derived from the hard work and effort put forth by The Friends of the Article V Convention and The Article V Library, both of which have amassed extensive databases of nearly all known Article V applications, including scans of the majority of the applications from the Congressional Record. Although I will still cite to specific applications throughout the Note, I would highly recommend that any reader wishing to view these records visit their websites at http://www.foavc.org and http://www.article5library.org.

67. Friends of the Article V Convention, TABLE 02: 704 Applications by ALL 50 States and Total Applications Per Issue, http://foa5c.org/file.php/1/Articles/AmendmentsTables.htm#Table02 (last visited Oct. 5, 2010).

68. *Id.*

69. *See, e.g.,* 122 CONG. REC. S4329 (1976) (Application for a convention from the State of Delaware) ("The PRESIDENT pro tempore laid before the Senate the following petitions, which were

concerning the validity of rescissions typically pertain to whether the rescission was made by both houses of the state legislature, whether it specifies particular applications to be rescinded or a general rescission of all applications by the state, etc.

Regardless, there have also been instances where the required number of applications has in fact been before Congress, even when accounting for most of the states' attempted rescissions of their applications. From the years 1963 to 1969, thirty-five states submitted applications for a convention to Congress, and thirty-two of those states submitted more than one application to Congress for a convention.[70] Even though timeliness should not be an issue when determining whether the required number of states have petitioned Congress for an Article V convention, these states submitted proposals within seven years, the same amount of time that Congress allowed for the ratification of the Eighteenth Amendment.[71]

In 1993, Professor Michael Stokes Paulson tabulated the number of states with then-current valid applications for an Article V convention.[72] Under Paulson's theory, applications are not considered valid if they "limited" the proposed convention to a specific amendment, as opposed to proposing a convention "for the purpose of" a specific amendment.[73] Paulson also accounted for rescissions of applications when determining whether a state still had a valid application before Congress.[74] According to Paulson's research, as of December 1993, *forty-five states* still had valid applications for an Article V convention before Congress.[75] The only states without valid applications were Alaska, Hawaii, Illinois, Florida, and Rhode Island.[76] Since 1993, the states of Montana,[77] Oklahoma,[78] Arizona,[79] Georgia,[80] Utah,[81] Idaho,[82] Tennessee,[83] and New Hamp-

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referred as indicated: House Concurrent Resolution No. 36 adopted by the Legislature of the State of Delaware; to the Committee on the Judiciary . . . ").

70. Friends of the Article V Convention, TABLE 06: 167 Applications by 36 States (sorted by State) in 7 years from 1963 and 1969, http://foa5c.org/file.php/1/Articles/AmendmentsTables.htm#Table06 (last visited Oct. 5, 2010) (FOAVC lists 36 states, as the Illinois House of Representatives attempted to rescind its call for a convention in 1969. However, FOAVC believes, as do I, that such a rescission would not be valid without the Illinois Senate also agreeing to rescind its call for the convention. However, I have left Illinois out to satisfy those who might disagree and claim that the rescission was valid. Regardless, the 35 other states satisfy the two-thirds requirement of Article V.).

71. U.S. CONST. amend. XVIII, § 3.

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

73. *Id.* at 746.

74. *Id.* at 735.

75. *Id.* at 764.

76. *See id.* at 764–789.

77. 150 CONG. REC. S8690 (2007).

78. 155 CONG. REC. H9549 (2009).

79. 149 CONG. REC. S6977 (2003).

80. 150 CONG. REC. H3605 (2004).

81. 147 CONG. REC. S10,387 (2001).

82. 146 CONG. REC. S739 (2000).

83. H.R.J. Res. 30, 106th Gen. Assem., Reg. Sess. (Tenn. 2010).

shire[84] have rescinded "any and all" applications for Congress to call an Article V convention.

It is questionable as to whether the states of Wyoming, North Dakota, and Oregon have also since rescinded their applications. Oregon has rescinded its applications for a federal balanced budget amendment, citing concerns that "there exists no guarantee that a federal constitutional convention, once convened, could be limited to the subject . . . ."[85] It then specifically stated that the resolution rescinding the applications "supersedes all previous memorials . . . requesting the Congress of the United States to call a constitutional convention to propose an amendment . . . that would require a balanced federal budget, including Senate Joint Memorial 2 (1977), and therefore any similar memorials previously submitted are hereby withdrawn."[86] What makes this rescission questionable is the fact that Oregon has an outstanding application for a convention "for the purpose of" proposing an amendment incorporating the Townsend Plan from the 1930s into the Constitution.[87] Because Oregon's rescission *explicitly* refers only to balanced budget applications, it is likely that Oregon's application from 1939 is still valid, even though Oregon rescinded its other applications due to the very concern that a convention would not necessarily be limited to a balanced budget amendment.

Wyoming's and North Dakota's present standings for an Article V convention are even more vague. In 2001, the North Dakota House of Representatives passed a concurrent resolution calling on Congress to propose an amendment restricting the power of the federal courts to require states to raise taxes.[88] The resolution also stated "this application constitutes a continuing application in accordance with Article V of the Constitution of the United States."[89] The North Dakota Senate concurred in the resolution and the resolution was filed with the North Dakota Secretary of State on March 22, 2001. Meanwhile, *at the same time*, the North Dakota Senate debated and passed a resolution "rescinding all applications made by the Legislative Assembly to the Congress of the United States to call a convention pursuant to the terms of Article V of the United States Constitution for proposing amendments to that Constitution . . . ."[90] The resolution also stated that "such a convention may propose sweeping changes to the Constitution, any limitations or restrictions purportedly imposed by the states in applying for such a convention or conventions to the contrary notwithstanding, thereby creating an imminent peril to the well-established rights of the citizens and the duties of various levels of government . . . ."[91] However, the

84. H.R. Con. Res. 28, 161st Gen. Court, Reg. Sess. (N.H. 2010).
85. 146 CONG. REC. S84 (2000).
86. *Id.*
87. 84 CONG. REC. 985 (1939).
88. H.R. Con. Res. 3031, 57th Legis. Assem., Reg. Sess. (N.D. 2001).
89. *Id.*
90. S. Con. Res. 4028, 57th Legis. Assem., Reg. Sess. (N.D. 2001).
91. *Id.*

resolution then specifically mentioned that it was only rescinding four specific applications, with the latest application dated 1979.[92] The North Dakota House of Representatives then concurred in this resolution, and it was filed with the Secretary of State on March 27, 2001—5 days after the resolution calling for an amendment and "constitut[ing] a continuing application." Thus, like Oregon, the North Dakota legislature's intent may have been completely opposite from the text of the resolution which it passed—the phrase "continuing application" may have meant the resolution was solely an application for Congress to propose the desired amendment and did not refer to an Article V convention, or the Senate may have specifically stated the applications which it wished to rescind for the purpose of allowing the House resolution to be considered on its own, although this is unlikely.

Finally, I include Wyoming in the "questionable" category due to what is a probable typographical error in the Congressional Record. On April 6, 2001, Congress received North Dakota's resolution calling for an amendment.[93] Immediately following the listing of North Dakota's resolution in the Congressional Record is another resolution rescinding all calls for an Article V convention, word-for-word the same as North Dakota's second resolution, complete with the line "Resolved by the Senate of North Dakota, the House of Representatives concurring therein . . . ."[94] However, the Congressional Record states that the resolution is from the legislature of Wyoming.[95] A search through Wyoming's legislative history reveals no such resolution, so it is probably safe to assume that the Congressional Record misstated the state which sent the resolution to Congress.

Even when considering the rescissions of Oregon, North Dakota, and Wyoming as valid, those three rescissions combined with the rescissions of the other eight states since 1993 leave a total of thirty-four states with valid applications before Congress calling for an Article V convention—exactly the required two-thirds of the states which would legally compel Congress to call a convention according to the Constitution.

CONCLUSION

When the Framers of our Constitution came together to form a new federal government, they realized that the power to change or alter the government should remain vested in the people. Based upon this insight, the Framers explicitly included a device in the Constitution which would allow the people, by way of the states, to propose amendments to the new Constitution, without any discretionary power by the Congress. When one accounts for the purposes behind the convention method included in Article V, it becomes clear that when

92. *Id.*
93. 147 CONG. REC. S3704–05 (2001).
94. *Id.*
95. *Id.*

considering various issues surrounding the application process, including rescissions/rejections, timeliness, and specificity, deference should be given to the states—or at least *not* given to Congress. Thus, many state applications which Congress would likely consider invalid should in fact be considered valid.

Even when accounting for the questionable status of various states' applications for Congress to call an Article V convention, in issues such as timeliness, specificity, and rescissions, there have still been more than the required number of applications before Congress which would legally compel Congress to call a convention. Unfortunately, Congress (whether corrupt or merely remiss in their constitutional duties), an uninformed public, an irrational fear of a "runaway" convention, and a judicial branch, which has granted broad powers to the legislative branch in previous cases concerning amendments to the Constitution have combined to produce a current system which has usurped the power of the people to govern themselves by the most effective means—that of amending the very document which protects their freedoms and limits the powers of the government which may violate those freedoms.